OF THE LAW OF NATURE AND NATIONS.

Eight BOOKS.

Written in Latin by the Baron Pufendorf,
Counſellor of State to his late *Swediſh* Majeſty, and to the late King of *Pruſſia.*

Done into English by *BASIL KENNETT*, D.D.
late Preſident of *Corpus Chriſti* College in *Oxford.*

To which are added
All the large NOTES of Mr. Barbeyrac,
Tranſlated from the beſt EDITION;
Together with Large TABLES to the Whole.

The Fourth Edition, carefully Corrected.

To which is now prefixed
Mr. Barbeyrac's Prefatory DISCOURSE,
CONTAINING
An Hiſtorical and Critical Account of the Science of Morality, and the Progreſs it has made in the World, from the earlieſt Times down to the Publication of this Work.

Done into English by Mr. *CAREW* of *Lincoln's-Inn.*

LONDON:
Printed for J. Walthoe, R. Wilkin, J. and J. Bonwicke, S. Birt, T. Ward, and T. Osborne.
MDCCXXIX.

BRITISH MUSEUM

To the Right Honourable

Sir *Nathan Wright*, Knight,

LORD-KEEPER

OF THE

GREAT SEAL of *ENGLAND*,

One of the LORDS of Her MAJESTY's moſt Honourable PRIVY-COUNCIL, *&c.*

MY LORD,

THE Author and Subject, here preſented to your Lordſhip, have in themſelves, the beſt of Claims to ſo great a Protection: For, neither can he, whoſe known Capacity, Induſtry, and Integrity, rendered him the Ornament of his own Profeſſion, and of his Prince's Council, apply himſelf with more Succeſs, than to one, who has riſen, by the ſame Steps, to a nobler Eminence of Honour and

Employment; nor ought any other, than the Guardian and Diſpenſer of publick Equity, to be acknowledged as the Patron of the *Law of Nature and Nations.* But the Ambition of this Addreſs was alike needful, in Reſpect of all the Tranſlators; as an Occaſion of acknowledging the Influence which they feel from your Lordſhip's Authority, with Regard both to their Function and their Studies: Your Lordſhip eſteeming it no leſs worthy a Part of your Character and Office, to ſupport the moſt primitive Church, and the moſt regular Univerſities; than to preſide over the Juſtice of the wiſeſt State, or to direct the Policy of the happieſt Reign.

I am,

With all Duty and Reſpect,

Your Lordſhip's moſt obliged

Humble Servant,

BASIL KENNETT.

THE PREFACE.

IT is a Dilemma frequently urged againſt Verſions of this Kind, that when a Subject lies remote from vulgar Conſideration, Perſons of Learning will purſue the Knowledge of it in the learned Languages, whilſt others muſt remain equally Strangers to it in all, which yet abates proportionably of its Force, according as either the original Performance has been leſs fortunate in Stile; or as the Improvements of a modern Tongue have been able to extend themſelves to the abſtruſeſt Reaſonings, and to ſpeak even of Philoſophy with the Advantages of Eloquence. As there is a Concurrence of theſe two Conditions, to juſtify the preſent Attempt; ſo the ſecond of them, which, through perſonal Inability, may have been impaired, ſeems yet to be recompenſed, by a peculiar Weight and Prevalency in the firſt. For the Commendation of our Author's Judgment hath ſcarce been more univerſal, than the Cenſure of his Compoſition; which though, by all, acknowledged to be expreſſive, yet to moſt appears ſo difficult and diſcouraging, that they ſometimes fancy the Senſe to have broken its Way through the Phraſe, and to have left theſe Irregularities, as the Tokens of its Violence. It is true, he has not failed in the very Entrance of his Work, to apologize for this Defect of Ornament; but the Plea he offers is, what may better excuſe the neceſſary Roughneſs of a Subject, than the particular Unhappineſs of a Writer. Another viſible Diſadvantage there was, which called for Relief. Our Author having publiſhed the firſt Draught of this great Undertaking in the Year MDCLX, *with the Title of* Elementa Juriſprudentiæ, *having alſo employed the Labour and Collections of twelve Years, in bringing it to its preſent Method and Name, was not content to have drawn together all Aſſiſtances, which were of direct and immediate Uſe, from the Stores of Morality, Politicks, and Law; but engaged himſelf in a longer and wider Search, running through the whole Circle of philological Authors, antient and* modern, and diſpoſing, under the Heads of his Work, the moſt remote Examples, and Illuſtrations. Hence every Page came to be loaded, not only with numerous Citations at large, but with diſorderly Marks of Addition, Reference, Compariſon, and the like: As if the Confuſion of a ſwelling Margin had run over, and diſcharged it ſelf upon the Text. Thus the Periods were frequently diſjointed, the Argument interrupted, or obſcured, and the greateſt Part of the main Body thrown into the diſagreeable Figure of a Common-place.

Some Endeavours have been here applied towards the leſſening of both theſe Imperfections. In Reſpect of Stile, it is hoped, that the Metal, how rude ſoever and incapable of being poliſhed to exact Beauty, yet after a ſecond melting, may appear leſs deformed, and may paſs into more general Uſe: But it is beyond Doubt, that the other Inequality has been farther rectified, by our caſting under the Page the needleſs and miſhapen Maſs of foreign Supplies; which it might have been no unpardonable Boldneſs utterly to have pared away; but that we ought to be cautious of practiſing upon an Author, and to take Care, leſt by cutting off an Excreſcency, we ſhould endanger the Life of a Deſign.

Cuſtom has not ſo far prevailed over Decency, as to engage the Tranſlators in proclaiming the Juſtice of their Choice, and Merit of their Author. Much leſs would they ground his Character on the invidious Argument of Compariſon. To contend with the admired Names of Grotius, Selden, and the Right Reverend the preſent Lord Biſhop of Peterborough, is what he ought to decline in Point of Modeſty, if not of Safety. Yet this ſeems to have fallen out to his Advantage, that no one of thoſe great Men attempted a compleat Body of moral, or political Doctrine. The firſt choſe rather to inſiſt on Authorities taken from the Hiſtorians, Civilians, and Canoniſts, than on philoſophical Deductions, from the Nature of Men, and the Reaſons of Things. The ſecond entred no farther into this Subject, than as the Jewiſh Inſtitutions directed his View. My Lord of Peterborough, having overthrown the deceitful Fabrick of a late treacherous Builder, and ſettled the Science of Morality on its trueſt and deepeſt Foundations, left the Superſtructure to be raiſed by inferior Hands. Thus, while each had a particular Boundary to his own Enquiries, all contributed to the Perfection of our Author's Syſtem: In which, as he abſtains not from grateful Remembrances of theſe, and other learned Benefactors, ſo he now teaches the Publiſher of this Tranſlation, moſt gladly to acknowledge the Favour and Aſſiſtance of his Friends; of whom two eſpecially, the Reverend Mr. Percivale, and the Reverend Mr. Itchiner, by entirely rendering the fifth and eighth Books, have, with the ſame Kindneſs, accepted a Part in his Burthen, and allowed him a Share in their Reputation and Succeſs.

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18. In what Manner it is lawful to deceive an ill deſigning Curioſity.
19. It is lawful to ſpeak falſe to a profeſſed Enemy.
20. Whether a guilty Perſon, arraigned, may deny the Charge.
21. What the Advocates or Counſel may, in this Reſpect, do for their Client.

CHAP. II.

Of an Oath.

Sect. 1. THE Sanctity of an Oath.
2. What an Oath is.
3. It muſt be taken only by the Name of GOD.
4. And according to the Religion of him that ſwears.
5. Of the Intention of him that ſwears.
6. An Oath is an additional Bond of an Obligation.
7. Of Oaths obtained by Deceit.
8. Of Oaths obtained by Fear.
9. Oaths to perform Things unlawful, bind not.
10. Nor thoſe which hinder a greater Good.
11. An Oath doth not alter the Nature of thoſe Actions to which they are joined.
12. An Oath excludes all Cavils.
13. But is not always to be interpreted ſtrictly,
14. Or without ſome tacit Conditions and Limitations.
15. An Oath is to be explained by the Intention of the Impoſer.
16. Of an Oath made in another's Stead to oblige him.
17. How an Heir is obliged by the Oath of the Dead.
18. A Diviſion of Oaths, as, 1. For Confirmation. 2. In bearing Witneſs. 3. Deciſive of a Controverſy. 4. Suppletory, or Clearing.
19. Whether every Breach of an Oath is Perjury.
20. Of the Ways of diſpenſing with Oaths.

CHAP. III.

Of the Power of Mankind over [the] Things [of the World.]

Sect. 1. THE greateſt Part of the Law is employed about worldly Things.
2. Man uſes other Creatures by GOD's Ordination.
3. Man does no Injury by deſtroying Vegetables.
4. Some Doubts about killing and eating living Creatures.
5. Which yet is maintained.
6. The Abuſe of our Right over living Creatures is to be reproved.

CHAP. IV.

Of the Origin of Dominion or Property.

Sect. 1. Property and Community are moral Qualities.
2. What is Property and Community.
3. That it has no Place, but where there are more Men than one.
4. It proceeds immediately from an Agreement among Men.
5. Of the antient Community of Goods.
6. By what Degrees Men departed from it.
7. That it was profitable to Mankind.
8. The Opinion of the Antients about the Original of Dominion or Property.
9. Grotius's Judgment conſidered.
10, 11, 12, 13. The Arguments of thoſe who deny the Community of Goods uſed among the Antients.
14. In what Senſe Dominion is ſaid to be by natural Right.
15. How far Infants are capable of Property.

CHAP. V.

Of the Object of Dominion and Property.

Sect. 1. WHAT is required to make Things our own.

2. *Things conſumed in their Uſe are in vain made our own.*
3. *A Thing become our own ſhould be capable of keeping.*
4. *The Uſe of ſome Things made our own is common to all.*
5. *The divine Grant is not contrary to our Dominion over the Sea.*
6. *Reaſons againſt all Property on the Sea.*
7. *What the Uſe of the Sea is.*
8. *What Parts of the Sea are made a Poſſeſſion.*
9. *The main Ocean can't be in any Man's Dominions.*
10. *How far Navigation and Commerce on the Sea is free.*

CHAP. VI.

Of Occupancy.

Sect. 1. *THE ſeveral Ways of acquiring Dominion.*
2. *The original Methods of acquiring it.*
3. *Occupancy is gained in whole, or by Parcels.*
4. *The Poſſeſſion of Moveables depends on the Diſpoſal of the chief Governour.*
5. *In ſome Places the catching of Wild-beaſts is allowed to every one,*
6. *In other Places it is the Privilege of great Men only.*
7. *Whether he that hunts contrary to the Law, has a Property in the Beaſt he takes.*
8. *When Things occupied are underſtood to be immoveable.*
9. *When they are moveable.*
10. *Whether a Wild-beaſt becomes mine as ſoon as I have wounded it.*
11. *Whether the Fiſh are ours, that are in our Ponds.*
12. *Things left become immediately the firſt Occupant's.*
13. *Of Treaſures.*
14. *Of Poſſeſſions obtained by War.*

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Of additional Acquirements.

Sect. 1. *HOW many Sorts of Additions.*
2. *Additions properly belong to the Owner of the Thing.*
3. *How many Sorts of Fruits.*
4. *The young ones of Beaſts belong to the Owner of the Dam, or Mother.*
5. *Things planted paſs with the Soil.*
6. *How Buildings go along with the Soil.*
7. *The Paper goes along with the Writing.*
8. *The Canvaſs with the Picture.*
9. *The Purple with the Garment.*
10. *Of new Models in Things.*
11. *Of whole Countries left by Waters.*
12. *Of Fields belonging to private Perſons.*

CHAP VIII.

Of Right over other Mens Goods or Poſſeſſions.

Sect. 1. *A Man may have a Right over other Mens Goods diverſe Ways.*
2. *How many Sorts of Right we have over others Goods.*
3. *The Right of holding in Fee* [*Simple.*]
4. *The Right of a Ground-plat.*
5. *The Right of an honeſt Poſſeſſor.*
6. *Services, what, and of how many Sorts?*
7. *The Uſe with the Profits.*
8. *The bare Uſe.*
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10. *The Works of Servants.*
11. *The Services of City-Eſtates.*
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Of transferring of Property in general.

Sect. 1. *IT proceeds from Property, that we may alienate a Thing.*
2. *The Conſent of two Perſons is required in every Alienation.*
3. *Which is to be expreſſed by ſome Signs.*
4. *An Alienation is made entirely, or upon Conditions.*
5. *Whether Livery be required in every Alienation.*
6. *Property is either accompanied with, or ſeparated from Poſſeſſion.*
7. *What, and how manifold Poſſeſſion is.*
8. *How Property is gained by bargaining only.*
9. *True and feigned Delivery.*

CHAP. X.

Of Wills and Teſtaments.

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2. Grotius's *Definition of a Will is examined.*
3. *What is a Will to us.*
4. *Whether Wills proceeded from the Law of Nature, is doubted.*
5. *The Antients diſpoſed of their Goods while they were living.*
6. *How far Wills proceeded from the Law of Nature, and how far from poſitive Laws.*
7. *An Inheritance given by Will, wanting due Form, may be entered upon, if none oppoſe it.*

8. *But the Heir may null that Will, as if his Anceſtor had died inteſtate.*
9. *Donation in Caſe of Death.*

CHAP. XI.

Of Succeſſions to Perſons who die inteſtate.

Sect. 1. *Succeſſion to Perſons that die inteſtate, depends upon a Preſumption of their Wills.*
2. *Yet as it is agreeable to Reaſon.*
3. *Children are preferred before all others.*
4. *Parents are to maintain their Children.*
5. *What is meant by Maintenance.*
6. *Who are to be accounted Children?*
7. *What more than Maintenance is due to Children, and why?*
8. *It is not neceſſary that Goods ſhould always be equally divided among Children.*
9. *Legitimate Children are to be preferred before natural,*
10. *Provided that the Father owns them,*
11. *Or does not diſinherit them.*
12. *Of the Right of Repreſentation.*
13. *Parents muſt ſucceed for want of Children.*
14. *And for Want of them, the neareſt Relations in their Order.*
15. *Whether Friends may be preferred before Kindred?*
16. *Or Benefactors before Relations?*
17. *The Order among Kindred.*
18. *The Civil Laws allow a large Power of diſpoſing Eſtates.*
19. *The Heir of the Deceaſed, how far he is obliged to pay his Debts.*

CHAP. XII.

Of Uſucapion or Preſcription.

Sect. 1 *How Uſucapion and Preſcription differ.*
2. *What Uſucapion is by the* Roman *Laws, and where it takes Place.*
3. *How far honeſt Dealing is required in Uſucapion.*
4. *Continual Poſſeſſion is required.*
5. *The Reaſons of introducing Uſucapion.*
6. *Whether the Law for Uſucapion be penal.*
7. *Many refer Uſucapion to civil Right.*
8. *Whether Uſucapion can ariſe from a tacit Dereliction of the Proprietor.*
9. *It ſeems to depend upon the tacit Agreement of Nations.*
10. *How Uſucapion may be prejudicial to Children not yet born.*
11. *Uſucapion is alſo in Uſe among diverſe Nations.*

CHAP. XIII.

Of the Obligations which ariſe immediately from Property.

Sect. 1. *Every one is obliged to abſtain from another's Goods.*
2. *Others Goods kept by us are to be reſtored.*
3. *Which is proved.*
4. *And illuſtrated.*
5. *Contracts made about others Goods are void, as ſoon as they are known.*
6. *What is gained by another's Goods, muſt be reſtored.*
7. *An honeſt Poſſeſſor is not bound to reſtore, if the Goods are decayed, or loſt.*
8. *But he is bound to reſtore the preſent Fruits,*
9. *And ſuch as are ſpent, if he muſt have ſpent others of the like Value.*
10. *But not them he has neglected to gather.*
11. *He is not obliged, who has given away what was given him, but with a Diſtinction.*
12. *Nor if he has ſold what he bought with a Diſtinction alſo.*
13. *How he may recover the Price, who has really ſold another Man's Goods?*
14. *Whether if a Man buys another's Goods, he ought to reſtore them to the Seller?*
15. *He that has another's Goods, and knows not the Owner, may keep them.*
16. *Whether what is given for a bad Reaſon muſt be reſtored?*

BOOK V. CHAP. I.

Of Price.

Sect. 1. *After Property, the Meaſure of Things muſt be introduced.*
2. *What is the moral Quantity of Things.*
3. *How many Kinds of Price.*
4. *What is the Foundation of the common Price of Things.*
5. *Many profitable Things have no Price, and why?*
6. *Why the Prices of Things riſe.*
7. *Of the Price of Fancy.*
8. *Of the lawful Price.*
9. *Of the common Price.*
10. *The Cauſes why the common Price riſes and falls.*
11. *The common Price is not ſufficient for the Commerce of Man's Life.*
12. *Hence an eminent Price was ſet in Money.*

13. *Which*

13. *Which, for the moſt part, was made of Metals.*
14. *How far the Governours of Societies may ſet an Eſtimate upon Money.*
15. *In ſo doing, they ought to have Reſpect to Land.*
16. *The Value of Money is alſo ſubject to an Alteration.*

CHAP. II.

Of Contracts in general, that preſuppoſe the Price of Things.

Sect. 1. T*HE Difference between Bargains and Contracts, according to Mr.* Hobbes,
2. *According to the Interpretation of the* Roman *Law.*
3. *Some Advice about what they have delivered.*
4. *Our Opinion about the Difference.*
5. *Contracts are divided into ſuch as oblige,* 1. *one Party only; and* 2. *ſuch as oblige both Parties.*
6. *And into real, or bare Conſent, verbal, and in Writing.*
7. *In ſome particular Name, and without a Name.*
8. *Beneficial and chargeable.*
9. *How many Sorts of chargeable Contracts.*
10. *Of mixed Contracts.*

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Concerning the Equality that ought to be obſerved in chargeable Contracts.

Sect. 1. T*HE Equality to be obſerved in chargeable Contracts.*
2. *The Faults of a Thing are to be diſcovered.*
3. *The Nature of a Contract requires it.*
4. *Whether what concerns not the Thing it ſelf, muſt be diſcovered.*
5. *The Faults known on both Sides need not be mentioned.*
6. *No Man is to be ſcared into a Contract.*
7. *In gainful Contracts Equality need not to be obſerved.*
8. *In a chargeable Contract nothing is ſuppoſed to be given.*
9. *How Inequality not fore-ſeen is to be corrected.*
10. *Whether Over-reaching in Buying be lawful.*

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Of gainful Contracts in particular.

Sect. 1. W*HAT a Commiſſion is.*
2. *The ſpecial Reſpect had to it by the* Romans.
3. *The Perſon commiſſioned ought to be very diligent.*
4. *How far he ought to be indemnified.*
5. *Whether a Commiſſion can be ſatisfied by an Equivalent.*
6. *Of a Loan, and how it differs from a voluntary Grant.*
7. *Of a Charge.*

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Sect. 1. O*F Exchanging or Bartering.*
2. *When a Contract of buying and ſelling is compleat.*
3. *Of the Loſs or Gain of a Thing ſold.*
4. *Of Agreements commonly joined with Sales.*
5. *What the Buyer ought to perform to the Seller, and* è contrario.
6. *Of buying in Hope and Expectation.*
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Of Renting and Hiring.

Sect. 1. W*HAT Things Hiring hath common with Buying.*
2. *The certain Uſe of a Thing, if it be intercepted, tends to the Loſs of the Leſſor,*
3. *The uncertain regularly tends to the Loſs of the Leſſee.*
4. *Whether the ſame Work may be let to many together.*

CHAP. VII.

Of the Loan of a conſumeable Commodity.

Sect. 1. W*HAT a Loan is, and what a conſumeable Commodity.*

2. *A double Uſe of theſe Things.*
3. *For what Things we are wont to be credited.*
4. *Of tacit Lending.*
5. *Whether Lending be an Alienation.*
6. *What if Money be altered in the intrinſic Value,*
7. *Or in the extrinſic Value.*
8. *The Doctrine of the* Jews *about Uſury.*
9. *That Uſury is not contrary to the Law of Nature.*
10. *The Arguments to the contrary are anſwered.*
11. *Some Contracts are much the ſame as Uſury.*
12. *The Evaſions uſed to avoid the Diſgrace of Uſury.*

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Sect. 1. *HOW many Ways Partnerſhip may be begun.*
2. *Money and Labour are balanced ſeveral Ways.*
3. *Irregular Partnerſhip.*
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Of Contracts depending on Chance.

Sect. 1. *BArgains mixt with Chance.*
2. *They are uſed as well in Peace,*
3. *As in War.*
4. *Contracts in laying Wagers.*
5. *Contracts in Play.*
6. *Of Rafflings.*
7. *Of Lotteries.*
8. *Of Inſurance.*

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Of acceſſory Bargains.

Sect. 1. *ACceſſory Contracts of two Sorts.*
2. *Variety of additional Bargains.*
3. *An additional Bargain, if it's lewd, is void.*
4. *Sometimes it diſorders Buſineſs.*
5. *Being preſently added, is valid, if other Things agree.*
6. *Being added, after ſome Time, in the Negative, is liable to an Exception.*
7. *Being affirmative, how far it is good.*
8. *Of truſting.*
9. *A Surety can't be engaged for more than the Debtor,*
10. *But he may be more ſtrictly bound.*
11. *What Advantages the Law allows a Surety.*
12. *Of Bails.*
13. *The Uſe of Pawns.*
14. *A Pawn is either fruitful, or barren.*
15. *Whether a Pawn may be gained by Uſe.*
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CHAP. XI.

By what Means Obligations founded upon Compact may be diſſolved.

Sect. 1. *THE moſt natural Way of diſſolving an Agreement, is to perform the Things agreed on.*
2. *What if one pays a Debt for one who knows not of it?*
3. *To whom we muſt pay.*
4. *What muſt be paid.*
5. *To whom, and by whom Compenſation may be made.*
6. *Where it may be uſed.*
7. *A Debt is paid by a Releaſe.*
8. *How an Obligation is made void by a Diſagreement.*
9. *The Knavery of one Party frees the other from his Obligation.*
10. *As alſo a Change of that Condition on which the Obligation was founded.*
11. *How an Obligation ceaſes by Time,*
12. *And how by Death.*
13. *Of Delegation.*
14. *Of Confuſion.*
15. *Of Novation.*

CHAP. XII.

Of the Interpretation of Compacts and Laws.

Sect. 1. *THE Reaſon of the Order.*
2. *The Neceſſity of a right Interpretation.*
3. *The Words are ordinarily to be underſtood according to the common Uſage. And*
4. *Words of Art according to the Art.*
5. *Conjecture is ſufficient, when Words are dubious,*
6. *Or ſeem to contradict one another.*
7. *Conjecture muſt be taken from the Matter treated on,*

8. From the Effect, or
9. From the Coherence, Original, and Place.
10. How the Senſe may be gathered from the Reaſon of them.
11. Some Words have both a large and ſtrict Signification.
12. Some Things are favourable, others odious.
13. Rules are to be made from thoſe Diſtinctions.
14. An Example of two who came to the Goal together.
15. How this Order is to be interpreted. No Man muſt wage War without the Command of another.
16. Of theſe Words, Carthage ſhall be free.
17. A Conjecture when a Law muſt be enlarged.
18. Of Tricks to evade a Law.
19. A Conjecture when the Law ought to be reſtrained upon the Account of ſome Defect in the Will of the Law-giver.
20. (An Obſervation upon this Conjecture)
21. Or upon the Account of ſome Accident inconſiſtent with his Will, as where it is either unlawful,
22. Or too grievous in Reſpect of the Performance.
23. What if two Laws are contrary one to another.

CHAP. XIII.

Of the Way of deciding Controverſies in the Liberty of Nature.

Sect. 1. WHAT is due to others is willingly to be performed.
2. In a State of Nature there is no Judge.
3. Controverſies which can't be decided by Conference are to be referred to Arbitrators.
4. There is a Covenant between an Arbitrator and the contending Parties.
5. Arbitrators, in a Doubt, are bound to judge by Laws.
6. Arbitrators are not to judge of the Poſſeſſion.
7. Of the Mediators of a Peace.
8. What if Deeds be loſt.
9. Of Witneſſes.
10. Of the Execution of the Sentence.

BOOK VI. CHAP. I.

Of Matrimony.

Sect. 1. THE Coherence.
2. Matrimony the Propagation of Mankind.
3. Whether there be an Obligation to marry.
4. A wandring Luſt oppoſite to the Laws of Nature.
5. Mankind not to be propagated but by Marriage.
6. What Obligation may be laid on Men to marry by the Laws of Nations.
7. What it is by the Law of Nature.
8. How far the Laws of Nations may order concerning Marriage.
9. The diſorderly Marriages of the Amazons.
10. The Laws and Rights of a regular Marriage.
11. Whence ariſes the Man's Power over the Wife.
12. Whether it be beſtowed immediately by God.
13. Whether it neceſſarily implies a Power of Life and Death.
14. Whether Conſent, not Bedding, makes the Marriage.
15. No Woman may marry more than one Husband.
16. Polygamy in Uſe among many People,
17, 18. Whether it be repugnant to the Law of Nature.
19. The true Nature of Marriage is for one Man and one Woman to be joined together.
20. It is not lawful raſhly to part Man and Wife.
21. Adultery and wilful Deſertion make a Marriage void.
22. Whether an intolerable ill Nature is a Reaſon for Divorce.
23. The Opinion of ſome Men about the Senſe of the Law of God about Divorce,
24. Particularly of Mr. Milton.
25. Marriage requires ſuitable Qualifications of Natures.
26. An Error concerning Matrimony.
27. A married Woman can't rightly marry another.
28. Marriages with Kindred, why forbidden?
29. How it comes to paſs that Men are aſhamed of their Genitals.
30. Of Nakedneſs.
31. The Original of natural Shame.
32. Marriages between Parents and Children wicked.
33. The Opinion of the Jews about it.
34. Of the Marriages of Brothers and Siſters.
35. Of the other Degrees forbidden.
36. Of the ſecondary Wives.

CHAP. II.

Of Paternal Power.

Sect. 1. THE common Opinion of the Original of paternal Authority.

2. Ac-

2. *According to* Hobbes, *the Original Power over Children is in the Mother,*
3. *And from her is derived to others.*
4. *On what Reaſon paternal Authority is grounded.*
5. *How far the Father has more Right than the Mother.*
6. *How great the Power of the Father is, as ſuch, over his Children,*
7. *Both in their Infancy and Childhood.*
8. *How far Children are capable of being governed at this Time.*
9. *Whether a Father may ſell his Son.*
10. *Of the Obligation of Children made free.*
11. *What Power Fathers have over their Children, out of civil Societies.*
12. *What Power in civil Societies.*
13. *How this Power is loſt.*
14. *Whether Children ought to have their Parents Conſent to their Marriages.*

CHAP. III.

Of a Maſter's Power.

Sect. 1. *WHAT is the Relation of Maſter and Servants.*
2. *Servitude was not ordained by Nature,*
3. *Nor by God immediately.*
4. *The Original of Servitude ſeems to have been from Contract.*
5. *War made the Number of Servants greater.*
6. *What is the Duty of Captives to their Maſters.*
7. *They are almoſt of the ſame Nature with their Goods.*
8. *Yet an Injury may be done them.*
9. *Of the Children of Servants.*
10. *The Inconveniences of Servitude.*
11. *How many Ways a Servant may become free.*

BOOK VII. CHAP. I.

Of the Cauſes and Motives inducing Men to eſtabliſh civil Societies.

Sect. 1. *INtroduction.*
2. *Man naturally loves himſelf more than Company.*
3. *Yet the Love of Company does not immediately infer the Love of civil Society.*
4. *Many Vices in Man prejudicial to civil Union.*
5. *Whether civil States aroſe in the World by natural Conſequence.*
6. *Whether Indigence was the Cauſe of civil Eſtabliſhments.*
7. *The true Origin of civil Government.*
8. *The bare Reverence of the Law of Nature not ſufficient to ſecure the Peace of Mankind,*
9. *Nor the ſole Force of Arbitrators; or Covenants.*
10. *Difference in Opinion greatly prejudicial to the Peace of the World.*
11. *Men need a much more ſevere Reſtraint than the Law of Nature only.*

CHAP. II.

Of the inward Structure and Conſtitution of civil States.

Sect. 1. *MEN only are a ſufficient Defence againſt the Wickedneſs of Men.*
2. *To this End it is neceſſary that many ſhould join together.*
3. *Thoſe who joined in this Manner ought to agree in their Reſolutions.*
4. *The Difference between the Polities of Bees and Men.*
5. *An Union of Wills and of Strength neceſſary to a civil State.*
6. *This Union produced by intervening Covenants.*
7. *The firſt Covenant, with the Decree following upon it.*
8. *The ſecond Covenant, giving the final Perfection to a civil Eſtabliſhment.*
9. *The Reaſon for which* Hobbes *will acknowledge but one Covenant.*
10. *This Reaſon ſufficient.*
11, 12. Hobbes's *Arguments anſwered.*
13. *A civil State how defined.*
14. *In a Monarchy, the Will of the Prince is the Will of the State.*
15. *Under other Forms of Government, according to the regular Courſe, the Community is concluded by the Votes of the major Part.*
16. *This Rule admits of a Limitation.*
17. *Of Equality of Votes.*
18. *Of joining, or dividing Suffrages.*
19. *How many Perſons at leaſt are requiſite to a ruling Council.*

20. Civis, *or a Member of a civil State, who may properly be ſo termed.*
21. *Subordinate Bodies, of how many Kinds.*
22. *Inveſted with what Rights and Privileges.*
23. *Of unlawful Bodies, and Factions.*
24. *The peculiar Duties incumbent on the Members of civil States.*

CHAP. III.

Of the Production of civil Sovereignty, or Majeſty.

Sect. 1. *Sovereignty, the Reſult of thoſe Covenants by which the publick Body was firſt united.*
2. *This done by the divine Will and Approbation.*
3. *Whether the Majeſty of Princes is immediately derived from* GOD.
4. *The Arguments which ſome make uſe of to prove the Affirmative.*
5. *Civil Authority not the Effect of War.*
6. *Whether a Father of a Family may, without any new Act, commence a Prince.*
7. *How a Vaſſal, or Feudatory, may become a Sovereign Lord.*
8. *Whether a Free State, or a Monarch, reſigning their Power into other Hands, are the Efficient Cauſe of the Sovereignty produced.*
9. *Who has properly the Power of conferring the regal Title.*

CHAP. IV.

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8 AP 67

An Hiſtorical and Critical

ACCOUNT

OF THE

SCIENCE of *MORALITY*,

And the PROGRESS it has made in the World, from the earlieſt Times down to the Publication of

PUFENDORF

OF THE

Law of Nature and Nations:

In a PREFATORY DISCOURSE to the ſaid Work, by

Mr. *BARBEYRAC*, Profeſſor in Law, *&c.*

Now done into Engliſh *from the* French *of the* AUTHOR;
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LONDON:
Printed for J. WALTHOE, R. WILKIN, J. *and* J. BONWICKE, S. BIRT,
T. WARD, *and* T. OSBORN. MDCCXXIX.

The Reader is deſir'd to make the Corrections following.

PAG. 5, *Col.* 2, *Lin.* 31, Precepts of Morality, *r.* the Precepts of &c.

P. 6, *col.* 1, *l.* 1, difficult to be rightly conſtituted; *r.* hard to ſettle,

Ibid. col. 2, *l.* 52, 53, ſometimes interfere; and Charity and Juſtice be often found &c. *r.* often interfere; and Charity and Juſtice be found &c.

P. 7, *col.* 2, *l.* 4, *à fine*, or great Inconvenience, *r.* or Inconvenience

Ibid. col. 2. *l.* 46, permitted, *r.* allowable

P. 8, *col.* 1, *l.* 21, do not proceed, *r.* proceed not

Ibid. col. 1, *l.* 47, Services, not hurtful to himſelf, that he can do him, *r.* Services, that he can without prejudice do him.

Ibid. col. 2, *l.* 8, are not yet born, *r.* are yet unborn?

Ibid. l. 16, not perhaps be very difficult, *r.* perhaps be not very &c.

P. 10, *col.* 1, *l.* 43, 44, purpoſe to anſwer &c. *r.* propos'd to anſwer briefly,

Ibid. col. 2, *l.* 14, *à fine*, Reaſon. *r.* Reaſon?

P. 11, *col.* 1, *l.* 13, them. *r.* them?

Ibid. col. 1, *l.* 17, carry'd on beyond, *r.* carry'd far beyond

Ibid. col. 2, *l.* 5, philoſophiſing, *r.* philoſophizing;

Ibid. col. 2, *l.* 12, *&c.* Reaſons which he alledges, —— a little —— cannot refuſe to —— them. *r.* Reaſons he alledges, —— the leaſt —— cannot but —— their cogency.

Ibid. col. 2, *l.* 19, to confirm themſelves, *r*, to be confirm'd

Ibid. l. 9, 10, *à fine*, chiefly maintain &c. *r.* pertinaciouſly inſiſt upon &c.

P. 12, *col.* 2, *l.* 4, Profit, *r.* Benefit

P. 13, *col.* 1, *l.* 44, whereas, *r.* nay

Ibid. col. 2, *l.* 41, conufs'd, *r.* confus'd,

P. 14, *col.* 1, *l.* 1, writing, *r.* writings

Ibid. col. 1, *l.* 9, 10, *à fine*, as well —— as &c. *r.* both —— and &c.

Ibid. col. 2, *l.* 10, *à fine*, *r.* Obligation, and Right,

P. 15, *col.* 2, *l.* 8, *à fine*, abuſe; *r.* abuſe, &c.

P. 16, *col.* 1, *l.* 6, worſhip; *r.* worſhip,

P. 17, *Not. k*, Idolatry, *r.* Idolatry, *c.* 10, *S.* 1-, 2".

P. 19, *col.* 2, *l.* 30, guilty; *r.* guilty:

P. 20, *l.* 16, *à fine*, come ſhort *r.* fail

P. 25, *col.* 2, *l.* 44, ſome-time, *r.* ſometimes

P. 26, *col.* 1, *l.* 3, *r.* Accounts, cou'd *Ibid. col.* 2, *l.* 10, *r.* Opinion

P. 27, *col.* 1, *l.* 8, it ſelf. In vain, *r.* it ſelf: in vain

Ibid. l. 11, Reflections. In vain *r.* Reflections: in vain

Ibid. l. 29, to ſuch, as have no better to make uſe of; having &c. *r.* to ſuch, as have no better; having &c.

P. 39, *col.* 2, *l.* 37, 38, to do with a Whore, *r.* Commerce with a Courtezan,

P. 46, *col.* 1, *Sect.* 17, *l.* 7, Lacedæmon, *r.* Lacedemon.

P. 50, *col.* 2, *l.* 3, which proceeded no farther than, *r.* which proceeded not beyond

Ibid. col. 2, *l.* 7, 8, a Spirit of Diffidence, *r.* a Spirit of Scepticiſm and Suſpence

Ibid. col. 2, *l.* 11, 12, was good, *r.* was a real Good, *and dele*, or.

P. 52, *col.* 1, *l.* 13, does; I may ſay, *r.* does, as I may ſay,

P. 53, *col.* 2, *l.* 15, always ſhunn'd it, *r.* ever ſhunn'd it,

P. 55, *col.* 1, *l.* 25, Right; *r.* Law,

P. 57, *col.* 1, *l.* 1, Scholar, *r.* Diſciple

Ibid. l. 13, *r.* a ſpice of &c.

P. 58, *col.* 1, *l.* 9, *à fine*, Caſes always *r.* Caſes wou'd always

P. 66, *col.* 2, *l.* 30, incertainty, *r.* uncertainty,

P. 68, *col.* 2, *l.* 8, 9, 10, will ſtill nevertheleſs be &c. *r.* will ſtill be never a jot the leſs an Atheiſt for all that; as long as it appears, that &c.

Ibid. col. 2, *l.* 27, Character, *r.* Name

P. 69, *col.* 2, *l.* 27, 28, his Reaſon he us'd; *r.* the Reaſon he us'd,

Ibid. col. 2, *l.* 35, *dele* too

P. 72, *col.* 1, *l.* 13. defac'd; *r.* disfigur'd

Ibid. col. 2, *l. à fine* 4, Profit, *r.* Intereſt

P. 74, *col.* 1, *l.* 1, deveſted of *r.* ſtripp'd of

Ibid. col. 2, *l.* 34, examine, *r.* examine at preſent,

P. 75, *col.* 1, *l.* 9, conciſe and rough Stile; *r.* conciſe and difficult Stile,

Ibid. col. 1, *l. from the bottom* 5, form'd; *r.* cull'd

Ibid col. 2, *l. ult.* We there alſo find ſome Deciſions; *r.* We find alſo ſome of his Deciſions &c.

P. 76, *col.* 1, *l.* 15, the Uſefulneſs of Religion in Civil Societies; *r.* the Importance of Religion to Civil Society.

Ibid. l. 24, approve of them; *r.* concur with him;

Ibid. l. 47, that are moſt uſeful to my deſign; *r.* that beſt fit my turn,

Ibid. col. 2, *l.* 13, begin firſt with that; *r.* begin with that firſt,

Ibid. l. 20, Argumentation, *r.* Argumentations

Ibid. l. 22, Heart of doubt; *r.* Heart of the Doubt;

Ibid. l 24, 25, Schools, the Bar, or the Pulpit; *r.* Schools and the Bar; or for the Pulpit, where &c.

Ibid. col. 2, *l.* 27, It is; *r.* It may be

P. 86, *col.* 1, *l.* 7, 8, *à fine &c.* Attention, that we ought to have for, *r.* Attention, we are to beſtow &c.

P. 87, *col.* 1, *l.* 12, faculty of &c. *r.* Faculty too of &c.

Ibid. l. 8, *à fine*, Habits and Cuſtoms &c. *r.* Habit and Cuſtom

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SEEING[a] *the ſpeculative Sciences, if conſider'd in, and for themſelves only, are all of 'em uſeleſs*; and ſeeing the Purſuit of ſuch Objects cou'd never be the End, for which Man was created; it ought not to ſeem ſtrange to any, if the Generality of Mankind ſhou'd be found incapable of applying themſelves to this ſort of Science with any tolerable Succeſs; and a very great Part not able even to comprehend its firſt Rudiments: But it wou'd be juſt Cauſe of Wonder, ſhou'd the Practical Science of[b] Moral Actions not be attainable, to a competent Degree at leaſt, by all who will make uſe of their Reaſon, in whatſoever State and Condition they are found to be.

And really, none can reaſonably doubt, but that[c] every Man, who will be happy, muſt needs, in order to make himſelf ſo, regulate his Conduct after ſome certain manner; and that God, as Author and Parent of all human Race, does preſcribe to all Men, without exception, the Duties, which tend to procure them that Happineſs, which they ſo paſſionately ſeek after. Now from hence it neceſſarily follows, that the natural Principles of this Science, are ſuch as may be eaſily diſcover'd; and ſuch too, as are proportionate to the Capacities of all ſort of Perſons: So that to be inſtructed in this Science, there will be no occaſion to mount up to Heaven; or to have from thence any extraordinary Revelation for that purpoſe. An antient Doctor of the Church has made uſe[d] of this Reaſon, to ſhew the Injuſtice and Vanity of the greateſt Part of the Heathen Philoſophers; who pretended that Philoſophy, without excepting the nobleſt Part of it, even that which concerns Morality; was not but for the ſmall Number of thoſe, who were the initiated, and profeſs'd Diſciples thereof: And it muſt be own'd, to the Eternal Glory of the Supreme Legiſlator of Mankind; as well as to the utter Confuſion of themſelves; that none can complain, without Injuſtice, that God has given him Laws, either impracticable; or environ'd with ſuch Obſcurity, as cannot be penetrated by one who really has his Duty at heart, notwithſtanding all his Pains and Application. This the wiſeſt Heathens have acknowledg'd; nor will it be improper here to produce their Teſtimonies; to confound thoſe, who, under Chriſtianity itſelf, ſeem to call in queſtion ſo inconteſtable a Truth. The *Stoicks*, who made Morality their principal Study, maintain'd, that their Philoſophy was not above the Reach of [e] Women and Slaves; and that, as the way to Virtue lies open to all Men without Diſtinction; [f] ſo there is no Eſtate or Condition with peculiar Privileges excluſive of others, as to the Faculty of knowing the Principles and Rules, as well of thoſe Duties which are common to all; as of thoſe which belong to each Particular. *Is* [g] *it ſo*, (ſaid an Emperour and Philoſopher of the ſame Sect) *that you cannot recommend yourſelf, and raiſe a Character by the Delicacy of your Wit, and the Fineneſs of your Underſtanding? Very well.. But there are many other Things, as to any of which you cannot ſay, I am not fit for it. Put in practice them, and ſhew forth what does entirely depend on yourſelf; Sincerity, Gravity, Humanity, Laboriousneſs and Induſtry, Contempt of Voluptuouſneſs. Be content with thy Condition; ſtand in need but of a little; avoid Luxury, trifling Amuſements, and vain Diſcourſes. Have a Soul judicious, free, and great. Don't you ſee, that, being able to raiſe yourſelf by ſo many Virtues, without having any pretence on the Account of natural Incapacity; you ſtill continue in the Mire, only becauſe you will? Ever bear in mind, that all the Happineſs of this Life depends on but very few Things. Becauſe you deſpair of being eminent in Logic, or Natural Philoſophy; will you give over all Thoughts of being free, ſociable, and ſubmiſſive to the Orders of God?* Another *Roman* Philoſopher, moſt illuſtriouſly eminent on account of his Eloquence and Employs in the Government, had ſaid long before, (being to confirm this Propoſition; That a good Man will never think that uſeful or profitable, that is not honeſt; and that he will never do, or even think of doing any thing, that he dares not boldly diſcover to all the World:) [h] *Is it not a ſhame for Philoſophers to doubt of a Truth, of which even Peaſants make no doubt? Witneſs that Saying, which is commonly made uſe of, when we deſcribe a Man of Integrity;* That he is a Man, with whom one may play * at *Mora* in the dark: *For 'twas the Peaſants who invented that old Proverb.*

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[a] See *The Art of Thinking*, Diſcourſe I, *p.* 2-. Edit. *Amſterd.* 1685, and 1697.

[b] I mean by this, and the Term *Morality*, not only what is commonly ſo call'd; but alſo *The Law of Nature, and Politicks*: In a word, all that it is neceſſary for the Conduct of a Man's Self, according to his Eſtate and Condition.

[c] *Hoc opus, hoc ſtudium parvi properemus & ampli,*
Si patriæ volumus, ſi nobis vivere cari. Hor. lib. 1. Epiſt. 3, 28, 29.
----- *Id, quod æquè pauperibus prodeſt, locupletibus æquè;*
Æquè neglectum pueris ſenibuſque nocebit. Idem ibid. Epiſt. 1, 24, *& ſeq.*

[d] *Non eſt ergo ſapientia, ſi ab hominum cœtu abhorret; quoniam, ſi ſapientia homini data eſt, ſine ullo diſcrimine omnibus data eſt; ut nemo ſit prorſus, qui eam capere non poſſit. At illi* [*Philoſophi*] *virtutem humano generi datam ſic amplexantur, ut ſoli omnium publico bono frui velle videantur; tam invidi, quam ſi velint deligare oculos, aut effodere cæteris, ne ſolem videant --- Quod ſi natura hominis ſapientiæ capax eſt; oportuit opifices, & ruſticos, & mulieres, & omnes denique qui humanam formam gerunt, doceri, ut ſapiant; populumque ex omni lingua, & conditione, & ſexu, & ætate conflari. Maximum itaque argumentum eſt, Philoſophiam neque ad ſapientiam tendere, neque ipſam eſſe ſapientiam; quod myſterium ejus barba tantum celebratur & pallio.* Lactant. Inſtit. Divin. *Lib.* 3, *c.* 25, Num. 2——6. Edit. Cellar.

But tho' none had ever yet diſcover'd in the Principles and Rules of Morality, ſo high a Degree of Evidence, and that they are ſo duly adjuſted to all Capacities; one might ſtill appeal in this Matter to the very Nature of the Thing itſelf; and in ſome meaſure to Experience. We have here no Buſineſs to dive down into the impenetrable Secrets of Nature, to diſcover thoſe imperceptible Springs, that produce in the World ſo many Phænomena, and ſuch variety of wonderful Events; to meaſure the Magnitude and Diſtance of the Stars; to rake up the Entrails of the Earth, and dig down to its very Center; † no more have we here any occaſion to bury ourſelves in metaphyſical Speculations; to turn over a vaſt Number of Volumes; to learn ſeveral Languages; to pierce thro' the Darkneſs of remote Antiquity; in a word, to be very learned: We ſhall ſcarce have occaſion to carry our Thoughts beyond ourſelves ‖, or conſult any other Maſter beſides our own Heart. The moſt common [i] Experience of Life; and a little Reflection on ourſelves, and the Objects that ſurround us on every Side; are ſufficient to furniſh even the moſt ordinary Capacities with general Ideas of the Law of Nature; and the true Grounds of all our moral Duties. Who does but ever ſo little examine his own Nature; and contemplate that wonderful Order of the Univerſe, which on all ſides preſents itſelf to the View of every one capable of any Degree of Reflection; will immediately be rais'd to the Knowledge of that Almighty, All-wiſe, and All-good Creator, *in whom we* [k] *live, and move, and have our Being*; to whom too, he will find he owes Homage with all the reſt of the Univerſe. Whence it is eaſy to conclude, that we ought to have the higheſt Idea of this Supreme Being, that our Minds are capable of receiving; and to obey his Laws, as far as we can attain to the Knowledge of them. After this, there will be no great need of much Penetration, to perceive how

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[e] *Senſerunt hoc adeo* Stoici, *qui & ſervis, & mulieribus philoſophandum eſſe dixerunt.* Idem ibid. *Num.* 7.

[f] *Non omnes curia admittit: caſtra quoque, quos ad laborem & periculum recipiunt, faſtidioſe legunt: Bona mens omnibus patet: omnes ad hoc ſumus nobiles. Nec rejicit quemquam Philoſophia, nec eligit: omnibus lucet.* Senec. Epiſt. 44-. *Nulli præcluſa virtus eſt; omnibus patet, omnes admittit, omnes invitat, ingenuos, libertinos, ſervos, reges, & exſules. Non eligit domum, nec cenſum; nudo homine contenta eſt.* Idem, de Benefic. l. 3, c. 18-. *Cicero* alſo ſays, that there is not any Perſon, of what Nation ſoever he be, but may arrive at Virtue, provided he will take Nature for his Guide. *Nec eſt quiſquam gentis ullius, qui, ducem naturam nactus, ad virtutem pervenire non poſſit.* De Leg. l. 1, c. 10.-

[g] Δριμύτητά σου οὐκ ἔχουσι θαυμάσαι; ἔστω· ἀλλὰ ἕτερα πολλά, ἐφ' ὧν οὐκ ἔχεις εἰπεῖν, οὐ γὰρ πέφυκα. Ἐκεῖνα οὖν παρέχου, ἅπερ ὅλα ἐστὶ ἐν σοί, τὸ ἀκίβδηλον, τὸ σεμνόν, τὸ φερέπονον, τὸ ἀφιλήδονον, τὸ ἀμεμψίμοιρον, τὸ ὀλιγοδεές, τὸ εὐμενές, τὸ ἐλεύθερον, τὸ ἀπερίεργον, τὸ ἀφλύαρον, τὸ μεγαλεῖον. Οὐκ αἰσθάνῃ, πόσα ἤδη παρέχεσθαι δύνασαι, ἐφ' ὧν οὐδεμία ἀφυΐας καὶ ἀνεπιτηδειότητος πρόφασις, ὅμως ἔτι κάτω μένεις ἑκών, Marc. Antonin. l. 5, c. 5.- Καὶ ἔτι ἐκείνου (μέμνησο ἀεί), ὅτι ἐν ὀλιγίστοις κεῖται τὸ εὐδαιμόνως βιῶσαι· καὶ μὴ ὅτι ἀπήλπισας Διαλεκτικὸς καὶ Φυσικὸς ἔσεσθαι, διὰ τοῦτο ἀπογνῷς καὶ ἐλεύθερος, καὶ αἰδήμων, καὶ κοινωνικὸς, καὶ εὐπειθὴς Θεῷ. Idem, Lib. 7, Sect. 67,- Edit. Gataker.

[h] *Hæc nonne eſt turpe dubitare Philoſophos, quæ ne ruſtici quidem dubitent? A quibus natum eſt id, quod jam tritum eſt vetuſtate proverbium: cum enim fidem alicujus bonitatemque laudant; dignum eſſe dicunt, quîcum in tenebris mices. Hoc quam habet vim, niſi illam; nihil expedire; quod non deceat; etiam ſi id poſſis, nullo refellente, obtinere?* Cicer. de Offic. *l.* 3, *c.* 19.- See alſo *Grotius*, *De J. B. ac Pacis, Prolegom.* §. 39.-

* *Digitis Micare*; to play at *Mora*; *i. e.* to gueſs on a ſudden, how many Fingers the Perſon againſt whom one plays, holds up or down; by which Play the Antients bought and ſold many Things; as we may by drawing Cuts; and Croſs or Pile.

† See *Lactant. Inſt.* l. 3, c. 25, *Num.* 9,- *& ſeq.*

‖ *Eſt profecto animi medicina, Philoſophia; cujus auxilium non, ut in corporis morbis, petendum eſt foris.* Cicer. Tuſcul. Quæſt. *l.* 3, *c.* 3-.

[i] *In illa priori parte* [*Philoſophia naturali*] *ut periculi minus,* [*ſi quid fuerit erratum*] *ita plus difficultatis eſt; quod obſcura rerum ratio cogit diverſa, & varia ſentire; hic* [*in philoſophia morali*] *ut periculi plus, ita minus difficultatis; quod ipſe uſus rerum, & quotidiana experimenta poſſunt docere, quid ſit verius, & melius.* Lactant. Inſtit. Divin. *l.* 3, *c.* 7, Num. 4. Edit. Cellar.

[k] *Acts* xvii, 28.

God has, by a natural Reſult from the Conſtitution of Human Affairs, put us under a Neceſſity of practiſing, one towards another, certain Duties, without which Society cou'd not be maintain'd; and how he has thereby laid upon us an indiſpenſable Obligation to obſerve thoſe Duties; every one according to his State and Vocation. This is certain at leaſt, that no ſooner are thoſe Principles propos'd, but that every one becomes ſenſible of their Goodneſs, and finds himſelf clearly convinc'd of their Truth; provided he be not the Slave of ſome violent Paſſion, that darkens and clouds his Judgment; or that there be not ſome other Obſtacle to hinder and divert his Attention. Let us here add the Teſtimony of a Heathen Philoſopher; 'tis the celebrated *Confucius* of *China*[l]. *The Rule of Reaſon*, ſays he, *which comprehends the reciprocal Duties of a King and his Subjects; a Father and Mother, and their Children; of Husband and Wife; of the young Folks, and the Aged; of Friends, and all who have any Correſpondence or Intercourſe with one another, is not above the reach of the Vulgar. Whereas the Maxims which certain People have themſelves invented, or which they wou'd have paſs for ſublime, and above our Comprehenſion; ſuch as are certain ſtrange and abſtruſe Principles, and which have no Relation to thoſe five ſorts of Perſons before-mention'd; cannot be at all reckon'd among the Rules of Reaſon.* Thus this wiſe *Chineſe* expreſſes himſelf, being to explain a Maxim, which he is endeavouring to ſet in its full Light, in order to prove, that 'tis eaſy for all the World to be virtuous; 'tis the ſame Maxim which the Goſpel ſo much inculcates: *Do not that to others, which you wou'd not have done to yourſelf.* And in very deed, there needs no more, to be convinc'd that the moſt ignorant are by Reaſon perſuaded of the Neceſſity of the general Duties of the Law of Nature; than[m] either to ask 'em if they wou'd be willing any one ſhou'd do themſelves the Hurt which they do others; or to actually do it: For they will then immediately make it appear, either by their Anſwer; or by their Complaints and Actions, that they look on ſuch Practices to be evil[*]; and that they underſtand very well, that they are forbid them, not purely thro' Caprice, or a miſtaken Notion of Juſtice and publick Good; but for moſt ſtrong and equitable Reaſons. Every one will complain, if he is ſlander'd, or robb'd, or ill treated in his own, or in the Perſon of thoſe who are dear to him; or in any other manner whatſoever: The moſt ſtupid have then underſtanding enough to repreſent livelily in their way, the Greatneſs of the Injuſtice; and the Puniſhment due to the Offender. Therefore, when they themſelves commit any thing of the like Nature againſt others, it is doing them no wrong to condemn them by their own Judgment; and to look on their Ignorance, in which they may pretend to have been on that Head, as altogether inexcuſable. But what is much more conſiderable, they can, not only comprehend and diſcover with little trouble the Fundamental Principles of Morality; but beſides, wou'd they but uſe their utmoſt Endeavours to augment their ſmall Stock of Knowledge; they might, without much Difficulty, draw from thence certain Conſequences, and extend their Knowledge to a Competency conſiderable enough; at leaſt ſufficient for their Condition. Inſtances too of this kind we often meet with in ſome of this ſort of People; who plainly ſhew, both by their Diſcourſe and by their Conduct; that they are neither ſhort, nor wrong in their Ideas concerning Morality; altho' they may not be always able to explain fully, or to expreſs clearly the Whole of what they think. *The Conduct and Intentions of Peaſants*, [n] ſays *Montagne*, *I have generally obſerv'd to be more agreeable to the Preſcription of true Philoſophy, than thoſe of our Philoſophers themſelves.* Vulgus interdum [o] plus ſapit; quia tantum, quantum opus eſt, ſapit. This was probably the Sentiment of an antient Philoſopher, [p] when he ſaid; That many People without having their Reaſon improv'd by Study, live nevertheleſs in a manner conformable to the Dictates of right Reaſon.

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[l] *Biblioth. Univerſ.* Tom. VII, *p.* 426, 427. In the Extract of Father *Couplet*'s *Confutius*.

[m] See the *Parrhaſiana*, Tom. II, *p.* 89, *& ſeq.*

[*] In the *Euthyphro* of *Plato*, *Socrates* ſays, That no one ſo much as queſtions whether he, who has kill'd another wrongfully, or committed any other Injuſtice, deſerves to be puniſh'd for it; but what they diſpute upon, is the particular Circumſtances; when the Queſtion is, for example, to know who it is that has committed the Injuſtice, and what he has done, and when he became guilty of it, *&c.* Ἀνθρώπων --- ἤδη πνδὸς ἤκουσας ἀμφισβητοῦντος ὡς τὸν ἀδίκως ἀποκτείναντα, ἢ ἄλλο ἀδίκως ποιοῦντα ὁτιοῦν, οὐ δεῖ διδόναι δίκην --- ἀλλ' ἐκεῖνο ἴσως ἀμφισβητοῦσι, τὸ τίς ἐστιν ὁ ἀδικῶν, καὶ τί δρῶν, καὶ πότε, p. 8. B, C, D, *Tom.* I, *Edit.* Serran. *And p.* 50. F, G, *Edit.* Læmar.

[n] Eſſays, *Lib.* 2, *c.* 17, *towards the End*, p. 115, *Ed.* 1727.

[o] Lactant. Inſt. Divin. *Lib.* 3, *c.* 5, *Num.* 4. *Edit.* Cellar.

[p] Πολλοὶ λόγον μὴ μαθόντες, ζῶσι κατὰ λόγον, Democrates, in Opuſc. Mytholog. *&c.* Amſt. 1688. *p.* 627.

SECT. II.

IF Perſons of the loweſt Rank can arrive at ſuch a Pitch of Knowledge in Morality; it is much more to be expected that thoſe, who have greater Talents, and more Penetration, with greater external Helps, and more eſpecially Men of Learning; ſhould be able to acquire to themſelves in this Science, and that too in a much more diſtinct manner, all the Light and Knowledge any way requiſite for the Conduct of Life: Nay I dare even venture to affirm, were the natural Principles of Morality, with due Application, cloſely purſu'd, Step by Step as far as they wou'd carry us; that all the moral Duties of Man, in every Station of Life, might from thence be eaſily deduc'd, by a Train of Conſequences connected one with the other, in a Method ſtrictly demonſtrative: It appears to me very improbable, [*] that our Creator, having given us Faculties ſufficient to diſcover and demonſtrate with entire Certainty abundance of ſpeculative

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[*] See the *Elements of Juriſprud. Univerſ.* of Mr. *Puſendorf*, p. 354. and the *Preface* of the ſame Book, *p.* 2. *Edit. Franc.* 1680.

Things, of which we may without a Fault be ignorant; principally, that vaſt Number of mathematical Truths, which have been acknowledg'd to be inconteſtable, by all who have been able to comprehend their Proofs and Principles: It is I ſay improbable and incongruous to ſuppoſe, that the ſame Creator has not alſo made us capable of knowing, and eſtabliſhing with the ſame Evidence, the Maxims of Morality; in which are contain'd thoſe Duties he indiſpenſably requires of us; and on the Practice whereof all our Happineſs depends. But, beſides this Reaſon, which the Goodneſs of God will not permit us to doubt of; there is ſtill another drawn from the Nature of the Thing itſelf; and which alone wou'd be of Force enough to convince any reaſonable Perſon, of the Poſſibility of reducing the Science of Morality to a Syſtem, as well connected, as thoſe of *Geometry*, for example, or *Mechanicks*; and founded on as certain Principles. It is no Part of the Buſineſs in Morality to know the *real Eſſence* of *Subſtances*; which is what has been hitherto attempted without Succeſs, and in all probability will never be brought about; as a great † Philoſopher of this Age has made appear: All that is requir'd here, is only to examine and compare with Care and Diligence certain *Relations*, which we conceive between *human Actions* and a certain *Rule*. Let us hear what Mr. *Locke* himſelf ſays on this Occaſion[a], “I doubt not, ſays he, but from ſelf-evident Propoſitions, by neceſſary Conſequences, as inconteſtable as thoſe in Mathematicks, the Meaſures of Right and Wrong might be made out, to any one who will apply himſelf with the ſame Indifferency and Attention to the one, as he does to the other, of theſe Sciences. The *Relation* of other *Modes* may certainly be perceived, as well as thoſe of Number and Extenſion: And I cannot ſee; why they ſhou'd not alſo be capable of Demonſtration, if due Methods were thought on to examine, or purſue their Agreement or Diſagreement. *Where there is no* [b] *Property, there is no Injuſtice*, is a Propoſition as certain as any Demonſtration in *Euclid*: for the *Idea* of *Property* being a Right to any thing; and the *Idea* to which the Name Injuſtice is given, being the Invaſion or Violation of that Right; it is evident, that theſe *Ideas* being thus eſtabliſh'd, and theſe Names annex'd to them, I can as certainly know this Propoſition to be true, as that a Triangle has three Angles equal to two right ones. Again, *No Government allows abſolute Liberty*: The *Idea* of Government being the Eſtabliſhment of Society upon certain Rules or Laws, which require Conformity to them; and the *Idea* of abſolute Liberty being for any one to do whatever he pleaſes; I am as capable of being certain of the Truth of this Propoſition, as of any in Mathematicks.—The preciſe real Eſſence of the Things, moral Words ſtand for, may (ſays the ſame Author[c] elſewhere) be perfectly known; and ſo the Congruity, or Incongruity of the Things themſelves, be certainly diſcover'd, in which conſiſts perfect Knowledge. Nor let any one object, that the Names of Subſtances are often to be made uſe of in Morality, as well as thoſe of Modes, from which will ariſe Obſcurity. For as to Subſtances, when concern'd in moral Diſcourſes, their divers Natures are not ſo much enquired into, as ſuppoſed; *v. g.* When we ſay, *That Man is ſubject to Law*: we mean nothing by *Man*, but a corporeal rational Creature: what the real Eſſence or other Qualities of that Creature are in this Caſe, is no way conſider'd. And therefore, whether a Child or a Changeling be a *Man* in a phyſical Senſe, may amongſt the Naturaliſts be as diſputable as it will, it concerns not at all the *moral Man*, as I may call him, which is this immoveable unchangeable *Idea*, of a corporeal rational Being: For were there a Monkey, or any other Creature to be found, that had the Uſe of Reaſon, to ſuch a degree, as to be able to underſtand general Signs, and to deduce Conſequences about general *Ideas*, he wou'd, no doubt, be ſubject to Law, and, in that Senſe, be a *Man*, how much ſoever he differ'd in ſhape from others of that Name. The Names of Subſtances, if they be uſed in them, as they ſhould, can no more diſturb moral, than they do mathematical Diſcourſes: where, if the Mathematician ſpeaks of a *Cube* or *Globe* of *Gold*, or any other Body, he has his clear ſettled *Idea*, which varies not, altho' it may, by miſtake, be apply'd to a particular Body, to which it belongs not. || The Negligence or Perverſeneſs of Mankind, cannot be excuſed, if their Diſcourſes in Morality be not much more clear, than thoſe in natural Philoſophy: ſince they are about *Ideas* in the Mind, which are none of them falſe or diſproportionate; they having no external *Beings* for *Archetypes* which they are referr'd to, and muſt correſpond with. It is far eaſier for Men to frame in their Minds an *Idea*, which ſhall be the Standard to which they will give the Name *Juſtice*, with which Pattern ſo made, all Actions that agree ſhall paſs under that Denomination, than, having ſeen *Ariſtides*, to frame an *Idea*, that ſhall in all things be exactly like him, who is as he is, let Men make what *Idea* they pleaſe of him. For the one, they need but know the Combination of *Ideas*, that are put together within their own Minds; for the other, they muſt enquire into the whole Nature, and abſtruſe hidden Conſtitution, and various Qualities of a Thing exiſting without them.—[d] The Truth and Certainty of *moral* Diſcourſes abſtracts from the Lives of Men, and the Exiſtence of thoſe Virtues in the World, whereof they treat: Nor are *Tully*'s Offices leſs true, becauſe there

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† Mr. *Locke*.

[a] Eſſay on Human Underſtanding, *by Mr.* Locke, *Book* IV, *Chap.* 3, *Sect.* 18, *p.* 477, 478. *Edit.* Lond. 1706.

[b] Mr. *Locke* means by the word *Property*, not only the Right which one has to his Goods and Poſſeſſions, but even with reſpect to his Actions, his Liberty, his Life, his Body; and, in a word, all ſorts of Right. See his *Latin* Letter on Toleration, *p.* 11. *In* Engliſh, *p.* 6. 4*to.* Lond. 1689. *and p.* 8. 12*ves.* Lond. 1690.

[c] *Book* III. *Chap.* 11, *Sect.* 16, 17, *p.* 434, 435. *Edit.* 1706.

|| *Pag.* 435.

[d] *Lib.* 4, *Chap.* 4, *Sect.* 8, 9, 10, *p.* 490, 491.

“is no body in the World that exactly practiſes his Rules, and lives up to that Pattern of a virtuous Man, which he has given us, and which exiſted no where, when he writ, but in *Idea*. If it be true in Speculation, *i.e.* in *Idea*, That *Murther deſerves Death*, it will alſo be true in reality of any Action that exiſts conformable to that *Idea* of Murther. As for other Actions, the Truth of that Propoſition concerns them not. ---- * But it will be here ſaid, that if *moral Knowledge* be placed in the Contemplation of our own *moral Ideas*, and thoſe, as other Modes, be of our own making, what ſtrange Notions will there be of *Juſtice* and *Temperance?* What Confuſion of Virtues and Vices, if every one may make what *Ideas* of them he pleaſes? (To this Mr. *Locke* anſwers,) There will be no Confuſion nor Diſorder in the Things themſelves, nor the Reaſonings about them; no more than (in Mathematicks) there wou'd be a Diſturbance in the Demonſtration, or a Change in the Properties of Figures, and their Relations one to another, if a Man ſhou'd make a Triangle with four Corners, or a *Trapezium* † with four Right Angles: that is, in plain *Engliſh*, change the Names of the Figures, and call that by one Name, which Mathematicians call ordinarily by another. --- I confeſs, the Change of the Name by the Impropriety of Speech, will at firſt diſturb him, who knows not what *Idea* it ſtands for: But as ſoon as the Figure is drawn, the Conſequences, and Demonſtrations are plain and clear. Juſt the ſame it is in *moral* Knowledge, let a Man have the *Idea* of taking from others, without their Conſent, what their honeſt Induſtry has poſſeſs'd them of, and call this *Juſtice*, if he pleaſe. --- He that takes the Name here without the *Idea* put to it, will be miſtaken, by joining another *Idea* of his own to that Name: but ſtrip the *Idea* of that Name, or take it ſuch as it is in the Speaker's Mind, and the ſame Things will agree to it, as if you call'd it *Injuſtice*. --- ‖ Where God, or any other Lawmaker, hath defined any moral Names, there they have made the Eſſence of that Species to which that Name belongs; and there it is not ſafe to apply or uſe them otherwiſe: but in other Caſes 'tis bare Impropriety of Speech to apply them contrary to the common Uſage of the Country. But yet even this too diſturbs not the Certainty of that Knowledge, which is ſtill to be had by a due Contemplation and comparing of thoſe even nick-nam'd *Ideas*.” See how this great Philoſopher reaſons. Let us add here, that the Demonſtrations of ſpeculative Truths are much more compounded, and depend on a much greater Number of Principles, than the Demonſtrations of the Rules of Morality. To be convinc'd of this, we need only compare the *Elements of Geometry*, with a [e] little methodical Syſtem of the Duties, which the Law of Nature preſcribes to Men; and, at the ſame time, that we ſhall find what I have juſt now ſaid, to be true; we ſhall alſo, in my opinion, be forc'd to acknowledge; that it is incomparably more eaſy to comprehend the Principles and Reaſonings of the laſt mention'd Book; than the Theorems, Problems, and Demonſtrations of the former. In fact, as an antient Philoſopher very juſtly remarks; [f] *It is falſe to ſay, that Precepts of Morality are of ſo vaſt an Extent, as to make us deſpair of ever ſeeing the end of them; thoſe that concern the moſt neceſſary and conſiderable Things, may be reduc'd to a certain Number: It is true, that the Circumſtances of Time, Place, and Perſons, create therein ſome Diverſity; but that ſignifies but little, for we have even in thoſe Caſes general Maxims which are ſufficient to direct our Judgments therein.*

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* *Sect.* IX.

† *Trapezium*, or *Trapezoides* rather, is a Quadrilateral Figure, whoſe Sides and Angles both are unequal. See *Euclid. Element. Græc. & Lat. Edit.* Paris 1573, *Definit.* 34, *l.* 1, *p.* 43. & *Diction. Acad. Franc.*

‖ *Sect.* X.

[e] Such as is (for example) the little Treatiſe of *Puſendorf*, entitled, *The Duty of a Man, and of a Subject*; which is an Abridgment of the Work here tranſlated.

[f] *Infinita, inquit, præcepta ſunt. Falſum eſt. Nam de maximis ac neceſſariis rebus non ſunt infinita: tenues autem differentias habent, quas exigunt tempora, loca, perſonæ. Sed his quoque dantur præcepta generalia.* Seneca, Epiſt. 94, *p.* 335. *Edit.* Amſt. 1658.

SECT. III.

NOtwithſtanding all theſe Reflections, which it is very obvious to make; ſome have [a] for a long time believ'd, and even at this day many do maintain, that Morality is a Science very uncertain; and wherein ſcarce any thing beyond Probabilities is to be found or expected: But it is not altogether for want of due Examination into the Nature of Things, that this falſe Notion has prevail'd. There has ever been an uninterrupted Succeſſion of Men, who, ſeduc'd by a ſecret Deſire to ſhake off the troubleſome and importunate Yoke of Duty; and to indulge themſelves ſecurely in the Gratification, if not of their ſenſual and groſs Deſires, yet at leaſt of their more delicate and refin'd Inclinations; have employ'd all the Faculties of their Souls in extinguiſhing the Evidence of thoſe Truths, which were the moſt clear, and the moſt generally acknowledg'd; in order to involve in their Ruin all certainty of the Rules of Virtue. My Deſign is not to diſpute with theſe Men in form; and to refute Step by Step all their vain Subtilties. I ſhall content myſelf with ſaying here, in a few words, ſomething to two Objections; on which they chiefly rely, and which ſeem moſt apt to amuſe and deceive.

The firſt Objection is drawn from the Difficulty there is to decide ſome certain Queſtions in Morality; and reconcile too even ſome of its Principles. *Since the moral Laws* (ſays [b] a celebrated Author) *that concern the particular Duties of each*

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[a] See Mr. *Puſendorf*, *Lib.* 1, *Cap.* 2, *Sect.* 1.

[b] Montagne's Eſſays, *Book* III, *p.* 398, in *Engliſh*. *And* p. 797. *in the* Paris *Edit.* *in Fol.* And *Edit.* 1727, *lib.* 3, *c.* 13, *p.* 478, 479. Tom. IV.

Perſon ſingly, are ſo difficult to be rightly conſtituted, as we ſee they are; 'tis no wonder, if thoſe, which are to direct ſo many Particulars, are much more ſo. Do but conſider the Form of that Juſtice which governs us, 'tis the very Emblem of human Infirmity; ſo full is it of Errour and Contradiction.

But 1*ſt*, Whoſoever will but beſtow ſome ſmall Attention upon this Matter, will, I am confident, readily agree, that the Thing which generally cauſes theſe Perplexities, is Intereſt; which join'd with the Prejudices of Infancy, Education, or Cuſtom, obſcure the cleareſt Dictates of right Reaſon: of this we every day ſee numberleſs Inſtances. The greateſt Part of Mankind are ſo much blinded with an exceſſive and miſtaken Self-love, that all their Penetration and Diſcernment of Mind, ſeem entirely to forſake 'em, as ſoon as ever any one Matter comes in debate, the Deciſion whereof is attended with Loſs or Gain. And yet they ſhall with eaſe, and without one falſe Step, go thro' with many other Things, a thouſand times more difficult, which they examine cooly, and with a Mind wholly diſintereſted. This is very well expreſs'd by the Philoſopher *Hierocles*. *One ſure Mark,* * ſays he, *that right Reaſon is natural to Men, is, that the unjuſt Man, when he is acting in an Affair, that does no way touch his own Intereſt, judges exactly according to the Rules of Juſtice; and the Intemperate, according to thoſe of Moderation and Temperance. In a word, vicious Perſons of every ſort, have juſt Ideas in Things, where they don't ſuffer themſelves to be prepoſſeſs'd by Paſſion. And here we have the true Reaſon, why it is in the Power of a wicked Man to reform, and become virtuous; for he has no more to do, but to open his Eyes, and to condemn the Irregularity of his paſt Conduct; which he can't but be ſenſible of, if he acts with any Degree of Attention.* Thus this *Greek* Commentator on the *Golden Verſes* of *Pythagoras* judiciouſly obſerves the Caſe to be. But yet it but too often happens, that, when there is even no violent Paſſion, or perſonal Intereſt, able to miſguide the Judgment; Precipitation and Prepoſſeſſion fail not to produce the very ſame Effects. A Man oftentimes becomes tenaciouſly fond of falſe or doubtful Principles, taken up without Examination or Reflection; and then 'tis no wonder, if he finds himſelf unable to reconcile theſe with the true; or to draw from 'em juſt and regular Conſequences. How few do we find, who ſo much as think of ever calling in queſtion certain Principles which they have early imbib'd; eſpecially if they ſee 'em authoriz'd by the Opinions in vogue; or eſtabliſh'd by the Law and Cuſtom of the Country they live in? You will find ſeveral Authors, who puſh'd on either openly and avowedly, or unawares and inſenſibly, by meer Party-Animoſity; have made it their ſole Aim, while they were compoſing Treatiſes on certain Queſtions in [c] Morality or Politicks; to endeavour to find out, not what was moſt conformable to the invariable Rules of right Reaſon and Equity; but only what to them ſeem'd moſt proper to juſtify the receiv'd Party-Notions; or the Pretenſions and Maxims of the Sovereign, under whoſe Dominion they liv'd.

2*dly*, Thoſe who make ſuch Objections as theſe, I am now examining; are generally ſuch Perſons, as, whatever Abilities and Penetration they may otherwiſe have, ſeem not to have ſtudy'd theſe Matters with ſufficient Care, or with a ſincere Affection for Truth; or elſe ſuch, as maliciouſly take Advantage of even the ſmalleſt Errours or Miſtakes, which they can find out in the Diſcourſes or Works of ſuch Authors, as have not, with juſt Attention and Care follow'd the natural Principles of this Science of Morality. And, in truth, 'tis but too often ſeen, that Authors build on Foundations not altogether ſolid enough; and produce weak and pitiful Arguments, to eſtabliſh the moſt clear and inconteſtable Truths. Whoever ſhall examine the vain Subtilties, impertinent Queſtions, ridiculous Deciſions, and deteſtable Maxims, with which the Books of many Caſuiſts are fill'd; will, no doubt, find ample Matter, to furniſh out a prodigious Parade of Contradictions and Abſurdities; but when all's done, this can no way affect the Certainty of the Principles and Rules of true Morality; but wholly redounds to the Confuſion of thoſe blind, ſhall I ſay, or ſham Doctors; certainly moſt wretched Subtilizers and Refiners, in whoſe Hands the pureſt Gold turns to muck and droſs. Wherefore, before they triumph too much, on pretence of ſome Inconſiſtency, which they may imagine to have obſerv'd between ſome certain Duties; or on account of ſome weak Proofs, that ſuch and ſuch Writers have made uſe of; they ought firſt ſeriouſly to conſider, whether they have not unhappily miſs'd the right way; and whether, if they wou'd but trace Things back to their true Sources; they might not from thence furniſh themſelves ſufficiently, for the Reſolution of thoſe Difficulties, with which they have been hitherto perplex'd. *Charron*, for example, maintains, that [d] *very often the Precepts of a ſingle Virtue cannot be put in Practice, without prejudice either to that ſame Virtue, or to ſome other; by reaſon of their claſhing and interfering one with the other: ſo that you cannot anſwer the Demands of the one, but at the Expence of the other. This is at leaſt,* adds he, *uncovering one Altar to cover another; ſo defective and weak is all human Sufficiency, that it is neither able to give or receive one certain, univerſal, and conſiſtent Plan of Duty, ſufficient for the forming a good Man by; nor can it ſo well adviſe and provide, but that the means of doing good ſhall ſometimes interfere; and Charity and Juſtice be often found repugnant to each other: If in War, I light on my Relation or Friend engag'd on the Enemy's ſide, Juſtice requires me to kill him; but Charity to ſave and ſpare him: If a Man be mortally wounded, ſo that, it being impoſſible for him to recover, he can only linger on in the Extremity of Pain; 'tis then a Work of* [e] *Charity to diſpatch him: but yet 'tis what* [f] *Juſtice will puniſh. Nay, to be found near ſuch an one in a By-place, where it is*

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* Τεκμήριον δὲ τοῦ ἐννεῖναι τὸν ὀρθὸν λόγον τοῖς ἀνθρώποις, τὸ, ϗ τὸν ἄδικον, ἐν οἷς μηδὲν αὐτῷ διαφέρει, κρίνειν δικαίως· ϗ τὸν ἀκόλαστον, σωφρονικῶς· ϗ ὅλως, τὸν κακὸν ὀρθαῖς ἐπιβουλαῖς χρῆσθαι, ἐν οἷς ἀπροσπαθὴς ἐστι. Διὸ ϗ μεθίστασθαι δύναται ὁ φαῦλος εἰς ἀρετὴν, καταγνώσει τῆς προτέρας κακίας. Hierocl. in Pythag. *p.* 82. *Edit*, Needh. 1709. & *p.*106. *Edit*. Lond. 1673.

[c] See Mr. *Buddeus*, in his *Hiſt. of Natural Right*, which is the firſt Diſſertation among the *Selecta*, *J.N.* & *Gent. Sect.*50, & *ſeq.*

[d] Of Wiſdom, *Book* I, *Chap.* 4, *Num.* 5, of the firſt Edition. And *Chap.* 37, *Num.* 5, *p.* 187-, of the Editions form'd upon that which he reviſ'd. As the Diſpoſition of theſe two Editions is different, eſpecially in the firſt Book, I have always mark'd the Difference of the Chapters in citing this Book, whether it be my own, or my Author's Citation.

[e] As he who diſpatch'd *Saul* at his earneſt Requeſt: This *Charron* adds in his new Edition of his Book, where he endeavours to ſoften ſome Things, to appeaſe thoſe who had been ſcandaliz'd at his free manner of writing on ſome very nice Subjects.

[f] As he who kill'd *Saul*, was by *David*, and juſtly too; *David* being the Miniſter of publick Juſtice, and not of private Charity. Another Addition of the ſecond Edition of *Charron*.

doubtful who is the Murtherer; altho' it was with deſign to do him Offices of Humanity, is extremely dangerous; and can end in nothing leſs to the Perſon ſo found, with all his Innocency, than the undergoing a criminal Proſecution on account of this Accident: But theſe Words, if well conſider'd, prove only this; that there are ſome Caſes, where ſeveral Virtues cannot be put in practice at the ſame time, and with regard to the ſame Object; not that there is any Inconſiſtency between the Virtues themſelves, their Functions, or Effects. It is no more than a ſeeming Conflict between certain Duties, of which ſome for the time being are to take place of others; ſo that what, out of ſuch Circumſtances, wou'd have been an indiſpenſable Act of Virtue, does then become unlawful, or at leaſt indifferent. Thus the Virtue, which at that Juncture is, if I may ſo ſay, oblig'd to give place; receives no Prejudice, nor loſes any of its Rights or Privileges. *Charron* ſeems to have been willing to ſoften and rectify his Notions in the ſecond Edition of his Book; where he adds the following Words: *Nor ought Virtue to be eſteem'd anſwerable for all this, or the ſeveral Virtues charg'd with repugnancy to one another; for they are in perfect Concord; but the Weakneſs of the human Condition; ſince with all its Sufficiency and Induſtry; it is ſtill ſo defective and feeble, that it is not able to find out a certain Plan,* &c. That is to ſay, (if I miſtake not; and to give theſe Words the moſt reaſonable Conſtruction they are capable of:) that the ſeveral Virtues conſider'd as they are in themſelves, and in the *Idea* of the Divine Underſtanding, or of ſome celeſtial Intelligent Being, agree perfectly well one with the other; but that our Ideas and Faculties are not ſufficient to reconcile them in ſuch manner, as to ſatisfy our Minds, and to determine our Judgments with certainty in thoſe Caſes where they ſeem to interfere; which in effect is the ſame thing to us, as to ſuppoſe a real and abſolute Inconſiſtency in the Virtues themſelves. This calls to my Mind another Author, whom *Charron* very often copies, and who ſays on the Subject of natural Laws; [g] *That it is credible, that there are natural Laws, as is ſeen in other Animals: but they are loſt in us; this ſame fine human Reaſon of ours every where taking upon itſelf to domineer and bear ſway; ſhuffling and confounding the Face of Things, according to its own Vanity and Inconſtancy.* But what we have ſaid before, does not allow us to admit of a Suppoſition ſo injurious to the Divine Goodneſs; nor are the Examples, produc'd by *Charron*, ſufficient to make it out. It is very rare, that a Soldier is oblig'd to kill with his own Hands, knowing and ſeeing him, his Relation or Friend, who may happen to be in the oppoſite Party. There are few Princes or Generals of an Army, who wou'd require this of a Soldier, or ſubaltern Officer; or who wou'd not, out of regard to the Tyes of Conſanguinity or Friendſhip, eaſily forgive his having ſpar'd the Life of a Perſon ſo dear to him. But ſuppoſe it ſhou'd happen, that in a juſt War, (for that muſt be ſuppos'd in the preſent Caſe) I ſhou'd, by the preciſe Order of my General, or of my Sovereign himſelf, having ſufficient Reaſons for giving me ſuch Orders; be reduc'd to the fatal Neceſſity of killing, with my own Hands, my Relation or Friend; I don't ſee, in this Caſe, how Charity can any ways interpoſe in favour of that Relation or Friend of mine, who is ſuppos'd to have born Arms in a bad Cauſe; eſpecially, if my refuſal to obey be capital. I muſt own, this wou'd be a very ſad and moſt ungrateful Office; but after all, 'tis in me no other than the Performance of what I am indiſpenſably oblig'd to do: And my Relation or Friend ought to look on me as acting no otherwiſe than as the ſimple Inſtrument, and that too with great Regret, of thoſe juſt Acts of Hoſtility, to which he has voluntarily expos'd himſelf. The other Caſe that *Charron* mentions, is as eaſy to decide; nor is there in it any Oppoſition betwixt *Publick Juſtice* and *Private Charity*, as this Author himſelf has made appear in the ſecond Edition of his Work [h]. Suppoſe I think a Man mortally wounded, beyond all Hope or Poſſibility of a Cure, (in which I, who am neither Phyſician or Surgeon, may very eaſily be miſtaken; ſince we very often ſee People recover after they have been given over, even by Men of thoſe Profeſſions;) altho' Compaſſion may ſeem to move and ſolicit all who paſs by, to abridge the Sufferings of one, who is thought in a Condition altogether deſperate; yet Charity cannot require me to diſpatch for him thoſe miſerable Remains of Life; unleſs his Caſe be attended with ſuch Circumſtances, as makes it lawful for himſelf to do it: Nor are there wanting in this Caſe [i] Principles ſufficient to determine us. But ſhou'd it prove to be ſo in this Caſe, that the Man had, according to the Principles of the Law of Nature, full Liberty to diſpoſe of his own Life; and that he ſhou'd intreat me to haſten the inevitable Moment of a Term, which wou'd otherwiſe ſoon expire, and the Prolongation whereof cou'd ſerve to no other Purpoſe, but to continue him in needleſs Pain and Miſery; yet, if the Laws of my Country abſolutely forbid me to contribute in any manner towards haſtening the Death of another, under any pretence whatſoever; as is the Caſe almoſt every where, and that upon very good Grounds; the Laws of Charity in ſuch Caſe cou'd in no wiſe oblige or authorize me, to render to this unfortunate Man the Service he demands; and it is no more permitted to grant him this Requeſt, than to force a Criminal out of the Hands of Juſtice, with an Intent to ſave his Life. As for the Danger he is expos'd to, of being taken for the Murtherer, or put to the Rack, who ſtays by the wounded Perſon, in order to ſuccour and relieve him; there is not always Reaſon to fear ſuch fatal Conſequences from a good Office on this preſſing Occaſion: But ſuppoſe there was all the Reaſon in the World to apprehend them; the Care of our own Preſervation, which is ſtrongly [k] recommended to every particular Man, by the ſame Law of Nature; wou'd, no doubt in this Caſe, be found to outweigh the Laws of Humanity; which are then only obligatory, when we can put them in Practice, without bringing on ourſelves any conſiderable Damage, or great Inconvenience; to which we are not otherwiſe oblig'd to expoſe ourſelves in favour of him, who has need of our Aſſiſtance. The Inference therefore, which *Charron* draws from theſe

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[g] Montagne's Eſſays, *Book* II, *Chap.* 12, *p.* 381. *And p.* 427, *in the* Paris *Edition. And Ed.* 1727, Tom. II, *p.* 544, 545.

[h] See above in the Margin, *Letter* (f).

[i] See *Pufendorf*, Book II, *Chap.* 4, *Sect.* 19.

[k] See what is ſaid on *Book* II, of *Pufendorf*, Chap. 3, *Sect.* 15, *Note* 5.

Examples, that *Juſtice not only offends againſt Charity, but that it is a Clog and Impediment to itſelf*; is altogether wrong and unjuſt. And wou'd we but examine, as we ought, the other Reaſons produc'd by this Author; or thoſe who, before and after him, have been deſirous to ſignalize themſelves by their Endeavours to eſtabliſh a Pyrrhoniſm, which ſpares not the moſt neceſſary Truths; we ſhou'd, I am ſatisfy'd, find that none of their other Reaſons, do a whit better make out thoſe pretended Contradictions, they fancy to themſelves, between the Principles of Morality; and that the Weakneſs of all thoſe Objections, which they have hitherto been able to invent, will only ſerve on the contrary to prepoſſeſs us in favour of that entire Certainty, and perfect Conſiſtency, to be found in all Deciſions and Determinations, grounded on the true Principles of our moral Duties.

3dly, The Difficulties that ſometimes cauſe Perplexity in Matters of Morality, or natural Right, do not proceed ſo much from the Obſcurity we find in the Rule itſelf; as from certain particular Circumſtances, which render the Application thereof difficult, but not impoſſible; and [1] conſequently are no more Proofs of the Uncertainty of the Rule, than the Trouble we are at, to apply a Demonſtration in Mathematicks, diminiſhes the Evidence or Infallibility thereof. Beſides, theſe Difficulties do not concern the general Principles, nor the Maxims which mediately or immediately flow from them, even to a conſiderable Diſtance; but only certain remote Conſequences, * and of little Importance, in compariſon with the others. If we will but ſuffer ourſelves to make never ſo little Uſe of that Faculty of reaſoning which Nature has endow'd us all with; we cannot in the leaſt doubt of the Truth of theſe following Rules: *That we ought to render to the Deity a Worſhip worthy of him; and to obey his Laws, as far as they are known to us: that every one is oblig'd to avoid the Exceſſes of Intemperance; which, by ruining his Health, make him incapable of attending thoſe Things, to which he is call'd by his Condition; and of making himſelf uſeful to humane Society: that he is not permitted to injure his Neighbour; and that, if he has done him any Damage, he ought to repair it as ſoon as may be: that he ought not to deny any one all friendly Services, not hurtful to himſelf, that he can do him: that he ought inviolably to keep his Word: that all Fraud and Tricking is criminal: that Children are under an indiſpenſible Obligation to honour their Parents: that it is juſt to obey the Orders and Laws of a lawful Sovereign, as long as he preſcribes nothing contrary to the invariable Principles of the Law of Nature; or to any Divine Law clearly reveal'd.* &c. All theſe Fundamental Truths, and many more of the like Nature, are ſo evident, that it is impoſſible to bring any Objection againſt them, that is even but plauſible; or whoſe Weakneſs will not appear at firſt Sight. But it may be diſputed with ſome ſhew of Reaſon, *Whether a Man*, for example, *who has committed Adultery with a marry'd Woman, is oblig'd to make Satisfaction to the legitimate Children; for the loſs they ſuſtain by the Concurrence of an illegitimate Sharer in the Succeſſion? Whether that Promiſe be binding, which I authorize another to make in my Name, where the Perſon to whom it was to be made, dies before Notice or Acceptance? Whether when a Thing, ſold and not deliver'd, happens to periſh by ſome Accident, without any Fault of the Seller; he, or the Buyer, ought to ſtand to the loſs of it? Whether a Preſcription ſhall enure to the Prejudice of thoſe who are not yet born? Whether a Poſſeſſor*, bona fide, *ought to make good the Fruits which he hath conſum'd? Whether Poligamy or Divorce are abſolutely contrary to the Law of Nature? Whether ſuch or ſuch degrees of Conſanguinity or Affinity are forbid by the ſame Law? Whether Sons or Daughters may marry without their Parents Conſent?* Altho' even theſe, and other the like Queſtions may not perhaps be very difficult to decide, if examin'd attentively, and without Prepoſſeſſion; yet there is beſides almoſt always, as to the Practical Part, another infallible way to determine ourſelves thereupon; and that by clear and ſelf-evident Principles: without at all entring into the Foundation of the Queſtion. You doubt, for example, whether Poligamy or Divorce are in their Natures abſolutely unlawful; but, to ſay nothing of the Laws of the Goſpel, you find theſe Things forbidden by the Civil Laws of your Country; and you cannot reaſonably doubt, but that it is a Crime to diſobey the Laws of the Sovereign Power; even when they take from you the Liberty of doing that, which otherwiſe would be permitted, or indifferent. Shou'd the Queſtion be about Things not ſettled by the Civil Laws; you have then theſe two inconteſtable Principles to regulate your Conduct by: *Firſt*, [m] *that in difficult Caſes you ought always to take the ſureſt Side of the Queſtion. Secondly, that the ſureſt Side, is always the oppoſite to that your Paſſions incline to.* And from hence I draw a Conſequence, that ſerves equally to confound as well thoſe who ſeek excuſe for their Faults from a pretended invincible Ignorance, or from the Difficulties of their particular Caſes; as thoſe, who alledge theſe Difficulties, in order to deſtroy the Certainty of all the Principles of Morality: The Conſequence, I wou'd infer, is this; that a Man before he can arrive at this State of Doubt and Perplexity, ſo as to be at a loſs which ſide of the Queſtion to take, in Points relating to his own Conduct; muſt firſt have negligently over-look'd Maxims, ſo clear, as to be ſelf-evident; and ſo eaſy, as to be obvious in every Caſe of Practical Duty. Thus it is plain, that the Fault lies at our own Door, and not at our Creator's; who, as he has given us his Laws, ſo has he given us Light, ſufficient to direct, and keep us from tumbling from one unfathomable Difficulty to another, into a perpetual State of Doubtfulneſs and Uncertainty. The Caſe is much the ſame here with that of the Maſter of a Family; who, upon taking a long Journey, had left with his Domeſticks Orders ſufficiently clear; and eaſy to be executed: and in this Caſe ſhou'd the Domeſticks, for want of having follow'd their Maſter's Orders, find themſelves reduc'd to ſuch a Nonplus, as not to be able, with their utmoſt Application, and moſt hearty Endeavours, to determine what to do, with reſpect to certain Affairs, that ſhould afterwards fall out, relating to his Service; they could have no Grounds to complain of their Maſter's Severity, when at his Return he puniſh'd them for having taken wrong Meaſures, and ill manag'd his Concerns.

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[1] See *Pufendorf*, Lib. 1, *Cap.* 2, *Sect.* 5, *Note* 2.

* 'Tis with reſpect to theſe only that we can admit what *Marriotte* ſays, (*Eſſay upon Logic*, p. 154, whoſe Words are cited and adopted by the late Mr. *Bayle*, Anſw. to the Queſt. of a Provinc. *Tom.* I, *p.* 352.) *That it is often neceſſary to conſider a great Number of Things, to judge well what we ought to follow or avoid.* But they are much in the wrong, both the one and the other, to infer from thence the Uncertainty of all Morality in general; and to maintain, that *the Concluſions thereof are more uncertain than thoſe of natural Philoſophy.*

[m] See *Pufendorf*, *Book* I, *Chap.* 3, *Sect.* 7. And Mr. *Bernard* in his *Nouvelles de la Repub. des Lettres*, March 1705, *p.* 294.

4thly, Unleſs we will doubt meerly for the ſake of doubting, or have the Aſſurance to deny that 'tis Light at Mid-day; we cannot refuſe to acknowledge, that there are a great Number of Principles and Maxims of Morality, which are attended with the higheſt degree of Evidence; and which are entirely conſiſtent one with another. There are ſome of theſe Truths, the Belief whereof, we are oblig'd to acknowledge to be as ancient as the World; and ſo extenſive, as to be diffus'd in a manner quite throughout it; as ſhall be hereafter ſhewn. Now if there be any certain Proof, any ſure Mark of the Clearneſs of our Ideas and Opinions; ſuch an univerſal Conſent as this, muſt undeniably be ſuch. As for thoſe Things, whoſe Evidence does not ſhew it ſelf without ſome Reflection, be it more or leſs profound; and about which there is likewiſe great diverſity of Opinions; if we take an account of all ſuch as really have ſome Difficulties at firſt, even to thoſe who examine them with ſome degree of Attention; it will be found that their Number is but ſmall; that for the moſt part they entirely depend upon extraordinary Conjunctures; and that they are often, by Dint of Thought, fairly vanquiſh'd; ſo that the Difficulty, which at firſt was look'd on as inſuperable, at length vaniſhes, and turns to the moſt clear and ſatisfactory Solution. But however, ſuppoſing there were Caſes, and thoſe too not uncommon; where it was abſolutely impoſſible to come to any fix'd Reſolution, upon Principles clear and ſelf-evident; God doubtleſs would not, in ſuch Caſes, make Men [n] reſponſible for thoſe Errours, which, after their beſt Endeavours us'd to find out the Truth, they ſhou'd unhappily fall into. So that this would not at all make either againſt the Goodneſs or Juſtice of the Creator and ſovereign Lord of Men; or againſt the Certainty and Evidence of thoſe Principles, which we have always ready at hand, as ſure Guides to conduct us ſafely in an infinite number of Caſes: But we ought rather, in ſuch Caſe, to ſay, that even this Degree of Light, ſeeing God has not thought fit to give us a greater, is ſufficiently adapted to the State and Intereſts of Mankind: Tho' 'tis my fix'd Opinion, that it cannot without Raſhneſs be poſitively affirm'd; that thoſe inconteſtable Principles of Morality we have, are not, if duly purſu'd thro' all their Conſequences, fully ſufficient to furniſh us with infallible Maxims in all imaginable Caſes, that can be ſuppos'd to occur in human Life. And my Reaſon is this; That theſe Principles have prov'd ſo fruitful, that even to this Day, they have not been explain'd entirely; and drawn out into all their Conſequences: But on the contrary, during the Space of near ſix thouſand Years, that is, of the whole Duration of Mankind; there has hardly been any one Science ſo much neglected, or ſo ſuperficially cultivated, as this Science of Morality; as will appear by the Sequel of this Diſcourſe.

5thly, After all, ſuppoſing now that Means cannot be found out, entirely to reſolve ſome Difficulties objected to certain remote Conſequences, that follow from ſome of the evident Principles of Morality; will this be ſufficient, in the Judgment of any reaſonable Man, to ſhake the Certainty of all thoſe Principles; and of that vaſt Number of Conſequences, which may be moſt manifeſtly deduc'd from thence? Permit me, on this Occaſion, to make a general and very important Remark; which, tho' made uſe of by ſeveral Authors, it is yet worth while here to repeat, and place in all its ſeveral Lights; to prevent the Effects of thoſe dangerous Impreſſions, which they who endeavour directly or indirectly to introduce into the World an extravagant, and, as I may venture to ſay, moſt ridiculous Scepticiſm, might otherwiſe make. You ſhall ſee theſe Men, with great Earneſtneſs and Application, collecting from all Parts, and expoſing to the utmoſt, all, even the moſt minute Difficulties, which they think can be urg'd againſt the moſt certain and generally receiv'd Truths; and then concluding, with an Air of Triumph; *That poor Reaſon, alas! knows not where to fix its* [*] *Foot: that it is an uncertain, fluttering, and ſupple Tool, to be turn'd about like any Weather-cock: that the great Secret it has found out to prevent its loſing its way, is not to ſtir one ſingle Step forwards; ſo that, wherever it finds two Ways, it ſtands ſtock ſtill:* with much more to the like Effect. Now all ſuch Reaſonings are grounded upon this ſingle Principle; that, whatever is a certain Truth, muſt be adequately known by us; and remov'd from all manner of Difficulty. But this is a Propoſition too conſiderable to be taken for granted; and ought to have been firſt fully prov'd, as the Ground on which all their Reaſoning ſtands; unleſs they mean to beg the Queſtion, by aſſuming for an unqueſtionable Truth, what is really falſe; which does but ill become Men, who wou'd ſeem reſolv'd to admit of nothing for Truth, but what they comprehend as fully and clearly, as they do, that *two and two make four*. May it not very well be ſo, that our Faculties are preciſely adapted to our preſent State and Occaſions here; and conſequently circumſcrib'd within their proper Bounds? (For bounded they muſt then be; ſince it can never be prov'd, that to this end they ought to be commenſurate with the Nature and Properties of all thoſe Things whereof we have Ideas.) This then being ſuppos'd, which no way implies any thing contrary to the Goodneſs or Wiſdom of the Creator; is not the having clear and direct Proofs of any Principle, enough to warrant the admitting it as certain; notwithſtanding there ſtill remain ſome Difficulties, the Solution whereof we do not yet ſee? To go about to make ſuch

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[n] Ὁρᾷς πῶς ὀλίγα ἐςὶν, ὧν κρατήσας τις, δύναται ἔυρουν καὶ θεουδῆ βιῶσαι βίον; καὶ γὰρ οἱ θεοὶ πλέον οὐδὲν ἀπαιτήσουσι παρὰ τοῦ ταῦτα φυλάσσοντος. That is to ſay, You ſee how few Things we have to practiſe, in order to lead a happy and divine Life; for the Gods will require nothing more of him, who ſhall follow theſe Rules. *Marcus Antonin.* lib. 2, ſect. 5.

[*] See *Bayle*'s Dictionary, *p.* 1565, *Col.* 1.

Difficulties ſerve for Proofs of the Negative of that very Principle, would be vain and frivolous; 'twould be no more than an idle evaſive Fallacy, that wou'd be ſtill bottom'd upon that precarious Suppoſition I juſt now mention'd; and one ſingle Inſtance will be ſufficient to make it out. Let the Queſtion be, ſay they, whether *Matter is to be divided infinitely* *, and let the uſual Proofs be produc'd on the affirmative ſide of the Queſtion; you will find 'em at firſt ſight ſo clearly demonſtrative, that all the great Difficulties of the Atomiſts on the other ſide, won't in the leaſt affect your Aſſent to the Affirmative: But then take the Negative, and let the Objections againſt the Affirmative be ſet forth and urg'd as Proofs; and they will not fail to make as great an Impreſſion on your Mind, as the Proofs for the Affirmative had done juſt before; ſo that you will find theſe a ſufficient bar to the others. For my part, I think the Difference, according to the Rules of right Reaſoning, to be very conſiderable; for the Arguments for the infinite Diviſibility of Matter, flow directly from the Idea of the very Nature of Matter, as an extended ſolid Subſtance; whereof the Parts, tho' never ſo ſmall, cannot be otherwiſe conceiv'd than as endu'd with Figure, and as having Sides, by which they are contiguous; not to ſay any thing of the Demonſtrations Geometry affords us in this Caſe: Whereas the Objections of the Atomiſts, which contain their ſtrongeſt Proofs for the Negative; being entirely grounded on the Difficulty of conceiving a Number of Parts really infinite, wherein the Imagination is at a loſs; are altogether inconcluſive: unleſs upon Suppoſition that nothing ought to be admitted as certain, but what we have an Idea of, exempt from all Difficulty; tho' a thing otherwiſe attended with never ſo much Credibility, grounded on Reaſons moſt evident; and ſuch as are drawn directly from the Nature of the thing it ſelf. Now 'till ſuch Suppoſition ſhall be demonſtrated, (and how can that be ever done, eſpecially by one under the Character of a Sceptick?) there will not be ſo much as a Poſſibility of ſtirring the Certainty of many Truths, as well ſpeculative as practical; which are manifeſtly held forth by Reaſon to all, who conſult her with Diſpoſitions proper for that purpoſe. The ſincere Lovers of Truth will ever find a juſt *Medium*, between the fooliſh Preſumption of the peremptory *Dogmatiſt*; who holds for Demonſtrations, all his ill-grounded Fancies, concerning even the moſt doubtful Matters: and the falſe Modeſty of the rigid *Pyrrhoniſt*; who, ſinking under the Weight of the ſmalleſt Difficulties, boldly rejects all Certainty; on pretence, that he cannot attain to a Knowledge entirely perfect, and exempt from all Mixture of Obſcurity. In vain do they heap Difficulty upon Difficulty concerning the Nature and Attributes of *God*; this will never, in the Judgment of any reaſonable Man, either overthrow the Exiſtence of that Infinite Being; or the certain, tho' imperfect Knowledge we have of ſome of his Perfections; particularly thoſe, which have relation to our Intereſts and Occaſions. In vain do they ſeek to exaggerate, with all the Cunning of ſubtle Philoſophers, thoſe ill-grounded Doubts; which, on the Subject of moral Obligations, the Mind, either not attentive enough in diſcerning Truth; or elſe ingeniouſly induſtrious in inventing Fallacy; can form to it ſelf. The Idea of a Creator, boundleſs in Power, Wiſdom, and Goodneſs; and the Idea of our ſelves, as intelligent, reaſonable, and ſociable Creatures: Theſe two Ideas, I ſay, if well look'd into, and compar'd together in their whole Extent, will always furniſh us with ſteady Grounds of Duty, and ſure Rules of Conduct; notwithſtanding it may ſometimes ſo fall out, that, for want of Care or Attention, we may, in ſome uncommon Caſes, not know how to apply them; or cannot methodically demonſtrate the neceſſary Connexion of ſome remote Conſequences, with the firſt Principles of Morality.

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* See Mr. *Bayle*'s Continuation des Penſeés diverſes à l'occaſion de la Comete, *&c.* *p.* 367.

SECT. IV.

THE other Objection, which I purpoſe to anſwer in a few Words, is taken from the great Diverſity of Opinions there is in the World concerning Virtue and Vice; inſomuch that not only ſome particular Men, but even whole Nations, have openly derided all Morality; or at leaſt ſome of its Principles. With this View the *Pyrrhoniſts* heretofore [a] made their long Enumeration of the Contrarieties they had obſerv'd thereupon; as well thoſe which are found between the Cuſtoms of particular Nations; as between the Notions even of Philoſophers themſelve. But what will all this ſerve to prove? That Men do not always make a right Uſe of their Reaſon *. I readily grant it; and ſeeing there are, even amongſt the Men of Wit and Underſtanding, ſome who ſo ſtrangely miſuſe their Leiſure and Parts; as to employ their utmoſt Efforts in utterly deſtroying, or in rendring at leaſt very dubious, the moſt manifeſt Truths; on pretence that there are Difficulties, beyond the Reach and narrow Limits of our bounded Underſtandings; I am not at all ſurpriz'd, to find ſome rude and unpoliſh'd Nations, who being either extremely corrupted; or enſlav'd to Opinions, conſecrated and eſtabliſh'd by long Uſage and Cuſtom; to have continu'd, either wholly or in part, immers'd in the groſſeſt Ignorance of thoſe moral Truths, which are indeed in themſelves evident enough; but not to ſuch, as either wilfully ſhut their Eyes againſt the Light of Nature; or who will not give themſelves the trouble of explicitly conſidering, and purſuing thoſe Ideas, which continually, I may ſay, every Moment, and from all ſides, preſent themſelves openly to their view. Or ſhall we hence infer, that thoſe ſure and inconteſtable Principles of Conduct, if any ſuch there are, ought to have been actually impreſs'd, even from the Cradle, on the Minds of all Men; ſo that none could be either ignorant of, or under any miſtaken or different Notions about them. *Montagne* indeed reaſons after this manner; An Author, who, amongſt a vaſt number of fine judicious Thoughts, has but too viſibly diſcover'd a Spirit of *Pyrrhoniſm*, carry'd on beyond its due Bounds[b]. *They are pleaſant*, ſays he, *when to give ſome Certainty to Laws, they ſay, that there are ſome of 'em firm, perpetual, and immutable, which they call natural; and ſay, they are eſſentially impreſs'd on the Minds of all Mankind: and of theſe ſome make the Number to be Three, ſome Four, ſome more, ſome leſs; which ſhows, that even this Impreſſion is a thing as doubtful as any of the reſt. Now they are ſo unfortunate, (for what can I call it elſe, but Misfortune, that of ſo infinite a number of Laws, there ſhould not be found one at leaſt, that Fortune and the Temerity of Chance has ſuffer'd to be univerſally receiv'd by the Conſent of all Nations?) They are, I ſay, ſo unhappy, that of thoſe three or four ſelect Laws, there is not ſo much as one, but is contradicted and diſown'd, not by one Nation only, but by many. And yet this ſame univerſal Approbation is the only probable Mark, from which they can argue, or infer, any Laws at all to be natural; for we ſhou'd without all doubt unanimouſly follow, whatſoever Nature had really enjoin'd us; and not only every Nation, but every particular Man would be extremely ſenſible of the Force and Violence offer'd him, ſhould any attempt to puſh him on to a Tranſgreſſion of ſuch Laws.* But this is a Suppoſition not to be admitted without Proof; it being contrary to Experience: and long ſince own'd to be falſe in Fact, by the moſt able Philoſophers. [c] *Nature alone*, (ſays one of them), *cannot furniſh us with the knowledge of moral Rectitude and Virtue; ſhe has indeed implanted in us the Seeds of the Science of Virtue, but not the Science it ſelf. This is the Reſult of thoſe Reflections and Compariſons which the Mind, by parity of Reaſon, makes between the Things it has often review'd and conſider'd.* A celebrated [d] Philoſopher of the laſt Age, one to whom the World will be eternally oblig'd, for having introduc'd the right manner of philoſophiſing; not that he was infallible neither; nor did he always follow his own Rules; *Des Cartes*, I ſay, had made the Opinion of *innate Ideas* very common among his Followers. But there aroſe another Philoſopher, [e] not long ſince deceas'd, who has re-eſtabliſh'd, and put in a new Light the antient Opinion. The Reaſons which he alledges, ſeem ſo very ſtrong, that whoever examines them with a little Attention, and without Prejudice, cannot refuſe to ſubmit to them. Dr. *Sherlock*, who has taken upon him lately to refute them, has, in my Opinion, with all his Penetration and all his Efforts; only given thoſe who deny *innate Ideas*, all the reaſon in the world to confirm themſelves in an Opinion, which they ſee attack'd with ſo little Succeſs[f]. All the Doctor ſays, is either grounded on abſtracted, and ſcarce intelligible Principles; or on ſuch, as are advanc'd without Proof; or whoſe juſt Conſequences terminate in the Proof of that, which at the bottom amounts to no more than the very Opinion he oppoſes. But what is moſt of all ſurpriſing, he very premptorily affirms, *That* [g] *the Doctrine of Mr.* Locke, *about the Origine of innate Ideas, may very much ſerve the Cauſe of Atheiſm*; *for*, ſays he, *if none of our Ideas are innate, neither thoſe we have of the Deity, nor thoſe we have of Virtue and Vice; what ſhall hinder the Atheiſt from ſaying, that all thoſe Ideas are the Effects of a wrong Education; and that they were firſt imprinted on the Minds of Children, for the good of Society; and to reſtrain and keep them in awe?* For my part, I think on the contrary, (nor am I the only one of this Opinion,) that the Clergy themſelves give great Advantage to the Atheiſt; when, not ſatisfy'd with thoſe inconteſtable Proofs, we have of the great Truths of Religion and Morality; they chiefly maintain and urge, through an imprudent Zeal, certain Reaſons for Proofs; which are really none, or at leaſt very doubtful ones; and then cry out, that all's loſt, if theſe are not allow'd of as well as the former. For after all, I would fain know how Dr. *Sherlock*, without entering into metaphyſical Reaſonings, which are generally very uncertain, and do not properly belong to a Diſpute about Matter of Fact; will be ever able to prove to an Atheiſt, that notwiſtanding the manifeſt Ignorance in which whole Nations have been and ſtill are, of ſome fundamental Duties of the Law of Nature; and the odneſs and prodigious diverſity of Opinions, which have at all times been in the World on the Subject of Morality and Religion; that, notwithſtanding all this, I ſay, every particular Perſon has *innate Ideas* of the Deity, and of Virtue? Nor do I ſee how this Difficulty can be anſwer'd otherwiſe, than by ſaying; that as Men are naturally provided with [*] Faculties ſufficient to acquire the knowledge, of the Author of their Exiſtence, and of the Duties he expects from them; and to form to themſelves thereupon right Ideas: ſo they may remain in Ignorance, or even run into Miſtakes about theſe Points, if they will not make good uſe of their Underſtanding: and this Anſwer hath nothing in it, but what is moſt ſolid. *God* [h] *having endued Man with thoſe Faculties of knowing which he hath, was no more obliged by his Goodneſs, to implant thoſe innate Notions in his Mind, than that having given him Reaſon, Hands, and Materials, he ſhould build him Bridges, or Houſes.* To alledge therefore the Abuſe, which Men make of the Light of Nature in Matters of Morality, as a Proof that there is no Certainty in it; is as poor Reaſoning as that of the *Epicureans*: who think to ſubvert true Religion, by ſetting forth all the Evils, Crimes, and Extravagancies that falſe Zeal, Bigotry, and Hypocriſy, under the ſpecious Pretence of Piety, have occaſion'd in the World. [i] *Tantum Relligio potuit ſuadere Malorum!* But let us only conſider this Matter in a different Light, and we ſhall find this Objection it ſelf furniſh us with a conſiderable Proof, or at leaſt a Prepoſſeſſion in favour of the natural Evidence of the Principles of Morality; and of that Impreſſion, which there is reaſon to believe theſe Truths wou'd make on the Minds of all Men, did they but hearken to Reaſon. In effect, it appears by Hiſtory, that thoſe Nations, which ſeem to have had no ſenſe at all of Virtue, are very few in Number. By the Confeſſion of Mr. *Bayle*, [k] *The moſt general Rules of Morality have been preſerv'd almoſt every where, and have at leaſt obtain'd in all Communities, where Reaſon and Knowledge have been at all cultivated. Is there any Nation,* [l] (ſays a very great Orator, and heathen Philoſopher,) *where Civility, good Nature, and Gratitude are not thought amiable, and had in eſteem? And where the proud, the miſchievous, the cruel, and ungrateful are not had in Contempt and Abhorrence?* It has too been very judiciouſly obſerv'd, that [m] *No Legiſlator cou'd ever yet procure Laws, that were entirely bad, to paſs: The Managers concern'd in paſſing ſuch Laws, have either dexterouſly tack'd 'em to others that were good; or elſe have had recourſe to violent Meaſures, either to eſtabliſh; or to maintain 'em; ſo that the very ſubmiſſion to unjuſt Conſtitutions, is even a Proof of the neceſſity of equitable and good ones.* It will perhaps be reply'd, that it is the Profit, which accrues from the Practice of the Rules of Morality, that cauſes 'em to be generally approv'd and receiv'd into the World. But, tho' this cannot be deny'd to contribute much towards it; yet is it not the only, nor the principal Reaſon thereof. For 'tis very hard to conceive, that in ſo many different places, and in all Ages, ſuch Multitudes of every Rank, Condition, and Character, ſhould have given their Conſent to theſe ſort of Maxims, merely for the Advantage each Perſon for himſelf found therein; ſo as at the ſame time to think themſelves exempt from all Obligation to obſerve them, whenever they cou'd Tranſgreſs with Impunity. Indeed there has been, and ſtill are too many, without any other Regard foi them, than upon that foot; whether it be, becauſe they have accuſtom'd themſelves to do ſo, in order to ſatiſfy quietly their Paſſions; or whether becauſe they have ſuffer'd themſelves to be impos'd upon by ſome ill-grounded Subtilties: but then we ſee, that the wiſeſt and moſt ſenſible part of the World have, at all times, judg'd of 'em quite otherwiſe. Nay all, whether learned or unlearned, have found in 'em a certain Agreement with, and Conformity to right Reaſon; and that too more or leſs diſtinct, as they have been endow'd with more or leſs good natural Senſe: and in proportion to the Progreſs each Man has made in Reaſoning and Knowledge, he ſtill finds this Agreement become more and more ſenſible. Men have always diſtinguiſh'd the Idea of Duty, from that of Profit; even in thoſe Maxims, where theſe two Ideas have been moſt inſeperably blended together: the firſt of theſe, even when they ſcarce, or not at all perceiv'd the true Foundations thereof; has ſtill made an Impreſſion, ſufficient to form in them ſuch a Conception of it ſelf, as carries with it a peculiar Force and Efficacy; plainly diſtinct from, and independent of that of the other. Men have ſcarce ever been able to forbear ſecretly reproaching themſelves, as oft as they had ſacrific'd to their Intereſt the practice of that, which they look'd upon to be their Duty. And it has even been obſerv'd, that [*] wicked Men would chooſe, (were it poſſible) to enjoy the Fruits of a criminal Action, without committing the Crime it ſelf. If we reflect rightly upon the Matter, it muſt be own'd, that the groſs of Mankind are not ſo much as capable of comprehending, or ſeeing to the end of all thoſe proſpects of Utility, which a skilful Lawgiver, or profound Philoſopher, might have had in view: ſo that it often happens here, that the Notion of Duty alone makes the Impreſſion; and it is likewiſe the Intention of the Law-maker, that it ſhould do ſo; for they well know the great power that this Notion of Duty has over the Minds of Men, and that it in many caſes lies level to the Capacity of Multitudes, who have no Idea of the expediency of the thing; which often mounts higher than their pitch of thinking can reach. Hence it has ſometimes happen'd, that Religion has been call'd in as an Auxiliary; and the Law-givers have given out, that their Laws were of divine Extraction. After all, this Reply ſuppoſes that, which will alone furniſh one good Argument, towards the eſtabliſhing the Solidity of the Maxims of Morality; and that will at the ſame time ſhow, that they are adapted to all Capacities. For, ſince the Creator, who no doubt deſigns that all Men ſhould be happy, has ſo manifeſtly and inſeparably connected human Virtue and human Felicity; it is clear, that he indeſpenſably requires of every one an exact Obſervation of the Law of Nature; and conſequently, that the Principles and Rules thereof ought to be ſuch, as may be eaſily known and demonſtrated.

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[a] See *Sextus Empiric.* Pyrrhon. Hypoth. Lib. 3, Cap. 24, p. 151. D^{r}. & Edit. *Fabric.* p. 176. Numb. 198, *&c.*

* See the Paſſage in *Diog. Laert.* cited hereafter, *Sect.* 27, Letter q.

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[b] *Montagne*'s Eſſays, Book II, Chap. 12, p. 380, *Engliſh*; *French*, 426. And *Edit.* 1727, *p.* 542_543-, *tom.* 2.

[c] *Deſideras dici: Quomodo ad nos prima Boni Honeſtique notitia pervenerit. Hoc nos docere Natura non potuit: ſemina nobis ſcientiæ dedit, ſcientiam non dedit.--Nobis videtur obſervatio collegiſſe, & rerum ſæpe factarum inter ſe collatio, per analogiam noſtro intellectu & Honeſtum & bonum judicante.* Senec. *Epiſt.* 120-, *pag.* 457-. *Edit. Gronov. See* Lipſius, *Manud. ad Philoſ. Stoic. lib.* 2, *cap.* 11, *per totum.*

[d] See the *Metaphyſical Meditations* of *Des Cartes*, with the *Objections* and *Anſwers* which are joined thereunto; particularly *p.* 17-, 24-, 102=, & *Append. p.* 16-, &c.

[e] Mr. *Locke*, in his Eſſay on *Human Underſtanding*, Book I.

[f] This was my Judgment ſix Years ago, form'd on the Extract in *Bernard*'s *Nouv. de la Repub. des Lett. May* 1705. I had reaſon to believe, that that ingenious Journaliſt had neither weaken'd, or miſrepreſented in the main, the Reaſons of this *Engliſh* Doctor. I have ſince found it to be fact, having read the Book it ſelf, well tranſlated into *French* in 1708. But as to my Judgment of the Doctor's Reaſonings, I am ſo far from altering it, that I find my ſelf more and more confirm'd in it by reading that long Digreſſion, where he pretends to eſtabliſh innate Ideas; and to confute thoſe who deny 'em. The judicious and diſintereſted will diſcern, who are moſt likely to clear the Matter; whether thoſe who go upon Experience, the only way we have to know the Truth; and upon the proper and certain Character of Ideas; which is to make themſelves be perceiv'd, where ever they happen to be; or whatever at bottom their Nature may be: or thoſe, who being oblig'd to acknowledge Experience to be againſt them, do yet advance nothing but Reaſons of Congruity; and yet charge others with want of Penetration to ſee the Difficulties.

[g] *Ibid. pag.* 545. and in the Book it ſelf of Dr. *Sherlock*, *pag.* 146, 147, in the *French* Verſion.

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[*] See *Silvæ Philologicæ* of Mr. *Le Clerc*, publiſh'd in 1711, at the end of his *Eſchines*; *Cap.* 2, towards the end.

[h] *Locke*'s Eſſay, *lib.* 1, *cap.* 4, §. 12, *p.* 75, *French*; and *p.* 42.- *Edit. Lond.* 1706.

[i] Lucret. *Lib.* 1, *ver.* 102.

[k] Continuation of divers Thoughts, *&c. p.* 762.

[l] *Quæ autem Natio non Comitatem, non Benignitatem, non gratum animum & Beneficii memorem diligit? Quæ ſuperbos, quæ maleficos, quæ crudeles, quæ ingratos non aſpernatur, non odit?* Cicero de Legib. lib. 1, cap. 11.-

[m] *Biblioth. Univerſ.* Tom. 8, p. 527.

[*] See the Paſſages cited in *Puffend. lib.* 3, *chap.* 1, §. 1, *Note* 5; and add there the following Words, which come after that of *Seneca: Maximum hoc habemus Naturæ meritum, quod Virtus in omnium animos lumen ſuum permittit: etiam qui non ſequuntur illam, vident.* De Benefic. 4, 17.

SECT. V.

I Conclude then, with the ſaying of *Strato* in the *New Dialogues of the Dead* [a], whatever the other Party may ſay of it; *that Reaſon, in all Caſes where human Conduct is concern'd, affords Reſolutions moſt clearly deciſive. But the Misfortune is, that we don't conſult her.* And it muſt be own'd, to the ſhame of Mankind, that this very Science, which ought to have been the great Buſineſs of Men, and the chief Object of all their Search and Enquiry; has in all times been treated with the greateſt Neglect and Indifference. * *Socrates* was aſtoniſh'd to ſee, That *when there was occaſion to have any one taught the Trade of a Shoemaker, a Carpenter, a Smith, or the Art of Riding; proper Places were never wanting, whither he might be ſent, to be made a Maſter in theſe ſorts of Things: and that, there was every where plenty of ſuch, as knew how to break, and manage Horſes and Oxen; whereas, if any one had a mind to be inſtructed himſelf in the Rules of Juſtice, or have 'em taught to his Children or Slaves; there was no place to be found to go to for that Purpoſe.* A conſiderable time after this Philoſopher's Days [b], we find *Cicero* making the ſame Complaint: *What can be the reaſon,* (ſays he,) *that, ſince we conſiſt of a Soul as well as a Body, the Art of curing, and preſerving the Body in Health, has been ſo early ſought out; and found ſo uſeful, as to have its Invention aſcrib'd to the Gods themſelves: Whereas the Art of curing the Diſeaſes of the Mind, has neither been near ſo much ſought after before, or cultivated and improv'd after, it was invented; nor has it been had in Eſteem and Admiration, but by few; whereas on the contrary, it has been even hated and ſuſpected by many?* It is, however, no very difficult Matter to diſcover the Reaſons hereof; and 'tis withal highly uſeful, to give 'em their due Conſideration. It it but too certain, that the ſeveral Neceſſities of Life, real or imaginary; the falſe and miſtaken Intereſts; the [c] Impreſſions of Example, and receiv'd Cuſtoms; the Prevalency of Faſhions, and the Torrent of Opinions in Vogue, with the early Prejudices of Education; but, above all, the predominant Paſſions and Vices; do generally draw off the Minds of Men from a ſerious Study of Morality; and won't let them apply their Faculties to thoſe Things, which really are their moſt proper Objects; and on which too really depends their true Felicity. [d] *Philoſophy* (ſays the Author of the *Dialogues*, a little before cited, very pleaſantly) *has no Buſineſs but with Men, and not at all with the reſt of the univerſe. The Aſtronomer fixes his Thoughts upon the Stars; the Naturaliſt on Nature; and the Philoſopher on himſelf. —— But becauſe Men find it troubleſome, to have her meddling with their Affairs, and perpetually at their Elbows, checking and regulating their Paſſions; they have therefore ſent her away to the Heavens, there to take an account of the Order and Motions of the Planets; or elſe they travel her over the terreſtrial Globe, and make her examine with the utmoſt Exactneſs all that is there to be ſeen. In a word, they take care always to employ her at as great a diſtance from themſelves as is poſſible.* The few, who have apply'd themſelves to the Study of Morality, have done it for the moſt part in a manner conuſ'd, and ſuperficial enough; and often ſo, as even to build upon Principles either entirely falſe, or obſcure and uncertain; either foreign to its proper Buſineſs, or mixt up with groſs Errours and Abſurdities. From whence it comes to paſs, that in all Languages, the Terms of Morality, both in common Diſcourſe, and in the Writing of the learned; are ſuch, as have the moſt obſcure, confus'd, indetermin'd, and unfix'd Ideas, of any other Terms whatever. And this might make it be ſuſpected, that the Principles too of Morality are likewiſe very abſtruſe; were it not known by the common Experience of all Ages, that Men generally deſpiſe the Things which are plain and ordinary, to run after ſuch as are extraordinary and myſterious; and that they either will not know, or will reject even Truth it ſelf, unleſs ſhe brings ſome Charm with her to raiſe their Curioſity; and gratify their Paſſion for what is marvelous and uncommon. This is what has been judiciouſly obſerv'd, and upon the ſame Subject too, by the famous [e] *Confucius*, the *Chineſe* Philoſoper: *I know very well*, ſays he, *why the greateſt part of Mankind do not follow the great Road of Mediocrity, altho' ſo eaſy to find; 'tis becauſe the learned deſpiſe it; and becauſe, imagining their Penetration to reach far beyond that Medium, they neglect it as below 'em; love to advance unheard of Principles; and engage themſelves in Ways more difficult and dangerous.* But it muſt be acknowledg'd, that it is not ſo much the Prejudices of the Underſtanding; as the Illuſions of the Heart, and the Tyranny eſtabliſh'd in the World with relation to Opinions; which form the grand Obſtacles to the ſerious ſtudy of Morality: and to the Attainment of a more exact Knowledge of our Duty. Mr. *Locke* [f] has very well expreſs'd it: *It is not to be expected*, (viz. *that any will very much apply themſelves to make Diſcoveries in Matters of Morality*,) *whilſt the deſire of Eſteem, Riches, or Power, makes Men eſpouſe the well endowed Opinions in Faſhion, and then ſeek Arguments either to make good their Beauty, or varniſh over, and cover their Deformity. --- Whilſt the Parties of Men, cram their Tenets down all Mens Throats, whom they can get into their Power, without permitting them to examine their Truth or Falſhood; and will not let Truth have fair play in the World, nor Men the Liberty to ſearch after it; What Improvements can be expected of this kind? What greater Light can be hoped for in the moral Sciences? The ſubject part of Mankind, in moſt Places, might, inſtead thereof, with* Egyptian *Bondage, expect* Egyptian *Darkneſs, were not the Candle of the Lord ſet up by himſelf in Mens Minds, which it is impoſſible for the Breath or Power of Man wholly to extinguiſh.* After all this, is it to be wonder'd at, that ſuch, whoſe Occupations and Diſtractions of Life, or want of Genius and outward Helps, do not allow 'em to engage in long and profound Meditations; (that is in a Word, the greateſt part of Mankind): are found to have generally Underſtandings ſo ſhort and narrow, and Ideas ſo falſe or ſo confus'd in Matters of Morality? Altho', as we have already ſaid, every one be by Nature capable to inſtruſt himſelf therein, as far as his particular Station requires; it has no doubt been always *God*'s Will, that they, who had the greateſt Light, and whom his Providence had furniſh'd with the greateſt Helps; ſhould communicate their Knowledge to ſuch, as were not able of themſelves to acquire it ſo eaſily; or in ſo great a degree. But, in order to ſet in its full Light, this inexcuſable Negligence of Mankind, in a thing of ſuch vaſt Importance; I ſhall here preſent the Reader with a ſhort Hiſtory of the Progreſs of Morality; and of the manner how it has been cultivated through all the paſt Ages of the World.

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[a] *Dialogues of the dead Ancients with the dead Moderns,* by Mr. *Fontenelle,* Dialog. 5, p. m. 208. Oeuvr. de Font. to. 1, p. 102-. Ed. Lond.

* Παρεγένετο [ὁ Ἱππίας] τῷ Σωκράτει λέγοντι πρός τινας, ὡς θαυμαστὸν εἴη τὸ, εἰ μέν τις βούλοιτο σκυτέα διδάξασθαί τινα, ἢ τέκτονα, ἢ χαλκέα, ἢ ἱππέα, μὴ ἀπορεῖν ὅποι ἂν πέμψας τούτου τύχοι· (φασὶ δέ τινες καὶ ἵππον καὶ βοῦν τῷ βουλομένῳ δικαίους ποιήσασθαι, πάντα μεστὰ εἶναι τῶν διδαξόντων) ἐὰν δέ τις βούληται ἢ αὐτὸς μαθεῖν τὸ δίκαιον, ἢ υἱὸν ἢ οἰκέτην διδάξασθαι, μὴ εἶναι, ὅποι ἂν ἐλθὼν τύχοι τούτου. Xenoph. Memorab. *l.* 4, *c.* 4, *ſ.* 5, *Ed.* Oxon. & *Ed.* Paris, *p.* 804, B.

[b] *Quidnam eſſe, Brute, cauſæ putem, cur, quum conſtemus ex animo & Corpore, Corporis curandi tuendique cauſſâ quæſita ſit Ars ejus, atque utilitas Deorum immortalium inventioni conſecrata; Animi autem medicina, nec tam deſiderata ſit, antequam inventa; nec tam culta, poſtea quam cognita eſt; nec tam multis grata & probata; pluribus etiam ſuſpecta & inviſa?* Tuſc. Quæſt. lib. 3, cap. 1.

[c] *Parvulos nobis dedit* [Natura] *igniculos, quos celeriter malis moribus, opinionibuſque depravati, ſic reſtinguimus; ut nuſquam Naturæ lumen appareat: —— Simul atque editi in lucem, & ſuſcepti ſumus, in omni continuò pravitate, & in ſumma opinionum perverſitate verſamur. —— Accedunt etiam Poetæ: qui, cum magnam ſpeciem doctrinæ, ſapientiæq; præ ſe tulerunt; audiuntur, leguntur, ediſcuntur, & inhæreſcunt penitus in mentibus. Cum vero eodem quaſi maximus quidam Magiſter Populus acceſſit, atq; omnis undiq; ad vitia conſentiens Multitudo; tunc plane inficimur opinionum pravitate, à Naturâq; deſciſcimus. —— Quid, qui pecuniæ cupiditate, qui voluptatum libidine feruntur?* &c. Idem ibid. cap. 1.- & 2.

[d] *Dial. des Morts Anciens,* in the firſt Part, *Dialog.* 4, *p.* 30. *Oeuvr. de Font. Lond.*-1707, *to.* 1, *p.* 19, 18-.

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[e] In the Extract from the Book of *P. Couplet, Bibl. Univ, Tom.* 7, *p.* 422.-

[f] Eſſay of *Human Underſtanding, Book* IV, *chap.* 3, §. 20, *p.* 479,_ &c. See the *Parrhaſiana, Tom.* 2, *p.* 66, *& ſeq.*

SECT. VI.

THERE are two ſorts of Men, who ought to apply themſelves in a more particular manner to Morality; (*viz.*) *The publick Miniſters of Religion*; and the *Men of Learning*; or thoſe *who make it their Profeſſion or Buſineſs, to cultivate and improve their Underſtandings by the ſtudy of the Sciences.* Both the one and the other are equally oblig'd, as much as in them lies, as well to be inſtructed therein themſelves; as to teach the ignorant: but the Obligation of the former, is more ſtrict and indiſpenſable; than that of the latter.

It is certain, *that* [a] *Morality is the Daughter of Religion, that they go hand in hand together; and that the Perfection of the latter, is the Standard of Perfection in the former.* This has been acknowledg'd by a great Emperour and heathen Philoſopher. *Thou wilt never*, ſaid [b] he, *do any thing, tho' purely human, well, if thou art ignorant of the relation it bears to Things divine; nor any thing divine, if thou knoweſt not what Affinity and Connexion it has with Things humane.* In Fact, the fundamental Principles of Natural Religion, which muſt be the Baſis of all other Religion; are alſo the moſt firm, or rather only, Foundation of this Science of Morality. Without a Deity, *Duty, Obligation, Right*, are no more, * to ſay the Truth, than fine Ideas; which may pleaſe the Mind, but can ſcarce touch the Heart; and which of themſelves, cannot impoſe an indiſpenſable Neceſſity to act or not to act, in ſuch or ſuch a certain manner. The Ideas of Order, Decency, and Conformity with Reaſon, have in 'em without doubt ſomething real; they are founded on the Nature of Things; on certain Relations moſt true: and even thoſe who cannot explain 'em diſtinctly and fully, have ſtill a Senſe, a Feeling of 'em; tho' perhaps not altogether ſo diſtinct: Our Minds are ſo fram'd, that they neceſſarily reſt ſatisfy'd with 'em, as ſoon as propos'd; and thus it is, that moral *Honeſty* or *Virtue* has thro' all Ages influenc'd Mankind, in all civiliz'd Nations. But to give theſe Ideas their full Force and due Meaſure of Efficacy; to make 'em ſtrong enough to maintain their Ground againſt Paſſion and Self-intereſt; they will require a ſuperiour Being; a Being ſuperiour to us in Power and Might, who has ſubjected us to a ſtrict Conformity therewith in our Conduct; who has ſo bound us thereto, that it is out of our Power to diſengage our ſelves, or at pleaſure diſpenſe with the Obligation; in a word, who has put us under an *Obligation*, properly ſo call'd; to follow each of us the Light of his own proper Reaſon. This Fear of a Deity, who puniſhes Vice and rewards Virtue, has ſo great an Efficacy; that, altho' the fundamental Principles of Religion be much darken'd, by the Intermixture of Errour and Superſtition; yet if they are not entirely corrupted and deſtroy'd, it will ſtill continue to actuate, and have a conſiderable Influence. The purer theſe Principles are, and the better they are ſupported, the more they contribute to the ſtrengthning the Foundations of Morality; and to the clear ſetting forth its Rules in all their Conſequences. But ſhou'd you make the fineſt Syſtem in the World, if Religion has not its part in it, it will be little more than (as I may ſay) a ſpeculative Morality; and you will be found to build on a ſandy Foundation. This being ſo, it was natural to expect, that the publick Miniſters of Religion, ſhould have made Morality their principal Study; in order to conform themſelves to it in all their Proceedings; and to give the People ſuch juſt Ideas thereof, as might be capable of producing ſolid Virtue. But they have been far ſhort, in this reſpect, of acting up to either their Duty, or Abilities. In the Times of Paganiſm, the *Theologers*, *Diviners*, and *Prieſts*, who gave out the celeſtial Oracles, and call'd themſelves the Interpreters of the Will of the Gods; took little or no Care to teach Men the Rules of Virtue. And I muſt needs confeſs, that Lectures of good ſound Morality, in their Mouths, wou'd have but ill ſuted the monſtrous Ideas they gave of the Deity; or thoſe Failings, Imperfections, and even Vices, which they, by an unaccountable Perverſion of all natural Knowledge, aſcrib'd to the Deity it ſelf. We ſee therefore the ancient Doctors of Chriſtianity, vigorouſly reproaching the *Pagans* with this illegal Divorce between Religion and Morality. *They who teach and inſtruct others in the Worſhip of the Gods*, (ſays [c] *Lactantius*), *ſpeak not a word of any thing that tends to the Regulation of Manners, and Conduct of Life: They do not ſo much as make Enquiry of any ſort after Truth; but confine themſelves wholly to the Knowledge of the Ceremonies of Divine Service; which require only the Miniſtry of the Body, and in which the Sentiments of the Mind have really no part.*---- [d] *The Philoſophy and the Religion of the Heathens, are two Things entirely ſeparate one from the other. Wiſdom or Philoſophy has its peculiar Profeſſors, who teach not the way of approaching the Gods: And Religion alſo has its Miniſters, who teach not the Rules of Wiſdom. Whence this is apparent, that theirs is neither true Wiſdom, nor true Religion.* And indeed, as Mr. *Bayle* has obſerv'd, “It would be very difficult to [e] prove, that the Prieſts of *Paganiſm* requir'd any thing, beſides the exterior or outward Shew of Piety; or that they preſs'd Amendment of Life upon the People; and denounc'd, that, without a ſincere and perſevering Repentance and Reformation of all corrupt Inclinations; Vows, Offerings, Proceſſions, Sacrifices, Ceremonies, ordinary or extraordinary, could not appeaſe the Anger of the Gods. It is much eaſier to prove, that they ſuffer'd the World to reſt under this commodious Illuſion; *That it was ſufficient to be liberal towards the Gods; and to follow the Formulary of Church-Ceremonies.* The Satyr of *Perſius* will ſerve to convince us of this; where having firſt thunder'd out againſt thoſe who make a Bank or Fund of Religion; he immediately calls upon and challenges the Prieſts, to ſhew what Gold has to do with holy Things: [f] “*Tell me, you who are our Prieſts, of what Uſe is Gold in our holy Places? Even juſt as much, as the little Babies which bridal Virgins offer to* Venus. *Why do we not offer to the Gods ſomething, which neither the* Cotta's, *nor the* Meſſala's *can preſent to them, with all their magnificent Chargers pil'd up with the Fleſh of their moſt exquiſite Victims? Why do we not offer to them a juſt, ſincere, and generous Heart, deeply imbu'd with the moſt lively Sentiments of Juſtice and Honour? Let me but have this Preſent to make 'em, and the meaneſt Sacrifice ſhall not fail to draw down upon me the choiceſt Bleſſings.* Does not this inſinuate, that that it was the Prieſts who cheriſh'd that mercenary Spirit, that Traffick and Trade of Devotion, that reigning Abuſe; which made Men ſo laviſh towards the Gods, as to ſpare nothing in Victims and Offerings; imagining that the Gods, being pleas'd as much as Men, with Preſents of Gold and Silver, cou'd not then but grant 'em whatſoever they ask'd?——We cannot tell whether theſe Prieſts were learned or not; and whether they had philoſophiz'd on the

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[a] Preface of Mr. and Madam *Dacier* to the Moral Reflections of *Marcus Antoninus, p.* 2.-. or * A 2, *p.* 2.-

[b] *Οὔτε γὰρ ἀνθρώπινόν τι ἄνευ τῆς ἐπὶ τὰ θεῖα συναναφορᾶς εὖ πράξεις, οὔτε ἔμπαλιν. Marcus Antonin. lib.* 3, §. 13_. *Edit. Gataker*; *&* §. 12_, in the Tranſlation of Mr. and Madam *Dacier*.

* See what is ſaid, *Pufend. lib.* 2, *chap.* 3, §. 19, *not.* 2. *and chap.* 4, §. 3, *not.* 4.

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[c] *Nihil ibi* [*in Deorum cultu*] *diſſeritur, quod proficiat ad mores excolendos, vitamque formandam; nec habet inquiſitionem aliquam veritatis, ſed tantummodo ritum colendi; quod non officio mentis, ſed miniſterio corporis conſtat.* Inſtit. divin. lib. 4, cap. 3, num. 1, Edit. Cellar.

[d] *Quoniam igitur, ut dixi, Philoſophia & religio deorum disjuncta ſunt, longeque diſcreta; ſiquidem alii ſunt profeſſores ſapientiæ, per quos utique ad deos non aditur; alii religionis antiſtites, per quos ſapere non diſcitur: apparet, nec illam eſſe veram ſapientiam, nec hanc religionem.* Idem. ibid. num. 4. See St. *Auſtin* de Civit. Dei, lib. 2, cap. 4*, 6*.

[e] *Continuation des Penſées diverſes*, Artic. 49, p. 223. See Mr. *Locke*'s Reaſonableneſs of Chriſtianity, *&c.* p. 267*. Edit. Lond. 1696.

[f] *Dicite, Pontifices, in ſancto quid facit aurum? Nempe hoc, quod Veneri donatæ a virgine puppæ. Quin damus id ſuperis, de magna quod dare lance Non poſſit magni Meſſalæ lippa propago; compoſitum jus, faſque animo, ſanctoſque receſſus mentis, & incoctum generoſo pectus honeſto? Hæc cedo, ut admoveam templis, & farre litabo.* Sat. 2, verſ. 69, & ſeqq.

“ Nature of the Gods: But this we have Reaſon “ to believe; that they had neither Virtue nor “ Probity enough, to perſuade Men to place a “ much greater Confidence, in the Purity of the “ Heart; than in the exterior Practices of divine “ Worſhip; and Diſburſements made on account “ of Religion.” The Profit of the Prieſts wou'd have been too much diminiſh'd, if Men had follow'd the Maxims of the Philoſophers. I ſhall add to this a gentle Wipe that *Socrates* gives 'em, in that Dialogue of *Plato*, which bears the Name of *Euthyphro*; that is, of him with whom *Socrates* is introduc'd diſcourſing; (whoſe *Greek* Name anſwers exactly to another *Greek* Name more in uſe with us, called Orthodox; *i. e.* one that is in the right). He was a Soothſayer, and *Socrates* ſeems to reproach in his Perſon the Prieſts in general, as well as others of that Stamp; [g] with *being too reſerv'd in communicating themſelves; and that they did not willingly impart to others their* Wiſdom; that is to ſay, their Knowledge, or what they themſelves had diſcover'd. By which in all Likelihood he intends chiefly what relates to Morality; as is intimated by the Oppoſition he makes between their Conduct, and the Conduct himſelf obſerv'd in his Converſations; which ran generally upon that Science: and which tended ſolely to correct the Errors of Mankind, and inſpire 'em with the Love of Virtue. Beſides, the very Subject of the Dialogue gives us clearly to underſtand the falſe Ideas the Prieſts had, upon the Subject of Morality; for we there ſee *Euthyphro*, who thinks he is doing the fineſt Action in the World, offering himſelf as a voluntary Accuſer againſt his own Father; in a Matter too, where he pretends to convict him of no leſs than Murther. Some perhaps will object to me here, what I have elſewhere ſhewn in [h] one of my Notes; that, amongſt the Heathens, even the common People were not ignorant, that as Virtue was well pleaſing; ſo Vice was odious to the Deity: From whence one might be apt to infer, that the People were beholden to the publick Miniſters of Religion for this Knowledge at leaſt. But it is very probable, that Principles of this ſort were preſerv'd among the People, either by ancient Tradition; or by ſome Remains of the Light of natural Religion; or by both theſe together: And that, if the Prieſts did not directly teach the contrary, but did ſometimes even recommend Virtue; it was only in general looſe Terms, without ever entring into the Particulars requiſite for Inſtruction; which without doubt they were not very capable of doing. But this is ſufficient for my Deſign; which is to ſhew, that, in the Time of *Paganiſm*, the publick Miniſters of Religion, who ought to have made it their principal Study, buſied themſelves about nothing leſs than this Science of Morality.

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[g] Ἴσως γὰρ σὺ μὲν δοκεῖς σπάνιον σεαυτὸν παρέχειν, καὶ διδάσκειν οὐκ ἐθέλειν τὴν σεαυτοῦ σοφίαν. Tom. 1, p. 3, D. Ed. Steph. Ed. Læmar. p. 48, E.

[h] *Puſend.* lib. 2, chap. 4, Sect. 3, Note 4.

SECT. VII.

AMongſt the *Jews*, it does not appear that the Prieſts apply'd themſelves to this Science: And from the Time that Prophets ceas'd from among that choſen People of *God*; that is to ſay, a little after their Return from the *Babyloniſh* Captivity; the Doctors and publick Interpreters of the Law began inſenſibly to corrupt Morality; ſo far were they from unfolding the true Principles thereof, and drawing out thoſe Principles into all their Conſequences; as they might eaſily have done, with the Help and Aſſiſtance of that Revelation, of which they were the Depoſitaries: But being entirely buſy'd about their Civil Law, or the Study of Ceremonies; and beſides fill'd with carnal Prejudices, and ſcrupulouſly attach'd to the Letter of the Law; they either did not at all penetrate into, or elſe did entirely fruſtrate and confound the Spirit and Deſign of the Legiſlatour. They, on pretence that *God*, to ſute himſelf to the Weakneſs of the *Jewiſh* Nation, had preſcrib'd to 'em a great Number of Rites and Ceremonies; inſiſted much more upon the Performance of the exterior Worſhip, and the practical Punctilio's of Devotion; than the Purity of the Heart and Inclinations, with an exact Conformity, and ſteady Adherence to the Rules of Virtue; and what was ſtill worſe, by their falſe Gloſſes, and by their human [a] Traditions, they came at laſt to deſtroy entirely ſeveral of the moſt inconteſtable Principles of the Law of Nature. They invented, for example, a thouſand ridiculous Subtilties, to furniſh Men with Expedients for eluding the Obligation of the moſt ſolemn Oaths, and Promiſes. *Whoſoever*, (ſay the *Scribes* and *Phariſees*, whom *Jeſus* for that Reaſon treats as *Hypocrites and blind Guides*) *Whoſoever* [b] *ſhall ſwear by the Temple, it is nothing; but whoſoever ſhall ſwear by the Gold of the Temple, he is a Debter: or, oblig'd to keep his Oath. Whoſoever ſhall ſwear by the* * *Altar, it is nothing; but whoſoever ſweareth by the Gift* (or Offering) *that is upon it, he is guilty: or oblig'd to keep his Oath.* ——*Whilſt they paid* † *Tithe of Mint, and Aniſe, and Cummin, they omitted the weightier Matters of the Law,* ‖ *Juſtice, Mercy, and Faith.* 'Tis one of the cleareſt Maxims of right Reaſon, that every Vow [c] contrary to any divine Law, is in it ſelf entirely void. Yet the Prieſts, and the Doctors who were their Dependants, finding their Account in Vows which Men made for the Benefit of the *Church*; had the face to maintain, that if any one had made a Vow to *God* of all that he ſhould be able to give to his Father or Mother; ſuch a Vow was good in Law, and irrevocable; ſo that after ſuch Vow made, this unnatural, or rather impious Child was, according to them, not only diſcharg'd from giving any Succour or Relief to his Parents in their Neceſſities; but even bound in point of Conſcience not to do it; on account of the Obligation of this ſame Vow: Their Deciſion runs thus: [d] *Whoſoever ſhall ſay to his Father or his Mother, what I could have ſuccour'd you withal, be it conſecrated to God; he muſt not ſuccour, that's, honour his Father or his Mother, according to the Commandment.* And whereas *God*, for Reaſons founded on the Conſtitution of the *Iſraelitiſh* Government; had forbidden the *Jews* to have much Commerce with other Nations; and had even expreſly commanded them to exterminate ſome of 'em. They hereupon entertain'd Sentiments of implacable Hatred and Animoſity againſt all the reſt of Mankind: So that the *Jew* believ'd himſelf wholly diſcharg'd from all the common Offices of Humanity [e] or Civility [f], with reſpect to all Foreigners, unleſs they embrac'd the *Jewiſh* Religion; he inſiſted likewiſe, that he was warranted by Law to treat 'em in a hoſtile manner; and that he was not only permitted, but poſitively commanded to take Vengeance of 'em, whenever it could be ſafely put in practice; and ſo far was he from any Poſſibility of being undeceiv'd in theſe barbarous and inhuman Opinions of his, by any Inſtruction he might receive from his Teachers; that all their Diſcourſes tended to nothing ſo much as to confirm him in 'em. The *Phariſees*, beſotted with the Notions of *Judas* the *Gaulanite*; vainly imagin'd, that there could be no Magiſtrate, unleſs of their own Nation, and eſtabliſh'd by the immediate Appointment of *God*, to whom Obedience was due for Conſcience ſake; and upon this they founded their particular Doctrine, [g] that it was unlawful to pay Tribute to the *Roman* Emperour; tho' in peaceable Poſſeſſion of their Country. [h] *And many ſuch-like Things did they*, as our Lord *Jeſus Chriſt* lays to their Charge, in many Places of the Goſpel. As for thoſe Doctors, the *Jews* have had during all the following Ages down to the preſent Time; theſe ſeem to have made it their ſole Aim to ſurpaſs their Predeceſſors in this Particular; witneſs the Extravagancies, deteſtable Maxims, and impious Notions, with which they have ſtuff'd their *Talmud*; and wherewith the Books of their *Rabbins* do ſo abound. You may find there, for inſtance, [i] that 'tis the moſt innocent Thing in the World, to utter all manner of Curſes and Execrations againſt Chriſtians: that it is not ſo much as a Thing tolerated, for any one to preſume to ſave [k] an Idolater, that's a drowning; or in danger of periſhing, by any other Accident: or to do the Office of a Phyſician to him, tho' he's ſure to be well paid for it; unleſs he have juſt Cauſe to fear ſome hurt to himſelf, from the Reſentment of the Patient, on account of his refuſal: In this particular Caſe, ſay they, he may aſſiſt him, but always upon condition that he be very well paid for his Pains; for it is by no means lawful to do it *gratis*. *Thus you* [l] *ſee how theſe Falſe-Teachers have corrupted the pure Morals of their Legiſlatour Moſes.*

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[a] See *Matth.* xv. 3, *&c.*

[b] *Matth.* xxiii. 16, 18, 23.

* Verſ. 18.

† Verſ. 23.

‖ See *Grotius* on the Place.

[c] See *Puſend.* de Jur. Nat. & Gent. *lib.* 3, *cap.* 6, *ſect.* 15. *&* *lib.* 4, *cap.* 2, *ſect.* 8.

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[d] *Matt.* xv, 5. See *Grotius* i, l.

[e] See *Juvenal*, Sat. 14, 103, 104. *Tacit. Hiſt.* lib. 5, cap. 5. And the Parable of the Samaritan, *Luke* x, 30, *&c.*

[f] *Matt.* v, 47.

[g] See *Matt.* xxii, 17. and *Joſeph. Antiq. Jud.* lib. 18, cap. 1. and *De Bell. Jud.* lib. 2, cap. 12, *Ed. Genev. And Ed. Havercam.* c. 8.

[h] *Mark* vii, 13.

[i] See *Grotius*'s *Letters*, Part I, Epiſt. 122.

[k] *Maimonides*, of *Idolatry*, tranſlated by, and with the Notes of, *Dion. Voſſ.* at the end of *Tom.* V, Oper. *Gerb. Jo. Voſſ. Amſterd.* 1700. *Note*, This Rabbin is one of the moſt eſteem'd, and judicious. See *Nouv. de la Rep. des Lett.* Jan. 1707, *Art.* 4. and *Baſnage, Hiſt. of the Jews*, lib. 4, cap. 15. where theſe Authors relate ſeveral Maxims of the corrupt Morality of the *Jewiſh* Doctors.

[l] Mr. *Bernard*, in his *News* of *Oct.* 1702. p. 46; where he reports theſe looſe Deciſions of the *Jewiſh* Caſuiſt.

SECT. VIII.

JESUS Chriſt did, thro' the whole Courſe of his Miniſtry, inceſſantly oppoſe, and utterly deſtroy the erroneous Maxims, and pernicious Gloſſes of theſe *Jewiſh* Doctors. He re-eſtabliſh'd Morality in its utmoſt Purity; he fully laid open the true Sources thereof; and he gave forth Rules touching the whole Duty both of Mankind in general, and of each Perſon in particular; they were general indeed, but perfect; entirely conformable to right Reaſon, and the true Intereſts of Mankind. His Diſciples every where preach'd up this moſt holy Doctrine; by the Light of which, if well underſtood and unfolded, a Man may ſecurely direct his Judgment in the Deciſion of all imaginable Caſes. Nevertheleſs, even in the Time of the Apoſtles themſelves, certain falſe Doctors, not a few, had crept into the Church; who began to corrupt the Chriſtian Morality, by pretending [a] it was neceſſary to add thereunto, the Obſervation of the *Moſaic* Ceremonies; altho' the Son of God had manifeſtly diſcharg'd Men from the Obligation of ſubmitting themſelves to that Yoke; a Thing in its own Nature much more proper to draw Men off from the Practice of true Virtue; than either to preſerve, or promote it. There were likewiſe ſome [b], *who teaching another Doctrine than that of* Jeſus Chriſt, *gave heed to Fables, and endleſs Genealogies, which caus'd Queſtions and Diſputes, rather than godly edifying in that Faith, which* GOD *demands; and in that Charity, which is the end of the Commandments*, both of the Law, and of the Goſpel; knaviſh and ignorant Doctors, *who underſtood neither what they ſaid, nor whereof they affirm'd, and who turn'd aſide unto vain jangling*. Others there were, who [c] *deſpis'd Government; who being audacious and inſolent, were not afraid to ſpeak*

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[a] See the Epiſtles of St. *Paul* to the *Romans*, and *Galatians*; and *Coloſſ.* ii, 20, *& ſeq.*

[b] 1 *Timothy* i, 3, 4, 5, 6, 7.

[c] 2 *Peter* ii, 10, 18.

evil of Diguities; who ſpeaking big Words full of Vanity and Folly, allur'd thro' the Luſts of the Fleſh, and thro' much Wantonneſs, thoſe who had truly eſcap'd from them who liv'd in Errour; who [d] *turn'd the Grace of our God into Laſciviouſneſs:* And laſt of all, ſuch, [e] as *held the Doctrine of* Balaam, who [f] taught *Balac* to caſt a Stumbling-block before the Children of *Iſrael*, ſo that they ate Things offer'd to Idols, and committed Fornication.

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[d] *Jude*, ver. 4.

[e] *Revelations*, Chap. ii, ver. 14.

[f] See *Numbers* xxii, & *ſeq.*

SECT. IX.

NO marvel then, if after the Death of the Apoſtles, and their Primitive Diſciples, the Evil grew every day worſe and worſe. The extreme Fondneſs and Conceit, which the following Ages grew into, of Fables[a], and Allegories; of a [b] falſe Eloquence, and of the groundleſs Imaginations of the Heathen [c] Philoſophers; the profound Ignorance they were in, of the Art of Reaſoning juſtly[d], and of the right Method of expounding the Holy Scripture; the Precipitation with which they acted, in purſuance of the raſh Dictates of an over-heated Imagination; the Ambition[e] and bad Morals of the greateſt Part of the Clergy; more jealous of their own Rights, and more intent upon diſcuſſing Points of Diſcipline, or abſtracted Notions of Metaphyſicks; than diligent in ſtudying themſelves, or teaching the People, the Rules of Morality; the dreadful Diſorders, and ſcandalous Diviſions, which did ſo often rend the Church; the groſs Frauds and Abuſes which from time to time ſtole into Practice; and which at laſt oblig'd them to come to a publick Reformation thereof; a Thing always found very difficult even but to undertake, tho' much more ſo in the Execution; add to theſe the little Solidity, which we find in the greateſt Part of thoſe Works, which are the Remains of Eccleſiaſtical Antiquity: all this, I ſay, gives us reaſon to believe, that the Study of Morality, during all this Interval, notwithſtanding the Light of the Goſpel; made but little Progreſs in the World. But, to put this Matter clearly beyond all poſſibility of doubt, we ſhall now deſcend to Particulars.

Who knows not, (ſays a Miniſter [f] of the Reform'd Religion) *that moſt of the Fathers have not wrote at all upon Matters of Conſcience; and that thoſe who have touch'd thereupon, have ſaid nothing to the greateſt Part of thoſe Queſtions, the Determination whereof was of the greateſt Importance?* In fact, it appears, both by thoſe Books we have tranſmitted down to us; and by the Catalogues of thoſe that are loſt; that the greateſt Part of thoſe, we call *Fathers of the Church*, ſcarce ever took Pen in hand on any other Subject, beſides Matters purely ſpeculative; or concerning the Diſcipline of the Church. It was but very rarely, if at all, that they handled Points of Morality; and that too only occaſionally; and ever in a manner by no means accurate, or methodical. The Sermons, which they ſometimes made on this Subject, were ſo ſtuff'd with the vain Ornaments of a falſe Rhetorick; that the Truth did, as it were, ly ſmother'd under heaps of Figures, and pompous Declamations. And the greateſt Part of thoſe moral Reflections, which they ſcatter'd here and there in their Works, were extracted, by forc'd and far-fetch'd Allegories, from a thouſand different Places of Scripture, where the true literal Senſe itſelf made nothing to their Purpoſe. To be convinc'd of this, we need only read thoſe Collections, which ſome of the moſt extravagant [g] Admirers of Eccleſiaſtical Antiquity, have given us of the Thoughts, which appear'd to them, the moſt beautiful in theſe Works of the Fathers. Beſides, theſe antient Doctors, even in their very beſt Treatiſes of Morality, perpetually [h] confound the Duties of Mankind in general, with the particular Duties of a Chriſtian, preciſely conſider'd as ſuch; as well as the Principles of Morality purely natural, with thoſe of Chriſtian Morality: on the other hand you ſhall often find 'em putting too great a Difference between the Man and the Chriſtian; and by puſhing this Diſtinction too far, run themſelves into the Abſurdity, of laying down Rules that are impracticable. To conclude then with what is a moſt apparent Proof, of the little Care they had to improve Morality; there is ſcarce one of them, who has not been guilty of very groſs Errours thereupon. Let us but run over the moſt celebrated of them, and they will furniſh us with manifeſt Examples of what I am ſaying.

Athenagoras [i] *ſeems to eſtabliſh the* [k] *Worſhip of Angels; and ſays, they were created Superintendants over the Things here below. He extols Celibacy, and condemns ſecond Marriages, which he terms* [l] *a ſpecious ſort of Adultery.*

The Work of *Clement* of *Alexandria*, entitled *The Pedagogue*, is a Book wherein [m] *he undertakes to form the Manners of Youth; and gives 'em Rules of*

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[a] See *Bibl. Univerſ.* Tom. X, *p.* 233, & *ſeq.* and *Du Pin*, *Bibl. des Auth. Eccleſ.* Tom. I, *p* 7, *Col.* 1-. *Edit. Hol.* And *Baſn. Hiſt. of the Jews*, Lib. 3, cap. 22 throughout.

[b] See the *Ars Critica* of *Le Clerc*, Tom. I, *Part* 2, *Sect.* 1, *Cap.* 16, *n.* 13-, & *ſeq.* p. 347, & *ſeq.* 4th Edit. and *p.* 386-, 2d Edit. and *Bibl. Univ.* Tom. XII, *p.* 144, & *ſeq.* and 263, & *ſeq.*

[c] See *Bibl. Univ.* Tom. X, *p.* 181-.

[d] See *La Defenſe des Sentiments de quelques Theol.* &c. Let. 14, p. 360-, &*c.* and *Wotton on the Antients and Moderns*, Chap. 28. and the *Epiſtolæ Crit.* & *Eccleſ.* of *Le Clerc*, Ep. 4.

[e] *Bibl. Univ.* Tom. XVIII, *p.* 57,- 92,- 110,- 119.- taken from ſeveral Places of *Gregory Nazianzen*, where he ſets forth the Corruption of the Clergy.

[f] *La Placette*, Treatiſe of *Conſcience*, Lib. 2, Chap. 16, *p.* 190, of the firſt Edition.

[g] See the Notes of Mr. *De Sacy* on the Scripture, which are full of them; and the *Penſees Ingenieuſes des Peres d'Egliſe*, by *P. Bouhours.* See Mr. *Bernard*, in his *Nouvelles* of *September* 1704, *p.* 282, 283, 284, 285.

[h] See Mr. *Buddeus*, in his *Hiſt. du Droit Natural*, Sect. 10, at the beginning of the *Selecta J. N. & Gentium.*

[i] In his Apology for the Chriſtians, *p.* 11, *A-*; and *p.* 27, *A-, B-, C-*, *Ed. Colon.* See *Barbeyrac*'s *Morale des Peres*, Pref. *p.* 15-, & lib. *p.* 6-, & *p.* 25-, &*c.*

[k] *Du Pin, Bibl. Des Aut. Eccleſ.* Tom. I, *p.* 65, *a - Edit. Holland.*

[l] Δεύτερος [γάμος] εὐπρεπής ἐστι μοιχία, *p.* 298. And *p.* 37, *B-*, *Ed. Colon.* 1683.

[m] *Bibl. Univ.* Tom. X, *p.* 218-.

Chriſtian Conduct; but ſuch as abound with Maxims exceſſively rigid, and far remote from any thing now in practice. It is in truth a confuſ'd Heap of Precepts without Order, without Connexion, full of Declamation, and dark myſtical Alluſion; in a word, ſuch as one would expect from an Author, who [n] *writes almoſt always without either Method or Coherence*; and who himſelf, in another Work, [o] *profeſſes to have wrote with deſign to hide and to confound, as I may ſay, Things; to the intent, that none but thoſe, who were Men of Ability and Underſtanding, and willing to undergo the Fatigue of a laborious Application, might be able to comprehend them.* There are ſome Paſſages in this *Pedagogue*, which, in the Opinion of Mr. [p] *Du Pin, ought not to be read by every body.* And as *Clement* of *Alexandria* did in the main give Preference to the *Philoſophy* of the *Stoicks*; ſo we find, in this Work of his, ſeveral of their Paradoxes: For example[q], he maintains, [r] *That the Chriſtian, and he alone, is a rich Man*; a Paradox very like that of the *Stoicks*, who ſaid the ſame Thing of their wiſe Man. Thoſe Philoſophers expreſs'd themſelves thus[s]: *That the wiſe Man, and he alone, is rich*; ſo that *Clement* has only chang'd the word *Wiſe*, for that of *Chriſtian*. The Reaſons likewiſe which he makes uſe of to prove his *Theſis*, are much the ſame with thoſe of the *Stoicks*; as any one may ſee, by comparing what he ſays, with the Explication, which *Cicero* gives of that ſame *Stoick* Maxim, in his Paradoxes[t]. And when he explains that * Precept in the Goſpel, † *When they perſecute you in this City, flee ye into another*; he ſtill reaſons upon the Principles of the *Stoicks*, who deny'd that *Pain* was an Evil; *The Lord*, ſays he, *does not enjoin us to fly, as if 'twas an Evil to be perſecuted; nor does he command us to avoid Death by flight, as a Thing to be fear'd.* And then our Doctor, proceeding to ſhew the Reaſon, on which this Permiſſion or Commandment of flying from Perſecution is grounded, ſuggeſts this; that otherwiſe we ſhould give occaſion to Perſecutors to commit Murther: *For*, ſays he, *the Will of Chriſt here is, that we ſhould not be any ways aiding or aſſiſting to others in the doing what is evil*, &c. It was the Chimerical Idea of a wiſe Man, according to the *Stoicks*, to be entirely without Paſſions: And thus *Clement* in another place, makes his true [u] Chriſtian exempt from all Paſſions or Affections, even the moſt innocent; [x] *Excepting thoſe only, which regard the Preſervation of the Body; ſuch as Hunger, and Thirſt, with others of the like Nature.* Upon this Principle, he maintains, That *Jeſus Chriſt* and his Apoſtles[y] had not any Paſſions at all; and that *Jeſus Chriſt* himſelf had never any, even the leaſt Impulſe of either Pleaſure or Pain; That he never had any occaſion to Eat; and that, if he did Eat, 'twas for fear of paſſing for a Ghoſt. He with equal Prudence too juſtifies the Idolatry of the *Pagans*, by ſaying, [z] That *God had given them the Sun, the Moon, and the Stars, to the intent, that they ſhould adore 'em; and by that Worſhip lift up their Minds to God himſelf.* A Profeſſor in Divinity, (*A*) of the Lutheran Communion, has endeavour'd to vindicate *Clement* with regard to ſome of the before-mention'd Errours. But, whoever examines what he has ſaid, will find, that he ſucceeds no better here, than when he maintains, that the *Pedagogue* and *Stromata* are excellent Works, both for their Morality; as well as for their Style and Method. The very Analyſis, he himſelf gives of them, does well nigh furniſh out full Proof of the contrary; and ſhew the little Foundation there is, for thoſe magnificent Encomiums, he is pleas'd to beſtow on the Presbyter of *Alexandria*.

Tertullian, to ſay nothing here of the Enthuſiaſm, and overſtrain'd Auſterities, of the *Montaniſts*, by whom he ſuffer'd himſelf to be impos'd upon; [aa] *ſeems on ſome Occaſions to have ſtretch'd a little too far, this moſt true Principle*; (viz.) *That all, who countenance or aſſiſt wicked Men in their vicious Practices, or contribute in any manner to what is ſinful, become thereby guilty; and to have put too rigorous an Interpretation on things, that were in themſelves juſtifiable; ſuch as, for inſtance,* [bb] *the bearing Arms in defence of the Government; the illuminating one's Houſe, and bedecking it with Laurels in honour of one's Prince; the making uſe of common Expreſſions, which may chance to have ſome reference to Idolatry. And this ſeems to have been the Caſe, when defending, in his Book of the Garland, the Action of a certain Soldier, who had refus'd to put a Garland on his Head; he maintains, that Chriſtians are abſolutely forbid to wear Garlands; as alſo to bear Arms.* He goes ſo far as to call theſe Chaplets or Coronets, which Soldiers us'd to put on their Heads, *the Pomps of the Devil*; and *a Sin againſt Nature*. When he is declaiming againſt Plays, he ſuffers himſelf to be tranſported beyond all Bounds, and gives into falſe Notions; as when he ſays, That * *'tis the Devil that mounts the Actors on their Buskins, in order to make* Jeſus Chriſt *a Lyar; who has ſaid, that no one can add one Cubit to his Stature.* He will have it, That a Chriſtian cannot in Conſcience [cc] exerciſe the Office of a Judge; nor ſerve as an Executioner of Juſtice. He ſeems to maintain, that † one cannot be an Emperour and a Chriſtian at the ſame time. *In his Books of Monogamy,* [dd] *and Exhortation to Chaſtity*; he abſolutely condemns ſecond Marriages, as a ſort of Adultery. He maintains,[ee] in his Book *of flying from Perſecution*; *that we are abſolutely forbidden to fly in Times of Perſecution*; *or to give Money, to avoid being tortur'd.* After this, it is not to be wonder'd at, that he condemns Self-defence againſt any unjuſt Aggreſſor, as a Thing contrary to Chriſtian Patience. His Reaſons for the Purpoſe are as remarkably weak; as his Maxim is rigorous, and overſtrain'd. He ſays, ** that the Goſpel without reſerve forbids us, *to render Evil for Evil:* That it is incroaching on the Prerogative of God, and the Homage due to him; to arrogate to ourſelves the Power of Self-Defence, as oft as we ſhall judge it neceſſary: That when *Jeſus Chriſt* ſays, *Judge not, that ye be not judged*; he demands and expects a Patience carry'd even to this Point; *for who elſe can be ſaid not to judge another, but he who is ſo patient, as not to defend himſelf?* Behold, in what a manner *Tertullian* explains the Scripture; and on what Principles he founds thoſe Maxims of Morality, he is pleas'd to advance.

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[n] *Du Pin, ubi ſupra*, p. 86, *Col.* 2. *Ed. Hol.*

[o] *Stromata*, or *Tapeſtry*. See *lib.* 1, *p.* 278, *B*. *lib.* 4, *p.* 475, *D*. *Lib.* 7, *p.* 767, at the end of the Book. See too *Du Pin, ubi ſupra*, p. 81, *Col.* 2, ——— whoſe Words theſe are.

[p] *Ubi ſupra*, p. 81, *Col.* 2-.

[q] Life of *Clement* of *Alexandria*, by Mr. *Le Clerc*, *Bibl. Univ.* Tom. X, *p.* 194-.

[r] *Lib.* 3, *Cap.* 6, *Pædag.* p. 233-, *&* *ſeq.*

[s] Ὅτι μόνος ὁ σοφὸς πλούσιος. Cic. Paradox. 6.

[t] *Paradox* 6. * *Stromata*, Lib. 4, *p.* 504, *B*. † *Matth.* x, 23.

[u] Whom he calls *Gnoſtick*, [γνωστικὸς] *i. e.* who perfectly knows the Chriſtian Religion.

[x] Τοιοῦτος γὰρ ὁ Γνωστικὸς, ὡς μόνοις τοῖς διὰ τὴν μονὴν τοῦ σώματος γινομένοις πάθεσι περιπίπτειν, οἷον πείνῃ, δίψει, καὶ τοῖς ὁμοίοις. *Stromat.* Lib. 6, *p.* 649, *D.*

[y] *Ibid.* p. 649,- 650. See Mr. *Le Clerc*'s *Lett. Critic.* and *Eccleſ.* Epiſt. 1, *p.* 18, 19, 4th Edit. And 2d Ed. *p.* 21-, 22.

[z] Ἔδωκεν δὲ [ὁ Θεὸς] τὸν Ἥλιον, καὶ τὴν Σελήνην, καὶ τὰ Ἄστρα εἰς θρησκείαν --- ὁδὸς γὰρ ἦν αὕτη δοθεῖσα τοῖς ἔθνεσιν, ἀνακύψαι πρὸς Θεὸν διὰ τῆς τῶν ἄστρων θρησκείας. Stromat. Lib. 6, *p.* 669, *B*, *C*.

(*A*) *Mich. Fortſchius*, Comm. in Offic. Ambroſ. *Diſſ.* 2, *Sect.* 6, *&* *ſeq.*

[aa] *Du Pin, Bibl. des Aut. Eccleſ.* Tom. I, *p.* 102, *Col.* 1-, 2.

[bb] *De Idololatria.* * *De Spectaculis*, cap. 23-, *p.* 155, *H.* *Sic & Tragœdos* [*Diabolus*] *cothurnis extulit, quia nemo poteſt adjicere cubitum unum ad ſtaturam ſuam. Mendacem facere vult Chriſtum.*

[cc] *De Idololatr.* cap. 17, 19-. *&* *ſeq.* *&* *De Corona Militis*, cap. 11. See *Dallæus de uſu Patrum*, Lib. 2, cap. 4, *p.* 262.

† *Sed & Cæſares credidiſſent ſuper Chriſto, ſi aut Cæſares non eſſent ſeculo neceſſarii, aut ſi & Chriſtiani potuiſſent eſſe Cæſares.* Apologet. *c.* 21-. See *Rigaltius* thereupon.

ORIGEN, in his Homilies, is full of moral Inſtructions: But they are ſcarce any thing more than moral Reflections, or the Morals of Scripture Stories, extracted out of the Facts by dint of Allegory; and propos'd in a manner, not very proper to ſtir up the Affections; or produce in the Mind any rational well grounded Conviction. 'Tis known, that this famous Doctor, by a Miſtake groſs enough, haſtily giving into the literal Senſe of theſe Words of our Saviour [ff]; *There be Eunuchs, which have made themſelves Eunuchs for the Kingdom of Heaven's ſake*; executed on himſelf this miſtaken Precept, or Advice: and *Demetrius*, Biſhop of *Alexandria*, did, before he became his Capital Enemy, admire this Action of his, as an Act of heroick Virtue.

St. *Cyprian*, “Was in the Marriage-State when he was converted; [gg] but from that time, even before he was baptiz'd, he *confin'd himſelf to the ſtrict Rule of Continence*; as his Deacon *Pontius* has it: Which ſhews, that it was look'd upon to be a kind of Holineſs to live a ſingle Life. A Notion agreeable enough to the Ideas of Virtue, Men had at that time; which, in many Caſes, were as remote from the common Uſage of Life, as was the Rhetorick of the ſame Age; which was then ſo much the more had in eſteem; as the Turn it gave Things was more ſtrange and uncommon: The one being as little fitted to procure the Good of our Neighbour, and of Society; as the other was to promote Perſpicuity of Diſcourſe, and furniſh the Mind with juſt Ideas. *Cyprian*, not content with ſeparating himſelf from his Wife, did moreover give all he had to the Poor. — The great Conflicts and Struggles he had to go thro' with, on account of this rigid Abſtinence from his Wife; were doubtleſs no ſmall Mortification to him. That the Chriſtian Religion does not enjoin needleſs or uſeleſs Mortifications, is pretty certain: So that the only Thing that remains to be known is, whether we are in any better Condition to ſerve *God*, by altogether abſtaining from a Thing, the Uſe of which has in itſelf nothing criminal, and which we cannot but be ſtill deſiring; than when we continue to enjoy the moderate Uſe of it. But be that as it will; from the Time of St. *Cyprian*, this new ſort of Continency began to be look'd upon as a great Virtue; tho' a thing altogether unknown to former Ages.—[hh] There is ſcarce any thing that St. *Cyprian* treats of, but in the declamatory Style; and he often expreſſes the moſt common Things in ſuch a figurative and affected manner; that, if the Reader be not very much upon his guard, he will be eaſily led to imagine, that every thing he ſays is of the utmoſt Importance. And I may add, that had not this been the true Bent and Caſt of his Genius, he could never have taken ſo much pleaſure in the reading of *Tertullian*; who every where makes this his conſtant Practice. --- [ii] Amongſt the Arguments he makes uſe of, to perſuade young Women to renounce the Vanities of [kk] Dreſs; he ſays, 'tis running counter to the Will of God, to make uſe of Paint, as alſo to black one's Hair; becauſe our Lord has ſaid: †† *Thou canſt not make one Hair white, or black*; and yet, adds *Cyprian*, ye attempt to ſurmount a Difficulty, which God has judg'd inſurmountable.” --- An Argument that either proves nothing; or elſe proves, that 'tis not lawful for us to trim our Hair, or Beards: for the whole Reaſoning of St. *Cyprian* turns on this Maxim[ll]: “*That every thing that grows naturally, is the Work of God*; *but whatever receives change, is the Work of the Devil.*” In his Notions too with reſpect to Martyrdom, he ſeems to come very little, if at all, ſhort of the falſe Ideas, Men had in thoſe days form'd to themſelves about that Matter. For he is careful to “comfort [mm] beforehand ſuch, as having confeſs'd *Jeſus Chriſt*, might perhaps come ſhort of the Honour of being Martyrs; becauſe it might poſſibly happen, that before their Turns came to ſuffer, the Perſecution might ceaſe. --- Which ſhews a Diſpoſition very different from the Sentiments of him, who, when juſt upon the Point of ſuffering the Pain of the Croſs, ‖ ſaid: *O my Father, if it be poſſible, let this Cup paſs from me.*” St. *Cyprian*, in his Tract *of the Uſefulneſs of Patience* ‡, commends *Abel* very much, for ſuffering himſelf to be murther'd by his Brother, without making any Reſiſtance; as it were on purpoſe to be a Prelude to the Conſtancy of the Martyrs: Whereby, as on the one hand, he gueſſes at a Circumſtance, of which there is not the leaſt Footſtep in the Hiſtory of *Geneſis*; ſo on the other hand, he utterly deſtroys both here, as well as in other Places, the natural Right, that all Men have to a juſt Self-defence. When [nn] he deſigns to rebuke thoſe who rebel againſt Biſhops, he makes uſe of an Argument, "Which either proves nothing at all; or elſe that we ought to pay a blind Obedience to all Biſhops, who are but duly elected according to the common Form." In his Anſwer [oo] to a Letter of *Florence Pupian*, an *African* Biſhop, [pp] "*He equals Biſhops to the Apoſtles*; *and maintains, that 'tis an inſupportable Piece of Pride, to pretend to judge of them*; *That* Pupian *in particular was an inſolent Fellow, to refuſe to acknowledge* Cyprian *for a Lawful Biſhop, until he ſhou'd be convinc'd thereof in his own Mind*; *because then it wou'd follow, that for the ſix Years that he had been a Biſhop, he had been uncapable of adminiſtring the Sacraments*; *or of giving Abſolution to thoſe he had abſolv'd*. Thus the Salvation of the People depended on the Validity of a Biſhop's Election; and the Validity of that Election depended on his Integrity.—A ſtrange Principle, that render'd the Salvation of Chriſtians ſo precarious and uncertain; and which annihilated and deſtroy'd the Effects of all the Virtue and Piety of the People; notwithſtanding which they were to be damn'd, if the Biſhop prov'd not to be a good Man; or to have been unduly elected."

[dd] *Du Pin, ubi ſupra*, p. 103, *Col.* 2‾.

[ee] *Idem, ibid.* p. 102, *Col.* 2_.

** *Abſolute præcipitur*, Malum malo non rependendum. *Par factum, par habet meritum. Quomodo id obſervabimus, ſi faſtiditi ante in faſtidio ultionis non erimus? quem autem honorem litabimus Domino Deo, ſi nobis arbitrium defenſionis arrogaverimus?* ---- Nolite judicare, *quum dicit*, ne judicemini, *nonne patientiam flagitat? Quis enim non judicabit alium, niſi qui patiens erit non defenſionis?* De Patientia, *p.* 165, *Ed. Rigalt.* and *p.* 144, *A_B-*, *Ed. Pamel.* cap. 10.-

[ff] *Matt.* xix, 12.

[gg] Life of St. *Cyprian*, by Mr. *Le Clerc. Bibl. Univ.* Tom. XII, *p.* 215_, 216, 217.

[hh] *Ibid.* p. 212_, 213.‾

[ii] *Ibid.* p. 232‾.

[kk] *De habitu virginum*, p. 99_, and 100,‾ *Edit. Oxon.*

†† *Matt.* v, 36.

[ll] *Opus Dei eſt, omne quod naſcitur; & Diaboli, quodcunque mutatur.* Ibid. p. 99.-

[mm] *Bibl. Univ. ubi ſupra*, p. 248,- 249‾. *ex Epiſt.* 10,- p. 22,- *Ed. Oxon.* See the reſt of Mr. *Le Clerc*'s Reflection upon this Matter, on to the end of *Page* 250.

‖ *Matt.* xxvi, 39.

‡ *Abel, originem martyrii & paſſionem juſti hominis initians primus & dedicans, adverſus fratrem parricidam non reſiſtit, nec reluctatur; ſed humilis & mitis patienter occiditur.* ——De bono Patientiæ, *p.* 214-. *Ed. Brem. & Oxon.*

LACTANTIUS maintains, that [qq] a truly good Man can neither bear Arms; nor have any Dealings or Traffick in Foreign Countries. He alſo abſolutely [rr] condemns the putting out Money to Intereſt; "and looks on it as a kind of Thievery.[ss]" He carries beyond all Bounds the Duty of Chriſtian Patience. And eſtabliſhes this Rule, that ⸸ one ought never to accuſe any Perſon whatever, where the Crime is capital; inſiſts too upon its being Homicide, and that without the Exception of ſo much as any one ſingle Caſe.

"THERE are but few Principles [tt] of Morality in the Works of St. *Athanaſius*; and thoſe you there meet with, (excepting what relates to the flying Perſecution, and the Epiſcopal Dignity; and to the Defence of Orthodoxy) are never handled in their full Extent." This is the Opinion of a Catholick Writer; who alſo owns, that *the Catechiſtical Diſcourſes* [uu] *of St.* Cyril *ſeem to be a Work compos'd in haſte, and without much Preparation.*

ST. BASIL, *ſurnam'd the* Great, *will have it*, [xx] *That whoever gives another a mortal Wound, whether he did it as Aggreſſor, or in his own Defence*; *is guilty of Murther*. He declares, [yy] *that it is better to ſeparate the Parties, who have committed Fornication, than to join them together in Matrimony*; *but however, if they will wed, he is not for hindring them*; *leſt a greater Evil happen*. "In that famous Letter to St. *Gregory*, where he eſtabliſhes the Rules of a Monaſtick Life; there is * one for regulating the outward Appearance of the Monks, which ſeems directly contrary to that of *Jeſus Chriſt* in the Goſpel; *Matt*. vi, 16, 17. For this Father ordains, † that *the Humility of the Anchoret be viſible in every part of his external Appearance*; *That he have a ſad and down-caſt Look, his Head uncomb'd, and his Cloaths naſty and ſlovenly*.—" In his little Tract, entitled, *How to read with Edification the* Greek *Authors*, I find two or three extravagant Maxims. He affirms, [1] that Chriſtians are forbidden ever to have any Law-Suits. He ſeems [2] to take ſtrictly in the literal Senſe, thoſe Proverbial Words of *Jeſus Chriſt*; || *Whoſoever ſhall ſmite thee on thy Right Cheek, turn to him the other alſo*: And it appears to him, that *Socrates* did ſomething very like, what is there preſcrib'd to us; when he quietly ſuffer'd himſelf to be ſoundly bang'd by an inſolent Fellow, who was enrag'd at him. He believes [3] it in no caſe lawful to ſwear; and gives us thereupon the Example of a certain *Pythagorean*; who choſe rather to pay Three hundred Talents, that is, about Four hundred and fifty Pounds; than to take an Oath, altho' he cou'd have done it with a ſafe Conſcience.

Gregory Nazianzene [zz] *is no very methodical Writer*.——*His Style is exceſſively figurative, not very correct, and even ſometimes hard and uncouth*.—— "He very much [aaa] exaggerates the Boldneſs of the *Arians* and *Macedonians*; who were then as numerous at leaſt as the Orthodox, and did preſume to aſſemble themſelves together, and form Churches; outragious Attempt! and that too, after the Determination of ſo well regulated a Council, [bbb] as had been held but juſt before!" *Gregory* too did not comprehend, how his *Holineſs* and his *Gravity* (for this was the Style in which they accoſted their Biſhops, and he was then addreſſing himſelf to *Nectarius*) cou'd tolerate the |||| *Apollinarian* Meetings.——"He conceiv'd, for

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[nn] *Bibl. Univ.* Tom. XII, *p.* 309. *ex Epiſt.* 59, p. 129. *Ed. Oxon.*

[oo] *Epiſt.* 66, p. 166, 167.

[pp] *Bibl. Univ. ubi ſupra*, p. 332, 333. See alſo what is ſaid *Page* 334.

[qq] *Nego ullo modo fieri poſſe, ut homini, qui quidem vere juſtus ſit, ejuſmodi caſus eveniat.* --- *Cur enim naviget, aut quid petat ex aliena terra, cui ſufficit ſua? cur autem belligeret, ac ſe alienis furoribus miſceat, in cujus animo pax cum hominibus perpetua verſetur?* Inſt. Divin. Lib. 5, cap. 17, Num. 11, 12-. Ed. Cellar. *Ita neque militare juſto licebit, &c.* Lib. 6, cap. 20, Num. 16, 17.

[rr] *Non accipiat uſuram, ut --- abſtineat ſe prorſus alieno.* Ibid. Lib. 6, cap. 18, Num. 7.

[ss] See what my Author ſays, *Lib.* 2, *Cap.* 5, *Sect.* 14.

⸸ *Neque vero accuſare quemquam* [*juſto licebit*] *crimine capitali, &c.* Lib. 6, cap. 20, Num. 16.

[tt] *Du Pin*'s Library of Eccleſiaſtical Authors, *Tom.* II, *p.* 54, *Col.* 2.

[uu] *Ibid.* 143, *Col.* 1-.

[xx] *Idem, ibid.* p. 179, *Col.* 1-. *Ex Epiſt.* 2, *ad* Amphiloch. *Canon* 43, *Tom.* II, *p.* 772, *B-. Oper. Baſil. Paris.* 1618.

[yy] Du Pin, *Canon* 26, *ibid. p.* 178, *Col.* 1-. *Baſil. Op.* Tom. II, *p.* 769, *D-. Ed. Paris.* 1618.

* *Bibl. Univ.* Tom. XXV, *p.* 412, 413, in the Extract of the third Tome of the *Eccleſiaſtical Hiſtory* of Mr. *Fleury.*

† *Oper. Baſil.* Tom. II, *p.* 786, *A-. Edit. Paris.* 1618.

[1] Οἷς τὸ μὴ δικάζεσθαι, νόμῳ προστεταγμένον ἐστί. Homil. de Legend. Græc. *Sect.* 7, *Edit.* Oxon. 1694. Oper. Baſil. *Tom.* I, *p.* 573, *C*, *Paris.* 1618.

[2] *Ibid. Sect.* 13. Oper. *Tom.* I, *p.* 577, *B*.

|| *Matt.* v, 39.

[3] Ἀκούσας, ἐμοὶ δοκεῖν, τοῦ προστάγματος, τὸν ὅρκον ἡμῖν ἀπαγορεύοντος. Ibid. & Op. *Tom.* I, *p.* 578.

[zz] See the Life of *Gregory Nazianzene*, by Mr. *Le Clerc*, *Bibl. Univ.* Tom. XVIII, *p.* 23-.

[aaa] *Ibid. p.* 114, 115, *ex Orat.* 46, Tom. I, *p.* 721, *A-, &c. Oper. Gregor.*

[bbb] That of *Conſtantinople*, held in 381.

|||| Antient Hereticks, whoſe Head was *Apollinaris* of *Laodicea*. They pretended that *Jeſus Chriſt* had not an humane Soul, but that the Word of God, or *Logos*, animated his Body. That the Fleſh of *Jeſus Chriſt* was not form'd out of the Holy Virgin, but that it came down from Heaven. They alſo reviv'd the Errour of the *Millennarians*, to which the Simplicity of *Papias*, a Diſciple of St. *John* the Evangeliſt, gave Birth. They were in the fourth Century.

“ what reaſon I know not; that to ſuffer thoſe
“ People to have their Aſſemblies, was to agree
“ with them, that theirs was the true Doctrine;
“ even truer than that of the Council; ſeeing that
“ both of them could not be true: as if granting a
“ Toleration to any one, was in fact an avowing
“ that we believe his Opinion to be true! In ſhort,
“ he exhorts *Nectarius* to remonſtrate to the Emperour, that all he had done in favour of the
“ Church, would ſignify juſt nothing; if the Hereticks were ſtill allow'd the Liberty of aſſembling. Thus the good St. *Gregory*, who was not
“ in the leaſt willing, while the *Arians* were the
“ ſtrongeſt, having the then Emperour on their
“ ſide; that the Orthodox ſhou'd attempt to do,
“ what they then cenſur'd in the *Arians*: was for
“ exhorting his Succeſſor to forget that good Leſſon.——And whereas † the Emperour *Julian*,
“ adding Inſult to Perſecution; was us'd, when
“ he ſtripp'd the Chriſtians of their Goods, by way
“ of raillery, to ſay; that what he did was in aid
“ of the Goſpel, which commanded 'em to deſpiſe all thoſe Things; ſo *Gregory*, being to anſwer this, amongſt other Things ſays, that *Julian*, acting in this manner, muſt needs have imagin'd, that the *Pagan* Gods were well pleas'd to
“ ſee innocent Men deſpoil'd of their Goods; and
“ conſequently that they approv'd of Injuſtice. This
“ Anſwer might have ſuffic'd: but he adds, that as
“ there are ſome things which *Jeſus Chriſt* has ſtrictly enjoin'd; ſo there were others, which he barely
“ propoſes to ſuch as ſhall be inclin'd to do them;
“ without obliging any Perſon whatever to an
“ indiſpenſible Performance. Such, according to
“ *Gregory*, is the Commandment to abandon the
“ Things of this Life:” Whereby 'tis plain, he ſuppoſes here a pretended Matter of Advice, to voluntarily renounce and abandon our Goods; and that without any other Motive, but our own Free-will and Pleaſure: whereas it is a real obligatory Command; but ſuch as then, and then only takes place, when the retaining our Goods is incompatible with our Duty; or becomes impracticable, without the Violation of ſome Precept of the Goſpel.

St. Ambrose [ccc] does ſo run himſelf beyond all Bounds in his Encomiums on Virginity and Celebacy; that he ſeems to make it his Buſineſs to cry down Marriage: and repreſent it as a Thing ſcarce reputable. He ſays plainly enough, [ddd] *That before the Law of* Moſes, *and that of the Goſpel*, *Adultery was not forbidden*. And looſe as he is upon this Article, he appears rigid enough on another; I mean, that of putting out Money to Intereſt: which he abſolutely condemns, in all Caſes whatever, * without Diſtinction. His Treatiſe of *Offices*, is a Book which he compos'd to teach Eccleſiaſticks their reſpective Duties. [eee] *And tho' the Name of* Miniſters *be omitted in the* Roman, *and following Editions*; *yet it is to be found in all the Manuſcripts: and 'tis plain by the Work itſelf, that St.* Ambroſe *compos'd it for the Uſe of his Clergy. But tho' he addreſſes himſelf particularly to them, yet he treats of the Duties of Chriſtians in general; which he lays in a more particular manner upon the Clergy.* It appears both by the Title, and by the Manner in which he treats his Subject, that his Deſign was to imitate the *Offices* of *Cicero*. But, after all that a certain ‖ Lutheran Divine, who publiſh'd this Work in *Wirtemburgh* in 1698, with ſome Diſſertations of his own compoſing, has ſaid; if the particular Principles of the Goſpel be but excepted, which St. *Ambroſe* has inſerted in this Work of his; with the Examples and Paſſages of Holy Scripture, which he perpetually quotes, tho' for the moſt part ill enough apply'd; I ſhall not ſtick to affirm, that the Copy comes infinitely ſhort of the Original; both for Purity and Eaſineſs of Style, the Oeconomy of the Whole, and the Diſpoſition of Particulars: as well as for Solidity of Senſe, and Juſtneſs of Reaſoning. For inſtance, ſee here the Contents of his firſt Book. After ſome Prefatory Diſcourſe upon the Queſtion, when, and in what manner, it is proper either to ſpeak, or be ſilent; he, at *Chap.* viii, enters upon his Subject-Matter with ſome Grammatical Remarks; which are not very [fff] well grounded. In the *Tenth Chapter* he treats of *Decency*; the chief Duty whereof he makes to conſiſt in *The Art of Governing the Tongue*. In the *Eleventh Chapter* he divides all *Duties* in general into two ſorts: the *Mean*; and the *Perfect*. Amongſt the latter, he ranks the Love of our Enemies; Prayers for thoſe who calumniate, or in any other manner injure us; Works of Mercy and Compaſſion. The xii*th*, and following *Chapters*, on to the xvii*th*, run wholly upon the Subject of a Providence; which he endeavours to eſtabliſh and defend in the beſt manner he can; both againſt the Murmurs of thoſe, who are in this Life expos'd to great Afflictions; and againſt the Objections of Libertines and Atheiſts. In the xviii*th*, and following *Chapters*, he treats of the Duties of Youth. Having at the end of the xxiv*th Chapter*, ſpoken occaſionally of the four Cardinal Virtues, *viz. Prudence*, *Juſtice*, *Fortitude*, and *Temperance*; he in the xxv*th* begins to treat of them; but in a manner ſuperficial enough; where he himſelf taking notice of the want of Order in his Diſcourſe, endeavours to excuſe, or rather juſtify it in theſe Words: ‖‖ *Some will perhaps ſay, that, becauſe from theſe four Virtues ſpring all the ſeveral ſorts of* Duties; *we ought therefore to have begun with them firſt. But this wou'd have been conforming myſelf to the Rules of Art; according to which Duty ought to have been firſt defin'd; and afterwards divided into its ſeveral kinds: Now we purpoſely avoid ſubjecting ourſelves to theſe Rules: It is enough for us to propoſe Examples drawn from the Conduct of our Anceſtors, which are neither obſcure or difficult*

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† *Bibl. Univ. ubi ſuprà*, p. 45-, 46.

[ccc] *De Inſtitutione virginum, & paſſim alibi.* See *Dall. de uſu patrum*, p. 272-.

[ddd] *Conſideremus primum, quia Abraham ante legem Moyſi, & ante Evangelium fuit, cum nondum interdictum adulterium videretur. Pœna criminis ex tempore legis eſt, &c.* Lib. 1, De Patriarch. Abrah. cap. 4. *See* Dall. de uſu Patr. *ubi ſuprà*, p. 271-, 272-, *and Mr.* Bayle's Dict. *Tom.* 3, *p.* 2670, *in the Notes*, *Col.* 1-.

* *De Tobia*, cap 3. & 15. *See the Tract of Mr.* Noodt, De Uſuris & Fænore, lib. 1, cap. 4, & cap. 10, p. 64, *& ſeq. As alſo Mr.* Du Pin, *Tom.* II, *p.* 256, *Col.* 1-.

[eee] Du Pin, *Tom.* II, *p.* 257-, 258-.

‖ Mich. Fortſchius, *Profeſſor at* Tubingen.

[fff] *Mr.* Du Pin *owns it*, ubi ſuprà, *p.* 258, *Col.* 2-.

‖‖ *Hæc forſitan aliquis dicat primo loco poni oportuiſſe, quoniam ab his quatuor virtutibus naſcuntur officiorum genera. Sed hoc artis eſt, ut primo officium definiatur, poſtea certa in genera dividatur. Nos autem artem fugimus, exempla majorum proponimus: quæ neque obſcuritatem adferunt ad intelligendum; neque ad tractandum verſutias.* Lib. 1, cap. 25, init.

to comprehend; and require not the Niceties of a methodical Writer. In the xxviii*th Chapter*, he without all reaſon attempts to ſhew, the Falſity of two of the Functions, which *Cicero* aſcribes to Juſtice; nor is this the only Place, where he unjuſtly cenſures the Heathen Philoſophers; by either miſtaking their Meaning; or undertaking to confute Things moſt apparently true. About the end of the firſt Book, he returns to the Clergy; whoſe principal Virtues he there gives a Deſcription of: and then concludes with a Diſcourſe, of the inviolable Fidelity requir'd, in the caſe of Things depoſited in truſt. Nor does he come to treat of Happineſs, till the beginning of the ſecond Book. The ſame want of Order and Accuracy reigns throughout the whole Work. He there maintains, *That*[ggg] *a Chriſtian ought not to engage or fight the Robber who attacks him; and lays it down for a General Rule:* That it can never be lawful to preſerve one's own Life at the Expence of another's. He lays down this General Maxim alſo; *That we cannot lawfully do* [*] *a Thing, which we do not find in expreſs Terms permitted and authoriz'd by Scripture:* And upon this Principle he abſolutely forbids the Clergy all ſort of Rallery. It ought not to be wonder'd at, that he condemns (*Book* I, *Chap.* 50,) ſecond Marriages: 'tis but what had been done by many before him, as we have already ſeen.

St. *Chryſoſtome*, with the reſt of the Fathers, runs into Notions exceſſively rigid on the Subject of Uſury. This ſame Doctor, ſpeaking of the Expedient, that *Abraham* made uſe of, the [†] firſt[hhh] time, for fear of being put to Death, in caſe he had been known to be *Sarah*'s Husband; ſticks not thus to addreſs himſelf to his Audience: "*You*[iii] *know, you well know, that nothing is more inſupportable to a Husband, than to ſee his Wife but ſuſpected of having been in the Power of another Man; and* [kkk] *yet this juſt and good Man, you ſee here, employs his utmoſt Efforts, that the very Act of Adultery may be conſummated.*——Thereupon, he beſtows very great Encomiums on his Courage and Prudence.——Then he excuſes him for having conſented to the Adultery of his Wife, upon this Conſideration; that Death, not being as yet deveſted of his Tyranny over Mankind, could not but be very formidable at that time.——After this Encomium on the Husband, he proceeds to the Commendation of the Wife; and ſays, that ſhe very courageouſly accepted the Propoſal; and that ſhe did all that was requiſite on her part, to make the Plot of the [lll] Play ſucceed. Whereupon, he exhorts all Wives to follow her Example; and then emphatically cries out: [‡] *Who is he that can forbear admiring this wonderful Readineſs to obey? Who can ever ſufficiently celebrate the Praiſes of* Sarah, *who after ſo much Continency, and at her Years, was willing to expoſe herſelf to* [mmm] *Adultery; and deliver up her Body to be enjoy'd by* Barbarians, *that ſhe might ſave the Life of her Husband?*—— Nor is the Elogy, St. *Ambroſe* beſtows on the [nnn] Charity of *Sarah* on this Occaſion, leſs remarkable. St. *Auſtin* too, reaſoning upon another Inſtance of the ſame Nature, [ooo] ſeems to have been under the like Illuſion. Is it not a very ſtrange Thing, that ſuch bright Ornaments of the Church as theſe, with all their Virtue and Zeal, ſhould be ignorant; That it is not lawful either to ſave one's own, or another's Life, by any any Action that is criminal?

"St. *Jerome*[ppp] *every where inveighs* againſt Matrimony in general, and more eſpecially againſt ſecond Marriages; and his Invectives are ſo bitter and violent, that notwithſtanding all the Savings and Softnings he has thrown in, quite thro' his Epiſtle to *Pammachius*, wrote for that Purpoſe; one cannot but diſcover, in every Thing he ſays [qqq] on that Subject, an entire Conformity with the Opinion of *Tertullian:* which has been condemn'd by the Church, as injurious to the Honour of Marriage; and contrary to Holy Writ. [rrr] He condemns all Oaths [sss] without Diſtinction. He forbids [ttt] Chriſtians to pay Tribute to Infidel Princes. He adviſes [uuu] and approves of the Action of thoſe, who murder themſelves, for fear of having their Chaſtity violated. He often talks of Virginity, and the monaſtick State, in ſuch a manner, as to make one almoſt believe it abſolutely neceſſary to Salvation. Labours, Faſtings, Auſterities, and other Mortifications, with Solitude, and Pilgrimages, are the Subject-Matter of almoſt all his Counſels, and Exhortations." He [xxx] plainly enough gives us to underſtand, that [yyy] *Jeſus Chriſt* has aboliſh'd the Permiſſion of eating the Fleſh of Animals; in the ſame manner as he aboliſh'd Divorce and Circumciſion. Every body knows, with how much Fury, and with how little Honeſty he inveigh'd againſt *Vigilantius*; who had wrote againſt the Worſhip, which at that time began to be paid to the Reliques of Saints and Martyrs; as alſo againſt divers other Practices, the dangerous Conſequences whereof, proceſs of Time has ſince but too plainly ſhewn us. The little Tract of St. *Jerome*'s againſt this Presbyter is ſtuff'd quite full of groſs Abuſes, and falſe Reaſonings[zzz]; contriv'd to raiſe popular Odium againſt his Adverſary, whom he wanted good Arguments to confute.

[ggg] Du Pin, *p.* 262, *Col.* 1-. See the Place: *Tamen non videtur, quod vir Chriſtianus, & juſtus, & ſapiens, quærere ſibi vitam aliena morte debeat: utpote qui, etiam ſi in latronem armatum incidat, ferientem referire non poſſit; ne, dum ſalutem defendit, pietatem contaminet.* Lib. 3, cap. 4.

[*] *Lib.* 1, *cap.* 23. See what I have ſaid thereupon in my Tract of Play, *Lib.* 1, *Chap.* 3, *Sect.* 3.

[†] See Mr. *Noodt*, *De Uſuris & Fœnore*, lib. 1, cap. 4, & 6.

[hhh] *Gen.* xii, 11, 12. N. B. *Barbeyrac* ſays the ſecond, by miſtake.

[iii] I make uſe here of the Words of Mr. *Bayle*, in his Dictionary, *Article* Abimelech, *Note* (*A*).

[kkk] Ὁ μὲν τοι δίκαιος, καὶ σπουδάζει καὶ πάντα ποιεῖ, ὥστε εἰς ἔργον τὴν μοιχείαν ἐκβῆναι. Hom. 33, in Geneſin. Oper. *Tom.* I, *p.* 258, *Edit.* Eton.

[lll] Πάντα ποιεῖ, ὥστε τὸ δρᾶμα λαβεῖν, ibid. Chryſoſt. *Tom.* I, *p.* 260, lin. 5, Edit. Eton. *Vid.* p. 258, lin. 35; & p. 259, lin, 12.

[‡] Ibid. p. 260, lin. 28.

[mmm] Καὶ εἰς μοιχείαν ἑαυτὴν ἐξέδωκε, καὶ συνουσίας ἠνείχετο βαρβαρικῆς. Ibid. p. 260, lin. 30.

[nnn] *De Abraham*, Lib. 1, cap. 2.

[ooo] See the Article of *Acindynus Septimius*, in *Bayle*'s *Dictionary*, and Notes (*A*), (*B*), (*C*).

[ppp] Theſe are the Terms of *Daillé*, *De Uſu Patrum*, p. 276.

[qqq] *Epiſt. ad Pammach. Hier. Op.* Tom. II, p. 101, *A*-, & *d*. Ed. Baſil, & *alibi paſſim.*

[rrr] *Du Pin*, Tom. III, *p.* 136, *Col.* 1-, 2.

[sss] *Comm. on* Matth. *Chap.* v, 34, *and Zachar.* c. 8, *Oper.* Tom. VI, *p.* 313, *B*.

[ttt] *On* Matth. *Chap.* xvii, *ver.* 25.

[uuu] *Comm. on* Jonah, *Chap.* i, *ver.* 12, Tom. VI, *p.* 150, *D*-, *Oper. Hieron.*

[xxx] *Dall. de uſu Patrum*, p. 277.

[yyy] *Lib.* 1, *adv. Jovin.* Tom. II, *p.* 30. This Paſſage is cited in the *Canon Law*, Diſt. 35, Canon 1.

St. *Auſtin*, endeavouring to make an [1] Apology for the Complaiſance, which *Abraham* ſhew'd his Wife, on account of *Hagar*; pretends, that the Wife can convey to another Woman, the Property which ſhe has in the Body of her Husband; and that the Husband alſo can transfer to another Man, the Power which he has over the Body of his Wife: and, what is ſtill more ſurpriſing, he founds this Paradox on a Paſſage of St. *Paul*,[2] the Meaning of which he for that purpoſe moſt wretchedly miſtakes. This Father is ſo bold as to maintain, that every Thing by Divine Right belongs to the Juſt, or Faithful[3]; and that Unbelievers have no right to poſſeſs any thing: abominable Principle, that entirely deſtroys at once all humane Society! but behold another of 'em, every whit as deteſtable; and which alone[4] is enough to caſt an *eternal Blemiſh on the Memory* of the Biſhop of *Hippo*: 'tis this, *that, after having declar'd it as his Opinion, that Lenity and Charity ought to be the Meaſure of our Conduct towards Hereticks; he became ſo heated with the Conteſts he had with the* Donatiſts, *as to change at once from white to black; and openly maintain, that Hereticks ought to be perſecuted, and by Force compell'd to embrace the Orthodox Faith; or elſe to be utterly deſtroy'd and extirpated: which certainly is, as a famous Miniſter amongſt the Reform'd obſerves, a moſt terrible and inhumane Opinion.* There are two of this [5] Father's Epiſtles, that any one may read in *French*; which were made uſe of to juſtify the laſt Perſecution in *France*: ſo that St. *Auſtin* may juſtly be ſaid to be, in a manner, the Grand Patriarch of Chriſtian Perſecutors. This Inſtance of Perſecution ought to be well taken Notice of; for it will be found not to confine itſelf to the Biſhop of *Hippo*: and it does alone afford us a moſt manifeſt Proof of the groſs manner, in which the Chriſtian Doctors have neglected, or rather disfigur'd and corrupted Morality. If ever there was a Poſition contrary to all the Dictates of right Reaſon, and natural Equity; to Charity, good Policy, and the Spirit of the Goſpel; 'tis, without doubt, this deteſtable Doctrine of Compulſion, and Perſecution for the ſake of Religion. And yet, ever ſince the Church began to enjoy any Quiet or Repoſe, this has been the common Opinion; which accordingly has been, for the moſt part, all along actually put in Practice, [6] by the ſtronger Party againſt the weaker. The *Codes* are full of Penal Laws againſt all Sects, but the Predominant; [7] *and they are the Councils, Biſhops, and moſt eminent Doctors, who have ever been the Sollicitors of theſe Laws; and have honour'd with large Encomiums, Acclamations, Benedictions, and with the moſt humble Thanks and Acknowledgments; thoſe Sovereigns, who have either made ſuch Laws; or vigorouſly put them in execution.*

St. *Leo*, in the Opinion of Mr. *Du Pin*,[8] *is not very fertile in Points of Morality: handles 'em but drily; and in a manner which diverts, rather than affects or moves his Readers.*

In the Time of *Theodoſius the Younger*, the Biſhop of *Suſa*, the Royal City of *Perſia*, whoſe Name was *Abdas*, (or rather *Abdaa*);[9] took the Liberty to burn one of the Temples where they worſhip'd Fire[10]. The King, ('twas *Iſdegerde*) inform'd thereof by the *Magi*, ſent for *Abdaa*; and after a very gentle Reprimand, order'd him to get the Temple, he had deſtroy'd, rebuilt. But the Biſhop could not be brought to do any thing in the Matter; tho' the King threaten'd, by way of Repriſals, to uſe the Churches of the Chriſtians in the ſame manner; which he accordingly executed afterwards, on the obſtinate Refuſal of *Abdaa*: who choſe rather to loſe his Life, and expoſe the Chriſtians to a furious Perſecution, than to obey an Order every way juſt and reaſonable. *Theodoret*, who reports this Story, does * not deny, but that the Zeal, which tranſported *Abdad* to burn the Temple of the *Perſians*, was unſeaſonable and ill tim'd; but he maintains, that his refuſal to rebuild ſuch another Temple, ſhew'd a Conſtancy worthy of all Admiration; and of the Reward of the *Perſian* Empire: for, adds he, it is as great an Impiety to build a Temple to *Fire*, as to adore it. But [11] "there is no one Perſon whatever, whether Metropolitan, or Patriarch, who can diſpenſe with this Law of natural Religion; *That every one is bound to make amends by Reſtitution, or other ways, for the Damage he has done to his Neighbour*. Now *Abdas* here, a private Man, and Subject of the King of *Perſia*, had deſtroy'd what was the Goods and Property of another; and in a Caſe, where the Thing deſtroy'd had the extraordinary Privilege of belonging to the Eſtabliſh'd or Predominant Religion. —— And to ſay, that the Temple which he ſhould have rebuilt, wou'd have been apply'd to the Service of Idolatry, was but a lame Excuſe; for he himſelf wou'd not have employ'd it to that Purpoſe: neither was he to have been anſwerable for the ill Uſe, which they, to whom it belong'd, ſhould have made of it. Is it a valid Reaſon, for the not returning a Purſe one has ſtolen, to ſay, that the Perſon, from whom he took it, is a Man that employs his Money in Debauchery? But beſides all this, what Proportion was there betwixt the rebuilding one Temple, without which the *Perſians* wou'd have remain'd as great Idolators as before; and the Deſtruction of a great many Chriſtian Churches? —— In ſhort, was there any thing more capable of rendring the Chriſtian Religion odious to all

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[zzz] See the *Diſſert.* of Mr. *Le Clerc*, entitled, *De Argumento Theolog. ab invidia ducto*, which is juſt after his *Latin Logick*, *Tom.* I, *Op. Philoſoph.* p. 250, &c.

[1] *De Civit. Dei*, Lib. 16, Cap. 25.

[2] 1 *Cor.* vii, 4.

[3] *Epiſt.* 153, *Tom.* II, *Ed. Benedict.* & *Col.* 250, *D*, *Ep.* 54, *Ed. Baſil.* See *Le Comm. Philoſoph. ſur, Contrain-les d'entrer*, Part III, p. 130, & *ſuiv.*

[4] *John Claud. Epiſt.* how to read the Fathers, &c. at the end of the firſt Edition of his *Ouverture de l'Ep. aux Rom.* p. 129.

[5] See *Part* III, of the *Philoſoph. Comment.* and *Vol.* III, of *Ars Critica* of Mr. *Le Clerc*, p. 353, *Edit.* 2.

[6] See *Biblioth. Univ.* Tom. XXIII, p. 366, & *ſeq.* and Mr. *Bernard*, in his News of *May* 1699, *p.* 574, 575; and *April* 1702, p. 409. And the *Comm. Philoſoph.* in the *Supplement*, cap. 29, 30, 31.

[7] *Comm. Philoſoph. ubi ſuprà*, p. 355, 356. See the Book of *P. Thomaſſin*, *De l'unitè de l'Egliſe.*

[8] *Tom.* IV, *p.* 164, *Col.* 1.

[9] See *Bibl. Choiſie de Mr.* Le Clerc, *Tom.* VIII, *p.* 321, & *ſeq.*

[10] *Theodoret. Hiſt. Eccleſ.* Lib. 5, cap. 39.

* *Ibid. p.* 245, *B*, *C*.

[11] Mr. *Bayle*, in the Article of *Abdas*, *Rem.* (*C*), *p.* 8, in the ſecond Edition of his Dictionary.

“ the World; than to ſee Chriſtians, after they “ had work'd themſelves in, on the Foot of People who deſir'd nothing elſe, but liberty to “ propoſe their Doctrine; have the Confidence to “ demoliſh the Temples of the National Religion: “ and then refuſe to rebuild them, tho' enjoin'd “ ſo to do by their Lawful Sovereign?” But theſe Biſhops went on Principles equally contrary both to the Goſpel, and to the Law of Nature. In which however, they did but imitate the * Maxims and Conduct of St. *Ambroſe* on a like Occaſion.

Gregory the Great, according to Mr. *Du Pin*[12] *is prolix, and ſometimes too tedious in his Explications of Morality; and too ſubtile in his Allegories.* ——His *Morals*, or Commentaries on *Job*, *are one of the greateſt Repertories*[13] *of Morality extant. But he ſeldom or never*[14] *inſiſts on the Explication of the Letter: They are only certain Allegories and moral Reflections, which he accommodates to the Text of* Job; *the greateſt Part whereof are full as applicable to any other Part of Scripture.*

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* See the Fact related with its Circumſtances, and neceſſary Reflections, in the *Critical Diſſertation on the Hiſtory of* Calvin, by *Maimbourg*, Tom. II, *Lett.* 30, *p.* 275, *&c.*

[12] *Tom.* V, of his *Biblioth.* p. 144, *Col.* 2.

[13] *Ibid.* p. 134, *Col.* 1.

[14] *Ibid.* p. 133, *Col.* 2.

SECT. X.

WHAT has been ſaid, is, I think, more than enough to demonſtrate clearly; that the moſt celebrated Doctors of the Church, for the ſix firſt Centuries, were but bad Maſters, and very poor Guides in Matters of Morality. As I ſaw reaſon for this Aſſertion ſix Years ago, when this Prefatory Diſcourſe came firſt abroad; ſo now, in this new Edition, after a ſecond Review, I find no Cauſe to alter my Opinion. Concern for Truth; which muſt needs over-rule every other Conſideration, but that of raiſing Obſtacles to its Eſtabliſhment; the Readineſs that moſt People ſhew to be miſled by great Names, and Prejudice in favour of Antiquity, more eſpecially Eccleſiaſtical Antiquity; the inexpreſſible Injury, that ſuch a blind Reſpect does to the Knowledge of true Religion, and ſound Morality; the Honour, due to the Age we live in, which has, above all others, ſhaken off the Yoke of ill grounded Authority; the Candor and Sincerity we profeſs: do all require, and oblige us frankly to ſpeak of Things, as they really are; and to judge of theſe Doctors, who have been dead ſo many Ages, with the ſame Diſintereſtedneſs and Freedom, as we wou'd of an Author of the laſt Age; whoſe Reputation we are under no concern about. As good Proteſtants, we may and ought boldly thus to act; without diſquieting ourſelves with what thoſe Men may ſay or think, who ſhall eſteem it their Concern, to declare themſelves jealous of the Honour of the Fathers; and ſuch profound Admirers of all their Productions, as to ſacrifice to 'em even the moſt common Rules of Reaſon and good Senſe: which they themſelves wou'd be very loth to have diſpens'd with on other Occaſions. So unhappy are they as to be reduc'd to this wretched Neceſſity, of judging differently of the ſame Things, according as they happen to proceed either from the Pen of a Profane, or an Eccleſiaſtical; of an Antient, or a Modern Author. Nay, we doubt not, but there are many among 'em, who do themſelves ſome Violence on this Account; and tho' they talk like others, yet do not, from the bottom of their Hearts, think ſo advantageouſly, as one would be apt to imagine, of the Perſonal Qualities and Writings, of even the moſt renown'd of the antient Doctors of the Church. As it would be inhumane to inſult Men, who live thus under perpetual Conſtraint; ſo we pity them with all our Heart: provided they do not voluntarily ſeek after, and wantonly embrace all Opportunities, of thus betraying their own Conſciences. But, it is very hard to keep one's Temper, when one ſees Men, who have here full Liberty to think and ſpeak as they pleaſe; and whoſe Grand Principle is, or ought to be, that the Holy Scripture is the only Rule of our Faith and Manners: when one ſees ſuch Men, I ſay, zealouſly eſpouſing the Cauſe of the Fathers; and, not content with being themſelves furiouſly engag'd in Maintenance of this viſible Relique of Popery; endeavouring alſo, at any rate, to impoſe the ſame Servitude on others; not being able to bear, that any one ſhou'd declare his Opinion of the Fathers, to be any thing ſhort of theirs; and bitterly inveighing againſt the living, in order to vindicate the Dead; to whoſe Memory no other Injury is offer'd, but the not paying a blind Veneration to their miſtaken Notions; and wrong Conduct.

Certainly Proteſtants, whether ſuch by Education or Converſion; who venture to declare themſelves ſuch mighty Zealots, and idolizing Partizans for Eccleſiaſtical Antiquity; were far from conſidering well of the Matter, when they engag'd in the Maintenance of ſo bad a Cauſe: wou'd they but reflect a little, they muſt ſoon ſee, that 'tis what they can never acquit themſelves of with Honour. This is evident enough by the Streights which they chuſe to be reduced to, rather than quit their Hold; being forc'd perpetually to change the State of the Queſtion; and contradict themſelves every Moment: They dare not in ſo many Words ſay, that the Fathers were infallible, or that they have not ſome time fallen into great Errors; but yet ſtill arguing as if they both believ'd it themſelves, and expected that others ſhou'd do ſo too, they almoſt perpetually build upon that tacit Suppoſition; ſo what they deny in one place, they grant in another; and even ſometimes more than is requir'd. In a word, they manage ſo as to make one believe, that they had, by continually reading, and admiring the Fathers, contracted the ſame Turn of Thought with them, and entirely form'd themſelves upon their Model. By which they themſelves furniſh us with a new Argument, a *viva voce* Evidence, for the Judgment I have given of theſe antient Authors; the Reading whereof does ſtill continue to produce ſuch viſibly ill Effects; ſo that by endeavouring to reinſtate them in that too high Eſteem, in which Ignorance and

Superſtition had plac'd them; they in the main diſcredit 'em more, than thoſe, who think they may be juſtly cenſur'd on many Accounts; cou'd or wou'd do.

But this is not all; they imitate thoſe Paſſions alſo; which are but too plainly viſible, both in the Writings and Lives of the Fathers; as far as they are tranſmitted to us. To come ſhort of their Maſters in nothing; they do to Declamation, falſe Reaſoning, apparent Ignorance in Criticiſm and Morality, and Contempt of Order and Method; add angry Tranſport, and Invective. They copy after their Originals ſo well, that they are themſelves become great Models: Ill Language is ſo fluent and natural, that we muſt do 'em the Juſtice to own, that in this Particular they perform like Men of great Genius and Ability. Mortify'd at the Sight of a conſiderable Number of Inſtances of falſe Reaſonings, and groſs Errours in the Writings of the Fathers, collected by ſeveral Authors, and that too without much Search or Pains; they, inſtead of applying themſelves, calmly, and by ſolid Reaſons to make it appear, that the Paſſages cited contain nothing but what is agreeable to Truth and good Senſe; which wou'd be a ſolid fair way of defending theſe antient Doctors, they ſo much eſpouſe: inſtead of this, I ſay, they think it enough to cry out with diſdain; *That it is now-a-days the Faſhion to attack the Fathers*; *that Ignorance thinks to make itſelf conſiderable this way*; *That thoſe mighty Antagoniſts of the Fathers, by their Performances, ſhew themſelves to be Men of but little Judgment and Knowledge.* By which They indeed diſcover themſelves to have but a very ſmall Portion of the former; becauſe in this Caſe, there is no manner of Occaſion for that vaſt Erudition, which they ſo much pretend to. There is no Neceſſity of knowing all the Languages both antient and modern; or having read all the Fathers quite through: There is ſcarce any thing more requir'd, to judge of their Merit, than to dip into the Fathers you have a mind to examine; whether it be the Originals, or any of the vaſt Number of Tranſlations, which have been publiſh'd. There are even entire Works, which are nothing but a perpetual Contexture of Impertinencies heap'd upon one another; ſuch, for inſtance, is the Commentary of St. *Auſtin*[*] on the *Pſalms*. Beſides, there is in Collections of Sermons, in Books of Devotion, in Commentaries on the Scripture publiſh'd in the Vulgar Tongues; an infinite Number of large Fragments and Paſſages out of the Fathers; which their moſt zealous Admirers diſplay and ſet forth, as the very Flower and Choice of thoſe fine and judicious Thoughts, they have remark'd in the reading of their Works. So that any one now may be ſufficiently qualify'd to judge, whether the Fathers do juſtly merit all that Encomium and Zeal, with which they have been extoll'd and defended: a reaſonable Share of common Reaſon and good Senſe is here ſufficient; and perhaps the Charge of Ignorance was never more impertinent, or worſe apply'd than in the preſent Caſe; to be ſure Men, who bring ſo looſe and rude an Accuſation as this; muſt needs think themſelves the ſole Proprietors of all the good Senſe, as well as Learning in the World: It ſhould ſeem they are not willing to allow the leaſt Spark of either to any, who do not run into all their Notions, or rather Prejudices, Paſſions, and Cabals. And what may very well lead one to imagine ſo, is, to ſee ſome of 'em ſo extremely civil and modeſt, as to publickly brand with the Name of downright *Impudence*, the Liberty we take of thinking and ſpeaking otherwiſe, than they and the Fathers do; on Matters too, where we do no more than follow the common Opinions of Proteſtants; as upon the Lawfulneſs of putting out Money to Intereſt: to ſee 'em, I ſay, look down from the Heights of their Self-Sufficiency, with an Air of Pity, on all ſuch, as ſhall preſume to declare, tho' in never ſo modeſt Terms; that they have not ſo high an Opinion of St. *Auſtin*, and St. *Jerome*, as themſelves have; as People who, without the leaſt Tincture of Learning, ſet up for a Character, by running down almoſt all the celebrated Authors of Antiquity: and then to ſee 'em, at the ſame time, tacitly and at the rebound take to themſelves the Character of great Authors; which the confus'd haſty reading of a great Number of Books, ſome good, ſome bad, muſt needs have juſtly entitled 'em to; and which we ſhall never be inclin'd to envy 'em.

But, what is the very Height of Blindneſs and Paſſion; our zealous Defenders of the Fathers, not content with the Charge of Ignorance, proceed to call in queſtion, either directly or indirectly, the Probity and Religion of thoſe; who freely ſet forth both the Good and the Bad in the Lives and Writings of the Eccleſiaſticks and Divines of the firſt Ages: and who believe that they were no more infallible, either in their Morals or their Doctrines, than the Eccleſiaſticks and Divines of the preſent Age. One of 'em ſcruples not roundly to affirm; *That a Man could not fail of having a Veneration for the Fathers, if he had any true Zeal for Chriſtianity:* Another of 'em, the very Eccho of the former, ſays; *That Contempt of the Fathers, if carry'd to exceſs*, (thus they term the Liberty of ſpeaking one's Sentiments of the Fathers without concern for their Reputation, other than what Truth and Equity permit) *that this Contempt, I ſay, redounds upon the Chriſtian Religion. If the Chriſtian Religion, adds he, has not had for its Propagators, Men of true Piety and Knowledge; what Opinion muſt Mankind have of it?* I confeſs, were Reaſons, which have no other Tendency, but to render the Opinion and Perſon of an Adverſary odious, good Arguments; that this wou'd be one of the beſt that ever was invented. All that cou'd be ſaid, is, that it might eaſily be retorted: The Fathers, ſay you, whom you regard as Propagators of the Chriſtian Religion, muſt neceſſarily have been Men of true Piety and Knowledge. But it has been maintain'd and prov'd to you, by a great Number of Inſtances, that the Fathers have not only fallen into very groſs Errours, and been moſt profoundly ignorant of many Things, which they ought to have known; but further, that moſt of 'em have, more or leſs, ſuffer'd themſelves to be led by Paſſion; ſo that their Conduct has been found frequently to be ſuch, as is neither regular or juſtifiable. You make no anſwer to all this, you do not attempt to refute the Examples and Facts which are produc'd to you, you fairly own the Charge: You do therefore by Implication confeſs, that the Chriſtian Religion is of no value: You are at bottom ſome diſguis'd Atheiſt or Deiſt, who, under the falſe Appearance of maintaining the Intereſt of Chriſtianity, by vindicating the Honour of thoſe, whom you regard as the *Propagators* thereof; are endeavouring ſecretly to undermine and deſtroy Religion itſelf. In vain do you play the Zealot for Orthodoxy, or the Opinions in faſhion; which you defend by nothing but odious Parallels, and malign Reflections. In vain do you ſearch into the hidden Secrets of Providence, employ all your Dexterity and Parts in the Explication of 'em; and flatter yourſelf to have found out new Solutions, which clear thoſe great Difficulties, which have at all times been objected, on account of the Origin of Evil: All this will never hinder one, if he be allow'd to reaſon in the manner you do againſt thoſe, whoſe eſteem of the Fathers comes not up to your Liking; from inferring from this ſame Reaſoning of yours, ſome ill Deſign on your Part, againſt that very Religion, you pretend to engage in this Diſpute. *Heic aliquis latet Error: Equo ne Credite Teucri.* I leave it to the Judicious and Diſintereſted to judge, whether the Conſequence is not at leaſt as well drawn on the one ſide, as on the other. Tho' at the ſame time we are far from intending to make uſe of any ſuch Weapons: We freely leave 'em to ſuch, as have no better to make uſe of; having Charity enough to believe, that this Proceeding of theirs is meer want of Prudence: whilſt blinded with Prejudice and Paſſion, they perceive not the Advantage they give both againſt themſelves, and againſt the Chriſtian Religion, by what appear'd to them a thundering deciſive Argument; proper both to ſave themſelves the Trouble of examining into the bottom of Things; and to throw Duſt in the Eyes of the People. But to undeceive 'em, if poſſible; at leaſt to prevent the Honeſt and Well-meaning, or ſuch as will not take the Pains to inform themſelves, how to diſtinguiſh between good and bad Reaſonings; from being impos'd upon by this; let us ſtop a Moment or two, to make its Weakneſs more fully appear.

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[*] See the Opinion of Mr. *Du Pin*, in his *Biblioth.* of *Eccleſiaſtical Authors*, &c. *Tom.* III, *p.* 218, *Col.* 2.

Firſt then I obſerve, that the Apoſtles alone can properly be call'd *The Propagators of the Chriſtian Religion*; whom the Holy Spirit did inveſt with the Gift of working Miracles; [a] and *guide into all Truth*, concerning *Jeſus Chriſt* and his Doctrine. Thoſe holy Men did [b] *make Diſciples among all Nations*, according to the Order they had receiv'd from their Maſter. St. *Paul*, who *ſtrove* [c] *not to preach the Goſpel but in thoſe Places, where* Jeſus Chriſt *had never been nam'd, leſt he ſhould build on another Man's Foundation*; declares expreſly, *That* [d] *he had fully preach'd the Goſpel of* Chriſt, *from* Jeruſalem, *and round about unto* Illyricum; [e] that is to ſay, throughout a great Part of the *Roman* Empire. Tradition has preſerv'd [f] in *India*, and among other barbarous Nations, the Remembrance of the Travels and Miracles of St. *Thomas*, St. *Andrew*, and other Apoſtles. Thus did the immediate Diſciples of our Saviour, fill'd with his Spirit and arm'd with his Power, plant almoſt thro' the whole World the Chriſtian Faith; it was they who laid the unſhaken Foundations of that great Work, either by themſelves in Perſon; or thro' the Means of ſome Apoſtolical Men, to whom they had communicated the Gift of working Miracles: And the ordinary Miniſters of the Goſpel, who ſucceeded them, but without any extraordinary Power, and with Authority infinitely leſs than theirs; have had nothing elſe to do, but to cultivate thoſe deep-rooted Seeds, which the Apoſtles had ſpread abroad in all Parts, for the Propagation of Chriſtianity; and which, by their own proper Virtue, aſſiſted with the Care of Providence, will always bring forth Fruit even to the end of the World; notwithſtanding all, that the Negligence or Malice of Men may, or can do to the contrary.

From whence it already appears, that the Argument we are now handling, even ſuppoſing it had any Force in it; will prove nothing in favour of the Fathers: for it is plain, that they were not, properly ſpeaking, the *Propagators* of the Chriſtian Religion. But let us grant the Fathers, ſeeing ſome will have it ſo, this glorious Title; as what might poſſibly in ſome Senſe, and in ſome Meaſure belong to them: it will yet be the eaſieſt Thing in the World, to ruin at once the Conſequence they wou'd draw from thence, in order to ſhew what they then ought to have been, without ever examining what they really were. We need but only conſider this one inconteſtable Fact; that even the Apoſtles themſelves were for a conſiderable Time full of carnal Prejudices; and had their Failings too: nor did they at all diſſemble or conceal 'em; the ingenuous Acknowledgment whereof ſerves very much to confirm the Truth of their Teſtimony, and the Sincerity of their Intentions. Shall we then think it Matter of Aſtoniſhment, that the ordinary Miniſters who ſucceeded 'em, and who were not favour'd with any extraordinary Aſſiſtance from Heaven; had not all that Exactneſs of Judgment, and all that Knowledge; had not all that Uprightneſs, and all that Purity of Heart, which we cou'd wiſh to have found in them?

Theſe Propagators of the Chriſtian Religion muſt needs, ſay they, *have been Men of true Piety and Knowledge*. But muſt all, who have, after the Apoſtles, contributed any thing to the Propagation of Chriſtianity, have been ſuch; or only ſome of 'em? The firſt is what they will not venture to ſay: and if they betake themſelves to the latter; I ask, by what ſhall we be able to know, that this Privilege was reſerv'd to ſuch or ſuch, for inſtance; rather than to others? Shall it be by the Age in which they liv'd? But why muſt the Fathers of the three or ſix firſt Centuries have been *Men of true Piety and Knowledge*; rather than thoſe of the tenth or eleventh? On the contrary, to argue on the Principle here laid down, it ſhou'd ſeem, that, in proportion, as we become more remote from the firſt Eſtabliſhment of Chriſtianity; ſo its Propagators ought to be Men of greater Eminence for Piety and Knowledge; that they may be able ſtill to augment more and more the Progreſs of this Holy Religion; and ſupply, what the Proofs of Matter of Fact, which are the very

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[a] *Joh.* xvi, 13. [b] *Matth.* xxviii, 19. [c] *Rom.* xv, 20. [d] *Ibid. ver.* 19.

[e] See a Diſſertation of the late Mr. *Cellarius*, entitled, *Itinerarium Apoſtolicum*, &c. printed a third Time at *Hall* in *Saxony* 1700.

[f] See *Grotius*, *De Ver. Rel. Chriſt. Lib.* 2, *Sect.* 18, *Note* 33, 34.

Baſis of its Truth; loſe of their Force, thro' Diſtance of Time, in the Judgment of a vaſt Number of Perſons, who are not capable of examining them, as they ought. Will they ſay that theſe Propagators of the Chriſtian Religion, who muſt have been *Men of true Piety and Knowledge*, are thoſe very Doctors, whoſe Writings have been tranſmitted to us? But why theſe, rather than an infinite Number of others; who have either wrote nothing; or whoſe Writings have not come to our Hands? Beſides, what do they mean here by *Men of true Piety and Knowledge?* Will they ſay, that all the Propagators of the Chriſtian Religion, ſince the Apoſtles, muſt neceſſarily have had as great a Meaſure of Piety and Knowledge, in Matters of Religion and Morality, as cou'd at all poſſibly be? What? muſt the Fathers have been liable to no Failings, no Paſſions, no Errours, no Ignorance at all? Was it neceſſary that God ſhould miraculouſly interpoſe, to hinder them from being Men as well as others; and ſubject to the Imperfections of the Age; as well as to the Temptations incident to the Circumſtances they liv'd in? If we have not ſo exalted an Opinion of them, as their extravagant Admirers have; do we pretend to ſay, that they were all a pack of profligate Wretches; or that there were not ſome among them, who were, in ſome meaſure, Men of Piety and Knowledge? If we maintain, that they were not Men of the moſt accurate Judgments; that they often made uſe of bad Arguments; that they were but little vers'd in the true Method of expounding the Holy Scriptures, and explaining the Principles of Morality, which they contain: Do we therefore deny that they retain'd the Fundamentals of Religion, and Morality? If we ſay, that thro' an Effect of humane Frailty, they have given way, ſome more, ſome leſs, to Paſſions, and Actions, contrary to the Rules of the Goſpel; Do we therefore take upon us to penetrate either into their Hearts; or into the Counſels of God? Do we deny, that many of them might, notwithſtanding all this, have been *truly pious and good Men*; that the Divine Mercy might have regarded their good Intentions; and the Sincerity of a general Repentance? Certainly, we leave it to *God* to judge of that, which we neither can or ought to decide: We reſerve to ourſelves only the Right of charitable Judgments; to which we ſhall always rather incline, than to raſh Condemnations. But we are not for all that oblig'd to call evil, good: and ſhall always take the liberty of blaming what is blame-worthy; without paying reſpect to the Fault, out of favour to the Perſon: and as we praiſe and heartily recommend to the Imitation of every body, the good Actions, and Virtues which appear in the Lives of the Fathers of the Church; ſo we ſhall never go about to diſſemble their ill Actions and Vices; which we cannot but ſee, when we examine them without Prejudice or Prepoſſeſſion.

But to come to the very bottom of the Argument in hand; beſides, what I have already intimated, and ſhall hereafter declare, that the Fathers were neither the only, nor the principal Propagators of the Chriſtian Religion, after the Apoſtles; this Argument contains at moſt but a Reaſon of Congruity. Now Reaſons of Congruity, which are generally very inconſiderable, and never amount to more than a ſlight Probability; are altogether ridiculous in a Matter of the Nature with this we are now upon. Have the Fathers argu'd well or ill? Have they fall'n into groſs Errours? Have they run into vicious Actions, and Paſſions? Have they handled Morality with Accuracy, and in its juſt Extent? Theſe are Matters of Fact, and there is nothing more to be done, but to ſee whether they are true or not. We have at hand the Tracts and Writings of the Fathers; the Hiſtory of their Lives: let us read, examine, and then judge. The Queſtion to be diſcuſs'd, is not, in what manner we conceive the Thing ſhou'd have been; but in what manner it actually has been. For, if the Facts be true, inſtead of concluding, as they would have us, that the Fathers muſt, for the Good of the Chriſtian Religion, have been ſuch, as they have repreſented 'em to us; I ſhall from thence infer, on the contrary, that there was no Neceſſity at all for it. To argue otherwiſe, is to imitate thoſe of the *Romiſh* Communion; who, to prove that *Tranſubſtantiation* is not a new Tenent, unknown to the firſt Ages; tell us gravely, that this Doctrine could not poſſibly have been ever introduc'd into the Church at all, had it not been receiv'd from the Beginning. If, with a profound Study of all the Subtilties of the Mathematicks, and the Affectation of being able to talk on all ſorts of Subjects, they form no better Judgments of Things; I fear they will give us but a very mean Opinion of *Algebra*, and that vaſt * *Encyclopedia*, which they pretend to value themſelves ſo much upon. Is it not true, for example, that, as early, as the ſecond Century, *Victor*, [g] Biſhop of *Rome*, caus'd many Broils, to ſupport his Opinion on this important Queſtion; *On what day the Paſſover ought to be celebrated?* And that he excommunited all the Churches of *Aſia*, becauſe they celebrated that Feſtival on the fourteenth Day of the Month of *March*; and not on the *Sunday* following, as he would have had it? The unſhaken Fidelity, with which he adher'd to the Chriſtian Religion; for which he ſuffer'd, even Martyrdom; had not made him incapable of being tranſported with Paſſion about meer Trifles; and of ſinning againſt that Spirit of Peace and Charity, which the Goſpel ſo earneſtly recommends. So that St. *Irenæus* thought fit to write to him about it; and ſharply cenſure his Proceedings. Have you a mind for another Example of a Father of the Church, a Martyr too? Read then the ſcandalous Conteſt, which happen'd in the third Century, between St. *Cyprian*, Biſhop of *Carthage*, and *Stephen*, Biſhop of *Rome*. The firſt had got it determin'd in a Council, that all who had been baptiz'd by Hereticks, ought to be re-baptiz'd. [h] " *Stephen*, on " the contrary, perhaps incens'd that they had

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* The whole Circle of Arts and Sciences, or univerſal Knowledge.

[g] See *Euſeb. Hiſt. Eccleſ. Lib.* 5, *Cap.* 24, *Edit. Vales.*

[h] See the Life of St. *Cyprian*, by Mr. *Le Clerc*, *Bibl. Univ. Tom.* XII, *p.* 351-, &c.

“come to a Deciſion therein, without firſt conſulting him; was of a quite different Opinion. He wrote a Letter to St. *Cyprian*, which is ſince loſt; wherein he rejected and condemn'd the Deciſions of the Council of *Carthage*; excommunicated all thoſe who had aſſiſted at it; and declar'd, that all, who came over to the Church, ought to be receiv'd without being re-baptiz'd, from what Hereſy ſoever they came: This gave Birth to a ſad and grievous Schiſm between the Churches of *Africa*, and that of *Rome*. At that time *Pompey*, Biſhop of *Sabrata*, a City of *Africa*, deſir'd the *Biſhop* of *Carthage* to let him know, what was the Opinion of *Stephen*; whereupon St. *Cyprian* ſent him *Stephen*'s Letter together with his own Refutation; wherein he no more obſerves the Rules of Patience, which he had laid down in a Book, wherein he treats of that Virtue, than *Stephen*; who, for his part, had violated them in a moſt unworthy manner. By which one may ſee, that the Praiſes which our Martyr gives to Chriſtians on that Account, in the ‖ beginning of the ſame Book; where he ſays, that they never at all extol their own Virtues, at the ſame time that he is extolling 'em to the Skies; were Praiſes, which rather inform us what thoſe Men, to whom they are given, ought to have been; than what they really were. He accuſes *Stephen* of having wrote in a haughty diſdainful manner; and of many other Things, which were nothing to the Purpoſe; that he had contradicted himſelf; and talk'd like an ignorant Fellow, without Parts or Learning.——That he took the Part of Hereticks againſt the *Church*, and betray'd it. All this too, with more than ordinary Heat and Paſſion. And thus in truth does he demean himſelf in all his Controverſies; where he talks of nothing but Diſcipline and Epiſcopal Authority, without much ſhew of Gentleneſs and Moderation; nor was it indeed the Cuſtom in thoſe days, to manage their Diſputes with Temper and Calmneſs; any more than it is now.”

In the beginning of the *fourth Century*, [i] “Eleven or twelve Biſhops aſſembl'd together at *Cirta*, in 305; where they reproach'd one another with enormous Crimes. The greateſt Part of them had deliver'd up their Bibles to the *Pagans*, to avoid Perſecution; which a great Number of the honeſt Lay-Chriſtians had born with Conſtancy. Others of them had, with their own Hands, thrown them into the Fire. One *Purpurius* of *Limate*, was accus'd, for having murder'd the two Children of his Siſter; who, inſtead of clearing himſelf of the Charge, ſturdily anſwer'd: *For my part, I have kill'd, and I do kill thoſe who are againſt me. Trouble me no more about the Matter: You know that I value no Man.* [k] As ſoon as ever there were Chriſtian Emperours, worldly Pleaſures began to introduce themſelves a-pace into the Church; and there was in a little time nothing to be ſeen, among the Clergy, but Enmities and Diviſions. And becauſe the Biſhops were become rich and in great Eſteem, they † ſtuck at nothing to compaſs Biſhopricks; which when they had obtain'd, they aſſum'd to themſelves a Tyrannical Authority. Theſe Diſorders daily increas'd, till they came to that Height, they have been ſince ſeen to riſe too; as the Learned *Iriſh* Archbiſhop *Uſher*, ſhews in the Book, I have quoted in the Margin; by a great Number of Paſſages out of Authors of Note, who have left us moſt lively Deſcriptions of the horrible Corruption of the reſpective Ages they liv'd in. I have already [l] quoted *Gregory Nazianzene* on this Head. Let us join to him *Sulpicius Severus*, who liv'd in the ſame Century. He in the firſt Book of his Hiſtory, [m] ſpeaking of the Morals of the Clergy of his Time; and having firſt [n] obſerv'd, that the Tribe of *Levi* had no ſhare in the Diviſion of the Land of *Canaan*, as the other Tribes had; that they might be more at liberty to devote themſelves to the Service of God: ſays, *That he was not willing ſilently to paſs by that Example; but choſe purpoſely to mention it, as a fit Leſſon for the Clergy: For it ſeems to me*, adds he, *that they have not only quite forgot that* * *Precept, but that they never had any Knowledge at all of it; ſo great is now-a-days their Thirſt after Riches; a Diſeaſe which has invaded their Minds, and infected their Spirits, like a common Peſtilence! They gape after Poſſeſſions; They beautify and adorn their Country-Seats, improve their Lands, and* ‡ *ſit brooding over their Gold: They buy, they ſell, and in all things ſeek after Gain. If there are any among them, who ſeem to have better Things in view; who are not poſſeſs'd of Eſtates, or engag'd in Traffick; Yet they do that, which is much more ſhameful and ſcandalous: They expect Preſents without doing any thing for 'em; and diſhonour themſelves by taking recompences; their Holineſs being as it were expos'd to ſale.* Towards the ⦀ End of the ſecond Book of his *Sacred Hiſtory*, you may alſo ſee the impartial manner, in which *Sulpicius Severus* relates the Perſecution, [o] which was carry'd on againſt the *Priſcillianiſts*; where he ſharply reprimands the Pride and Cruelty of ſome

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‖ *Op. Cypr. Tract. p.* 211-.

[i] Extract from the *Hiſt. Eccleſ.* of Mr. *Fleury*, *Tom.* II, *p.* 580, *& ſuiv.* in the *Bibl. Univ. Tom.* XXIV, *p.* 341-.

[k] Uſſerius, *De Eccleſiarum Chriſtianarum, in occidente præſertim, continua ſucceſſ, &c.* In the Extract of the *Bibl. Univ. Tom.* IX, *p.* 5-, *& ſeq.* See alſo *Tom.* XXIII, *p.* 366-, *& ſeq.*

† See what is related of *Damaſus*, in *Amm. Marcel. Lib.* 27, *Cap.* 6, *per tot.*

[l] In *Sect.* IX, *Lett.* (*e*) in the Margin.

[m] The Article added to the Months of *March* and *April* 1701. In the *Journal* of *Trevoux*, *Edit. Amſterd.* That Article is Mr. *Le Clerc*'s.

[n] *Cap.* 23, *Ed. Lipſ.* 1709. *And p.* 30-, *Ed. Elzev.* See alſo *Repub. des Lettres*, of Mr. *Bayle*, *May* 1684, *p.* 244, *&c.*

* *Levitis enim in ſacerdotium aſſumpſis, nulla portio data, quo liberius ſervirent Deo.* Ibid. p. 30-, *Edit.* Elzevirianæ.

‡ *Auro incubant.* Perhaps this means, that they love Gold very much, that they ſeek after it, and guard it with great Care; brooding, if I may ſay ſo, with their Eyes, over their Treaſures. See *Virg. Georg.* 2, 507. *Æneid.* 6, 610.

⦀ *P.* 114-, *& d. Edit.* Elzevir.

[o] See *Pacatus* in his *Panegyrick* on *Theodoſius*, *cap.* 29, *Num.* 3, *p.* 404-, *Edit.* Cellar.

“of the || *Spaniſh* Biſhops; who then began to employ the Secular Arm againſt thoſe People: and at length caus'd many of them to be put to Death. In his firſt Dialogue, [p] he gives a clear Account of the Violences, which *Theophilus*, Biſhop of *Alexandria*, employ'd againſt Hereticks; and alſo of the Pride of the Clergy of *France*.” One of the moſt famous Doctors of that Century, is St. *Jerom*, a Man full of Choler and Paſſion, if ever Man was ſo. He had always been a great Extoller of *Origen*, [q] without any the leaſt mention of his Errours; whether it was that he thought 'em inconſiderable; or that he judg'd 'em pardonable, on account of the many good and uſeful Things he had written. But when once the *Arians* began to take Advantage of *Origen*'s Authority; more eſpecially when *John*, Biſhop of *Jeruſalem*, who favour'd the Opinions of the Catechiſt of *Alexandria*, had drawn upon himſelf the Indignation of St. *Jerom*; he then fell a railing moſt unmercifully againſt *Origen*; whom he had formerly cry'd up to the very Skies; and ſet himſelf * violently to perſecute the *Origeniſts*. *Ruffinus*, who had been St. *Jerom*'s great Friend, having declar'd himſelf for *Origen*; and having alledg'd for his Defence, the Praiſes which St. *Jerom* had given him; what does our humble and pacifick Prieſt do, but immediately write a Book, full of the bittereſt Gall and Paſſion againſt *Ruffinus*. The ſame Spirit reigns in his other Works, where he had to do with People he did not affect. St. *Cyril*, Patriarch of *Alexandria*, was, in the |||| Opinion of Mr. *the Abbot Du Pin*, “a Man ambitious and violent; who, ſeeking nothing but to augment his own Authority, no ſooner ſaw himſelf rais'd to the Epiſcopal Seat, but he expell'd the *Novatians*, by his own Authority; and plunder'd their Biſhop of all the Goods he was poſſeſs'd of. He attack'd the *Jews* in their Synagogues, at the Head of his People; took away their Synagogues from 'em, drove them out of *Alexandria*; and gave their Goods for plunder to the Chriſtians; grounding himſelf, no doubt, upon that pious and holy Maxim of the Biſhop of *Hippo*; that every Thing belongs to the Faithful, and that the Wicked can have no juſt Title to poſſeſs any thing. Another time St. *Cyril* fell out with *Oreſtes*, Governour of *Alexandria*, on whoſe Authority he was perpetually encroaching: five † hundred Monks, in ſupport of their Biſhop, one day ſurrounded the Governour, wounded him by a Blow with a Stone, and had kill'd him, if the Guards and People had not put a Stop to their Fury. This coſt one of the Monks, who was taken, and put to the Rack, his Life; but St. *Cyril* ſtrait canoniz'd him. A famous Heathen Philoſophreſs, call'd *Hypatia*, was the Victim, which the Partizans of the Biſhop, immolated to the Manes of their Martyr. She was cruelly tore to pieces, becauſe ſhe was ſaid to have irritated the Governour againſt the Prelate.” Wou'd you know what were the Clergy of the *fifth*, and following *Centuries?* An Author, who cannot be ſuſpected of deſigning any Ill to the Fathers, [r] will inform us. “The Sects, ſays he, (meaning thoſe of the *Neſtorians* and *Eutychians*) which ſprung up, partly thro' the Lazineſs and Superſtition; and partly thro' the particular Grudges, Envy, and Malignity of the Clergy; gave the finiſhing Stroke to the Spirit of Perſecution on account of Religion. 'Tis [s] true, this ſame Spirit of Perſecution had already appear'd in the World; but had not as yet exercis'd its Tyranny, with all thoſe Circumſtances of Cruelty, with which it has been attended ſince that unhappy Century; *when* Diviſions aroſe about Opinions, in which there may have been ſomething of reality; but *what however might have eaſily been agreed and ſettl'd, had but the Spirit of Chriſtianity preſided in Eccleſiaſtical Aſſemblies*. After that time nothing was to be ſeen in the *Eaſt*, but Proſcriptions, Maſſacres, Fury, and Rage. See what a Biſhop of the fifth Century, who was perſecuted for *Neſtorianiſm*, ſays thereupon: *I paſs by* [t] *in ſilence*, ſays he, *the Chains, the Dungeons, the Confiſcations, the Notes of Infamy, thoſe lamentable Maſſacres, the Heinouſneſs of which is ſuch, that even they who have had the Misfortune to be Eye-Witneſſes thereof, do with pain believe 'em to be true: All theſe Tragedies too are acted by Biſhops.——Amongſt whom down-right Impudence paſſes for Courage; they call their Cruelty Zeal, and their Knavery is honour'd with the Name of Wiſdom.* But it ſtill went on increaſing, and grew ſtill worſe and worſe. The Emperour *Juſtinian* wou'd not be thought to have leſs Zeal, than the Prelates of the fifth and ſixth Centuries: *He thought it no Murther*, ſays *Procopius*, [u] *to condemn to Death, ſuch as made Profeſſion of a Religion different from his own.* All the World ſaw the dreadful Cruelties that were committed in theſe unhappy Centuries. They maintain'd Sieges in in their Monaſteries; they battled it in their Councils; They enter'd the Churches Sword in hand; [x] They treated with the utmoſt Cruelty, all whom they but ſuſpected to favour *Opinions*, *which too often prov'd to be*

|| See *Sulpic. p.* 118, *&c. Edit. Elzev.*

[p] *Cap.* 21, *and Ed. Elzev. cap.* 3.

[q] See the *Quæſt. Hieron.* of Mr. *Le Clerc*, *Quæſt.* 8, *Sect.* 12.

* He himſelf brags of it in his Apology againſt *Ruffin: Imperatorum quoque ſcripta*, ſays he, *quæ de* Alexandria & Ægypto *origeniſtas pelli jubent, me ſuggerente, dictata ſunt: ut Romanæ urbis Pontifex miro eos odio deteſtetur, meum conſilium fuit: ut totus orbis, poſt tranſlationem tuam, in Origenis odia exarſerit, quem antea ſimpliciter lectitabat; meus operatus eſt ſtylus.* Hieron Oper. *Tom.* II, *p.* 201, lib. 1, *adv. Ruffin. Edit. Baſil.*

|||| The Report here given of it, is in the Terms of the Extract thereof, by M. *Bernard*, *Bibl. Univ. Tom.* XXI, *Part* 2, *p.* 19.

† *Socrat. Hiſt. Lib.* 7, *c.* 14, 15.

[r] *Diſſert. Hiſtoric. &c.* printed at *Rotterdam* in 1707, *p.* 8, 9. See, for the fifth Century, the Paſſages of *Iſidorus* of *Damietta*, quoted in the *Epiſt. Eccleſ.* and *Crit.* of Mr. *Le Clerc*, *p.* 167, & *ſeq.* and *p.* 203, & *ſeq. Edit. ſecunda.*

[s] See *Amm. Marcel. Lib.* 22, *cap.* 5, *p.* 233. *And p.* 559, *Edit. Gruteri.*

[t] Eutherius, *Tyanorum Epiſcopus, inter opera Theodoriti, Tom.* V, *p.* 688, *and* 689. *Et inter Opera Athanaſii, Tom.* II, *p.* 292, *A*, *C*, *Edit. Colon.* 1686. *Et apud* Du Pin, *Bibl. des Aut. Eccleſ. Tom.* IV, *p.* 67, *Col.* 2. *Ed. Holland.*

[u] *Anecdot. p.* 60, *Edit.* Alemanni.

[x] See *Eutychii Annales*, *p.* 155.

“ *ſuch as no body underſtood; not even thoſe who* “ *defended them with the greateſt Zeal and Ob-* “ *ſtinacy.*” Theſe are the great Lights of the Church; theſe are the Holy Fathers, which we muſt take for *Men of true Piety, and Knowledge.*

But however, what we are principally concern'd about, is the Soundneſs of their Judgments, the Solidity of their Thoughts, and the Extenſiveneſs of their Knowledge: Give me leave then to make a Parody; and apply to the Fathers ſome Verſes of a Modern * Satyriſt, whom *France* has not long ſince loſt.

Qu'on vante en eux l'honneur, la foi, la probité,
Qu'on priſe leur Candeur & leur ſincérité;
Qu'ils aient eu quelque fois une humeur débonnaire,
On le veut, j'y ſouſcris, & ſuis prêt de me taire:
Mais que comme un modéle on vante leurs Ecrits,
Qu'on les faſſe paſſer pour de fort bons Eſprits,
Comme aux Rois des Auteurs, qu'on leur donne l'Empire,
Ma bile alors s'échauffe, & je brûle d'écrire, &c.

Which may be *Engliſh'd* thus.

Extol them, if you pleaſe, for Probity,
For Honour, Candor, Faith, Sincerity;
Let 'em good-natur'd too ſometimes appear,
'Tis granted all, and I am ſilent here:
But that their Works, and they ſhou'd make pretence,
To be the very Models of good Senſe,
That they of Writers ſhou'd as Sovereigns reign,
My Choler riſes, and I can't contain,
But muſt let looſe my Rage in the Satyrick Strain.

The Examples, which I have already produc'd, of the groſs Errours, and wrong Notions of the Fathers; what I have ſaid of Books, where may be found an infinite Number of mean trifling Thoughts, quoted with great Applauſe, by the over-fond Admirers of thoſe antient Doctors of the Church; the great Number of Paſſages of the ſame kind, which [y] divers Authors have occaſionally remark'd and criticiz'd: All this might very well ſerve to excuſe me the Trouble of producing any more at preſent. I ſhall nevertheleſs here give the Reader a ſmall Sample, by which he may be able readily to judge of the Turn of Spirit, and manner of thinking, which, in thoſe Times, grew moſt prevalent.

Juſtin Martyr, in the fifth † Chapter of his firſt *Apology*, ſays, [z] *that bad Demons did formerly appear, that they committed Adultery with Women, and corrupted Boys*, &c. And all this founded ſolely upon the ſixth Chapter of *Geneſis*, Ver. 4. miſunderſtood. The moſt antient Fathers, have alſo one after another, given out this Opinion, for certain Truth; as a Learned Editor [aa] of this Father has obſerv'd. *Juſtin* [bb] finds the Sign of the *Croſs* in Sail-Yards, Maſts of Ships, Ploughs, Mattocks, *&c.*

St. *Irenæus*, in the Judgment of *Photius*, has [cc] *corrupted, by foreign and weak Arguments, the Simplicity, and exact Verity of the Doctrines of the Church.* “ Can any thing, [dd] for example, “ be more inſipid, than the Reaſons, he makes “ uſe of to prove that there are four Goſpels, “ *viz.* becauſe there are four principal Regions “ of the World, Eaſt, Weſt, North, and “ South; or becauſe the Edifice of the Church “ is founded on the Goſpel, and there muſt be “ four Columns to ſupport an Edifice? *Theophylact* “ does not ſucceed much better, when “ he ſays; that it muſt be ſo, becauſe the Goſpel “ teaches us the four Cardinal Virtues; or “ becauſe theſe Goſpels contain Doctrines, Pre- “ cepts, Promiſes, and Threats. And don't the “ five Books of *Moſes* contain the ſame Things? “ St. *Maximus* and *Theophanes* ſeem to have ſuc- “ ceeded ſtill worſe, when they ſaid, that there “ are but four Goſpels, becauſe there are but “ four Elements. It was juſtly obſerv'd by “ Mr. *Fabricius*, that had there been five, “ three, or an hundred Goſpels, they cou'd not “ have wanted as good Reaſons to prove, why “ they were neither more or leſs. Such wretch- “ ed trifling Stuff as this, is a Diſgrace to hu- “ mane Reaſon: It might perhaps paſs in Con- “ verſation, where one does not always ma- “ turely weigh and reflect upon every thing “ that is ſaid; but when one finds it ſeriouſly “ wrote; in Works too compos'd for the pub- “ lick View, and to be left to Poſterity; the “ leaſt one can do, in my Opinion, by way of “ reſentment, to Authors, who have oblig'd us “ to read ſuch Things; is freely to diſapprove “ and cenſure 'em.

“ St. *Cyprian* [ee] quotes at every turn, when “ he is upon the Matter of Eccleſiaſtical Diſ- “ cipline; the Paſſages out of the Old as well “ as New Teſtament, where-ever there is the “ *Latin* word *Diſciplina*, without having any “ regard to Circumſtances. See the Reaſoning “ he makes uſe of againſt *Lucian*, (Presbyter “ and Martyr of *Carthage*, who was willing “ that thoſe ſhou'd be receiv'd into the Peace of “ the Church, who had ſunk under Perſecution, without obliging them to paſs thro' all the ſeveral Degrees of Penance:) *The* [*] *Lord having ſaid, that they ſhould baptize all Nations in the Name of the Father, Son, and Holy Ghoſt, and that their paſt Sins are forgiven 'em in Baptiſm*; *he* (meaning *Lucian*) *not knowing either the Commandments, or the Laws, ordains Peace and Pardon of Sins to be given in the Name of* Paul. But how eaſy is it to ſee the infinite Difference, between the Pardon which God grants to Sins committed before Baptiſm receiv'd in his Name; and the remitting of ſome Eccleſiaſtical Puniſhments by the Authority of a Martyr, who gives order for ſo doing? —— In his Treatiſe of the *Unity of the Church*, [ff] he maintains, that the Indiviſibility of the Church was typify'd by our Saviour's Garment without Seam. —— He ſays, [gg] that we ought to be liberal to the Poor, becauſe as by Baptiſm we obtain Pardon for all the Sins, that were committed before Baptiſm, in virtue of the Blood of *Jeſus Chriſt*; ſo by giving Alms we expiate thoſe that are committed after. —— Endeavouring to deſtroy the frivolous Pretences, which are ſometimes alledg'd by way of excuſe, for not giving of Alms; he mentions, among others, the Excuſe of thoſe, who ſay that the Multitude of their Children will not ſuffer them to be ſo liberal, as they cou'd wiſh to be: To which he replies thus; that the more Children we have, the more we ought to give; becauſe we have the more Sins to purchaſe Redemption for, more Conſciences to purify, and are to deliver the Souls of a greater Number of Perſons.

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* *Boileau, Sat.* 9, *v.* 213.

[y] See eſpecially the Remarks which *Phéreponus*, or Mr. *Le Clerc*, has made *ex profeſſo* on St. *Auſtin*, in the *Appendix Auguſtin.*

† *P.* 55, *D*, *Edit. Colon.*

[z] See the *Bibl. Choiſie* of Mr. *Le Clerc*, *Tom.* II, *p.* 335, 336.

[aa] Erneſt. Grab. *in ſpicilegio patrum, &c. Tom.* I, *p.* 347, and 359, 360. *Petavii Dogm. Theol. Tom.* III, in Tract. *De Angelis, lib.* 3, *cap.* 2, *Sect.* 1, *&c.*

[bb] See his firſt *Apology*, *cap.* 72, *p.* 90, *C*, *Ed. Colon.* See *Bibl. Choiſie*, *Tom.* III, *Article* 8, *p.* 390. Where one finds many other Examples: as alſo *Bibl. Univ. Tom.* VI, *p.* 22, *& ſeq.*

[cc] *Cod.* 120.

[dd] *Repub. des Lett.* of Mr. *Bernard*, *Decemb.* 1703, *p.* 635.

[ee] *Epiſt.* 27, *Bibl. Univ. Tom.* XII, *p.* 264, *& ſeq.*

St. *Jerom*, [hh] "Who recommends Celibacy, as much as he poſſibly can; and who, according to the Cuſtom of Orators, wou'd make any thing paſs for a Reaſon; makes uſe of this fine Argument againſt *Jovinian*: *Cælibes*, ſays he, *quod cœlo digni ſunt, inditum nomen*; *They have given 'em that Name, becauſe they are worthy of Heaven.*" If you wou'd ſee an Heap of Sophiſms, and poor wretched Arguments, which prove nothing, or elſe prove that Marriage is in itſelf criminal; you need only read the Remainder of that Book againſt *Jovinian*, and that which he wrote againſt *Helvidius*; [ii] where he ſtrenuouſly oppoſes ſecond Marriages: In this laſt Book, he prides himſelf, in having play'd the Rhetorician and Declaimer: *Rhetoricati ſumus, & in morem Declamatorum paululum luſimus.*

In another Place, [kk] he makes it his Boaſt, that he wrote with great Precipitation, and without giving himſelf the Trouble to beſtow much thought upon his Commentaries: and is accordingly found frequently contradicting himſelf. He has the Aſſurance to own in plain Terms, [ll] that in his Polemick Works, he had no other Aim, but to get the better of his Adverſaries; without the leaſt Concern, whether what he advanced were true, or falſe. He ſupports himſelf by the Examples of *Origen*, *Methodius*, *Euſebius*, *Apollinaris*, and other Apologiſts for the Chriſtian Religion; who, as he ſays, us'd the ſame Method againſt the Heathens; making uſe of very doubtful and precarious Reaſons; and maintaining, not what they thought, but what the Intereſt of the Diſpute requir'd. Nay further, he pretends, that in ſo doing, he did but imitate *Jeſus Chriſt*, and [mm] St. *Paul*, who maintain'd, as he wou'd have us believe, the *Pro* and *Con*, juſt as it ſuited their Purpoſe.

The great St. *Auſtin* alone might afford us Matter enough, to furniſh out a large Volume of Trifles and Impertinencies: I ſhall content myſelf with producing only two Inſtances. In explaining that Paſſage of *Geneſis*, Chap. iii, *Ver.* 14, where the *Latin* Verſion, which he us'd, reads with the *Septuagint*, *Upon thy Breaſt, and upon thy Belly ſhalt thou go, and Duſt ſhalt thou eat, all the Days of thy Life*: By [nn] the *Breaſt*, ſays he, is meant *Pride*; by the *Belly*, the *Luſts of the Fleſh*; and by that which follows, *Duſt ſhalt thou eat*, *Curioſity*, which extends only to Things temporal and terreſtrial. By *Curioſity*, he means *Avarice*: And thus it is he draws his moral Reflections from Scripture. His remark on the Title of the *Pſalms* is very pleaſant. "The [oo] Tranſcribers it ſeems, did not uſe to put before the firſt *Pſalm*, *Pſalmus primus*, as they do now-a-days, becauſe they did not probably think it at all neceſſary; ſince there cou'd be no Miſtake, it being at the Head of the Book, and follow'd by the ſecond *Pſalm*: But this wou'd not ſerve St. *Auſtin*'s Turn, he was for a Reaſon much more myſterious:" [†] *As this Pſalm*, ſays he, *introduces God himſelf ſpeaking, ſo for this Reaſon it has no Title, for fear leſt otherwiſe ſomething elſe ſhou'd be preferr'd before the Speech of God*; *or leſt he ſhould be call'd the firſt, which is not call'd the firſt. but one: And therefore it neither cou'd nor ought to have a Title*; *for fear leſt if it had had the Title of the firſt, it might have been believ'd to have been the beſt, by its numerical* Order *only*; *and not by its Authority.* *Or elſe, adds he, as has been already ſaid, for fear, that it might have been believ'd, that the Pſalmiſt had preferr'd ſomething elſe before the Speech of God,*

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[*] *Epiſt.* 27, *p.* 53-, *Ed. Oxon.*

[ff] *Bibl. Univ. Tom.* XII, *p.* 283ˉ, *ex libro de Unitat. Eccleſ. p.* 109_.

[gg] *Bibl. Univ. Tom.* XII, *p.* 338ˉ, 339_, *ex libro* De Opere & Eleemoſynis, *p.* 197-, 205ˉ.

[hh] *Repub. des Lett. May* 1702, *p.* 502.

[ii] See the 8th *Hieronym. Quæſt.* of Mr. *Le Clerc.*

[kk] *Comment. in* Abdiam, *ſub fin. & præfat. lib.* 2, *in Epiſt. ad* Epheſ.

[ll] The whole Paſſage may be found at full Length, in the *Sentimens de quelques Theolog. de Holl. p.* 368-, 369ˉ. *Et Hieron. Oper. Tom.* II, *p.* 105-, 106ˉ, *Ed. Baſil.*

[mm] *Nonne nobis loquitur cum ſervatore, aliter foris, aliter domi loquimur?* Ibid. p. 106ˉ.

[nn] *Lib.* 2, *De Geneſi contra Manich. c.* 17_, 18ˉ. See *Les Obſervat. Hall. Tom.* IV, *Obſervat.* 5.

[oo] *Sentimens de quelques Theol. de Holl. p.* 362ˉ.

[†] *Auguſtin. Oper. Tom.* VIII, *Col.* 10, Cˉ, *Ed. Baſ.*

had he put a Title before this Pſalm; *for if it had been call'd the firſt, that might have been underſtood to mean, preferable to the reſt. And therefore*, concludes he, *to the end that we may manifeſtly ſee, how much this* Pſalm *is diſtinguiſh'd above the reſt, it is the only one that has no Title.* “Reconcile, if you pleaſe, the Concluſion with the Premiſes.

As I am quite tired with copying ſo much of this tedious, and injudicious Stuff; ſo there is more than enough of it, to ſet in their true Light the Characters of the Authors in queſtion, and to let the Reader ſee *ex ungue Leonem*. I have deſignedly pitch'd upon Examples, which had been already remark'd and produc'd by others; and are extant in Books moſt common and eaſy to be had. By this we may ſee, with what an ill Grace it is, that our zealous Defenders of the *Fathers*, require us to take it upon their Word, that they were *Men of true Piety, and Knowledge*; againſt ſo many and ſo notorious Proofs, which demonſtrate, even to Eye-ſight, that their Virtues were for the Generality, far from being any way conſiderable; and at the ſame time accompany'd with very great Imperfections; and ſome of 'em much to be ſuſpected of Hypocriſy: and for their Knowledge, that it was commonly falſe and confus'd; that they had a much greater ſhare of Imagination, than of good Senſe; that they were deſtitute of many Helps, which were neceſſary to the augmenting and perfecting that Knowledge, they were Maſters of; and that they even neglected * thoſe Helps, which they actually had, or might have procur'd; and that conſequently their [pp] Knowledge muſt needs have been very narrow and confin'd: in a word, that the moſt able amongſt them, are in nothing comparable to the good Authors of ours, or the laſt Age; for either Solidity, Stile, Order, or Method. And now, after all that has been ſaid of their Writings, is it poſſible that any one can ſeriouſly look upon the Fathers, as Men of great Knowledge and Judgment? A Man of the greateſt Knowledge and Judgment in the World, I muſt own, may be miſtaken, and may give into ſome falſe Notion; but then it muſt be a Notion, that has at leaſt ſome Plauſibility, and this too is what will not often happen: but I ſhall venture to affirm, that a Man of tolerable good Senſe will never be guilty of thoſe Extravagancies, which we ſee the Fathers, almoſt all of 'em, have run into. None but thoſe, who are capable of ſaying as ſilly Things themſelves, or who are ſtrangely blinded by a Spirit of Party; cou'd ſo much preach up the Authors of ſuch arrant Trifles. But to their great Mortification, we do not now live in an Age, that will paſſively ſubmit to ſuch Treatment: The Publick is no longer to be impos'd upon by ſuch ſort of grave Affirmations as theſe, void of all Proof; and at the ſame time contradicted by an infinite Number of deciſive Reaſons, fairly expos'd to the publick View of the World. 'Tis a moſt ridiculous fond Conceit, to imagine, that, without having ſo much as attempted to diſprove Facts, Facts ſo clear and certain as thoſe which have been alledg'd; it is enough to ſalve all, to produce ſuch a pitiful Reaſon of Congruity as this; (*viz.*) *If the Chriſtian Religion had not for its Propagators Men of true Piety and Learning, what opinion muſt we have of it?* As we are under no Obligation to account for the Conduct of *God*, either for what he does, or what he does not do; for what he permits, or what he directs, according to the ſecret Methods of his Providence: ſo, inſtead of ſaying; *ſuch or ſuch a Thing is contrary to the Deſigns of* God, *or to his Attributes*; *therefore* God *could not have done or permitted it*; I think, (and I have all the Reaſon in the World to think ſo) that we ſhou'd rather argue thus: God *has done or permitted ſuch or ſuch a Thing*; *therefore there is nothing in it contrary to his Deſigns, or to his Attributes:* altho' it may not always, in our weak and narrow Underſtandings, be clearly reconcilable with the Views, and infinite Perfections of that Sovereign Being. But however, as he has not forbidden us to enquire after, and with due Reverence to propoſe, the Reaſons he might have had, not to interpoſe in an extraordinary manner, to prevent certain Things; ſo, if we wou'd a little exert the Faculties of our Souls upon the Subject-matter of the Fact in queſtion; we might eaſily diſcover enough, both to ſatisfy ourſelves, and to ſtop the Mouths of thoſe, who wou'd have *God* always to act according to their Caprice. If “after the Apoſtles themſelves, we find nothing, but what is very mean and confus'd in that firſt Riſe of Chriſtianity; it was probably, as Mr. [qq] *Le Clerc* has very well remark'd, “ſo order'd, to the end that it might not be ſaid in future Ages, that there were in thoſe days Men able enough to form ſuch a Religion as Chriſtianity, and to forge ſuppoſititious Books for its firſt Authors; ſince there is nothing to be ſeen after them, that comes up to their genuine Writings: Not only none of the Heads of the ſeveral Sects, which ſprung up at that time; but none even of thoſe who profeſs'd to follow the Apoſtles, as their ſole Guides, have produc'd any thing, that comes near that manner of writing, which is ſeen in the Works of thoſe holy Men. There is too withal in that manner of writing of theirs, ſo much unaffected Plainneſs, and native Sincerity, if I may ſo ſay; that we may from thence moſt clearly diſcern, that what they tell us, is not of their own Invention; but the real Dictates of *Jeſus Chriſt*; and of that Spirit, which he had conferr'd upon 'em.” Certain it is, that, conſidering the Books of the New Teſtament with reſpect to the reaſoning Part; not one of the Fathers, take 'em as they really were, wou'd ever have been able to compoſe Works, full of that good Senſe, which ſo viſibly reigns throughout the Goſpels and Epiſtles of the Apoſtles. It may alſo be ſaid, that God, in permitting the Fathers of the Church to be ſo unaccurate in their Writings; and oftentimes ſo irregular in their Conduct; was willing to ſhew, that the Chriſtian Religion, which was to continue to the end of the World; both can and will maintain itſelf by its own Efficacy; maugre all the Ignorance and Wickedneſs of thoſe, who ought to have been its chief Supporters. And ſhou'd this be deem'd to imply any thing that is really contrary to the Wiſdom of God, or injurious to the Chriſtian Religion; it may be prov'd, by the ſame Principle, that there ought not to have been, under Chriſtianity, Ages of univerſal Ignorance and Corruption, eſpecially amongſt the Clergy; and ſuch too, as in fact thoſe Ages were, which preceded the Reformation: and thus our zealous Defenders of the Fathers will have every whit as good a Foundation to maintain, contrary to the Faith of all Hiſtory; that thoſe Ages were not ſuch, as they are generally believ'd to have been. But entirely to put to ſilence ſuch, as are not aſham'd to urge this wretched Argument; which, whatever Light 'tis view'd in, affords not the leaſt Colour of Reaſon; I ſhall take occaſion to add in a few Words three or four Reflections. The firſt is; that neither *Jeſus Chriſt*, nor his Apoſtles have any where ſaid, or in any wiſe given us to underſtand; that thoſe, who next after them might be look'd upon as the *Propagators of the Chriſtian Religion*, were to be Men of true Piety, and Knowledge. So very far from that were they, as to prepare us for the Expectation of juſt the contrary. The Parable of the Tares ſow'd by the[rr] Enemy; and that of the[ss] Net that gather'd of every kind; do plainly enough ſhew us, that in the Chriſtian Church, the Wicked were to be very much intermix'd with the Good; inſomuch that theſe latter were not to have the Aſcendant, or make a better Figure in it than the others. Our Lord hath foretold the Diviſions, which the Ignorance, the vain Subtilties, the Temerity, the Preſumption, and Paſſions of theſe *Propagators* of his Religion would produce in the Church. And St. *Paul* aſſures us, [tt] *that there muſt be Sects, to the end that thoſe who ſhould be worthy of Approbation, might be made manifeſt*; (that is to ſay) that a Mind free from Prejudice, and which judges not of things by Appearances; might be able to diſtinguiſh who were the Men, that did in good earneſt devote themſelves to Truth and Virtue. When the Apoſtles are telling us what was to happen in the Church, they[uu] expreſs themſelves in ſuch a manner, as gives us all the Reaſon in the World to believe, that the Clergy were not for the Generality to be Men of the greateſt Piety, and Underſtanding: In the very Days of the Apoſtles, there were Men of turbulent Spirits, and falſe Teachers; againſt whoſe Temerity and Seduction thoſe holy Men were oblig'd to oppoſe themſelves. There was even at that time to be ſeen a *Diotrephes*, [xx] a Man both vain and ambitious; who preſum'd to prate againſt St. *John*, with malicious Words; who treated as Hereticks, and excommunicated, thoſe whom the Apoſtle held for Brethren.

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* See Mr. *Le Clerc*'s *Crit.* and *Eccleſ. Lett. Epiſt.* 4, *p.* 107, *& ſeq.* and *Edit.* 2, *p.* 128, *& ſeq.* And the *Bibl. Choiſie Tom.* XI, *p.* 102, *& ſeq.*

[pp] The Erudition of even thoſe, who paſs'd for the moſt learned, was very common, and coſt them little or no Pains; as Mr. *Bernard* has very well obſerv'd in his *Repub. des Lett. March* 1699, *p.* 259.

[qq] *Bibl. Choiſe, Tom.* IV, *p.* 356, 357.

The ſecond Obſervation I have to make is; that, in the firſt Ages of Chriſtianity, as well as in thoſe that follow'd after; the Men moſt applauded, and who bore the greateſt Character in the Church, were not always thoſe, who had the greateſt ſhare of good Senſe; or were the moſt eminent for Learning and Virtue. It was not for the moſt part [yy] then, any more than it is now, Merit, which ſerv'd to raiſe Men to the higheſt Dignities of the Church. Thus, notwithſtanding that Corruption both of Judgment and Manners, which reign'd, more or leſs, thro' every Age; it is not to be doubted, but that there were, both amongſt the People, and Clergy too, Men of more Senſe, Knowledge, Moderation, Juſtice and Piety; than theſe, whoſe Names and Writings have been tranſmitted down to us with ſo much Pomp and Oſtentation. Let the Reader judge, to which of the two, the Name and Title of *Propagators of the Chriſtian Religion*, does moſt properly belong; whether to theſe we do, or to thoſe which we do not know; the others having made it their Buſineſs both to prevent their making any Figure while they liv'd; and to hinder their Memory from being handed down with advantage to Poſterity. Amongſt theſe latter, ſome out of Fearfulneſs; others thro' Prudence, or the Impoſſibility which they ſaw there was of ſucceeding; declin'd the entring into Conteſts, with Men more powerful than themſelves: and if any one prov'd ſo hardy as to make head againſt thoſe Doctors, who had gain'd the Admiration of the Populace; he ſoon found there was no good to be got by it: Witneſs the Affair of *Vigilantius* with St. *Jerom*.

I obſerve in the third place; that we have no other occaſion, with reſpect to the Intereſts of the Chriſtian Religion, for the Writings of Eccleſiaſtical Antiquity; than as they furniſh us with hiſtorical Evidence, of what has paſs'd; and been believ'd in the time of each Writer. This is in expreſs Terms acknowledg'd, by an Author whom I have already quoted: *When* [zz] *the Proteſtants*, ſays he, *conſult the Fathers and the Councils, they make no other uſe of that Study, but to learn the Hiſtory of their Doctrines, and to ſearch out the firſt Beginnings of Errour*; *ſo far are they from looking there for the Foundations of their Faith*. Now after this to come and cry out, that all is loſt, if we have not a profound Veneration for the Fathers; and but venture freely and impartially to ſpeak our Minds of them; is plainly ridiculous. The very Diviſions, which their Ignorance, Paſſions, and vain Subtilties have produc'd in the Church; contribute not a little to aſſure us, that no conſiderable Corruption has crept into the Text of the Holy Scriptures; ſince it is plain, had it been ſo, that the oppoſite Party wou'd not have fail'd to have openly reproach'd the other therewith.

My fourth and laſt Obſervation is; that, notwithſtanding the great Inaccuracy of the Fathers, which has often caus'd 'em to commit conſiderable Errours; notwithſtanding that ſtrange Fancy they had for vain Subtilties, which made 'em neglect Things of much greater Importance; notwithſtanding all this, I ſay, the Fundamental Doctrines of Religion and Morality have ſtill been preſerv'd amongſt Chriſtians; even in[aaa] the moſt diſmal Ages of Darkneſs and Vice. And tho' ſeveral Falſities have been added to, and mix'd with theſe Fundamentals; tho' they have not been fully explain'd, and drawn out into all their juſt Conſequences; this is no way the fault of the Goſpel. But Providence has at length highly juſtify'd itſelf, if I may ſo ſay, in the Eyes of all thoſe, who wou'd otherwiſe have prepoſterouſly laid to its Charge, the Neglects and erroneous

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[rr] *Matth.* xiii, 24, *&* *ſeq.* See the *Epiſt. Crit. & Eccl.* of Mr. *Le Clerc*, *p.* 121, 122. *Et p.* 146-, *& ſeq. Edit.* 2. And his Treatiſe of *Iucredulity*, *p.* 189, *& ſeq. Et p.* 199-, *Edit.* 2.

[ss] See *Matth.* xiii, 47.

[tt] 1 *Cor.* xi, 19.

[uu] See 2 *Theſſ.* ii, 3, *& ſeq.* 1 *Tim.* iv, 1, *& ſeq.* 2 *Pet.* iii, 3, *& ſeq. Jude* 18, *& ſeq.*

[xx] 3 *Joh.* 9, 10.

[yy] See what *Gregory Nazianzene*, ſays of the Times he liv'd in, in his Life publiſh'd by Mr. *Le Clerc*, *Bibl. Univ. Tom.* xviii, *p.* 56-, 89-, 92-, 119-.

[zz] *Diſſ. Hiſtoriques, &c. p*, 217.

[aaa] See Mr. *Le Clerc*'s Treatiſe, *De eligenda inter Chriſtianos diſſentientes ſententia*; (which is at the end of the laſt Edition of *Grotius*, *De Ver. Rel. Chriſ.*) *Sect.* 7-.

Judgments of Men. *God* has rais'd up a Set of Men, who have introduc'd a better manner of ſtudying and reaſoning. We improve daily in rightly expounding the Holy Scriptures; and in ſolidly handling Morality. A true Reliſh for ſound Knowledge and wholeſom Literature begins to appear; and gives us reaſon to hope, that they will both in due time make a conſiderable Progreſs; notwithſtanding the Efforts of thoſe, who are labouring to bring us back to the Primitive Food of Husks and Acorns. And an Age may perhaps come, wherein the Fathers of the Church, together with their fond Admirers; ſhall be generally had in no greater Eſteem, than they can fairly merit.

But it is time to put an end to this long Digreſſion. I thought it neceſſary once for all, utterly to deſtroy the only Subterfuge which theſe boaſted Defenders of the Fathers had left. We ſhall now purſue the Thred of our Hiſtory of Morality. After what has been ſaid of the little care taken by the Doctors of the Church of the ſix firſt Centuries, to cultivate it; it wou'd be ſuperfluous to run over the following Ages; wherein Ignorance and Corruption, augmenting ſtill more and more, did at length riſe to ſuch a Pitch, as that there was hardly to be ſeen, eſpecially among the Clergy, the leaſt Spark of good Senſe or Virtue left. Not to mention that vaſt Number of ridiculous Superſtitions, that prodigious and amazing Idolatry, which had entirely defac'd Chriſtianity; there were beſides a thouſand deteſtable Maxims eſtabliſh'd, worthy only of the groſs Darkneſs of thoſe unhappy Centuries. The Biſhop[15] of *Rome* made himſelf to be regarded, as one inveſted with Power to depoſe all ſuch Kings, as he ſhou'd judge to be Hereticks; and to abſolve their Subjects from their Oaths of Allegiance. Every one knows to what exceſs *Indulgencies*[16] were carry'd. An *Italian* call'd[17] *John Giglis*, or *Des Lis*, (*De Liliis*), who was made Biſhop of *Worceſter* by the Authority of the Pope; receiv'd from him at the ſame time the Power to pardon all ſorts of Crimes; and to permit any one to retain the Goods of another, howſoever acquir'd; provided part thereof was given to the Commiſſaries of the Pope, or to their Subſtitutes.

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[15] See the 4th *Lateran* Council held at *Rome* in 1215, Canon the third. You may find the Canon tranſlated, *Tom.* IX, of the *Bibl. Univ. p.* 39-. See alſo *Tom.* XI, *p.* 387-. And the Treatiſe by Mr. *Du Pin*, *De la Puiſſance Eccleſ. & Temporelle*, printed in 1707. See *Caranza*'s *ſumma Concil. p.* 603-, printed 1659.

[16] See *Setkendorff, Comm. Hiſt. & Apolog. de Lutheraniſimo, &c. Lib.* 1.

[17] See *Wharton*'s *Anglia Sacra, Supplem. ad Hiſt. Eccleſ. Vigorn.*

SECT. XI.

THE Light of the *Reformation*, 'tis true, did in a great Meaſure reſtore, amongſt *Proteſtants*, Purity both of Doctrine and Practice. But yet it cannot be truly ſaid, that even the Reformers themſelves, and their Succeſſors, have always exactly purſu'd the true Spirit of Chriſtianity; and of the Reformation. Was not that horrible Tenent of Intoleration, or Perſecution on account of Religion, maintain'd by two Treatiſes, written for that very purpoſe; the one by *Calvin*;[a] and the other by[b] *Beza?* and did not *Calvin* actually put theſe his Principles in practice, in the Caſe of *Servetus?* are there not at this day Numbers, who, after having for many Years, and in divers Manners, themſelves felt the dire Effects of Intoleration; cannot yet be brought to make this explicit Declaration; that all Perſecution, or Vexation whatever, whether great or ſmall; direct or indirect; on account of Religion, is in truth no better than downright Tyranny? Have we not ſeen ſome of 'em, bold enough to aſcribe the Progreſs, Chriſtianity has made in the World, to this way of converting Men; by expreſly maintaining, *that*[c] Paganiſm *wou'd have ſubſiſted to this day; and that three Fourths of* Europe *wou'd have been ſtill* Pagans; *had not* Conſtantine *and his Succeſſors employ'd their Authority to aboliſh it.* Are not[d] others for reviving that pernicious Maxim of St. *Auſtin*; that ſuch as believe not in *Jeſus Chriſt*, cannot be look'd upon as lawful Poſſeſſors of the Goods of this World? If we conſider how few good Books of Morality we have, eſpecially in our Language; in compariſon of the infinite Number of controverſial Writings, with which the Libraries and Bookſellers-Shops do every where abound; we may from thence fairly conclude, that Morality is a Study very little minded at preſent. Neither do the publick[e] Sermons ſeem to be very inſtructive on this Head: And that no one may doubt of it, we ſhall produce authentick Teſtimonies, fully ſufficient to convince us thereof. Mr. *La Placette*, Paſtor of the *French* Church at *Copenhagen*, in[f] his *Treatiſe of Reſtitution*; introduces ſome of thoſe, who had miſcarry'd for having neglected this important Duty, complaining of their Teachers at the Day of Judgment, in the Terms following: "We could have very well "diſpens'd with thoſe many vain Speculations; "thoſe many frivolous Diſquiſitions; thoſe many "metaphyſical Enquiries; thoſe many uſeleſs "Controverſies about Things, in which we had "no real concern: and which have been, alas! "the principal Matter of your Sermons. We "ſee none here damn'd, for want of knowing "thoſe Things; hundreds of which you have "taught us, and with that care and concern too, "which might have been very well ſpar'd. But

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[a] *Fidelis expoſitio errorum* Mich. Serveti, & *brevis eorumdem refutatio:* ubi docetur, jure gladii coercendos eſſe Hæreticos.

[b] *De Hæreticis à magiſtratu puniendis. Note*, That the Friends of *Juſtus Lipſius*, to anſwer ſome Proteſtants, who cry'd out againſt the Opinion of puniſhing Hereticks which he maintains in his *Politicks*, and in his Tract *De una Religione*; return'd upon 'em the ſame Charge, by alledging the Affair of *Servetus*; and citing a Paſſage out of *Beza*, where he ſays in expreſs Terms, *That it is more abſurd, to ſay that one ought not to puniſh Hereticks, than it wou'd be to hold, that Men guilty of Sacrilege, and Parricides ought to go unpuniſh'd: Hereticks*, adds he, *being infinitely worſe Villains than all thoſe.* See the Life of *Lipſius*, by *Aubert le Mire, Tom.* I, of the Works of that great Critick, *p.* 16, *Edit. Veſal. Et Edit. Lugd. p.* 10, *Col.* 2-.

[c] *Droits de deux ſouverains, &c. p.* 286. See *Bayle*'s *Dict. Tom.* I, *p.* 424, 425. *Edit.* 2. *Lett.* (*H*).

[d] See *P. Molin. Anatom. Arminianiſmi, cap.* 32, *Diſt.* 18. *Macov. Diſtinct. cap.* 3, *Sect.* 18. *Theol. Quæſt. Loc.* 25, *Quæſt.* 19. *Voetius, &c.*

[e] *N.B.* What our Author here ſays, is by him apply'd to Sermons and Books in *French*; how far 'tis applicable or not applicable to thoſe in other Modern Languages, he leaves to his Reader to judge; but ſeems to except the *Engliſh* and *Dutch*.

[f] *Pag.* 51, 52. See alſo *p.* 147.

“ here we find ourſelves for ever loſt and undone, for the neglect of a Duty, which we cou’d never hear the leaſt Word from you about. You have ſuffer’d us to approach the Holy Table, without forewarning us, that we came thither unworthily, and there receiv’d our own Damnation; if we did not firſt entirely empty both our Hands and Coffers of all our unjuſt Gains. You have indeed preach’d up to us the Mercy of God: You have alſo preſs’d us to implore it with the moſt affectionate Devotion, and the moſt lively Hope; but without ſaying one Word of the Impoſſibility of obtaining the Effects thereof, if we obſtinately continu’d in our Injuſtice, and conſequently in Impenitency; which all moſt certainly do, who reſtore not that which they have unjuſtly acquir’d. In a word, ’tis you who have let us remain ignorant of theſe capital Truths, whilſt we might have profited by them; ’tis you who are the Cauſe, that we learn’d ’em not till now, when they will only ſerve to render us inexcuſable; and convince us that we now moſt juſtly are, and for ever ought to be moſt miſerable.” Mr. *Oſtervald*, Miniſter of *Neufchatel* in *Swiſſerland*, makes the like Declaration: take it as reported, by a third [g] Miniſter, which is Mr. *Bernard*, the learned and judicious Continuator of the *Novelles de*[h] *la Republique des Lettres*. “The Ignorance, ſays he, of the Duties of Chriſtianity, is both very general, and very great. There are ſome of them which vaſt Numbers have never thought on. The Author here inſtances in the Duty of *Reſtitution*; and tells us, that Mr. *La Placette* having ſome time ago publiſh’d a Treatiſe on that Subject, the Book was look’d upon as very ſingular, and for its Subject new and curious; and that ſome there were, who treated this Doctrine of *Reſtitution*, as a Doctrine entirely novel, and withal too rigid. ——There are ſome too, who pretend, that Points of Morality ought not to be urg’d too far; that ſome Indulgencies ought to be made to humane Nature; and at the ſame time rigidly inſiſt upon Points of Doctrine; and on ſuch too oftentimes, as are of very little Importance. Some alſo have proceeded ſo far, as to ſay, that it is even dangerous to inſiſt ſo much upon Morality; and that it is a Mark of Hereſy ſo to do. Divines have likewiſe had the Aſſurance to publiſh Books, wherein they ſeem to have made it their Buſineſs, to decry good Works. Is it to be wonder’d at then, if the People, who are committed to the Care of ſuch Guides, do not give themſelves much Trouble about the Practice of them?—The Doctors appointed to inſtruct the People in Religion, fall out with one another about unprofitable Queſtions; ſo that while the Paſtor is taken up in his Cloſet or in the Pulpit in confuting an Adverſary, that perhaps he has never ſeen; or in combating an Errour utterly unknown to his Flock; his Sheep go aſtray, his Auditors become confirm’d, as to their Morals, in the moſt capital Errours; and deeply engag’d in vicious Habits and evil Courſes.” Here you have the Depoſitions of unexceptionable Witneſſes. And I wiſh it cou’d be ſaid, to the Honour of thoſe, againſt whom theſe Imputations have been but too juſtly brought; that they begin now to open their Eyes, and alter their Courſe. But, alas! it is much to be fear’d, that the greateſt part of ’em will for ſome time continue ſtill prepoſſeſs’d with this Notion, ſo contrary to the Engagements of their Miniſterial Function; that a flaming Zeal for ſpeculative Doctrines, which coſt ’em not much Pains to acquire; and in maintaining of which they find their Account; will excuſe ’em the Labour of entring deep into the ſerious Study of Morality: which will require much profound [i] Meditation; and Knowledge, beyond the rate of Common-Place-Book Learning. It would be a good Point gain’d, if they would but let them alone, who are to the utmoſt of their Power ſtriving to do that, which they themſelves were oblig’d to do. But their Predeceſſors have ſet ’em an Example; and they will by no means degenerate. Who was it, I pray, that introduc’d in the laſt Age, the methodical Study of the Law of Nature; that firſt attempted to give the World a Syſtem of this ſo vaſt, and neceſſary a Science? Was it any of the Eccleſiaſticks, or Profeſſors of Divinity? No: ’twas the illuſtrious *Grotius*; whoſe Memory wou’d on this very Account, be for ever bleſs’d amongſt all ſincere Lovers of Truth and Virtue; tho’ he had not otherwiſe gain’d an immortal Reputation, by the many Pieces he has wrote of another Nature; all excellent in their kind.—Yet no ſooner did that admirable Treatiſe, of the *Right of War and Peace*, appear in the World; but the Eccleſiaſticks, inſtead of returning thanks to the Author for it; every where declar’d againſt him: And his Book was not only put into *the Expurgatory Index* of the [k] *Roman Catholick* Inquiſitors, (which is not ſo much to be wonder’d at;) but many, even Proteſtant Divines, labour’d to cry it down. And thus it far’d too with Mr. *Puſendorf*’s Book of, *The Law of Nature and Nations*. The *Jeſuites* of *Vienna* caus’d it to be prohibited [l]; and many Proteſtant Divines, both of *Sweden* and *Germany*, did their beſt, to make this excellent Work ſhare every where elſe the ſame Fate.

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[g] Mr. *Bernard*, Paſtor of the *Walloon* Church at *Leyden*, and Profeſſor of Philoſophy and Mathematicks in the Univerſity of that Town.

[h] *November* 1699, in the Extract of the Treatiſe *Des ſources de la Corruption*, *&c.* *p.* 582, 583, 585.

[i] See the Reflections Mr. *Bernard* makes, in his *Repub. des Lettres*, *April* 1706, *Art* 1. And which drew upon him an inſipid Libel by a petty *French* Miniſter.

[k] *Ann.* 1627. See *Boecler*’s *Preface* to *Grotius*.

[l] See an Account of all theſe Diſturbances in the *Eris Scandica*, printed at *Francfort* on the *Main* 1686.

SECT. XII.

MORALITY, being thus ſlighted, and almoſt baniſh’d out of the World by the publick Miniſters of Religion; took Sanctuary amongſt the Laicks, or undignify’d Men of Letters; who gave it a much better Reception. Let us now ſee in what manner theſe latter have treated it; and what has been the Progreſs it hath made in their Hands. It may very reaſonably be ſuppos'd, that, notwithſtanding the Simplicity and Ignorance of the firſt Ages of the World, as to what concern'd Arts and Sciences purely ſpeculative; thoſe Fathers of Families, who were Men of good Senſe and Probity; did not fail to [a] teach their Children betimes, together with the Principles of Religion, thoſe Maxims too, that were the moſt important in Morality; as far as they had been made known to them, either by their own proper Meditation; or by [b] Tradition, deriv'd to 'em from the firſt Parents of Mankind. Theſe Inſtructions, however imperfect, and immethodical they may poſſibly have been; might well enough ſuffice for thoſe Times; eſpecially before Corruption had come to that Height, at which it afterwards arriv'd. But when Depravity of Manners had deface'd the true Ideas of Religion and Morality; and the Fathers were become as negligent in inſtructing their Families, as their Children prov'd ſtubborn and unteachable; then had the cleareſt and moſt common Principles of Virtue been in a manner, entirely extinguiſh'd in the World; had there not been a Set of Men, who apply'd themſelves, in a very particular manner, to the Improvement of their natural Reaſon, by the Study of the Sciences: and it was out of their Schools that [c] the moſt celebrated Legiſlatours have proceeded; to whom Communities have been beholden for all the Order and Decency they have ever had amongſt them; and for all the Tranquillity they ever enjoy'd: [d] *Men more worthy of Admiration, and immortal Praiſe, than the greateſt Conquerours.*

As the *Eaſtern* Countries were the firſt peopled; ſo 'tis from thence that the moſt general Notions of Morality, and the other Sciences ſpread themſelves thro' the World. The *Greeks*, with all their Vanity, were forc'd to own themſelves [e] Debtors for theſe Notices to thoſe, they call'd *Barbarians*; chiefly to the *Chaldeans*, *Egyptians*, and *Perſians*. But all that we know of the Sentiments of theſe antient Eaſtern Nations, we have from the *Greeks* themſelves; who have ſometimes mix'd their own Opinions with thoſe they reported, and give us at beſt but a ſlender Account, of what the Sages of the Eaſt taught, on the Subject of Morality. This more particularly appears by the Works of two Learned [f] *Engliſhmen*; who have collected with great Care, all that is to be found thereupon, in the Writings of the Antients.——The Syſtem, we have given us of the Doctrine of the *Chaldeans*; is nothing but a heap of Notions in Phyſicks, or Aſtrology, Metaphyſicks and Pneumatology; mix'd up with abundance of ſuperſtitious, myſtical Alluſions; and ridiculous Fancies. I have here ſet down All I have been able to remark, which can any way be referr'd to the Science of Morality; which is as follows: *You* [g] *ought to make haſte*, (theſe are Maxims, taken from a Collection entituled, *The Oracles of the* Chaldeans; and that they were actually couch'd in the Style of Oracles, will inſtantly appear, by the Sample I am about to give,) *You ought to make haſte to* [h] *approach the Light and Rays* [i] *of the Father, from whence your Soul was ſent you.* —— *Lift up entirely all your Eyes on high, and do not abaſe yourſelf towards this gloomy World, under which there lies an Abyſs, never to be truſted, and an* [k] *Hell, ſurrounded on all ſides with Miſts and Clouds*, &c.—— *Seek* [l] *Paradiſe.*—— *Seek the Channel* [m] *of your Soul, and from whence, and from what* [n] *Rank, you are become a Slave to the Body, that you may be able to return to that Rank, from whence you are deſcended, by joining Practice to Holy Diſcourſe.* —— *Do not aggravate your Deſtiny.* —— *Preſerve your frail Body for the Practice of Piety.* —— *Nouriſh yourſelf with the Hope of that Fire,* [o] *which is in the Country of Angels.* —— *Do not defile your Soul, do not debaſe it, do not yourſelf make it depart from you, leſt in departing from you, it find nothing: The Souls of thoſe who are ſeparated from the Body* [p] *by Force, are the moſt pure.* —— *O Man, who art a Creature*

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[a] See the *Hiſt. du Droit Naturel*, by Mr. *Buddeus*, *Sect.* 2.

[b] See *Bibl. Univ. Tom.* III, *p.* 322.

[c] *Hi* [*Zaleucus, Charondas*] *non in foro, nec in conſultorum atrio, ſed in Pythagoræ tacito illo ſanctoque ſeceſſu didicerunt jura, quæ florenti tunc Siciliæ; & per Italiam Græciæ ponerent.* Senec. *Epiſt.* 90, *p.* 301, *Edit.* Gronov.

[d] Mr. *Bayle's Dict. Tom.* III, *p.* 2442, *Rem.* (G).

[e] Τὸ τῆς φιλοσοφίας ἔργον ἔνιοι φασιν ἀπὸ Βαρβάρων ἄρξαι. Diog. Laert. *Lib.* 1, *Sect.* 1. See thereupon the Commentators, *Edit. Amſtelæd.* 1692.

[f] *John Marſham*, in his *Canon Chronicus*, *Ægyptiacus*, &c. printed at *London* 1672, and at *Leipſick* 1676. And *Thomas Stanly*, in his *Engliſh Hiſt. of Philoſophy*, (which, as I am inform'd, has been lately tranſlated and publiſh'd at *Leipſick* 1711,) *Parts* 14, 15, 16, 17, 18, 19. Theſe ſix laſt Parts have long ſince been tranſlated by Mr. *Le Clerc*; which Tranſlation was a 4th time reprinted in the 2d *Tome* of his Philoſophy in 1710.

[g] See *Le Clerc*'s Philoſophy, *Tom.* II, *p.* 338, &c. *Ver.* 215, 216, 238, & *ſeq. Ver.* 247, & *ſeq. Ver.* 254, 259, 268, 274, & *ſeq. Ver.* 280, & *ſeq.* Χρή σε σπεύδειν πρὸς τὸ φάος ϗ πατρὸς αὐγάς, Ἔνθεν ἐπέμφθη σοι ψυχή, Ver. 215, 216. Edit. Cleric. Ὄμματα δ' ἄρδην πάντα ἐκπέτασον ἄνω. Μήτε κάτω νεύσῃς εἰς τὸν μελαναυγέα κόσμον Ὧι βυθὸς αἰὲν ἄπιστος ὑπέστρωταί τε ϗ Ἅδης Ἀμφικνεφής, Ver. 238, & ſeq. Ζήτησον παράδεισον. Δίζεο σὺ ψυχῆς ὀχετὸν, ὅθεν, ἢ τινι τάξει σώματι θητεύσας, ἐπὶ τάξιν ἀφ' ἧς ἐρρύης Αὖθις ἀναστήσεις, ἱερῷ λόγῳ ἔργον ἑνώσας, Ver. 247, & ſeq. Μὴ σὺ αὔξανε τὴν εἱμαρμένην, Ver. 254. Ἔργον ἐπ' εὐσεβίης ῥευστὸν ϗ σῶμα σαώσεις, Ver. 259. Ἐλπὶς τρεφέτω σε πυρίοχος ἀγγελικῷ ἐνὶ χώρῳ, Ver. 268. Μὴ πνεῦμα μολύνῃς, μήτε βαθύνῃς τὸ ἐπίπεδον, Μὴ ἐξάξῃς, ἵνα μὴ ἐξιοῦσα ἔχῃ τι. Βίῃ ὅτι σῶμα λιπόντων ψυχαὶ καθαρώταται, Ver. 274, & ſeq. Ὦ τολμηροτάτης φύσεως ἄνθρωπε τέχνασμα! Μὴ τὰ πλατέα μέτρα γαίης ὑπὸ σὴν φρένα βάλλε, Οὐ γὰρ ἀληθείης φυτὸν ἐνὶ χθονί. Μήτε μέτρει μέτρα ἠελίου, κανόνας συναθροίσας, Ἀϊδίῳ βουλῇ φέρεται, οὐχ ἕνεκα σοῖο. Μηναῖον μὲν δρόμημα, ϗ ἀστέρων προπόρευμα, Μήνης ῥοῖζον ἔασον, ἀεὶ τρέχει ἔργῳ ἀνάγκης. Αἴθριος ὀρνίθων ταρσὸς πλατὺς οὔποτ' ἀληθής. Οὐ θυσιῶν, σπλάγχνων τ' ὄθομαι· τὰ δ' ἀθύρματα πάντα, Ἐμπορικῆς ἀπάτης στηρίγματα. Φεῦγε σὺ ταῦτα, Μέλλων εὐσεβίης ἱερὸν παράδεισον ἀνοίγειν, Ἔνθ' ἀρετὴ, σοφία τε ϗ εὐνομία συνάγονται, ver. 280, & *ſeq.*

[h] That is to ſay, to do all you can, to return to the Place from whence your Soul is deſcended down here below; for they believ'd the Pre-exiſtence of Souls.

[i] They meant by that, the Spaces that are above the Moon, which they conceiv'd to be all ſhining with bright Light. This Light was, in their Opinion, an Emanation from the Father, or Sovereign Divinity. See hereupon *Stanly*, and the Notes of Mr. *Le Clerc*, on the *Chaldean* Oracles.

[k] Ἅδης. They, as well as the *Greeks*, believ'd, that the Place to which the Souls of the Wicked went, was underneath the Earth.

[l] That is to ſay, the Place of Bliſs, or of that Light above the World, (Φῶς ὑπερκόσμιον) which was the Abode, and Reſidence of pure Spirits. See Mr. *Le Clerc*'s Note on that Verſe.

[m] Thro' which it paſs'd, to come down here below.

[n] They conceiv'd, that there were ſeveral Ranks or Orders of Beings, and ſeveral Claſſes of pure Spirits.

[o] That is to ſay, of returning into the luminous Space, already mention'd,

[p] That is to ſay, by the Effect of an exterior Force. They thought, as did the Diſciples of *Plato*, that they ought not to depart out of this Life without the Permiſſion of *God*. See Mr. *Le Clerc*, on this Verſe.

of a moſt daring Nature, take not into thy Mind the vaſt Dimenſions of the Earth; for the Plant of Truth is not upon the Earth. Do not meaſure the Sun by the help of collected Rules: He moves by virtue of an eternal Decree, and not for thy ſake. Trouble not thyſelf about the Courſe of the Moon, and the Motions of the Stars, nor about the Noiſe of the Moon: She holds her Courſe by an Effect of Neceſſity.——The expanded Wing of Birds that fly in the Air, never tells Truth. I do not trouble myſelf at all about Sacrifices, or Entrails; they are all Mockeries, and the vain Supports of Fraud and filthy Lucre. Fly theſe Things, you who are to open the ſacred Paradiſe of Piety, where Virtue, Wiſdom, and Equity dwell in conjunction. The two laſt Sentences do plainly enough condemn judicial Aſtrology, and[q] Sacrifices too, if not abſolutely, at leaſt the Preſages, which were drawn from the Entrails of the Victim; as well as thoſe from the Flight of Birds: and yet theſe Things were highly in vogue amongſt the Eaſtern Nations; and chiefly amongſt the *Babylonians* and *Aſſyrians*. In the other Oracles, which would have been unintelligible to an ordinary Reader, without the ſhort marginal Notes; which I have been oblig'd to add as a Key to ſome Places; they condemn Self-Murder; and recommend continual Meditation on the Rewards and Puniſhments of another Life. It remains to be conſider'd, wherein they made thoſe Duties to conſiſt, which were to be practis'd in order to propitiate the ſovereign Deity; and to aſſure to themſelves a State of Bliſs after this Life ended. In what has been hitherto collected of the Doctrine of the *Chaldeans*, there is no mention of any thing beſides an exact Obſervation of certain Rites and Ceremonies, whereof Sacrifice is the moſt conſiderable; by means whereof they fancied themſelves capable, of maintaining Correſpondence with the Celeſtial Beings; of raiſing the Soul above the Power of the Paſſions; and even healing the Diſeaſes of the Body; as well as thoſe of the Mind. Theſe Ceremonies they call'd the [r] *Works of Piety. They, who perform theſe as they ought, ſay they,* [s] *ceaſe to be troubled with any Evil whatever; they acquire thereby all ſorts of Virtues; they become good and virtuous Men; they are ſet free from their Paſſions, and unruly Inclinations; they are purify'd from all Impiety and Prophaneneſs. On the contrary, thoſe who neglect, or do not rightly perform them; are deliver'd up as a Prey to their Paſſions, depriv'd of all Commerce with the pure ſpiritual Beings, and become like to thoſe evil Genii, with whom they converſe; and who puſh 'em on to the Practice of all manner of Vice.*

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[q] Mr. *Le Clerc* believes, we ought to read with *Pſellus*, σπλάγχνων τε τομαὶ: So that theſe Words ſhou'd not condemn Sacrifices, but only Divinations by the Entrails of Victims.

[r] Ἔργα εὐσεβείας. See *Stanley, Hiſt. Phil. Oriental,* tranſlated by Mr. *Le Clerc, Lib.* 1, *Sect.* 2, *Cap.* 28.

[s] *Iamblich, de Myſter, Sect.* 3, *Cap.* 31, *p.* 102, *Lin.* 25, *&c. Edit. Oxon.*

SECT. XIII.

NOR are we much better inform'd as to the Morality of the *Egyptians*; not tho' we ſhould even admit for genuine, thoſe viſibly ſpurious Writings, which paſs under the Name of their[a] *Hermes*, or *Mercurius Triſmegiſtus*. 'Tis well known, that the Learned of that Country were [b] very much addicted to Enigma's, Symbols, and Hieroglyphicks; which render'd their Doctrine obſcure and impenetrable to all, who were without a particular Key to it. So that it was almoſt impoſſible, for it ever to be tranſmitted to us; eſpecially if we conſider, with what care they conceal'd their Myſteries from all, who had not been initiated therein. However there is a certain Fragment ſtill remaining, by which we may form ſome Judgment of the principal Heads of the Morality of the *Egyptians*; 'tis the Form of a kind of Funeral Sermon, pronounc'd by ſome Funeral Officer; wherein he thus delivers himſelf in the Name of the Deceas'd[c]: *I have religiouſly ſerv'd, during my Abode in this World, the Gods which my Forefathers had made known unto me. I have ever honour'd thoſe who procreated my Body. I have never committed Murther. I have never been guilty of Breach of Truſt. Nor have I ever committed any other Crime that is inexpiable.* Thoſe Remains we have preſerv'd to us by antient Writers, of the[d] Laws of the *Egyptians*; the Eſtabliſhment whereof is aſcrib'd to their famous *Hermes*, or *Mercurius Triſmegiſtus*, Counſellor of State to *Oſiris*, one of their firſt Kings; do likewiſe give us reaſon to conclude, that the Sages of *Egypt* apply'd themſelves as well to Morality and Politicks; as to the Study of the ſpeculative Sciences. There are notwithſtanding certain of thoſe Laws, which do not rightly quadrate with ſome of the moſt evident Maxims of the Law of Nature. The Daughters alone, for example, were oblig'd to nouriſh and ſupport their Parents; whilſt the [e] Sons were entirely excus'd. They alſo made a Difference to the Prejudice of the Mother, between the reſpect due to her from the Children, and that which they ow'd to their Father; which they founded on this falſe Notion [f] in natural Philoſophy: that the Mother contributes nothing to the Production of the Child, beſides the furniſhing it with a Lodging, as I may ſay, and Nouriſhment during the Time of her Pregnancy. Whereupon a very ingenious

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[a] See the *Bibliotheca Græca* of Mr. *Fabricius, Lib.* 1, *Cap.* 7, *& ſeq. Hecateus* of *Abdera* had wrote the Hiſtory of their Philoſophy; *Diog. Laert. Lib.* 1, *Sect.* 10, 11: But this Book is loſt. See *Menag.* i. l.

[b] See *Marſham, p.* 38, *Edit. Lipſ.*

[c] Ἐγὼ γὰρ τοὺς Θεοὺς, οὓς οἱ γονεῖς μοὶ παρέδειξαν, εὐσεβῶν διετέλουν, ὅσον χρόνον ἐν τῷ ἐκείνῳ αἰῶνι τὸν βίον εἶχον· τούς τε τὸ σῶμά μου γεννήσαντας ἐτίμων ἀεί· τῶν τε ἄλλων ἀνθρώπων οὔτε [τινὰ] ἀπέκτεινα· οὔτε παρακαταθήκην ἀπεστέρησα· οὔτε ἄλλο οὐδὲν ἀνήκεστον διεπραξάμην. Porphyr. de Abſtinentiæ, Lib. 4, Sect. 10, juxta verſionem Euphanti ex lingua Egyptiaca. *See Marſham, p.* 156.

[d] See *Marſham*, who has collected them with care; and Mr. *De Meaux*, who has copy'd him in his *Diſcourſe ſur l'Hiſt. Univ. p.* 361, *& ſeq. Edit. Holl.*

[e] Τρέφειν τοὺς τοκέας τοῖσι μὲν παισὶ οὐδεμίη ἀνάγκη, μὴ βουλομένοισι. Τῇσι δὲ θυγατράσι πᾶσα ἀνάγκη, καὶ μὴ βουλομένῃσι. Herodot. Lib. 2, c. 35, p. 64, 65, Edit. Steph. Et p. 102, Ed. Gronov.

[f] Ὑπειλήφασι τὸν πατέρα μόνον αἴτιον εἶναι τῆς γενέσεως, τὴν δὲ μητέρα τροφὴν καὶ χώραν παρέχεσθαι τῷ βρέφει. Diodor. Sic. Lib. 1, p. 51, A.

Commentator[g] has judiciouſly remark'd, that in that Law of the Decalogue, *Honour thy Father and thy Mother*; there is, as in many other Places of the Pentateuch, a tacit Oppoſition to the wrong Notions and Cuſtoms of the *Egyptians*.

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[g] *Cleric.* in *Exod.* xx, 12.

SECT. XIV.

THE Doctrine of the *Perſians*, was much the ſame with that of the *Chaldeans*, their Maſters, as ſome pretend, from whom they receiv'd it. The manner, in which they educated in *Perſia*, the Children[a] of their Kings, and their young Noblemen; gives us all the reaſon in the World to believe, that they diligently apply'd themſelves to Morality and Politicks. At[b] the Age of fourteen, the young Prince was put into the Hands of thoſe, who were call'd the Royal Preceptors. *Who were four of the moſt Eminent for Birth, and Character, that cou'd be found in all* Perſia; *they were choſen in the Vigour of their Age; the firſt paſt for the moſt wiſe, the next for the moſt juſt, the third for the moſt temperate, and the fourth for the moſt valiant. The firſt taught him the Magick of* Zoroaſter, *Son of* Oromazus; *in which was comprehended all the Worſhip of the Gods: He alſo taught him the Laws of the Realm, and all the particular Duties of a good King. The ſecond taught him to ſpeak the Truth always, tho' it made againſt himſelf; The third taught him never to ſuffer himſelf to be overcome by his Paſſions; to the end that he might continue always free, and always a King; by ever maintaining as abſolute a Sway over himſelf, as over his Subjects. The fourth taught him to fear neither Dangers, nor Death; for, by ſubjecting himſelf to fear, from a King he becomes a Slave.* A Learned *Engliſh* Author[c], who was Maſter of almoſt all the Oriental Languages, and even of the Dead Language of the *Zend*; (for ſo it was the *Perſians* call'd the Books of their famous *Zoroaſter*, or *Zerduſht*:) publiſh'd, ſome Years ſince, a *Latin* Tranſlation of a Piece in Verſe; which is itſelf but a Verſion, into the Modern *Perſian*, of part of the Books of that antient Legiſlatour. They who have read that Abridgment, call'd *Sad-der*, will, I'm perſuaded, readily ſubſcribe to the Judgment of a Learned Journaliſt[d]; who ſays, that there are, *amongſt ſeveral good Precepts of Morality, many ſuperſtitious, and trifling Things*; I have in my *Notes*[e] on Mr. *Pufendorf* reported part of theſe Maxims; which are indeed highly conformable to Reaſon. And here the Reader has the moſt conſiderable of the reſt. (*viz.*) *If you*[f] *will be holy, and ſave yourſelf, you have two Rules to practiſe: The one is, that if in this World, you love Paradiſe better than any other Thing whatever, do not poſſeſs yourſelf of the Goods of another; for Paradiſe is worth more than all the Things of this World; becauſe this World is only as it were the Space of five days; whereas Paradiſe is as it were an infinite Duration. And if the Poſſeſſion of Paradiſe be moſt agreeable to you, ſet not your Heart on theſe poor Things: Remember to do good to every one, for Acts of Goodneſs are excellent Works in this Life. Do then unto Men the ſame things, that you wou'd they ſhou'd do to you. The other Rule is, to offend no body with your Tongue; but to promote, by your Humanity and good Nature, Society amongſt Men.*—*Do*[g] *your Endeavour to follow Truth, without any Adulteration; ſeek it with care, for it will make your Soul perfect: Of all the Things which God hath created, there is none better than Truth.*—*Have*[h] *no Commerce with a Proſtitute: do not ſeduce the Wife of another, tho' ſhe tickle your Heart, and tho' ſhe lay Snares for you.* --- *Do not offend your Father,*[i] *who hath brought you up; nor your Mother, who hath carry'd you nine Months in her Womb; nor the Prieſt, who hath taught you the Maxims of Goodneſs and Virtue.* --- *When your Parents command you to do any thing, riſe up chearfully to obey them.* [k] *Inſtruct your Children; and then be it known unto you, that all the good Actions, which they ſhall do, it ſhall be as if their Parents had done 'em themſelves.* --- *He that lives in Ignorance, knoweth neither God nor Religion.* The Reaſons, with which theſe excellent Maxims are accompany'd, are not always very ſolid; and there are ſome of 'em even ridiculous. They ſay, for example, that a Man ought not to debauch his Neighbour's Wife, becauſe, [l] *if after it the Husband approaches his Wife, he committeth a Sin, as much as if he had to do with an Harlot.* They ſay farther, that [m] *whoſoever hath had to do with a Whore, ſhall loſe for forty days, his Underſtanding, Knowledge, and Diſcernment; nor ſhall he be able to conduct himſelf,* &c. In another Place[n], they adviſe to *marry betimes*; becauſe, ſay they, *Children are as a Bridge at the laſt Judgment; ſo that they who have no Children at that day, cannot paſs over into the Manſion of Immortality; But muſt remain on this ſide the Abyſs, which ſeparates it from this World.* It muſt nevertheleſs be acknowledg'd, that they do not fail frequently to alledge the general Motive of the Rewards and Puniſhments of another Life; which *Zoroaſter* taught, with a kind of Reſurrection; tho' he has upon that occaſion vented a thouſand groſs and abſurd Conceits; as may appear by reading Mr. *Hyde*'s Book.

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[a] Πάντες γὰρ οἱ τῶν ἀρίστων Περσῶν παῖδες ἐν ταῖς βασιλέως θύραις παιδεύονται. Xenoph. de Cyri Min. expedit. p. 158, Ed. H. Steph. Lib. 1, c. 9, ſ. 2, Ed. Oxon. Et p. 266, D⁻. Ed. Paris.

[b] Δὶς ἑπτὰ δὲ γενομένων ἐτῶν, τὸν παῖδα παραλαμβάνουσιν οὓς ἐκεῖνοι βασιλείους παιδαγωγοὺς ὀνομάζουσιν· εἰσὶ δὲ ἐξειλεγμένοι Περσῶν οἱ ἄριστοι δόξαντες ἐν ἡλικίᾳ τέτταρες· ὅ, τε σοφώτατος, καὶ ὁ δικαιότατος, καὶ ὁ σωφρονέστατος, καὶ ὁ ἀνδρειότατος. Ὧν ὁ μὲν μαγείαν τε διδάσκει τὴν Ζωροάστρου τοῦ Ὡρομάζου (ἔστι δὲ τοῦτο θεῶν θεραπεία) διδάσκει δὲ καὶ τὰ βασιλικά· ὁ δὲ δικαιότατος, ἀληθεύειν διὰ παντὸς τοῦ βίου· ὁ δὲ σωφρονέστατος, μηδ' ὑπὸ μιᾶς ἄρχεσθαι τῶν ἡδονῶν (ἵνα ἐλεύθερος εἶναι ἐθίζηται καὶ ὄντως Βασιλεὺς, ἄρχων πρῶτα τῶν ἐν αὑτῷ, ἀλλὰ μὴ δουλεύων) ὁ δὲ ἀνδρειότατος, ἄφοβον καὶ ἀδεᾶ παρασκευάζων, ὅταν δείσῃ δοῦλον ὄντα. Plat. in Alcib. 1, *p.* 121-, 122⁻, *Tom.* II, Ed. Serran. Et p. 32, F⁻, Ed. Læmar. *N.B.* As the Author follows the Tranſlation of Mr. *Dacier*, ſo does his Tranſlator him, unleſs where he ſees juſt Cauſe to do otherwiſe: and this he obſerves too in all Tranſlations from Originals, quite thro' this Prefatory Diſcourſe.

[c] The late Mr. *Hide*, in his *Hiſtory of the Religion of the antient* Perſians, printed at *Oxford*, in 1700.

[d] Mr. *Bernard*, in his *Novelles*, of *March*, 1701, *p.* 250.

[e] On *Lib.* 1, *Cap.* 3, *Sect.* 8, *Not.* 3. *Cap.* 7, *Sect.* 4, *Not.* 3. and *Lib.* 2, *Cap.* 3, *Sect.* 14, *Not.* 10. and *Lib.* 3, *Cap.* 3, *Sect.* 16, *Not.* 1. *Cap.* 4, *Sect.* 2, *Not.* 3.

[f] *Sad-der, Port.* 71.

[g] *Port.* 68.

[h] *Port.* 69.

[i] *Port.* 64.

[k] *Port.* 55.

[l] *Port.* 69.

[m] *Ibid.*

[n] *Ibid.*

SECT. XV.

AFTER having ſpoke of the *Chaldeans*, the *Egyptians*, and the *Perſians*; I muſt, before I paſs on to the Weſtern Nations, ſay ſomething of the *Indians*, and *Chineſe*. What ſome Authors have related concerning the manner of living us'd by the *Indian Philoſophers*, whether they are call'd *Brachmans*, or *Germans*, or Gymnoſophiſts; (for there were ſeveral Sects of them, which are not ſufficiently diſtinguiſh'd by the antient Authors, who ſpeak of them:) What, I ſay, is related concerning their (*A*) ſad and ſolitary Way of living; and of their ſuperſtitious Auſterities, in which the Modern *Bramins* (*B*) have but outdone 'em; plainly ſhew, that there was a great deal of Caprice and Folly in their Principles and Maxims. However, as *Strabo* reports, they believ'd the Immortality of the Soul, and a future Judgment; (*C*) *as far*, ſays he, *as it has any relation to Piety and Holineſs*. And it appears, by a Converſation, related (*D*) by *Philoſtratus*, which *Apollonius* had with one of the *Gymnoſophiſts* of *Ethiopia*; that their Notions of Juſtice were right enough. As for the *Chineze*, whoſe Opinions and Cuſtoms were unknown to us till theſe latter Ages; the celebrated Mr. *Leibnitz* aſſures us, [a] that, in Matters of Morality and Politicks, the Learned of that Country far exceed ours here in *Europe*. Perhaps this Encomium may be ſome what over ſtrain'd; but however this at leaſt is certain, tho' * Mr. *De St. Evremond* be never ſo much of the contrary Opinion; that there are a great many moſt excellent Things to be met with in the Books of [b] *Confucius*, (or *Cum Fu Cu*): who, not to mention the Divine Honours which have been long ſince paid him in that Country; is ſo much eſteem'd for his Philoſophy, that there are in every City publick Schools, where his Works are expounded; and where one muſt ſtudy ſome time, before he can be admitted into any Poſt in the Government. I will now give my Reader a Taſte of his Principles. [c] "All that, which is the Celeſtial Part of Man, we call the Rational Nature; what is conform to Nature and Reaſon, we call the Rule: as we do Morality, or the Inſtitution of Virtue, the Re-eſtabliſhment of that Rule, by the Application thereof to ourſelves, in the Government of our Paſſions. This Rule, being eſſential to the Rational Nature, neither can, nor ought to be ſeparated one ſingle Moment from Man; for if it cou'd be ſeparated from him at any time, it wou'd not then be the Rule, nor the Reaſon, which Heaven has given us. (*Confucius*, or *Cu Su*, no doubt meant by this, that to ceaſe to be rational, is to ceaſe to be a Man; ſince they add:) This is the reaſon why the Man of Integrity keeps ſo diligent a Guard upon himſelf; and is ſo watchful even in Things, which do not appear to the Eye; ſuch as are the firſt and moſt minute Motions of the Heart: and that he governs himſelf with ſo much Precaution alſo in Things, which are not to be diſtinguiſh'd by the Ear; to the end, that whatever he does, he may never ſwerve from the Rule of right Reaſon; which he always carries imprinted on his Soul. The Paſſions being eſſential to Nature, or rather being Nature itſelf; the Man of Integrity applies himſelf to govern, and keep 'em under the Reſtraint of right Reaſon; (but not to ſuppreſs or extinguiſh 'em:) For Joy, the Attendant on Good, and Grief, on bad Succeſſes; Sorrow for the Loſs, and Pleaſure in the Enjoyment of any good; before they come to be reduc'd into Act, are term'd *Medium*, or reputed to be in a State of Mediocrity; being as yet indifferent with reſpect to either Redundancy, or Deficiency. But when they have produc'd their Effect, and that Effect agrees with the Light of right Reaſon; 'tis then call'd Union or Agreement between Reaſon and the Paſſions; whilſt the Paſſions ſtill keep the Medium, they are look'd upon as the main Spring of the Univerſe, and the Foundation of all good Actions; and, when they are conformable to Reaſon, they are call'd the Rule of the Univerſe, and the Royal Way of Mankind. —— [d] There are four Rules, which a Man of Integrity endeavours to obſerve: Scarce one which have I obſerv'd as I ought: *1ſt*, To pay the ſame Obedience to my Father, which I require from my own Children. *2dly*, To have the ſame Fidelity to my Prince, that I expect from my own Servants. *3dly*, To have the ſame reſpect for my Seniors, that I look for from thoſe, who are my Juniors. *4thly*, To have the ſame Zeal for the Intereſt of my Friends, as I myſelf expect at their Hands; and to endeavour as much to be beforehand with 'em in all manner of good Offices, as I wou'd deſire they ſhou'd do on my Account. A Man of Integrity puts theſe Virtues in practice every Day, and every Hour; without Artifice, and without Diſguiſe. He is prudent and circumſpect in all his Diſcourſe; and if he has in any thing come ſhort of his Duty, he never reſts, till he has ſupply'd what was wanting. If he finds a Torrent of Words come upon him, he is very careful how he gives 'em utterance; becauſe he will be always ſeen to ſute his Actions exactly to his Words; and his Words to his Actions. A Man of Integrity is always content with his Lot, he always lives in a manner ſutable to his preſent Condition; and never wiſhes for any thing, that is not proper for him. As he ſeeks only to make himſelf perfect, and demands nothing of other Men, he is never diſpleas'd or angry with them; and never murmurs either againſt Heaven or Earth. When he is unfortunate, he complains not of the Injuſtice of Providence; he imputes not to other Men, his own Defects; nor does he accuſe them of being the Authors of his Miſery. He is like an Archer, who lays all the fault upon his own Hand, when he has miſs'd his aim. --- [e] I do not ſee of what uſe a Man can be in the World, who is without faith; unſincere in his Words, and unſteady in his Promiſes. Of what uſe is a Chariot without a Beam; or a Wheel without an Axel-tree?" One may judge by this Sample, of the Accuracy of Thought, and profound Meditation of this *Chineſe* Sage. The Inſtructions which he gave to *Ngaïcum* King of *Lu*, concerning the Art of Government, [f] *contain moſt admirable moral Reflections; which do not meerly conſiſt of indetermin'd general Notions; but of particular Inſtructions, adapted to all the ſeveral Occaſions, and Junctures of Affairs, which can befal a Prince: inſomuch, that it may very well be ſaid without Exaggeration, that there is more to be learn'd from this ſmall Book of* Confucius, *than from the vaſt and numerous Volumes of ſome of the Fathers of the Church.* But there aroſe ſince his Time another [g] Philoſopher, whoſe impious Notions at length prevail'd; and have continu'd to this day to be the Opinions moſt commonly receiv'd. His * Diſciples have an *exterior Doctrine*, which they preach to the People, to retain them, ſay they, in their Duty; and which conſiſts in teaching, that there is a real Difference between *Good*, and *Evil*; *Juſt*, and *Unjuſt*: and that there is another Life, where every one ſhall be puniſh'd or rewarded, according to that which he hath done in this. But their || *interior Doctrine*, which is only for the *initiated*; is upon the upſhot a kind of *Spinoſiſm*; which at once entirely expunges both Religion, and Morality.

(*A*) See chiefly *Strabo, Geogr. lib.* 15, *p.* 712, *A*, *&c.* and *Philoſtratus, De Vitâ Apoll. Tyan. paſſim:* and particularly *p.* 119, *&c. Edit. Paris.* 1608.

(*B*) See the Letter of Mr. *Bernier*, entitled, *Qu'il n' y a opinions ſi ridicules, ni ſi extravagantes, dont l'Eſprit humain ne ſoit capable, &c.* inſerted in his Voyages.

C Παραπλέκουσι δὲ ϗ μύθους ὥσπερ ϗ Πλάτων, περί τε ἀφθαρσίας ψυχῆς, ϗ τῶν καθ᾽ ᾅδου κρίσεων, ϗ ἄλλα τοιαῦτα --- ὅτι δοκεῖ πρὸς εὐσέβειαν ϗ ὁσιότητα. Strabo, *Lib.* 15, *p.* 1040, *A, C, Ed. Almelov. Et p.* 713, *C*, *& p.* 714, *A*, *Edit. Paris. Anno* 1620.

(*D*) *De Vita Apoll, Tyan, Lib.* 6, *cap.* 21, *Edit. Olear. Et cap.* 11, *Edit. Morell. Pufendorf* has cited a Paſſage out of it, *lib.* 1, *c.* 9, *ſ.* 5, *n.* 4.

[a] *Præfat. ad Noviſſima Sinica.*

* He calls him (*Tom.* 5, *p.* 69,) *the moſt tedious Moraliſt he ever read. His Sentences*, adds he, *where he is intelligible, are below the Stanza's of Pibrac; where he is obſcure, he is above the Apocalypſe.* But a Man of the Character of St. *Evremond*, might be tired with the reading a Book of Morality; and yet that be no Prejudice to the Merit of the Book. Not that there are not as well bad, as good Things, in what has been publiſh'd of *Confucius*'s Works; and we may very well ſubſcribe, or come pretty near the Judgment of Mr. *Gundling*, Profeſſor at *Hall* in *Saxony*, in his Book call'd *Hiſtor. Phil. Moral. Part* 1, *cap.* 5, *Sect.* 5; of which the firſt Part only has been yet publiſh'd, as I think, which treats of the Oriental Philoſophy; printed in 1706.

[b] 'Tis pretended, that he liv'd 551 Years before *Chriſt*.

[c] *Biblioth. Univ. Tom.* 7, *p.* 420, *&c.* in the Extract out of *Confucius*, by *P. Couplet*, printed at *Paris*, in 1687, in *Folio*.

[d] *Ibid. p.* 427, *& ſeq.*

[e] *Ibid. p.* 443.

[f] *Bibl. Univ. ubi ſupra, p.* 436.

[g] *Foe*, or *Xe Kia*, or *Xaca*. See *Bibl. Univ. ubi ſupra, p.* 402, *& ſeq.*

* *Ibid. p.* 404, 405.

|| *Ibid. p.* 406.

SECT. XVI.

WE come now to the *Grecians*, whoſe Opinions we are much better acquainted with than thoſe of the *Eaſtern Nations*, whoſe Diſciples they had firſt been; though they afterwards became Maſters to all the other Nations of *Europe*. They ſet themſelves to extend, and, in Proceſs of Time, did in Fact conſiderably improve [a] that Stock of Knowledge, they had imported from abroad: And hence it is, that the farther we look back into Antiquity, the more we trace amongſt the *Greeks*, the Notions and Manner of teaching of the Eaſtern Nations. Thus it comes to paſs, that the Morality of the moſt antient *Grecians* conſiſted in *Enigma's*, *Apologues*, and *Sentences*, not much unlike the *Proverbs* of *Solomon*. There had been, before *Æſop*, whoſe Fables are ſo much celebrated, many other [b] Authors in that Sort of ingenious and inſtructive Fictions. *Plutarch*, ſpeaking of [c] *Pittheus*, Grandfather, on the Mother's Side, to *Theſeus*, who liv'd about the Time of the firſt *Judges of Iſrael*; ſays, That *the Science then in Uſe conſiſted chiefly of Sentences, and moral Sayings; ſuch as thoſe which gain'd* Heſiod *ſo much Eſteem, in his Work entitled,* Works and Days. *Amongſt the Sentences of that Poet,* adds he, *this is one; which is aſcrib'd to* Pittheus [d]: *Let the Reward thou promiſeſt to thy Friend, be a competent Reward.* Theſe Sentences were generally put into Verſe after the *Eaſtern* Manner; which ſerv'd to help the Memory, and give the Precepts a more lively Turn. There is now extant an Elegiack Poem of *Theognis* [e] of *Megara*, under the Title of *Sentences*; where you have abundance of good moral Reflections. *Homer* too we find, with the other leſs antient Poets, but more eſpecially the Tragedians, full of Precepts; ſometimes direct, ſometimes indirect; ſcatter'd too all over Works, which were principally deſign'd [f] for Diverſion, rather than Inſtruction. But they muſt be read with Judgment and Caution; for the good and the bad lie there both blended together: For which Reaſon *Plato* baniſh'd them his Republick; and *Plutarch* wrote a Treatiſe purpoſely to inform Youth, with what Precautions they were to be read. But to ſay nothing of the abſurd Ideas they give of the Deity; we find there, amongſt ſome few Inſtances of Virtue, many Characters extremely vicious; which they are ſo far from expoſing as they ought, to the Horrour and Deteſtation of their Readers; that on the contrary, they are frequently ſet forth as the very Patterns of Virtue. "[g] As there are ſome moral Sentences, "which are moſt true; and ſome moſt noble "Sentiments: ſo likewiſe there are ſome "Thoughts mean enough; and moral Reflec"tions too, which are falſe and ill-grounded. "Let any [h] one read what *Theognis* ſays con"cerning Poverty, and the great Care we "ought to take to avoid it; and he will be "forc'd to own, that no Miſer could have ſaid "more. [i] *Heſiod* ſays: *For my Part, I would "neither myſelf be juſt amongſt Men, nor would*

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[a] See *Plato, Epinomid. p.* 987, *E,— Tom.* 2, *Edit. H. Steph. & p.* 703, *D,— Ed. Lamar.*

[b] See *J. Alb. Fabricii, Bibliothec. Græc. lib.* 2, *c.* 9, *Sect.* 5,— tom. 1, *p.* 394.—

[c] Ἦν τῆς σοφίας ἐκείνης τοιαύτη τὶς ἰδέα κὶ δύναμις, ᾗ χρησάμενος Ἡσίοδος εὐδοκίμει μάλιστα περὶ τὰς ἐν τοῖς ἔργοις γνωμολογίας· κὶ μίαν γε τούτων ἐκείνην λέγουσι Πιτθέως εἶναι, Μισθὸς δ' ἀνδρὶ φίλῳ εἰρημένος ἄρκιος ἔστω. In vita Theſ. init. p. 4,— tom. 1, H. Steph. Edit. & p. 2, A,— tom. 1, Edit. Francofurti, 1620.

[d] *Oper. & Dier.* Lib. 1, verſ. 370, *Edit. Cleric.* cujus vide Not.

[e] He liv'd about the fifty eighth Olympiad, about five hundred and fifty Years before Jeſus Chriſt. See the *Bibl. Græc.* of Mr. *Fabricius*, Lib. 2, c. 11, Sect. 1.—

[f] See the *Parrhaſiana*, Tom. 1, Article 1, p. 1,— 2.— and the fine *Diſcourſe* of *Houdart de la Motte* upon Poetry, *&c.* p. 21, *& ſeq. Edit. Holl.* An antient Philoſopher, nam'd *Eratoſthenes*, did long ago advance this Propoſition, which does at preſent ſo much ſcandalize the Grammarians and extravagant Admirers of Antiquity: Ποιητὴν γὰρ ἔφη πάντα στοχάζεσθαι ψυχαγωγίας, οὐ διδασκαλίας, which are the very Words of *Strabo*, who vainly endeavours to refute them, p. 28, *& ſeq.* Ed. *Amſt.* 1707. & p. 15, D.— Ed. *Caſaub.* Nor is it likely, that what Madam *Dacier* ſays thereupon, in her Preface upon *Homer's Iliad*, p. 67, *& ſeq.* Edit. *Paris*, will make Men quit this Opinion of theirs, who have not devoted themſelves to the idolizing of Antiquity. Perhaps too this new Verſion, done by ſo able a Hand, will not a little prejudice the Original, in the Judgment of thoſe who have not toil'd much in ſtudying it, notwithſtanding the Care Madam *Dacier* takes at every Remark to cry out, *This is admirable!* this is divine! as if ſhe had ſome Diſtruſt, that without ſome ſuch Advertiſement, the great Beauties of *Homer* would not be perceiv'd. Perhaps too it were to be wiſh'd, for the better underſtanding this Poet, that his learned Interpreter had made uſe of the Remarks of other learned Moderns; and that ſhe had not ſometimes ſo faithfully adher'd to the antient and common *Latin* Verſion. For Inſtance, lib. 1, ver. 76, ſhe turns, σὺ δὲ σύνθεο, *Aſſurez moi*, &c. for *prenez y garde, Conſider well what you engage me in:* as it is well expounded by Mr. *Bos*, *Obſer. Crit.* c. 29, p. 125.— Verſ. 132, ἐπεὶ οὐ παρελεύσεαι, *Vous ne pourrez me ſurprendre*; inſtead of, *Vous n'échapperez pas, You ſhall not avoid what I have reſolv'd to do*; as Mr. *Grævius* has corrected the common Verſion, in his Notes upon *Heſiod, Theogon.* ver. 613. and this Correction has been followed in the ſmall Edition of *Wetſtein*, publiſhed in 1707; and which might have been very ſerviceable to Madam *Dacier*. Verſ. 410, Ἵνα πάντες ἐπαύρωνται βασιλῆος, the *Latin* Tranſlator has ridiculouſly put, *Ut omnes fruantur rege:* Madam *Dacier* tranſlates, *Afin qu'ils jouiſſent tous de la ſageſſe de leur roi*; and thereupon ſhe makes a very ſubtle Remark, which ſhe might have ſpar'd, had ſhe tranſlated *Afin qu'ils ſoient tous punis pour leur roi*, according to the ſure Expoſition of Mr. *Grævius*, upon *Heſiod*, Ἐργ. verſ. 240; follow'd by the laſt *Latin* Tranſlator, in the Edition of *Wetſtein*. I ſhall mark but one Place more, Verſ. 178; where *Agamemnon* ſays to *Achilles*; Εἰ μάλα καρτερός ἐσσι, θεός που σοὶ τόγ' ἔδωκεν. *Si tu es ſi vaillant, d'où te vient ta valeur? n'eſt-ce pas Dieu, qui te l'a donnée?* It ſhould be turn'd, *N'eſt-ce pas une Divinité*; that is to ſay, Thetis *your Mother*, as appears by Verſ. 280. But our Admirers of *Homer*, and other Pagan Authors, will, whatever it coſts, find in them thoſe Ideas, which are peculiar to the ſacred Writers.

[g] I apply to the Poets in general, what Mr. *Le Clerc* ſays of *Heſiod*, in the Extract inſerted amongſt the Additions of the *Journal de Trevoux*, Edit. *Holl.* Tom. 1, p. 262.

[h] Parrhaſ. Tom. 1, p. 45.—

[i] *Oper. & Dier.* Lib. 1, Verſ. 270, *al.* 268, *& ſeq.* I uſe the Words of the Journal above-cited. See here the *Greek* Verſes of the Poet: Νῦν δὲ ἐγὼ μήτ' αὐτὸς ἐν ἀνθρώποισι δίκαιος Εἴην, μήτ' ἐμὸς υἱός· ἐπεὶ κακὸν ἄνδρα δίκαιον Ἔμμεναι, εἰ μείζω γε δίκην ἀδικώτερος ἕξει. Ἀλλὰ τάγ' οὔπω ἔολπα τελεῖν Δία τερπικέραυνον.

“ *I have my Son ſo, if we were to be Sufferers by it; or if Wrong-doers were to prevail over the Juſt. But this is what I do not believe* Jupiter *will ever ſuffer to come to paſs.* He muſt have liv'd but a very little while, or taken but very little Notice of what paſſes amongſt Men; who imagines, that the moſt virtuous are generally the moſt eſteem'd: And the Man who expects to ſee any ſuch Thing, will find himſelf wretchedly miſtaken. Let him but conſult *Seneca*'s Book *of Providence*; the excellent Preface to it by *Mark Anthony Muret*; and the Notes of ſeveral learned Commentators on that Book; and he will plainly ſee, that the Miſery which attends Virtue; and the Proſperity of Vice, if we conſider this Life only; have always been the conſtant Subject of Lamentation and Complaint. Yet *Heſiod*, more than once, makes the Adherence we owe to Virtue, [k] depend on the Riches and Proſperity which accompany it. Such Diſcourſes were very proper to perſwade Men, that Virtue is but a mere Piece of Cunning, to be made uſe of whilſt ſucceſsful; but to be thrown aſide, whenever there is any Probability of its being hurtful; that is to ſay, for the moſt part. -- Can any Thing be more flat and low, than to ſay, as [l] *Heſiod* does; that *if we make a Feaſt, we ſhould invite none but our Friends*, and not our Enemies; and that *we ought to love them only, that love us*; and not to viſit any, but thoſe from whom we receive Viſits?” Much of this kind is to be found in all the Poets; with whom *'tis* [m] *the commoneſt Thing in the World to hold* pro *and* con, *without affording the Means of diſtinguiſhing between the good and the bad. This may be ſeen in the Collection of* Stobæus; *where you may be ſtor'd with Paſſages out of the Poets, that will ſerve to maintain both Sides of the Queſtion, upon ſeveral moral Subjects.* But our proper Buſineſs here is with thoſe, who make it their Profeſſion to inſtruct, and not to divert. Let us run over the moſt celebrated of theſe, as they lie in order of Time.

[k] See Verſ. 281, *al.* 278, 279. & 284. *al.* 283.

[l] Τὸν φιλέοντ' ἐπὶ δαῖτα καλεῖν, τὸν δ' ἐχθρὸν ἐᾶσαι. Verſ. 342. *al.* 340. Τὸν φιλέοντα φιλεῖν, ϗ τῷ προσιόντι προσεῖναι. Verſ. 353. *al.* 351.

[m] Parrhaſ. Tom. 1, p. 46.

SECT. XVII.

THE firſt that occur, are thoſe ſeven famous Cotemporaries, call'd the *Wiſe Men of Greece*; viz. [a] *Thales* of [b] *Miletus*, *Pittacus* of *Mytilene*, *Byas* of *Priene*, *Solon* the *Athenian*, *Cleobulus* of *Lindus*, *Myſo* of *Chen*, a Town of *Laconia*, and *Chilo* of *Lacedæmon*. All theſe, except *Thales*, [c] *govern'd the States where they liv'd*; and every one knows, that *Solon* was one of the greateſt Legiſlatours of Antiquity. *Their Knowledge* [d] *conſiſted in certain notable Sayings or Sentences, expreſs'd in a lively and conciſe Manner. Being one Day all together, they conſecrated to* Apollo, *as the firſt Fruits of their Wiſdom, theſe two Sentences, which are now become common Proverbs; and caus'd them to be written in Letters of Gold, over the Door of the Temple of* Apollo *at* Delphos: KNOW THYSELF: And, TOO MUCH OF NOTHING. The Antients have preſerv'd, and tranſmitted down to us, ſeveral Apothegms of theſe ſeven wiſe Men *. I ſhall content myſelf with reciting here thoſe of [e] *Thales*, the Founder of the *Ionick* Sect. *God*, ſaid he, *is the moſt* [f] *antient of all Things; for he is uncreate. The World is the moſt beautiful of all Things; for it is the Work of God. ---- God* [g] *is what hath neither Beginning nor End. They who commit any wicked Action, are ſo far from being able to hide it from his Eyes, that they cannot even conceal their Thoughts from his Knowledge. --- Perjury is worſe than Adultery. --- The moſt difficult Thing in the World is, to know one's ſelf: The moſt eaſy, to preach it to others. That's the happy Man, who enjoys good Health, finds Fortune favourable, and has well cultivated his Soul with ſound Learning: -- which*

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[a] Thus they are named and placed by *Plato*, in *Protagor.* Tom. 1, p. 343, A,— Ed. *Serr.* And p. 206, G,— Ed. *Lamar.* Others inſtead of *Myſo*, put *Periander* of *Corinth*. Some make the Number greater. See *Diog. Laert.* Lib. 1, Sect. 13,— ibique Interpr. & p. 9.— Ed. *Colon.*

[b] But a Native of *Phœnicia.* See *Menage* on *Diog. Laert.* Lib. 1, Sect. 22. But Ed. *Colon.* p. 13.—

[c] *Septem fuiſſe dicuntur uno tempore, qui ſapientes & haberentur, & vocarentur. Hi omnes, præter Mileſium Thalen, civitatibus ſuis præfuerunt.* Cicer. de Orat. Lib. 3, c. 34.—

[d] Καὶ καταμάθοι ἄν τις αὐτῶν τὴν σοφίαν τοιαύτην οὖσαν, ῥήματα βραχέα ἀξιομνημόνευτα ἑκάστῳ εἰρημένα. Οὗτοι ϗ κοινῇ ξυνελθόντες ἀπαρχὴν τῆς σοφίας ἀνέθεσαν τῷ Ἀπόλλωνι εἰς τὸν νεὼν τὸν ἐν Δελφοῖς, γράψαντες, ταῦτα ἃ δὴ πάντες ὑμνοῦσι, ΓΝΩΘΙ ΣΑΥΤΟΝ, ϗ, ΜΗΔΕΝ ἊΓΑΝ. *Plat.* ubi ſupra, tom. 1, p. 343, A,— Edit. *Serr.*

* See a Treatiſe of Mr. *Buddeus*, entitled, *Sapientia veterum; hoc eſt, dicta illuſtriora ſeptem Græciæ ſapientum, diſſertationibus aliquot Academicis explicata*, &c. at *Hall* in *Saxony*, 1699.

[e] He was born in the firſt Year of the thirty fifth Olympiad, 640 Years before Jeſus Chriſt, and died aged ninety two Years. See *Petav.* D. Temp. tom. 2, p. 303.—

[f] Πρεσβύτατον τῶν ὄντων, Θεός· ἀγέννητον γάρ. Κάλλιστον, κόσμος· ποίημα γὰρ Θεοῦ. *Diog. Laert.* Lib. 1, Sect. 35.— & p. 23.— Edit. *Colon.*

[g] Τί τὸ θεῖον; τὸ μήτε ἀρχὴν ἔχον, μήτε τελευτήν. ibid. p. 24.— Ed. *Colon.* & Sect. 36.— Ἠρώτησέ τις αὐτὸν, εἰ λήθοι Θεοὺς ἄνθρωπος ἀδικῶν· Ἀλλ' οὐδὲ διανοούμενος, ἔφη ... Χεῖρον μοιχείας ἐπιορκία. .... Τί δύσκολον; .... τὸ ἑαυτὸν γνῶναι. Τί δὲ εὔκολον; τὸ ἄλλῳ ὑποτίθεσθαι. ibid. Τίς εὐδαίμων; ὁ τὸ μὲν σῶμα ὑγιής, τὴν τύχην εὔπορος, τὴν ψυχὴν εὐπαίδευτος. .... μὴ τὴν ὄψιν καλλωπίζεσθαι, ἀλλὰ τοῖς ἐπιτηδεύμασιν εἶναι καλόν, ibid. Sect. 36,— 37.— & p. 24.— Πῶς ἂν ἄριστα ϗ δικαιότατα βιώσαιμεν; ἐὰν ἃ τοῖς ἄλλοις ἐπιτιμῶμεν, αὐτοὶ μὴ δρῶμεν, ibid. Sect. 36.— & p. 24.— Φίλων παρόντων ϗ ἀπόντων μεμνῆσθαι φησί. .... Μὴ πλούτει κακῶς. .... Οὓς ἂν ἐράνους εἰσενέγκῃς τοῖς γονεῦσι, τοὺς αὐτοὺς προσδέχου ϗ παρὰ τῶν τέκνων, ibid. Sect. 37.— & p. 25.— Edit. *Colon. Allobr.* See the *Bibl. Choiſie* of Mr. *Le Clerc*, Tom. 2, p. 49, & ſeq. where *Thales* is clear'd from Atheiſm.

we ought to value ourſelves more upon, than the adorning and ſetting off our Perſons. --- The beſt Way to live up to the Rules of Juſtice, is, to avoid doing that, we blame in others. --- We ought to be mindful of our abſent, as well as preſent Friends. --- Do not enrich thyſelf by evil and baſe Practices. --- Expect the ſame Treatment from your Children, that your Parents have receiv'd from you. --- [h] *Nothing is more uſeful than Virtue: for it makes all other Things uſeful, by teaching us to make a right Uſe of them. --- Nothing is more pernicious than Vice: for it makes almoſt every Thing elſe noiſom and offenſive. ---* [i] *Love Learning, Temperance, Prudence, Truth, and Fidelity. Make thyſelf skilful by Experience: Labour to acquire Dexterity and Addreſs: Cheriſh Friendſhip, OEconomy, Arts, and Piety.* I know not whether a favourable Conſtruction can be put upon another Sentence, which is amongſt thoſe already mentioned: [k] *What beſt enables to bear Misfortunes, is to ſee one's Enemy more unfortunate than one's ſelf.*

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[h] Τί ὠφελιμώτατον; ἀρετή· ϗ γὰρ τ' ἄλλα τῷ χρῆσθαι καλῶς, ὠφέλιμα ποιεῖ. Τί βλαβερώτατον; κακία· ϗ γὰρ τὰ πλεῖστα βλάπτει παραγενομένη. *Plutarch.* in conviv. ſap. p.266.— Opuſc. Tom. 1, Edit. *H. Steph.* & Tom. 2, p. 153, D.— Edit. *Francofurt.*

[i] Φίλει τὴν παιδείαν, σωφροσύνην, φρόνησιν, ἀλήθειαν, πίστιν, ἐμπειρίαν, ἐπιδεξιότητα, ἑταιρείαν, οἰκονομίαν, τέχνην, εὐσέβειαν. *Stob.* Serm. 3, p. 46, lin. 25. Edit. *Genev.* 1609.

[k] Πῶς ἄν τις ἀτυχίαν ῥᾷστα φέροι; εἰ τοὺς ἐχθροὺς χεῖρον πράσσοντας βλέποι. *Diog. Laert.* Lib. 1, Sect. 36.— & p. 24.— Edit. *Colon. Allobr.*

SECT. XVIII.

PYTHAGORAS, [a] the Diſciple of *Thales*, and of *Pherecydes* of *Scyros* *, and Founder of the *Italick Sect*; *conſiderably* [b] *advanc'd the Science of Morality; yet it ſtill continu'd to be but a Collection of particular Precepts, under Covert and Obſcurity; unattended with either Reaſoning, or Proof. Ariſtotle* ſpeaks of him as [c] *the firſt who attempted to treat of Virtue*; and *Horace* ſays, [d] *That he was no mean Author on the Subjects of natural Philoſophy, and Morality.*

Before his Time, thoſe who excell'd in the ſpeculative and practical Sciences, and were diſtinguiſh'd by an exemplary Life; were call'd *Sages*, or wiſe Men: which, according to the Style of the *Greeks*, [e] meant the ſame with what we now-a-days term *learned*, or *literate, Men*. *Pythagoras* however, finding ſomething too aſſuming [f] in this Title, took another inſtead of it; by which he ſignified, that he did not think fit to arrogate to himſelf the actual Poſſeſſion of Wiſdom, being only an humble Enquirer after it; and therefore he gave himſelf the Appellation of *Philoſopher*, or *Lover of Wiſdom*: a Name which has been ever ſince given to thoſe, who make it their Buſineſs to ſtudy Natural Science and Morality. "*Pythagoras* [g] bent his uſeful Labours to reform, and inſtruct the World. His Eloquence could not but be very powerful, when his Inſtructions had ſo great Effect, as to make the Inhabitants of a very large Town [h], deeply plung'd in Debauchery, entirely quit their luxurious Way of living; and betake themſelves to a Life of ſtrict Sobriety and Virtue. He prevail'd even with the Ladies to part with all their fine Cloaths and Ornaments; and to preſent 'em as an Offering to the principal Deity of the Place. --- It was his ſpecial Care to correct the Abuſes committed in in the [i] Marriage State; without which he thought neither publick Peace, Liberty, a good Form of Government, or any the like Things, for which he labour'd with very great Zeal, could make the People happy. -- [k] His Affection for the publick Good of Mankind, made him reſolve to carry his Inſtructions to the Palaces of the Great. --- He had the good Fortune and Glory of having form'd Diſciples, who prov'd ſome of the moſt excellent Legiſlatours; ſuch as *Zaleucus*, [l] *Charondas*, and others." He had travell'd [m] very much in the *Eaſt*; more eſpecially among the *Egyptians*, the *Perſians*, and the *Chaldeans*; from whence he brought many of his Notions, with his Method of Teaching; for he deliver'd his moſt excellent Precepts under the Vail of Symbols and Enigma's; and there is but too much of the Myſtical in the greateſt Part of his Principles of Morality; even thoſe of 'em which are the moſt clear. He had two Ways of Teaching; the one for Strangers, which was obſcure und enigmatical [n]: the other for Initiates, which was open and inſtructive. It is not certainly known whether he ever publiſh'd [o] any Thing in Writing; but certain it is, that we have now nothing of his extant. The little Poem, call'd, the *Golden Verſes of* Pythagoras, was compos'd by one of his Diſciples; which ſome affirm to be *Lyſis*; others [p] *Empedocles*. I ſhall here give the Reader a general Account of his Notions, as far as they relate to Morality. He believ'd the Unity of a ſupreme God; whom he conceiv'd to be of a [q] *Nature impaſſible*; *and which falls not under the Cogniſance of the Senſes, but is Inviſible, Incorruptible, and ſolely Intelligible.* As he made great Uſe of Arithmetick, or the Science of Numbers, to expreſs his Thoughts by; he ſaid that *Virtue*, [r] *Health*, *Friendſhip*, *every Thing that is good*, *and even God himſelf*, *were nothing but* Harmony. 'Tis well known, [s] that he had his Opinion concerning the *Tranſmigration of Souls*, from the *Egyptians*. Notwithſtanding which he ſpeaks of *Hell*, and the Pains of another Life; in which [t] he is not very conſiſtent with himſelf. "Nothing in the World can be more admirable, and Chriſtian-like, than what he ſays of the main Deſign and Aim of our Actions and Studies: For he held, that the Study of Philoſophy [u] tends to bring Men to a Reſemblance with God. --- His Doctrines contain'd [w] two Parts; which may very well be compar'd to the *Purgative*, and *Unitive Ways*; about which our Quietiſts * have ſaid ſo many fine Things. --- The Acquiſition of Truth was, in his Opinion [y], the only Way to become like God: But the Way to diſcover Truth, is to ſearch after it with a Soul that is purify'd; and has ſubdu'd the Paſſions of the Body. The Followers of [z] this Philoſopher taught, that a Man perfects himſelf three Ways: Firſt, by converſing with the Gods; becauſe, during ſuch Commerce, he abſtains from every evil Action; and thereby makes himſelf like the Gods, as far as ſuch a Thing is poſſible. Secondly, by doing [aa] good to others; for this in God, is one of his Properties; in Man, the Imitation of him. Thirdly, by departing out of this Life. The moſt excellent Endowments Heaven ever conferr'd on Men, are, according to *Pythagoras* [bb], thoſe of ſpeaking Truth; and doing good Offices: Theſe two Things, ſay the *Pythagoreans*, nearly reſemble the Works of *God*." This [cc] Philoſopher very earneſtly recommended Sobriety, and Moderation in all Sorts of Pleaſures. *He forbids* [dd] *the leaving this World without expreſs Order from our General, that is, God; who has given each Man his Poſt here.* But, when we are call'd upon to quit this Life, he would have us do it with a good Grace, and without any Concern for the Loſs of the Pleaſures of this World; all which he ſignifies to us by this ſymbolical Sentence: "[ee] *Not to return back again, when we are once enter'd upon our Journey.* [ff] Another of his Symbols ordains, *not to paſs the Equilibrium of the Balance*; intimating, that the Rules of Equity and Juſtice ought exactly to be follow'd.

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[a] He flouriſh'd about the ſixtieth Olympiad, five hundred and forty Years before Jeſus Chriſt. Authors are not agreed as to the Time of his Birth and Death. See *J. Alb. Fabricii Bibl. Græc.* Lib. 2, Cap. 12, Sect. 1.— and *Bayle*'s Dict. Not. (B)

* Our Author ſhould have ſaid *Syros*. See *Menag. Obſervat. on Diog. Laert.* p. 69, Col. 1.— & *Cellar. Geogr.* Tom. 1, p. 834.— & *Suidam* in Φερεκύδης. & *Strab. Geogr.* p. 487. B.—

[b] *Dacier*'s *Life of Plato*, p. 68.— Edit. *Paris.* You may alſo conſult the *Life of Pythagoras* by this learned Perſon, publiſh'd in 1706, before his Tranſlation of *Hierocles*'s Comment on the Golden Verſes; and of thoſe Golden Verſes, as well as of the *Symbols* attributed to *Pythagoras*.

[c] Πρῶτος μὲν οὖν ἐνεχείρησε Πυθαγόρας περὶ ἀρετῆς εἰπεῖν, *Magn. Moral.* Lib. 1, c. 1, p. 145, c. Edit. *Paris,* 1629. & p. 192, A.— An. 1654.

[d] —— *Non ſordidus auctor Naturæ, verique. Horat.* Lib. 1. Ode 28, 14, 15. See thereupon Meſſrs. *Le Fevre*, and *Dacier*.

[e] See *Scheffer. de Nat. & conſtit. Phil. Italicæ*, Cap. 6. So that the critical Cenſure of *Lactantius, Inſt. divin.* Lib. 4, cap. 1, Num. 10. is not over-well grounded.

[f] *Cicer. Tuſc. Quæſt.* Lib. 5, cap 3.— *Diog. Laert.* Lib. 1, Num. 12.— & p. 8.— Ed. *Colon. Allob.*

[g] Mr. *Bayle*'s Dictionary, p. 2441.— Second Edition.

[h] *Crotona*, in *Italy*. See *Juſtin.* Lib. 20, Cap. 4, *per totum.*

[i] See Rem. (F) in *Bayle*'s Dictionary, p. 2442, Col. 1.—

[k] Ibid. Rem. (G)—

[l] See *Jamblich. in vita Pythag.* Lib. 1, cap. 30, Sect. 172.— and *Diog. Laert.* Lib. 8, Sect. 16.— & p. 577.—

[m] See *Diog. Laert.* ubi ſupra, Sect. 2,— 3.— ibique Interpr. And p. 568.— Ed. *Col. Allob.*

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[n] See *Scheffer. de Nat. & Conſt. Philoſ. Ital.* Cap. 13.

[o] See *Diog. Laert.* ubi ſupra, Sect. 7,— ibique Interpr. & Ed. *All.* p. 370, & ſeq. and the *Bibl. Græc.* of Mr. *Fabricius*, Lib. 2, cap. 12, Sect. 4.—

[p] See Mr. *Fabricius* ubi ſupra, Sect. 6,— p. 469.—

[q] Οὔτε γὰρ ἐκεῖνος αἰσθητὸν ἢ παθητὸν, ἀόρατον δὲ ϗ ἀκήρατον ϗ νόητον ὑπελάμβανεν εἶναι τὸ πρῶτον. *Plutarch. in Numa*, p. 65, B,— Ed. *Francoſ.* & p. 118,— Ed. *H. Steph.* See *Bayle*'s Dict. Not. (N) p. 2446, Col. 1.—

[r] Τήν τε ἀρετὴν ἁρμονίαν εἶναι, ϗ τὴν ὑγίειαν, ϗ τὸ ἀγαθὸν ἅπαν, ϗ τὸν Θεόν . . . Φιλίαν τε εἶναι, ἐναρμόνιον ἰσότητα. *Diog. Laert.* Lib. 8, Sect. 33.— & Ed. *Col.* p. 587.— See *Ariſtot. Mag. Moral.* Lib. 1, c. 1. p. 192, A.—

[s] See *Diog. Laert.* ubi ſupra, Sect. 14,— ibique Interpr. & p. 569.— Edit. *Colon. Herodot.* Lib. 2, cap. 123.— *Diod. Sic.* Lib. 1, p. 88, B.— towards the End. Mr. *Dacier* pretends to explain in a figurative Senſe, this Opinion of the Tranſmigration of Souls, but ſee what Mr. *Le Clerc* ſays to it, *Bibl. Choiſ.* Tom. 10, p. 185,— & ſeq.

[t] See Mr. *Bayle*'s Dict. Rem. (F) towards the End, p. 2445, Col. 2.— & Rem. (M) p. 2445, Col. 2.—

[u] Πρὸς τὴν θείαν ὁμοίωσιν ἀνάγει, ϗ τῆς Πυθαγορικῆς Φιλοσοφίας τὸν τελειότατον σκοπὸν ἐκκαλύπτει, *Hierocles in Præf. ad Carm. Aurea, circa finem*, p. 13, Ed. *Needh.* & p. 9.— Edit. *Lond.* Σωκράτης, Πλάτων ταυτὰ τῷ Πυθαγόρᾳ, τέλος ὁμοίωσιν Θεῷ. *Stob.* Eclog. Lib. 2, c. 3, p. 163, lin. 44. I have here all along taken the Words of *Bayle*, Rem. (N), Artic. *Pythagoras*, p. 2446, Col. 2.—

[w] See *Scheffer. de Nat. & Conſt. Phil. Ital.* cap. 10, p. 78.

* See the Words (*Myſtique* and *Quiétiſme*) in *Dictionnaire Univerſel, à Trevoux*, 1721.

[y] *Scheffer.* ibid. cap. 7.

[z] Apud *Phot* Cod. 249, p. 1313, lin. 55, Ed. *Roth.*

[aa] Δεύτερον, ἐν τῷ εὖ ποιεῖν· Θεοῦ γὰρ τοῦτο ϗ θείας μιμήσεως. Ibid. lin. 58.

[bb] Πυθαγόρας ἔλεγε, δύο ταῦτα ἐκ τῶν Θεῶν τοῖς ἀνθρώποις δίδοσθαι κάλλιστα, τό, τε ἀληθεύειν, ϗ τὸ εὐεργετεῖν· ϗ προσετίθει, ὅτι ϗ ἔοικε τοῖς Θεῶν ἔργοις ἑκάτερον. *Ælian. Var. Hiſt.* Lib. 12, c. 59, Ed. *Perizon.* & *Tornas.*

[cc] See *Diog. Laert.* ubi ſupra, Sect. 9.— & Ed. *Col.* p. 573.— & *Jamblich.* Sect. 41,— 42.— Ed. *Kuſter*

[dd] *Vetatque* Pythagoras *injuſſu imperatoris, id eſt, Dei, de præſidio & ſtatione vitæ decedere. Cicer. de Senectute*, cap. 20.— *Plato*, (in his *Phædo*, p. 61.— And p. 377, B,— C,— D,— Ed. *Lemar.*) aſcribes this Precept to *Philolaüs*, a *Pythagorean*, who doubtleſs had it from the Doctrine of *Pythagoras*.

[ee] Διὰ δὲ τοῦ, εἰς ἀποδημίαν βαδίζοντα μὴ ἐπιστρέφεσθαι, παρῄνει τοῖς ἀπαλλαττομένοις τοῦ βίου, μὴ ἐπιθυμητικῶς ἔχειν τοῦ ζῆν, μήδε ὑπὸ τῶν ἐνταῦθα ἡδονῶν ἐπάγεσθαι. *Diog. Laert.* ubi ſupra, Sect. 18 — And p. 579.— Ed. *Colon. Allob.*

[ff] Τὸ δὲ, Ζυγὸν μὴ ὑπερβαίνειν, τουτέστι τὸ ἴσον ϗ δίκαιον μὴ ὑπερβαίνειν. Ibid. Sect. 18.— And Ed. *Colon.* p. 578.—

SECT. XIX.

ANAXAGORAS,[a] *the firſt of the*[b] Ionick *Sect*, (*if we except* Thales,) *who acknowledg'd for the original Cauſe*[c] *of the Univerſe, an infinite Spirit; was nevertheleſs generally look'd upon as an Atheiſt: becauſe he ſaid, that*[d] *the Sun was nothing elſe but a Globe of Fire, and the Moon but an Earth; that is to ſay, becauſe he denied, that there were ſpiritual Subſtances join'd to theſe Planets; and conſequently that they were Deities.* "Before ever the Goſpel had taught Men, to renounce the World and its Riches, in order to travel the more expeditely the Way to Perfection; there had been Philoſophers, who ſaw, and were ſo fully perſuaded of it, as to have actually put it in Practice; by the ridding themſelves of their Eſtates, that they might have nothing left to incumber, or divert them from the Study of Wiſdom; and a ſerious Enquiry after Truth." Thus ſays Mr. *Bayle*[e]: But as he ſeems here to attribute to the Goſpel, according to his wonted Cuſtom, overſtrain'd Notions of Morality; ſo he extols a little too much the Conduct of theſe antient Philoſophers; in which there was more of Oſtentation, and a miſtaken Notion of Diſintereſtedneſs, than of true Wiſdom: for we may make a good Uſe of our Riches; nor is the entire relinquiſhing of 'em neceſſary, to a more cloſe Application to the Study of Truth and Virtue. But, be that as it will, *Anaxagoras*[f], "after having convey'd[g] all his Patrimony to his Relations; applied himſelf wholly to the Study of Nature, without in the leaſt meddling or concerning himſelf with the Publick; which occaſion'd his being ask'd, whether he had no Concern for his Country: His Anſwer was admirable; the Chriſtian Philoſophers could not have made a better: *Yes*, ſaid he, pointing to the Heavens[h], *I have an extraordinary Care for my Country.* Another Time[i] one ask'd him, To what End he was born? *To contemplate*, replies he, *the Sun, the Moon, and the Heavens.* And accordingly he plac'd the[k] Sovereign Good, or the chief End of humane Life, in Contemplation; and in that free State of Mind, which Contemplation produces. ---[l] He thought the Conditions[m] of Life, which appear'd leaſt happy, to be the moſt ſo; and that thoſe, who taſte the Sweets of true Happineſs, were not to be look'd for amongſt the Men ſurrounded with Riches and Honours; but among thoſe, who till a ſmall Spot of Ground; or who, void of all ambitious Cares, apply themſelves to the Study of the Sciences. --- He[n] was the firſt, who ſuppos'd the Poems of *Homer* to be Books of Morality; where Virtue and Juſtice are explain'd by allegorical Stories.

"*Archelaus*[o], the Scholar of[p] *Anaxagoras*, apply'd himſelf chiefly to the Study of Natural Philoſophy, as his Predeceſſors had done; but[q] withal engag'd ſomething farther in the Buſineſs of Morality; though he prov'd not over-orthodox on that Subject: for he held[r], that humane Laws were the Origin of all moral Rectitude; that is to ſay, that he own'd no ſuch Law as the Law of Nature, but admitted of poſitive Laws only; and conſequently believ'd, that all Sorts of Actions are in their own Nature indifferent; and that they become good or bad, according as it ſhall pleaſe Men to eſtabliſh ſuch or ſuch Laws." I cannot ſay, whether what has been alledg'd be exactly conform to the Sentiments of *Archelaus*: But certain it is, that *Socrates*, his Scholar and Succeſſor, had quite different Ideas of the Nature and Foundation of the moral Part of humane Actions. Perhaps it may be in this Caſe, as it is with reſpect to the Imputation of another Opinion to this ſame Philoſopher; which, in the Judgment of a moſt able Perſon[s], appears not to be well verify'd: But be this as it will; let us now paſs on to his Scholar, who, in every Reſpect, much excell'd his Maſter; and under whom Philoſophy took a quite different Turn.

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[a] He was born at *Clazomene* in *Ionia*, about the ſeventieth Olympiad, five hundred Years before Jeſus Chriſt. He died aged about ſeventy two Years.

[b] *Ralph Cudworth*, in the *Extract of the Bibl. Choiſ.* by Mr. *Le Clerc*, Tom. 2, p. 56.— See alſo Tom. 1, p. 83.—

[c] See *Diog. Laert.* Lib. 2, Sect. 6.— & Ed. *Colon.* p. 91.—

[d] Ibid Sect. 8.— & p. 93.— Edit. *Colon. Allobr.*

[e] Mr. *Bayle*'s Dict. Art. *Anaxagoras*, Rem. (A)

[f] Ibid. in the Text, p. 214.—

[g] *Diog. Laert.* ubi ſupra, Sect. 7.— & p. 92.— Edit. *Colon. Allobr.*

[h] Ὅτε ϗ πρὸς τὸν εἰπόντα, οὐδέν σοι μέλει τῆς πατρίδος; εὐφήμει, ἔφη, ἐμοὶ γὰρ ϗ σφόδρα μέλει πατρίδος, δείξας τὸν οὐρανόν. Ibid. p. 92.— Edit. *Colon. Allob.* And Edit. *Amſtel.* Sect. 7.—

[i] Ἐρωτηθείς ποτε, εἰς τί γεγένηται; Εἰς θεωρίαν, ἔφη, ἡλίου ϗ σελήνης ϗ οὐρανοῦ. Ibid. p. 95.— Ed. *Allob. Amſtel.* Sect. 10.—

[k] *Clem. Alex. Strom.* Lib. 2, p. 416.— This Thought is criticis'd very impertinently by *Lactantius*, (Lib. 3, Cap. 9, Num. 5, & ſeq. Edit. *Cellar.*) who groſly makes *Anaxagoras* mean it of the Eyes of the Body. See the *Obſerv. Selectæ*, &c. printed at *Hall* in *Saxony*. Tom. 2 Obſerv. 14.

[l] *Bayle*'s Dict. ubi ſupra, Rem. (N) p. 226, Col. 1.—

[m] *Nec parum prudenter Anaxagoras interroganti cuidam, quiſnam eſſet beatus: Nemo, inquit, ex iis, quos tu felices exiſtimas: ſed eum in eo numero reperies, qui a te ex miſeriis (vel miſeris) conſtare creditur. Non erit ille divitiis, aut honoribus abundans: ſed aut exigui ruris, aut non ambitioſæ doctrinæ fidelis, ac pertinax cultor; in ſeceſſu, quam in fronte beatior. Val. Maxim.* Lib. 7, cap. 2, in extern. Sect. 9.— And p. 362.— Ed. *S. Gryph.*

[n] *Diog. Laert.* ubi ſupra, Sect. 11.— Lib. 2, & p. 95,— Edit. *Colon. Allobrogum.*

[o] Some ſay he was born at *Athens*, others at *Miletus*: His Age is not certainly known. See *Bayle*'s Dict. Rem. (A), Tom. 1, p. 309, Col a.—

[p] The Words of Mr. *Bayle*, ibid. in the Text, p. 310.—

[q] Ἔοικε δὲ ϗ οὗτος ἅψασθαι τῆς Ἠθικῆς. *Diog. Laert.* Lib. 2, Sect. 16.— And p. 99,— Ed. *Col.*

[r] Καὶ τὸ δίκαιον εἶναι ϗ τὸ αἰσχρὸν οὐ φύσει, ἀλλὰ νόμῳ. Ibid. Sect. 16.—

[s] See Mr. *Le Clerc*, in his *Bibl. Choiſie*, Tom. 1, p. 86.—

SECT. XX.

SOCRATES [a], the honeſteſt Man, and wiſeſt Philoſopher of all Heathen Antiquity; *was* [b] *the firſt who, knowing that what paſſes without us concerns us not, and affords rather Matter of Curioſity, than truly profitable Enquiry; applied himſelf more particularly to the Study of Morality; and handled it in his Diſcourſes more methodically, than any who had gone before him:* And for this Reaſon it is, that he has been look'd upon as the Parent of [c] moral Philoſophy; not that he was the very firſt Philoſopher, who had laid [d] down Rules for the Conduct of Life: we have the expreſs Teſtimony of *Ariſtotle* thereupon: *Pythagoras*, ſays he, *was the firſt who attempted to treat of Virtue.* --- [d] *And after him* Socrates *did it more accurately, and in a more extenſive Manner. Socrates* [e] wrote nothing: His Inſtructions were only, the Diſcourſes he had in common Converſation, with Men of all Sorts and Degrees; for he ſet up no School, where he might communicate his Thoughts only to a certain Number of Scholars. He had an admirable Way of confounding, and turning into Ridicule the Sophiſters of his Time; who being Maſters of no other Learning, but a falſe Rhetorick; and the Art of maintaining, by vain Subtilties, both Sides of the Queſtion, on all Sorts of Subjects; entirely corrupted and debauch'd the Principles of their Youth; and thereby acquir'd, with immenſe Riches, a great Reputation among the Unlearned, and the Populace. Whenever he had to do with any of theſe Pretenders to Learning, who made it not their Buſineſs honeſtly to ſearch after Truth; or with thoſe, who were prejudic'd in Favour of them; he contented himſelf with only confuting 'em, and reducing 'em to Contradictions; without ever proceeding to the Deciſion of the Queſtion in Debate. "He gave out [f], that he knew nothing; and had always theſe Words in his Mouth [g]; that there was but one Thing that he certainly knew, which was, that he knew nothing. --- He talk'd thus, to confound the Pride of all thoſe, who boaſted of Science, which they had not; and which it was even impoſſible for Man to acquire. He did not eſteem that to be Knowledge, which proceeded no farther than Doubts and Conjectures; nor call'd him a clear-ſighted Man, who ſaw no better, nor farther than his ſhort-ſighted Neighbours. -- But to infer from hence, that he had a Mind to introduce a Spirit of Diffidence in all Sorts of Knowledge; and to pretend, that his ſaying he knew nothing, was in effect to ſay; that he knew not that Virtue was good, that a Man ought to love his Country, or, that he ought to have an Averſion to Vice: This, I ſay, would be to miſtake his Meaning very groſly; and to put a very ugly Face upon his known Humility. He could not but be well aſſur'd, that true Happineſs conſiſted in Virtue; for Virtue was his only Aim in all his Actions. He could not but well know, that the Laws ought to be obey'd; for 'tis plain that he himſelf obſerv'd 'em: that Arrogance, Hatred, and Ingratitude ought to be had in Deteſtation; for he did his utmoſt Endeavour to make 'em odious. And finally, he could not but have ſtedfaſtly believ'd there was a *God*, and that he ought to be ador'd; for he never ceas'd talking of his Benefits towards us: and of the Duty and Reverence we owe him. Therefore we find [h] *Cicero* inſiſting upon it, that *Socrates* ought to be ſtruck out of the Scepticks Liſt; it being very unreaſonable to make that great Man, who had, with ſo much Clearneſs and Perſpicuity, taught Mankind the Rules of Juſtice and Piety; to be the Author of this Doctrine of Doubting; which deſtroys all Religion and Virtue whatever." Thus does the *French* Author, who has given us his Life, juſtify him. "[i] *Socrates* acknowledg'd one only ſupreme *God*; as manifeſtly appears by thoſe Diſcourſes of his, which *Xenophon* has left us. But it is not true, that he rejected the inferiour Deities; and that he was for this Reaſon put to Death. 'Tis a vulgar Errour, which Mr. *Cudworth* has very well refuted; tho' maintain'd by ſeveral of the Fathers. It appears by the *Euthyphro*

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[a] He was born the fourth Year of the ſeventy ſeventh Olympiad, four hundred and ſixty nine Years before Jeſus Chriſt, and died aged ſeventy Years. See his Life, by Mr. *Charpentier*; and the *Silva Philologica* of Mr. *Le Clerc*, publiſhed in 1711, cap. 3.

[b] *Dacier's* Preface to *M. Antonin.* A 3 a.— and in the *Life of Plato*, p. 68.—

[c] *Socrates mihi videtur, id quod conſtat inter omnes, primus à rebus occultis, & ab ipſa natura involutis, in quibus omnes ante eum Philoſophi occupati fuerunt; avocaviſſe Philoſophiam, & ad vitam communem adduxiſſe; ut de virtutibus & vitiis, omninoque de bonis rebus & malis, quæreret; cœleſtia autem vel procul eſſe a noſtra cognitione cenſeret; vel ſi maximè cognita eſſent, nihil tamen ad bene vivendum. Cicer. Academ.* Quæſt. 1, 4.— See alſo, *Tuſc.* Quæſt. 5, c. 4.— & *Diog. Laert.* Lib. 2, Sect. 21,— & 45,— ibique Interpr. And p. 101, 102: & p. 120.— Ed. *Colon.*

[d] Μετὰ τοῦτον Σωκράτης ἐπιγενόμενος, βέλτιον, καὶ ἐπὶ πλεῖον εἶπεν ὑπὲρ τούτων. *Ariſtot. Mag, Moral.* Lib. 1, c. 1,— p. 192, B.— See the reſt of the Paſſage cited above, Sect. 18, Not. (*c*).

[e] See the *Bibl. Græc.* of Mr. *Fabricius*, Lib. 2, Cap. 23, Sect. 30, Tom. 1, p. 825.— Obſerve, that when *Horace* ſays, *Rem tibi Socraticæ poterunt oſtendere chartæ, Artis Poetic.* verſ. 310; he means only the Writings of his Diſciples.

[f] *Charpentier's Life of Socrates*, p. 83, & ſeq. Edit. *Amſterd.*

[g] Καὶ εἰδέναι μὲν μηδὲν, πλὴν αὐτὸ τοῦτο εἰδέναι. *Diog. Laert.* Lib. 2, Sect. 32.— & Ed. *Col.* p. 109.— See thereupon *Caſaub.* & *Menag.* & *Cic. Acad.* Quæſt. 1, 4,— & *Davis*, i. l. As alſo *Plato*, Apolog. p. 360, E.— Edit. *Lemar.* & p. 21, D,— *Serran.*

[h] *Quorum e numero* [qui negaſſent quidquam ſciri, aut percipi poſſe:] *tollendus eſt & Plato, & Socrates* --- *de ſe ipſe detrahens in diſputatione, plus tribuebat iis, quos volebat refellere. Ita cum aliud diceret atque ſentiret, libenter uti ſolitus eſt ea diſſimulatione, quam Græci* εἰρωνείαν *vocant, Acad.* Quæſt. Lib. 4, Cap. 5.—

[i] *Bibl. Choiſie* of Mr. *Le Clerc*, Tom. 3, p. 70,— 71,— 72.—

“ *thyphro* of *Plato*[k], that all the Impiety laid to his Charge was; that he had openly condemn'd all the Fables concerning their Gods, in which wicked and impious Actions were attributed to them; although he had at the ſame Time own'd inferior[l] Deities; as may be ſeen by ſeveral of his Diſcourſes. --- The People indeed concluded, that thoſe Fables could not be rejected, without denying, at the ſame Time, the Deity of thoſe, to whom they related; in which they reaſon'd better than *Socrates*: for, in fine, the only Knowledge they had of *Jupiter*, and the reſt of their Gods, was no other than what they had received by Fable, or oral Tradition; and if that Tradition was to be look'd upon as impious or falſe; then it muſt neceſſarily follow, that the whole of what was ſaid, concerning the Gods of *Athens*, ought to have been rejected. That there is a *God*, might then as well as now be believed, without admitting thoſe Fables: but how could it have been ever imagined without them, that there was a *Jupiter*, a *Saturn*? &c. The natural Idea of a Deity, which is abſolutely incompatible with Vice; made *Socrates* overlook this Inconſequency in his Principles. Nothing can be finer than what he ſays of [m] divine Providence; and his Maxim upon Prayer, is worthy the Light of the Goſpel. [n] *When he pray'd to the Gods, he only ask'd them in general Terms, that they would give him good Things; becauſe they knew better than we do, what Things are truly good; and he ſaid, that they who ask'd either Gold or Silver, or ſovereign Power; made as abſurd Requeſts, as if they had ask'd to game, or to fight, or deſir'd any Thing elſe, that might eaſily turn to their Prejudice.* Let us now ſee what his Sentiments were concerning the Law of Nature. *There are*[o], ſaid he, *certain Laws which are not written; theſe are the Laws which are univerſally receiv'd throughout the World:* But nevertheleſs Men did not make them; *for all Men could not aſſemble themſelves together in any one Place; neither could they all ſpeak the ſame Language. They*[p] *were therefore made by the Gods: for in the firſt Place, it is ordain'd for all Men to worſhip and adore the Gods. It is alſo commanded every where, and to every Man, to honour his Father and Mother: and that Fathers and Mothers ſhould not marry with their Children. No one ever violates with Impunity,* adds he, *any one Law eſtabliſh'd by the Gods. There are Puniſhments which inſeparably adhere to the Crimes committed againſt theſe Laws, which Puniſhments it is impoſſible to eſcape; whereas a Man may eaſily ward againſt the Severity of humane Laws, after he has tranſgreſs'd 'em; either by concealing, or defending himſelf by open Force. --- To do good to them, who have done good to us, is alſo an univerſal Law. If any ſin againſt this Law, they are* ſufficiently puniſh'd *for it; ſince their beſt Friends will thereupon abandon them: and then they will be oblig'd to betake themſelves to thoſe, who have an Averſion to them. For are not thoſe, the beſt Friends, who do us good Offices, when we make uſe of 'em? But if he, who has receiv'd Favours from them, proves unthankful, does he not draw upon himſelf their Hatred by ſuch his Ingratitude? And yet, as he finds it to his Advantage to keep himſelf in their good Graces, will he not ſtill continue conſtantly to court and ſue to them with the greateſt Application? --- When I conſider, that each Law carries with it the Puniſhment of him, who tranſgreſſes it; I eaſily perceive it to be the Work of a Legiſlatour more excellent than Man. The Gods never make any Laws which are unjuſt: on the contrary, other Legiſlatours, beſide the Gods, can ſcarce make any that are juſt.* It may eaſily from hence be judg'd, what were the Principles of *Socrates*. Many of the particular Conſequences, he drew from them, may be ſeen in the *Memoirs* of *Xenophon*; who ſeems to have mix'd nothing of his own, with the Diſcourſes of his Maſter, which he there reports. This great Philoſopher makes uſe of a very poor Argument, to ſhew that Inceſt with a Father or Mother is contrary to the natural, or divine Law: [q] *For they,* ſays he, *who give themſelves up to theſe unlawful Embraces, muſt needs have but very pitiful Children.*

Beſides the Works of *Xenophon*, we have ſtill extant ſome * Dialogues by *Eſchines* the *Philoſopher*; and a little Piece of another of *Socrates*'s Scholars, call'd [r] *Cebes*. This laſt is a moſt ingenious Picture of human Life, wherein the Method and Genius of the Maſter may be ſeen, as well as in the Dialogues I juſt now mention'd. All the ſeveral Sects of Philoſophers, who have appear'd in the World ſince *Socrates*[s], have been deſirous to have him for their Chief; and have endeavour'd to bring their Sentiments and Notions to thoſe of this great Man. We ſhall now ſay ſomething of the moſt celebrated Founders of Sects, who came out of his School; and we ſhall begin with him, who was the moſt celebrated, and the only one, except *Eſchines*, whoſe Writings we have now left.

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[k] P. 6, A,— B,— Tom. 1, Ed. *Serrani*. And p. 49, E,— F,— d. & Edit. *Lamar*.

[l] See what *Xenophon* ſays, in the Beginning of the firſt Book of *Memorable Things*, p. 708,— 709,— & ſeq. Ed. *Paris*, 1625.

[m] *Xenoph. Apomnem.* Lib. 1, p. 422, & ſeq. Ed. *H. Steph.* And cap. 4, Ed. *Oxon.* And p. 47, & ſeq. in *Charpentier*'s Verſion. And p 726, E,— & ſeq. Ed. *Paris*.

[n] Καὶ ἔυχετο δὲ πρὸς τοὺς Θεοὺς ἁπλῶς τ' ἀγαθὰ διδόναι, ὡς τοὺς Θεοὺς κάλλιστα εἰδότας ὁποῖα ἀγαθά ἐστι· τοὺς δὲ ευχομένους χρύσιον, ἢ ἀργύριον, ἢ τυραννίδα, ἢ ἄλλο τι τῶν τοιούτων, ουδὲν διάφορον ἐνόμιζεν ἔυχεσθαι, ἢ ει κυβείαν, ἢ μάχην, ἢ ἄλλο τι ἔυχοιντο τῶν φανερῶς ἀδήλων, ὅπως ἀποβήσοιτο. Ibid. p. 420, in fine, Ed. *Steph.* cap. 3, Sect. 2, Ed. *Oxon.* Et p. 722, C,— Ed. *Paris*.

[o] Ἀγράφους δὲ τινας οἶσθα νόμους; τοὺς γ' ἐν πάσῃ --- χώρᾳ κατὰ ταυτὰ νομιζομένους --- οἱ γὲ [ἄνθρωποι] οὔτε συνελθεῖν ἅπαντες ἂν δυνηθεῖεν, οὔτε ὁμόφωνοί εἰσι. Ibid. p. 807, B,— Ed. *Paris*. And p. 470, Ed. *Steph.* And cap. 4, Sect. 19, Ed. *Oxon*.

[p] Θεοὺς οἶμαι τοὺς νόμους τούτους τοῖς ἀνθρώποις θεῖναι· καὶ γὰρ παρὰ πᾶσιν ἀνθρώποις πρῶτον νομίζεται τοὺς Θεοὺς σέβειν --- καὶ γονέας τιμᾷν πανταχοῦ νομίζεται --- καὶ μήτε γονέας παισὶ μίγνυσθαι, μήτε παῖδας γονεῦσιν. --- Δίκην γέ τοι διδόασιν οἱ παραβαίνοντες τοὺς ὑπὸ τῶν Θεῶν κειμένους νόμους, ἣν οὐδενὶ τρόπῳ δυνατὸν ἀνθρώπῳ διαφευγεῖν, ὥσπερ τοὺς ὑπ' ἀνθρώπων κειμένους νόμους, ἔνιοι παραβαίνοντες διαφεύγουσι τὸ δίκην διδόναι, οἱ μὲν, λανθάνοντες, οἱ δὲ, βιαζόμενοι. --- Τοὺς εὖ ποιοῦντας ἀντευεργετεῖν, πανταχοῦ νόμιμόν ἐστι --- οἱ τοῦτο παραβαίνοντες δίκην διδόασι· φίλων μὲν ἀγαθῶν ἔρημοι γιγνόμενοι, τοὺς δὲ μισοῦντας ἑαυτοὺς ἀναγκαζόμενοι διώκειν· ἢ οὐχ οἱ μὲν εὖ ποιοῦντες τοὺς χρωμένους ἑαυτοῖς, ἀγαθοὶ φίλοι εἰσὶν, οἱ δὲ μὴ ἀντευεργετοῦντες τοὺς τοιούτους, διὰ μὲν τὴν ἀχαριστίαν μισοῦνται ὑπ' αὐτῶν, διὰ τὸ μάλιστα λυσιτελεῖν τοῖς τοιούτοις χρῆσθαι, τούτους μάλιστα διώκουσι; --- Τὸ γὰρ τοὺς νόμους αὐτοὺς τοῖς παραβαίνουσι τὰς τιμωρίας ἔχειν, βελτίονος ἢ κατ' ἄνθρωπον νομοθέτου δοκεῖ μοι εἶναι. --- Ουκ ἄλλα [τῶν δικαίων νομοθετοῦσιν οἱ Θεοί] σχολῇ γὰρ ἂν ἄλλος γέ τις τὰ δίκαια νομοθετήσειεν, εἰ μὴ Θεός. Ibid. p. 807,— 808, A.— Ed. *Paris*.

[q] Τί γὰρ ἂν μεῖζον πάθοιεν ἄνθρωποι τεκνοποιούμενοι, τοῦ κακῶς τεκνοποιεῖσθαι. Ibid. p. 807, D,— Ed. *Paris*.

* Mr. *Le Clerc* has lately publiſhed them, with his Notes, in 1711.

[r] It was publiſh'd entire, and of a very fine Edition, at *Amſterdam*, 1689. See the *Bibl. Græc.* of Mr. *Fabricius*, Lib. 2, cap. 23, Sect. 34.

[s] *Cum tamen omnes ſe Philoſophi Socraticos, & dici vellent, & eſſe arbitrarentur.* Cicer. de Oratore, *Lib.* 3, *cap.* 16.—

SECT. XXI.

PLATO[a], as well as *Eſchines*, "the better "to keep up the Appearance and Air "of their Maſter[b], that grand Reſtorer "of Morality; preferr'd that of teaching by "Dialogue, to any other Method. For as it is the "moſt diverting, in that it does, as it were, ſet "before the Reader the very Scene of Affairs; "where he ſees all the Parties concern'd in Ac"tion: ſo it does, I may ſay, better carry on "the main Deſign, which is to perſwade and "inſtruct; for it is more animated, and has "all the Force of a judicial Proceeding, where "the Parties on each Side of the Queſtion are "fairly admitted to make their Defence, as ful"ly as they are either willing, or able to do; "ſo as that the Victory, which the one gains "over the other, can be no farther diſputed; "at leaſt when the Dialogue is compos'd by "an able Hand; and one who is ſincerely en"gaged in the Search after Truth." This is the Sentiment of Mr. *Dacier*; who has undertaken to tranſlate our Philoſopher into the *French* Tongue. But ſince all Capacities have not either the Attention, or Penetration requiſite to diſcern, amidſt the Jumble of Arguments *pro* and *con*, what is the real Opinion of the Author; *Plato*, in my Judgment, would have done well to have modeſtly declar'd himſelf at laſt; and have let the Reader ſeen, what upon the Upſhot appear'd to him the moſt probable.--- Thus the ingenious Dialogiſt of our Days, who has given us *the new Dialogues of the Dead*; never fails to put into the Mouth of the laſt Interlocutor that ſpeaks, ſuch Sentiments as contain the Deſign and Reſult of the whole Dialogue; the Want of which Precaution has drawn this Reflection upon *Plato*[c]; that *in his Books the Reader, who finds nothing there laid down as certain, is always left in Suſpence.* But *Cicero*, whoſe Reflection this is, does him Juſtice in another Place[d]; where he exempts him from the Number of thoſe, who maintain'd, that nothing could be certainly known. And it appears, by a beautiful Paſſage in his *Phædo*, that this Philoſopher was, as well as his Maſter, in many Things well fix'd and determin'd in his Opinions; and that, "if he ſeems not "poſitively to affirm any Thing in his Wri"tings, 'tis becauſe he[e] entirely follows *Socra"tes*'s Manner of Diſputing; and is in every "Thing careful to avoid the magiſterial Air "of the Sophiſts, and Dogmatiſts; who aſſert"ed every Thing in a peremptory Manner; "taking almoſt always ſimple and bare Ap"pearances, for indiſputable Truths." He accordingly there introduces *Socrates* ſpeaking in this Manner: [f] *Is it not a moſt deplorable Miſfortune, that though there are Reaſons true, certain, and moſt obvious to the Apprehenſion; there ſhould neverthe leſs be found a Set of Men, who, after having refus'd to lay hold of them; and having been preſent at ſome of thoſe frivolous Diſputes, where every Thing appears, ſometimes true, ſometimes falſe; come at length to doubt whether it be ſo or no: and inſtead of laying the Blame of thoſe Doubts on themſelves, or their own Want of Skill and Application, they at laſt throw it on the Reaſons themſelves; and then peeviſhly paſs the reſt of their Lives in vilifying and ſetting at naught all Reaſon whatever; and thereby utterly deprive themſelves of all Truth, and Knowledge.* It has been obſerv'd, that there are four[g] particular Perſons, in whoſe Mouths *Plato* generally puts his real Sentiments; *viz. Socrates, Timæus*, the *Athenian Hoſt*, and the *Stranger of Elea.*

And tho' there are ſome particular Dialogues[h], which treat more expreſly and particularly of Morality, than the reſt; yet that Science *is diffus'd*[i] *thro' all his Works; and whatſoever Subject he is upon, he ſeems to have always an Eye to that.* His Principles, as far as I have been able to collect 'em from his Writings, may be reduc'd to theſe following Heads.

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[a] He was born the firſt Year of the eighty eighth Olympiad, four hundred and twenty eight Years before Chriſt. He died aged eighty one Years. See *Dacier's Life of Plato*; who would have done well, in this, as well as the other Works he has publiſh'd, to have cited the Paſſages of thoſe Authors, from whence he takes his Facts; or at leaſt have referr'd to 'em exactly. One is not oblig'd in ſuch Caſes to take a Man's bare Word.

[b] *Dacier*, ibid. p. 68.—69.—

[c] *Cujus* [Platonis] *in libris nihil adſirmatur, & in utramque partem multa diſſeruntur, de omnibus quæritur, nihil certi dicitur.* Academ. *Quæſt. Lib.* 1, *cap.* 12—

[d] *Quorum è numero tollendus eſt* Plato: --- *quia reliquit perfectiſſimam diſciplinam, Peripateticos, & Academicos*, &c. *Ibid. Lib.* 4, *cap.* 5.—

[e] *Dacier*, ubi ſupra, p. 74.—75.—

[f] Οὐκοῦν, ὦ Φαίδων, (ἔφη) οἰκτρὸν ἂν εἴη τὸ πάθος, εἰ ὄντος δή τινος ἀληθοῦς καὶ βεβαίου λόγου, καὶ δυνατοῦ κατανοῆσαι, ἔπειτα τούτου ἐκπεσὼν ἀπορῇ διὰ τὸ παραγίγνεσθαι τοιούτοισι λόγοις, τοῖς αὐτοῖς τοτὲ μὲν δοκοῦσιν ἀληθέσιν εἶναι, τοτὲ δὲ μή, μὴ ἑαυτόν τις αἰτιῷτο, μηδὲ τὴν ἑαυτοῦ ἀτεχνίαν, ἀλλὰ τελευτῶν, διὰ τὸ ἀλγεῖν, ἄσμενος ἐπὶ τοὺς λόγους ἀφ' ἑαυτοῦ τὴν αἰτίαν ἀπώσαιτο καὶ ἤδη τὸν λοιπὸν βίον μισῶν τε καὶ λοιδορῶν τοὺς λόγους διατελοῖ· τῶν δὲ (thus I read, inſtead of τε, with *H. Steph*) ὄντων τῆς ἀληθείας τε καὶ ἐπιστήμης στερηθείη. p. 390, C,— D.— Ed. *Lamar.* And Tom. 1, p. 90, C,— D.— Ed. *Serrani. Sextus Empiricius* (*Phyr. H pot.* Lib. 1, cap. 33,— p. 45, B.—) acknowledges *Plato* to have had fix'd Opinions about ſome certain Things. (Edit. *Fabricii*, p. 57,— Num. 221, & d.)

[g] Καὶ περὶ μὲν τῶν αὐτῷ δοκούντων ἀποφαίνεται διὰ τεττάρων προσώπων, Σωκράτους, Τιμαίου, τοῦ Ἀθηναίου Ξένου, τοῦ Ἐλεάτου Ξένου. *Diog. Laert.* Lib. 3. Sect. 52.— & p. 217,— Ed. *Col.*

[h] As, for Inſtance, his two *Alcibiades, Socrates's Apology, Crito, Phædo, Gorgias, Philebus*, the ten Books *de Repub.* and the twelve *de Legibus*, &c.

[i] *Fleury's Diſcourſe on Plato*, p. 252, the *Bruſſels* Edition,

The End and Aim of all humane [k] *Actions is ſome Good; and there is* [l] *a ſovereign Good, a Good by way of Excellence; which every Soul pants after. This ſovereign Good muſt needs be* [m] *perfect, ſole ſufficient by itſelf; and ſuch, that whoever comes to know it, cannot but moſt ardently ſeek the Poſſeſſion of that alone; without the leaſt Concern for any other Things, but ſuch as are made perfect by thoſe Goods, which have ſome Relation thereto.* But this can only be found in [n] *that infinite Being,* who is *the Parent and* [o] *Cauſe of all other Beings;* who *not only gives to* [p] *Things knowable, whatever they contain of Truth; and to intelligent Beings, the Faculty of knowing them: but is alſo the Author of their Exiſtence and Eſſence; being himſelf above all Eſſence, both in reſpect of Time, and Power.* Without the Knowledge [q], and Poſſeſſion of this Good, all other Things are unprofitable. And tho' all Men deſire it [r], and have ſome Senſe of it; yet do they not ſufficiently know what it is: nor can they arrive at a thorough Knowledge of it, either by their own Meditation; or by any certain and invariable Information from others. For which Reaſon there are but very few Men [s], who arrive at Happineſs in this World; and none who can obtain it in Perfection. All the Happineſs we can poſſibly attain to here, amounts to no more, than the Enjoyment of a Good, which is only [t] *the Production of, and Emanation from that ſovereign Good; or bears the neareſt Reſemblance to it:* This Good, which may be compar'd *to the other,* as *Light and* [u] *Eyeſight to the Sun, which may be truly ſaid to reſemble the Sun, but not to be the Sun itſelf;* this Good, I ſay, *is Knowledge and Truth;* which [x] produce *Holineſs and Juſtice,* by which *we are, as far as 'tis poſſible, united* [y], *and made like, to* [z] God: and alſo *the Love* [aa] of that ſuperlatively excellent Being; from whence reſults *a Pleaſure that is pure* [bb], *virtuous, and without Remorſe. If the Soul retires pure, unſully'd by any Contagion of the Body; as not having willingly had any Commerce with it, but on the contrary, having, as it were, always ſhunn'd it, and been always recollected within itſelf, by continual Medition; that is to ſay, by truly philoſophizing, and effectually learning how to die; (for Philoſophy is a Preparation for Death:) if the Soul, I ſay, retires in this Diſpoſition, it goes to a Being like itſelf; to a Being divine, immortal, and replete with Wiſdom; where it lives in the Enjoyment of marvellous Felicity; exempt from all its Errours, Ignorance, and Fears; from all thoſe Paſſions, and Affections, which once tyranniz'd over it; and from all the other Evils attending humane Life: and leads a truly celeſtial Life with the Gods* [cc] *to all Eternity* [dd]. So that, beſides *the moſt glorious and moſt certain Rewards, that good Men receive in this World* [ee], *both from*

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[k] Τέλος εἶναι ἁπασῶν τῶν πράξεων τὸ ἀγαθόν; ϗ ἐκείνȣ ἕνεκα δεῖν πάντα τἄλλα πράττεσθαι; ἀλλ' ȣ̓κ ἐκεῖνο, τῶν ἄλλων, p. 302, *H.*— Ed. *Lamar.* & Ed. *Serrani,* Tom. 1, p. 499,— 500,— *Gorg.*

[l] Ὃ δὲ διώκει μὲν ἅπασα ψυχὴ, ϗ τȣ́τȣ ἕνεκα πάντα πράττει, *De Repub.* Lib. 6, Tom. 2, p. 505, E.— & p. 477, G.— Edit. *Lugdun. Lamar.*

[m] Πάντων δή πȣ τελεώτατον [ἀνάγκη εἶναι] --- ἱκανόν τ' Ἀγαθόν --- τὸ δέ γε μὴν, ὡς οἶμαι, περὶ αὐτȣ͂ ἀναγκαιότατον εἶναι λέγειν, ὡς πᾶν τὸ γιγνῶσκον αὐτὸ, θηρεύει ϗ ἐφίεται βȣλόμενον ἑλεῖν, ϗ περὶ αὐτὸ κτήσασθαι, ϗ τῶν ἄλλων ȣ̓δὲν φροντίζει, πλὴν τῶν ἀποτελȣμένων ἅμα ἀγαθοῖς. In *Phileb.* Tom. 2, p. 20, D.— & p. 76, C,— Ed. *Lugd.*

[n] Πρῶτον μὲν τοίνυν ἄπειρον λέγω, *Phileb.* p. 78,— Ed. *Lugd.* & Tom. 2. p. 27, B.— For *Plato* acknowledg'd, beſides the ſupreme Being, inferiour Deities. See *Bibl. Univ.* Tom. 10, p. 387,— *& ſeq.* and the *Bibl. Choiſ.* of Mr. *Le Clerc,* Tom. 3, p. 72,— 73.—

[o] Τȣ͂ πάντων Αἰτίȣ. *Phileb.* p. 30, E.— & p. 80, D.— Edit. *Lugdun.*

[p] Τȣ͂το τοίνυν τὸ τὴν ἀλήθειαν παρέχον τοῖς γιγνωσκομένοις, ϗ τῷ γιγνώσκοντι τὴν δύναμιν ἀποδιδὸν, τὴν τȣ͂ ἀγαθȣ͂ ἰδέαν φάθι εἶναι, αἰτίαν δ' ἐπιϛήμης ȣ̓͂σαν ϗ ἀληθείας --- ἀλλὰ ϗ τὸ εἶναι τε ϗ τὴν ȣ̓σίαν ὑπ' ἐκείνȣ αὐτοῖς προσεῖναι' ȣ̓κ ȣ̓σίας ὄντος τȣ͂ ἀγαθȣ͂, ἀλλ' ἔτι ἐπέκεινα τῆς ȣ̓σίας πρεσβείᾳ ϗ δυνάμει ὑπερέχοντος, *De Repub.* lib. 6, Tom. 2, p. 508, F.— & p. 479, A,— Ed. *Lugdun.*

[q] Ἐι δὲ μὴ ἴσμεν [τὴν τȣ͂ Ἀγαθȣ͂ ἰδέαν,] ἄνευ δὲ ταύτης εἰ ὅτι μάλιϛα τἄλλα ἐπιϛάιμεθα, οἶσθ' ὅτι ȣ̓δὲν ἡμῖν ὄφελος· ὥσπερ ȣ̓δ' εἰ κεκτήμεθά τι, ἄνευ τȣ͂ ἀγαθȣ͂. *De Rep.* 6, p. 505, A,— Tom. 2. & p. 477, E.— Ed. *Lugdun.*

[r] Ἀπομαντευομένη τὶ εἶναι [πᾶσα ψυχὴ,] ἀπορȣ͂σα δὲ ϗ ȣ̓κ ἔχȣσα λαβεῖν ἱκάνως τί ποτ' ἐϛὶν, ȣ̓δὲ πίϛει χρήσασθαι μονίμῳ, οἵα ϗ περὶ τἄλλα. *De Rep.* p. 505, E,— Tom. 2. & p. 477, G,— Ed. *Lugdun.*

[s] Ου φημι εἶναι δυνατὸν ἀνθρώποις μακαρίοις τε ϗ εὐδάιμοσι γενέσθαι, πλὴν ὀλίγων' μέχρι περ ἂν ζῶμεν, τȣ͂το διορίζομαι. *Epinomid.* init. p. 973, C,— Tom. 2. & p. 697, F,— Ed. *Lugd.* Ὅτι αὐτὴν [τȣ͂ Ἀγαθȣ͂ ἰδέαν,] ȣ̓κ ἱκανῶς ἴσμεν. *De Repub.* lib. 6, p. 505, A,— & p. 477, E,—

[t] Ὃς δ' ἔκγονός τε τȣ͂ Ἀγαθȣ͂ φάινεται ϗ ὁμοιότατος ἐκείνῳ. Ibid. p. 506, E,— & p. 478, C,— Ed. *Lugd.* Ὃντ' Ἀγαθὸν ἐγέννησεν ἀνάλογον ἑαυτῷ. Ibid. p. 508, B,— & p. 478, G,— Ed. *Lugd.*

[u] Ἐπιϛήμην δὲ ϗ ἀλήθειαν, ὥσπερ ἐκεῖ φῶς τε ϗ ὄψιν, ἡλιοειδῆ μὲν νομίζειν ὀρθὸν, ἥλιον δὲ ἡγεῖσθαι ȣ̓κ ὀρθῶς ἔχει. p. 509.— Et p. 479, A,—

[x] Ἡγȣμένης δὲ ἀληθείας, ȣ̓κ ἄν ποτε, οἶμαι, φαῖμεν αὐτῇ χορὸν κακῶν ἀκολȣθῆσαι. *De Rep.* lib. 6, p. 490, C.— & p. 471, F,— Ed. *Ludg.*

[y] See *Phædo,* Tom. 1, p. 79, D.— & p. 385, C,— Ed. *Lugdun.*

[z] Διὸ ϗ πειρᾶσθαι χρὴ ἐνθένδε ἐκεῖσε φύγειν ὅτι τάχιϛα, φυγὴ δὲ, ὁμόιωσις Θεῷ κατὰ τὸ δυνατόν' ὁμόιωσις δὲ, δίκαιον ϗ ὅσιον μετὰ φρονήσεως γενέσθαι. Theætet. Tom. 1, p. 176, A,— B.— & p. 128, F.— See alſo *de Legibus,* lib. 4, p. 716, C,— Tom. 2. & p. 601, A,— Ed. *Lugdun.*

[aa] Ὁρῶντι ᾧ ὁρατὸν τὸ καλὸν, [γενήσεται] τίκτειν --- ἀληθῆ [ἀρετὴν] ἅτε τȣ͂ ἀληθȣ͂ς ἐφαπτομένῳ; τεκόντι δὲ ἀρετὴν ἀληθῆ, ϗ θρεψαμένῳ, ὑπάρχει θεοφιλεῖ γενέσθαι, ϗ, εἴπερ τῷ ἄλλῳ ἀνθρώπῳ, ἀθανάτῳ ϗ ἐκείνῳ --- τȣ́τȣ τȣ͂ κτήματος τῇ ἀνθρωπείᾳ φύσει συνεργὸν ἀμείνω Ἔρωτος ȣ̓κ ἄν τις ῥαδίως λάβοι. In *Conviv.* Tom. 3, p. 212, A,— B.— & p. 331, E.— Ed. *Lugd.*

[bb] Ἃς ἡδονὰς ἔθεμεν, ἀλύπȣς ὁρισάμενοι, καθαρὰς ἐπονομάσαντες τῆς ψύχης αὐτῆς ἐπιϛήμας, τᾶις δὲ αἰσθήσεσιν ἑπομένας. *Phileb.* Tom. 2, p. 66, C.— & p. 94, G,— Ed. *Lugdun.*

[cc] *Plato* believ'd, as the *Chaldeans* did, that the Soul return'd to the Places which are above the Moon; from whence they had been ſent into the Body, as a Puniſhment, for the Crimes they had committed, See *Timæus.*

[dd] Ἐὰν μὲν καθαρὰ ἀπαλλάττηται [ἡ ψύχη,] μηδὲν τȣ͂ σώματος συνεφέλκȣσα, ἅτε ȣ̓δὲν κοινωνȣ͂σα αὐτῷ ἐν τῷ βίῳ ἑκȣ͂σα εἶναι, ἀλλὰ φεύγȣσα αὐτὸ, ϗ συνηθροισμένη αὐτὴ εἰς αὐτὴν, ἅτε μελετῶσα ἀεὶ τȣ͂το, τȣ͂το δὲ ȣ̓δὲν ἄλλο ἐϛὶν ἢ ὀρθῶς φιλοσοφȣ͂σα, ϗ τῷ ὄντι τεθνάναι μελετῶσα ῥαδίως --- τȣ͂τ' ἂν εἴη μελέτη θανάτȣ. --- ȣ̔́τω μὲν ἔχȣσα, εἰς τὸ ὅμοιον αὐτῇ τὸ θεῖον ἀπέρχεται, τὸ θεῖόν τε ϗ ἀθάνατον ϗ φρόνιμον· Οἱ ἀφικομένῃ ὑπάρχει αὐτῇ εὐδάιμονι εἶναι, πλάνης ϗ ἀγνόιας ϗ φόβων ϗ ἀγρίων ἐρώτων ϗ τῶν ἄλλων κακῶν τῶν ἀνθρωπείων ἀπηλλαγμένῃ --- ὡς ἀληθῶς τὸν λοιπὸν χρόνον μετὰ Θεῶν διάγȣσα. *Phædo.* p. 80, E,— 81,— Tom. 1. & p. 385, 386, Ed. *Lugd.*

[ee] Ἃ μὲν τοίνυν --- ζῶντι τῷ δικάιῳ, παρὰ Θεῶν τε ϗ ἀνθρώπων, ἆθλά τε ϗ μισθοὶ ϗ δῶρα γίγνεται, πρὸς ἐκείνοις τοῖς ἀγαθοῖς οἷς αὐτὴ παρείχετο ἡ δικαιοσύνη, τοιαῦτ' ἂν εἴη. Καὶ μάλ', ἔφη, καλά τε ϗ βέβαια. Ταῦτα τοίνυν --- ȣ̓δέν ἐϛι πλήθει ȣ̓δὲ μεγέθει πρὸς ἐκεῖνα ἃ τελευτήσαντα ἑκάτερον περιμένει. *De Rep.* lib. 10, p. 613,— 614,— Tom. 2. & p. 318, F,— Ed. *Lugdun.* See the Deſcription that follows on quite to the End of the Book, of the Rewards and Puniſhments of another Life; as alſo in *Phædo,* and *Gorgias,* Tom. 1, p. 523,— *& ſeq.*

God, *and Man; and the good Things which Probity naturally procures for thoſe, who with Conſtancy adhere thereto: they receive after their Deaths too, Rewards both immenſe and innumerable.* Whereas the Wicked are puniſh'd, in another Life, proportionably to the Crimes they have committed in this. *Plato* ſets forth theſe Principles with all the Ornaments of a majeſtick Eloquence; but intermix'd with abundance of abſtracted, and myſterious Notions; to ſay nothing of the *Metempſychoſis* of the Souls of wicked Men, with his many other Imaginations and Conceits about the State of another Life: ſee, for inſtance, what he ſays of Love; in the Abridgment, which one of his extravagant Admirers [ff] has given us of his Thoughts on that Subject: "There is nothing more natural to Men than Love; they naturally love every Thing that is beautiful: becauſe their Souls are deſcended from the very Source of Beauty. But every Thing that has any Reſemblance of that primitive Beauty, affects them more or leſs; according as the Soul is more or leſs addicted to the Body. They, whoſe Souls are more free and diſengag'd, adore in each beautiful Object that ſovereign Beauty, of which they have a complete Idea, and for which they were born; and this Adoration produces in 'em Temperance, Fortitude, and Wiſdom; with every other Virtue. But they, who are bemir'd and deep ſunk in Matter, no longer retaining any Idea of the ſovereign Beauty; madly purſue thoſe Beauties which are imperfect and tranſitory; and plunge themſelves, without any Conſideration into all Sorts of Pollution, and Impurity." But what is ſtill more to be regretted, *Plato* [gg], even when he is handling the great Truths of Religion and Morality; interſperſes ſometimes very looſe Diſcourſes, upon the moſt ſcandalous Exceſſes of Debauchery; or at leaſt very ludicrous Ideas, fit only to turn Morality into Ridicule. In what a pompous Manner, for Example, does he deſcribe [hh] *thoſe Voyages, which the winged Souls make in Chariots, on the higheſt Vault of the Heavens; where they contemplate Beauty in its Eſſence: the unhappy Falls they ſometimes have from a Place ſo lofty and ſublime, quite down to the Earth; thro' the Fault of ſome one of their Steeds, that happens to prove ungovernable: the breaking of their Wings; their Reſidence in the Body; how ſtrangely they are affected with the ſudden View of ſome beautiful* Face; *which they diſcover to be a Copy of that Beauty, which they have ſeen in Heaven: their Wings which grow warm again, which begin to fledge; and which they endeavour to make uſe of, to fly with, towards the Object of their Love: to conclude, the Aw, the Dread, the Terrour, with which they are ſtruck at the Sight of a Beauty, which they know to be divine; the holy Fury, which tranſports them; the longing Deſire which they feel, to offer Sacrifices to the Object of their Love, as Men do to the Gods?*

It muſt however be allowed, that *Plato* draws from his Principles a conſiderable Number of excellent Precepts of Morality and Politicks; which are ſometimes too ſufficiently clear'd and diſcuſs'd: ſo that a Reader of Senſe may very much improve himſelf by the reading of his Works. There he may find that famous Argument, which Mr. *Paſcal* has in the laſt Age urg'd with ſo much Strength and Clearneſs: For *Socrates*, after having produc'd the Reaſons he had for his Belief of the Immortality of the Soul; addreſſes himſelf to his Friends in the following Manner: [ii] *If what I ſay be found true, 'tis highly reaſonable and expedient firmly to believe it; and even ſhould it after my Death prove otherwiſe, and all come to nothing, I ſhall have ſtill reap'd this Advantage from it; that in this Life, I have been leſs ſenſible of thoſe Evils, that generally accompany it. --- Unleſs a Man has loſt his Senſes, he cannot but be afraid of Death, till he knows aſſuredly, and is able to demonſtrate, that the Soul is immortal. --- To tell you now, that all theſe Things are in fact preciſely ſuch, as they have been repreſented to be; 'tis what a Man of ſound Senſe will never take upon himſelf to averr. But that, what I have told you concerning the State and Manſion of departed Souls, is, in all Probability, either abſolutely true, as I have related it; or very near the Matter, ſeeing the Soul is, as appears, immortal; this is what no Man of ſound Senſe needs ſcruple the venturing to affirm; and he will moſt certainly find his Account in it, whoe'er ſhall run the Risk: And a nobler Venture he cannot make; for 'tis ſuch a bliſsful Hope, that every Soul ought to be charm'd and tranſported with it.*

Plato teaches [kk], that we ought never to undertake any Thing, without Prayer to God: But declares, at the ſame Time, that God [ll] rejects the Prayers and Sacrifices of thoſe whoſe,

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[ff] *Dacier's Life of Plato*, p. 107.— 108.— See *Phædrus*, Tom. 3, p. 250,— *& ſeq. Serran.* & p. 346, B,— *& ſeq.* Ed. *Lamar.*

[gg] In his *Banquet*, for Inſtance, and in his *Phædrus*. It is remarkable, that *Philo* the *Jew*, otherwiſe a great Admirer of *Plato*, durſt not undertake to excuſe him as to this Particular: If this Philoſopher, ſays he, ſpeaks ſometimes of *Celeſtial Love*, 'tis but for Decency ſake. *De Vit. Contemplat.* p. 898, B. Ed. *Paris.* & p. 694, F,— Edit. *Colon. Allob.* See alſo *Le Clerc's Bibl. Choiſie*, Tom. 11, p. 317,— *& ſeq.*

[hh] I make uſe of the Words of Mr. *Fontenelle, Nouv. Dial. des morts* 2. *Part. Diag. des morts Anc. avec les Modernes*, Dial. 4. p. 198. & p. 97,— Edit. *Lond.* 1707.

[ii] Ει μὲν τυγχάνει ἀληθῆ ὄντα ἃ ἐγὼ λέγω, καλῶς δὴ ἔχει τὸ πεισθῆναι· εἰ μηδέν ἐςι τελευτήσαντι, ἀλλ' ȣ̃ν τȣ̃τόν γε τὸν χρόνον αὐτὸν τὸν πρὸ τȣ̃ θανάτȣ ἧττον τοῖς παρȣ̃σιν ἀηδὴς ἔσομαι ὀδυρόμενος. *Phædon*, tom. 1, p. 91, B.— & p. 390, E,— Ed. *Lugdun.* Προσήκει γὰρ φοβεῖσθαι, εἰ μὴ ἀνόητος εἴη, τῷ μὴ εἰδότι, μηδ' ἔχοντι λόγον διδόναι ὡς ἀθάνατόν ἐςι. ibid. p. 95, D.— & 392, E— Τὸ μὲν ȣ̃ν ταῦτα διισχυρίσασθαι ȣ̈τως ἔχειν ὡς ἐγὼ διελήλυθα, ȣ' πρέπει νȣ̃ν ἔχοντι ἀνδρί· ὅτι μὲν τοι ἢ ταῦτ' ἐςιν, ἢ τοιαῦτ' ἄττα, περὶ τὰς ψυχὰς ἡμῶν, ϗ τὰς οἰκήσεις, ἐπείπερ ἀθάνατόν γε ἡ ψυχὴ φαίνεται ȣ̃σα, τȣ̃το ϗ πρέπειν ἐμοὶ δοκεῖ, ϗ ἄξιον κινδυνεῦσαι, οἰομένῳ ȣ̈τως ἔχειν· καλὸς γὰρ ὁ κίνδυνος, ϗ χρὴ τὰ τοιαῦτα ὥσπερ ἐπᾴδειν ἑαυτῷ. ibid. p. 114, D,— *Serr. Lamar.* 401, A,— See the Paſſages cited, *Pufend. De Jur. Nat. & Gent.* lib. 1, c. 3, Sect. 7, Not. 5.

[kk] Τȣ̃το γε δὴ πάντες ὅσοι ϗ κατὰ βραχὺ σωφροσύνης μετέχȣσιν, ἐπὶ πάσῃ ὁρμῇ ϗ σμικρȣ̃ ϗ μεγάλȣ πράγματος Θεὸν ἀεί πȣ καλȣ̃σιν. In *Timæo*, Tom. 3, p. 27, C,— *Serr.* & p. 526, C,— Ed. *Ludg.*

[ll] Παρὰ δὲ μιαρȣ̃ δῶρα ȣ̈τ' ἄνδρ' ἀγαθὸν, ȣ̈τε Θεὸν ἐςὶ ποτὲ τό γε ὀρθὸν δέχεσθαι. *De Leg.* lib. 4, Tom. 2, p. 716,— 717,— *Serr.* & p. 601, B.— Ed. *Lugd.* Ου γὰρ (οἶμαι) τοιȣ̃τόν ἐςι τὸ τῶν Θεῶν, ὥςε ὑπὸ δώρων παράγεσθαι, οἷον κακὸν τοκιςήν, *Alcib.* 2, Tom. 2, p. 149, E,— *Serr.* & p. 43, C,— Ed. *Ludg.*

Souls are impure; and that he ſuffers not himſelf to be brib'd with Gifts. This Philoſopher [mm] look'd upon a blind and immoderate Self-love to be the Source of all the Evils of Life; and eſteem'd the Conqueſt a Man gains [nn] over himſelf, to be the greateſt and moſt glorious of all Victories. He ſays, that we ſhould be always learning [oo] to die; and yet [pp] ſhould bear with Life, in Obedience to *God*; whoſe Will it is, that we ſhould not quit it, till we have obtained his expreſs Diſcharge. He ſhews us,[qq] *that we were not born for ourſelves only*; *but alſo for our Country*, *for our Relations*, *and for the reſt of our Friends*:[rr] that we ought not to injure any Man: that *we ought not to return Evil* [ss] *for Evil*; *and that* [tt] *'tis much better to receive*, *than to do an Injury*. He refutes in his *Republick*, in his *Laws*, in his *Gorgias*, and in many other Places, thoſe falſe Notions of Morality and Politicks; which tend to the utter Subverſion of the Law of Nature. He acknowledges [uu] that there is no Law in common to Men and Beaſts; and that Man of all Animals is the only one, who has any Idea of Right; and of the Deity, from whence it proceeds. He forbids [xx] all Copulation contrary to Nature. He gives Rules of Conduct for the different States of Life. The Deſcription he gives of a conſummate Virtue, is ſo beautiful, and does ſo hit the Character of our Saviour, the only Pattern here below of perfect Holineſs; that many have regarded it as a kind of Prophecy in the Mouth of an Heathen. This Philoſopher does, in fact, give us the Repreſentation of a Man truly virtuous; who nevertheleſs was to be generally reputed a bad Man, altho' in all Things he inflexibly adher'd to Juſtice; and was, without being diſcourag'd at this unjuſt Cenſure, which all the World paſs'd upon him; ſtill to march reſolutely on, even to Death, in a ſteady uninterrupted Courſe of Virtue[yy]; *tho' publickly ſcourg'd*, *put to various Kinds of Torture*, *kept in Irons*, *his Eyes burnt out*, *forc'd to endure all Sorts of Miſery*; *and in the End crucify'd*. But *Plato* has, notwithſtanding, here and there ſcatter'd throughout his Works ſeveral Notions, which are really exorbitant and beyond Bounds. In his *Crito*, for Example, *Socrates* maintains, that it is unlawful for a Man condemn'd to die, to make his Eſcape, if he can, tho' his Sentence be never ſo unjuſt [zz]. Nay, he goes ſo far as to ſay, * that if a Criminal is not diſcover'd, he ought of his own Accord to go and offer up himſelf to Puniſhment. What he ſays upon [aaa] *Treaſure-Trove*, ſhews, that he did not very well underſtand that Topick. He likewiſe gives into the vicious Extreme of thoſe, who abſolutely [bbb] condemn all lending of Money at Intereſt.

Plato has, in his Political Writings, laid down the true Principles of that Science; tho' the Conſequences he draws from 'em are not always juſt. He makes it a Fundamental, That [ccc] Laws are abſolutely neceſſary for the Preſervation of Society; and that without 'em, Men would live together no better, than the moſt ſavage Beaſts. He defines a Law to be, *a publick Ordinance* [ddd] *of the Body of the State*, *the Subject-Matter of which*, *is for the Good of the Community*. He owns the tacit Agreement there is between every particular Member, and the State; and ſays, that thoſe, who refuſe to ſubmit themſelves to the Laws, *violate that Agreement* [eee]; *which was not impos'd upon 'em*, *either by Force*, *or Surpriſe*, *without giving them Time to conſider of the Matter*; *ſince they might have retir'd*, *had they been diſſatisfied with the Laws*; *or thought the Terms they propos'd unjuſt*. He ſays, that the Heads, and Governours of a State are no more, than [fff] *Miniſters of the Laws*; *that wherever the Law bears Sway, and the Magiſtrates are its Slaves*; *there we ſee flouriſhing Towns, and the greateſt Plenty of all thoſe good Things, we expect from the Bounty of the Gods: but, on the other hand, where the Magiſtrate is Maſter, and the Law his Servant and Slave*; *there nothing can be expected or hop'd for, but Ruin and Deſolation.* He maintains, that thoſe Laws [ggg], which tend only to the particular Intereſt of the Legiſlatour, and not to the publick Good, are not really Laws; but the Dictates of Faction, Tyranny, and Injuſtice. In a word, "'tis his fix'd Opinion [hhh], that all Politicks, which tend to make the governing Part powerful at the Expence of the Subjects; and which make all the Virtue of a Sovereign to conſiſt in ſecuring, and increaſing his own Power; leaving Juſtice, Patience, Goodneſs, Fidelity, and Humanity, as Virtues fit only for Slaves, to be practis'd by the Subjects; are no better than downright Tyranny: and that the End and Deſign of true Politicks, is to make the whole Body of the Subjects live ſociably together, like Brethren, in the happieſt Manner poſſible; without Poverty, without Riches; according to the Rules of Juſtice and Sanctity." *Plato*, having laid down theſe general Principles, enters upon particular Expedients; of which he gives us a conſiderable Number, for the regulating of the publick religious Worſhip, the Choice of Magiſtrates, Marriages, Divorces, the Education of Children, Wills, Guardianſhips, War, and Peace; with the other principal Affairs of Civil Life. But "there is, in his Politicks, a very conſiderable Defect [iii]; for in order to baniſh, out of the Government he is forming, all Manner of Property; he ordains Community, not only of Goods, but alſo of Wives and Children. --This Community is ſo far from conducing to the End its Legiſlatour propoſes; that on the contrary it effectually prevents the Attainment of it; and intirely fruſtrates the Deſign of his whole Eſtabliſhment. For inſtead of uniting the Minds of his Subjects, it ſets 'em at Variance; diſſolving at once all the Relations, and moſt ſacred Ties of Nature; and trampling under Foot all Law, Religion, Honeſty, and Decency. --- *Ariſtotle* has ſtrenuouſly oppos'd this Maxim, in his ſecond Book of *Politicks*; and *Plato* himſelf abandons it in his ſixth Book of *Laws*; where he reſtores to the Marriage State, all that he had before taken from it. Beſides this, there is another Defect, concerning the Education of Women; whom he deſtins to the ſame Employments as the Men; and calls 'em to the Command of Armies, and the Government of States." Let us add, that, by his Manner of ſpeaking of thoſe, whom the *Greeks* call'd *Barbarians* [kkk]; he ſeems to have retain'd the falſe and preſumptuous Ideas of that Nation; who, forgetting the natural Equality of all Men; pretended to have a Right, to treat all other Nations, as their Enemies *by Nature*, againſt whom they might ſecurely exerciſe all Manner of Hoſtilities. Another very conſiderable Blemiſh, is his Pretence; that [lll] *nothing ought ever to be chang'd in the Religion we find eſtabliſh'd*; *and that but to think of any ſuch Thing, was the higheſt Pitch of Extravagance and Folly.* A Maxim which can have no other Effect, but to keep up Superſtition and Ignorance in the World; and for ever exclude Truth.

[mm] Τὸ δὲ ἀληθείᾳ γε πάντων ἁμαρτημάτων, διὰ τὴν σφόδρα ἑαυτοῦ φιλίαν, αἴτιον ἑκάστῳ γίγνεται ἑκάστοτε. *De Leg.* lib.5, p.731, E,— *Serr.* & p.606, D,— Ed. *Lugd.*

[nn] Τὸ νικᾷν αὐτὸν αὐτὸν, πασῶν νικῶν πρώτη τε ϗ ἀρίστη. *De Leg.* lib.1, p.626, E,— *Serran.* & p.565, G,— Ed. *Lugd.*

[oo] See the Paſſage out of *Phædo*, cited before, Note (dd.)

[pp] See *Phædo*, p.62, B.— Tom.1, *Serran.* & p.377, B,— C,— D,— Ed. *Ludg.*

[qq] Ἕκαστος ἡμῶν οὐχ αὑτῷ μόνον γέγονεν, ἀλλὰ τῆς γενέσεως ἡμῶν τὸ μὲν τι ἡ πατρὶς μερίζεται, τὸ δὲ τι, οἱ γεννήσαντες· τὸ δὲ, οἱ λοιποὶ φίλοι. Epiſt.9.—

[rr] Οὐδαμῶς τό γε ἀδικεῖν οὔτε ἀγαθὸν, οὔτε καλόν. In *Critone*, Tom.1, p.49, A,— *Serran.* & p.372, D,— Ed. *Ludg.*

[ss] Οὔτε ἄρα ἀνταδικεῖν δεῖ, οὔτε κακῶς ποιεῖν οὐδένα ἀνθρώπων, οὐδ' ἂν ὁτιοῦν πάσχῃ ὑπ' αὐτῶν, ibid. C,— *Serr.* & E,— *Lugd.*

[tt] Μεῖζον μὲν κακὸν φαμὲν τὸ ἀδικεῖν, ἔλαττον δὲ, τὸ ἀδικεῖσθαι. In *Gorgia*, Tom.1, p.509, C,— See alſo p.527. B,— *Serran.* & p.306, H,— Ed. *Ludg.* See alſo p.314, C.—

[uu] Ὃ [ἄνθρωπος] συνέσει τε ὑπερέχει τῶν ἄλλων [ζώων,] ϗ δίκην ϗ θεοὺς μόνον νομίζει. *Menexen.* p.237, D,— Tom. 2, *Serran.* & p.404, C,— Ed. *Lugd.*

[xx] *De Legibus*, Lib.8, Tom.2, p.836, A,— *& ſeq. Serran.* & p.645. F,— *& ſeq.* Ed. *Ludg.*

[yy] Μηδὲν γὰρ ἀδικῶν, δόξαν ἐχέτω τὴν μεγίστην ἀδικίας· ἵν' ᾖ βεβασανισμένος εἰς δικαιοσύνην, τὸ μὴ τέγγεσθαι ὑπὸ κακοδοξίας, ϗ τῶν ὑπ' αὐτῆς γιγνομένων· ἀλλ' ἴτω ἀμετάστατος μέχρι θανάτου.--- εἰς τὸ ἔσχατον (ἐλελυθὼς) δικαιοσύνης --- ὅτι οὕτω διακείμενος ὁ δίκαιος, μαστιγώσεται, στρεβλώσεται, δεδήσεται, ἐκκαυθήσεται τῷ ὀφθαλμῷ· τελευτῶν, πάντα κακὰ παθὼν, ἀνασχινδιλευθήσεται. *De Repub.* lib.2. 361, C,— 362,— Tom. 2, *Serran.* & p.423, B,— C,— Ed. *Lugd.* See a Fragment of the third Book *de Rep.* of *Cicero*, in *Lactantius*, *Inſt. Divin.* Lib.5. c.12, n 5, 6.

[zz] See Mr. *Pufendorf*'s *Law of Nature and Nations*, Book 4, cap. 1, Sect. 20. And Book 8, cap.3, Sect.4, Num.4.— And Not.8, 9.—

* *Gorg.* p.480, A,— B,— Tom.1. *Serran.* & p.294. E,— & F,— Ed. *Lugdun.* See *Pufend. de Jur. Nat. & Gent.* lib.4, c.6, Sect. 20, Not.1. where you will find the Paſſage here referr'd to.

[aaa] *De Legib.* Lib.11, p.913, A,— & d. at the Beginning. See *Pufendorf*, Lib.4, c.6, Sect.13.—

[bbb] Μηδὲ δανείζειν ἐπὶ τόκῳ. *De Legib.* Lib.5, p.742, C,— Tom.2, *Serr.* & p.610, G,— Ed. *Ludg.*

[ccc] Ὡς ἄρα νόμους ἀνθρώποις ἀναγκαῖον τίθεσθαι, ϗ ζῆν κατὰ νόμους, ἢ μηδὲν διαφέρειν τῶν πάντῃ ἀγριωτάτων θηρίων. *De Leg.* lib.9, Tom.2, p.874, E.— *Ser.* & p.660, G,— Ed. *Ludg.*

[ddd] Ἐπὶ δὲ πᾶσι τούτοις, λογισμὸς ὅ, τι ποτ' αὐτῶν ἄμεινον ἢ χεῖρον· ὃς γενόμενος δόγμα πόλεως κοινὸν, νόμος ἐπωνόμασται. *De Leg.* lib.1, p.644, D,— See *Minos*, p.317, A,— C,— *Serr.* & Ed. *Ludg.* p.573, B.— See too p.45, F,— G.—

[eee] Φάσκοντές σε ὡμολογηκέναι πολιτεύσεσθαι καθ' ἡμᾶς [νόμους] ἔργῳ, ἀλλ' οὐ λόγῳ --- ξυνθήκας τὰς πρὸς ἡμᾶς αὐτοὺς, ϗ ὁμολογίας παραβαίνεις· οὐχ ὑπ' ἀνάγκης ὁμολογήσας, οὐδὲ ἀπατηθεὶς, οὐδὲ ἐν ὀλίγῳ χρόνῳ ἀναγκασθεὶς βουλεύσασθαι --- ἦν σοι ἀπιέναι, εἰ μὴ ἠρέσκομεν ἡμεῖς, μηδὲ δίκαιαι ἐφαίνοντό σοι αἱ ὁμολογίαι εἶναι. In *Criton.* Tom.1, p.52, D,— E,— *Serran.* & p.374, A,— B. Ed. *Ludg.*

[fff] Τοὺς δ' ἄρχοντας λεγομένους, νῦν ὑπερέτας τοῖς νόμοις ἐκάλεσα. *De Leg.* lib. 4, Tom. 2, p. 715, C.— *Serran.* & p. 600. E.— Ed. *Lugd.* Ἐν ᾗ μὲν γὰρ ἂν (πόλει) ἀρχόμενος ᾖ καὶ ἄκυρος νόμος, φθορὰν ὁρῶ τῇ τοιαύτῃ ἑτοίμην οὖσαν· ἐν ᾗ δὲ ἂν δεσπότης τῶν ἀρχόντων, οἱ δὲ ἄρχοντες δοῦλοι τοῦ νόμου, σωτηρίαν, καὶ πάνθ' ὅσα θεοὶ πόλεσιν ἔδοσαν ἀγαθὰ γιγνόμενα καθορῶ. ibid. D,— *Serran.* & F,— Ed. *Lugd.*

[ggg] Ταύτας δήπου φαμὲν ἡμεῖς νῦν οὔτ' εἶναι πολιτείας, οὔτ' ὀρθοὺς νόμους, ὅσοι μὴ ξυπάσης τῆς πόλεως ἕνεκα τοῦ κοινοῦ ἐτέθησαν· οἱ δ' ἕνεκα τινῶν, στασιωτείας, ἀλλ' οὐ πολιτείας τούτους φαμὲν καὶ τὰ τούτων δίκαια ἅ φασιν εἶναι, μάτην εἰρῆσθαι. Ibid. B,— *Serran.* & Ed. *Lugd* D.—

[hhh] *Dacier's Life of Plato*, p. 90,— 91.—

[iii] Ibid, p. 92,— *& ſeq.*

[kkk] See *Menexenus*, Tom. 2, p. 242, D.— and the fifth of his *Repub.* p. 470, C,—*Serran.* & p. 406, C,— & p, 464, G,— Ed. *Ludg.*

[lll] Οὐδεὶς ἐπιχειρήσει κινεῖν νοῦν ἔχων --- τούτων νομοθέτῃ τὸ σμικρότατον ἁπάντων οὐδὲν κινητέον. *Leg.* lib. 5, p. 738, B,— C,— *Serran.* & p. 609. B,— Ed. *Lugd.* See Mr. *De Meaux's Diſcours ſur l'Hiſt. Univ.* p. 217, Ed. *Holl.*

SECT.

SECT. XXII.

ANTISTHENES[a], another Scholar of *Socrates*, founded the Sect of the *Cynicks*; and had, amongſt others, the famous *Diogenes*, for his Scholar. What an ingenious[b] modern Writer has ſaid of *Diogenes*, may be generally apply'd to the Philoſophers of that Sect. "That they "were of the Number of thoſe extraordinary Perſons, who run every Thing into Extremes, without excepting even Reaſon itſelf; and who verify the Maxim, "* *That there is no great Wit without a Spice "Madneſs*." They had learn'd from *Socrates*, that Morality was the moſt uſeful of all the Sciences; and what deſerv'd our greateſt Care and Application. From this moſt true Principle, they abſurdly concluded; that Logick, Natural Philoſophy, Geometry, Muſick, the liberal Arts and Sciences; in a word, every Thing that did not immediately relate to the Science of Morality, was to be deſpis'd[c], and intirely thrown aſide. The fundamental Maxim of their Doctrine[d] *was, to live in Conformity to the Rules of Virtue; which*[e] *is ſufficient to make Men happy.* But the Conſequences, they drew from thence, were in ſome Things too rigid; and in others too remiſs. [f] *The Gods*, ſaid they, *have need of nothing; this is their proper and natural Condition: Thoſe then who ſtand in need but of a few Things, do the moſt reſemble them.* To procure to themſelves then this happy Independancy; and to ſhew with what an utter Indifferency they look'd upon Riches, Pleaſures, Honours, and the Approbation of Men; they pretended, that we ought intirely to renounce all the Conveniences of Life; and voluntarily reduce our ſelves to the moſt extreme Poverty[g]: And they accordingly purſu'd this Maxim of theirs in their Manner of living: A long Beard, a Cloak, a Staff, and a Wallet, made up the whole of their Attire, Equipage, Goods and Chattels. *Diogenes*, for his Part, would have no other Habitationbut a[h] Tub; his Wooden Cup too[i], when he came to find he could drink out of the Hollow of his Hand, was thrownaway. *Antiſthenes* ſaid[k], *he had rather loſe his Senſes, than be ſenſible of Pleaſure.* They thought themſelves entitled freely to make uſe of any Thing that came in their Way, without troubling themſelves whether they had the Owners Conſent, or not; which Practice of theirs they juſtify'd in this Manner. *All Things*, ſaid they, *belong to the Gods: But the Sages are Friends to the*[l] *Gods, and all Things are common among Friends: Therefore all Things belong to the Sages.* They laugh'd at all humane Eſtabliſhments[m], believing themſelves bound by no other Law, than the Law of Nature; of which they had very falſe and imperfect Notions. Upon this Principle *Diogenes*[n] made no Scruple of coining falſe Money. He maintain'd that[o] all Women ought to be in common; and that the Laws of Marriage were but a vain Subjection. According to the Opinion of theſe ſame Philoſophers, there was nothing that a Man ought to be aſham'd of: They publickly, and without Reſerve, trod under Foot all the Laws of Decency, and Modeſty. A learned *German*[p] not long ſince, maintain'd; That they had never advanc'd this Paradox, had it not been to remove from themſelves the Abuſe of thoſe, who, making the Whole of Virtue to conſiſt in external Decency, did under this beautiful Vail conceal the moſt enormous Practices. "If this be ſo, "(ſays an[q] ingenious Journaliſt in his Remarks thereupon) their Deſign was good; "but their Means ſtark nought: For, as a "certain[r] Lady, who did not always fol-

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[a] See *Diog. Laert.* lib. 6, Sect. 1,— *& ſequen.* And p. 365, 366. Ed. *Colon. Allob.*

[b] Mr. *Bayle*, Diction. Artic. *Diogenes.* p. 1049.—

* *Nullum magnum ingenium ſine mixturâ dementiæ fuit. Senec. de Tranq. Anim.* cap. ult. p. 229,— Tom. 1, Ed. *Gronov.*

[c] Ἀρέσκει οὖν αὐτοῖς (Κυνικοῖς) τὸν Λογικὸν ϗ τὸν Φυσικὸν τόπον περιαιρεῖν --- μόνῳ δὲ προσέχειν τῷ Ἠθικῷ ϗ ὅπερ τινὲς ἐπὶ Σωκράτους, τοῦτο Διοκλῆς ἐπὶ Διογένους, ἀναγράφει, τοῦτον φάσκων λέγειν, Δεῖ ζητεῖν ὅ, τι τοι ἐν μεγάροισι κακόν τ' ἀγαθόν τε τέτυκται. Παραιτοῦνται δὲ ϗ τὰ ἐγκύκλια μαθήματα. Γράμματα γοῦν μὴ μανθάνειν ἔφασκεν ὁ Ἀντισθένης τοὺς σώφρονας γενομένους, ἵνα μὴ διαστρέφοιντο τοῖς ἀλλοτρίοις. Περιαιροῦσι δὲ ϗ Γεωμετρίαν, ϗ Μουσικὴν, ϗ πάντα τὰ τοιαῦτα. *Diog. Laert.* Lib. 6, Sect. 103,— 104.— Et p. 431,—432. Ed. *Colon.*

[d] Ἀρέσκει δ' αὐτοῖς ϗ τέλος εἶναι τὸ κατ' ἀρετὴν ζῆν. Ibid. Sect. 104.—

[e] Αὐταρκῆ γὰρ τὴν ἀρετὴν εἶναι πρὸς εὐδαιμονίαν. Ibid. Sect. 11.— & p. 371.— Ed. *Colon.*

[f] Ὅς (Διογένης) ἔφασκε, Θεῶν μὲν ἴδιον εἶναι, μηδενὸς δεῖσθαι· τῶν δὲ Θεοῖς ὁμοίων, τὸ ὀλίγων χρῄζειν. Ibid. Sect. 105.— & Ed. *Col.* p. 433. *Socrates* had ſaid this before. See *Xenoph. Apomn.* Lib. 1, circa fin. p. 731, A,— Ed. *Paris.*

[g] See *Diog. Laert.* ubi ſupra, Sect. 13.— ibique Interpr. Vid. p. 373, Ed. *Coloniæ Allobr.* & p. 378, 379.

[h] See Remark (G) of Mr. *Bayle*'s Dictionary, in the Article of *Diogenes*, p. 1051, Col. 2.—

[i] See *Diog. Laert.* ubi ſupra, Sect. 37.— And p. 379,— Ed. *Colon.* And *Senec.* Epiſt. 90, p. 302.— Ed. *Gronov.*

[k] Μανείην μᾶλλον ἢ ἡσθείην. *Diog. Laert.* ib. Sect. 3.— & p. 366,— Ed. *Col.*

[l] Τῶν Θεῶν ἐστὶ πάντα· φίλοι δὲ οἱ σοφοὶ τοῖς Θεοῖς· κοινὰ δὲ τὰ τῶν φίλων. πάντα ἄρα ἐστὶ τῶν σοφῶν. Ibid. Sect. 37.— & Ed. *Col.* p. 388.— See alſo Sect. 11,— & Sect. 72.— & p. 371,— And p. 410.— Edit. *Colon.* They excepted not even Things ſacred. See Sect. 73,— & Ed. *Colon.* p. 411.—

[m] Μηδὲν οὕτω τοῖς κατὰ νόμον, ὡς τοῖς κατὰ φύσιν διδούς. Ibid. Sect. 71,— & p. 410.— Ed. *Col.*

[n] Τοιαῦτα διελέγετο ϗ ποιῶν ἐφαίνετο, ὄντως νόμισμα παραχαράττων. Ibid. Sect. 71— & Ed. *Col.* p. 410.— See Sect. 20.— & Ed. *Col.* 377, 378.

[o] Ἔλεγε δὲ ϗ κοινὰς εἶναι δεῖν τὰς γυναῖκας· γάμον μηδὲν ὀνομάζων, ἀλλὰ τὸν πείσαντα τῇ πεισάσῃ συνεῖναι. Ibid. Sect. 72.— & p. 411,— Edit. *Colon.*

[p] See *Buddei Elem. Philoſ. Inſtrument.* Hiſt. Philoſoph. Cap. 4, Sect. 35.

[q] Mr. *Bernard*'s *Nouvelles* of *July*, 1703, p. 95.

[r] Madam *De Villedieu.*

" low her own Maxim, has handſomely ex-" preſs'd it,

C'eſt un méchant moien d'enſeigner la Vertu,
Que de la faire voir par le portrait du Vice.

It is but a bad Way of teaching Virtue, to illuſtrate it by vicious Images. But let us ſee how they argu'd the Matter: [t] *There is not*, ſay they, *any Harm in dining: Therefore there is none in dining in the Middle of the Market-Place.* It is juſt and lawful to careſs one's own Wife [u]: Therefore 'tis juſt and lawful to careſs her before all the World. But, as Mr. *Bayle* has very well obſerv'd [w], " this is but the poor Fallacy, " *a dicto ſimpliciter ad dictum ſecundum quid.* " 'Tis as if one ſhould ſay: *It is good to drink* " *Wine; therefore it is good to drink it in a* " *Fever.* Theſe Men knew not, that many " Actions are not good but in certain Circum-" ſtances; ſo that the Abſence of thoſe Cir-" cumſtances may make that a bad Action, " which otherwiſe might have been a very " good one. To lend a Friend Money to pay " his Creditors, is a very laudable Action: " But to lend it him, to be drunk, or to game " with, is a bad one. Some Actions are eſſen-" tially bad, and can never become good, how-" ever circumſtantiated; but there are others, " which are ſometimes good; and ſometimes " bad, according to the Time, Place, and other " Circumſtances, in which they are perform'd. " --- The Difficulty then may be reduc'd to " this ſingle Queſtion: *Whether a Man ought* " *to be aſham'd, to perform conjugal Duty in* " *publick View?*" I am ſurpris'd to find this celebrated Author, whoſe Words I have borrow'd, making the *Cynicks* to triumph; as if Reaſon alone was not ſufficient to demonſtrate, that their Impudence is vicious, and contrary to the Maxims of the Law of Nature. " It " may be objected, ſays he, to *Diogenes*, that " the Senſe of Shame, in Caſes of this Nature, " is a natural Sentiment; ſo that to be without " Shame on theſe Occaſions, is to do Violence " to Nature itſelf. But, to this he will an-" ſwer; that was this Senſe of Shame a real " Dictate of Nature, the other Animals too, " who ſo faithfully follow the Impulſe of Na-" ture, would ſeek for dark Holes and ſecret " Receſſes, to perform this Work of Genera-" tion in: The contrary of which is moſt ap-" parent. At leaſt, this would be univerſally " true as to Men, that they in ſuch Caſes al-" ways ſeek out the darkeſt and moſt obſcure " Retreat; which is alſo [x] falſe. --- It will " here be reply'd to *Diogenes*, that it is ſuffi-" cient, that all civiliz'd Nations are ſubject to " this Senſe of Shame. --- To which he again " will make this Return; that the Nations we " are pleaſed to call barbarous, have much leſs " deviated from the Rules of Nature; than " thoſe, who have, with their refining, and " Subtilty of Thought, ſo vaſtly multiply'd " the Modes and Forms of Decency and Ci-" vility; and in ſhort, ſince the Law of Na-" ture is not ſubject to Preſcription, it is both " right and lawful, at all Times, and in all " Places to return back to the Obſervation of " it; without having any Regard to the arbi-" trary Yoke of Cuſtoms and Opinions, how-" ever, or whereſoever eſtabliſh'd." Theſe are the Reaſons which Mr. *Bayle* puts into the Mouth of *Diogenes*. I have no Deſign to engage myſelf in the Diſpute; this being no proper Place for it. I ſhall content myſelf with ſhewing in a few Words, that all theſe puzzling Subtilties of *Diogenes*, are capable of a very eaſy and obvious Anſwer. Firſt, he aſſumes a falſe Principle; to wit, that the Maxims of the Law of Nature are founded on an Inſtinct, common to all Animals; every Impulſe whereof is irreſiſtible: And yet Mr. *Bayle* has himſelf juſtly ſet at nought [y] thoſe moral Reflections, which are drawn from the Conduct of brute Beaſts. Secondly, Neither is it neceſſary, that all Men ſhould have innate Ideas of Virtue; and ſtill leſs, that they ſhould univerſally follow them in their Conduct. What I have already ſaid, is ſufficient, in my Opinion, to make *Diogenes* change his Battery. So that, thirdly, I ſhall now grant, as much as he pleaſes, that the Senſe of Shame, with regard to Actions in themſelves lawful or indifferent, is not a natural Sentiment: But I ſhall maintain, that humane Inſtitution may have Force enough, to make ſuch kind of Actions vicious and criminal; when attended with proper Circumſtances. My Reaſon is, becauſe Men are born to live together in Society, and conſequently to be complaiſant one towards another; not unſeaſonably affecting Singularity, but avoiding to give Offence to any Perſon whatever; as far as it can be done without Breach of their Duty, or bringing on themſelves ſome conſiderable Detriment: in a word, to have all the Reſpect imaginable for one another, and more eſpecially with Relation to thoſe Things, that are authoriz'd by an eſtabliſh'd Cuſtom. Fourthly, There are three Sorts of Modes or Cuſtoms, in the Practice of which, Civility and Decency are made to conſiſt: Some, which are exceeding troubleſome, and without any Foundation: Others, which are but little or not at all inconvenient; and which may be diſpens'd with, as well as the former; without giving Offence or Scandal to any one; or occaſion to fear any ill Conſequence thereupon: And laſtly ſuch, the Violation whereof is liable to very great Inconveniences, and, on this Account, have the Character of Impudence affix'd to the Contempt of 'em. I conceive, that no Man can be oblig'd to ſubject himſelf to the firſt Sort, any farther than his own Intereſt, or Condition of Life do neceſſarily require it.

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[t] ʼΕιώθει δὲ πάντα ποιεῖν ἐν τῷ μέσῳ, ϗ τὰ Δήμητρος ϗ τὰ ʼΑφροδίτης· ϗ τοιούτους τινὰς ἠρώτα λόγους. ʼΕι τὸ ἀριστᾶν μηδὲν ἐστιν ἄτοπον οὐδʼ ἐν ἀγορᾷ ἐστιν ἄτοπον· οὐκ ἔστι δὲ ἄτοπον τὸ ἀριστᾶν· οὐδʼ ἄρα ἐν ἀγορᾷ ἐστιν ἄτοπον. *Diog. Laert.* ubi ſupra, Sect. 69. — & p. 408. — Ed. *Colon.*

[u] See *Auguſt. de Civ. Dei*, Lib. 14, Cap. 20, — & L. Viv. i. l.

[w] *Dict. Hiſt. & Crit.* in the Article of *Hipparchia*, Wife of *Crates*, a *Cynick* Philoſopher, Remark (D), p. 1564, Col. 2. —

[x] Several Nations in *India* do the contrary. See alſo *Sext. Empiric. Pyrrhon. hypot.* Lib. 3, Cap. 24, p. 152, A, — Ed. *Steph.* p. 177, — Ed. *Fabric.* And *la Mothe le Vayer, Dial. D'Oraſias Tubero*, p. 156.

[y] See the Tranſlation of *Pufend. de Jur. Gent. & Nat.* by Mr. *Barbeyrac*, lib. 2, cap. 3, Sect. 2, Note 7.

As to the ſecond Sort, I do not ſee why a wiſe Man ſhould here refuſe to conform; ſince it will coſt him ſo little Pains or Trouble to comply: why, for Inſtance, ſhould a Man obſtinately inſiſt upon dining in the Streets, when he can, with as much or more Eaſe and Conveniency, dine in his own Houſe? However I ſhall grant *Diogenes*, if he pleaſe, that in violating this Sort of Cuſtoms, *a Man at moſt incurs but the Cenſure of Clowniſhneſs; and Want of common Complaiſance to an eſtabliſh'd Cuſtom.* But, for the laſt Sort, there's none but a *Cynick*, that is to ſay, a Man accuſtom'd *to treat all the World with Contempt*, and to take the Liberty of doing every Thing he pleaſes, on an ill-grounded Pretence of reſtoring the Law of Nature; who can, out of mere Humour, and without any Neceſſity, trample upon and deſpiſe 'em. Thus we ought, without Diſpute, to make uſe of ſome certain Terms, rather than others, tho' in the main both ſignify the ſame Thing. *The Words* [z] *Adultery, Inceſt, abominable Sin, are not infamous; altho' they repreſent very infamous Actions: becauſe they repreſent them no otherwiſe, than as cover'd with a Vail of Horrour; which makes us conſider them only as Crimes; ſo that theſe Words ſignify rather the Crime of thoſe Actions, than the Actions themſelves: Whereas there are certain Words, which, without giving any Horrour at all, expreſs them rather as pleaſing and agreeable, than criminal; and with the Addition too of a certain Air of Impudence and Effrontery. Theſe are the Words, which we call infamous and ſhameful; becauſe of thoſe acceſſory* Ideas *which the Mind*, by the Means of humane Inſtitution, and common Uſage, *joins to the principal Ideas of the Things themſelves. The ſame may be ſaid with reſpect to certain Turns, which ſerve modeſtly to expreſs ſuch Actions,* as common Decency would have hid from publick View, on Account of the many Inconveniences which would otherwiſe enſue; not *that they have in 'em any Tang of the Corruption of humane Nature*; as the Author, whoſe Words I have juſt before cited, pretends. *For in Reality, theſe Turns are, for this ſingle Reaſon, counted modeſt and virtuous; becauſe they do not ſimply expreſs the Things themſelves; but the Diſpoſition alſo of him who thus ſpeaks of 'em; and who by his Modeſty and Reſervedneſs ſhews an Uneaſineſs at the Sight of 'em; and an Endeavour to conceal them, as much as may be, both from himſelf and others. Whereas they, who mention them in another Manner; plainly ſhew, that they are pleas'd and diverted with the View of ſuch Objects; and ſuch Pleaſure being infamous, 'tis no Wonder that the Words too, which imprint ſuch Ideas on the Mind, ſhould be thought contrary to true Modeſty, and ſtrict Virtue.* Much more then ought this to take place, in regard to Actions themſelves; but there is no Need at preſent to enlarge on a Thing ſo evident and clear: Nor is there, in my Opinion, the leaſt Occaſion here for Revelation; and I could wiſh with all my Heart, that there was nothing more than theſe, and ſuch-like, Objections of the *Cynicks*, to be produc'd, to ſhew the Scantineſs of our Knowledge. I am perſuaded, that humane Reaſon, would not, were that the Caſe, be much mortify'd at it.

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[z] *Art of Thinking*, 1, Part. Cap. 14, p. 137,— 138. & p. 121,— 122.— Ed. *Amſterd.*

SECT. XXIII.

AMONG thoſe Diſciples of *Socrates*, who were the Founders of new Sects, we have alſo *Ariſtippus*; Chief of the *Cyrenaicks*. *He* [a] *had the Character of an agreeable Deboſhee, a polite Libertine; and a Man of Addreſs, who knew the World, and perfectly underſtood how to carry himſelf. --- Altho' the* Cyrenaicks *were for gratifying Nature, in every Thing ſhe could deſire; they did not however aſſume to themſelves the Impudence of the* Cynicks. They entirely rejected the Law of Nature [b]; and according to them, Civil Laws and Cuſtom, were the only Foundation of Juſtice and Honeſty. They plac'd their ſupreme Good in *Pleaſure* [c], *from what Cauſe ſoever it proceeded; not excepting even that, which was procur'd by the moſt infamous Actions.* They abſtain'd from their Pleaſures, no farther than was neceſſary, either to the avoiding Pain and Trouble; or to the keeping up ſuch [d] an Independency in themſelves, as might hinder 'em from falling under a ſlaviſh Subjection, to any one Thing whatever; ſo that being ty'd to no one particular Pleaſure, they might, with the greater Freedom and Indifferency, experience all Manner of Enjoyments. By this we may ſee, that Virtue had no Place in their Syſtem of Morality; any farther than ſhe was thought requiſite, towards the procuring for 'em, that groſs and brutiſh Pleaſure, which was the only Object of their Enquiry. This Sect was divided into ſeveral ſmall Branches; one of which [e] made open Profeſſion of downright Atheiſm; and in conſequence thereof maintain'd, that [f] *a Sage might ſteal, commit Adulteries, and Sacrileges, whenever he had convenient Opportunities ſo to do; thoſe Things being evil only,* ſaid they, *in the Opinion of the Vulgar; which was invented to keep Fools in Awe. Hegeſias,* Chief of that Branch, which bears his Name [g]; made ſuch eloquent, and pathetick Deſcriptions of the Miſeries of humane Life; that ſeveral of his Auditors, upon hearing theſe Lectures, went home and diſpatch'd themſelves; ſo that *Ptolomy,* King of *Egypt,* where he taught, was forc'd to prohibit him from touching any more upon that Subject.

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[a] Dict. of Mr. *Bayle*, Art. *Heracleotes*, Rem. (F), p. 1558, Col. 2.— See alſo *Diog. Laert.* lib. 2, Sect. 65, 66,— *& ſeq.* & p. 132,— *& ſeq.* Ed. *Col.*

[b] Μηδὲν τε εἶναι φύσει δίκαιον, ἢ καλὸν, ἢ αἰσχρὸν, ἀλλὰ νόμῳ ϗ ἔθει. ibid. Sect. 93.— & p. 149,— Ed. *Col.*

[c] Ἡδονὴν μὲν τοι τὴν τȣ̃ σώματος --- τέλος εἶναι φασί --- εἶναι δὲ ἀγαθὸν, κἂν ἀπὸ τῶν ἀσχημοτάτων γένηται. Ibid. Sect. 87,— 88.— & p. 145,— 146.— Ed. *Col.*

[d] *Nunc in Ariſtippi furtim præcepta relabor; Et mihi res, non me rebus, ſubmittere conor. Horat.* Lib. 1, Ep. 1, 18, 19. There has been ſome Diſpute about the Meaning of this laſt Verſe, occaſion'd by the new Explication of Mr. *Coſte*, in his Edition of *Tarteron's Horace.* See *Nouvelles de la Repub. des Lettres*, 1710.

[e] The *Theodorians*, ſo call'd from *Theodorus* their Head, ſurnam'd the *Atheiſt.* See *Diog. Laert.* Sect. 86,— lib. 2. & p. 144— 145.— & p. 152.— I know not how *Rapin* (in his Compariſon of *Plato* and *Ariſtotle*, Tom. 1, of his *Oeuvres diverſes*, p. 367. Ed. *Amſterd.*) comes to put *Hegeſias* and *Theodorus* among the *Stoicks.* This Anachroniſm is very conſiderable.

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[f] Κλέψειν τε, ϗ μοιχεύσειν, ϗ ἱεροσυλήσειν [τὸν σπουδαῖον] ἐν καιρῷ· μηδὲν γὰρ εἶναι τούτων αἰσχρὸν φύσει, τῆς ἐπ' αὐτοῖς δόξης αἱρομένης, ἣ σύγκειται ἕνεκα τῆς τῶν ἀφρόνων συνοχῆς. Ibid. Sect. 99.— & p. 153,— Ed. *Col.*

[g] For this Reaſon he was ſurnam'd ὁ Πεισιθάνατος. See *Diog. Laert.* ubi ſupra, Sect. 86.— & Ed. *Col.* p. 144,— 145.— *Cicer.* Tuſc. Quæſt. lib. 1, cap. 34.— & *Val. Maxim.* lib. 8, cap. 9.— I know not on what Grounds Mr. *Buddeus,* to juſtify the *Cyrenaicks,* as to the Opinions they are charg'd with, ſays, (in his *Abridgment of his Hiſtory of Philoſophy, Inſtit. Phil. Electic.* Tom. 1, c. 4, Sect. 13.) that *Hegeſias wrote very elegantly about the Immortality of the Soul, and its Happineſs after Death.* The Authors I cite, ſay nothing of this; *Cicero* mentions him, where he is proving Death to be no Evil, in caſe the Soul does not ſurvive; becauſe 'tis then deliver'd from the Miſeries of Life. Mr. *Dacier* is guilty of the ſame Fault, in his Argument to *Plato's Phædo,* Tom. 2, p. 150.— Ed. *Par.*

SECT. XXIV.

ARISTOTLE [a], the moſt celebrated of all *Plato*'s Scholars, founded the Sect of the *Peripateticks.* He was the firſt of the antient Philoſophers, who gave us a methodical Syſtem of Morality; at leaſt of thoſe, whoſe Writings we have left. Father *Rapin* [b], grounding himſelf upon [c] a Paſſage of *Cicero*; inſiſts, that *the Morality of* Ariſtotle, *has the ſame Foundations, the ſame Principles, and the ſame OEconomy, with that of* Plato; and that, if the latter *is leſs ſimple, and has more of Splendour and Ornament* [d]; the other will be found to be *more ſolid, and better connected.* But I know not how to reconcile this, with what he himſelf owns, in another Place; where he ſays [e], *That* Ariſtotle's *Morality is too humane, and too much confin'd within the Bounds of this Life; that he ſcarce propoſes any other Happineſs to Man, than that of civil Life:* Whereas *the Morality of* Plato, *is more noble and ſublime; is a Preparative to a Life more pure and perfect.* And indeed, Religion has no Share in the Syſtem of *Ariſtotle* [f]. Beſides that 'tis not yet a ſettled Point [g], whether he believ'd the Immortality of the Soul; he makes no Mention of Providence but by the By; and in ſuch a Manner too, as ſhews him not to be thoroughly perſuaded of it. *If* [h] *the Gods,* ſays he, *at all concern themſelves with human Affairs, as 'tis probable they may; 'tis juſt and reaſonable to believe, that they are pleas'd with that in Man, which is the beſt, and the moſt like to themſelves; (and ſuch is the Underſtanding:) That they reward them, who love and cultivate this Part of themſelves; as taking care of that, which is dear to the Gods: and moreover, as leading good and honeſt Lives.* This Philoſopher “makes frequent Mention of a [i] Plurality of Gods; and when he talks of *Dæmons,* which he does more ſparingly; he ſpeaks of 'em as intelligent Beings, united to the Stars. However, he acknowledges, as well as *Plato,* his Maſter; but one only Principle, which he calls [k] the *Immovable Spirit,* which moves all Things. In his Syſtem of Divinity, there are four principal Articles: The firſt is, that, tho' every Thing is not eternal, yet ſomething there muſt be that is incorruptible: otherwiſe all Things might return to their primitive Nothing. The ſecond is, that the Deity is an immaterial Subſtance. The third, that his Underſtanding comprehends in itſelf every Thing that is intelligible. The fourth, that God

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[a] He was born in the firſt Year of the ninety ninth Olympiad, 384 Years before Jeſus Chriſt; and died aged ſixty three Years.

[b] Tom. 2, *de ſes Oeuvres diverſes,* &c. And in his *Reflex. ſur la Morale.* Art. 4, p. 390. Ed. *de Holl.*

[c] *Idem fons erat utriſque,* [Peripateticis, & Veteri Academiæ,] *& eadem rerum expetendarum, fugiendarumque partitio.--- Communis hæc ratio, & utriſque hic bonorum finis videbatur.--- Omnis illa antiqua Philoſophia ſenſit in una virtute eſſe poſitam beatam vitam.* Acad. Quæſt. Lib. 1, Cap. 4,— & 6.— Beſides, that *Cicero* there ſpeaks rather of the Scholars of *Plato,* than of *Plato* himſelf. What he ſays may be true in ſome Senſe, and yet the Principles of *Plato* be very different from *Ariſtotle's*; as the Caſe appears to be in my Abridgment of 'em.

[d] Tom. 1, p. 342.

[e] Ibid. p. 346.

[f] Ariſtotle *was the leaſt of any made-uſe of by the Greek Fathers. They found, that he ſpoke ſlightly of Providence, and of the Nature of the Soul; that his Logick was too intricate, and his Morality too humane: For this is the Judgment St.* Gregory *of* Nazianze *makes of him,* (Orat. 33, p. 535, D.—) *Fleury, des Etudes,* &c. p. 18. Ed. *Bruſſels.* See alſo the *Abridgment of the Hiſtory of Philoſophy,* by Mr. *Buddeus,* Cap. 4. Sect. 33.

[g] See *Bayle's* Dict. p. 351. Col. 1,— Rem. (O), Artic. *Ariſtot.* in c. 11, lib. 1, of his *Ethicks* to *Nicomachus,* towards the End, p. 17, B,— Edit. *Paris. Ariſtotle* ſays, that 'tis a Problematical Queſtion, *Whether the Dead can partake of any good Good or Evil?* Τὸ διαπορεῖσθαι περὶ τοὺς κεκμηκότας, εἴ τινος ἀγαθοῦ κοινωνοῦσιν, ἢ τῶν ἀντικειμένων. *Ariſtot.* Tom. 3, p. 17, B,— Ed. *Pari.*

[h] Εἰ γάρ τις ἐπιμέλεια τῶν ἀνθρωπίνων ὑπὸ Θεῶν γίνεται, ὥσπερ δοκεῖ, ϗ εἴη ἂν εὔλογον χαίρειν τε αὐτοὺς τῷ ἀρίστῳ ϗ τῷ συγγενεστάτῳ· τοῦτο δ' ἂν εἴη ὁ νοῦς· ϗ τοὺς ἀγαπῶντας μάλιστα τοῦτο ϗ τιμῶντας, ἀντευποιεῖν· ὡς τῶν φίλων αὐτοῖς ἐπιμελουμένους· ϗ ὀρθῶς τε ϗ καλῶς πράττοντας. *Ethic. Nicom.* lib. 10, c. 9, p. 185, C.— Ed. *Duval.* This Paſſage is ill tranſlated in *Le Clerc's Bibl. Choiſ.* Tom. 1, p. 129.— but I did the Juſtice to charge the Fault on Mr. *Cudworth,* who cited not the Place where it was to be found; and beſides, has omitted a material Word of the Original. See *Bibl. Choiſ.* Tom. 9, p. 395.—

[i] Extract from Mr. *Cudworth,* in *Bibl. Choiſ.* Tom. 3, p. 73,— 74.—

[k] Τὸν δὲ Θεὸν ἀσώματον ἀπέφαινε, καθὰ ϗ ὁ Πλάτων. --- ϗ εἶναι ἀκίνητον αὐτόν. *Diog. Laert.* lib. 5, Sect. 32.— & Ed. *Colon.* p. 321.— Φανερὸν, ὅτι ἀδύνατον τὸ πρῶτον κινοῦν, ϗ ἀκίνητον ἔχειν τι μέγεθος. --- ἀδιαίρετόν ἐστι ϗ ἀμερές. *Ariſtot. Phyſ. Auſcult.* lib. 8, in fine, Tom. 1, p. 609, B.—

“ being * immoveable, all his Action is included “ within his own Eſſence, (or is the ſame with “ it.) -- So the Religion of *Ariſtotle*, may be re- “ duc'd to theſe two Heads: That there is a Deity, “ which includes all Nature; and that there are “ beſides inferiour Gods [l]. As for all the reſt, he “ look'd upon it as fabulous, and the additional “ Inventions of Men; fram'd and eſtabliſh'd up- “ on politick Views. --- He [m] introduces Na- “ ture, acting as an Inſtrument of the ſupreme “ Cauſe; not as a Machine ſet a-going by the “ neceſſary Effect of Mechaniſm; but as car- “ rying on certain [n] Ends, tho' to her un- “ known.” In his *Ethicks*, this Philoſopher explains well enough the Principles of humane Actions; treats too of the particular Virtues, in a Manner much more diſtinct, extenſive, and methodical; than his Maſter had done. But not enough to make us ſay, with one of his extravagant Admirers; that [o] it is *the moſt exact, regular, and compleat Syſtem of Morality in the World.* The Jeſuit too, whoſe Words theſe are, does himſelf confeſs elſewhere [p], that *there is ſomething of Order wanting in* Ariſtotle'*s Ethicks*; *as well as in his Logick.* The Reader will be able to form ſome Judgment thereupon, by the ſhort Analyſis, which I am now going to give him of that Treatiſe of *Morality*, which paſſes for *Ariſtotle*'s Maſterpiece; I mean that which he has entitled, by the Name of his Son, *Nicomachus*. After the Introduction, where our Philoſopher ſays, amongſt other Things; that [q] the Sovereign Good, which is the ultimate Scope of [r] Morality, and of all humane Actions; is no other than *Beatitude*, or *Felicity*: he ſhews, that this ſovereign Good does not conſiſt [s] either in *Pleaſures*, or *Honours*, or *Riches*, or even in *Virtue*; or in [t] *that Idea of Good*, of which his Maſter *Plato* ſpeaks; and which the Scholar ſeems not rightly to have underſtood. The *Beatitude* then in Queſtion, according to his Definition is [u]; *the Action of the rational Soul, perform'd according to the moſt excellent and moſt accompliſh'd Virtue, in a perfect Life*; that is to ſay, throughout the Courſe of a long Life: For, adds he, *as one Swallow, or one Day, makes no Summer*; *ſo neither will one Day, or a ſhort Space of Time ſuffice, to make a Man happy.* He then goes on to [x] explain this Definition in a very verboſe and confus'd Manner; and after ſome incident Queſtions, begins to [y] treat of *Virtue* in general; which he thus defines; * *A laudable Habit, which perfects both the Subject in which it reſides, and its proper Action, or Buſineſs.* He † divides it into *intellectual*, and *moral Virtue*: The *intellectual*, which reſides in the *Underſtanding*; and the *moral*, which has its Seat in the *rational Appetite*, or *Will.* The firſt [z] is acquir'd and corroborated chiefly by Study; ſo that it requires both Time and Experience: The other is produc'd by Cuſtom, or Practice; from whence it has its Name. Here, according to Order, our Author ſhould have enter'd upon his particular Account of *intellectual Virtue*; which, as *Ariſtotle* himſelf owns, is the [aa] principal Source of all *moral Virtue*: This Philoſopher however has thought fit to begin with the latter. After having prov'd, that it is [bb] neither a *Paſſion*, nor a *Faculty of the Soul*; he defines it to be: [cc] an *Habit of Acting with Choice*; *which conſiſts in a certain Mediocrity with regard to us, determin'd by Reaſon, according to the Judgment of a prudent Man.* So that, according to him, what conſtitutes the Eſſence of *moral Virtue*, is a *Medium equally diſtant from two oppoſite Vices*; *whereof the one errs through Exceſs*; *and the other through Deficiency. And this as well with Regard to the Actions*; *as Paſſions.* Let us ſtop a little at this Principle, which is the Baſis of *Ariſtotle*'s Syſtem, in his Explication of the Virtues. “ It is certain, “ there are ſome Virtues, whoſe Office it is “ to moderate the Paſſions: but this (as [dd] *Gro-* “ *tius* obſerves) ariſes not from any eſſential “ Property belonging to all Sorts of Virtues; “ but 'tis becauſe right Reaſon, whoſe Max- “ ims Virtue conſtantly purſues; teaches us, “ that there are ſome Things wherein a Me- “ diocrity ought to be obſerv'd; whilſt in o- “ thers, it encourages us to puſh forward to “ the utmoſt of our Ability. We cannot wor- “ ſhip God too much; for Superſtition con- “ ſiſts not in exceeding the juſt Bounds of di- “ vine Worſhip; but in the perverſe Man- “ ner of Worſhipping. A Man cannot have “ too earneſt a Deſire for eternal Happineſs; “ nor too great an Apprehenſion of eternal “ Miſery; or exceed to a Fault in his Averſion “ to

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[*] See *Cudworth* himſelf. *Intel. Syſt.* p. 417.—

[l] See his *Metaphyſicks*, Lib. 14, cap. 6, 7, 8.— See particularly Tom. 4, p. 483, B.—

[k] *Bibl. Choiſie*, Tom. 1, p. 132.—

[m] Ἄτοπον δὲ τὸ μὴ οἴεσθαι ἕνεκα τοῦ γίνεσθαι, ἐὰν μὴ ἴδωσι τὸ κινοῦν βουλευσάμενον ---- [n] Ὅτι μὲν οὖν αἰτία ἡ φύσις, καὶ οὕτως ὡς ἕνεκα τοῦ, φάνερον. *Phyſ. Auſcult.* Lib. 2, c. 8, in fine. Tom. 1, p. 477, C.—

[o] *Rapin*, Tom. 2, p. 390.

[p] Tom. 1, p. 361.

[q] Lib. 1. cap. 2,— Tom. 3, p. 3, E.—

[r] Πολιτική. For as he always has in View Man, as a Member of Civil Society; ſo he underſtands by *Politicks*, Morality in general, of which *Politicks*, properly ſo call'd, is but one Part.

[s] Ibid. Cap. 3,— *per totum.*

[t] Cap. 4, *totum.*

[u] Τὸ ἀνθρώπινον ἀγαθὸν, ψυχῆς (λογικῆς) ἐνέργεια γίνεται, κατ᾽ ἀρετήν· εἰ δὲ πλείους αἱ ἀρεταὶ, κατὰ τὴν ἀρίστην καὶ τελειοτάτην· ἔτι δὲ ἐν βίῳ τελείῳ. μία γὰρ χελιδὼν ἔαρ οὐ ποιεῖ, οὐδὲ μία ἡμέρα· οὕτω δὲ οὐδὲ μακάριον καὶ εὐδαίμονα μία ἡμέρα, οὐδὲ ὀλίγος χρόνος. c. 6,— Tom. 3, p. 10, B,— Ed. *Paris.*

[x] Cap. 7,— *& ſeq.*

[y] Cap. 13, *per tot. & ſeq.*

[*] Τῶν ἕξεων δὲ τὰς ἐπαινετὰς, ἀρετὰς λέγομεν. ibid. in fine, p. 20, D.— Πᾶσα ἀρετὴ, οὗ ἂν ᾖ ἀρετὴ, αὐτό τε εὖ ἔχον ἀποτελεῖ, καὶ τὸ ἔργον αὐτοῦ εὖ ἀποδίδωσιν, Lib. 2, c. 5,— init. p. 27, A.—

[†] Λέγομεν γὰρ αὐτῶν, τὰς μὲν διανοητικὰς, τὰς δὲ ἠθικάς. Lib. 1, c. 13, in fine. p. 20, C.—

[z] Ἡ μὲν διανοητικὴ, τὸ πλεῖστον ἐκ διδασκαλίας ἔχει καὶ τὴν γένεσιν καὶ τὴν αὔξησιν· διόπερ ἐμπειρίας δεῖται καὶ χρόνου· ἡ δ᾽ ἠθικὴ, ἐξ ἔθους περιγίνεται· ὅθεν καὶ τοὔνομα ἔσχηκε, μικρὸν παρεκκλῖνον ἀπὸ τοῦ ἔθους. Lib. 2, c. 1,— init. p. 20, E,— 21.—

[aa] Προαιρέσεως δὲ (ἀρχὴ,) ὄρεξις καὶ λόγος ὁ ἕνεκά τινος· διὸ --- ἄνευ νοῦ καὶ διανοίας, --- οὐκ ἔστιν ἡ προαίρεσις, Lib. 6, c. 2,— p. 98, A.—

[bb] Lib. 2, Cap. 4, *per tot.*

[cc] Ἔστιν ἄρα ἡ ἀρετὴ (ἠθικὴ) ἕξις προαιρετικὴ, ἐν μεσότητι οὖσα τῇ πρὸς ἡμᾶς, ὡρισμένη λόγῳ, καὶ ὡς ἂν ὁ φρόνιμος ὁρίσειε. Μεσότης δὲ δύο κακιῶν· τῆς μὲν, καθ᾽ ὑπερβολήν· τῆς δὲ, καθ᾽ ἔλλειψιν ---- ἔν τε τοῖς πάθεσι, καὶ ἐν ταῖς πράξεσι. ibid. c. 6,— p. 28, C,— D.—

[dd] *De Jure Belli ac Pacis Prolegom.* Sect. 45.—

“ to Sin [ee]. --- One cannot, ſays a more modern Author [ff], love his Country too well; tho', to ſave that, he loſeth his Life. A Man may be reſolvedly patient unto Death; ſo that it is not the Mediocrity of Reſolution, which makes the Virtue; nor the Extremity which makes the Vice; but the one being with, the other without, Reaſon. Saving a Man's ſelf, or ſuffering, if with Reaſon, is Virtue: If without it, is either Softneſs; or Obſtinacy. 'Tis true, Virtue ſtands, for the moſt Part, between two Vices; yet is it hereby no more defin'd, than an honeſt Man, by living between two Thieves. Therefore the Nature of Virtue is better expreſs'd by *Proportion*; as it alſo is, elſewhere, by *Ariſtotle* himſelf. For they are both of them founded in Truth. And as in *Proportion*, there is the Equality of a double *Ratio*; ſo alſo in Virtue, *viz.* between the Acts, and the Objects of the Mind. For as Perception is to the End; ſo is Reſolution to the Means. This Proportion is ſeen, even in *penal Juſtice*; whoſe Acts ought to be proportion'd to the Crimes puniſh'd. --- [gg] We need only, (as *Grotius* again obſerves, whoſe Diſcourſe I have a little interrupted,) we need only conſider what *Ariſtotle* ſays, with reſpect to *Juſtice*; and the Falſity of his Principle of *Mediocrity*, ſo univerſally taken, will be apparent. For not being able to find, in the Paſſions, and their ſubſequent Actions, a Pair of Vices in the two oppoſite Extremes of Exceſs and Deficiency; he was forc'd to ſeek for both in the very Things themſelves; about which Juſtice is converſant. Which is *ſhifting the Genus*; a Fallacy which *Ariſtotle* juſtly cenſures in others. Beſides, tho' in ſome Circumſtances, where a Man, either with regard to himſelf, or thoſe who depend upon him, is oblig'd to make the moſt of what belongs to him; it may indeed be a Fault to take leſs than his Due: Yet there can be nothing in it contrary to Juſtice, properly ſo call'd; for that conſiſts only in the not invading the Property of another. Much ſuch another Miſtake as this, is his denying, that Adultery and Murder, when the mere Effects of Luſt and Anger; are, properly ſpeaking, Acts of Injuſtice. And yet nothing is more certain, than that the very Eſſence of Injuſtice conſiſts in violating the Rights of another. Nor is it of any Moment upon what Motive this is done; whether out of Avarice, Senſuality, ſudden Paſſion, miſtaken Pity, or Ambition; the uſual Sources of all Manner of Injuſtice. Nay, 'tis the proper Buſineſs of Juſtice, to arm itſelf againſt all the Charms, and Efforts of the Paſſions; in order to prevent thoſe Breaches they would otherwiſe make in the Laws, which are to ſupport human Society. --- And again, 'tis [hh] in Conſequence of this falſe Principle, that he found himſelf oblig'd to make *Liberality* and *Frugality* to be but one ſingle Virtue; whereas they are in Fact two different Virtues: that he oppoſes two Extremes to *Truth*, which are not equally contrary to it; that is to ſay, *Boaſting*, and *falſe Modeſty*: and at length is reduc'd to the Neceſſity of impoſing the Name of Vice upon Things, which either have no Exiſtence at all; or have nothing in 'em, that is any way vicious; ſuch as the Contempt of Pleaſure and Preferment; and Inſenſibility of the Paſſion of Anger.” Let us now return to the Analyſis, we have undertaken, of his Syſtem of Morality.

In explaining the diſtinguiſhing Character of the *Habit*, or Diſpoſition, belonging to moral Virtue; I mean the Property of *acting* with Choice and Deliberation; *Ariſtotle* [ii] takes Occaſion to treat of *voluntary* and *involuntary Acts* in general; and what he ſays on that Head, is for the moſt Part well enough digeſted. He after that enters upon a particular Account of the *moral Virtues*; and begins with *Fortitude*, which he defines to be: [kk] *a Mediocrity between Fear and Boldneſs*, but chiefly in regard to the firſt of theſe two Extremes: So that, according to him, *a Man of Courage*, is properly one, *who is not afraid to expoſe himſelf to an honourable Death; or to any of the Dangers that lead to it.* He had before, in the [ll] general Enumeration of all theſe Virtues he ſpecifies in, oppos'd to this Virtue, on the one hand, *Stupidity*; *or the Security of thoſe, who are apprehenſive of nothing*; a Diſpoſition, ſays he, which has no proper Appellation; and Audacity or Foolhardineſs: And, on the other hand, *Timerouſneſs* or *Cowardice*. Here he warns [mm], againſt the confounding true *Fortitude*, not only with the ſenſeleſs Fury of thoſe, who kill themſelves to be deliver'd from Poverty, or ſome Miſery, which they are not able to bear; and which rather deſerves the Name of Weakneſs and ſhameful Cowardice; but alſo with five other Things, which ſeem to have ſome Reſemblance with this Virtue. Such is, Firſt, *Civil Valour*, or that of Subjects; who expoſe themſelves to Danger in View of the Honours and Rewards promis'd by the Laws: or to avoid the Penalties they threaten. Secondly, *The forc'd Bravery of Soldiers*, and all ſuch as are compelled to meet Blows and Dangers, at the Command of ſuperiour Officers; who threaten to puniſh them if they diſobey their Orders. Thirdly, *The Heat of Anger* [nn]; which, by a ſudden Motion and Impulſe, common both to Man and Beaſt, puſhes on the offended Perſon to make an Aſſault upon thoſe, from whom he has receiv'd Blows, or any other Injury. Fourthly, the Preſumption of *thoſe, who confide in their own Strength*; which they have often made Proof of with Succeſs. Fifthly, The Security of thoſe, who *fear nothing, becauſe they know no Danger.*

[ee] See *Aul. Gell.* Lib. 4, cap. 9, at the End. And *Lactant. Inſt. divin.* Lib. 6, Cap. 16, Num. 7, Ed. *Cellar.*

[ff] *Grew, Coſmolog. Sacr.* Lib. 2, c. 7, Sect. 21, 22, 23, p. 73. See Mr. *Le Clerc's Bibl. Choiſ.* Tom. 3, p. 326,— 327.

[gg] *Grotius ubi ſupra*, Sect. 44. *Gronovius* has in his Notes undertaken to refute this Criticiſm of his Author, upon the Notions of *Ariſtotle*. But if we examine well what he ſays, we ſhall only find, that he is one of thoſe, who are reſolv'd, coſt what it will, to defend every Thing the Antients ſay; and ſuppoſing him in the right in ſome Things, yet *Ariſtotle* has at leaſt given juſt Cauſe for this Criticiſm, by needleſly expreſſing himſelf in a Manner ſo obſcure and confus'd.

[hh] Ibid. Sect. 43.—

[ii] Lib. 3. cap. 1, *& ſeq.*

[kk] Ἡ Ἀνδρία μεσότης ἐστὶ περὶ φόβους ϗ θάῤῥη. (c. 9.—) ἀλλὰ μᾶλλον περὶ τὰ φοβερά. ibid. c. 12,— init. Κυρίως δὲ λέγοιτ' ἂν ἀνδρεῖος, ὁ περὶ τὸν καλὸν θάνατον ἀδεὴς, ϗ ὅσα θάνατον ἐπιφέρει ὑπόγυια ὄντα. c. 9, p. 45, E,—

[ll] Τῶν δὲ ὑπερβαλλόντων, ὁ μὲν τῇ ἀφοβίᾳ, ἀνώνυμος --- ὁ δ' ἐν τῷ θαῤῥεῖν ὑπερβάλλων, θρασύς· ὁ δὲ τῷ μὲν φοβεῖσθαι ὑπερβάλλων, τῷ δὲ θαῤῥεῖν ἐλλείπων, δειλός. Lib. 2, c. 7,— p. 29, C.—

[mm] Lib. 3, cap. 11,— p. 47, C,— & d.

Temperance is, according to *Ariſtotle* [oo]; a *Mediocrity in reſpect of the ſenſual Pleaſures of Taſte and Feeling*; *and in ſome meaſure, in reſpect of Grief too:* in as much as the temperate Man grieves not to ſee himſelf depriv'd of Pleaſures; whereas it cauſes great Trouble and Vexation to the Intemperate. He owns that an *utter Inſenſibility as to Pleaſure*, which he makes one of the oppoſite Extremes of Temperance; is a [pp] *Thing ſcarce ever known in fact*; *as being contrary to the very Frame, and Conſtitution of humane Nature.* There are two Virtues which concern the Uſe of worldly Goods or Riches; that is to ſay, [qq] of Money; and whatever elſe is capable of being priz'd by Money. The firſt, which he calls *Liberality*, has for its Object moderate Wealth; and it *conſiſts in preſerving a juſt Medium* [rr], *as to giving or receiving*; *but more eſpecially as to giving.* The Vices oppoſite to it, are [ss] *Avarice*, and *Prodigality*. The other Virtue, which he calls *Magnificence*, regulates the Uſe of great Riches; but it conſiſts only [tt] in giving, or expending. Its vicious Extremes, are, on the one hand, a *ſordid Parſimony*; and on the other, a *ridiculous and miſtaken Profuſeneſs.*

Ariſtotle then particularizes a Couple of Virtues, which concern the juſt Medium to be obſerv'd, with relation to Honours; the one is [uu] *Magnanimity*, or *Greatneſs of Soul*; *which conſiſts in believing ourſelves worthy of great Honours; and in purſuing 'em, when we really deſerve 'em.* He oppoſes to this Virtue, on the one hand, an *unbounded Ambition*, or Vaingloriouſneſs; which makes us believe ourſelves worthy of, and aſpire to, great Honours, although we do not in any wiſe deſerve them: On the other hand, a *Meanneſs of Soul*, that hinders us from knowing our own Merit; and makes us deprive ourſelves, either wholly, or in Part, of thoſe Honours, whether great or ſmall, of which we are worthy. Thus this Philoſopher makes that Diſpoſition of Mind a Vice, which is, if not the ſame with Chriſtian Humility; at leaſt a Thing in itſelf very innocent. He goes ſtill farther; and maintains, that this [xx] Indifference for Honours, which he imagines to be more common, than exceſſive Ambition; is alſo worſe, and more oppoſite to *Magnanimity*. The other [yy] Virtue, which has for its Object ſmall Preferments or Honours; has [*] no fix'd Appellation.

He afterwards treats of the Virtue, that preſerves a juſt Medium, with reſpect to *Anger*; *viz.* [zz] *Manſuetude* or *Mildneſs*; which conſiſts *in being never angry, but where there is ſufficient Cauſe; and with ſuch only as deſerve it; and in a Degree too proportionable to the Nature of the Fact; on proper Occaſions only; and no longer than is reaſonable.* The vicious Extremes are, on the one hand, *unreaſonable Tranſport of Paſſion*; on the other, *an Indolence, that takes every Thing without the leaſt Reſentment.* So that, according to our Philoſopher [aaa], the Contempt of Injuries is a Vice; and Revenge a Virtue: The firſt, the Property of a ſervile Spirit; the other, that of a noble and generous Soul. There are three Virtues, which take Place in Converſation, or in the common Buſineſs of Life. The firſt, which may be call'd *Affability*, or a *reaſonable Complaiſance*

[nn] Καὶ τὸν θυμὸν δὲ ἐπὶ τὴν ἀνδρίαν ἐπιφέρουσιν --- ὅτι ϗ οἱ ἀνδρεῖοι, θυμοειδεῖς. ibid. p. 48, E.— I find by the Extract in the *Bibl. Choiſ.* Tom. 3. p. 334,— that Mr. *Grew*, reading *Ariſtotle* too haſtily, charges him with a Contradiction; from which 'tis no difficult Matter to clear the Philoſopher. I doubt not but he had in View this Chapter, tho' he cites the Tenth, where is nothing to his Purpoſe, either in mine, or any of the former Editions. It appears by the Extract here given, that *Ariſtotle* is far from pretending, that Courage belongs to the Faculties, deſtitute of Reaſon. Neither is the other Paſſage more exactly cited: For *Ariſtotle* does not ſpeak of Courage in particular, but of Virtue in general: Ἡ δὲ ἀρετὴ πάσης τέχνης ἀκριβεστέρα ϗ ἀμείνων ἐστί. Lib. 2, c. 5, p. 27, E— Virtue is more exact, and more excellent than all Sorts of Arts.

[oo] Μεσότης ἐστὶ περὶ ἡδονὰς ἡ Σωφροσύνη. --- περὶ τὰς τοιαύτας --- ὧν ϗ τὰ λοιπὰ ζῶα κοινωνεῖ --- αὗται δ' εἰσὶν ἁφὴ ϗ γεῦσις. --- ἧττον γὰρ ϗ οὐχ ὁμοίως ἐστὶ περὶ τὰς λύπας --- ἀλλ' ὁ μὲν ἀκόλαστος, τῷ λυπεῖσθαι μᾶλλον ἢ δεῖ, ὅτι τῶν ἡδέων οὐ τυγχάνει --- ὁ δὲ σώφρων, τῷ μὴ λυπεῖσθαι τῇ ἀπουσίᾳ, ϗ τῷ ἀπέχεσθαι τοῦ ἡδέος. Lib. 3, c. 13,— p. 51, B,— 52, A,— B,— 53, A,— B.—

[pp] Ἐλλείποντες δὲ περὶ τὰς ἡδονὰς, ϗ ἧττον ἢ δεῖ χαίροντες, οὐ πάνυ γίνονται· οὐ γὰρ ἀνθρωπική ἐστιν ἡ τοιαύτη ἀναισθησία. Ibid. c. 14,— p. 53, C.—

[qq] Χρήματα δὲ λέγομεν πάντα ὅσων ἡ ἀξία νομίσματι μετρεῖται. Lib. 4, c. 1, p. 55, C.—

[rr] Ἐλευθεριότης δοκεῖ εἶναι περὶ χρήματα μεσότης. Ἐπαινεῖται γὰρ ὁ ἐλευθέριος --- περὶ δόσιν χρημάτων ϗ λῆψιν· μᾶλλον δ' ἐν τῇ δόσει. Ibid. init. p. 55, B.—

[ss] Ἀνελευθερία· Ἀσωτία. c. 3.— Ibid. p. 58, A.—

[tt] Ἡ Μεγαλοπρέπεια, οὐχ ὥσπερ δ' ἐλευθεριότης, διατείνει περὶ πάσας τὰς ἐν χρήμασι πράξεις, ἀλλὰ περὶ τὰς δαπανηρὰς μόνον. ἐν τούτοις δ' ὑπερέχει τῆς ἐλευθεριότητος μεγέθει --- τῆς τοιαύτης δ' ἕξεως, ἡ μὲν ἔλλειψις, Μικροπρέπεια καλεῖται· ἡ δ' ὑπερβολὴ, Βαναυσία ϗ ἀπειροκαλία. Ibid. c. 4,— p. 60. A,— B,— C.—

[uu] Ἡ δὲ Μεγαλοψυχία περὶ μεγάλα μὲν ϗ ἐκ τοῦ ὀνόματος ἔοικεν εἶναι --- δοκεῖ δὲ ὁ μεγαλόψυχος εἶναι ὁ μεγάλων αὑτὸν ἀξιῶν, ἄξιος ὤν. ὁ γὰρ μὴ κατ' ἀξίαν αὐτὸ ποιῶν, ἠλίθιος --- χαῦνος· ὁ δ' ἐλαττόνων, ἢ ἄξιος, μικρόψυχος, ἐάν τε μεγάλων, ἐάν τε μετρίων, ἐάν τε ϗ μικρῶν ἄξιος ὤν, ἔτι ἐλαττόνων ἑαυτὸν ἀξιοῖ, ϗ μάλιστα ἂν δόξειεν ὁ μεγάλων ἄξιος. Ibid. c. 7,— p. 62, E,— 63, A,— B.—

[xx] Ἀντιτίθεται δὲ τῇ μεγαλοψυχίᾳ ἡ μικροψυχία μᾶλλον τῆς χαυνότητος. ϗ γὰρ γίγνεται μᾶλλον, ϗ χεῖρόν ἐστι. Ibid. c. 9,— in fine. p. 67, A.—

[yy] Ibid. cap. 10. *per tot.*

[*] Ibid. See the *Greek* Summary of cap. 9, and p. 67, D,— E.—

[zz] Πραότης δ' ἐστὶ μὲν μεσότης περὶ ὀργάς --- ὁ μὲν οὖν ἐφ' οἷς δεῖ, ϗ οἷς δεῖ, ὀργιζόμενος, ἔτι δὲ ϗ ὡς δεῖ, ϗ ὅτε, ϗ ὅσον χρόνον, ἐπαινεῖται --- ἡ δ' ὑπερβολὴ, ὀργιλότης τις λέγοιτ' ἄν --- ἡ δ' ἔλλειψις, εἴτ' ἀοργησία τίς ἐστιν, εἴθ' ὅ, τι δή ποτε, ψέγεται. Ibid. c. 11,— p. 68, A,— B,— C.—

[aaa] Οἱ γὰρ μὴ ὀργιζόμενοι ἐφ' οἷς δεῖ, ἠλίθιοι δοκοῦσιν εἶναι, ϗ οἱ μὴ ὡς δεῖ, μηδ' ὅτε, μηδ' οἷς δεῖ. δοκεῖ γὰρ οὐκ αἰσθάνεσθαι, οὐδὲ λυπεῖσθαι, μὴ ὀργιζόμενός τε, οὐκ εἶναι ἀμυντικός. Τὸ δὲ, προπηλακιζόμενον ἀνέχεσθαι, ϗ τοὺς οἰκείους περιορᾷν, ἀνδραποδῶδες. Ibid. p. 68, C.—

plaiſance[bbb]; keeps the Mean between *Flattery*, which officiouſly ſeeks to pleaſe every Body, in all Things, and without Reſerve; and the *Roughneſs*, or ill Nature of thoſe, who are always carping at, and deſpiſing others; and who care not whom they ſhock or offend. The Second, is[ccc] *Candour* or *Sincerity*, in Things indifferent; that is to ſay, ſuch, where an undiſguis'd Openneſs is not enjoin'd by the Laws of Fidelity or Juſtice. *Ariſtotle* oppoſes to this Virtue, on the one hand, *ſenſeleſs, and ill-grounded Boaſting*; and on the other, *falſe Modeſty*; by which we pretend an Unwillingneſs to own, or do endeavour to extenuate thoſe good Qualities, which we are really poſſeſs'd of. The third, and laſt of theſe Virtues; is an[ddd] *an eaſy and agreeable Humour in Company, and Meetings for Mirth and Diverſion.* To which are oppos'd, the *Buffoonry* of falſe Wits; and the *ſower Humour* of ſuch, as are ſcandaliz'd at the moſt harmleſs Pleaſantry; and take pet at the moſt inoffenſive Raillery. As for Juſtice, which is the Subject Matter of one intire Book of *Ariſtotle*'s Morals; Mr. *Puſendorf* having given us[eee] a Summary of our Philoſopher's Notions thereupon; I ſhall forbear ſaying any Thing here upon that Head. But I muſt not forget to obſerve, that he diſtinguiſhes Law, (the exact Obſervation whereof, is what conſtitutes *Juſtice*; as the Violation of it, on the contrary, does *Injuſtice*;) into *Law properly and ſimply ſo call'd; and Law that is only ſuch by Analogy*, or Parity of Reaſon[fff]: The firſt, which he calls *Civil Law*; is that which takes place amongſt a Number of free Perſons, who are Members of one and the ſame Community; in which they live upon a Foot of Equality, either abſolutely ſo call'd; or ſuch, according to a juſt Rule of Proportion. The other, which he calls the *OEconomical* or Domeſtick Law; is the Power a Maſter of a Family has over his Children, or his Slaves; and in ſome Meaſure over his Wife: For, ſays *Ariſtotle*, this Law is not the ſame with the *Civil Law*; becauſe the Maſter of a Family cannot[ggg] do any *Injuſtice*, properly ſo call'd; to thoſe who have their whole Dependance on him. Our Philoſopher divides his *Civil Law*, into *the Law of Nature*; *and poſitive Law*[hhh]. *The Natural Law*, is that, *which is every where equally in Force; and depends not on the particular Conſtitutions of each State. The Poſitive*, is that, *which extends only to Things indifferent; and ſuch as each Perſon might, before any Eſtabliſhment concerning them, have regulated as he himſelf ſhould think fit; but which, after ſuch Eſtabliſhment, do no longer remain indifferent. Ariſtotle* hereupon ſtarts the Objection, uſually made by thoſe, who inſiſt, that there is no ſuch Thing as a real Law of Nature; becauſe, ſay they, if there was, it would be immutable; as we ſee Fire has in all Countries the ſame natural Quality of burning. To which our Philoſopher makes this Anſwer[iii]; that perhaps amongſt the *Gods* the Law of Nature may be abſolutely invariable: But that it is otherwiſe among Men; in reference to whom, as there are ſome Things in the Law of Nature, which do not; ſo there are others, which do admit of ſome Alteration. In order to diſtinguiſh the laſt Sort from Laws purely poſitive; *Ariſtotle*, by way of Illuſtration, produces the following Inſtances. 'Tis naturally, ſays he, that we uſe the Right Hand better than the Left. But for Laws founded upon Compact, and the Good of particular Communities; 'tis with them, juſt as 'tis with the Meaſures for Corn and Wine; which are found to be larger or ſmaller, according to the different Places, and Intereſts of thoſe, who trade in ſuch Commodities. Thus the Forms of Government, in different Countries, differ from each other; though at the ſame Time there is but one of 'em, which is conformable to Nature; and that is, the Form, which beſt ſerves to promote the Good of every Civil Community. In ſhort, this Chapter alone is ſufficient, to ſhew, that *Ariſtotle*'s Morality runs wholly upon the Duties of a Subject; and that it does not take in the Duties of Man in general, conſider'd as ſuch. Nor is there one ſingle Word to be found concerning the Law of Nature, as it takes place among the Subjects of different States; or ſuch as are not Members of any Civil Community: And, by his Silence at leaſt, this Philoſopher ſeems to favour that inhumane Opinion of the *Greeks*, with reſpect to thoſe, they were pleas'd to call *Barbarians*. But he ſeems plainly enough to declare [*], in his *Politicks*; all thoſe Nations, that have not enter'd into Treaties of Alliance, to be in a State of War with one another. And if we may take *Plutarch*'s Word [†] for it, he adviſed *Alexander* to behave himſelf as a legal Prince towards the *Greeks*; and as a deſpotick Maſter towards the *Barbarians*; to regard the former, as his Friends, and Domeſticks; but *to treat the latter as ſo many Beaſts or Vegetables.* *Ariſtotle* after this paſſes on to *intellectual Virtue*, whoſe Function has for its Object [kkk] *Truth:* he divides it into five Kinds; to wit, *Science*, *Art*, *Prudence*, *Intelligence*, and *Wiſdom.* By *Science*, he underſtands [lll] *demonſtrative Knowledge*; that is to ſay, a diſtinct Perception of neceſſary Conſequences, flowing from Principles certainly *true*; *or from Truths eternally ſuch.* *Art*, [mmm] is an habitual Knowledge of the Rules, which right Reaſon preſcribes, for the performing of any Operation; or for the accompliſhing any Work, which the Agent was at Liberty to do, or leave undone. *Prudence*, is the Habit of diſcerning [nnn] what is, or is not conducive towards the governing ourſelves according to right Reaſon, in all the Affairs of Life. *Intelligence* [ooo], is the Knowledge of thoſe firſt Principles, which want not Demonſtration; becauſe they are ſelf-evident. *Wiſdom* [ppp], which is compounded of *Intelligence, and Science*; conſiſts in the Knowledge of the Principles and Demonſtrations of thoſe Things, which are moſt excellent. I might here make ſeveral Obſervations on theſe Diviſions; and the Method, in which *Ariſtotle* explains thoſe Virtues, which he treats of under diſtinct Heads. But this will require a larger Diſcourſe; they who will give themſelves the Trouble to examine into the Matter, will eaſily diſcover the Defects of this Work. The Author proceeds to treat, [qqq] in a more particular Manner, of the Characteriſticks, and ſeveral Functions of *Prudence.* After which he ſpeaks of thoſe moral Habits, which are imperfect; that is, of Diſpoſitions [rrr] towards Virtue, or Vice: and to theſe he refers, on the one hand [sss], *Continency and Patience*; on the other, *Incontinency*, and [ttt] *Impatience.* On this Occaſion he enters upon the Subject of [uuu] *Pleaſure*, and *Pain*; which are the two grand Springs of the whole Movement of the Soul. From thence he paſſes on to *Friendſhip* [www]; which is, ſays he, *either a Virtue* [yyy], *or a Concomitant of Virtue*; and is beſides, *a very neceſſary Ingredient to the Happineſs of Life.* He defines it [zzz], *a mutual Benevolence, whereby Perſons deſire the Proſperity and Happineſs of each other*; *and on all Occaſions give reciprocal Demonſtrations thereof.* It is founded, continues he, either [1] upon *Profit*, or *Pleaſure*, or *Virtue:* but 'tis the laſt only that forms ſolid and perfect Friendſhip, which is only to be met with among good and virtuous Men; while Intereſt and Pleaſure can at beſt but produce ſome ſlight Sort of Union amongſt the Bad and Vicious. *Ariſtotle* [2] divides *Friendſhip*, as to its Subjects, into that which is *between Equals*, and that *which ſubſiſts between thoſe, whoſe Condition is unequal*; or, where there is ſome ſort of Superiority in the one over the other; as, between a *Father*, and a *Son*; the *Aged*, and the *Young*; a *Man and his Wife*; a *Sovereign*, and his *Subjects*, &c. He then proceeds to the Reſolution of divers Queſtions relating to *Friendſhip*; and preſcribes Rules for the better Cultivation and Improvement of it.

[bbb] Ἐν δὲ ταῖς ὁμιλίαις, ϗ τὸ συζῆν, ϗ λόγων ϗ πραγμάτων κοινωνεῖν, οἱ μὲν, ἄρεσκοι δοκοῦσιν εἶναι, οἱ πάντα πρὸς ἡδονὴν ἐπαινοῦντες, ϗ οὐθὲν ἀντιτείνοντες, ἀλλὰ δὴ οἰόμενοι δεῖν ἄλυποι τοῖς ἐντυγχάνουσιν εἶναι. οἱ δὲ ἐξεναντίας τούτοις, πρὸς πάντα ἀντιλυποῦντες ϗ τοῦ λυπεῖν οὐδ' ὁτιοῦν φροντίζοντες, Δύσκολοι ϗ δυσέριδες καλοῦνται --- ἡ μέση τούτων [ἕξις] ἐπαινετὴ, καθ' ἣν ἀποδέξεται ἃ δεῖ, ϗ ὡς δεῖ --- ὄνομα δὲ οὐκ ἀποδέδοται αὐτῇ τι' ἔοικε δὲ μάλιςα φιλίᾳ. Ibid. c. 12,— p. 69, E,— 70, A.—

[ccc] Δοκεῖ δὲ ὁ μὲν ἀλαζὼν, προσποιητικὸς τῶν ἐνδόξων εἶναι, ϗ μὴ ὑπαρχόντων, ϗ μειζόνων ἢ ὑπάρχει· ὁ δὲ Εἴρων ἀνάπαλιν, ἀρνεῖσθαι τὰ ὑπάρχοντα, ἢ ἐλάττω ποιεῖν· ὁ δὲ μέσος αὐθέκαςός τις ὢν, ἀληθευτικὸς ϗ τῷ βίῳ ϗ τῷ λόγῳ --- οὐ γὰρ περὶ τοῦ ἐν ταῖς ὁμολογίαις ἀληθεύοντος λέγομεν· οὐδ' ὅσα εἰς ἀδικίαν ἢ δικαιοσύνην συντείνει. ἄλλης γὰρ ἂν εἴη ταυτ' ἀρετῆς· ἀλλ' ὃς ἂν μηδενὸς τοιούτου διαφέροντος, ϗ ἐν λόγῳ ϗ ἐν βίῳ ἀληθεύῃ, τῷ τὴν ἕξιν τοιοῦτος εἶναι. Ibid. c. 13,— p. 71, B,— D.—

[ddd] Οἱ μὲν οὖν τῷ γελοίῳ ὑπερβάλλοντες, Βωμολόχοι δοκοῦσιν εἶναι ϗ φορτικοὶ --- οἱ δὲ μήτ' αὐτοὶ ἂν εἰπόντες μηθὲν γελοῖον, τοῖς τε λέγουσι δυσχεραίνοντες, Ἄγριοι ϗ σκληροὶ δοκοῦσιν εἶναι· οἱ δὲ ἐμμελῶς παίζοντες, Εὐτράπελοι προσαγορεύονται, --- ὡς χαρίεντες. Ibid. c. 14,— p. 73, A,— B.—

[eee] See *Puſendorf de Jure Naturæ & Gentium*, Lib. 1, c. 7, Sect. 12.—

[fff] Τὸ ζητούμενόν ἐςι ϗ τὸ ἁπλῶς δίκαιον, ϗ τὸ πολιτικὸν δίκαιον. τοῦτο δέ ἐςιν ἐπὶ κοινωνῶν βίου πρὸς τὸ εἶναι αὐτάρκειαν, ἐλευθέρων ϗ ἴσων, ἢ κατ' ἀναλογίαν ἢ κατ' ἀριθμόν --- τὸ Δεσποτικὸν δίκαιον ϗ τὸ πατρικὸν, οὐ ταὐτὸ τούτοις, ἀλλ' ὅμοιον. Lib. 5, c. 10,— p. 87, A,— D.—

[ggg] Οὐ γάρ ἐςιν ἀδικία πρὸς τὰ αὑτοῦ ἁπλῶς --- διὸ μᾶλλον πρὸς γυναῖκά ἐςι δίκαιον, ἢ πρὸς τέκνα ϗ κτήματα· τοῦτο γάρ ἐςι τὸ οἰκονομικὸν Δίκαιον. Ibid. p. 87, D,— E.—

[hhh] Τοῦ δὲ πολιτικοῦ δικαίου, τὸ μὲν φυσικόν ἐςι· τὸ δὲ, νομικόν. φυσικὸν μὲν, τὸ πανταχοῦ τὴν αὐτὴν ἔχον δύναμιν, ϗ οὐ τὸ δοκεῖν ἢ μή· νομικὸν δὲ, ὃ ἐξ ἀρχῆς μὲν οὐθὲν διαφέρει οὕτως ἢ ἄλλως· ὅταν δὲ θῶνται, διαφέρει. Ibid. E.—

[iii] Τοῦτο δ' οὐκ ἔςιν οὕτως ἔχον, ἀλλ' ἔςιν ὡς. καί τοι παρά γε τοῖς Θεοῖς ἴσως οὐδαμῶς ἄλλως ἔχον. παρ' ἡμῖν δ', ἐςὶ μὲν τι ϗ φύσει κινητόν. οὐ μέν τοι πᾶν --- φύσει γὰρ ἡ δεξιὰ κρείττων· καί τοι ἐνδέχεται τινας ἀμφιδεξίους γενέσθαι. Τὰ δὲ κατὰ συνθήκην, ϗ τὸ συμφέρον, τῶν δικαίων, ὅμοιά ἐςι τοῖς μέτροις· οὐ γὰρ πανταχοῦ ἴσα τὰ οἰνηρὰ ϗ σιτηρὰ μέτρα --- ἐπεὶ οὐδὲ πολιτεία· ἀλλὰ μία μόνον πανταχοῦ κατὰ φύσιν, ἡ ἀρίςη. Ibid. p. 88, A,— B.—

In the tenth and laſt Book, he returns [3] to his Subject of *Pleaſure* and *Pain*; which he handles a little more at large, than he had done before. He concludes with that of *Beatitude*; which he divides into *Contemplative*, [4] and *Practical.* The latter, which he makes to conſiſt in the Exerciſe of thoſe *moral Virtues*, he had been treating of; is, in his Opinion, leſs excellent than the other: which he grounds, amongſt other Reaſons, upon this; that [5] Contemplation, as it is accompanied with a purer, and more ſolid Pleaſure; ſo has it but little Need of the borrow'd Aid of external Things; which are much more requiſite for the obtaining the other ſort of Beatitude: and for that the Practice of *moral Virtues* [6], does not at all comport with the Condition of the Gods; who yet enjoy perfect Felicity.

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[*] Διὸ καὶ ἡ Πολεμικὴ φύσει κτητική πως ἔσται· ἡ γὰρ θηρευτικὴ, μέρος αὐτῆς· ᾗ δεῖ χρῆσθαι πρός τε τὰ θηρία, καὶ τῶν ἀνθρώπων ὅσοι πεφυκότες ἄρχεσθαι, μὴ θέλουσιν. ὡς φύσει δίκαιον τοῦτον ὄντα τὸν πόλεμον. Lib. 1, c. 8,— p. 405, C.— See Mr. *Noodt*, *de Uſuris & Foenore*, lib. 1, c. 10, p. 66.

[†] Οὐ γὰρ (Ἀλέξανδρος,) ὡς Ἀριστοτέλης συνεβούλευεν αὐτῷ, τοῖς μὲν Ἕλλησιν ἡγεμονικῶς, τοῖς δὲ Βαρβάροις δεσποτικῶς χρώμενον (παρέσχε·) καὶ τῶν μὲν, ὡς φίλων καὶ οἰκείων ἐπιμελούμενον, τοῖς δὲ, ὡς ζώοις ἢ φυτοῖς προσφερόμενον, &c. *De Fortun. vel virtute Alexand.* p. 586,— *Opuſc.* Tom. 1, Edit. *H. Steph.* Et Tom. 2, p. 329, B,— Ed. *Wech.* See alſo *Strab.* *Geogr.* Lib. 1, in fin. p. 66, C,— *D.*— Edit. *Paris.*

[kkk] Ἔστω δὴ οἷς ἀληθεύει ἡ ψυχὴ τῷ καταφάναι ἢ ἀποφάναι, πέντε τὸν ἀριθμόν· ταῦτα δ' ἐστὶ, τέχνη, ἐπιστήμη, φρόνησις, σοφία, νοῦς. lib. 6, c. 3, p. 98, D.—

[lll] Ἐξ ἀνάγκης ἄρα ἐστὶ τὸ ἐπιστητόν. ἀΐδιον ἄρα· --- ἡ μὲν ἄρα ἐπιστήμη ἐστὶν ἕξις ἀποδεικτική. Ibid. E,— 99, A.—

[mmm] Ταυτὸν ἂν εἴη τέχνη καὶ ἕξις μετὰ λόγου ἀληθοῦς ποιητική. ἔστι δὲ τέχνη πᾶσα περὶ γένεσιν, καὶ τὸ τεχνάζειν, καὶ θεωρεῖν ὅπως ἂν γένηταί τι τῶν ἐνδεχομένων καὶ εἶναι καὶ μὴ εἶναι· καὶ ὧν ἡ ἀρχὴ ἐν τῷ ποιοῦντι, ἀλλὰ μὴ ἐν τῷ ποιουμένῳ. Ibid. c. 4,— p. 99, C.—

[nnn] See Mr. *Pufendorf*, Lib. 1, Cap. 2, Sect. 4, Not. 1.

[ooo] Λείπεται, νοῦν εἶναι τῶν ἀρχῶν. ibid. c. 6.— p. 101, D.—

[ppp] Ἡ σοφία ἐστὶ καὶ ἐπιστήμη, καὶ νοῦς τῶν τιμιωτάτων τῇ φύσει. Ibid. c. 7,— p. 102, C.—

[qqq] Ibid. Cap. 8,— & *ſeq.* [rrr] Lib. 7, Cap. 1, p. 111, B,— & *ſeq.*

[sss] Ἐγκράτεια καὶ καρτερία. Ibid. c. 1.— p. 111, B.— & c. 2.— p. 111, C.—

[ttt] Ἀκρασία, καὶ μαλακία καὶ τρυφή. Ibid. c. 1.— p. 111, B.— & c. 2,— p. 111, C.—

[uuu] Ubi ſupra, Cap. 12,— & *ſeq.* [www] Lib. 8, & 9.

[yyy] Ἔστι γὰρ (ἡ φιλία) ἀρετή τις, ἢ μετ' ἀρετῆς· ἔτι δ', ἀναγκαιότατον εἰς τὸν βίον. Lib. 8, c. 1, init. p. 131, E.—

[zzz] Δεῖ ἄρα (φίλους) εὐνοεῖν ἀλλήλοις, καὶ βούλεσθαι τἀγαθὰ μὴ λανθάνοντας. Ibid. c. 2, in fin. p. 134, A.—

[1] Τρία γάρ ἐστιν εἴδη τῆς φιλίας, ἰσάριθμα τοῖς φιλητοῖς --- οἱ μὲν οὖν διὰ τὸ χρήσιμον φιλοῦντες ἀλλήλους, οὐ καθ' αὑτοὺς φιλοῦσιν. --- οἱ δι' ἡδονήν. --- τελεία δ' ἐστὶν ἡ τῶν ἀγαθῶν φιλία καὶ κατ' ἀρετὴν ὁμοίων· --- διαμένει οὖν ἡ τούτων φιλία, ἕως ἂν ἀγαθοὶ ὦσιν. ἡ δ' ἀρετὴ μόνιμον. ibid. c. 3,— 4,— p. 134, B,— C,— p. 135, B,— C.—

[2] Εἰσὶ δὲ οὖν αἱ εἰρημέναι φιλίαι ἐν ἰσότητι. --- Ἕτερον δέ ἐστι φιλίας εἶδος, τὸ καθ' ὑπεροχήν· οἷον πατρὶ πρὸς υἱὸν, καὶ ὅλως πρεσβυτέρῳ πρὸς νεώτερον, ἀνδρί τε πρὸς γυναῖκα, καὶ παντὶ ἄρχοντι πρὸς ἀρχόμενον. Ibid. c. 8,— p. 139, D,— E.—

[3] Cap. 1—5. [4] Cap. 7, 8.

[5] Οἰόμεθά τε δεῖν ἡδονὴν παραμεμῖχθαι τῇ εὐδαιμονίᾳ· ἡδίστη δὲ τῶν κατ' ἀρετὴν ἐνεργειῶν, ἡ κατὰ τὴν σοφίαν ὁμολογουμένως ἐστί. δοκεῖ γοῦν ἡ σοφία θαυμαστὰς ἡδονὰς ἔχειν καθαριότητι καὶ τῷ βεβαίῳ. ibid. c. 7,— p. 181, B.— Δόξειε δ' ἂν καὶ τῆς ἐκτὸς χορηγίας ἐπὶ μικρὸν ἢ ἐπ' ἔλαττον δεῖσθαι τῆς ἠθικῆς. c. 8,— p. 183, B.—

This is the Summary of his ten Books of *Ethicks* to *Nicomachus*. *Ariſtotle* does little more than repeat, and extend the ſame Principles, in his two Books of *grand Morals*; and in his ſeven Books addreſs'd to *Eudemius*. His *Politicks* are founded upon very near the ſame Principles with thoſe of *Plato*; but apparently more ample, methodical, accurate, and, in general, better proportion'd and adapted to the Conſtitution of humane Affairs: Not that they are compleat neither; for theſe too have their Defects. There are ſeveral Matters handled in a very ſuperficial and confus'd Manner. This Philoſopher, as well as his Maſter, ſeems to have had too much in View, the *Grecian* Forms of Government. Nor does he ſeem to have juſt Ideas of the natural Equality of Mankind; and by ſome of his [7] Expreſſions, he gives Occaſion to believe, that he thought ſome Men to be by Nature deſign'd for Slaves. He [8] is againſt bringing up Children that happen to be born with any bodily Infirmity; and thinks, ſhould the Laws forbid the expoſing Infants; Women ſhould be made to miſcarry, when they find themſelves with Child, after having had a certain Number of Children, anſwerable to what the Intereſt of the State requires; for, adds he, when we ſay that ſuch a Thing is lawful, or unlawful, it ought to be underſtood with reſpect to Beings, that have Life and Senſe. Thus this vaſt Genius of Nature, this Philoſopher, for whom ſuch Numbers have ſo great a Veneration; proves to be groſly ignorant of, and without any Scruple treads under Foot, one of the moſt evident Principles of the Law of Nature.

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[6] Ἡ δὲ τελεία εὐδαιμονία, ὅτι θεωρητική τίς ἐστιν ἐνέργεια, ϗ ἐντεῦθεν ἂν φανείη· τοὺς θεοὺς γὰρ μάλιστα ὑπειλήφαμεν μακαρίους, ϗ εὐδαίμονας εἶναι· πράξεις δὲ ποίας ἀπονεῖμαι χρεὼν αὐτοῖς. Pag. 183. E.—

[7] *Politic.* Lib. 1, Cap. 5.

[8] Περὶ δὲ ἀποθέσεως, ϗ τροφῆς τῶν γιγνομένων, ἔστω νόμος, μηδὲν πεπηρωμένον τρέφειν. διὰ δὲ πλῆθος τέκνων, ἐὰν ἡ τάξις τῶν ἐθνῶν κωλύῃ, μηδὲν ἀποτίθεσθαι τῶν γιγνομένων· ὡρίσθαι γὰρ δεῖ τῆς τεκνοποιΐας τὸ πλῆθος. ἐὰν δέ τισι γίγνηται παρὰ ταῦτα συνδυασθέντων, πρὶν αἴσθησιν ἐγγενέσθαι ϗ ζωὴν, ἐμποιεῖσθαι δεῖ τὴν ἄμβλωσιν· τὸ γὰρ ὅσιον ϗ τὸ μὴ, διωρισμένον τῇ αἰσθήσει ϗ τῷ ζῆν ἔσται. *Polit.* Lib. 7, c. 16, p. 597, E.— The laſt Words are ſo read in the *Paris* Edition, form'd upon that of *Caſaubon*: And this reading is, in my Opinion, much better than that, which Mr. *Perizonius* follows (in his Notes *on Elian*, *Var. Hiſt.* 8, 1, p. 481, Col. 1.) τὸ γὰρ ὅσιον, ϗ τὸ μὴ διωρισμένον, ἐν τῇ αἰσθήσει, ϗ τῷ ζῆν, ἐστι. I could, were it now proper, eaſily prove this.

SECT. XXV.

ARCESILAS [a], one of the Succeſſors of *Plato*, founded a new Sect, call'd the *Second*, or *Middle Academy*, to diſtinguiſh it from that of *Plato*. His Doctrine conſiſted [b] in making a Doubt of every Thing; in arguing both for, and againſt all Manner of Queſtions, without ever coming to any Determination; and in maintaining, that there was no one Thing whatever that could be certainly known, or comprehended. So that, this Sort of Philoſophy [c] *apparently tends, to the utter Subverſion of all the Precepts of Morality: For, whoever affirms, that there is nothing certain, and that all Things are incomprehenſible; does at the ſame Time declare it to be uncertain, whether there be any ſuch Things as Virtue and Vice.* *Cicero*, who was an Academick, but a moderate one; has acknowledg'd the Juſtneſs [d] of this Conſequence, ſpeaking of *Pyrrho*, a Contemporary of *Arceſilas*; and whoſe Scepticiſm, at the Bottom, was the ſame with the [e] *Incomprehenſibility* of the new *Academicks*. *Carneades* [f] founded the *Third Academy*; “ which [g], in Reality, “ did not at all differ from the *Second*: For, “ bating a few Softnings, which ſerv'd only to “ amuſe; he was, in the main, as zealous a “ Defender of Incertainty, as *Arceſilas* him- “ ſelf: He pretended to diſcover it, even in “ the moſt evident Notions; inſomuch, as [h] “ that we find him muſtering up all his Subtil- “ ties againſt this Maxim: *That Things equal* “ *to, or the ſame with any one third Thing*; *are* “ *equal to, or the ſame with one another*. - - - - “ He retain'd [i], in the main, the whole Doc- “ trine of *Arceſilas*: But thro' Policy, and to “ diſarm his Adverſaries of their moſt plauſible

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[a] He flouriſh'd about the hundred and twentieth Olympiad, three hundred Years before *Jeſus Chriſt*. See *Diog. Laert.* Lib. 4, Num. 28,— *& ſeq.* particularly p. 284,— Ed. *Colon. Allob.*

[b] *Arceſilas negabat eſſe quidquam, quod ſciri poſſet; ne illud quidem ipſum, quod* Socrates *ſibi reliquiſſet. Sic omnia latere cenſebat in occulto, neque eſſe quidquam, quod cerni, aut intelligi poſſit: quibus de cauſis nihil oportere neque profiteri, neque adfirmare quemquam, neque adſenſione approbare. Cic. Academ. Quæſt.* Lib. 1, cap. 12.—

[c] Mr. *Bayle*'s Dict. in the Text, and Remark (K,) p. 307,— & col. 2.—

[d] *Ariſtonis, Pyrrhonis, Herilli, jampridem exploſa ſententia eſt: qui tamen haberent jus ſuum diſputandi de officio, ſi rerum aliquem delectum reliquiſſent, ut ad officii inventionem aditus eſſet. De Offic.* Lib. 1, cap. 2.— See alſo the ſame Argument made uſe of againſt the Academicks, *Acad. Quæſt.* Lib. 4, c. 8.—

[e] Ἀκαταληψία. See the Article of *Pyrrho*, Rem. (A,) in Mr. *Bayle*'s Dict. p. 2429, col. 2,— & 2430, Col. 1.—

[f] This Philoſopher was of *Cyrene*; he came to *Rome* in the Year 599, from the Building of that City; a hundred and fifty Years before *Jeſus Chriſt*. See *Petav. D. Temp.* Tom. 2, 354. See *Diog. Laert.* Lib. 4, Sect. 62,— *& ſeq.* And Ed. *Colon.* p. 296.— & *Cicer. Academ. Quæſt.* Lib. 4, cap. 45.— Et *Bayle* Dict. p. 810,— 811,— Artic. *Carneade*, the whole Article and Notes, & p. 812,— & 813, Col. 1.—

[g] Mr. *Bayle*'s Dict. See the Rem. (A.) & (B.) Artic. *Carneade*.

[h] Ibid. Rem. (C,) p. 811, col. 2.— See *Galen*, in *Lib. de optimo dicendi genere*, printed at the End of the *Pyrrhon. Hypot.* of *Sext. Empiric.* Ed. *H. Steph. Ann.* 1562, p. 220, 221. Et p. 499, D.— Ed. *Genev.* 1621.

[i] Ibid. p. 811, Col. 1.—

“ Topicks for Declamation, and Raillery; he “ admitted ſuch a Degree of Probability, as “ might ſerve to determine a prudent Man, “ which Side of the Queſtion to take, in all “ ſuch Matters as concern'd the Actions of “ Civil Life. He plainly ſaw, that without “ this, he could never anſwer the moſt odious “ Objections; nor clear his Principles from the “ ſcandalous Charge, of bringing Men to a “ moſt ſhameful State of Inaction, and Quietiſm. All Things conſider'd, it amounts to “ the ſame Thing, to ſay, *That there is not* “ *any ſuch Thing as Truth*; or, *That there is,* “ *but that we have no Rule to diſtinguiſh it from* “ *Falſhood.*” Thus it is that Mr. *Bayle* is pleas'd to expreſs himſelf. I ſhall not give myſelf the Trouble to examine; whether there ever has in Fact been ſuch a Perſon in the World, as one ſeriouſly perſuaded, that it is impoſſible for a Man certainly to diſtinguiſh, for Inſtance, whether he be aſleep, or awake; or to diſcern a real Difference between Madneſs and ſound Senſe; or to be poſitively aſſur'd, that there is a Sun, Moon, Earth, Men, and Animals; that the Whole is greater than any of its Parts: And whether we may not ſay, with the Author of the *Art of Thinking* [k]; *that the Pyrrhoniſts are a Sect of Liars.* But one Thing there is, which to me appears *inconteſtable*; *viz.* that this Spirit of univerſal Scepticiſm, utterly deſtroys, and overturns the very Foundations of all Religion, and Morality. Nor do I know any Books more dangerous, for Men to read, who have not accuſtom'd themſelves to an accurate Way of Thinking, and diſcerning between Truth and Falſhood; than thoſe, whoſe Authors make it their whole Buſineſs, to accumulate Difficulties againſt the moſt evident Truths; without ever reſolving them, or preventing the fatal Impreſſions thereof, by a clear and rational Account, of what may and ought to be held as certain, notwithſtanding ſuch Difficulties; which, however conſiderable, yet can no way leſſen, or hinder the Cogency of ſuch direct Proofs, as are really convincing. 'Tis true, the antient *Scepticks* [l] *did not indeed deny, but that a Man ought to conform to the Cuſtoms of his Country; to practiſe the Duties of Morality; and in all ſuch Caſes to be determin'd upon* [m] *probable Grounds; without inſiſting upon, or expecting, abſolute Certainty.* But then, as Mr. *Bayle* himſelf owns, *they* [n] *did, under Pretence of only oppoſing the Reaſons which the Dogmatiſts urg'd for the Exiſtence of a Deity; in Effect, undermine the Doctrine itſelf. Their Way was, firſt to premiſe* [o], *that as for themſelves, they pretended not to be ſingular in any Thing; but that following the common Courſe of Life, they, without being addicted to any particular Sect, held that there were Gods, worſhipp'd 'em, and aſcrib'd to 'em a Providence; but for the raſh Reaſonings of the Dogmatiſts about theſe Matters, 'twas what they could not ſubmit to: Whereupon they produc'd their Objections; which were uſually ſuch, as did, by diſproving a divine Providence, at the ſame Time deſtroy the Exiſtence of a Deity.* As to Morality, there is no doubt to be made, but *Pyrrho* [p] taught, “ that the Honeſty and [q] Tur“ pitude, Juſtice and Injuſtice of humane Ac“ tions, were intirely dependent upon humane “ Laws, and Cuſtom.” *Carneades* [r], after having one Day made an admirable Harangue in Praiſe of Juſtice; did the very next ſhew, that it was only a mere empty Name; oppoſing it at the ſame Time more ſtrenuouſly, than he had before defended it. Thus however excellent, thoſe [s] Maxims of Morality, which the *Academick* and *Pyrrhoniſt* give out for Precepts, may be in themſelves; yet in their Mouths, they can amount to no more, than empty Sounds, unprofitable Rules, Propoſitions advanc'd without any Foundation, and in flat Contradiction to their own proper Principles; this too, notwithſtanding their Conduct and Demeanour be otherwiſe never ſo regular, and umblameable. According to *Carneades*, the chief End, or ſupreme Good, of Man, conſiſted in *the Enjoyment of*, what he call'd [t], the *natural Principles*; that is to ſay, in ſatisfying the Deſires of Nature; without giving one's ſelf any Trouble or Concern about Honour and Virtue. The *Pyrrhoniſts* propos'd to themſelves, by Means of their [u] *Suſpenſion of Aſſent* [w]; to keep the Mind in ſuch a State of Tranquillity, as ſhould effectually prevent their receiving any Uneaſineſs, on account of eſtabliſh'd Opinions; and likewiſe in ſuch a State of abſolute Indifferency for all Manner of Things, as ſhould keep them from ſetting their Hearts too much upon any one Object; or troubling themſelves too much about any Contingencies whatſoever.

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[k] The firſt Diſcourſe, p. 6.— See alſo the ſixth Chapter of Part 4, p. 419,— *&c.* Ed. *Amſt.* 1685.

[l] Mr. *Bayle* Dict. Art. *Pyrrho*, Rem. (B,) p. 2430, Col. 1.—

[m] See *Diog. Laert.* lib 9, Sect. 108.—

[n] Mr. *Bayle's* Dict. Artic. *Ruſin*, Rem. (C,) p. 2625, Col. 2.—

[o] *Sextus Empiric. Pyrrhon. Hypot.* Lib. 3, cap. 1,— Init. & Ed. *Fabric.* p. 128.—

[p] *Bayle*, Dict. Art. *Pyrrho*, in the Text, p. 2433.—

[q] Ὀυδὲν γὰρ ἔφασκεν οὔτε καλὸν, οὔτε αἰσχρὸν, οὔτε δίκαιον, οὔτε ἄδικον. ϗ ὁμοίως ἐπὶ πάντων, μηδὲν εἶναι τῇ ἀληθείᾳ, νόμῳ δὲ, ϗ ἔθει πάντα τοὺς ἀνθρώπους πράττειν. *Diog. Laert.* lib. 9, Sect. 61.— Et Ed. *Col.* p. 669.—

[r] *Lactant. Inſtit. Divin.* Lib. 5, cap. 14, n. 3, 4. See the Subſtance of his Reaſons againſt Virtue, reported, and confuted by Mr. *Pufend.* Lib. 2, cap. 3. Sect. 10,— 11.—

[s] See *Cicer. de Finib.* Lib. 2, cap 18.—

[t] *Carneadi, frui principiis naturalibus, eſſet extremum.* Ibid. cap. 11,— in fine. See Mr. *Bayle's* Dict. p. 814, col. 2,— & 815; col. 1.— [u] Ἐποχή.

[w] See *Diog. Laert.* Lib. 9, Sect. 67,— 68,— 108.— Et Ed. *Col.* p. 672,— 674,— 695.— *Stob.* Serm. 118, & 120, p. 601,— 609.— *Sext. Empiric. Pyrrhon. Hypotheſ.* Lib. 1, cap. 12,— & Edit. *Fabric.* p. 8.—

SECT.

SECT. XXVI.

EPICURUS[a], Cotemporary of *Arceſilas*, and chief of the Sect that bears his own Name;[b] admitted thoſe two Principles of the antient Atheiſts: "*That there is no other Subſtance beſides* [c] *Body*; *and, that Body hath nothing elſe belonging to it but* [d] *Magnitude, Figure, Site, and Motion, without Qualities.*--- However he profeſs'd the Belief of a vaſt Number of Gods.--- He plac'd them in certain Spaces which he called [e] *Intermundane*; which he believ'd to be void, and to lie between the ſeveral Worlds, of which, according to him, the Univerſe was made up. He held [f], that the Sovereign Felicity of the Gods, conſiſted in having nothing to do; and in being free from all Manner of Care.-- And tho' they did not, in his Opinion, any way intermeddle in the Concerns of Mankind; and tho' Men had nothing either to hope or fear from them; yet, ſaid he, they ought to have ſome Worſhip paid 'em, on Account of the Excellency of their [g] Nature, and Felicity. There needs not much Penetration to diſcern, that all this Divinity of *Epicurus* was but mere Chimera; ſince 'twas directly contrary to the Principles he himſelf had laid down; by which he acknowledg'd no other Beings, but ſuch as were made of Atoms; and conſequently corruptible. But Gods he gave out there were [h]; out of pure Policy, and to avoid the Odium which an avow'd and open Atheiſm would otherwiſe have drawn upon him. For which Reaſon *Poſidonius*, the *Stoick*, ſaid [i], that Epicurus *believ'd no Gods at all*; *and that it was to avoid Odium, that he ſaid what he did of the immortal Gods.*--- *He introduces*, ſays [k] *Cicero, by way of Ridicule, tranſparent Gods*; *Gods which might be diſſipated with a Puff of Wind*; *dwelling as it were between two Worlds, for Fear of being ſome Time or other buried in their Ruins.* But let us ſuppoſe *Epicurus* to have been never ſo ſerious in thoſe Matters; yet, with [l] *Gaſſendus*'s good Leave, he will ſtill nevertheleſs be an Atheiſt for all that; as long as it ſhall appear, that he held *the World to be form'd without the Diſpoſition of any* [m] *Agent*; *or the Concurrence of a bleſſed and immortal Being*; and that the Univerſe, with all the intelligent Beings therein, ow'd their Original to the fortuitous Concourſe of Atoms.---- [n] The God of this Philoſopher is, in his Syſtem, like a Piece of Building without the Clear; and which may as well be ſuppos'd not to be at all, without making any Alteration therein." Yet, with all theſe his impious Principles; *Epicurus* has nevertheleſs given us a Syſtem of Morality, in many Things, juſt and beautiful enough. "His Doctrine [o] touching the Sovereign Good, or Happineſs, was very liable to be miſunderſtood, which prov'd of ill Conſequence; and in effect brought an ill Character upon his Sect: But the Doctrine was in the main a very rational Doctrine; nor can it be denied, taking the Word *Happineſs* in the Senſe he us'd it; but that the true Happineſs of Man conſiſts in Pleaſure.--- [p] Almoſt all the antient Philoſophers, who have treated of humane Happineſs, fix'd their Notions upon ſomething external; which is what has occaſion'd amongſt 'em ſo great [q] a Variety of Opinions: Some placing the true Happineſs of Man in Riches,

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[a] He was born in the third Year of the hundred and ninth Olympiad, three hundred and forty two Years before *Jeſus Chriſt*, and died aged ſeventy two Years. See *Du Rondel, de vita & moribus Epicuri*.

[b] Extract from Mr. *Cudworth*, in the *Bibl. Choiſie*, Tom. 2, p. 14,— *& ſeq.* See *Cudw.* p. 59._ 60,— *&c.*

[c] See *Diog. Laert.* Lib. 10, Sect. 39,— 40. Et Ed. *Col.* p. 732.— & *Lucret.* Lib. 1. Verſ. 430, *& ſeq.*

[d] *Diog. Laert.* ibid. Sect. 44.— Et Ed. *Col.* p. 735.—

[e] *Intermundia.* See *Cicer. de Nat. Deor.* Lib. 1, cap. 8.— & *Dav.* i. l. & *Lucret.* Lib. 5, verſ. 147, *& ſeq.* & Lib. 3, verſ. 18, *& ſeq.* In the firſt Book of *Cicero*, of the Nature of the Gods, cap. 25,_ *&c.* this ridiculous Notion of *Epicurus*'s Gods is turn'd into Ridicule.

[f] *Nos autem beatam vitam in animi ſecuritate, & in omnium vacatione munerum ponimus.* Theſe are the Terms of *Velleius* the *Epicurean*, whom *Cicero* introduces; Lib. 1, cap. 20.— *de Nat. Deor.* See too cap. 30._ *Omnis enim per ſe Divum natura neceſſe eſt Immortali ævo ſumma cum pace fruatur, Semota ab noſtris rebus, ſejunctaque longe; Nam privata dolore omni, privata periclis, Ipſa ſuis pollens opibus, nihil indiga noſtri, Nec benè pro meritis capitur, nec tangitur irâ. Lucret.* Lib. 1, verſ. 57. *& ſeq.* Edit. *Creech.*

[g] *Habet enim venerationem juſtam quidquid excellit. Velleius apud Cicer. de Nat. Deor.* Lib. 1, cap. 17._

[h] This was the Opinion of ſeveral of the Antients. *Quamquam video nonnullis videri, Epicurum, ne in offenſionem Athenienſium caderet, verbis reliquiſſe Deos, re ſuſtuliſſe. Cicer.* ibid. cap. 30._

[i] *Apud Cicer. de Nat. Deor.* Lib. 1, cap. 44,— *ſive ultim.*

[k] In the Extract of the *Bibl. Choiſ.* Tom. 1, p. 17,— theſe Words are aſcrib'd to *Poſidonius*; but they are *Cicero*'s, Lib. 2, *de Divinat.* cap. 17:— *Deos enim ipſos jocandi causâ induxit Epicurus perlucidos, & perflabiles, & habitantes, tanquam inter duos lucos, ſic inter duos mundos, propter metum ruinarum.*

[l] *De vita Epicuri*, lib. 4, cap. 1, *& ſeq.* Mr. *St. Evremond*, who is not ſuſpected to bear any ill Will towards *Epicurus*; judges more ſincerely and juſtly of this Matter, in his Eſſay upon the Morality of *Epicurus*; (before the fifth Volume of his Miſcellanies, Ed. *Amſterd.* 1706.) where you may ſee too his Opinion about *Epicurus*'s *Pleaſures*.

[m] *Docuit enim nos idem, qui cætera,* [*Epicurus*] *naturâ effectum eſſe mundum; nihil opus fuiſſe fabricâ*; --- *quod* --- *quemadmodum natura efficere ſine aliqua mente poſſit, non videtis.* —— *Velleius apud Cicer. de Nat. Deor.* lib. 1, Cap. 20.— *Ex his* [corpuſculis] *effectum eſſe cœlum, atque terram, nullâ cogente naturâ, ſed concurſu quodam fortuito.* ibid. cap. 24.—

[n] The Words of Mr. *Le Clerc.* in his *Bibl. Univ.* Tom. 10, p. 531.—

[o] Mr. *Bayle*'s Dict. in the Text of Article, *Epicure*, p. 1133.—

[p] Ibid. Rem. (G.—) p. 1133, Col. 2.—

[q] See *Auguſtin. de Civ. Dei.* Lib. 19, cap. 1,— Tom. 5, col. 1137, C,— *&c.* Here Mr. *Bayle* cautions us not to believe what ſo many tell us, *viz.* that, according to *Varro*, there were 288 different Opinions about the Nature of the Sovereign Good. 'Tis only a Piece of Pleaſantry of that learned *Roman*.

"ſome in Science, ſome in Honours, and others in Virtue, &c. It is plain, they fix'd the Idea of Happineſs to --- that, which they thought capable of producing in us a State of Felicity; without ever telling us what that State of the Soul is, in which its Happineſs conſiſts. *Epicurus* has not run into this Miſtake.--- He ſaid, that Man's Happineſs conſiſts in his being at Eaſe, and under the actual Senſation of Pleaſure; in a word, in Contentedneſs: This no way proves, the Placing of the Happineſs of Man in good Cheer and Venery; for theſe can at moſt be but efficient Cauſes; which make no Part of the Matter in Queſtion. When an Enquiry into the efficient Cauſes of Contentedneſs, comes to be the Matter in hand; you will then find the very beſt of 'em mark'd out to you: On the one hand, you will find ſuch Objects as are beſt fitted for the Preſervation of a good Conſtitution; on the other, ſuch Occupations as are moſt proper to prevent Uneaſineſs of Mind: You will then find preſcrib'd to you Sobriety, Temperance, and a reſolute Oppoſition to all thoſe tumultuous and unruly Paſſions, which ouſt the Soul of its State of Happineſs; that is to ſay, of that ſweet Compoſure and Acquieſcence it has in its preſent Condition [r]. Theſe were the Pleaſures in which *Epicurus* made the Happineſs of the Soul to conſiſt. An Outcry however was rais'd againſt the Word *Pleaſure*; thoſe who had been before debauch'd and corrupted, made an ill Uſe of it; and the Enemies of the Sect took Advantage of all this; thus the Name of an *Epicurean* became extremely odious. All which is nevertheleſs merely accidental; and may as well befal any other Doctrine." Thus it is that Mr. *Bayle* juſtifies the fundamental Principle of *Epicurus*. It muſt however be acknowledg'd, that, (tho' *Epicurus* in the main might reaſon well, in keeping to the general Idea of Tranquility, or, Contentment of Mind,) yet he neither taught true Happineſs; which is the End of Morality, and the Object of all humane Deſire; nor ſolid Virtue: And that 'twas even impoſſible for him, in purſuance of his own Principles, ſo to do. It is certain, that the Soul of Man thirſts after perfect Happineſs; which, 'tis evident, beyond Contradiction, can never be attain'd to in ſuch a Life, as this we Mortals lead on Earth [s]. All the Happineſs we can reaſonably aſpire to here below, is an agreeable Tranquility of Mind; produc'd by the View of that perfectly happy State, which we hope to enjoy after this Life ended. "If Men (I make uſe of Mr. [t] *Lock*'s own Words) in this Life only have Hope; if in this Life they can only enjoy; 'tis not ſtrange, nor unreaſonable, that they ſhould ſeek their Happineſs by avoiding all Things that diſeaſe them here; and by purſuing all that delight them; wherein it will be no Wonder to find Variety and Difference. For if there be no Proſpect beyond the Grave, the Inference is certainly right, *Let us eat and drink*, let us enjoy what we delight in, *for To-morrow we ſhall die*." Thus moſt of the antient Philoſophers, not grounding their Morality upon the Suppoſition of the Immortality of the Soul; and looking for their *Summum bonum* in this Life; did vainly enquire, "Whether it [u] conſiſted in Riches, or bodily Delights, or Virtue, or Contemplation? And they might have as reaſonably diſputed, whether the beſt Reliſh were to be found in Apples, Plumbs, or Nuts; and have divided themſelves into Sects upon it. For as pleaſant Taſtes depend not on the Things themſelves, but their Agreeableneſs to this or that particular Palate, wherein there is great Variety; ſo the greateſt Happineſs conſiſts in the having thoſe Things which produce the greateſt Pleaſure; and in the Abſence of thoſe which cauſe any Diſturbance, or any Pain. Now, theſe to different Men, are very different Things." Since therefore *Epicurus* expreſly maintain'd, that the Soul dies with the Body; and made this too his Reaſon he us'd, to [x] recover Men from the Fear of Death; he could not promiſe more than a Happineſs of ſhort Duration; and his Morality muſt in the Nature of it be the Concern of this Life only. In this he no way contradicts his Principles; and Mr. *Le Clerc* has very juſtly obſerv'd, that "his [y] Morality has two enormous Defects; Defects too, which make the laudable Precepts it contains, of little or no Effect; whatever may be ſaid by thoſe, who have undertaken his Apology, to the contrary. The firſt is, that, its End propos'd being only the Attainment of an eaſy and quiet Life; it can engage us to purſue its Maxims upon no other View, but the preſent Advantage, that accrues from that Manner of Life it preſcribes. We ought not to be covetous, for Example, according to *Epicurus*, and *Horace*, (a Sectary of his,) becauſe Covetouſneſs cannot make us happy in this Life; as the latter has in many Places made appear. This being then an eſtabliſh'd Principle, put the Caſe a Man ſhould find himſelf under a Government, where Vice was rewarded, and Virtue puniſh'd; what muſt he do? Suppoſe a Man liv'd in *Japan*, and that a conſiderable Party there treated the Superſtitions of that Country, as ridiculous, and pernicious to Society; and that himſelf alſo was of their Opinion: If the Emperour of *Japan* ſhould raiſe a Perſecution againſt all of that Perſuaſion, ought he too with the reſt voluntarily to ſuffer Perſecution? No certainly, according to *Epicurus*; for, in his

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[r] See *Diog. Laert.* Lib. 10, Sect. 127,__ 128,— *& ſeq.* Et Ed. *Colon.* p. 790, *& ſeq.* Notwithſtanding this favourable Interpretation of the fundamental Principle of the Morals of *Epicurus*; this Principle is nevertheleſs dangerous to Civil Society. See what Mr. *Perizonius* ſays, concerning the Reaſons why the *Epicureans* were driven from ſeveral Places; in his Notes on *Elian*, *Var. Hiſt.* Lib. 9, cap. 12, Not. 2 See alſo Not. 4, of the ſame Commentator, on Lib. 4, c. 13.

[s] See the *Bibl. Choiſ.* of Mr. *Le Clerc*, Tom. 11, p. 307,__ 308.—

[t] *Eſſay on humane Underſtanding*, Book 2, chap. 21, Sect. 55, p. 171,— Ed. *Lond.* 1706.

[u] Mr. *Lock*, ubi ſupra, p. 171.—

[x] *Diog. Laert.* lib. 10, Sect. 124,— 125.— Et Ed. *Colon. Allobr.* p. 786,— & d.

[y] *Bibl. Univerſ.* Tom. 10, p. 288,— *& ſeq.*

“Opinion, Virtue is of no Eſtimation but for the preſent Advantage it brings with it. As to the Suppoſition, that Vice may be rewarded, and Virtue puniſh'd; 'tis by no Means the Suppoſition of an Impoſſibility; 'tis what is actually practis'd throughout the greateſt Part of the World. Thus all the Arguments drawn from the preſent Advantage, which is found in the Exerciſe of Virtue, are very weak, eſpecially if they ſtand alone; and it is highly probable, that had the *Athenians* offer'd to have treated *Epicurus*, as they did *Socrates*; the firſt would not have thought it an Honour to die a Martyr for his Philoſophy, as the ſecond did; who, when they would have hinder'd him from Philoſophizing, anſwer'd, *That it was better to obey God, than Man.*” We have even at this Day ſome of the Maxims of *Epicurus*; among which there is one, wherein that Philoſopher expreſly ſays, *That* [y] *Injuſtice is not evil in itſelf; and if we ought to refrain from doing wrong to another, and from violating the Laws which forbid it; 'tis purely thro' Fear of being diſcover'd, and expos'd to Puniſhment*; for, adds he, *tho' we may have eſcap'd a thouſand Times, we cannot always be aſſur'd, that, what has been committed in the darkeſt Corners, and with the greateſt Privacy, will not, before we die, come to the Knowledge of the Miniſters of Juſtice.* “[z] The ſecond Defect in the Morality of *Epicurus* is, that, in what Manner ſoever that Philoſopher liv'd towards the latter End of his Days; he did not prohibit certain Pleaſures, which moſt certainly do diſturb humane Society; and would cauſe infinite Diſorders, if all Men were of his Opinion. *Horace* may, in Mr. *Dacier*'s Judgment, be eſteem'd a [aa] *rigid Epicurean*; and yet his Writings are full of the Marks of a Licentiouſneſs, which one would not care to call by its true Name: And if he exclaim'd againſt Adultery, for Example, as he does in his ſecond Satyr; 'twas only on account of the Danger there was [bb] in being ſurpriz'd with a married Woman. This is likewiſe conformable to the Maxims of his Maſter; who was againſt the Enjoyment of that Pleaſure [cc], which brought with it more Harm than Good; as he alſo would have deſpis'd the Virtue, which would have brought upon him too much Trouble and Vexation.”

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[y] Ἡ ἀδικία, ου καθ' ἑαυτὴν κακὸν, ἀλλ' ἐν τῷ κατὰ τὴν ὑποψίαν φόβῳ, εἰ μὴ λήσει ὑπὲρ τῶν τοιούτων ἐφεστηκότας κολαστάς. οὐκ ἔστι τὸν λάθρα τι ποιοῦντα ὧν συνέθεντο πρὸς ἀλλήλους, εἰς τὸ μὴ βλάπτειν μηδὲ βλάπτεσθαι, πιστεύειν ὅτι λήσει, κἂν μυριάκις ἐπὶ τοῦ παρόντος λανθάνῃ. μέχρι γὰρ καταστροφῆς ἄδηλον εἰ ϗ λήσει. *Diog. Laert.* Lib. 10, Sect. 151.— Et Ed. *Colon. Allobr.* p. 802.—

[z] *Bibl. Univerſ.* ubi ſupra, p. 289 —

[aa] *Remarks on* Horace, Tom. 7, p 340, *& ſeq.* in the laſt Edition, printed at *Paris.* Et p. 371,— Edit. *de Paris*, 1709.

[bb] This alſo was the Reaſon why *Epicurus* ſaid, *that we ought to abſtain from our Neighbour's Wife*: At leaſt if we may give Credit to *Origen.* againſt *Celſus*, Lib. 7, p. 374,— cited by Mr. *Menage*, p. 469, Col. 2,— on *Diog. Laert.* Lib. 10, Sect. 118.— Et p. 782,— Edit. *Colon. Allobrogum.*

[cc] Οὐδεμία ἡδονὴ καθ' ἑαυτὴν κακόν· ἀλλὰ τὰ τινῶν ἡδονῶν ποιητικὰ, πολλαπλασίους ἐπιφέρει τὰς ὀχλήσεις τῶν ἡδονῶν. *Diog. Laert.* Lib. 10, Sect. 141.— Et. Ed. *Col.* p. 797.—

SECT. XXVII.

ZENO the Cypriot, of *Citium*, Cotemporary of *Epicurus*, founded the Sect of the *Stoicks*; a Sect directly oppoſite to that of the Diſciples of *Epicurus*, his Cotemporary [a]. The *Stoicks* imagin'd the World to be an [b] Animal; whereof the ſupreme [c] God, they ſaid, was the Soul, or the *active Principle*; and Matter, the *paſſive Principle*. That [d] eternal intelligent Being, which produc'd all Things, and directs them by his Providence; was, in their Opinion [e], “nothing but a fiery Subſtance; or, as it were, [f] an operative mechanick Fire; whereof ſome Parts animated Plants, Beaſts, and Men; whilſt other Parts, more ſubtil and elaſtick, made the Gods in the Sun, and Stars.” They paid religious Worſhip to theſe inferiour Deities; but [g] they believ'd, that the Gods themſelves, the ſupreme God only excepted, would one Day be deſtroy'd by Fire, with the reſt of the World; which, in their Opinion, was to undergo ſeveral Conflagrations; each whereof would happen after a certain Period or Revolution of a fix'd Number of Years. They held, that the Souls of Men were, after Death, reunited to that [h] ſubtil *Air*, from whence they had been taken; but they believ'd

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[a] He died eight Years after *Epicurus.*

[b] Ζῶον ἄρα ὁ Κόσμος. *Diog. Laert.* Lib. 7, Sect. 143.— Et p. 525,— Ed. *Col.* See *Cicer. de Nat Deor.* Lib. 2,— cap. 12,— *& ſeq.*

[c] Δοκεῖ δ' αὐτοῖς, ἀρχὰς εἶναι τῶν ὅλων δύο, τὸ ποιοῦν ϗ τὸ πάσχον. τὸ μὲν οὖν πάσχον, εἶναι τὴν ἄποιον οὐσίαν τὴν ὕλην· τὸ δὲ ποιοῦν, τὸν ἐν αὐτῇ λόγον, τὸν θεόν. *Diog. Laert.* Lib. 7, Sect. 134.— Et Ed. *Col.* p. 519.—

[d] Τοῦτον γὰρ ὄντα ἀΐδιον, διὰ πάσης αὐτῆς (ὕλης) δημιουργεῖν ἕκαστα.-- *Diog. Laert.* Sect. 134,— ubi ſupra. Θεὸν δὲ, εἶναι ζῶον ἀθάνατον, λογικὸν, τέλειον, ἢ νοερὸν ἐν εὐδαιμονίᾳ, κακοῦ παντὸς ἀνεπίδεκτον, προνοητικὸν κόσμου τε ϗ τῶν ἐν κόσμῳ· μὴ εἶναι μέν τοι ἀνθρωπόμορφον, Ibid. Sect. 147.— Et p. 525,— 526,— Ed. *Col.* See *Cic. de Nat. Deor.* Lib. 2, c. 6, *&c.* where this whole Matter is treated of at large.

[e] The Words of Mr. *Bayle*, in his *Continuation des Penſées diverſes*, cap. 67. See what he ſays there, and alſo p. 120, *& ſeq.* on the Abſurdity of that Hypotheſis of the Soul of the World.

[f] Δοκεῖ δὲ αὐτοῖς, τὴν μὲν φύσιν εἶναι πῦρ τεχνικὸν, ὁδῷ βαδίζον εἰς γένεσιν, ὅπερ ἐστὶ πνεῦμα πυροειδὲς ϗ τεχνοειδές. *Diog. Laert.* ubi ſupra, Sect. 156.— Et Ed. *Col.* p. 534 — *Zeno igitur ita naturam definit, ut eam dicat, ignem eſſe artificioſum ad gignendum progredientem via. Cic. Nat. Deor.* Lib. 2, c. 22.— *Atque hac mundi divinitate perfecta, tribuenda eſt ſideribus eadem divinitas: Quæ ex mobiliſſima puriſſimaque Ætheris parte gignuntur.* Ibid. c. 15,— v. Davis. i. l.

[g] Ὃς (Θεὸς) δὴ ἄφθαρτός ἐστι ϗ ἀγέννητος, δημιουργὸς ὢν τῆς διακοσμήσεως, κατὰ χρόνων ποιὰς περιόδους, ἀναλίσκων εἰς ἑαυτὸν τὴν ἅπασαν οὐσίαν, ϗ πάλιν ἐξ ἑαυτοῦ γεννῶν. *Diog. Laert.* Sect. 137.— Et Ed. *Col.* p. 521.— See *Cic. de Nat. Deor.* Lib 2, c. 46.— *Senec. de Conſolat. ad Marc.* c. 26.— in fine. And the Remark (I) on Artic. *Chryſipp. Bayle*'s Dict. As alſo the Diſſertation *de Stoica mundi exuſtione* by *J. Thomaſius*; *Lipſ.* 1676. And Diſſert. the tenth of the ſame Volume, with the ſeventh.

[h] Or Æther. See *Gataker* on *Marcus Antoninus*, Lib. 4, Sect. 21, p. 139, Col. 2,— *&c.* Et Lib. 7, Sect. 50, p, 279, col. 2, lin. 24. In the latter of theſe Paſſages, the Emperor expreſſes his Thoughts by ſome Verſes of *Euripides*, taken out of a Tragedy, now

'em [i] corruptible; and made 'em to ſubſiſt no longer, at fartheſt, than the Conflagration of the World; nay, ſome of 'em did not allow even this Privilege, but to the Souls of their Sages. They [k] acknowledg'd an inevitable Deſtiny or Fate; to which they ſubjected the Gods themſelves, without excepting even their ſupreme Deity. "Nor has there ever been, "amongſt all the Philoſophers [l], yet extant, "any who have ſpoke in ſtronger Terms of the "fatal Neceſſity of Things; or who have more "magnify'd [m] the Liberty of Man, than the "*Stoicks*." Theſe Principles, I muſt own, are monſtrous; and the ſeveral Philoſophers of that Sect have, each in particular, added thereto ſome new Abſurdities. However, bating ſome certain Things, nothing can be more beautiful than their Morality, conſider'd in itſelf; which, by only correcting a few of its Maxims, with ſome ſmall Difference in their Explanation; might be eaſily reduc'd to a Syſtem of Morality, very near approaching to that of the Goſpel; to that, I ſay, which alone is entirely conformable to the Dictates of right Reaſon.

The great and fundamental Principle of the Morality of the *Stoicks* is, *That we ought to live* [n] *conformable to Nature*; and that the ſovereign Good of Man conſiſts in Virtue; which is nothing else, according to them, but [o] a Life conformable to Nature; *for*, ſay they, *Nature leads us to Virtue*. By this *Nature* [p], ſome of 'em meant directly the Conſtitution of the humane Nature; or that Light of Reaſon, by the Help of which we diſcern what is truly ſutable to our State and Condition; others meant, univerſal Reaſon, or the Will of God; which forbids us every Thing, that is contrary to our natural Conſtitution; and preſcribes to us every Thing that is agreeable thereto; and others again, meant both theſe join'd together. They ſaid, That [q] *Juſtice, as ſuch, is not from the Inſtitution of Men, but from its own Nature; as is alſo Law and right Reaſon; and that the Difference of Opinions, that prevail among Philoſophers, ought not to diſcourage us from the Study of Philoſophy; for, if that Reaſon was of Weight enough to divert or diſſuade us from any Thing, we ought to leave the World; there being nothing in it, about which Men are not divided in their Opinions.* They conſider'd the World as [r] a Kingdom, of which God is the King; and as a Total, to the Intereſt and Utility of which, every Perſon, as a Part thereof, ought to concur, and direct all his Actions; without ever preferring his own private Advantage to the common Concern. They believ'd, they were [s] born, not every one for himſelf alone; but for the Good of humane Society: this was the diſtinguiſhing [t] Character of their Sect; this the Idea they [u] gave of the Nature of Juſtice and Honeſty. There was never any Sect of Philoſophers, who ſo well underſtood, and ſo ſtrongly preſs'd thoſe indiſpenſable Duties of Humanity, which Men, preciſely conſider'd as ſuch,

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now loſt, call'd *Chryſippus*; where he ſays, that *what was born of the Earth, returns to Earth; and that which had an ætherial Origin, returns to the Celeſtial Poles.* But, as Mr. *Le Clerc* has very well obſerv'd, *Bibl. Choiſ.* Tom. 6, p. 244,— *& ſeq.* that Poet had other Ideas, than thoſe of the *Stoicks*; and believ'd the Immortality of the Soul. *Euripides* repeated the firſt Words of thoſe Verſes, in another Tragedy, which is now loſt; whereof *Cicero* has given us a Tranſlation; *Reddenda eſt terra terræ.* --- *Tuſc. Quæſt.* Lib. 3, Cap. 25,— Edit. *Gron.* and not *Tuſc. Quæſt.* Lib. 2, as Mr. *Bayle* has cited it, in his Dict. Art. *Amphiarus*, p. 208, Col. 2,— Rem. (K.) There is another Fault too, in this Article, but chargeable upon the Printers of the Edition, he made uſe of. He criticiſes, p. 208, col. 2,— upon *Amiot*, as if, in turning the Paſſage of *Euripides*, reported by *Plutarch*, (*Conſol. ad Apoll.* p. 110,— 111,— Ed. *Wech.* Et 192,— *Steph.*) he had render'd the Words, Ὁ παρὰ τῷ ποιητῇ Ἀμφιάρεως, by *Amphiaraus en un poëme*: but in the fine Edition of *Genev.* in Folio, 1604, by *J. Stoer*, I ſaw it was, as it ſhould be, *en un poëte*, p. 251, A.— And 'tis likely that the other correct Editions read ſo too. 'Tis ſo Edit. ibid. An. 1627, p. 251, A.—

[i] Διὸ ϗ σῶμα εἶναι (τὴν ψυχὴν,) ϗ μετὰ θάνατον ἐπιμένειν, φθαρτὴν δὲ εἶναι. τὴν δὲ τῶν ὅλων, ἄφθαρτον, ἧς μέρη εἶναι τὰς ἐν τοῖς ζώοις --- Κλεάνθης μὲν οὖν πάσας ἐπιδιαμένειν μέχρι τῆς ἐκπυρώσεως· Χρύσιππος δὲ, τὰς τῶν σοφῶν μόνων. *Diog. Laert.* lib. 7, Sect. 156,— 157.— Et Ed. *Colon.* p. 534.—

[k] See the thirteenth of the Diſſertations I quoted laſt; and Rem. (H) on the Artic. of *Chryſippus*, in Mr. *Bayle*'s Dict. p. 925, Col. 1,— *&c.*

[l] Mr. *Bayle*, ibid. p. 925,— in the Text. See the ſecond Diſſertation of Mr. *Buddeus*, *de erroribus Stoicorum*, Sect. 8, 9, 10, amongſt his *Analecta Hiſt. Philoſoph.* which were publiſhed in 1706. It will not be amiſs to join the three other Diſſertations of that ingenious Man on the ſame Subject, to what I have here ſaid, on the Principles and Errours of the *Stoicks*.

[m] Thoſe Books which remain of the *Stoicks*, are full of Sentences on that Subject, carried ſometimes even to a very high Degree of Preſumption.

[n] Πρῶτος ὁ Ζήνων --- τέλος εἶπε, τὸ ὁμολογουμένως τῇ φύσει ζῆν. *Diog. Laert.* ubi ſupra, Sect. 87.— Et p. 490,— Ed. *Col. Cum ergo hoc ſit extremum, congruenter naturæ convenienterque vivere,* &c. *Cicero*, under the Name of *Cato*, the *Stoick*, *de Fin. bon. & mal.* Lib. 3, Cap. 7.—

[o] Ὅπερ ἐστὶ κατ' ἀρετὴν ζῆν. ἄγει γὰρ πρὸς ταύτην ἡμᾶς ἡ φύσις. *Diog. Laert.* ibid. Sect. 87.—

[p] Πάλιν δ' ἴσον ἐστὶ τὸ κατ' ἀρετὴν ζῆν τῷ κατ' ἐμπειρίαν τῶν φύσει συμβαινόντων ζῆν· ὥς φησι Χρύσιππος ἐν τῷ πρώτῳ περὶ τελῶν. μέρη γάρ εἰσιν αἱ ἡμέτεραι φύσεις τῆς τοῦ ὅλου. διόπερ τέλος γίνεται τὸ ἀκολούθως τῇ φύσει ζῆν. ὅπερ ἐστὶ κατ' ἀρετὴν αὑτοῦ ϗ κατὰ τὴν τῶν ὅλων, οὐδὲν ἐνεργοῦντας ὧν ἀπαγορεύειν εἴωθεν νόμος ὁ κοινὸς, ὅσπερ ἐστὶν ὁ ὀρθὸς λόγος διὰ πάντων ἐρχόμενος, ὁ αὐτὸς ὢν τῷ Διῒ καθηγεμόνι τούτῳ τῆς τῶν ὄντων διοικήσεως ὄντι. εἶναι δ' αὐτὸ τοῦτο τὴν τοῦ εὐδαίμονος ἀρετὴν, ϗ εὔροιαν βίου, ὅταν πάντα πράττηται κατὰ τὴν συμφωνίαν τοῦ παρ' ἑκάστῳ δαίμονος πρὸς τὴν τοῦ ὅλου διοικητοῦ βούλησιν. ὁ μὲν οὖν Διογένης τέλος φησὶ ῥητῶς, τὸ εὐλογιστεῖν ἐν τῇ τῶν κατὰ φύσιν ἐκλογῇ. Ἀρχέδημος δὲ, τὸ πάντα τὰ καθήκοντα ἐπιτελοῦντα ζῆν. Φύσιν δὲ Χρύσιππος μὲν ἐξακούει, ᾗ ἀκολούθως δεῖ ζῆν, τήν τε κοινὴν, ϗ ἰδίως τὴν ἀνθρωπίνην. ὁ δὲ Κλεάνθης τὴν κοινὴν μόνην ἐκδέχεται φύσιν, ᾗ ἀκολουθεῖν δεῖ, οὐκέτι δὲ ϗ τὴν ἐπὶ μέρους. *Diog. Laert.* ubi ſupra, Sect. 87,— 88,— 89. p. 490,— 491. Edit. *Col.*

[q] Φύσει τε τὸ δίκαιον εἶναι, ϗ μὴ θέσει, ὡς ϗ νόμον ϗ τὸν ὀρθὸν λόγον, καθά φησι Χρύσιππος ἐν τῷ περὶ καλοῦ. δοκεῖ δὲ αὐτοῖς μητὲ τὴν διαφωνίαν ἀφίστασθαι φιλοσοφίας· ἐπεὶ τῷ λόγῳ τούτῳ προλείψειν ὅλον τὸν βίον, ὡς ϗ Ποσειδώνιος φησὶν ἐν τοῖς προτρεπτικοῖς. *Diog. Laert.* ubi ſupra, Sect. 128,— 129. Et Ed. *Colon.* p. 515,— 516.

[r] *Mundum autem* [Stoici] *cenſent regi numine Deorum, eumque eſſe quaſi communem urbem & civitatem Hominum, & Deorum; & unumquemque noſtrûm ejus mundi eſſe partem: ex quo illud naturâ conſequi, ut communem utilitatem noſtræ anteponamus.* Cato *apud Cicer. de Fin. bon. & mal.* Lib. 3, cap. 19.—

[s] Κοινωνικὸς γὰρ φύσει ϗ πρακτικός, *Diog. Laert.* ubi ſupra, Sect. 123.— Et Ed. *Col.* p. 512.— Ὅτι γὰρ πρὸς κοινωνίαν γεγόναμεν, πάλαι δέδεικται. *Marc. Antonin.* Lib. 5, Sect. 19.— There are on this Head many beautiful Paſſages in the Reflections of that Emperor. See *Cicer. de Fin.* Lib. 3, Cap. 20,— *& ſeq.*

[t] Thus *Lucan* characterizes it, in ſpeaking of *Cato*: *Hi mores, hæc duri immota Catonis Secta fuit, ſervare modum, finemque tenere, Naturamque ſequi, patriæque impendere vitam; Nec ſibi, ſed toti genitum ſe credere mundo,* Lib. 2, v. 380, *& ſeq.*

[u] Δίκαιον δὲ, ὅτι νόμῳ ἐστὶ σύμφωνον, ϗ κοινωνίας ποιητικόν, *Diog. Laert.* ubi ſupra, Sect. 99.— p. 497,— 498, Ed. *Col. Quicquid æquum, juſtumque eſſet, id etiam honeſtum* [*cenſent Stoici*]; *viciſſimque, quicquid eſſet honeſtum, id juſtum etiam, atque æquum fore.* *Cicer. de Fin. bon. & mal.* Lib. 3, cap. 21.—

ſuch, owe to one another. A learned *Engliſhman* [x], in the Preface to his great and inſtructive Commentary on the *Reflections* of *Marcus Antoninus*, has given us a ſhort Summary of the moſt ſhining Precepts of the Morality of the *Stoicks*; taken chiefly from the Writings of that Emperour, *Epictetus*, and *Seneca*; who are the only Philoſophers of that Sect, whoſe Writings we have left. I am perſuaded, it will not be diſpleaſing to inſert it here; ſince this will ſerve to let us ſee how far the Light of Reaſon alone, tho' not exactly follow'd, and in ſome Things too a little defac'd; has carry'd thoſe among the Pagans, who have thought fit to conſult her.

The *Stoicks* then ſaid, "That we ought above all Things to honour [y] and ſerve God: "to call upon him in [z] all our Actions, to "have our [aa] Thoughts always fix'd upon him, "to [bb] raiſe up our Hearts to him, to like [cc] "his Conduct in every Thing, and to [dd] praiſe "and give Thanks to him for all Things: to "obey him alone abſolutely [ee], and without "Reſerve: to receive with a ready Submiſſion, "and with Complacency [ff], all that he is "pleas'd to ſend us; to reſt aſſur'd, that there "is nothing [gg] better, nothing [hh] more fit, nothing [ii] more advantageous, nothing [kk] more "ſeaſonable, than that which he ordains to "come to paſs, whatever it be; to follow him "without heſitating or murmuring [ll], wherever "he is pleas'd to lead us; courageouſly to defend, and with Conſtancy to guard the Poſt "he hath aſſign'd us, whatever it be; and to "[mm] ſuffer a thouſand Deaths rather than abandon it."

As to the Duties of Men towards one another, theſe Philoſophers taught, "That each "Man in particular, ought to love the reſt of "Mankind [nn] with all his Heart; to take [oo] "care of 'em, and to intereſt himſelf in every "Thing that concerns 'em; to [pp] bear with 'em; "to do 'em no [qq] Wrong, and to believe, that "all Injury and Injuſtice [rr] is a Sort of Impiety; "to [ss] exerciſe his Bounty towards 'em; to live "in ſuch a Manner, as will convince the World "of his being thoroughly perſuaded, that we "were not [tt] born for ourſelves alone; but for the "common Good of humane Society; and to do "good [uu] to all Men, according to our Strength "and Abilities: to be [xx] ſatisfy'd with the having done a good Action, and with the favourable Teſtimony of a good Conſcience "thereupon; and even, in ſome meaſure, to [yy] "forget it, inſtead of ſeeking for [zz] Witneſſes; "or propoſing to himſelf any [aaa] Recompence, "or [bbb] acting with a View to his own particular "Intereſt; to [ccc] go on from one good Action "to another, never growing weary of doing [ddd] "good; but continuing, thro' the whole Courſe "of his Life, to accumulate [eee] good Actions "upon good Actions; without ſuffering the "leaſt Interval or Vacuity to be between them; "as if in that alone conſiſted all the Advantage "and Pleaſure of Life [fff]; to think the Opportunity of doing a good Office to another, "a ſufficient Reward for the doing it; and to "eſteem himſelf oblig'd to thoſe, who ſhall "have furniſh'd him therewith; looking upon it, as a Thing [ggg] that redounds to his "own Profit and Advantage; and conſequently "not to ſeek beyond himſelf [hhh], for either "Profit, or the Praiſe of Men. As to ourſelves; we ought (ſay the *Stoicks*) to make

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[x] *Thomas Gataker*, Prælog. ** 3, p. 4.—

[y] Τί δ' ἄλλο (ἀρκεῖ) ἢ Θεοὺς μὲν σέβειν, ϗ εὐφημεῖν· ἀνθρώπους δὲ εὖ ποιεῖν. *M. Antonin.* Lib. 5, Sect. 33.— But I ſhall not report at their full Length the Quotations of *Gataker*, without making ſuch Corrections and Additions as I ſhall judge expedient. See alſo a beautiful Paſſage in *Seneca*, on the true Worſhip of God. Epiſt. 95, p. 354;— which I have cited, *Pufend.* Lib. 2, c. 4, Sect. 3, Not. 1.

[z] *Marc. Antonin.* Lib. 6, Sect. 23.—

[aa] Idem, Lib. 6, Sect. 7.—

[bb] Idem, Lib. 3, Sect. 13.—

[cc] Τοῖς Θεοῖς σύμφωνον τελέσιν, ἐπαινοῦντα ὅσα ἐκεῖνοι διανέμουσι ϗ διατετάχασιν. Idem, Lib. 6, Sect. 16.— Ἐγώ σοι ὑπὲρ ἁπάντων τούτων πρὸς τοὺς ἀνθρώπους ἀπολογήσομαι. *Arrian. Epict.* Lib. 2, c. 16, p. 217.— Ed. *Cantab.*

[dd] Εἰ γὰρ νοῦν εἴχομεν, ἄλλο τι ἔδει ἡμᾶς ποιεῖν ϗ κοινῇ ϗ ἰδίᾳ, ἢ ὑμνεῖν τὸ θεῖον, ϗ εὐφημεῖν, ϗ ἐπεξέρχεσθαι τὰς χάριτας; οὐκ ἔδει ϗ σκάπτοντας, ϗ ἀροῦντας, ϗ ἐσθίοντας, ᾄδειν τὸν ὕμνον τὸν εἰς τὸν θεόν; *Epict. Diſſert.* Lib. 1, cap. 16, p. 127.— See alſo, c. 6.— & Lib. 4, c. 4, p. 386.—

[ee] See *Epict.* Diſſert. *Arrian.* Lib. 4, cap. 12, p. 426.— And *Marc. Anton.* Lib. 4, Sect. 33.—

[ff] Ἀσπαζόμενον μὲν ἐξ ὅλης τῆς ψυχῆς τὰ συμβαίνοντα ϗ ἀπονεμόμενα πάντα. *Marc. Anton.* Lib. 3, Sect. 4.— See alſo Lib. 4, Sect. 25. & *Epict. Arrian.* Lib. 2, c. 17.— lib. 3, c. 26, p. 367.— lib. 4, c. 7, p. 401.—

[gg] Κρεῖττον γὰρ ἡγοῦμαι ὃ ὁ Θεὸς θέλει, ἢ ὃ ἐγώ. *Epict.* ibid. p. 402.—

[kk] Καὶ τότε συμφέρει, ὅτε ἐκείνη φέρει.

[hh] Τί γὰρ ἁρμοδιώτερον; *M. Anton.* lib. 7, Sect. 57.—

[ii] Συμφέρει ἑκάστῳ, ὃ φέρει ἑκάστῳ ἡ τῶν ὅλων φύσις. Idem. Lib. 10, Sect. 20.—

[ll] *Optimum eſt* - - - *Deum, quo auctore cuncta proveniunt, ſine murmuratione comitari. Malus miles eſt, qui Imperatorem gemens ſequitur. Senec.* Epiſt. 107,— p. 402,— Edit. *Gronov.* See the Prayer of *Cleanthus*, which *Seneca* there tranſlates into *Latin* Verſe, related by *Epictetus*, in his Manual, Chap. 77, or the laſt but two, Ed. *Berkel.* and in the *Diſſert. Arrian.* Lib. 2, Cap. 17, p. 221.— & 23,— p. 251.— Lib. 3, cap. 22, & 321.— & Lib. 4, cap. 4,— p. 386.—

[mm] Ἣν ἂν χώραν ϗ τάξιν ἐγχειρίσῃς, --- μυριάκις ἀποθανοῦμαι πρότερον, ἢ ταύτην ἐγκαταλείψω. *Epict. Diſſert.* Lib. 3, Cap. 24, p. 342.— *Socrates* had ſaid the ſame Thing in the Apol. of *Plato*, p. 28,— 29.— Edit. *H. Steph.* & p. 363, F.— Ed. *Lugdun.*

[nn] Οὔπω ὑπὸ καρδίας φιλεῖς τοὺς ἀνθρώπους. (*ut par eſſet*) *M. Anton.* lib. 7, Sect. 13.—

[oo] Ἀλλὰ ϗ κήδεσθαι (αὐτῶν δεῖ.) Idem, Lib. 9, Sect. 3.—

[pp] Καὶ ἀνέχεσθαι αὐτῶν. Idem, Lib. 5, Sect. 33.—

[qq] Καὶ ἀπέχεσθαι. Ibid.

[rr] Ὁ ἀδικῶν ἀσεβεῖ. Idem, Lib. 9, Cap. 1.—

[ss] See above, Lett. (*y.*)

[tt] See above, Lett. (*s*) (*t.*) And *Marc. Antonin.* Lib. 7, Sect. 55.— & Lib. 8, Sect. 7.—

[uu] Καὶ ὅτι κήδεσθαι μὲν πάντων ἀνθρώπων, κατὰ τὴν τοῦ ἀνθρώπου φύσιν ἐστίν. Idem, Lib. 3, Sect. 4, p. 17.— Edit. *Gataker.*

[xx] Ἑαυτῷ ἀρκεῖσθαι δικαιοπραγοῦντι. Idem, Lib. 7, Sect. 28.—

[yy] *Se dediſſe, dum dat, oblitus eſt. Senec. de Benef.* Lib. 2, cap. 6.— See *Marc. Antonin.* Lib. 5, Sect. 6.— We find the like Expreſſion in the Goſpel, *Matt.* vi. 3.

[zz] *Ut in omnibus factis re, non teſte, moveamur. Cicero de fin.* Lib. 2, cap. 16.— The Paſſage of *M. Ant.* which *Gataker* cites here, taken from Lib. 3, Sect. 5,— has another Senſe, according to which he himſelf explains it in his Commentary, p. 101, col. 1, lin. 53. See rather Book 9, Sect. 29,— with the Note of that Commentator, p. 340, col. 1. lin. 14, & d.

[aaa] See *Plutarch de amore prolis,* Tom. 2, p. 495, A.— Ed. *Francofurt.*

[bbb] See *M. Antonin.* Lib. 9, in fine, p. 93.—

[ccc] Ἑνὶ τέρπου ϗ προσαναπαύου, τῷ ἀπὸ πράξεως κοινωνικῆς μεταβαίνειν ἐπὶ πρᾶξιν κοινωνικὴν, σὺν μνήμῃ Θεοῦ. Idem. Lib. 6, Sect. 7,— & Lib. 5, Sect. 6.—

[ddd] Μὴ οὖν κάμνε ὠφελούμενος, ἐν ᾧ ὠφελεῖς. Idem, Lib. 7, Sect. 74.—

[eee] Τί λοιπὸν, ἢ ἀπολαύειν τοῦ ζῆν, συνάπτοντα ἄλλο ἐπ' ἄλλῳ ἀγαθὸν, ὥστε μηδὲ τὸ βραχύτατον διάστημα ἀπολείπειν, Idem, Lib. 12, Sect. 29.— And ſee alſo Lib. 9, Sect. 23.—

[fff] See above, Lett. *bbb*, & *ddd*.

[ggg] See *M. Antonin.* Lib. 9, in fine, p. 93.—

[hhh] Idem, Lib. 7, Sect. 73.—

“the [iii] Soul our firſt and principal Care; to honour it, as the moſt excellent Part of us; to have nothing ſo much at Heart [kkk], or in ſo great Eſteem, as Virtue and Honeſty; never to ſuffer ourſelves to ſwerve from our Duty [lll], as far as we can attain to the Knowledge of it; either through the Deſire of Life, much leſs of any other Thing; [mmm] or through the Fear and Dread of Torments or Death, much leſs of any Damage or Loſs whatſoever.”

This is the beautiful Side of the Morality of the Stoicks; and it muſt be further acknowledg'd, to their Praiſe, that they ſtopp'd not at general Notions; and indeterminate unapply'd Maxims: But on the contrary, to judge of the Matter only by thoſe few Writings, we have left us by the three Perſons above mention'd, with the Fragments of others, and the Writings of thoſe who have reaſon'd upon their Principles; it may be truly affirm'd, that of all the Philoſophers of Antiquity, they are the Men, who have gone the fartheſt into the Particulars of Morality; and have the beſt apply'd its general Precepts to the ſeveral States of Life; and the different Exigences of humane Affairs. *Ariſto* of *Chios*, who thought it ſufficient to eſtabliſh [nnn] in general the Nature of true Wiſdom; and to ſhew wherein the ſovereign Happineſs of Man conſiſts; without entering into any particular Explication of the Duties between Husbands and Wives; Parents and Children; Maſters and Servants: This Philoſopher, I ſay, who departed a little from the Sentiments of his Maſter *Zeno*, form'd indeed a kind of Sect, but it did not laſt long: And *Seneca* has prov'd againſt him, that particular Precepts, as well as Maxims, or moral Reflections couch'd in ſhort lively Sentences; are extremely uſeful. *Ariſto* ſaid, it was the proper Buſineſs of Pedagogues, and [ooo] Nurſes, and therefore ought to be left wholly to them. *A fine Reaſon indeed*, anſwers [ppp] *Seneca: as if the Sage was not the Pedagogue of Mankind!* “*Chryſippus* even condeſcended to give ſhort [qqq] Precepts about the Education of Children: which as it is a Thing in itſelf of no ſmall Importance to Mankind; ſo this Condeſcenſion of *Chryſippus* cannot but deſerve Commendation.” But having done Juſtice to the *Stoicks*, as to what we find laudable; let us now ſee what there is to be found in that Sect which may be juſtly eſteem'd blameable. I have nothing to ſay, as to the Vanity, Hypocriſy, and bad Lives, that ſeveral particular Philoſophers of that Sect have been charg'd with; Theſe are perſonal Faults, and extend not to their Doctrines: and I ſhall here, as I do every where elſe, only conſider the Opinions, as they are purely and ſimply in themſelves. The Idea then, which the *Stoicks* form'd of Virtue, how magnificent ſoever it may at firſt appear; is, in ſome Reſpects, if rightly conſider'd, not altogether juſt, or compleat; not intirely founded on its true Principles; nor exempt from Errour. Virtue, ſay they, is the ſovereign Good; nor is there any other Good beſides Virtue: The Sage is ſtill [rrr] happy, tho' in the Midſt of the moſt cruel Torments. But, beſides that Virtue is only the [sss] efficient Cauſe of Happineſs, and not Happineſs itſelf; they laid no Foundation, in the Hopes of another Life, for the Recompence and Conſolation of Virtue: nor indeed could they, as not properly acknowledging the Immortality of the Soul; or at leaſt [ttt] ſpeaking of it but in a very confus'd and ambiguous Manner. Inſomuch, that *Brutus*, who was a *Stoick*, ſeems [uuu] not to have been ſo much out, as ſome would imagine, in thoſe dying Words of his [xxx]: *Wretched Virtue, how have I been deluded in thy Service! I thought thee a real Good, and as ſuch have I always devoted myſelf to thee; but thou, alas! art only an empty Name, a Fantom, an abject Slave expos'd to the Inſults of Fortune.* And in truth, if the Idea of Rewards and Puniſhments in another Life, be not join'd to the Practice of Virtue; “both Virtue and Innocence may be rank'd [yyy] in the Number of thoſe Things, on which *Solomon* has pronounc'd his definitive Sentence: *Vanity of Vanities, all is Vanity!* To rely upon Innocence, would be to lean on a broken Reed; which will not fail to pierce the Hand, that reſts upon it. *God*, as he is the Diſpoſer of Events, the grand Almoner both of good and bad Succeſs; has here on Earth, made Virtue and Innocence no leſs ſubject to his general Laws; than Health and Riches.” Beſides, to ſay that a Man who ſuffers for a good Cauſe, is really happy, altho' he hath no Reward to expect after Death; is to advance a Propoſition equally contrary to right Reaſon, and to every Sentiment of Nature. But this is not the only Thing on which the *Stoicks* form'd extravagant and chimerical Ideas. Every one knows, what [zzz] a Jeſt the World has made of their

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[iii] Τῶν ἐν σοὶ τὸ κράτιστον τίμα. Idem. Lib. 5, Sect. 21.— See Lib. 2, Sect. 13.—

[kkk] Idem, Lib. 3, Sect. 6.— Lib. 6, Sect. 16.— [lll] Idem, Lib. 6, Sect. 22.— Lib. 7, Sect. 15.— Lib. 8, Sect. 5.—

[mmm] Idem, Lib. 7, Sect. 44. *ex Platon. Apol.* See above, Lett. *(mm.)*

[nnn] Ariſto Chius --- *Moralem, quam ſolam reliquerat, circumcidit. Nam eum locum, qui monitiones continet, ſuſtulit; & Pædagogi eſſe dixit, non Philoſophi: tanquam quidquam aliud ſit ſapiens, quam humani generis Pædagogus!* Senec. Epiſt. 89, p. 296.— Ed. *Gronov. Eam partem Philoſophiæ, quæ dat propria cuique perſonæ præcepta, nec in univerſum componit hominem, ſed marito ſuadet, quomodo ſe gerat adverſus uxorem; patri, quomodo educet liberos; domino, quomodo ſervos regat; --- Ariſto Stoicus, --- levem exiſtimat, & quæ non deſcendat in pectus uſque: at illam, non habentem præcepta, plurimum ait proficere; ipſaque decreta Philoſophiæ, conſtitutionem eſſe ſummi boni; quam qui bene intellexit & didicit, quid in quaque re faciendum ſit, ſibi ipſe præcepit.* Idem, Epiſt. 94,— at the Beginning, p. 327.— Ed. *Gronov.*

[ooo] See *Sextus Empiricus, adv. Mathem.* Lib. 7, apud *Menag.* ad *Diog. Laert.* Sect. 160, p. 331, Col. 1.—

[ppp] Ubi ſupra, Epiſt. 89, p. 296,— Ed. *Gronov.*

[qqq] See Mr. *Bayle*'s Dictionary, Artic. *Chryſipp.* Rem. (R,—) p. 929, Col. 2.— & *Quintil. Inſt. Orat.* lib. 1, c. 1, p. 6.— c. 3, p. 20.— c. 10, p. 61.— c. 11, p. 66,— Edit. *Oxon.*

[rrr] See *Cicer. Paradox* 1, 2. *Diog. Laert.* Sect. 128.— and the Books of *Cicero, de Fin. bon. & mal.* or *Quæſt. Tuſcul.*

[sss] See what has been ſaid before, concerning the Principles of the Morality of *Epicurus*, Sect. 26, p. 69, col. 1.—

[ttt] See *Gataker* on *Marc. Antonin.* Lib. 4, Sect. 21,— p. 139, col. 2, lin. 22, & *ſeq.*

[uuu] Dict. of Mr. *Bayle*, Artic. *Brutus*, Rem. (B), p. 716, col. 1.—

[xxx] Ibid. Rem. (B—). See *Plutarch*, in his Life of *Brutus*. And *de Superſtitione*, init. And *Dio.* lib. 47, ſub fin. *Plutarch.* Tom. 1, 1008, B,— & d. Tom. 2, p. 165, A,— Edit. *Francof. Dio. Caſ.* p. 406, B.— Ed. *H. Steph.*

[yyy] Mr. *Bayle*, ubi ſupra, Rem. (C,) p. 716, Col. 2.—

[zzz] See *Horace*, Lib. 1, Sat. 3, Verſ. 115, & *ſeq. Cicer. Orat. pro Murena*, cap. 29,— & *ſeq.*

Sage; [1] whom, on the one hand, they deveſted of even the moſt innocent and moderate Paſſions, nay, in a Manner, of Humanity itſelf; whilſt on the other, they made him to vie Happineſs with the very Gods themſelves. They held all Sins to be [2] equal. They ſaid, that, Virtue excepted, all other Things were indifferent [3]; that is to ſay, neither good nor bad; but of theſe *indifferent Things*, ſome were *eligible*, and others *rejectable*. *Mr.* and *Madam Dacier* have undertaken the Apology of the true *Stoicks*, on all theſe Heads. [4] "If theſe Philoſophers, ſay they, have mix'd ſomething of Auſterity with the Sentiments of their Maſter *Socrates*; 'twas not ſo much the Effect of a Savage and moroſe Diſpoſition; but rather an Expedient, which Prudence ſuggeſted to them: for being well acquainted with the natural Imbecillity, and Supineneſs of Mankind; they have thought fit, in preſcribing Rules of Duty, to preſs them to a greater Degree of Perfection, than they are capable of; that ſo by exerting their utmoſt Endeavours to come up to their Precepts, they might at leaſt come to fix in a State of Mediocrity; as Trees which ſtand bent one Way are ſet right by a contrary Flexure. Thus when *Zeno*, for Example, ſaid, that all Crimes were equal; his Intent was to reclaim Men from an unhappy Opinion, which they are but too apt to give into; that provided they keep clear of Crimes of the firſt Magnitude, they are not oblig'd to be ſo much upon their Guard againſt the leſſer or more venal Tranſgreſſions; now his Deſign was to perſuade 'em, that the leaſt Sin, if neglected, becomes incurable; and that in the Eye of *God*, who is the very Eſſence of Purity; there can be nothing found in us, that is ſinful, but what deſerves Death; unleſs we diſarm his Juſtice by a due Atonement and Repentance: But then comes a *Chryſippus*, who groſly miſtaking this Precept; maintains, that there is no Difference between the Stealing of Cabbages out of a Garden, and the committing of Sacrilege; between the cutting one's Father's Throat, and the killing of a Capon; which two Actions he will have to deſerve one and the ſame Puniſhment: This indeed is ſo far from reſtraining; that it rather encourages and prompts Men to the Commiſſion of the greateſt Enormities. When *Zeno* ſaid, that the Sage ought to be void of Compaſſion; his Aim was to ſhew, that the Sage does not confine his Beneficence to thoſe Succours alone, which Pity and Compaſſion extort from him; but thinks himſelf oblig'd to aid and aſſiſt his Neighbour, though he be under no ſuch Emotion: Though a *Chryſippus* ſhall take Occaſion from hence, to break aſunder all the Bands of Society; and trample under Foot that merciful Diſpoſition, which is one of the moſt eſſential Characters of the Deity. When *Zeno* ſaid, that the Sage relies on himſelf alone for all Things; he only meant to ſhew, that our true and real Happineſs could not depend on the Actions of other Men; and to encounter the ſupine Lazineſs of thoſe, who, on Pretence of committing themſelves to Providence, expect every Thing immediately from *God*; without ever ſeeking to obtain his Favour, by their own honeſt Endeavours and Induſtry. Beſides, as he taught, that the Soul was a Part of *God*, nay, *God* himſelf; ſo this Precept, that Men ought to rely on themſelves for all Things, was in Effect the ſame as to ſay; that we ought in all Things to rely on the Providence of *God*, that governs us. But then comes a Diſciple of his, full of Ignorance and Pride; and intirely perverts this Precept, by drawing from it this pernicious Conſequence; That the Sage is above even God himſelf; and is, independently of that ſovereign Being who created him, the ſole Author of his own Happineſs. Of almoſt the ſame Nature are all thoſe other Paſſages, which have at any Time been made Uſe of to bring the Doctrine of the *Stoicks* under Odium and Diſcredit." Not to examine, whether theſe Expoſitions are as well grounded, [5] as they are ingenious; or whether they do not rather ſavour of a Commentator, extremely prepoſſeſs'd in Favour of his Author, and in general of all Antiquity; and whether too they are not worthy of thoſe, who, to inhance the Merit of the antients, and keep up their Characters; make 'em to be as enlighten'd as the Prophets and Apoſtles; find out very great Beauties in the moſt inſipid and ridiculous Paſſages; and wreſt the Senſe of the cleareſt Expreſſions, even to the expounding figuratively the *Metempſychoſis* of *Pythagoras:* I ſhall content my ſelf with taking Notice of two Things, which to me ſeem inconteſtable: The one is, that rigid and over-ſtrain'd Maxims are not at all proper to inſpire true Notions of Virtue; and ſo far is the demanding more of Men than their juſt Duties, from being the proper Method to induce 'em to a due Performance thereof; that Experience plainly ſhews us, that to require too much, is the ready Way to obtain nothing at all. The other is, that 'tis the Part of a true Philoſopher to reject, eſpecially

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[1] *Cúmque perturbationem animi illi* [*ſuperiores Philoſophi*] *ex homine non tollerent, naturâque & condoleſcere, et concupiſcere, et extimeſcere, et efferri latitiâ dicerent; ſed ea contraherent, in anguſtumque deducerent: hic* [Zeno] *omnibus his, quaſi morbis, voluit carere Sapientem.* Cicer. Academ. Quæſt. Lib. 1, Cap. 10.— See *Diog. Laert.* Lib. 7. Sect. 122,— 123.— Et p. 512,— *& ſeq.* Ed. Colon.

[2] Ἀρέσκει τε ἀυτοῖς, ἴσα ἡγεῖσθαι τὰ ἁμαρτήματα. *Diog. Laert.* ibid. Sect. 120.— Et Ed. Colon. p. 510. — See *Cicer.* Acad. Quæſt. Lib. 4, Cap. 43,— 44.— *& de Finib.* Lib. 3, Cap. 14.—

[3] *Media illa, inquit, inter quæ nihil intereſt, tamen ejuſmodi ſunt, ut eorum alia eligenda ſint, alia rejicienda, alia omnino negligenda. ---- Iſta ---- valere, locupletem eſſe, non dolere, bona non dico, ſed dicam Græce,* προηγμένα, *Latine autem* producta: *ſed* præpoſita *aut* præcipua *malo.---- Illa autem, egeſtatem, morbum, dolorem, non appello mala, ſed, ſi libet, rejectanea. Itaque illa non dico me expetere, ſed legere; non optare, ſed ſumere: contraria autem non fugere, ſed quaſi ſecernere. Cicer. de Fin.* Lib. 4. Cap. 25.— 26.— See alſo, Lib. 3. Cap. 17.— *& Diog. Laert. ubi ſuprà,* Sect. 102,— *& ſeq.*

[4] Preface to the Tranſlation of the Reflections of *Marc. Antonin,* * A 3, p. 2.—

[5] The Reaſons, for Example, that *Cicero* brings to eſtabliſh the Equality of criminal, as well as of good Actions, Paradox. 3,

leave

pecially when he is treating of Morality, all ſuch Maxims as are ambiguous, or ſubject to Miſconſtruction. So that, even ſuppoſing that theſe Maxims in Queſtion are capable of the Mitigations contended for by thoſe, who are ſo bent upon juſtifying the Antients, what 'ere it coſt; yet we cannot fairly avoid cenſuring the Paradoxes of the *Stoicks*; together with their vain Subtleties, [6] their conciſe and rough Stile, their Affectation of new coin'd Words, their frequent Logomachies, the Contradictions [7] charg'd upon 'em, and their Opinion as to obſcene Terms; which [8] they inſiſt, may be made uſe of without any Manner of Scruple. Nor is this laſt Particular to be much wonder'd at in Men who contend, as the *Stoicks* do, that all Women [9] ought to be had in common among the Sages. There were alſo ſome among them, who maintain'd, that [10] the *Cynicks* Way of living was *the ſhorteſt Cut to Virtue. Chryſippus* [11] taught, that there was no Harm in committing Inceſt with one's Father, Mother, Son, Daughter, [12] Brother, or Siſter; or in feeding upon human Carcaſſes. What the [13] *Stoicks* ſaid about the Love of beautiful Boys; is at leaſt liable to very odd Conſtructions. In fine, theſe Philoſophers believ'd, that their Sage might abſolutely diſpoſe [14] of his own Life, and put an End to it whenever he thought fit; and this Opinion, as falſe and dangerous as it is, was, as is univerſally agreed, the Senſe of the whole Sect.

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leave us little Room to doubt, but that the *Stoicks* underſtood this according to the Letter. See the Reaſon given by *Diog. Laert.* lib. 7, c. 120.— And p. 510,— Edit. Col. and reported by Mr. *Pufendorf*, Lib. 1, Cap. 8, Sect. 1, n. 1.

[6] *Stoicorum adſtrictior eſt oratio, aliquandoque contractior, quam aures populi requirunt.* *Cicer. in Bruto*, Cap. 31.— *Quamquam ex omnibus Philoſophis Stoici plurima novaverunt. Zeno quoque eorum princeps, non tam rerum inventor fuit, quam novorum verborum. Idem, de Finib.* Lib. 3. Cap. 2.— *Nova verba fingunt; deſerunt uſitata: ---- pungunt, quaſi aculeis, interrogatiunculis anguſtis: quibus etiam qui adſentiuntur, nihil commutantur animo, et iidem abeunt, qui venerant: res enim fortaſſe vera, certè graves, non ita tractantur, ut debent, ſed aliquanto minutius.* Ibid. Lib. 4, Cap. 3.—

[7] See *Plutarch*, in his Treatiſes, *de repugnantiis Stoicorum*, and, *de communibus notitiis contra Stoicos.*

[8] Ὁ σοφὸς εὐθυῤῥήμων ἔσῃ. *Cicer. Ep. ad Famil.* lib. 9, Ep. 22.— See the whole Letter.

[9] Ἀρέσκει δὲ αὐτοῖς, καὶ κοινὰς εἶναι τὰς γυναῖκας δεῖν παρὰ τοῖς σοφοῖς. *Diog. Laert.* §. 131,— lib. 7. p. 517.— Ed. Colon.

[10] Εἶναι γὰρ τὸν Κυνισμὸν σύντομον ἐπ' ἀρετὴν ὁδόν. Id. §. 121.— p. 511,— Ed. Colon.

[11] Ἐν δὲ τῷ περὶ πολιτείας, καὶ μητράσι λέγει συνέρχεσθαι, καὶ θυγατράσι, καὶ υἱοῖς ---- καὶ τοὺς ἀποθανόντας κατεσθίειν κελεύων: *Diog. Laert.* ibid. §. 188.— p. 556.— Ed. Colon.

[12] See Sext. Empir. Pyrrh. hypoth. Lib. 3, c. 24, p. 153, A.— Et Ed. Fabric. p. 178.—

[13] See *Diog. Laert.* §. 129.— p. 516,— Ed. Colon. & *Cic. Tuſc. Quaeſt.* Lib. 4, c. 33,— 34.—

[14] Εὐλόγως τέ φασιν ἐξάξειν ἑαυτὸν τοῦ βίου τὸν σοφὸν, καὶ ὑπὲρ πατρίδος καὶ ὑπὲρ φίλων. κἂν ἐν σκληροτέρᾳ γένηται ἀλγηδόνι, ἢ πηρώσεσιν, ἢ νόσοις ἀνιάτοις. *Diog. Laert ubi ſuprà*, §. 130.— Ed. Colon. p. 517.— See *Cic. de Finib.* Lib. 3, c. 18.— & M. Antonin. Lib. 3, §. 1.— *ibique Gataker*, p. 83, col. 1, lin. 53, & d.

SECT. XXVIII.

AFTER *Epicurus* and *Zeno*, we find not, among the ſucceeding Philoſophers, any, who ſet up new Schemes of Morality. Each Man betook himſelf to that Sect, where he found what moſt ſuited his own private Sentiments. The *Romans*, who had their Philoſophy, as well as the reſt of the Sciences, from the *Greeks*; took this Courſe. In the Reign of *Auguſtus*, a Philoſopher of *Alexandria*, called [a] *Potamo*, introduc'd a Manner of Philoſophizing, which they called *Eclectick*; becauſe it conſiſted in collecting from all the Tenents of the preceding Philoſophers, ſuch as appear'd moſt reaſonable; out of which they form'd, each Man his own Syſtem of Philoſophy. *Cicero*, who, as I ſaid before, was a moderate *Academick*; does for the moſt Part purſue this Method in his Book of *Offices*; [b] where he is ſometimes a *Stoick*; ſometimes a *Peripatetick*. That excellent Work, ſo well known to the World, is without Diſpute the beſt Treatiſe of Morality, that all Antiquity has furniſh'd us with; the moſt regular, the moſt methodical; and what does the neareſt of any come up to a full and exact Syſtem of Morality. I ſay, *what comes the neareſt:* For he would be much out, who ſhould imagine it to contain a [c] *Compleat Body of Morality*; ſuch as *deſcends to the utmoſt Degree of Particularity*; and where every Thing is digeſted into the very beſt Order, and Method poſſible. Many Things are there wanting, which naturally come within the Plan of that Science; and, for the Generality, the Topicks he there goes upon, are but very ſuperficially handled; as might be eaſily made appear. We there alſo find ſome [d] Deciſions too rigid; or ſuch as plainly ſhew, that *Cicero* was not thoroughly acquainted with the true Principles, on which the Reſolution of ſome certain Caſes depends. 'Tis great Pity his Treatiſe *of Government* is loſt; of which the few Fragments remaining give us a very noble Idea. His Diſcourſe of *Laws*, which we yet have, though imperfect; contains many excellent Things. *Cicero* there particularly applies himſelf to prove at large, that there is a natural Law, independent of any [e] humane Inſtitution; and which derives its obligatory Force from the Will of *God*. This he proves [f] to be the Foundation of all juſt and reaſonable Laws. He ſhews the Uſefulneſs of Religion [g] in civil Societies. He follows the grand Principle of the *Stoicks*, that Man is born for Society; and from thence deduces all the reciprocal [h] Duties of Mankind. And though he acknowledges it neceſſary to admit all this, for one who intends to build upon well-choſen and well-connected Principles [i]; "yet he expects not that all the World will approve of them; he promiſes himſelf only the Approbation of the antient *Platoniſts*; and that of the *Peripateticks* and *Stoicks*. As to the *Epicureans*, he is under no Concern about them; they profeſſedly retir'd from all *political* Affairs; he therefore leaves them to philoſophize, in this their Retreat, as they ſhould think fit: But for *Arceſilas* and *Carneades*, he asks [k] Quarter of them; and fears, that, ſhould they come to point their Batteries upon him, they would ſoon make practicable Breaches in this his ſuppos'd impregnable Fortreſs: He perceives not in himſelf Courage enough to repulſe 'em, wiſhes therefore not to be expos'd to their Indignation; is deſirous to appeaſe 'em, and prevent all Acts of Hoſtility." He has been, and not without Reaſon too, charg'd with not adhering ſtedfaſtly enough to his Principles; and with being too much an [l] occaſional Reaſoner. I cannot forbear adding here *Montagne*'s Opinion of this great Orator's Way of Writing. As to *Cicero*, ſays he [m], *Thoſe of his Works that are moſt uſeful to my Deſign, are his philoſophical Tracts; particularly the moral: But, to ſpeak my Mind freely --- his particular Way of Writing, with all others of the ſame kind, is to me very tedious. For his Prefaces, Definitions, Diviſions, and Etymologies take up the greateſt Part of his Work. Whatever there is of Life and Marrow, 'tis ſmother'd and loſt in the Tediouſneſs of the Preparation. When I have ſpent an Hour in reading him, --- and come to recollect what I have thence extracted of Juice and Subſtance; for the moſt Part I find nothing but Wind: For he is not yet come to his main Arguments; or yet ready to produce the ſtrong Reaſons, which are to do the Buſineſs, and clear the Point, I want to be reſolv'd in. To me, who only deſire to become more diſcreet, not more learned or eloquent; theſe* Logical *and* Ariſtotelian *Rules and Ordinances are of no Uſe at all. I would have a Man begin firſt with that, which is of the laſt Conſequence. I know well enough what* Death *and* Pleaſure *are, there is no Occaſion to ſtand anatomizing of 'em to me. I look for good and ſolid Reaſons at firſt Daſh; ſuch as will inſtruct me how to ſtand the Shock of 'em, and make a brave Defence. Your grammatical Niceties, fine-ſpun Argumentation, and delicate Turns, are nothing to this Purpoſe: I am for Diſcourſes that give their firſt Charge into the very Heart of Doubt; his only beat about the Buſh. They are proper enough for the Schools, the Bar, or the Pulpit; where we have Leiſure to nod, and may awake a Quarter of an Hour after, Time enough to find again the Thread of the Diſcourſe. It is very requiſite to talk after this Manner to Judges, we have a Mind to gain, right or wrong, to favour our Cauſe; to Children and common People, where every Thing is to be urg'd, in order to ſee what will take with them. I want not any one to make it his Buſineſs to ſtir up my Attention, and cry out to me fifty Times,* O yes, *as our Cryers, and Heralds do. The* Romans *in their religious Exerciſes began with,* Hoc age: *as we in ours do with,* Surſum Corda; *which are ſo many Words loſt to me. I come thither already fully prepar'd from my Chamber; --- inſtead of whetting my Appetite by theſe Preparatives and Preludes, they quite ſpoil my Stomach. Would but the Licentiouſneſs of the Times excuſe the ſacrilegious Boldneſs; I ſhould even cenſure the* Dialogiſms *of* Plato *himſelf, as languid, and cumberſome to his Matter; and regret the great Loſs of Time, ſpent upon long and needleſs Preliminaries and Interlocutions; by one who had ſo many, and ſo much better Things to ſay.* My Subject now naturally engages me to give the Reader here, what *Montagne* ſays * immediately before the laſt-cited Paſſage. "*Plutarch*, ſays he, and *Seneca* have both this great Accommodation for one of my Humour; that the Knowledge, I ſearch for, is there

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[a] Ἔτι δὲ πρὸ ὀλίγου καὶ ἐκλεκτική τις αἵρεσις εἰσήχθη ὑπὸ Ποτάμωνος τοῦ Ἀλεξανδρέως, ἐκλεξαμένου τὰ ἀρέσαντα ἐξ ἑκάστης τῶν αἱρέσεων. *Diog. Laert. Prooem.* Sect. 21,— p. 14.— See *Menage* thereupon p. 11, col. 2.—

[b] *Sed tamen noſtra leges, non multum a Peripateticis diſſidentia; quoniam utrumque, et Stoici, et Peripatetici, eſſe volumus. De Offic.* Lib. 1. Cap. 1.— v. Græv. i. l. p. 4, col. 1,— & d. 'Tis thus we ought to read that Paſſage, partly according to the Conjecture of *Gronovius* the Father, and *Grævius*; and partly according to Mr. *Le Clerc*; See *Ars Critica*, Part. 3, Sect. 1, Cap. 16, Num. 22, Tom. 2, p. 286.— Edit. 2d.

[c] This is what his laſt Tranſlator into *French*, in his Preface, pretends to aſſert.

[d] You may ſee Examples enough, both in the Text, and Notes of Mr. *Barbeyrac*'s Tranſlation of *Pufendorf*. See there the Index of Authors.

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[e] *Nec, ſi regnante Tarquinio nulla erat Romæ ſcripta lex de ſtupris; idcirco non contra illam Legem ſempiternam* Sextus Tarquinius *vim Lucretiæ, Tricipitini filiæ, adtulit. Erat enim ratio profecta à rerum naturâ, & ad rectè faciendum impellens; & a delicto avocans: quæ non tum denique incipit Lex eſſe, cum ſcripta eſt; ſed tum, cum orta eſt. Orta autem ſimul eſt cum mente divina. Quam ob rem Lex vera, atque princeps, apta ad jubendum; & ad vetandum; Ratio eſt recta ſummi Jovis,* Lib. 2, cap 4.—

[f] *Ergo eſt Lex, juſtorum injuſtorumque diſtinctio, ad illam antiquiſſimam, & rerum omnium principem expreſſa naturam; ad quam Leges Hominum diriguntur, quæ ſupplicio improbos adficiunt; defendunt ac tuentur bonos.* Ibid. cap. 5.—

[g] Ibid. Cap. 7.— See the Paſſage cited by Mr. *Barbeyrac, Pufend.* Lib. 2, Cap. 4, Sect. 3, Note 4, p. 222, Col. 1.—

[h] *Atqui, ſi natura confirmatura jus non erit, virtutes omnes tollantur. Ubi enim Liberalitas, ubi Patriæ Caritas, ubi Pietas; ubi aut benè merendi de altero, aut referendæ gratiæ voluntas poterit exiſtere? nam hæc naſcuntur ex eo, quod natura propenſi ſumus ad diligendos homines: quod fundamentum juris eſt,* Ibid. Lib. 1, Cap. 15.—

[i] Dict. of Mr. *Bayle*, Artic. *Carneades*, Rem. (H.)

[k] *Perturbatricem autem harum omnium rerum Academiam, hanc ab* Arceſila *&* Carneade *recentem; exoremus, ut ſileat. Nam ſi invaſerit in hæc, quæ ſatis ſcitè nobis inſtructa, & compoſita videntur; nimias edet ruinas: quam quidem ego placare cupio; ſubmovere non audeo.* Lib. 1, Cap. 13.—

[l] See the *Quæſt. Hieronym.* of Mr. *Le Clerc*, p. 252, *& ſeq.*

[m] Eſſays, Lib. 2, Cap. 10, p. 295, 296. And p. 164,— Ed. ultim.

* Pag. 162,— *&c.*

“deliver'd out in Parcels. --- Such are the *Opuſcula* of *Plutarch*, and the Epiſtles of *Seneca*; which are the moſt beautiful Part of their Writings. -- Theſe Authors, as they do for the moſt Part concur, in all their uſeful and true Notions; ſo they both happen'd to flouriſh about the ſame Age; were both Tutors to two [n] *Roman* Emperours; both Foreigners, both rich, both great Men: Their Doctrine is the very Cream of Philoſophy; and deliver'd after a plain and pertinent Manner. *Plutarch* is more uniform and conſtant: *Seneca* more various and wavering. The laſt toils, ſets himſelf, and bends his whole Force, to fortify Virtue againſt Frailty, Fear, and vicious Inclinations: The other ſeems more to ſlight their Power; diſdaining either to mend his Pace, or ſtand upon his Guard. *Plutarch's* Sentiments [o] are *Platonick*, gentle, mild, and accommodated to civil Society: The other's are *Stoical* and *Epicurean*, more remote from common Practice; but, in my Opinion, better fitted for private Uſe, and more determin'd. *Seneca* ſeems to lean a little to the Tyranny of the Emperours of his Time. --- *Plutarch* every where ſhews a Spirit of Freedom. *Seneca* abounds with ſurpriſing Turns, and Flaſhes of Wit; *Plutarch* with Things. The firſt warms and animates; the latter gives more Content, and fuller Satisfaction. The one guides us, the other puſhes us on.-- There are, (ſays the ſame Author in another Place [p]) in *Plutarch*, abundance of Diſcourſes, well worth our Peruſal, where he is even prolix: --- but then there are a thouſand others, where he but glances upon Matters: Where he only points with his Finger to direct us which Way we may go if we will; and contents himſelf ſometimes with barely touching upon what is moſt material. Theſe then are to be remov'd out of their Obſcurity into a clearer Light.” Mr. and Madam *Dacier* confeſs [q], *That in the Morals of* Plutarch, *there is ſcarce any Thing that is thoroughly diſcuſs'd, and fully made out; and that all the Matters there treated, a few only excepted, are but very ſuperficially handled.* As for *Seneca*, his Treatiſe *de Beneficiis* is, in my Opinion, the very beſt Piece he has; but there too he obſerves as little Order, and Method, as in the reſt of his Writings: a Defect, which is, more or leſs, to be found in almoſt all the Authors of Antiquity. 'Tis own'd [r], *That he has join'd to the Virtues of the firſt* Stoicks, *all the Pride and Haughtineſs of their Followers:* And indeed, we may eaſily diſcover [s], *that this haughty Stoick never ſpeaks of Virtue without Vanity.* Notwithſtanding all which, *he may be read with infinite Advantage* [t], *if we do but join to his Precepts two Things, which are there wanting: The one is, that God has commanded us to apply ourſelves to Virtue; the other is, that he will reward with eternal Happineſs all ſuch as ſhall have faithfully adher'd thereto.* The ſame is to be ſaid too of *Epictetus*, and *Marcus Antoninus*. We have of the firſt, beſides his *Manual*, ſo well known to the World; ſome Diſcourſes that have been preſerv'd by *Arrian*. That Philoſopher, in the Opinion of Monſieur and Madam *Dacier* [u], *is more unaffected, ſolid, and pure than* Seneca: *But is without any great and noble Views, is wanting in Extent of Genius, and Elevation of Thought.* Antoninus *has all theſe Qualifications, with a Soul more vaſt and capacious than his Empire. He contents not himſelf with the bare receiving, and ſolidly explaining the Precepts of his Maſters; but frequently corrects, and gives 'em new Strength, either by the ingenious and natural Manner in which he has propos'd 'em; or by the new Diſcoveries with which he has improv'd 'em.* But however, it muſt be own'd, that he retains ſo much of the ill Principles, and Maxims of the *Stoicks*; as to require a Reader of no ſmall Caution and Judgment. Beſides, *the Obſcurity and Hardneſs of Stile, common to all of that Sect* [x]; *is ſtill greater in the Reflections of that Emperour; who often explains himſelf but by Halves; becauſe he wrote only for himſelf.* Nor would any Thing leſs, than the Ability of his laſt Tranſlators, have ſerv'd to make that Work be read with Pleaſure in our Language.

The *Roman Lawyers*, of whom the greateſt Part were *Stoicks*, contributed very much to the perfecting that Part of Morality, which may be call'd *Natural Juriſprudence* [y]. The Study of the Law having under the Emperours, become a principal Step to Preferment; the Men of the greateſt Genius, and Parts among the *Romans*, continu'd to apply themſelves to this Study, for near the Space of two Centuries. It were to be wiſh'd, that we had had the Writings of thoſe famous Lawyers intire; they would no doubt have afforded us very great Light. But the Emperour *Juſtinian*, having been pleas'd to abridge

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[n] It is believ'd (ſay Mr. and Madam *Dacier*, in their Preface to the Tranſlation of ſome of *Plutarch's* Lives,) that he was Tutor to *Trajan*; but this is founded only on a *Latin* Letter, which manifeſtly appears to have been forg'd: *Trajan* was as old as he. See *Vies de Plutarque Traduit. par Dacier*, Tom. 8, p. 260,— Edit. *Par.*

[o] He had ſtudied under the Philoſopher *Ammonius*, at *Delphos*.

[p] Lib. 1, Cap. 25, pag. 98. And Ed. ult. p. 267.—

[q] In their Preface. See *Vies de Plutar. Dac.* Tom. 1, Pref. p. 41.—

[r] The ſame, in their Preface to *Marc. Antonin.* ✶ A 7, pag. 2.— Edit. *Haye*, 1691. See what *Gataker* ſays in his ✶✶✶ 3, p. 2.—

[s] Reflections on good and bad Fortune in Lotteries, by Mr. *Le Clerc*, p. 229.

[t] Ibid.

[u] *Ubi ſupra*, Pref. to *Marc. Antonin.* ✶ A 7, p. 10.—

[x] Ibid.

[y] See what *Pufendorf* ſays in his *Specimen Controverſ.* &c. Chap. 1, Sect. 3.

bridge the *Roman* Laws; of which the Deciſions of theſe Lawyers, were the moſt conſiderable Part; their Works hereupon grew out of Uſe; ſo that we have now left of 'em, only ſome Fragments in the *Digeſt*. *Tribonian* the Lawyer, to whoſe Care the Emperour had committed this Work; has left us a very Chaos [z], full of Obſcurity and Contradictions; which afford a vaſt Field for Chicanery; and which have, in the latter Centuries, produc'd that prodigious Number of ſenſeleſs, and confus'd Commentaries. It appears by this Collection, and ſome Hiſtorical Remains, that there were, in the *Roman* Empire, Sects among the Lawyers [aa]; who, upon ſeveral Points, follow'd different Opinions; in the Manner we ſee practis'd among Philoſophers, and Divines. However, notwithſtanding all thoſe Diviſions, and the vain [bb] Subtleties, that were the common Source from whence they ſprung; we may find among thoſe few Fragments, ſeveral conſiderable Principles of natural Equity, that may ſerve to decide many difficult Caſes; but they lie intermix'd with a far greater Number of Laws, purely poſitive.

The *Platoniſts*, who became famous in the third and fourth Centuries; ſuch as *Plotinus*, *Amelius*, *Porphyrius*, *Jamblichus*, *Proclus*, &c. apply'd themſelves much more to explain the Speculations, or rather chimerical Conceits of the Founder of their Sect; than to cultivate his Morals. *Ariſtotle* had hitherto, had but very few Followers: He was ſcarce known in the Weſtern Parts of the World, till towards the Beginning of the ſixth Century. The celebrated *Boetius*, by tranſlating ſome of that Philoſopher's Writings, laid the firſt Foundations of that prodigious, and truly deſpotick Authority, which the Peripatetick Philoſophy became afterwards poſſeſs'd of; and which, even to this Day, in many Places, it ſtill maintains. The *Arabians*, in the eleventh Century, grew fond of it; and introduc'd it into *Spain*. From thence ſprung the *Scholaſtick Philoſophy*; which ſpread itſelf all over *Europe*, and with its barbarous Cant became even more prejudicial to Religion and Morality, than to the ſpeculative Sciences. The Ethicks of the *Schoolmen* [cc], is a Piece of Patchwork; a confus'd Collection, without any Order, or fix'd Principles; a Medley of divers Thoughts and Sentences out of *Ariſtotle*, Civil and Canon Law, Scripture, and the Fathers. Both good and bad lie there jumbled together; but ſo as that there is much more of the latter, than the former. The *Caſuiſts* of the ſucceeding Centuries, made it their ſole Buſineſs to out-do their Predeceſſours, in broaching of vain Subtilties; nay, what is worſe, monſtrous and abominable Errours; as all the World knows. But let us paſs by theſe unhappy Times; that we may at length come to that Age, wherein the Science of Morality was, if I may ſo ſay, rais'd again from the Dead.

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[z] See the *Anti-Tribonian* of **Francis Hotman**; the **Latin** Verſion of which was reprinted at **Hall** in **Saxony**; and at **Leipſick**, in 1704, with a Preface by Mr. **Thomaſius**.

[aa] You will find the Hiſtory thereof in a few Words, in the *Principia Juris Civilis* of Mr. **Van Eck**, Profeſſor at **Utrecht**; where that Book was reprinted in 1694. See pag. 55, & *ſeq*. of this ſecond Edition.

[bb] See **Barbeyrac**'s *Table of Authors*, to his Tranſlation of **Puſendorf**; where you will find many Examples of this Kind.

[cc] See Mr. **Buddeus**, in his Abridgment of the Hiſtory of Philoſophy, Cap. 5, Sect. 9.

SECT. XXIX.

THE famous Chancellour of *England*, *Francis Bacon*, who liv'd in the End of the Sixteenth, and the Beginning of the Seventeenth Century; was *one of thoſe*, [a] *who moſt learnedly diſcover'd the Imperfection of the preſent State of Philoſophy; which he labour'd vigorouſly to redreſs; and laid down moſt excellent Plans for its Reformation.* Poſterity will be eternally obliged to him, for the great Light and noble Projects he has furniſh'd the World with; towards the general Reſtauration and Advancement of the Sciences. We have Reaſon to believe, that 'twas the reading of the Works of this great Man, that inſpir'd *Hugo Grotius*, with the Thoughts of attempting the firſt to compoſe a Syſtem of the Law of Nature; which he afterwards undertook, at the Sollicitation of the celebrated *Nicholas de Piereſc*, Judge of the High Court of Parliament for *Provence*. 'Tis pretended, that *Melancthon* had already given a Sketch of ſomething of this kind, in his *Ethicks*; and they tell us too of one *Benedict Winckler*, who publiſh'd in 1615 a Book intitled, *Principia Juris*; wherein he intirely departs from the Method of the Schoolmen; and maintains againſt them, amongſt other Things[b]; that the Will of *God* is the very Fountain and Foundation of all Juſtice. But 'tis acknowledg'd, that [c] the latter of theſe two often confounds the Law of Nature with that which is poſitive: And that neither the one, nor the other has afforded any more than a [d] ſmall Gleam of Light; not ſufficient to diſſipate thoſe thick Clouds of Darkneſs, in which the World had been ſo long invelop'd. Beſides, *Melancthon* [e] was too much prepoſſeſs'd in favour of the Peripatetick Philoſophy, ever to make any great Progreſs in the Knowledge of the true fundamental Principles of the Law of Nature, and the right Method of explaining that Science. *Grotius* therefore ought to be regarded, as the firſt who broke the Ice; and moſt certain it is, that no Man could be better qualify'd, for ſuch an Enterprize. Extraordinary Clearneſs of Underſtanding; exquiſite Judgment; profound Meditation; univerſal Knowledge; prodigious Reading; continual Application to Study, in the Midſt of a great many vexatious Obſtacles, and the neceſſary Duties of ſeveral conſiderable Employments; with a ſincere Love for Truth; are Qualifications, which no one can deny properly to belong to that great Man, without wronging his own Judgment; and bringing his Character in Danger of the Imputation either of baſe Envy; or groſs Ignorance. "If (as has been very rightly [f] obſerv'd) he was not thoroughly acquainted with the Art of Thinking juſtly; the Philoſophy of his Time, being ſtill very dark and obſcure; he has ſupply'd, in a great meaſure, that Defect, by the Force of his good Senſe. If, without the Help of Art, he has ſhewn ſo much Delicacy of Taſte, and true Diſcernment; what would he not have done, had he been intire Maſter of that Art of reaſoning juſtly, and of rightly methodizing his Thoughts, which is now, and has been for ſome Time, to be had?" His Book was firſt publiſhed at *Paris* in 1625, and dedicated to *Lewis* XIII. 'Tis ſaid he at firſt deſign'd to have entitled it, *The Law of Nature and Nations*; but he choſe afterwards to give it the Title it now bears, of, *the Law of War and Peace*. What he had chiefly in View was, to ſet forth thoſe Duties, which the ſeveral [g] Nations of the World, or their ſovereign Powers, that govern them, owe one to another; and how the Differences ariſing between 'em might be juſtly terminated. For which Purpoſe, he takes into his Work the principal Subject Matters of natural Juriſprudence, and Politicks; and lays down alſo Principles ſufficient to eſtabliſh the moſt conſiderable Duties of private Men. He [h] himſelf owns, that he is far from having exhauſted ſo copious a Subject; and wiſhes that others may ſupply what's wanting; to the End that Mankind may one Day be furniſh'd with a compleat Syſtem of this Science. Never had Book a more univerſal Approbation. Numbers of the Learned [i] have wrote Comments upon it: It has been publickly read and expounded in the Univerſities: And the Author, *but fifty Years* [k] *after his Death, had an Honour done him, which was not paid to any of the Ancients, till after a long Succeſſion of Ages:*

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[a] See Mr. *Bayle's* Dict. p. 447.— See alſo the *Specimen controverſ.* of *Puſendorf*, Cap. 1, Sect. 5.

[b] Lib. 1, Cap 3. 4.

[c] See *Gronengii Biblioth. Jur. Gent.* Lib. 3, cap. 4, Sect. 9. And *J. Frid. Ludovic. Delineatio Hiſt. J. Nat.* &c. Sect. 24.

[d] Mr. *Buddeus*, in his *Hiſtory of the Law of Nature*, Sect. 23.

[e] See his Article, in Mr. *Bayle's* Dict. Rem. (K).

[f] *Parrhaſiana*, Tom. 1, p. 346.— [g] See his Preface, Num. 1.—

[h] Ibid. Num. 31,— *& ſeq.*

[i] See the Names of the chief of them, and a very juſt Account of their Performance, in the *Hiſt. du Droit Nat.* by Mr. *Buddeus.*

[k] Mr. *Bayle* Dict. Rem. (O), p. 1407, Col. 2.— See the reſt of this Remark.

Ages: I mean, his being publiſh'd cum Commentariis Variorum, *at* Francfort [l] *on the* Oder, *in* 1691.

Some Time after the Publication of this Work of *Grotius*, *John Selden*, a celebrated *Engliſh* Lawyer, enter'd the Liſts; and, whether through Jealouſy, or a commendable Emulation; form'd a Syſtem of all the *Hebrew* Laws, relating to the Law of Nature; which he ſeparated from thoſe, that concern'd the particular Conſtitution of the *Jewiſh* Republick. He gave his Book the Title, of *the Law of Nature, and Nations, according to the Doctrine of the Hebrews*; wherein he is exceſſively laviſh of that vaſt Erudition, which we find in all his other Writings: But is far enough from eclipſing the Treatiſe of *Grotius*. For, beſides the extreme [m] Diſorder, and Obſcurity, for which *Selden*'s Manner of Writing has been juſtly cenſur'd; that Author [n] derives not the Principles of the Law of Nature from the pure Dictates of Reaſon; but from the ſeven Precepts given to *Noah*; which, as to their Number, are very uncertain; and ſolely founded upon a doubtful Tradition, though perhaps ancient enough: He very often too contents himſelf with barely reciting the Deciſions of the Rabbins; without giving himſelf the Trouble to examine, whether they are well or ill grounded.

Not long before the Death of *Grotius*, another *Engliſh* Author appear'd, of a Character quite different from that of *Selden*, I mean [o] *Thomas Hobbes*; a great Mathematician, and one of the moſt penetrating Genius's of his Age. It is great Pity he ſuffer'd himſelf to be miſled by the Indignation he had conceiv'd againſt thoſe, whom he look'd upon as the ſeditious Diſturbers of the Peace of his Country: Had he philoſophiz'd without Prejudice, and with a ſincere Regard to Truth only; he would doubtleſs have done her very ſignal Service. He publiſh'd at *Paris* 1642, his [p] Treatiſe *de Cive*; wherein, amongſt other dangerous Errours, he endeavours to eſtabliſh, and that too in the Geometrical Method, the Hypotheſis of *Epicurus*; which makes Self-Preſervation and Self-Intereſt, to be the original Cauſes of Civil Society. He builds upon this Suppoſition; That all Men have the Will, as well as the Strength and Power to Miſchief one another; and that the State of Nature is a State of War, between each particular Perſon, and the reſt of Mankind. He gives an unlimited Authority to Kings; not only in Affairs of State, but even in Matters of Religion. Hobbes *created himſelf by this Work many Enemies; but, as Mr.* Bayle *ſays* [q], *the more diſcerning and judicious Part of Mankind were forc'd to acknowledge, that no one had ever yet penetrated ſo far into the Foundations of Civil Policy. Lambert Velthuyſen*, a famous Philoſopher [r] of the united Provinces, boldly undertook the Defence of this Treatiſe *De Cive*, as far as related to *Hobbes*'s Manner of demonſtrating the Laws of Nature. The ſame Year this Defence appear'd, *Hobbes* publiſh'd his *Leviathan*; the Sum whereof is: "That, without [s] Peace, there is no Safety "in a State; and Peace cannot ſubſiſt, with"out Authority; nor Authority, without "Arms; and Arms avail not, unleſs put into "the Hands of one Perſon: and that the Fear "of Arms cannot incline thoſe to Peace, who "are puſh'd on to Hoſtilities by an Evil, "more to be dreaded than Death itſelf; that "is to ſay, by Diſſentions about Things ne"ceſſary to Salvation." In this Piece he lays himſelf much more open; for he here roundly maintains, That the Will of the Sovereign alone conſtitutes, not only what we call juſt and unjuſt; but even Religion alſo; and that no divine Revelation can bind the Conſcience, till the Authority, or rather Caprice, of his *Leviathan*; that is, of the ſupreme arbitrary Power, to which he attributes the Government of every Civil Society; has given it the Force of a Law. If thereupon we ſometimes find in his Works, ſome ſeeming Contradictions; 'tis probably, becauſe he durſt not truſt the Reader with the whole of his Notions; and was willing to provide for a Retreat, in caſe he ſhould not be able to ſtand the Shock of his Adverſaries. He had ſeveral of 'em; but [t] they did not all ſucceed alike. He paſs'd for an Atheiſt; and perhaps they were not very much out in their Judgments, who thought him ſo; for he admitted none but Corporeal Subſtances.

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[l] By the Care of Mr. *Becman*, Profeſſour in that Univerſity. That Edition was reprinted there in 1699. It is in 4*to*.

[m] See the *Ars Critica* of Mr. *Le Clerc*, Tom. 1, Part 1, Sect. 3, Cap. 5, & Num. 5, p. 115,— 116,— Edit. 2. & *Bib. Choiſ.* Tom. 1, p. 355.—

[n] See the *Specimen Controverſ.* of Mr. *Pufendorf*, Cap. 1, Sect. 1.

[o] He was born at *Malmesbury*, and Son of a Clergyman. See his Life printed at *Carolopoli*, in 1681, in 12°; and abridg'd by Mr. *Bayle*, in his Dictionary, p. 1571.

[p] See the Judgment *Grotius* paſſes upon it, in the Appendix to his Epiſtles; Epiſt. 648,— p. 951, col. 2.—

[q] Mr. *Bayle*'s Dict. Rem. (D), p. 1572, col. 1.— And *Pufendorf*'s Preface to his firſt Edition, * 3, p. 2,— Ed. *Amſt.* 1698, of his *De Jure Naturæ & Gentium*.

[r] In an anonymous Diſſertation, intitled, *Epiſtolica Diſſertatio, de principiis juſti & decori, continens Apologiam pro tractatu clariſſimi Hobbei, de Cive. Amſterd.* 1651. It was afterwards reprinted among his Works, at *Rotterdam*, 1680, Tom. 2.

[s] *Bayle*, Dict. Rem. (E), p. 1573, Col. 1,— *ex Auctore vitæ Hobbeſii*, p. 45.

[t] See the *Hiſt. du droit Naturel*, by Mr. *Buddeus*, Sect. 26. A Liſt of them may be ſeen at the End of his Life.

SECT.

SECT. XXX.

THE Number of Commentators upon *Grotius* daily increaſing, inſomuch that there was now ſcarce any Thing elſe minded, beſides Diſputes about the Senſe of his Words; and the barbarous Terms, and ridiculous Subtleties of the Schoolmen, of which *Grotius* had purg'd his Work, being again brought upon the Stage; a *German* had the Courage to ſhake off the tyrannical and pernicious Yoke of Cuſtom; and bravely follow the Footſteps of that great Man: I mean the *illuſtrious Samuel Pufendorf*[a]; who has thereby acquir'd an immortal Reputation: a Reputation, whoſe Luſtre not all the Efforts of his envious Competitours will be ever able to efface. He purſu'd the Genius and Method of *Grotius:* He examin'd and weigh'd Things in their Originals; and making the beſt Uſe he could, of the Diſcoveries of thoſe who had gone before him, he then added his own; which ſoon gave very great Hopes of his accompliſhing that Work, which as yet was but in Embryo. The Principles of the new Philoſophy, which he exceedingly reliſh'd, but without blindly adopting all the Opinions of the *Carteſians*; together with the Mathematicks, which he ſtudy'd under[b] a celebrated Profeſſour in the Univerſity of *Jena*; did not a little contribute towards the perfecting his natural Qualifications; and rendering him more capable of ſo vaſt a Work. We are beholden, for the firſt Sketch he drew of it, to the Leiſure an unhappy Accident, he had the Misfortune to meet with, gave him. He had been ſent for into *Denmark*, to be Governour to the Children of a certain Lord, who was then Ambaſſadour of[c] *Sweden* to the other Northern Crown. A little after his Arrival at *Copenhagen*, the War ſuddenly breaking out again with the *Swedes*, (who attack'd that City, but were after ſome Time oblig'd to raiſe the Siege;) Mr. *Pufendorf* was made Priſoner[d], with the reſt of the Retinue of the Ambaſſadour; who was himſelf but a few Days before, gone to take a Trip to *Sweden*. During this Confinement, which laſted eight Months; as he had no Books, neither was permitted to ſee any Body; he took a Reſolution[e] to meditate on what he had read in *Grotius* and *Hobbes*; and having collected his Meditations together, he compos'd a ſhort Syſtem out of what he lik'd beſt, which he turn'd and explain'd his own Way; handling ſuch Matters as thoſe Authors had omitted; and adding to the whole ſome new Thoughts of his own, as they occurr'd. Not that he intended, at that Time, any Thing more, than to divert himſelf in his Solitude: But about two Years after his being ſet at Liberty, he went into *Holland*; where a Friend of his getting a Sight of this Eſſay, adviſ'd him to review, and publiſh it. He did ſo; and the Work was printed at the *Hague*, in 1660; under the Title of *Elements of Univerſal Juriſprudence.* He owns in his * Preface, that, beſides *Grotius* and *Hobbes*, the Profeſſour in Mathematicks mention'd before, had afforded him ſome Light. His Method is, in ſome meaſure, that of the *Geometricians*: For he firſt lays down his Definitions and Axioms; afterwards he explains 'em; and then draws out the Conſequences they contain. And though he himſelf prov'd afterwards diſſatisfied with this Work of his, and publickly own'd it to be the imperfect and premature Fruit of his more juvenile Studies; yet as the Publick gave it a very favourable Reception; ſo it ſerv'd to make our Author known to the World, in a very advantageous Manner. The Elector Palatine, *Charles Lewis*, to whom it was dedicated; was not ſatisfy'd with returning him his immediate Thanks for it, in a very obliging Letter[f]; but ſent for him the Year following to his Univerſity of *Heidelberg*;

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[a] He was originally of the *Marquiſate* of *Miſnia*, in *Saxony*, and a Lay Man, tho' ſprung from the Clergy; for his Father, Grandfather, his Uncles, both on the Father's and Mother's Side, were Miniſters of the Lutheran Communion. I learn'd this from one of the Pieces, which compoſe that Collection, intitled, *Eris Scandica*, p. 149, 150. The Village, whereof his Father was Miniſter, is call'd *Fleh*, near *Chemnitz*; and in all Probability he was born there. His Brother at leaſt, *Iſaiah Pufendorf*, is a Native of that Place; as Mr. *Gundling* teſtifies, in his *Hiſt. Philoſ. Moralis*, Part 1, cap. 6, Sect. 5, Note 10. See alſo the *Acta Eruditorum* of *Leipſic*, An. 1708, p. 185.

[b] *Erhard Weighel*. He was with that Profeſſour in 1657, during the whole Year. See *Eris Scandica*, p. 126.

[c] Mr. *Coyel:* This happen'd in 1658. *Eris Scandica*, p. 126.

[d] One of his Letters, to the *Baron de Boineburg*, is publiſh'd; wherein he ſays, that the Pretence for detaining him was; that his Brother was ſettled in *Sweden*. See *J. Groningii Bibliothec. Jur. Gent.* Lib. 3, cap. 9, p. 281. 'Twas that Brother, to whom he dedicated, in 1675, his *Diſſertationes Academicæ Selectiores*. He calls him *Iſaiah de Pufendorf*, Knight, (*Eques Auratus*,) and Chancellour to the King of *Sweden*, in the Dutchies of *Bremen* and *Verden*. He ſays he had been ſent to the chief Courts of *Europe*, about the Affairs of that Prince. See the Place before quoted, Lett. (*a*), in Mr. *Gundling*'s Book.

[e] 'Tis what he ſays himſelf, in the Letter above cited; but which, as well as the others which follow, is full of Errata; which in many Places ſo ſpoil the Senſe, as to make 'em unintelligible.

* Pref. * p. 3,— & d.

[f] The Dedication is dated the Firſt of *September*, 1660, and the Elector's Letter the 29th of the ſame Month. The Letter is printed in the *Bibl. Jur. & Gent.* of *Groningius*, Lib. 3, Cap. 10, Sect. 1. And in the *Delineatio Hiſt. Jur. divini*, &c. of *J. Frid. Ludovic.* publiſhed at *Hall* in *Saxony*, 1701. Sect. 45.

Heidelberg; where, on his Behalf, he founded a *Profeſſorſhip in the Law of Nature and Nations.* Thus, that great Prince, at the ſame Time that he conferr'd on Mr. *Puſendorf* ſo high a Mark of Diſtinction and Favour; ſecur'd to himſelf the immortal Glory, of having firſt ſet the Example to all, who ſhould hereafter publickly cauſe to be taught, this noble Science; a Science ſo neceſſary for Youth, and indeed for all Mankind; but which no one had as yet bethought himſelf of introducing into the publick Univerſities. As our new Profeſſour conſtantly made it his Buſineſs to explain the Treatiſe of *Grotius*; ſo this gave him the Opportunity of obſerving, more and more every Day, the Neceſſity there was of compoſing ſomething in that Kind, that ſhould be more complete. The Sollicitations too of the *Baron de Boinebourg*, then Chancellour to the Elector of *Mentz*; might alſo contribute very much to engage him therein. That Miniſter was extremely deſirous, to have ſome Body ſet about the compiling a methodical Body of natural Juriſprudence; and had in vain endeavour'd to perſuade ſeveral learned Men to undertake it; and amongſt the reſt, *Boecler*, *Conringius*, and *Rachelius*. We may eaſily imagine that, after having read Mr. *Puſendorf's* *Elements of Univerſal Juriſprudence*, he could not fail to apply to him for that excellent Purpoſe, judging him more capable, than any other, of executing that noble Deſign. He found him accordingly intirely diſpos'd to ſatisfy ſo laudable a Deſire. Mr. *Puſendorf* laid before him a Plan of the Syſtem he deſign'd: He repreſented to the *Baron*, that the due Execution thereof would require (theſe are his own proper Terms) *great Penetration of Mind; an exquiſite Judgment; and free from all Manner of Prejudice; a numerous Library; great Leiſure; a ſettled Correſpondence with ſeveral learned Men; who would, upon all Occaſions, freely communicate their Thoughts to him: All which Things*, adds he, *I want.* However, he promis'd to do all that lay in his Power; but without hurrying himſelf; neither would he engage to publiſh his Work, till he had brought it in ſome Degree to anſwer his Expectation. Theſe Particulars I have from a Letter, he wrote in Anſwer to the *Baron de Boinebourg* [g], publiſh'd about four or five Years ago, with two Letters of *Boecler*, and one of *Herman Conringius*; to whom that Miniſter had ſent Mr. *Puſendorf's*, to have their Opinions upon the Matter. *Conringius* and *Boecler* were too much prepoſſeſs'd in favour of Antiquity; and too unexperienc'd in the Buſineſs of clear Reaſoning [h], to weigh and examine rightly the Project and Ideas of our Author. This plainly appears by their Anſwers: *Conringius's* is indeed a very civil and obliging Letter; but 'tis remarkable, that *Boecler* in his diſcovers an extraordinary Uneaſineſs at the growing Fame of Mr. *Puſendorf*; and an extreme Deſire to leſſen that Eſteem, the World had conceiv'd of him. This happen'd in the Year 1663. About the Year 1667, *Charles* XI, King of *Sweden*, deſigning to eſtabliſh an Univerſity at *Lunden*, in the Province of *Schonen*; reſolv'd [i] to invite thither our *Heidelberg* Profeſſour. The Elector Palatine was very loth to part with him; but did not however think fit to lay his Commands upon him; and at length conſented to his accepting the more profitable and advantageous Poſt, offer'd him in *Sweden*. But oblig'd him that ſame Year to beſtow ſome Hours extraordinary on the Electoral Prince his Son; who had his appointed Preceptors beſides. Mr. *Puſendorf* went into *Sweden*; and was, in 1670, there eſtabliſh'd in the new Univerſity at *Lunden*, in Quality of chief Profeſſour in the Faculty [k] of Law; and with a Salary more conſiderable than any of the other Profeſſours. Two Years after, he publiſh'd his *Law of Nature and Nations*: And in 1684 he reprinted it at *Francfort* on the *Main*, augmented above a Fourth Part.

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[g] See *Groningius*, ubi ſupra, Lib. 3, Cap. 9.

[h] Some learned Men, of *Boecler's* own Country, ſay, that his Notes on *Grotius* are very perplex'd; and that he promiſes throughout more than he performs; beſides, in the greateſt Part of his Writings, he is very politick as to his Sentiments; which he always manifeſtly accommodates to the Intereſts of thoſe, he deſires to pleaſe. See Mr. *Buddeus Hiſt. Jur. Nat.* Sect. 28.

[i] *Eris Scandica*, p. 127, 128.

[k] See the Preface of the *Eris Scandica*, and p. 128, of that Collection. Some Years after his having executed that Charge, the King of *Sweden* made him his Hiſtoriographer; and one of his Privy-Council. About the Year 1686, he was ſent for by the late Elector of *Brandenburgh*, *Frederick William*; who gave him the ſame Employs of Councellour and Hiſtoriographer. He was created a *Baron*, (*Liber Baro*,) a little before his Death, which happen'd at *Berlin*, on the Sixth of *October*, 1694.

SECT.

SECT. XXXI.

I Shall not here enlarge in ſetting forth, in a pompous Manner, all the particular Excellencies of this Work. Nor do I think myſelf under any Obligation to follow the eſtabliſh'd Mode; which will have [a] *every Tranſlator to pay his Original the Tribute of Preference*; neither does the Office of an Interpreter neceſſarily oblige me ſo to do: I ſhall content myſelf with ſpeaking here hiſtorically; with the ſame Indifference and Impartiality, as will, I dare ſay, every where ſhew itſelf in my Notes upon this * Author. There is no ſuch Thing as abſolute Perfection in Books, any more than in any other humane Productions; And Mankind has, without any more ado, a Right to treat as Mountebanks, all thoſe panegyrical Writers; who, to ſet off the Authors they tranſlate or comment upon, or rather themſelves and their own Performances; begin with aſſuring the Reader, that it is an intirely accompliſh'd Work in its Kind; a compleat Model, the utmoſt Effort of human Ingenuity: Always ready to ſay as much, in four Days Time, of any other Author, who ſhall firſt have the good Fortune to fall into their Hands.

Firſt then, I ſhall obſerve, that this Work has had a very general Approbation. The vaſt Number of Editions it has had in *Sweden*, *Germany*, and *Holland*, within the four and thirty Years ſince it was firſt publiſh'd; do ſufficiently declare, in what an advantageous Manner, it has been receiv'd by the Publick. At the ſame Time that I was tranſlating it into *French*, I was inform'd, by the *Nouvelles* of Mr. *Bernard*, [b] That *Dr.* Kennet *of* Corpus Chriſti *in* Oxford, *with ſome* † *others, had tranſlated it into* Engliſh: I ſhould have been very glad to have met with that Tranſlation; to have conſulted the Introduction, and the ‖ *ample Notes*, with which it was ſaid to be accompany'd; and at the ſame Time to have ſeen, if thoſe ſeveral Hands have been able ſo to carry on ſuch a Work in Concert, as that the neceſſary Uniformity thereof has receiv'd no Prejudice: But, for our Author himſelf, as there are certain ſingle Suffrages, which alone weigh more than Multitudes of the common Sort; I ſhall here produce two of that Kind, which are of very great Weight; and to which all Men of Judgment will, I am perſuaded, pay a very great Regard. The firſt is that of the illuſtrious Mr. *Locke*, that great Philoſopher; whoſe Loſs the Republick of Letters ſtill laments; and whoſe exquiſite Judgment, profound Penetration, and extraordinary Abilities, eſpecially as to what concern'd Matters of Reaſoning; all the World is ſufficiently acquainted with. Let us ſee what he ſays, in his excellent Treatiſe of *Education: When* [c] [*a young Lad*] *has pretty well digeſted* Tully's Offices, *and added to it* Pufendorf de Officio hominis & civis, *it may be ſeaſonable to ſet him upon* Grotius de Jure Belli & Pacis, *or, which perhaps is the better of the two*, Puſendorf de Jure Naturali & Gentium; *wherein he will be inſtructed in the natural Rights of Men, and the Original and Foundations of Society, and the Duties reſulting from thence.* The other Suffrage, is that of Mr. *Le Clerc*; concerning whom I ſhall, though with Regret, forbear ſaying what I think; for fear I ſhould offend his Modeſty by Encomiums, which no reaſonable Perſon refuſes to give him; and which, in my Mouth, would be of no great Weight. His Approbation falls not directly on my Original; but is not therefore of leſs Force; ſeeing it regards the Abridgment of it, which the Author himſelf made, a Year after he had publiſh'd his principal Work. Let us ſee then what he ſays, in the [d] *Parrhaſiana*; when he is treating of the general Knowledge, which one ought to have of the Principles of Civil Policy: *The Books of* Hugo Grotius de Jure Belli ac Pacis; *and that of* Samuel Pufendorf, *intitled*, De Officio Hominis & Civis; *are admirable for their general Principles. More eſpecially* the Second; *which, as it is more conciſe, eſtabliſhes with great Clearneſs and Order, the Fundamentals of Morality, Politicks, and Juriſprudence. Whoever reads it carefully, will there find Principles ſufficient, to ſolve moſt of the principal Queſtions in thoſe Sciences*;

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[a] *Sacy*, in his Preface to the Tranſlation of the Letters of *Pliny the Younger*.

* Mr. *Puſendorf, de Ju. Gent. & Nat.*

[b] *April*, 1703, p. 467.

† The principal Tranſlator, in his Preface, names Mr. *Percival*, and Mr. *Itchiner*, who tranſlated the fifth and eighth Books.

‖ Theſe Notes are only the Quotations of the Author himſelf.

[c] Sect. 186,— of the fifth and ſixth Editions, in 8*vo*, printed in 1705, and 1709, p. 334,— *&c.*

[d] Tom. 2, p. 117, 118.

ences; which can admit of any Debate. Since then the Abridgment is, in Mr. *Le Clerc*'s Opinion, ſo uſeful; what muſt he think of the Book itſelf? But that I may give a more particular Idea of the Work itſelf, and that every one may know the juſt Value thereof; I will in a few Words draw the Parallel of it with that of *Grotius*.

To begin then with the Style; if the Queſtion be about Purity of Language, and Accuracy of Expreſſion, I readily give the Preference to *Grotius*; who had an Erudition incomparably more vaſt; and who, from his Cradle, if I may ſo ſay, wrote with marvellous Facility and Elegance. But then even his Style is too conciſe; he very often ſpeaks out but half his Meaning; and ſuppoſes his Reader to know many Things, which require very great Study and Application; ſo that his Work is of little Uſe but to the Learned: Whereas Mr. *Pufendorf*'s is much more within the Reach of common Capacities. As to what concerns Order, and the Diſpoſition of Particulars; the general OEconomy of the Work of Mr. *Pufendorf* is by far the beſt: But, in the particular Ranging of the [*] Materials, that compoſe each Chapter, he has ſometimes let ſlip ſome Inaccuracies, which are not to be found in *Grotius*; from which I have endeavour'd, as much as poſſible to diſengage my Tranſlation: As to the Subject Matter, I have already taken Notice, that *Grotius* pretended not to give a compleat Syſtem; which might be eaſily ſeen, though he himſelf had not declar'd it. 'Tis only occaſionally that he touches upon even the greateſt Part of the principal Subject Matters of natural Right: So that, though his Views had been more extenſive, and leſs imperfect, than they ſeem in many Things to have been; his Plan did not lead him to a full Diſcuſſion of them; it was enough for him to handle 'em ſo far, as might be ſufficient to decide the Queſtions, which concern'd the principal Subject of his Book. In a Syſtem of the Law of Nature, an Author ought, without Diſpute, to begin with inſtructing his Reader in the Nature of moral Entities or Beings; in the Principles and different Qualities of humane Actions; and what it is that makes 'em imputable either as good or evil; in the Nature of Laws in general; and their different Kinds, *&c.* But we meet with ſcarce any Thing in *Grotius*, relating to all theſe Matters; which compoſe the firſt Book of my Original. *Grotius* ſaw what was the fundamental Principle of the Law of Nature: But he does no more than juſt point it out in his [e] Preface; and that in ſuch a Manner too, as gives us Reaſon to conclude, that his Ideas on that Head were not altogether clear; nor enough diſengag'd from the Prejudices of the Schools: And when he handles any Matter particularly, he does not always ſhew the Connection it has with its firſt Principles. On the contrary, my Author eſtabliſhes, and diſtinctly explains the fundamental Maxims of the Law of Nature; and from thence deduces, by a regular Train of Conſequences, the principal Duties of Men and Subjects; in whatſoever State and Condition they are. As *Grotius* omits ſome important Matters; ſo he touches upon others that might have been very well ſpar'd; as when he examines Queſtions relating rather to Divinity, than to the Science of natural Right; or elſe enlarges on ſome certain Subjects, more than is requiſite in a general Syſtem; as, for Inſtance, on the Subject of War. On all theſe Accounts, his Work is very much inferiour to that of Mr. *Pufendorf*; who beſides ſcarce ever borrows any Thoughts from *Grotius* [f], but what he improves, and explains more diſtinctly; and draws from 'em a greater Number of Conſequences. In fine, Mr. *Pufendorf* often refutes *Grotius*, and that too with Reaſon; as may be ſeen at one View by running over my *Index of Authors:* and, to be convinc'd, that *Grotius* had, as to ſeveral Matters, even falſe, or at leaſt very confus'd Ideas; there needs no more, than to examine one ſingle Notion of his, which runs through his whole Syſtem; I mean that pretended Diſtinction of his, between the *Law of Nature*, and a certain *Law of Nations*; which he conceives to be founded on the tacit Conſent of the People of thoſe ſeveral Nations.

From all this, I think, I may boldly, and without any Fear of being ſuſpected to have too great a Tenderneſs and Affection for my Author; infer, that his Work, take it all together, is far more uſeful than that of *Grotius*. I have no Deſign to derogate in the leaſt from the Glory of that great Man, who is far above all my Encomiums. We ſhould not, perhaps even at this Day, have had any tolerable Syſtem of the Science of the Law of Nature, had it not been for the Light he has given us: And had Mr. *Pufendorf* been in the Place of *Grotius*, and *Grotius* in the Place of Mr. *Pufendorf*; the Work *de Jure Belli ac Pacis* would, in my Opinion, have been much more imperfect than it is; and the other, *De Jure Gentium & Naturæ*, much more perfect. I ſay it once again, that I never entertain'd a Thought of diverting any one from reading the Book of *Grotius:* But very far from it, I am heartily ſorry, out of the Good-will I bear to the Republick of Letters; that this excellent Work is ſo wretchedly tranſlated into our Language. If the Truth may be ſpoken, Mr. *de Courtin*, who is the Author of this Tranſlation, undertook more than he was able to perform; and it is ſurprizing that a Man, whoſe Employments particularly engag'd him in the Study of the Subject Matter of this Book; ſhould ſucceed no better in a Deſign of this Nature. I ſhall ſay nothing of the Barbarouſneſs, Harſhneſs, and Obſcurity of his Style: This is obvious to every Reader upon the firſt Opening of the Book. But there are too a great Number of eſſential Faults, which make *Grotius* ſpeak quite beſide his Meaning; and the Tranſlator ſometimes trips in Places ſo plain and eaſy, that he diſcovers a great deal of Ignorance, both in the Subject Matter; and in the *Latin* Tongue. The Notes too, which he has inſerted in his *Index*, in order to explain the Terms, and ſometimes the Thoughts of *Grotius*; make the Thing yet more apparent. His Explanations are for the moſt Part either falſe, imperfect, or ſo confus'd; that inſtead of clearing up Matters, they ſerve only to render 'em ſtill more obſcure. I have here advanc'd nothing, but what I can very eaſily make appear. And though I have not confronted this Tranſlation with the Original quite through; yet I have noted down, as I have at ſeveral Times conſulted it, ſo great a Number of ſuch Sort of Blunders; that I may, without the Imputation of Raſhneſs, paſs this Judgment upon it. When the firſt Edition of my Preface appear'd, I immediately ſent a ſmall Liſt of them to one, who had taken Offence at this Judgment of mine on the Performance of Mr. *de Courtin*; but the Party had nothing to reply to me as to thoſe enormous Faults, of which I had taken my Inſtances almoſt at the very firſt Opening of the Book. But the beſt Way to convince all Mankind of a Thing, of which I think no judicious and impartial Perſon can have a Moment's Doubt; would be to publiſh a new Tranſlation of *Grotius*'s Book: which I may * perhaps ſome Time or other do, ſhould I find Leiſure enough for it. I ſhould follow the ſame Plan as in my Tranſlation of *Puſendorf*; in ſuch Manner as to refer from one to the other, both in the Text, and Notes; and to make the two Works join'd together ſerve as perpetual Supplements to each other. There would then appear ſo great a Difference between the two Tranſlations, that every one at firſt Sight would conclude, that one or other of the Tranſlators muſt have been ſtrangely out of the Way. I am not ignorant that a learned *German*[a] Profeſſour commends this Verſion of Mr. *de Courtin*; *as an elegant, clear Verſion, that may ſerve inſtead of a Comment*; he adds too, that *the Tranſlator has in an accurate Index, given his Reader an Abridgment of the whole Work.* But, in all Probability, this learned Man has rely'd upon ſome Body elſe's Judgment in this Matter; or perhaps, being better acquainted with the *Latin*, than our Language; he has concluded this Tranſlation to be a good one, becauſe the Author ſpeaks *Latin* in *French*. It has perhaps[b], been reprinted thrice, or it may be oftner; but this only ſhews what Credit the Original itſelf of *Grotius* has in the World; and the great Want there is of Books of this Nature. So that, admitting there was, in the main, no great Difference between my Original, and the Work of *Grotius*; this Tranſlation at leaſt of the latter, could afford no juſt Cauſe, why I ſhould have deſiſted from tranſlating the former.

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[*] The learned Journaliſts of *Leipſick*, in that moſt obliging Extract they gave of the firſt Edition of this Work, *Jun.* 1707, p. 35,— make me ſay quite the contrary: *In ſpecialioribus pertractandis accuratiorem eſſe* Grotio *putat.* Perhaps this is only an Errour of the Preſs, (*Grotio* for *Grotium*:) though I do not find it mark'd in the Errata of that Year.

[e] *Prolegom.* Num. 7, *& ſeq.* particularly, Num. 11, 12, 13, 14.

[f] For which Reaſon I have taken care to cite in the Margin that learned Man, in a great many Places, where Mr. *Pufendorf* had forgot to do it; ſo that by Means of my Tranſlation, one may perpetually confront *Grotius* with my Author.

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* This he has ſince perform'd, and his Tranſlation printed at *Amſterdam*, An. 1724.

[a] Mr. *Buddeus*, heretofore Profeſſour of the Law of Nature and Morality at *Hall* in *Saxony*; and at preſent Profeſſour in Divinity at *Jena*. See his *Hiſtory du droit Naturel*, Sect.4.

[b] The laſt Edition I know of, is that of the *Hague*, in 1703.

SECT. XXXII.

MY Deſign in this Tranſlation, has been to do Service to two Sorts of Perſons. The firſt, are ſuch young Men, as are deſtin'd for publick Employments, as well Eccleſiaſtical, as Civil. We ſee 'em every Day aſpire to, and actually obtain thoſe Employs; without having the leaſt Tincture of the moſt general Principles of a Science, ſo univerſally neceſſary, [illegible] is the Science taught in this Book: In ſo much that, even though the Paſſions ſhould not otherwiſe intrude themſelves; we need not wonder to ſee Affairs ſucceed ſo ill in the Hands of Men, who ſit down contented under ſo groſs an Ignorance of their Duties. It may perhaps be ſaid, that they can read this Book in *Latin*, and therefore have no need of my Tranſlation. But, not to mention at preſent the Regulations and Amendments I have made in the Text of my Author, and the Notes I have added to it; an exact Knowledge of the moſt neceſſary Languages is beſides a Thing generally very much neglected; and there are vaſt Numbers in Offices, who either do not underſtand *Latin* at all; or elſe ſo little, that they cannot, with Pleaſure and Improvement, read a Book in a Stile like that of my Author. Beſides 'tis my Notion (if I may be allow'd to venture a Thought, which is perhaps peculiar to myſelf; but I believe well enough grounded:) that we ought, as much as poſſibly we can, to begin our Studies of the Sciences with Books written in that Language, which is moſt familiar to us. However able we may be to read with great Eaſe, and Readineſs, Books wrote in a dead Language; yet our Mother Tongue is always beſt underſtood: neither is it good to divide the Mind by ſharing our Thoughts between the Attention, that we ought to have for the Things themſelves; and that, which we are oblig'd to give to the Underſtanding of the Terms, in which they are expreſs'd.

The other Sort of Men, I intended to ſerve by this Tranſlation, are the illiterate or common People; among whom, it is not at all to be wonder'd at, if we find the groſſeſt Ignorance of the Things, contain'd in this Book; ſeeing thoſe, whom I have juſt now mentioned, have but very falſe and confus'd Ideas thereof. I know by Experience, that even the Term, *Law of Nature*, is as much unknown to them, as is the *Terra Auſtralis incognita*; for which Reaſon, I thought myſelf oblig'd to explain it in the Title Page. The People of this Rank, when they heard talk of the Tranſlation I was then upon; imagin'd at firſt, that it was a Book thick-ſet with the Querks and Subtilties of the Bar; and therefore to be left to the Lawyers. I own 'tis not within the Reach of a Peaſant or a Day-Labourer. But how many Men are there, who without making Learning their Profeſſion, might with Proficiency read ſuch a Book as this; if they would but give the ſame Attention thereto, as they do to their common Affairs; or to the Reading of other Books far leſs uſeful; nay, ſometimes pernicious. I ſhall not ſtop here to ſhew 'em the Neceſſity they are under of being inſtructed, at leaſt to a certain Degree, in the ſeveral Points of Morality, Juriſprudence, and Politicks, treated of in this Work. If they will take the Pains to read carefully the [*] *Parrhaſiana*, they will no longer doubt thereof; and, if they have their true Intereſt at Heart, they will ſpeedily apply themſelves to the making a proper Uſe of thoſe excellent Leſſons, the Author there gives. I did intend to have ſaid ſomething in this Place of the [*] Defects, and Imperfections in the Generality of Books and Diſcourſes of Morality; of the Method to be obſerv'd in treating of, and ſtudying this important Science; of the Conformity of the Duties, right Reaſon teaches us [†], with the Maxims of the Goſpel; and of ſome other Things of the like Nature. But, beſides that this Preface is already ſpun out to a very great Length, the Matters I have handled having led me further than I imagin'd; the Printers allow me not Time enough, to digeſt thoroughly what I had to ſay on thoſe Heads. I ſhall therefore content myſelf with obſerving, in a few Words, one Thing, which we ſeem not enough to reflect on. And that is, that Revelation was not given to Men, to teach them abſolutely and fully all that they ought to know. On the contrary, it ſuppoſes in 'em the Knowledge of ſome certain Things; which Knowledge they either actually have, or which 'tis intirely in their Power to acquire: And the Faculty of drawing Conſequences from Principles known, either by the ſole Light of Reaſon; or by Holy Scripture. The Exiſtence, for Inſtance, of a Deity infinite in Power, Wiſdom, and Goodneſs, the ſovereign Legiſlator, and Author of humane Society; is a Principle evident by its own Light: Therefore we find that the Sacred Writers do not ſo earneſtly apply themſelves to the eſtabliſhing of it; if they ſometimes ſpeak of it, 'tis as of a Thing manifeſt to all Mankind. They even expreſly tell us, that *that which* [b] *may be known of God, was manifeſt among the Heathens, God having ſhewn it to them* (by the Light of Reaſon); *for that the inviſible Things of him, his eternal Power and Godhead, were from the Creation of the World, clearly ſeen, being underſtood by his Works; ſo that the Heathens were inexcuſable:* Becauſe they did not give that Attention to 'em, they ought to have done. Thus too it is with reſpect to the true Principles of Morality, which are founded on the general Notions of Religion. The Sacred Writers aſſure us, that, [c] *when the Nations, which have not the Law,* (written, like that of *Moſes*;) *do by Nature* (that is to ſay, without Revelation;) *the Things contained in the Law; theſe having not the Law, are a Law unto themſelves: And ſhew, that the Commandments of the Law are written in their Hearts; their Conſciences alſo bearing Witneſs, and their Thoughts the mean while accuſing or excuſing them.* The Manner, in which the Sacred Writers propoſe the Maxims of Morality, does alſo manifeſtly ſhew, that they did ſuppoſe, in the Minds of Men, certain Notions, which, though imperfect, are nevertheleſs moſt true; and that they were ſatisfy'd with ſupplying what was therein defective; or with retrenching what ill Habits and Cuſtoms had perverſely added thereto. They have not left us a methodical Syſtem; they do not exactly define all the Virtues; they enter not into Particularities; they only give, as Occaſion requir'd, general Precepts; from whence we muſt draw many Conſequences, in order to apply them to the ſeveral States and Circumſtances of particular Perſons, and Caſes; as it would be eaſy to ſhew by many Inſtances, if the Thing was not evident to all who read, with ever ſo little Care, the Holy Scriptures. And from thence it appears, to mention it only by the By; how far we ought to rely upon the Expedient of thoſe, who, after having made it their Buſineſs to ruin and deſtroy the Certainty of the Light of Reaſon; refer us to the *Light of Faith,* for the reſolving of our Doubts: As if the Light of Faith did not neceſſarily ſuppoſe that of Reaſon; and as if the Proofs we have of the Truth of thoſe Facts, on which Revelation is founded; or of the Senſe and Meaning of a great many Paſſages in Scripture; were more evident, than the Maxims of right Reaſon are, with relation to our Duties, and their true Foundations: not to mention how far theſe Gentlemen carry *Hiſtorical Pyrrhoniſm.* On the contrary, 'tis certain, that the intire Conformity of the Chriſtian Morality with the cleareſt Dictates of right Reaſon; is one of the moſt convincing Proofs of the Divinity of the Chriſtian Religion: as has been acknowledg'd by all, who have wrote with any Solidity on that Subject. *We are aſſur'd,* ſays a [d] famous *Engliſh* Divine, *that God can never reveal any Thing contradictory to the true Dictates of our Reaſon. Nay, what ought chiefly to perſuade us, that the Holy Scriptures are the Work of God, or of the Author of Nature; is, that that Holy Book illuſtrates, confirms, and every where lets in new Light upon the Laws of Nature.* And if we duly weigh and conſider it, we ſhall find, that this is the Proof, which of all others is the moſt affecting; and the beſt proportion'd to the common Capacities of the Bulk of Mankind. I have no Deſign, in any Reſpect, to diminiſh the Certainty of thoſe Facts, that are the Foundation of Faith: There is no one Fact to be found, in all antient Hiſtory, ſo well prov'd, as theſe are found to be; and it has been very juſtly obſerv'd, that they afford when well conſider'd, a Demonſtration as inconteſtable, as thoſe of the Mathematicks; though of another Nature. But it muſt be own'd, that the Generality of Mankind are, by their State and Condition of Life, reduc'd to an Impoſſibility of ſufficiently inſtructing themſelves, in all that is neceſſary, for the apprehending the Force of this Demonſtration. They muſt underſtand ſeveral Languages, and read with Application a great many Volumes; which we well know, they have neither Leiſure nor Means to do. They are therefore oblig'd lig'd to refer themſelves therein to thoſe, who are in a Condition to make ſuch Enquiries: And, though they may be able to draw a very ſtrong Proof, in Favour of the Goſpel, from the Unanimity which they obſerve, as to this fundamental Point, among all Chriſtians, though otherwiſe ſo very much divided about particular Opinions: Yet after all it muſt be own'd, that there is ſtill ſomething wanting to produce in 'em an intire Conviction. But when they come at length to conſider the Evangelical Morality, and find it intirely conformable both to their true Intereſts; and to all thoſe Principles, of which every Man has by Nature the Seeds in his own Heart; they cannot then help concluding, that the Author of it muſt neceſſarily be, that very Being, who has given 'em Life, and brought 'em into this World only to make 'em happy; provided they will not be wanting to themſelves, but contribute on their Part, all that lies in their own Power, towards the Attainment of their own Felicity.

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[*] Tom. 2, pag. 54, & ſeq.

[*] See what I have ſaid in a few Words about one of theſe Defects, in my Preface to the *Traité du Jeu*, printed in 1709, pag. 17, & ſeq.

[†] I have ſince handled this at large in my Treatiſe *du Jeu*, Lib. 1, Cap. 3. I have no more Leiſure at preſent to undertake the reſt, than I had, when the firſt Edition of this preliminary Diſcourſe was printed; which is beſides now conſiderably inlarg'd, by ſeveral Additions in this new Edition.

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[b] Rom. i. 19, 20. See alſo Acts xvii. 27, 28.

[c] Rom. ii. 14, 15.

[d] *Richard Cumberland, de Leg. Natur. Proleg.* Sect. 27.—

N. B. *The Thirty third, or laſt Section, relating wholly to the Text, Notes, and Indexes of Mr.* Barbeyrac's French *Tranſlation of* Pufendorf; *is here purpoſely omitted, as of no Uſe to the* Engliſh *Reader.*

THE

OF THE LAW of NATURE AND NATIONS.

BOOK I.

Containing the preliminary Parts of that Knowledge.

CHAP. I.

Of the Origin and Variety of MORAL ENTITIES.

The CONTENTS of every Paragraph of the firſt Chapter.

I. *The Introduction.*
II. *Man's Life is govern'd by moral Entities.*
III. *What are moral Entities, what is their Cauſe and End.*
IV. *The Way of producing them. Their Inſtitution. Their Operation, and from whence.*
V. *Their Diviſion.*
VI. *Their State what.*
VII. *Their natural and adventitious State.*
VIII. *Peace and War, and how manifold?*
IX. *Determinate States.*
X. *States having reſpect to Time.*
XI. *Certain Precepts concerning States.*
XII. *The Diviſions of ſingle Perſons.*
XIII. *And Compound.*
XIV. *Some Precepts about moral Perſons.*
XV. *Feigned Perſons.*
XVI. *Moral Things.*
XVII. *The Diviſion of moral Modes.*
XVIII. *Titles.*
XIX. *Power.*
XX. *Right.*
XXI. *The remaining moral Qualities.*
XXII. *Moral Quantities.*
XXIII. *How moral Entities periſh.*

I. IT was the Buſineſs of the *firſt* and *higheſt Philoſophy*[1], and that by which alone it could fully anſwer the Deſign of its Name, and Inſtitution, to deliver the moſt comprehenſive Definitions of Things, and to rank them agreeably under their proper Claſſes, ſubjoining the general Nature and Condition of every Sort of Beings. Now as the Series of *natural Things*[2] hath been fairly enough regulated by thoſe, who have hitherto apply'd themſelves to the adorning of that *Science*, ſo it is evident, that Men have not been equally ſolicitous about conſtituting the *Entia moralia*, or *moral Entities*, nor treated them with that Reſpect which their Dignity requir'd. Many Authors ſeem never ſo much as to have thought on them; others only touch them lightly over, as idle Fictions, of no uſe or moment in the World. When, at the ſame time, it was highly expedient, that they ſhould be fully underſtood by Mankind, who are endu'd with the Power of producing them[3], and through whoſe whole Lives and Conducts their Force and Activity is diffuſed. This Reflection obligeth us to premiſe ſomewhat on a Part of Knowledge generally neglected; ſo far as ſhall ſeem requiſite to il-

Mr. BARBEYRAC's *NOTES on* Chap. I. §. I.

[1] *Metaphyſicks* are moſt probably meant by our Author's *Philoſophia prima*, becauſe it comprehends (as ſome Philoſophers hold) not only the Science of Eſſences in general, their chief Properties, and moſt eminent Species; but alſo Natural Theology, and an Account of the Nature of Spirits.

[2] Our Author reſerving the Diſtinction of phyſical and moral Entities to the next Paragraph, paſſes it over here in the beginning of the Chapter.

[3] How this is done, ſee §. 3. and 4. following.

luſtrate our principal Undertaking: Eſpecially leſt our Definitions of moral Things ſhould, either upon account of their Obſcurity, or of their Novelty, prove a Stop to the Reader, who perhaps in common Treatiſes hath rarely met with the like Terms. And here, if thoſe who have been bred up in the nicer Delicacies of Letters, ſhall diſdain our Endeavours of this kind, and caſt a cenſorious Frown on Words unknown to antient Eloquence; we only petition them for this Favour, that as we often pardon the Impertinencies of their over-ſcrupulous Exactneſs, ſo they would be pleas'd to grant us the Toleration not to be Polite [1], whilſt we profeſs a cloſer Regard to the ſtrict Severity of Things, than to the exterior Ornaments of Speech. For how to expreſs ourſelves with more Advantage about theſe Matters, we are yet to ſeek; unleſs by tedious Circumlocutions we would leave them more obſcure and more perplex'd than we found them. Againſt the Charge of Novelty *Tully* himſelf will be our Advocate: *New Names* (ſays [2] he) *are to be apply'd to new Things; nor is this to be wonder'd at by any Man of ordinary Knowledge, when he conſiders, that in every Art and Craft, not vulgarly underſtood, there is a Variety of Terms coin'd for that particular Subject.* And then giving Examples in the liberal and mechanic Arts, he concludes; *A Philoſopher of all Men hath an eſpecial Right to this Privilege; for Philoſophy is the Art of Life, and he that would undertake to explain its Rules, cannot, from the common Currency of Words, find Stock enough to anſwer his Occaſions* [a] [3]. But he that can upon no account digeſt ſuch Harſhneſs of Stile, is left at his Liberty to turn out of theſe rougher Tracts, and to paſs immediately to a Field of more Smoothneſs and Pleaſure.

II. All the Beings [4] which compoſe this Univerſe, as they conſiſt of ſuch Principles as were by the moſt wiſe Creator temper'd and fitted for the producing of each particular Eſſence; ſo they have every one of them their particular *Properties*, ariſing from the Diſpoſition and Aptitude of their Subſtance, and exerting themſelves in agreeable Actions, according to that Portion of Strength which their Divine Author and Founder hath imprinted on them. Theſe *Properties* we now uſually call *natural*, ſince the Term *Nature* hath been extended ſo far, as to denote not only the general Maſs of Things, but alſo the Modes and Acts flowing from the internal Force of their Conſtitution, by which is produc'd that infinite Variety of Motions which turns and manages all the Buſineſs of our World. Thoſe Things which exerciſe their Operations, either without any Senſe at all, or with pure down-right Senſe, or with ſuch as is aſſiſted by very imperfect Reflection, are guided by the ſole Inſtinct of Nature, and are unable to govern their Actions by any Rules or Modes of their own Invention. But Man, who beſides his excellent Form and moſt accurate Contexture of Body, fitting him for the nobleſt and the quickeſt Offices of Life and Motion, is endu'd with a ſingular Light of Underſtanding, by the Help of which he is able moſt exactly to comprehend and to compare Things, to gather the Knowledge of Obſcurities from Points already ſettled, and to judge of the Agreement which Matters bear to each other; and hath alſo the Liberty of exerting, ſuſpending, or moderating his Actions, without being confin'd to any neceſſary Courſe and Method: Man, we ſay, is farther inveſted with the Privilege of inventing and applying new Helps to each Faculty, for the more eaſy Regulation of its Proceedings. To conſider what numberleſs Modes and Notions have been introduc'd for the Aſſiſtance of the *Underſtanding*, and for preventing the Confuſion which might ariſe from the undiſtinguiſh'd Vaſtneſs of its Objects, is the Province of another Sort of Enquirers. Our Buſineſs is, to declare, how, chiefly for the Direction of the *Will*, a certain [5] Kind of Attributes have been impos'd on [6] Things, and their natural Motions; whence there ſprings up a peculiar Agreement and Conveniency in the Actions of Mankind, a grateful Order and Comelineſs for the Ornament of human Life. And theſe Attributes are call'd *moral Entities*, becauſe the *Manners* and the *Actions* of Men are judg'd and temper'd with relation to them; and do hence aſſume a Face and Habit different from the horrid Stupidity of the dumb Creation.

The Author in his laſt Editions adds theſe Quotations here.

[a] We find *Manilius* uſing the like Excuſe: Lib. iii. ℣. 39. &c.

Ornari res ipſa negat, contenta doceri.
Et ſi qua externa referantur nomina lingua,
Hoc operis, non vatis erit: non omnia flecti
Poſſunt, & propria melius ſub voce notantur.

And though ſome Words of foreign Stamp appear,
Seem harſh, untun'd, uneaſy to thy Ear,
This is the *Subject*'s, not the *Writer*'s, Fault:
Some things are ſtiff, and will not yield to Thought.
I muſt be plain: and if our Art hath found
Expreſſions *proper*, it neglects the *Sound*.
Nor hope ſweet Verſe and curious Turns to find:
I'll leave thy Paſſions, and inſtruct thy Mind.

Mr. Creech.

To the ſame purpoſe, V. Lucret. Lib. i. ℣. 137. & Horat. Art. Poet. ℣. 48. *which laſt ſpeaks thus:*

- - - - - - - - - - Si forte neceſſe eſt
Indiciis monſtrare recentibus abdita rerum,
Fingere cinctutis non exaudita Cethegis
Continget: dabiturque licentia ſumpta prudenter.

Thus in Engliſh:

None may to us that Liberty refuſe,
Suppoſing that it prudently be none.

- - - - - - - - - - - Licuit, ſemperque licebit
Signatum præſente notâ producere nomen.

If to expreſs Things new found out, we uſe
New Words, unto the Antients never known,
It ever was, and e'er will lawful be
To uſe the Words forg'd by Neceſſity.

Mr. Barb. *NOTES on* §. I, II.

[1] *Cicero* maintains it to be a childiſh Thing to ſpeak elegantly of Matters philoſophical: In ſuch Caſes to ſpeak plain is ſufficient, and learned Men have no other Intent, but to expreſs themſelves clearly. Cic. *de fin.* l. iii. c. 5.

[2] *De fin.* l. iii. c. 1. The following Part of this Diſcourſe plainly ſhews us, that he ſpeaks expreſly of ſuch Philoſophers as treat of moral Knowledge, becauſe he diſtinguiſhes them from Logicians, Natural Philoſophers, Geometricians, &c.

[3] Our Author infers from theſe Quotations, that 'tis as lawful for him, as theſe antient Poets, to borrow ſome Terms from other Languages, to expreſs himſelf in this Work, ſince he can find none proper in his own, and he has no other Way to render himſelf intelligible. And this might have been a good Excuſe for the antient Schoolmen, if they had not carry'd this Liberty too far, and made uſe of Terms wholly barbarous.

[4] By *Beings* our Author means the Subſtances of Things, with all their Properties and Qualities, internal and external, as appears by what follows.

[5] See Note 2. upon §. 5. of this Chapter.

[6] Men and their Actions are here underſtood, as §. 16. ſhews.

III. We may define our *moral Entities* to be *certain Modes ſuperadded to natural Things and Motions by underſtanding Beings, chiefly for the guiding and tempering the Freedom of voluntary Actions, and for the procuring of a decent Regularity in the Method of Life.* We call them *Modes*, becauſe we conceive *Ens*, or *Being*, in general, to be more conveniently divided at large into *Subſtance* and [1] *Mode*, than into *Subſtance* and *Accident*. And as *Mode* is contradiſtinguiſh'd to *Subſtance*, ſo it is manifeſt, that *moral Entities* have no Self-ſubſiſtence, but are founded in Subſtances and in their Motions, and do only affect them after a certain manner. Of *Modes*, [2] ſome flow, as it were, naturally from the Things themſelves; [3] others are ſuperadded by the Intervention of an intelligent Power. For whatever is endu'd with Underſtanding, can, from the reflex Knowledge of Things, and from comparing them with one another, form ſuch Notions as may prove very ſerviceable in the Direction of an agreeable and conſiſtent Faculty. *Moral Entities* are of this kind; the Original of which is juſtly to be referr'd to Almighty GOD, who would not that Men ſhould paſs their Life like Beaſts, without Culture and without Rule; but that they and their Actions ſhould be moderated by ſettled Maxims and Principles; which could not be effected without the Application of ſuch Terms and Notions. But the greateſt Part of them were afterwards added at the Pleaſure of Men, as they found it expedient to bring them in, for the poliſhing and the methodizing of common Life. And from hence the End of them is plainly to be diſcover'd, which is not, like that of natural Beings, the Perfection of the Univerſe, but the particular Perfection of human Conduct, as ſuperior to brutal, in being capable of regular Beauty and Grace; that thus in ſo inconſtant a Subject, as the Motions of Mens Minds, an agreeable Elegance and Harmony might be produc'd.

IV. As the original Way of producing natural Entities is [4] by *Creation*, ſo the Manner of framing moral Entities cannot be better expreſſed than by the Term of [5] *Impoſition*. For theſe do not proceed from Principles ingrafted in the Subſtance of Things, but are added, at the Pleaſure of intelligent Creatures, to [6] Beings already perfect in their Nature, and to the real Productions of thoſe Beings; and conſequently obtain their [7] whole Exiſtence from the Determination of their Authors. The ſame Power aſſigns them ſuch and ſuch Effects, which, when it ſees convenient, it can deſtroy [8], without cauſing any natural Alteration in the Subject to which they were apply'd. Hence their Force and Ability of Operation doth not conſiſt in this, that they can by their internal Efficacy produce any natural Motion or Change in Things, without the Intervention of other Cauſes; but partly in ſhewing Men how they ought to govern their Freedom of Actions, and chiefly in making them capable of receiving Benefit or Injury, and of exerciſing ſeveral Works towards other Perſons, with ſome peculiar Effect [9]. And the Efficacy of moral Entities, produc'd by Almighty GOD, flows from this Principle, That he, by his Right of Creation, hath the Power of circumſcribing, within proper Limits, that Liberty of Will with which he indulg'd Mankind, and when it grows refractory, of turning it which way ſoever he pleaſeth, by the Force

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Mr. BARB. *NOTES on* §. III, IV.

[1] Our Author, without doubt, intends by this Diſtinction to make a Difference between Modes properly ſo call'd, which are not to be ſeparated from their Subſtance, and have no Exiſtence by themſelves; and ſuch, as being real Subſtances of themſelves, can have an independent Exiſtence from the Subject to which they are joyned. For the Term *Mode*, in its true Signification, is oppoſed to *Subſtance*, and imports only the Modification, or Manner of Being. It is not the ſame with Accident.

[2] For Inſtance, The Figure of a Body, which is really inherent in it; and therefore called an *Internal Mode*.

[3] Such are *moral Entities*, which are not in the Things themſelves, but depend upon the Operation of the Mind; and are therefore called *External Modes*, becauſe they are nothing elſe but certain Relations of Objects or Ideas one to another. See *The Art of Thinking*, l. i. c. ii. and Mr. LOCKE's *Human Underſtanding*, l. ii. c. xxviii.

[4] This Word is ſometimes uſed in Latin, to ſignify the Eſtabliſhment of a Man in an Office, as *Conſul creatus eſt*, He was made Conſul.

[5] The *French* renders it *Inſtitution*, which being uſed in *Engliſh* for every Thing that proceeds from mere human Invention and Appointment, in Oppoſition to what proceeds from Nature, may be better uſed here.

[6] We muſt not imagine, that the Exiſtence of moral Entities is always poſterior to the Exiſtence of the Things they are annexed to. 'Tis true, in reſpect of ſuch as are of human Inſtitution only, but not of ſuch as are of divine, becauſe they are appropriated to Man from the Moment of his Creation, of which Sort are all natural Obligations, of which our Author treats, *l.* iii. *c.* iv. §. 5. and the State of compleat Nature, of which he ſpeaks §. 7. So that there is no Moment, in which a Man may be conceived free from all moral Entities. Nevertheleſs, as moral Entities, which are born with a Man, are not leſs true Modes than the other, though they do not proceed from the Subſtance and phyſical Qualities of the Man, but from the Determination and Will of the Creator, in ſuch Manner as ſhall be explained in the following Note; yet theſe may be conceived abſtractly, as the Properties, and phyſical Qualities of Man, by Virtue of Divine Inſtitution. This Expoſition is taken out of a Work of this Author's, call'd A *Specimen of the Controverſies with* Pufendorf *about his Right of Nature*, &c. *c.* iii. §. 10.

[7] To obviate all Objections againſt this Expreſſion of our Author, we ought to obſerve, that he makes two ſorts of Inſtitution: 1. Purely arbitrary. 2. Another, which has a Foundation in the Thing itſelf, and which is a neceſſary Conſequent of what is before freely reſolved, and can't be oppoſed or contradicted: As for Example, an Architect may or may not build a Palace; but when he has reſolved to do it, he muſt neceſſarily order the Materials in a clear different Manner than if he were to build a Cottage; and he'd paſs for a Fool, if, after he had built a Cottage, he ſhould affirm it to be a Palace: Yet this hinders not, but the ordering of the Materials proceeds from the Contrivance and Will of the Architect. In like manner it was altogether free for GOD either to create Man, or not; but after he had reſolved to ſend him into the World, it was neceſſary that he ſhould lay ſuch Obligations on him, as became a rational and ſociable Creature; ſo that if the Laws of Nature depend originally on the Divine Inſtitution, they are not a pure arbitrary Conſtitution, as the ceremonial Laws given to the *Jews* were; but an Inſtitution founded upon the very Nature of Man, and the Wiſdom of GOD, who can't will the End, but he muſt at the ſame time will the Means to the End. Nevertheleſs, though the Will of GOD can't be ſeparated from his Goodneſs and Wiſdom, yet we impute the Eſtabliſhment of the Laws of Nature chiefly to the Divine Will, becauſe it is not only the Principle of all Divine Actions, but becauſe GOD's Wiſdom and Goodneſs are Attributes intirely free, and ſo can't be conceived without the Will. Theſe Expoſitions are taken from this Author's Works, *viz. Specim. Controverſ.* cap. v. §. 9. *Diſſert. Acad.* p. 743. *Spicil. Controv.* cap. iii. §. 9.

[8] See the laſt Paragraph of this Chapter.

[9] By virtue of moral Entities we have a Right to do ourſelves, or require of others, certain Things; or rather we are obliged to do them, or ſuffer others to do them. See Note 2. in the next Paragraph.

of ſome threatned Evil: Men likewiſe were impowered to give a Force to their Inventions of the ſame kind, by threatning ſome Inconvenience, which their Strength was able to make good againſt thoſe who ſhould not act conformably to them.

V. Since then *moral Entities* were inſtituted for the Regulation of Mens Lives; to which End it is neceſſary, that thoſe who are to obſerve this Rule ſhould bear ſome ſettled Relations to one another, ſhould govern their Actions by a fixed Method; and, laſtly, ſhould act with determinate Reſpects and Titles about ſuch Goods and Poſſeſſions as the Occaſions of Life require; we may hence conceive them to be principally inherent, *firſt*, in *Men*; *ſecondly*, in the *Actions* of Men; and, *thirdly*, after a ſort, likewiſe [1], in *Things*, which Nature, either by her own Strength, or with the Aſſiſtance of human Induſtry, may produce [2] But though it would be no Abſurdity to ſtate their Diviſion according to theſe three Heads or Subjects, yet it ſeems a more exact Method to make the Claſſes of natural Entities our Patterns in digeſting the moral; not only becauſe the former have more engag'd the Studies of philoſophical Men, and being compar'd with the latter, caſt a conſiderable Share of their own Light and Evidence upon them; but likewiſe becauſe our Underſtandings are ſo immers'd in corporeal Images, as to be hardly capable of apprehending ſuch moral Beings any otherwiſe than by their Analogy to thoſe of Nature.

VI. Now though *moral Entities* do not ſubſiſt of themſelves, and for that Reaſon ought not, in general, to be rank'd under the Claſs of *Subſtances*, but of *Modes*; yet we find many of them to be conceiv'd in the Manner of Subſtances, becauſe other moral Things ſeem to be immediately founded in them, juſt as Quantities and Qualities inhere in the real Subſtance of Bodies. Farther, as natural Subſtances ſuppoſe ſome Kind of *Space*, in which they fix their Exiſtence, and exerciſe their Motions; ſo in Alluſion to theſe, *moral Perſons* are eſpecially ſaid to be in ſome *State*, which in like manner contains them, and in which they perform their Operations. Hence a *State* may not improperly be defin'd *a moral Entity fram'd and taken up on account of the Analogy it bears to Space.* And as *Space* ſeems no principal and original Being, but is deviſ'd, to be, as it were, *ſpread under* other Things, to hold and to ſuſtain them in ſome particular manner; ſo the ſeveral *Sates* were not introduc'd for their own Sakes, but to make a Field for [3] *moral Perſons* to exiſt in. Yet there is indeed this Difference between *State* and *Space*, that the latter is a kind of immoveable Subſtance, extended primarily, and of it ſelf, and which might ſtill ſubſiſt, if all the natural Things, which now fill it, were remov'd: But *States* (and all other *moral Beings*, conſider'd *formally* as ſuch) obtain no higher Condition than that of *Modes* or Attributes; ſo that upon taking away the Perſons ſuppos'd to be in ſuch a *State*, the *State* it ſelf is in manifeſt Danger of loſing its own Exiſtence.

VII. There are two Sorts of *Spaces*; one according to which Things are ſaid to be *in a Place*, which the Logicians call *Ubi*, as *here*, *there*, &c. and another according to which they are pronounc'd to be *in Time*, which they call *Quando*, as *Yeſterday*, to *Day*, to *Morrow*, &c. In the ſame manner we may conceive a double Notion of *State*; one which denotes a *moral Ubi*, and bears an Analogy to *Place*; another which includes a Reſpect to Time, ſignifying the Application of ſome moral Effect to Perſons exiſting in ſuch a Time. The former *State*, which hath a Relation to *Place*, may be conſider'd either undeterminately, as it reſults only from [4] moral Qualities; or determinately, as it ſuppoſeth a Dependence on moral Quantities, and on Compariſon. The *State* of Man conſider'd undeterminately, is either *natural* or [5] *adventitious*. We uſe the Word *natural*, not becauſe ſuch a *State* flows from the internal Principles of human Eſſence, antecedent to the Power of Impoſition; but becauſe it was impos'd by God himſelf, not by Man, and affects us immediately upon our Nativity. We are wont to conſider the natural State of Man, either *abſolutely*, or *with relation* to other Men: The former Notion, till we can find a more convenient Term, we may expreſs by the Word *Humanity*, importing that Condition in which Man is plac'd by his Creator, who hath been pleas'd to endue him with Excellencies and Advantages in a high Degree above all other animate Beings [a]. Of which State this Principle is a direct Conſequence, That Man ought to be a Creature acknowledging and worſhipping the Divine Author, and admiring his Works; and that 'tis expected he ſhould maintain a Courſe of Life far different from that of Brutes. To this *State* is oppos'd the Life and the Condition of irrational Animals.

Since then the very being a Man is a *State* obliging to certain Duties, and giving a Title to certain Rights, it cannot be out of the way to conſider the preciſe Point of Time at which particular Perſons may be ſaid to enter on ſuch a *State*: And this we conceive ought to be fix'd on the very firſt Moment when any one may be truly call'd

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[a] Cicero Off. i. c. 28. *Nature hath given us a Perſon and Character to ſuſtain, in a Degree of Excellence far above any other Creatures.*

Mr. Barb. *NOTES on* §. v, vi, vii.

[1] See what the Author ſays §. 16.

[2] All moral Entities may be reduced to two Heads: 1. Right. 2. Obligation. Theſe are the Foundation of all Morality, which conſiſts either in Actions, or Perſons, which have Right to act in ſuch a Manner, or are under an Obligation to do it. This Right and Obligation are Relatives, which always reciprocally ſuppoſe each other, as they refer to different Perſons. See *Lib.* iii. *cap* v. §. 1. In fine, as all Right, and every Obligation depends on the Authority of a Superior, who regulates by Laws the Actions of all that are ſubject to him, natural Order requires, that we treat firſt of human Actions, their Principles, and different Kinds; and then of a Law in general; after which the Explication of moral Entities, which are founded on Laws, will properly follow.

[3] As for Example, When a Prince, in favour to, or to reward any of his Subjects, eſtabliſhes an Office or Dignity, which he would not elſe have done, nor was otherwiſe neceſſary, but purely to advance the Honour of him for whom it was eſtabliſhed: Such are all honorary Employments.

[4] From the 17 to the 23 §. of this Chapter, the Author ſhews what he means by *moral Qualities* and *Quantities*.

[5] *Adventitious* is a ſort of moral State, which is added by way of Overplus to the State of Nature, in Conſequence of ſome human Action.

a Man, though he as yet want thoſe Perfections which will follow his Nature in a longer Courſe: that is, whenſoever he begins to enjoy Life and Senſe, though his Mother hath not yet delivered him into the World. Now becauſe the *Obligations* cannot be fulfilled by him, without he underſtand his own Nature and the Ways of working, they for that Reaſon do not actually exert their Force, 'till he is able to ſquare his Actions by ſome Rule, and to diſtinguiſh them by their proper Differences. But the *Rights*, on the contrary, date their Validity from the very Beginning of our Being, in as much as they engage other Perſons, already arrived at the full Uſe of Reaſon, to ſuch and ſuch Performances towards us, and may turn to our Benefit, even whilſt we are incapable of apprehending the Favour. Hence, it being a general Right and Privilege of all Men not to be hurt by others, if the Body of a *Fœtus* in the Womb ſhould ſuffer any unlawful Violence, the Injury is not only done to the Parents, but to the Child; who, we ſuppoſe, may in his own Name demand Juſtice on that ſcore, when he is grown up to a Knowledge of the Action [1]. But before the imperfect Materials [2] have acquired an human *Form* in the Womb, if any one ſhould diſſipate or deſtroy them, he cannot properly be termed injurious with regard to that ſenſeleſs Maſs; though he hath indeed broken the Law of Nature, by intercepting a Member of human Society, and hath done an Injury to the Commonwealth, and to the Parents, by depriving them of their promis'd Citizen and Off-ſpring.

The *Natural State* of Man, conſidered *with relation to other Men*, is that which effects us upon the bare account of an univerſal Kindred, reſulting from the Similitude of our Nature, antecedent to any human Act or Covenant, by which one Man is rendered peculiarly obnoxious to the Power of another. According to which Senſe, thoſe Perſons are ſaid to live in a *State of Nature*, who neither obey one common Maſter, nor are at all ſubject one to the other, nor have any Acquaintance by the means of Benefits, or of Injuries. To which may be added a third Notion of a *natural State*, as it abſtracts from all Inventions and Inſtitutions brought in, either by human Induſtry, or by divine Revelation, for the Grace and the Conveniency of Life.

The *Adventitious State* is that which obligeth Men at, or after their Birth, by the Authority of ſome human Conſtitution; the Diviſions of which will be better ſettled hereafter [3].

But we ought to obſerve, by the way, that there's no Reaſon why People ſhould imagine a State of Nature, in the Senſe but now delivered, to be a Thing that never was, or can be in the World; becauſe there was never any Set of Men joyned together barely by that Similitude of Nature, as it abſtracts from Conſanguinity; *Eve* being knit to *Adam* in the conjugal Tie, and all their numerous Deſcendents being cloſely united and ally'd by the Communion of Blood and Affinity of Race. For we muſt know, that the Bond ariſing from Nearneſs of Birth, doth by Degrees wear out amongſt Perſons remov'd at a great diſtance from the common Stock; nor is eſteem'd of any farther force, when once got beyond the reach of thoſe ſeveral Appellations and [4] Terms which Mankind have invented to expreſs it by. And therefore ſuch a *State*, though it did not appear at the Commencement of human Race, aroſe afterwards in a longer Tract of Time, when the Memory of the univerſal Root, and the Senſe of the Relation ſpringing from it, were ſunk out of the Thoughts and Minds of Men.

VIII. But although every State ſuppoſeth, in the Perſon whom it affects, a Reſpect and Diſpoſition towards others, in as much as it is attended with ſome Right, or ſome Obligation, neither of which we can conceive without an Object to employ their Force upon; yet ſome Kinds of States do more expreſly include and denote a Relation towards other Men, whilſt they ſignify the Manner and Proceſs by which the mutual Buſineſs of Mortals is on both

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[1] Another Example may be; If a Thing be given to an Infant before he comes into the World by Will, or by any other Title, when he is in Conception, the Infant has a certain Right to it; ſo that if it be taken from him, he may legally require it, when he comes to an Age of Diſcretion: For it is ſufficient, that he declares, that his Goods were taken away without his Conſent. This Compariſon will clear the Matter. When any Perſon in our Abſence robs us, or does us any Manner of Damage, he does us a real Injury, though we may not know it till a long time after. We have taken this out o our Author's Work, call'd *The Elements of the Civil Law*, p. 11, 12. We may add, that by the *Roman* Law, an Infant in the Mother's Womb is ſuppoſed to be come into the World at all times, when any thing may be done for its Advantage, as the Words of the *Digeſt. Lib.* i. *Tit.* iii. *De Statu hominum. Leg.* vii. import. *Qui in utero eſt, perinde ac ſi in rebus humanis eſſet, cuſtoditur, quotiens de commodo ipſius partûs quæritur. See Leg.* xxvi. of the ſame Title. Yet the *Roman* Lawyers are not well agreed upon this Point; for ſome of them hold, that the *Fœtus* is a Part of the Mother, or of her Entrails, and that it can't be called a Man, till it is born into the World. *Partus enim, antequàm edatur, mulieris portio eſt, vel viſcerum. Digeſt. Lib.* xxv. *Tit.* iv. *Leg.* i. §. 1. They borrow'd this Motion of the *Stoicks*, who in this agreed with divers others of the ancient Philoſophers. See *Julius Paulus*, written by Mr. *Noodt*. c. ii. and xi.

[2] The Explication, which *Philo* the *Jew* gives upon *Exod.* xxi. 22. is ſo very pertinent here, that 'tis a wonder our Author did not apply it. The Text is, If Men, in ſtriving together, hurt a Woman great with Child, ſo that ſhe miſcarry, tho' no other Miſchief follow, they ſhall pay the Husband of that Woman ſuch a Fine, or Mulct, as he ſhall lay on them, and give it him before the Judges; but if Death follow, ye ſhall give Life for Life. Theſe Words may be underſtood of the Death of the Mother only, as *Joſephus* thinks, or of both the Mother and Child, as *Philo* ſuppoſes, according to the Opinion of this Author. Ἐὰν μὴ ἄπλαστον, &c. If the *Fœtus* be not formed, he that ſtrikes the Mother, ought to make Satisfaction, as well for the Harm done her, as becauſe he hath hindred Nature from perfecting her Work, and giving Life to ſo noble a Creature as Man; but if the *Fœtus* be already formed, every Member being in its natural Place, and having its proper Qualities, the Perſon ought to be put to Death; *Philo De Leg. ſpecial.* See *Selden de Jure Nat. & Gent. ſecundum Hebr.* l. iv. c. i. Further, if before the *Fœtus* be compleatly formed, a Man by hurting the Woman on purpoſe, cauſes a bodily Deformity, or other Infirmity in the Child; he may, when he is grown up, proſecute the Author of ſuch a Damage, and ſhall obtain Satisfaction according to his Damage, as our Author ſpeaks in a Place cited hereafter, where he treats alſo of another Queſtion, which deſerves our Notice, *lib.* iv. *c.* xii. §. 10.

[3] Yet our Author does no where do it formally, but he treats, in their proper Place, of the four principal adventitious States, to which all the reſt may be reduced, *viz.* Marriage, the Relation of Parents and Children, Maſter and Servant, and Citizen, or Member of a Society. To this we may add the Diviſions of moral Perſons, which our Author lays down in the ſame Chapter, §. 12, *&c.*

[4] *Viz.* When we have paſſed the Degrees of Father, Mother, Grandfather, Grandmother, Brother, Siſter, Uncle, Aunt, Nephew, Niece, Couſins, he and ſhe, and ſome others depending on them; for as we have no other Names proper for ſuch Deſcendents, ſo the Line of Kindred produces no ſuch ſtrong Ties between them, who are in ſuch diſtant Degrees of Relation.

Sides manag'd and tranſacted. Of this ſort the moſt ſignal and material are *Peace* and *War*, which two *States*, [1] *Libanius* ſays, comprehend all the Affairs, and all the Conduct of Life. *Peace is that State by which Men live quietly together, without the Diſturbance of Violence or Injuries, and voluntarily diſcharge their mutual Duties, as Matters of neceſſary Obligation. War*, on the other hand, *is a State of Men mutually engag'd in offering and repelling Injuries, or endeavouring forcibly to recover their Dues. Peace* may be divided into *common* and *particular*; the former, ſuch as is maintain'd amongſt Men by Duties flowing purely from the Law of Nature; [2] the latter, ſuch as derives its Force from expreſs Covenants and Leagues, binding both Sides to agreeable Performances: This again is branched into *internal* and *external*, the one [3] between Members of the ſame Commonwealth, the other regarding Perſons of different Countries and Governments, whether as common Friends, or as ſpecial Confederates and Allies. A common or univerſal War engaging all Mankind at the ſame time, is an impoſſible Suppoſition; this being a direct Conſequence of the State of Beaſts. *Particular* War is either *internal* and *civil*, or *external*; *that*, between Members of the ſame [4]; *this*, between thoſe of different Communities. When the *Acts* of War are ſuſpended, though the *State* ſtill continue, ſuch a Ceſſation is call'd a *Truce* [a].

IX. *States* are ſaid to be conſider'd *determinately*, when we meaſure them according to the high or low Degree of Eſteem which attends them; or accounting as they are reckon'd more or leſs honourable. [5] For ſince peculiar *Rights* and Obligations accompany each *State*, every one obtains a larger Share of Splendor and Credit, either as its *Rights* are more numerous and [6] more forcible; or as its *Obligations* are directed towards the Performance of ſuch Works as require a ſingular Ability of Parts and Wit. On the other hand, thoſe which demand only dull Pains and Labour of Body, are in very little Value and Repute.

X. The latter ſort of *State*, which, in our general Diviſion, we ſettled with relation to Time, in conjunction with ſome moral Effect, may be divided, *firſt*, into *Seniority* and *Juniority*; both which are conſider'd, either with reſpect to the Duration of human Exiſtence, and are then call'd *Age*; the Degrees of which are *Infancy*, *Childhood*, *Puberty*, *Youth*, *Manhood*, *fix'd Age*, *declining*, *old*, and *decrepit Age*: or, with regard to ſome adventitious State, [7] according as a Man hath continued a longer or a ſhorter Time in it. *Secondly*, into *Plen-age* [8], when one is preſum'd able by his own Strength and Diſcretion to manage his Affairs; and *Non-age*, when a Perſon hath need of a *Tutor*, or *Guardian*, becauſe he is ſuppos'd, upon the account of Weakneſs of Judgment, incapable of dexterouſly proſecuting his own Buſineſs. The Limits of this *State* are different, according to the various Conſtitutions and Cuſtoms of Nations.

Different from *Non-age* is what we may call *an Age capable of* [9] *meditated Guile*; the Bounds of which it is likewiſe impoſſible to aſſign. *Ælian* in his *Various Hiſtory* relates a very remarkable Way of diſcovering ſuch an early Deceit. A Boy, having taken up a golden Plate [b] dropt out of *Diana*'s Crown, was indicted in Court: The Judges order'd a Pack of trifling Play-things to be laid upon the Board, and amongſt theſe a Plate of Gold, and bid the Boy chooſe which he lik'd beſt; who again laying hands on the Gold, was condemn'd as guilty of the former Sacrilege.

XI. Before we proceed to other Matters, it ſeems neceſſary for us to obſerve, that through Scarcity of Words we are frequently compell'd to expreſs by the ſame Term, the *State* it ſelf, and the *Attribute* proper to ſuch a *State*; though they are really diſtinct, and form different Conceptions in our Minds [c]. Thus, to give an Inſtance, *Liberty* is us'd as well for a *State* with analogy to *Space*, as for a *Faculty of working*, with reſemblance to an *active Quality* [10]. And ſo *Nobility* ſometimes expreſſeth a *State*, ſometimes an Attribute, or Affection of the Perſon in ſuch a *State*, in the manner of a *paſſive Quality*. So likewiſe the word *Truce* denotes both the *State* of Peace, and the Manner of ſettling it.

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[a] Vide *Grot. de Jur. B. & P.* l. iii. c. xxi. [b] Lib. v. Cap. xvi.

[c] *Senec.* de Benef. l. ii. c. xxxiv. *There is a vaſt multitude of Things which have no peculiar Words fix'd upon them; and theſe we expreſs not by proper, but by foreign and borrow'd Names.*

Mr. BARB. *NOTES on* §. VIII, IX, X, XI.

[1] *Progymnaſm.* p. v. c. Edit. *Pariſ. Morel. Ariſtotle,* as Mr. *Hertius* obſerves, had before ſpoken to the ſame effect. Διῄρηται δὲ ϗ πᾶς ὁ βίος, &c. The whole Life of Man is divided into Labour and Idleneſs, War and Peace. *Polit.* l. vii. c. xiv. Edit. *Pariſ.* 1629.

[2] *See Book the* viii. *Chap.* ix. *Sect.* 2, 3. &c.

[3] *Viz.* So far as they execute the fundamental Agreement punctually, for the ſake of which the Society was eſtabliſhed, and do not oppoſe, by open Fact, the lawful Power which is exerciſed over them; and ſo that Peace is not diſturbed by any ſort of Violence, but only that which we are engaged not to uſe, when we are entred into a Society. As for Example, The internal Peace of a State ſuffers no Interruption, when the Magiſtrate uſes the Power entruſted to him to curb and puniſh the Breakers of the Laws. But when the Subjects will by Force deliver a Criminal from Puniſhment, and endeavour to oppoſe the Magiſtrate in the Exerciſe of his legal Authority, this is called a Civil War. *Element. Juriſprud. Univerſ.* p. 17. The War alſo which breaks out among Confederates, united together by a perpetual Alliance, may alſo be looked upon as an inteſtine War, as Mr. *Hertius* there obſerves.

[4] When this ſort of War is extinguiſhed at its firſt Riſe, *viz.* without any regular Preparations on either Side, it is a Sedition; when Subjects take up Arms unjuſtly againſt their Sovereign, it is a Rebellion. In *Democracies* and *Ariſtocracies,* when the People and the Magiſtrates make two Parties, and uſe Acts of Hoſtility one againſt the other, this is properly call'd a Civil War. *Element. Juriſprud. Univerſ.* p. 18.

[5] See Mr. DAUMAT's *Publick Right*, *Lib.* i. *Tit.* ix. *Sect.* 1. and what our Author ſays, *l.* viii. *c.* iv.

[6] *More forcible.*] The *French* Tranſlator renders the Words, *validiora jura,* more conſiderable, *i. e.* of greater Validity and Certainty; for the Honour of an Employ does not depend upon the Manner of obtaining it, but upon the Dignity and Privileges which it confers on ſuch as are inveſted with it. And ſo this ſeems the better Tranſlation.

[7] And ſo we ſay for Example, an Old General, an Old Soldier, a Young Apprentice, *&c.*

[9] See *Lib.* iii. *Ch.* vi. §. 4. and *Lib.* iv. *Ch.* iv. §. 15.

The *Roman* Law declares ſuch as are in their *Non-age,* or not far from it, capable of Deceit. *Igitur doli non capaces, ut admodum impuberes--------- excuſati ſunt. Digeſt. Lib.* xlvii. *Tit.* xii. *De Sepulchro violato, Leg.* iii. §. 1. See CUJAS's Obſervations, *Lib.* vi. *Ch.* xxii. & *Digeſt. Lib.* xlvii. *Tit.* viii. *De vi bonorum raptorum, Leg.* ii. §. 19.

[10] The Author will explain a little lower, *viz.* §. 19. what he means by Qualities *active* and *paſſive.*

Nor muſt we forget to hint, that as one Perſon may be at the ſame time engag'd in ſeveral *States*, provided that the Obligations of thoſe *States* do not interfere with one another; ſo the Obligations adhering to one particular *State*, may, according to different Parts, be deriv'd from different Principles. And therefore he that only collects the Obligations flowing from a ſingle Principle, and omits the reſt, doth not preſently form a diſtinct *State* incapable of other Obligations beſides thoſe which he hath taken notice of. Thus he that gathers ſeveral Parts of the Office of Prieſts purely from the Holy Scriptures, doth not in the leaſt deny, but that they are likewiſe bound to ſuch Performances as the Conſtitutions of particular Governments ſhall farther enjoyn. So we that profeſs in this Work to treat only of thoſe Duties of Men, which [1] the Light of Reaſon ſhews to be neceſſary, do not at all pretend that there ever was, or now is, or ought to be, ſuch a *State* in which thoſe *Obligations* only ſhould prevail, excluſive of all others. Nay, it would be almoſt a needleſs Diſquiſition to ſearch, whether ſuch a State of Men was once ſo much as likely to have been in the World. For the Aſſertion, which ſome ſo confidently lay down, could never yet be clearly made out; That *if Man had continued in his primitive Holineſs, the Law of Nature alone, as it govern'd him at firſt, ſo ſhould have continued its Sway, except that one or two* [2] *poſitive Commands might probably have been added to it.* We may juſtly queſtion, whether Mankind, although untainted with Sin, ſhould have always paſs'd their Time in the Compaſs of a ſingle Garden, ſuſtaining themſelves with the Fruits of ſpontaneous Growth, and not have cultivated and adorn'd their Ways of living, by induſtrious Management, and by Variety of Arts and Inventions. For what Prejudice could it have been to their original Innocence and Integrity, if, upon the Multiplication of human Race, they had divided into ſeparate Societies in the Forms of Commonwealths? And what Notion can we frame of ſuch Societies, without the Addition of *poſitive* Laws and Conſtitutions?

XII. *Moral Entities*, fram'd with Analogy to Subſtances, are call'd *moral Perſons* [a]; which are either particular Men, or ſeveral join'd in one Body by ſome moral Tie, conſider'd with the State and Office which they maintain in common Life. *Moral Perſons* are either *Simple*, or *Compound*. The *Simple*, according to the Difference of their Poſts and Employments, are either *Publick*, or *Private*; as their Duty is immediately apply'd, either to the Benefit of civil Society, or to the particular Advantage of [3] every private Member. *Publick Perſons*, by the general Cuſtom of the Chriſtian World, are divided into *Civil* and *Eccleſiaſtical*. The former [4] are either *Principal*, or *Inferior*. Of *principal* Perſons, ſome adminiſter Affairs with a *ſupreme Power*; others either execute ſome Part of the Adminiſtration by Commiſſion from the ſupreme Power, who are properly call'd *Magiſtrates*, or elſe aſſiſt with their Advice and Counſel in the Management of the Commonwealth. The *Inferior* perform a leſs noble Service to the Community, and act under the *Magiſtrates*, with reſpect to their publick Capacity. In War the Officers, whether of higher or lower Commiſſions, anſwer to Magiſtrates, and are aſſiſted, in Subordination, by the common Soldiers. We reckon Men of that Profeſſion amongſt publick Perſons, in as much as they are authoriz'd by the ſupreme Power, either immediately or mediately, to bear Arms in the Service of the Commonwealth.

There is likewiſe a peculiar Species of *politick Perſons*, which we may ſtile *Repreſentatives*, becauſe they ſuſtain the Character of other Perſons: ſuch as, being inveſted with the Power and Authority of acting by another, do in his room tranſact Buſineſs with the ſame Force and Validity, as if he himſelf had managed it. Of this Kind are *Legates*, *Vicars*, *Burgeſſes*, &c.

A new Diſtinction hath been brought in of late, between Miniſters [5] of a repreſentative Character, who are *Embaſſadors* properly ſo call'd; and

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[a] *The Roman Lawyers ordinarily reſtrain the word* Perſon *to thoſe that are Free: and rank their Slaves amongſt the Goods they poſſeſſed.*

Mr. BARB. *NOTES on* §. XII.

[1] In Oppoſition to Revelation, and particular Rules of the Civil Laws of every Country, from whence ariſe three diſtinct Sciences, *viz.* Natural Right, which is common to all Men ~~with~~ [illegible] ~~ption~~; Civil Right, which is or may be different according to the Intereſt of every State; and Moral Theology[illegible]; the Author's Abridgment of the Duties of a Man and Citizen. *Præf.* §. 2.

without excep-tion

[2] It is not known, whoſe Words theſe are, which our Author cenſures. As to the Queſtion itſelf, 'tis one of the moſt impertinent; for our Author elſewhere acknowledges, that is is very hard to imagine, how a Propriety of Goods and Government, on which our whole Lives now are ſpent, could have Place in our State of Integrity. See his *Spicil. Jur. Nat. c.* 2. §. 9. and his *Comment. ſuper. inven. Vener. Lipſ. pullo. p.* 386. Nevertheleſs ſome others have treated ſeriouſly upon this frivolous Queſtion; as Mr. *Thomaſius Inſt. Juriſpr. Divin. Lib.* i. *c.* 2. §. 37, 38. and Mr. *Hirtius* in his *Elem. prud. Civil. l.* i. *Sect.* 3. §. 5.

[3] There is another Reaſon, why they are call'd ſo, and that is, that they are ſettled in publick Employs by the Authority of a civil Society, or of them that govern it. Whereas private Employments depend upon the Will and Chioce of every Man, unleſs the State will interpoſe and confer them.

[4] Why does he not define what is meant by Perſons political, or civil? They are ſuch, as (for ſo our Author himſelf ſpeaks, *Elem. Juriſprud. Univerſ. p.* 23.) adminiſter by publick Authority thoſe Affairs which have a particular regard to civil Society, conſidered as ſuch; whereas Eccleſiaſticks are to take care of Matters of Religion only. Theſe laſt, though they ought to be ſubject to their Sovereigns in temporal and civil Matters at all times, yet may and ought alſo to be independent, as to Spirituals, provided they keep within their Bounds, and do not ſet up any other Religion beſides the eſtabliſhed: And the Reaſon of it is, that as Religion is a Thing in its own Nature free, at leaſt, directly, and can't be ſuppoſed to be admitted into civil Society for no End, every eccleſiaſtical Society may do what it judges for the Intereſt of Religion, provided it encroach not upon any Prerogative of the Civil Power. See what ſhall be ſaid hereafter, *Lib.* vii. *ch.* 4. §. 11. *Note* 2. Nevertheleſs, I do not aſſert any Thing here, which may be a Foundation for any Principles contrary to the *Engliſh* Author, *Of the Rights of the Chriſtian Church.*

[5] The Author here quotes the Work of Mr. *Wicquefort*, entituled, *The Embaſſador, and his Office*, printed in his Time without a Name, and under a different Title, *viz. Memoirs concerning Embaſſadors*; but lately publiſhed, with many Additions, as above.

Miniſters of the ſecond Order, as *Envoys* or *Reſidents*, who do not, like the former, expreſs the full Power and Grandeur of their Maſters [1].

With reſemblance to theſe publick Repreſentatives, Tutors and Guardians are concern'd for private Perſons, as they manage Affairs in behalf of Pupils or Minors given them in Charge.

On this Point Mr. *Hobbs* [a] is miſtaken, when he will have it frequently to happen in Communities, *that a Man ſhall bear the Perſon of an inanimate Thing, which therefore is it ſelf not properly a Perſon; as ſuppoſe of a Church, an Hoſpital, a Bridge*, &c. For there appears no Neceſſity of introducing a *Fiction* of *Law*, to conſtitute Perſons by whom any of theſe ſhould be repreſented. It being more natural to ſay in plain Terms, that particular Men are impower'd by the Community, to collect the Revenue, ſettled for the preſerving of ſuch Places, or Things, and to carry on and ſuſtain any *Suits* that ſhall ariſe on thoſe Accounts.

The Variety and Diviſion of *eccleſiaſtical Perſons* is obvious to every Man, according to the particular Religion in which he hath been bred up. Nor can any Man of Letters be at a loſs to apprehend what Kinds of *Perſons* are founded in the Management of Schools.

Private Perſons are of a vaſt Latitude and Extent; yet their principal Differences may be taken, *firſt*, from their Buſineſs, Craft, or Trade, which imploys their Pains, and exhibits their Livelihood: and theſe are, either creditable and genteel, or ſuch as ſeem to carry in them more Baſeneſs, or Drudgery. *Secondly*, from the Condition, or, as we may ſay, the *moral Situation* which any one obtains in a Community; in which reſpect one is a Citizen, with more or fewer Privileges; another a Sojourner, and a third a Stranger. *Thirdly*, from the Place in a Family, upon which account one is ſaid to be a Houſholder, which may comprehend the Perſon of a Huſband, a Father, and a Maſter; another is call'd a Wife, another a Son, another a Servant: Theſe may paſs for the ordinary Members of a Family; the extraordinary are Gueſts and Lodgers. *Fourthly*, upon account of Race and Birth; whence ariſe *Nobles* (divided into different Degrees in different Countries) and *Plebeians*. *Fifthly*, from Sex and Age, whence come the Differences of Man and Woman, and the Diſtinctions founded in Childhood, Youth, ×M[illegible]d, and Old-Age [2]. For though the ×[illegible] Sex, and Number of Years, are not of external Impoſition, yet in the Method of a ſocial Life, they involve ſome kind of moral Notion; in as much as different Actions are becoming in different Sexes, and Perſons of various [3] Ages require a various Treatment and Application.

×manhood
×Diversity of

XIII. A *Compound moral Perſon* is then conſtituted, when ſeveral individual Men are ſo united together, that what they *will* or *act* by virtue of that Union, is eſteem'd a ſingle Will, and a ſingle Act, and no more. And this is ſuppoſed to be done, when the particular Members ſubmit their Wills to the Will of one Man, or of one Council, in ſuch a manner as to acknowledge, and to deſire others to acknowledge, for the common Act and Determination of them all, whatever that Man, or that Council ſhall decree or perform, in Matters which properly concern ſuch an Union, and are agreeable to the End and the Intention of it. Hence it comes to paſs, that whereas in other Caſes, when many Men *will* or *act* any Thing, we conceive ſo many diſtinct Wills and Acts as there are in number *natural Perſons*, or *human Individuals*; yet when they cloſe, and form a *compound Perſon*, they are ſuppoſed to have but a ſingle Will, and every Action which they perform is conſtrued as one only, although a Number of natural Individuals concurs in its Production. And hence ſuch a *compound Perſon* doth and ought to obtain ſome particular Goods and Rights, which none of the Members, in their private and ſeparate Quality, can claim or arrogate to themſelves [4].

Here alſo we muſt remark, that as natural Bodies continue *the ſame*, although in length of Time, by ſlow and ſilent degrees they receive a conſiderable Alteration from the various Acceſſions and Deſertions of their Particles; ſo by the particular Succeſſion of Individuals, the Identity of the *compound Perſon* is not injur'd; unleſs at one and the ſame time ſuch a Change ſhould arrive, as would entirely take away the Nature and Conſtitution of that united Body. On which Point we ſhall be more large in [5] another Part of our Work.

Compound moral Perſons, or Societies, may, after the manner of *ſingle Perſons*, be divided into *Publick* and *Private*. And the former again are ſubdivided into *Sacred* and *Civil*. Of the *Sacred*, ſome we may call *general*, as is the *Catholick* Church, and likewiſe any particular Church, whether comprehended within the Bounds of ſuch a Nation, or diſtinguiſh'd from others by publick Forms of Confeſſion. Others *Peculiar*, as are Councils, Synods, Conſiſtories, Presbyteries, *&c.* *Civil* Societies are alſo either *general*, as a *Commonwealth*, of which there are many Species, as ſimple, compound, regular, and irregular; or *particular*, as a Senate, an Order of Knights, a Tribe, a Parliament, *&c.* Armies may be called *military Societies*, and conſiſt

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[a] *Leviath.* cap. 16.

Mr. Barb. *NOTES on* §. xii, xiii.

[1] This is a viſible Miſtake in our Author, who has aſſerted the contrary elſewhere, and ought to have been corrected by Mr. *Hirtius*, who put out the *Frankfort* Edition in 1706; for there is great reaſon to reject the Sentiments of ſuch Men (as *Charles Paſcal, Richard Zouchaus*, &c.) who affirm that Embaſſadors, properly ſo called, are as their Maſter himſelf, who ſends them; inſomuch, that the Prince or State, to whom they are ſent, ought to give them the ſame Honour they would to their Maſter. The Character of an Embaſſador certainly gives neither the Dignity nor Title of a Sovereign, and ſuch a Miniſter may not pretend, becauſe his Maſter has a Superiority above another Prince, that he muſt perſonally be preferred before him. See what our Author ſays, *Lib.* iii. *ch.* 4. §. 20.

[2] In the Civil Law ſome other Diſtinctions are made among Perſons from their Age and Sex. See Mr. Daumat's *Civil Laws in their natural Order, Lib.* i. *Tit.* II. *Sect.* I. *of the Preliminaries; and the Interpreters upon the Digeſt. Lib.* i. *Tit.* V. *De ſtatu Hominum.*

[3] *Ages* is not in the Original, but the Manner of Reaſoning, and Beginning of the Sentence require the Addition of it, as our Author himſelf does in his *Elements Juriſpr. Univerſ. p.* 28.

[4] As for Example, No private Perſon hath a Right to puniſh Criminals, although the Right to do it proceeds originally from private Perſons; the Sovereign only has that Power.

[5] See *Lib.* viii. *Ch.* XII.

of [1] Regiments, Troops, Cohorts, Companies, *&c.*

Amongſt *private Societies* we do not only reckon *Families*, but all the [2] Colleges, or Corporations in a Kingdom, or a City, as thoſe of the Merchants, of the Artificers, and the like. To make a minute Catalogue of every Species we think unneceſſary to our preſent Deſign.

XIV. Concerning the Nature of *ſimple moral Perſons*, we have this farther to obſerve; that as one and the ſame Man may be in ſeveral *States* together, [3] provided they do not claſh with each other, ſo he may ſuſtain ſeveral *Perſons* together, upon Suppoſition that the Duties attending thoſe *Perſons* may be perform'd together by him. For, though upon a natural Account one cannot be both a Husband and a Wife, both a Son and a Daughter; nor in a moral Conſideration, at the ſame Time, a Maſter and a Servant, a Judge and a Priſoner, a Party and Witneſs; yet nothing hinders why the ſame Man may not be (for Example) at home a Houſholder, a Senator in Parliament, an Advocate in the Halls of Juſtice, and a Counſeller at Court. In as much as thoſe particular Offices do not require and engage the whole Man; but may, at different Times, be all conveniently adminiſtred [a]. And upon this Principle the wiſer Heathens undertook to defend *Polytheiſm* [b], which they knew well enough was contrary to Reaſon: For, their Excuſe was, they only conceiv'd ſuch a Number of Perſons in the ſame ſupreme Being, as might anſwer the Variety of Operations which proceeded from his Eſſence and Nature [c] [4].

It's very plain from the Name and the Notion of *Impoſition*, that when a Man enters on the Capacity of a new *Perſon*, there is no natural Change produc'd in him, no Generation of new natural Qualities, no Augmentation of old ones; but whatever accrues to him from this Relation, is comprehended within the Sphere of *moral* Things. So when a Man is declar'd Conſul, he is made ne'er the wiſer, nor when he lays down his Office, doth he lay down any of his Parts with it. Though ſome have obſerv'd, that the Splendor of Mens Dignity hath frequently a ſtrong Influence on their Actions, and that many Men have made very different Figures in a publick, and in a private Station. But we may reckon theſe Fanſies amongſt the common Deceptions of Sight, occaſion'd by gaudy Pomp and Shew. The Caſe being much the ſame, as when Country People imagine the Name and Title of *Doctor* to have ſome Share in the Force and the Succeſs of a Preſcription [d]. Except indeed, that ſome kinds of Parts and Diſpoſitions are rouz'd and enliven'd by Buſineſs; and on the contrary, lie dormant in a State of Eaſe [e]. Yet there is no Queſtion to be made, but that when God Almighty impoſeth a peculiar Charge and *Perſon* on any Man, he can, and often doth indue him with extraordinary Qualities, beyond the Meaſure of moral Acquirements; as is evident from the holy Scriptures [f].

From what hath been offer'd on this Subject it appears, that the *Jews* heretofore attributed too large Effects to their *Regeneration*, by which the new *Perſon* of a *Proſelyte of Juſtice* was impos'd on a Gentile; as, when they affirm'd, that there was no Force remaining in his former Kindred; that he ought not to eſteem, or uſe as Relations, his Brethren, Siſters, or Parents; nor his Children begotten in his firſt Condition [g]. The Cauſe of this Error was their abſurd Belief, that a new Soul was infus'd into the *Proſelyte*.

XV. It may not be amiſs, in the laſt Place, to obſerve, that Men ſometimes frame a kind of Shadows, or Images of *moral Perſons*, for the repreſenting of them in Sport and Jeſt. Whence it came to paſs, that the Term of *Perſon* hath been peculiarly challeng'd by the Stage. The Eſſence of a *feigned Perſon* conſiſts in this, that the Habit, Geſture, and Speech of another *real Perſon* be handſomely expreſs'd: Thus the whole Procedure bears only a Countenance of Mirth, and whatever ſuch a fictitious Actor ſays or does, leaves no *moral Effect* behind it, and is valu'd only according to the Dexterity and Artifice of the Performance: For which Reaſon we may, by the way, juſtly wonder, why

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[a] CICERO Off. *Lib.* i. *Ch.* xxx. *We muſt underſtand, that we are by Nature inveſted, as it were, with two* Perſons, *or Capacities; one common to Mankind, on account of our being Partakers of Reaſon, and of that Excellence by which we ſurpaſs the Beaſts; the other proper to particular Men. A third is caſt upon us by Time or Chance: A fourth we undertake and accommodate to our ſelves by our own Judgment.*

Idem de Oratore. *Lib.* ii. *Ch.* xxiv. *I ſuſtain three* Perſons *at the ſame Time; mine own, the Adverſary's, and the Judge's.*

[b] SENEC. de Benef. *Lib.* iv. *Ch.* vii. *There may be ſo many Appellations of* GOD, *as there are Employments.*

[c] MAXIM. TYRIUS, Diſſert. xxiii. *The Gods are one in Nature, though many in Name. But we, ſuch is our Ignorance, aſſign them different Titles, according to the different Helps and Favours which they afford Mankind.*

[d] ——————— *Purpura vendit*
Cauſſidicum, vendunt amethyſtina; convenit illis,
Et ſtrepitu & facie majoris vivere cenſus. Juv. Sat. vii. ℣. 135, &c.

[e] *Vide Corn, Nep. Alcibiad. Ch.* i.

[f] *Vide Exod.* iii, iv. *Deut.* xxxiv. 9. 1 *Sam.* x. 6, 9. *Matt.* x. 1. 19, 20.

[g] *Vide Selden de J. N. & G. Lib.* ii. *Ch.* iv.

Mr. BARB. *NOTES.*

[1] Our Author expreſſes theſe Parts of an Army according to the Manner of the *Romans*, as *Legio*, *Turma*, *Cohors*, *Manipulus*, &c. to which we have no Terms that will exactly anſwer, and therefore we are forced to tranſlate them thus. See the Treatiſes of *Juſtus Lipſius* upon this Matter.

[2] *Collegia* is a Name given to the Aſſemblies of ſome particular Society of Men of one Trade or Calling in a City or Corporation, and ſuch were the *Collegia, or Societies of Coachmen, Augurs, Æſculapius, or Health, Dendrophori, or Timber-Merchants*, &c. as we have at *London*, Companies, *or Collegia of Mercers, Drapers*, &c. Vide *Mr.* DAUMAT, *Of publick Right, Lib.* i. *Tit.* xv.

[3] Mr. *Hertius* has treated at large of this, and cleared it by a great Number of Examples, in his Diſcourſe, *De uno homine plures ſuſtinente perſonas*, which makes up a Part of the third *Tome* of his *Commentaries*, and ſmall Tracts. Printed at *Frankfort* on the *Mein*, *A. D.* 1700.

[4] See Mr. LE CLERC's *Bibliotheque Choiſie*; i. e. *Choice Library*, Tom. iii. Art. i.

Peter [1], Biſhop of *Alexandria*, approv'd of the *Baptiſm* which *Athanaſius*, when a little Boy, had adminiſtred to one of his Play-fellows [a].

But the *Impoſition* which produceth true *moral Perſons*, is allow'd no ſuch Liberty; but ought always to preſuppoſe ſuch Qualities, as may contribute to the ſolid Uſe and real Benefit of human Life: And he that in conſtituting Perſons hath not a Regard to theſe Endowments, is to be eſteem'd an extravagant Buffoon, and a vain Inſulter over Mankind [2]. Thus *Caligula* might have made a *Conſul* of the moſt wicked, or of the moſt ſenſeleſs Wretch in *Rome*, provided the Man had been a free Citizen, and could at leaſt have perform'd the common and formal Part of that Office: But to deſign his Horſe *Incitatus* the ſame Honour, was a Pitch of Madneſs, and of inſipid Raillery: nor a leſs Impudence than when he ſet him up for a Maſter of a Family, and gave him a Houſe and Furniture; where there was good Entertainment provided for Gueſts invited in the Name of the Beaſt [b]. An equal Madneſs was it, as well as a horrid Impiety, that many of the Antients, to flatter their Princes, their Founders of States, and other Worthies, rank'd them after their Death in the Number of the Gods [c]. And what to think of the Canonization amongſt the modern Papiſts, no Man of Senſe is at a Loſs.

XVI. As to *Things* conſider'd as they are the Object of Law [d], there ſeems to be no Occaſion of ranking them under the Head of *moral Entities*. For, though *Men* are conceiv'd as different *Perſons*, upon account of their different State or Office, yet *Things* do not raiſe ſuch diſtinct Notions in us, with reference to their Owners, whether ourſelves or others, or whether the *Propriety* be yet uncertain. When at firſt ſome Things fell under particular Right and Dominion, and others were left exempt, we muſt not fanſy, that they themſelves acquir'd any new Qualities; it ſeems rather, that upon introducing this Propriety of Things, a moral Quality aroſe amongſt Men, of which the *Men* were the *Subjects*, and the *Things* only the *Terms*: For, as during the primitive Communion of Goods, any Man had a *Right* of applying to his proper Uſe, what equally belong'd to all; ſo, when once Maſters or Owners were conſtituted, there ſprung up a *Right* in each particular Maſter of diſpoſing how he pleas'd of his own, and an *Obligation* in all other Maſters to abſtain from his Poſſeſſions. But the *Things* themſelves obtain'd nothing hence, but an extrinſical Denomination, as they make the Object of ſuch a Right, and of ſuch an Obligation. So when certain Things are ſaid to be holy, or ſacred, no moral Quality of Holineſs inheres in the Things; only, an Obligation is laid upon Men to treat them in ſuch a particular Manner: and when that Obligation ceaſeth, they are ſuppos'd to fall again into promiſcuous and ordinary Uſe. Yet if, ſtill, any Man will poſitively maintain, that there are ſome *Things*, as well as *Perſons*, which ſhould be call'd *moral*, he muſt take care ſo to explain himſelf, that he may be underſtood to attribute this *Morality* to the Things, not *formally*, as if it were *inherent*, but only *objectively*, as it is *terminated* in them [3].

XVII. Thus much of thoſe *moral Entities* which are conceiv'd with Analogy to *Subſtance*. We are now to enquire about thoſe that are really and formally *Modes*, and paſs in our Notion as ſuch. *Modes* may be conveniently enough divided into [4] *Modes* of *Affection*, and *Modes* of *Eſtimation*: According to the former, we ſuppoſe *Perſons* to be affected in ſuch and ſuch a Manner; according to the latter, both *Things* and *Perſons* may be rated and valu'd. The former fall under the Name of *Quality*, the latter of *Quantity*; if we take both thoſe Terms in the moſt extended Senſe. *Qualities*, ſo far as concerns our Buſineſs, may be divided into *formal* and *operative*. *Formal Qualities* are ſuch as do not tend, nor are directed towards any Act or Work, but agree and are join'd with the Subject, in the Manner of pure and naked *Forms*: whence we may likewiſe call them *ſimple Attributes*. *Operative Qualities* are either *primitive*, or *derivative*. By the *primitive*, a Thing is conceiv'd fit and able for ſuch an Act: They are divided into internal [5], and external [6], and may be term'd *moral paſſive Qualities*. The *derivative* are thoſe which proceed from the *primitive*, and are the [7] *Acts* themſelves, as the former were the *Powers*.

XVIII. Among *moral Attributes*, *Titles* have a conſiderable Place, which are apply'd for the Diſtinction of Perſons in civil Life, with Reference to their *State* and their Eſteem. They are chiefly of two Sorts: Some directly ſignify the Degree of the Rate and Value, which Perſons bear in common Account, together with the Qualities peculiar to Men of that Rank; but the State itſelf they only denote indirectly, and by the Bye, and

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[a] Sozom. *Lib.* ii. *Ch.* xvi. *Add the Argument of the Biſhop of* Minorca *in the Council of* Trent, *by Father* Paul, B. ii. *concerning the Intention of the Miniſter in the Celebration of the Sacrament.*

[b] *Sueton. Calig. Ch.* lv.

[c] *See* Tiberius's *Speech in* Tacitus, An. iv. *Ch.* xxxvii, xxxviii.

[d] *The different Diſtinctions of Things with Reference to Law, will be explain'd in the 4th and 5th Books.*

Mr. BARB. *NOTES.*

[1] The greateſt Number of learned Men reject this Story, becauſe (as they prove) S. *Athanaſius* was eighteen Years old, when this pretended *Baptiſm* was adminiſtred. See the Life of this Father written by the *Benedictines*; but it is ſufficient for our Author's Deſign, that the Fact was poſſible.

[2] A witty Speech of *Antiſthenes* deſerves our Notice in this Place. He adviſed the *Athenians*, upon a certain Time, to decree, *That hereafter Aſſes ſhould be called Horſes.* Some preſent replied in Banter, *That can't be. But, Gentlemen,* (ſays he) *you can chooſe for your Generals Men that know nothing of warlike Affairs, and whoſe Qualifications conſiſt only in having a greater Number of Voices,* Diog. Laert. *Lib.* vi. §. 8. Edit. Amſt.

[3] The different Diſtinctions of Things in relation to Right, ſhall be explain'd in *Lib.* iv. and v. See the *Inſtit. Lib.* ii. *Tit.* i. & *Digeſt. Lib.* i. *Tit.* viii. *De rerum Diviſione,* as alſo Mr. DAUMAT's *Civil Laws,* in their natural Order in the *Preliminaries, Tit.* iii.

[4] *Modi affectivi:* Words hard to be tranſlated. The *French* renders them, *ſimple Modes*; becauſe, as our Author explains them, they only modify; *i. e.* diſpoſe moral Perſons.

[5] Internal Qualities are ſuch, as are really inherent in a Perſon, as Power, Right, Obligation; as alſo, ſuch paſſive Qualities, of which our Author treats in §. 20. following. It were to be wiſhed, that our Author had been clearer in his Diviſions, which are not very Scholar-like.

[6] External Qualities are ſuch, as are not annexed to the Perſon, but being fixed to external Objects, make an Impreſſion upon the Perſon. See §. 21. following.

[7] *Viz.* Theſe derivative Qualities are nothing but the Effect and actual Operation of the primitive Qualities. In a Word, our Author ought to have avoided all this Jargon and unprofitable Diſtinctions of the Schools.

that either more clearly, or more obſcurely, according as ſuch a Title is uſually attributed to fewer, or to more *States*. Of this kind are thoſe honorary Epithets, commonly prefixed to the Names of great Perſons, as Marks of general Reſpect: As, *The moſt Serene*, *The moſt Eminent*, *The moſt Illuſtrious:* the Signification of which riſes higher, or falls lower, according to the Condition of the Subſtantive to which they are join'd. Other *Titles directly* ſignify ſome particular State, or ſome peculiar Seat and Place in a *State*, but *indirectly* denote that Degree of Value and Repute, which uſually accompanies ſuch a *State:* as are the Names of *moral* Perſons, of thoſe eſpecially who fill any Poſt of Honour. Now theſe Titles are not conſider'd, as they are only Notions repreſenting to one Man's Underſtanding the State and Office of another, but as, by Virtue of human Impoſition, they declare the Power and Authority of the Perſon that enjoys them. So that 'tis not a vain Contention about empty Ceremonies, when Men frequently have ſuch hot Diſputes and Quarrels about *Titles:* becauſe, upon the Denial of a Title, we are ſuppos'd at the ſame time to deny the *State*, the Office, the Power and the Rights, which ſuch a *Title* generally expreſſes, or includes. But here we muſt be ſure to obſerve, that the Impoſition of moſt *Titles* is not perpetual and uniform; but in different Countries, and in the ſame Country at different Times, admits of very large Alterations. Thus the *Titles* of the firſt Kind which we mention'd (or the honorary Epithets) made uſe of by our Anceſtors, how mean and little do they ſound to the Ears of our own Age: while what was heretofore thought a worthy Mark for the greateſt of mortal Men, ſhall now be deſpis'd by an inferior Scribler? For which reaſon the Increaſe of ſuch *Titles* does not always argue the increaſe of Dignity; but when the *Titles* ſwell higher, while the Thing itſelf maintains its firſt Condition, their Value and Price is ſuppoſed to be conſiderably debaſed. Sometimes alſo a certain *Title* is affix'd by way of Elogy and Complement to ſome particular Order, becauſe the Quality or Thing meant by that *Title*, is, or ought to be conſpicuous in the Generality of the Members belonging to ſuch an Order. And hence thoſe *Members*, who are not really poſſeſs'd of the *Thing*, do however enjoy the *Title*[1]. Thus in the Order of Men of Letters, many Perſons are ſaluted with the Appellation of *moſt famous*, and *moſt learned*, who are as much any thing elſe in the World as what thoſe Terms ſignify. And ſo too, an idle unactive Nobleman muſt have *Induſtry*, and *Strength*, and *Valour* applied to him in our Addreſſes. It happens likewiſe very commonly, that private Men, or others, either advance or diminiſh the Titles of Perſons, as they judge it convenient for the preſent Condition of their Affairs to flatter and careſs, or to deſpiſe and vilify them. And even in the latter Sort of *Titles*, as we above divided them, it frequently falls out, that the *Title* may continue, tho' the Thing itſelf, or the Dignity and Right be in a high manner either better'd or impair'd. And farther, 'tis very uſual, that in different Countries the ſame Word ſhall expreſs very different Degrees of Honour. And therefore it would argue a very unskilful Head, to place in the ſame Claſs all thoſe who bear the ſame *Title* all over the World[2]. It muſt not be forgot, that ſometimes a bare *Title* is attributed to a Man without the *Thing*, or without the Offices and the Profits which uſed to attend ſuch a *Title*; only to this Intent, that he may hence obtain the external Enſigns and Badges of the Honour, and may acquire a more creditable Place and Seat in the Community of which he is a Member. Laſtly, It is worth remarking, that chiefly in the Titles of the principal Houſes of *Europe*, the ſame *Title* ſometimes imports both the Family, and the Poſſeſſion of the mention'd Territory; ſometimes the Family only, without the Poſſeſſion, yet with the Right of ſucceeding to it, according to the due Courſe and Order of Inheritance.

XIX. *Moral operative Qualities*[3] are either active or paſſive. Of the former the moſt noble Species are *Power*, *Right*, and *Obligation*. *Power* is *that by which a Man is enabled to do a thing lawfully and with a moral Effect:* which *Effect* is, That the Perſon exerciſing this Power, ſhall lay an Obligation on others to perform ſome certain Buſineſs, which he requires, or to admit ſome Action of his as valid, or not to ſtop and hinder it; or that he ſhall confer on others a Licenſe of doing or poſſeſſing ſomething, which Licenſe they did not before enjoy. Whence it appears how wide this Quality runs, and how very diffuſive it is of itſelf. *Power*, with reſpect to its Efficacy, is divided into *perfect* and *imperfect*. The former is that, the Exerciſe of which may be aſſerted even *by Force*, againſt thoſe who endeavour unlawfully to let and oppoſe it. Now *Force* is chiefly applied, within the Bounds of the ſame Community, by an *Action at Law*, and without theſe Bounds by a *War*. The latter, or *imperfect Power*, is that, the Exerciſe of which if any Man is unlawfully prohibited, he may be ſaid indeed to be inhumanly dealt with, yet he has no Right to defend it, either by Proceſs of a Court, or by the Force of Arms, unleſs this[4] Inefficacy or Imperfection is ſupplied with abſolute Neceſſity. With reſpect to its Subject, *Power* is further divided into *perſonal* and *communicable*. The former *is ſuch as one Man cannot lawfully transfer to another*. But then this muſt be conſider'd under ſeveral Differences. For ſome *Powers* are

Mr. Barb. *NOTES on* §. xviii, xix.

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[1] Hence it is that *Cicero* calls Titles of Honour no certain Marks of Dignity. *Lib.* x. *Epiſt. ad famil. Ep.* vi. and obſerves a little after, that during the Troubles of the Commonwealth, ſeveral Perſons were honoured with the Titles of *Conſuls*, who were altogether unfit for that Dignity, *Conſules dicti, ſed nemo in Rempublicam conſularis.* See *The Art of Thinking, Part* ii. *Ch.* vii. §. 2. and *The New Letters of Mr.* Bayle, on the Occaſion of his general critical Remarks on Maimbourg's Hiſtory of *Calviniſm*. *Let.* iv. §. 3, 4, 8.

[2] *Vide Mr.* Le Clerc's *Ars Crit. Tom.* i. *Part* ii. *Sect.* i. *Cap.* 13.

[3] We muſt underſtand by theſe Qualities, ſuch as our Author calls Original and Primitive; and, in that Number, thoſe that he calls internal. See §. 17. above.

[4] As for Example, If a Man refuſe to let us paſs through his Ground, though we do him no Injury, and we can paſs no other way, without great and manifeſt Danger, he is guilty of an inhuman Action towards us; which nevertheleſs does not licenſe us to offer him any manner of Force; but if a Man finds himſelf attacked, and can't otherwiſe ſave his Life; as, when an Enemy proſecutes us furiouſly, then we may force a Paſſage. *Puſend. Elem. Juriſpr. Univerſ. p.* 91. See alſo what he ſays, *l.* ii. *c.* 6.

ſo cloſely united with the *Perſon*, that the Acts belonging to them cannot rightly be exerciſed by another. Such is the *Power* of the Husband over the Body of his Wife, which no Laws allow him to diſcharge by a Deputy. In ſome again, tho' we cannot transfer the Poſſeſſion, yet we may by Delegacy commit the *Acts* to the Adminiſtration of others; but in ſuch a manner, that the whole Strength of their Authority muſt be deriv'd from him, in whom thoſe *Powers* are originally ſeated. Of this kind is the power of ſuch Kings as are conſtituted by the Will of the People: For they cannot transfer the Right of Reigning to another, and yet they may uſe the Service of Miniſters for the Performance of the *Acts* belonging to that Right. *Communicable Power* is ſuch as may be lawfully devolv'd upon others; and that either at the Pleaſure of the Perſon ſo devolving it, or by the Authority or the Conſent of a Superior [1].

Laſtly, In reſpect of the Objects, the Generality of *Powers* may be reduced to four Heads: For they regard either *Perſons* or *Things*; and both theſe as they are either *our own*, or *other Mens*. A *Power* over *our own* Perſons and Actions is called *Liberty*; [2] the different Acceptations of which Word ſhall be hereafter diſcuſs'd. This muſt not be conceiv'd as a diſtinct Principle from him who enjoys it, or as an Authority [3] of obliging himſelf to any thing which is oppos'd by his Inclinations [a]; but as a Licence to diſpoſe of himſelf and of his Actions, according to his free Pleaſure; which at the ſame time includes a Negation of any Impediment, proceeding from a ſuperior *Power*. A *Power* over our own Things or Goods, is called [4] *Property*. A *Power* over the Perſons of other Men, is properly *Empire* or *Command* [5]. A *Power* over other Mens Things, is what the *Civilians* term *Service*.

XX. *Right is that moral Quality by which we juſtly obtain either the Government of Perſons, or the Poſſeſſion of Things, or by the Force of which we may claim ſomewhat as due to us.* The *Latin* Word *Jus* is a very wide and ambiguous Term: beſides the Signification here uſed, it is taken for *Law*, and for [6] a Syſtem or Body of municipal Laws or Conſtitutions, and likewiſe for a [7] Sentence pronounc'd by a Judge. There ſeems to be this Difference between the Terms of *Power* and *Right*, that the firſt does more expreſly import the Preſence of the ſaid Quality, and does but obſcurely denote the Manner how any one acquir'd it. Whereas the Word *Right* does properly and clearly ſhew, that the Quality was fairly got, and is now fairly poſſeſs'd. Yet becauſe the ſeveral kinds of *Power* have for the moſt part a peculiar Name, which [*] that Quality, by which we conceive ſomething to be due to us, wants, we have thought it convenient to give it the name of *Right* in a peculiar manner, tho' we do not in other places abſtain from its more common Signification, as may be obſerved in the following Parts of this Diſcourſe. We place *Right* in the Claſs of *active Qualities*, as by virtue of it any thing may be requir'd of others. It may likewiſe be rank'd in the number of *paſſive Qualities*, as it impowers us lawfully to receive any thing from others. For *moral paſſive Qualities* are thoſe by which we are ſaid to do or ſuffer ſomewhat, or to admit and receive it. Of theſe there be three kinds: One according to which we *rightly* indeed admit ſomething, but in ſuch manner, that neither we our ſelves have any Power of exacting it, nor others any Obligation to give it: Such is the Ability of receiving a Gift purely under the Notion of a Gratuity. And that this *Quality* is not a mere Fanſy and Fiction, is evident from this one Conſideration, that it may be reſtrain'd by a Law. A Judge, for Example, may be debarr'd the Liberty of taking a Gift from Parties engag'd in a Suit, under what Colour or Pretence ſoever. A ſecond Species is ſuch as puts us in a Capacity of receiving ſomething from another, not ſo, that we can force it from him againſt his Will, unleſs in Caſes of Neceſſity; yet ſo, that he is oblig'd by ſome moral Virtue to pay or perform it. This [b] *Grotius* calls [8] *Aptitude*, or *Deſert*. The third Species is that by which we are enabled to compel another to ſome Performance even againſt his Will, to which Performance he is likewiſe fully oblig'd by the Force of ſome Law ordaining a Penalty upon his Default. Here 'tis worth our remembring, that many Things in common reckoning paſs under the Notion of *Rights*, which if we would ſpeak accurately, we ſhould rather call Compoſitions, made up of Power and Right, in the ſtrict Senſe of thoſe Words: At the ſame Time involving, or ſuppoſing, ſome Obligation, ſome Honour, or the like. Thus the *Right* or Privilege of being a Citizen, contains both the Power of exerciſing with full Virtue all Acts peculiar to the

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[a] Vide *Lib.* li. *D. de Recept. Lib.* xiii. *D. ad L. Aquil.*

[b] *De Jure B. & P. Lib.* i. *Ch.* i. §. 7.

Mr. Barb. *NOTES.*

[1] Such was, among the *Romans*, the paternal Power, which a Father had obtained by adopting a Son; for there muſt alſo be beſides, a transferring of the paternal Authority, confirmed by the People, Magiſtrate, or Prince. See *Aul. Gel. Lib.* v. *Ch.* xix. and the Titles *De Adoptionibus*, in the *Digeſts* and *Inſtitutes*.

[2] See *Chap.* iv. of this Book, §. 2, 3. and *Lib.* ii. *Ch.* i.

[3] *Neque autem imperare ſibi, neque ſe prohibere quiſquam poteſt*; *i. e.* No Man can command or forbid himſelf. *Digeſt. Lib.* iv. *Tit.* viii. *De Receptis, qui arbitrium, &c. Leg.* li. See alſo *Lib.* ix. *Tit.* ii. *ad Leg. Aquil. Leg.* xiii.

[4] See *Lib.* iv. *Ch.* iv.

[5] This Command or Authority is divided into, 1. Abſolute, 2. Limited, ſee *Lib.* vii. *Ch.* vi. As alſo into, 1. Private, 2. Publick. The firſt is that with which private Perſons are inveſted for the Management of their private Concerns, as ſuch, to which may be referred the Authority of Parents over their Children; of Maſters over their Slaves, or Servants; of an Husband over his Wife; of a Schoolmaſter over his Scholars; of a Tutor over his Pupils, *&c.* The other is that which publick Perſons are endowed with as ſuch, for the Advantage of the civil Society. *Puſend. Elem. Juriſpr. Univ. p.* 93, 94.

[6] Thus the Collection made by the Command of *Juſtinian*, is called the *Civil*, or *Roman Law*; and in the ſame Senſe this Book is entitled, *The Right of Nature and Nations.*

[7] This is only proper in *Latin.* See *Digeſt. Lib.* i. *Tit.* i. *De Juſtitia & Jure, Leg.* xi.

[*] This relates to what the Interpreters of the *Roman* Law call, *Jus ad Rem*, or, *a Right to a Thing.* See what is ſaid *Lib.* iv. *Ch.* ix. §. 8. *Note* 2. *Ulpian* the Lawyer, as Mr. *Hertius* thinks, calls it, *Jus crediti*; *i. e.* a ſort of active Debt. *Digeſt. Lib.* iv. *Tit.* ii. *Quod metûs cauſa, &c. Leg.* xii. §. 1. See *Lib.* l. *Tit.* xvi. *De verborum ſignificat. Leg.* x. *&c.* And what is ſaid *Lib.* v. *Ch.* xi. §. 1. *Note* 4.

[8] See *Ch.* vii. §. 7. where we ſhall explain the Diſtinction of perfect and imperfect Right.

Members of that City, and alſo a Right of enjoying the Benefits proper to it, ſuppoſing in the Perſon an Obligation toward the Corporation. So, for Example, the Honours and Degrees of learned Men include both the Power of performing certain Actions proper to ſuch a Dignity, and the Right of ſharing in the Profits of their Order; to which Notion there is further added the height of Eſteem and Reſpect, which accompanies their Place and Title.

XXI. An *Obligation* is that by which a Man is bound under a moral Neceſſity to perform, or admit, or undergo any thing. The ſeveral Kinds of Obligatious † will be hereafter inſiſted on at large [a].

There are alſo a ſort of [1] *moral patible Qualities*, which are conceiv'd to affect the Underſtandings of Men in ſome certain manner: as in natural Qualities, thoſe have obtain'd the Name of *patible*, which affect the Faculty of *Senſation*. Of this Order are Honour, Ignominy, Authority, Gravity, Fame, Obſcurity, and the like.

XXII. It remains that we ſubjoin ſomething about the *Modes of Eſtimation*, or the *moral Quantities:* For 'tis evident in common Life, that Perſons and Things are rated, not only according to the Extenſion of their natural Subſtance, or according to the Intenſeneſs of their Motion, and their other natural Qualities, conſidered as they flow from the Principles of their Eſſence; but likewiſe according to another kind of Quantity, different both from phyſical and mathematical: And this *Quantity* ariſes from the Impoſition and Determination of a rational Power. Now *moral Quantity* is met with firſt in *Things*, where it is called *Price*; ſecondly in *Perſons*, where we term it *Eſteem*; both which were included in the Notion of *Value*; and thirdly, in *Actions*, where it has not yet acquired [2] a peculiar Name. Of each Species we ſhall treat in its proper Place. What we have hitherto inſiſted on, about the Variety and Diſtinction of *moral Entities*, may ſeem ſufficient to our preſent Deſign.

XXIII. We will only add this general Remark, That as *moral Entities* owe their Original to *Impoſition*, ſo they draw their Continuance and their Changes from the ſame Cauſe; and when that once ceaſes, they immediately vaniſh, juſt as when we put out the Light, the ſhadow inſtantly diſappears. Thoſe which are made by *divine Impoſition*, are not diſſolv'd but by the divine Pleaſure. Thoſe which are fram'd at the Will of Men, are deſtroy'd by the ſame Power, without the leaſt Alteration in the Perſons or Things, as to their natural Subſtance. For tho' it implies a Contradiction in the Nature of Things, that what has been done already, ſhould be made not to have been done; as that a Man, who has been Conſul, ſhould not have been Conſul; yet we find every Day how eaſy 'tis to cauſe a Man not to be for the future what he has already been: and we ſee at the ſame time all the *moral Entities* that inher'd in ſuch a Man, entirely defac'd, and leaving no real Footſteps behind. For 'tis impoſſible that a *moral Entity* ſhould ever grow up to the Strength and Force of a natural Quality. Whence 'tis a very weak thing to believe, that when a Man is conſtituted ſuch or ſuch a Perſon, an indelible Character is imprinted on him barely by virtue of that moral Impoſition: For thus, when a Commoner is created a Nobleman, he only acquires new Right, but does not at all change his Subſtance, or the Qualities founded in it: And if a Nobleman be degraded, he only forfeits the Rights of his Order; but the Benefits he holds from Nature, remain perfect and unimpair'd [3].

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[a] Vide *Lib.* iii. *Ch.* iv.

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† See *Ch.* vi. §. 5. of this Book, and *Lib.* iii. *Ch.* iv.

[1] Our Author calls theſe *external operative Qualities*, §. 17. above; and the *French* tranſlates them, *moral ſenſible Qualities*.

[2] *Vide*, for the firſt, *Lib.* v. *Ch.* i. For the ſecond, *Lib.* viii. *Ch.* iv. For the third, *Lib.* i. *Ch.* viii.

[3] The proper and real Foundations of Honour loſe nothing of their Value, although Men are ſtript of their Titles. *Demetrius Phalereus* lively expreſſes this Matter, as he is quoted by Mr. *Hertius*; when it was told that Philoſopher, That the *Athenians* had thrown down his Statues: *Well,* ſaid he, *but they cannot overturn that Virtue, for the ſake of which they were erected.* Diog. Laert. Lib. v. §. 82. See other Examples concerning the Manner how moral Entities are deſtroyed, in the laſt Chapter of this Book, §. 6.

CHAP.

CHAP. II.

Of the Certainty of Moral Science.

The Contents of every Paragraph of the ſecond Chapter.

I. *Moſt Men deny that there is a demonſtrative Certainty in moral Sciences.*
II. *What is a Demonſtration.*
III. *The Principles of a Demonſtration.*
IV. *Demonſtration agrees to that moral Science only, that treats of the Goodneſs or Evil of Man's Actions.*
V. *The Uncertainty of moral Things is objected.*
VI. *Whether any Thing be good or bad before any Inſtitution.*
VII. *Whether Shame be a Proof of it.*
VIII. *Of the Extent of moral Actions as to the Quality.*
IX. Grotius's *Opinion conſider'd.*
X. *In moral Quantities there is a Latitude.*
XI. *What is called Morally Certain.*

IT has been an eſtabliſh'd Perſuaſion among the Generality of learned Men, that *moral Knowledge* is deſtitute of that Certainty which is ſo famous in other Parts of Philoſophy, and eſpecially in the *Mathematicks* [1]. The Foundation of their Notion is this: They take Mortality to be incapable of Demonſtration, from whence only true Science, and free from the fear of Error, can proceed; but imagine that all its Evidence riſes no higher than a probable Opinion. An Unhappineſs that has been prodigiouſly injurious to the moſt noble Diſciplines, and the moſt neceſſary to human Life. For, hence it came to paſs, that Men of Wiſdom and Parts were afraid of ſpending too much Labour in cultivating Notions which depended on ſo weak a Bottom: And the ſame Principle furniſh'd thoſe who were intirely idle and negligent about theſe Studies, with a fair Excuſe; while they might alledge, that there was no firm and demonſtrative Aſſurance to be had in ſuch Diſquiſitions, but that they could only be proſecuted in a rude and unaccurate Manner. To which *Ariſtotle* contributed not a little, who in the common Judgment of the World, has arriv'd at the higheſt Pitch of moral Attainments, and left no farther Field for the ſucceeding Induſtry and Wit of Men. *Ariſtotle* then, as to the Truth of Ethicks, in his Treatiſe on that Subject, addreſs'd to *Nicomachus* [a], delivers himſelf in the following Propoſitions: *It muſt not be expected, that all Kinds of Things ſhall be explain'd with the ſame Accuracy. Honeſty and Juſtice, which fall under the Conſideration of* [2] *civil Knowledge, have ſo many different Faces, and are liable to ſo many Miſtakes, that they ſeem to be only inſtituted by Law, and not originally decreed by Nature. We ſhall therefore think it ſufficient, when we diſcourſe on ſuch Heads, or when we argue from them, to ſhew the Truth in a ruder Manner, and under a kind of Shadow and Figure. It becomes a Man well inſtituted to require ſuch Proof and ſuch Explication of any Matter, as the Nature of the Thing will bear. For, it ſeems equally abſurd, to demand Demonſtrations from an Orator, and to let a Mathematician ſatisfy us with Probabilities* [3]. We, for our Part, as we are not at all influenc'd by the Name of a ſingle Philoſopher; ſo we intend to enquire what Anſwers are to be return'd to the principal Arguments urg'd by him, and others, ſo ſoon as we ſhall have premis'd a Word or two concerning the Nature of *Demonſtration* in general.

II. To *demonſtrate* then, as we apprehend it, is ſyllogiſtically to deduce the neceſſary Certainty of any Matter propos'd from ſuch Principles, as being its Cauſes, muſt needs make it known beyond Doubt and Diſpute. Now, tho' 'tis manifeſt that there is ſuch a Thing as we here define, and we ſee Inſtances of it every Day in mathematical Operations, to which no Man in his Wits ever denied the Art and Power of Demonſtrating; yet from the falſe Expoſition of two or three Words, it has happen'd that the greateſt Number of Philoſophers have committed a wretched Overſight in the Point, and have raſhly excluded this noble Way of Proof from many Parts of Knowledge, which had a juſt Title to its Poſſeſſion. The chief Occaſion of the Error was this: They found it laid down for a Rule, That the Subject of a Demonſtration ought to be *neceſſary*, which they interpreted, as if in a demonſtrative Syllogiſm the *Subject* of the *Concluſion*, to which the *Predicate* was applied, ought always to be a Thing *neceſſarily exiſtent*; as for Example, in that thread-bare Inſtance, *Man is rational, therefore riſible*; the *Subject* of the Demonſtration is *Man*, who muſt be own'd for a *neceſſary Being* [4]. But in Reality the *Subject* of Demonſtration is not any one ſingle Term, but ſome entire Propoſition, the neceſſary Truth of which is from ſettled Principles ſyllogiſtically inferr'd. Where it ſignifies little, whether or no the *Subject* of this demonſtrable Propoſition neceſſarily exiſt; but 'tis ſufficient, if granting its Exiſtence ſuch certain Affections neceſſarily agree to it, and if it can be made out, that they do thus agree to it, by undoubted Principles. Thus, a Mathematician never troubles himſelf to enquire, whether a *Triangle* be *neceſſary* or *contingent*, ſo long as he can demonſtrate all the *Angles* of it to be equal to two *Right* ones. And therefore the *Subject* of Demonſtration is only call'd *neceſſary* upon account of the *neceſſary Connexion* by which the *Predicate* cleaves to it in Concluſions of that Nature [1].

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[a] *Vid. Lib.* i. *Cap.* i.

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[1] If we would know the Reaſons, why it is falſly believed, that all demonſtrative Knowledge borders upon mathematical Quantity, we need read nothing but Mr. Locke's excellent Work of Human Underſtanding, *Lib.* iv. *Ch.* ii. §. 9, 10, *&c.* and *Chap.* iii. §. 19, 20.

[2] *Ariſtotle* underſtands not by this, the Art of Government ſimply, but the Knowledge of Morality, and the Condition of a Citizen, of whatever Degree he is. This very Word among the *Greeks* includes ſometimes all practical Sciences, as, Oeconomicks, Rhetorick, *&c.* See Mr. *Hertius*'s *Introduct. Element. Prud. Civil.* §. 8.

[3] Theſe Words appeared ſo plain to Mr. *Buddeus*, that he was wholly of Opinion, that *Ariſtotle*'s Judgment about the Original of Juſtice and Honeſty was the ſame as *Epicurus*'s. See his Diſcourſe of *moral Scepticiſm*, printed with his *Analecta of Hiſt. Philoſ.* in 1706. §. 12. However, Mr. *Hertius* in his Notes upon that Place, pretends to excuſe *Ariſtotle*, by ſaying, That he wrote for ſuch of his Scholars, as, according to the Cuſtom of thoſe Times, applied themſelves cloſe to Mathematicks, and on that Account fanſied that they had found geometrical Demonſtrations every where. Hereupon he quotes a Paſſage in his *Metaphyſicks*, where he ſays, That we muſt not expect a mathematical Exactneſs in all ſorts of Subjects, *τὴν ἀκριβολογίαν μαθηματικὴν*, *Lib.* ii. *Ch. ult.* and refers us to *Rachelius*'s Introduction to the Philoſophy of *Ariſtotle, Ch.* xii.

[4] He does not mean, that Man has ſuch an Exiſtence that he can't but exiſt; for that's the Property of God only. The Exiſtence of Man then is no otherwiſe neceſſary, than as God has determined to ſend him into the World, and that being ſuppoſed, he muſt exiſt till God deſtroys him.

III. But what kind of Propoſitions thoſe ought to be, which we are to uſe in Demonſtration, will appear from the Conſideration of its End and Effect. That then, which we require by Demonſtration, is *Science*, or *a clear and certain Knowledge, every Way, and at all times conſtant to itſelf, and plac'd beyond the Fear of Miſtake. What we have Science of* (ſays * *Ariſtotle*) *we imagine under an Impoſſibility of being otherwiſe.*

* *Eth. Nicom. Lib.* vi. *Ch.* iii.

Therefore 'tis neceſſary the Propoſitions ſhould be *true* [2] really and abſolutely, and not upon *Conceſſion* or *Suppoſition*. For, tho' from a Suppoſition laid down, a long Chain of Concluſions may be drawn; yet 'tis impoſſible that, being deriv'd from a precarious Principle, the Streams ſhould not reliſh of the Fountain. And tho' we ſhould make the two moſt contradictory Suppoſitions in Nature, one of which muſt of Neceſſity be true; yet we can by this Means only prove for certain τὸ ὅτι, as the Logicians call it, or that the Matter is really ſo: for τὸ διότι, or the Reaſon why it is ſo, requires, as an indiſpenſable Condition, the Firmneſs of the precedent Hypotheſis. The Propoſitions of Demonſtration muſt likewiſe be the *firſt* and the higheſt that can be, ſo as to want no farther Proof, but to deſerve Credit upon their own Evidence; or, however, ſo as at laſt to be reducible to ſome *firſt* Truth. For as ſome Propoſitions are plac'd at a leſs, and ſome at a greater Diſtance from the firſt Principles; ſo we muſt not imagine that every Demonſtration can be finiſh'd in a ſingle Syllogiſm, but we muſt carry on the Argument from the Propoſition to be demonſtrated, till we arrive at the firſt Principle, on which it depends. For, *they* are not the only Maſters of Reaſoning, who are ſo very quick and expert at their *quicquid*, their *atqui*, and their *ergo*; but thoſe alſo, who beginning at evident Principles, underſtand how to frame an Argument by a juſt Train of neceſſary Conſequences. Another Requiſite in ſuch Propoſitions is, that they be *immediate* [3]; that is, that they flow immediately from one another, without any Gap or Interruption. For, a demonſtrative Argument ſhould be work'd up in the manner of a Chain, the Propoſitions being knit within one another, like ſo many Links; ſo that if any one Link breaks, or proves deficient, the whole Frame muſt diſſolve and fall in Pieces. Laſtly, 'tis neceſſary that the Propoſitions in Demonſtration be the *Cauſes of the Concluſion*, as containing the Reaſon why in ſuch a Concluſion the *Predicate* neceſſarily agrees to the *Subject* [4].

IV. This being premiſ'd, it is farther obſervable, that tho' 'tis a Thing common to all moral Diſcipline not to take up with a bare Theory, but to paſs into Uſe and Practice, yet there is a vaſt Difference to be diſcover'd between the two Principal of them; of which one is concern'd about the Rectitude of human Actions, in order to Laws; the other about the dextrous Government of our own, and of other Mens Actions, for the Security and the Benefit of ourſelves, and more eſpecially of the Publick. For this latter Part of *Ethicks* ought to be rank'd under the Name of *Prudence*, which *Ariſtotle* [5] defines; *A Habit, active according to Reaſon, about the Good and Evil that can happen to a Man.* Whence he thus ſettles the Duty of a prudent Perſon: *It ſeems to me to be the Property of a Man of Prudence, to take right Conſultations about thoſe Things which are good for him, and of univerſal Uſe in well living.* And theſe Opinions he builds upon Axioms drawn from the accurate Obſervation and Compariſon of human Manners and Events. But thoſe Axioms do not appear ſo very firm and evident, as to be the Ground of infallible Demonſtration, as well upon account of the wonderful Frailneſs and Inconſtancy that occurs in the Wits and Tempers of Men, as becauſe the Events of Affairs are frequently turn'd in a little Moment, and driven to a Reſult quite contrary to our Intentions

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[1] So that though the *Actions* of Men, and all other *moral Entities*, do not neceſſarily exiſt, but depend upon the free Determination of our Underſtanding; yet if we ſuppoſe certain Relations between Deeds which are actually produced, or may exiſt, and a Rule with which we may compare them, ſome Right and Obligation will as neceſſarily follow from thence, as ſuppoſing a Triangle, it follows, that its three Angles are equal to two Right ones.

[2] Our Author argues here upon the Principles of *Ariſtotle*, whoſe Words are, Ἀπόδειξιν δὲ λέγω, &c. "I call that a Demonſtration, which by Reaſoning produceth Knowledge, as ſoon as we apprehend it. And if this be the Way to "know, it is a neceſſary Conſequence, that all demonſtrative Knowledge muſt be deduced from Maxims ſo evidently "true, that they enforce a Concluſion immediately, and ſo are the proper Principles of the Thing to be demonſtrated. *Ariſt. Analyt. Poſt. Lib.* i. *Ch.* ii. *D.* "If demonſtrative Knowledge be from neceſſary Principles, 'tis plain, that all de"monſtrative Reaſoning muſt be from ſuch. *Ib. Ch.* vi.

[3] Every Step or Degree of Inference ought to be known intuitively, *i. e.* at the firſt View, and of itſelf: *viz.* we muſt ſee the Agreement or Diſagreement of the Medium which unites the Terms together; and which intervenes to ſhew the Agreement of the two Extremes at one ſingle View. See Mr. *Lock*'s *Eſſay of the human Underſtanding, Lib.* iv. *Ch.* ii. §. 7.

[4] Our Author might have obſerved here, that all that he was about to ſay of the Nature of a Demonſtration, is explained more at large in a *Latin* Book entitled, *Analyſis*, &c. *An Analyſis of* Ariſtotle'*s Philoſophy, according to the Principles of* EUCILD, by *Erhard Weigel*, Profeſſor of Mathematicks at *Jena*. This Perſon firſt encouraged Mr. *Puſendorf* to undertake this Work, and furniſhed him with ſome Materials for it; as our Author owns in his Preface to his *Elemens de Juriſp. Univerſ.* He adds there alſo, That no Man of his Nation has ſo well taught the Art of Demonſtration as that Profeſſor.

[5] *Ariſt. Ethic. ad Nicom. Lib.* vi. *Ch.* v. *Cicero* alſo calls Politicks, *Prudentia civilis. Partit. Orat. Ch.* xxii.

and Expectations [a] [1]. Nor is human Subtilty in the Applications of theſe Rules and Maxims baffled only by ſuch unlook'd for Accidents and Occurences; but the divine Wiſdom is pleas'd often to interpoſe, and to elude the craftieſt Stratagems, and the beſt contriv'd Plots of mortal Deſigns. And therefore the ableſt Managers of Affairs aſpire not to act always with ſtrict Demonſtration of Succeſs [2], but when they have apply'd the moſt ſage Circumſpection, and the moſt piercing Forecaſt, they commit the Iſſue to Providence and Fate. [b] For tho' generally we may know what can poſſibly happen, tho' we may compare theſe poſſible Events together, tho' we may determine for certain, not only which of two Poſſibilities is of greater, and which of leſſer Value, ſuppoſing them now to exiſt; but alſo what Effect can proceed from more, what from fewer Cauſes, either now in being, or hereafter to be: and tho' we may conclude *that* Effect, which can be produc'd by moſt Cauſes and Ways, to have the higheſt Degree of Probability, and therefore beſt to deſerve our Hopes and Expectations [c]; yet all Poſſibilities do not occur to the Mind at all Times and Places; or, if they do, are not always rightly weigh'd and conſider'd: and by reaſon of ſtrange and ſudden Accidents, which could ſcarcely have been foreſeen, many Things, which we at firſt thought to be moſt poſſible, or the moſt likely to fall out, when we come to the Point, appear quite otherwiſe than we before imagin'd them. Hence, in prudential Managements moſt Men think it ſufficient to follow that Rule of *Ariſtotle* [d]: *We ought no leſs to hearken to the undemonſtrated Declarations and Opinions of skilful, of antient, or of wiſe Men, than to Demonſtration itſelf: for ſuch Perſons found their ſight of Things on Experience, and ſo look into the very Principles of Action.* But let others fight out this Prize [3]. As for the former and more noble Species, which we aſſign'd to moral Diſcipline, that which conſiders what is Right, and what Wrong in human Actions, the beſt Share of which [4] will be illuſtrated in our preſent Attempt; this is built altogether on ſo ſure Grounds, that we thence draw genuine Demonſtrations, able to produce true and ſolid Science: Or, in other Words, its Decrees may be in ſuch a Manner deriv'd from certain Principles, as to leave no Room, no Excuſe for Doubt [e]. Whatever contributes to the improving of our Virtue, or of our Happineſs, Nature hath taken Care to lay either directly before us, or at a very eaſy Diſtance for our Search. This Aſſertion will be more clearly made out, if we in the firſt Place conſider and examine the Arguments uſually alledg'd to the contrary. But, by the way, we acknowledge Mr. *Hobbes* [f] to have been extreamly miſtaken, when he contends, that ‘*Ethicks* and *Politicks* are therefore capable of a Demonſtration *à priori*, *i.e.* by Reaſons drawn from the Nature of the Thing; becauſe we ourſelves are the Authors of the Principles of Juſtice and Injuſtice, of Right and Wrong, by making thoſe Laws and Compacts whence the Meaſures of Juſtice are to be taken: ſince before any ſuch Laws or Compacts were inſtituted, there was no ſuch Thing as Juſtice or Injuſtice, *publick* Good or Evil, among Men, any more than among Beaſts’ [5]. The abſolute Falſeneſs of which Poſition we ſhall hereafter [g] have Occaſion to demonſtrate; as there is alſo a Fallacy lurking under the word *Publick*.

V. To proceed therefore to the Objections: Some affirm moral Things in general to be uncertain and unſtable; and no Science can be of a more firm and ſettled Nature than the Object about which it is employ'd. To which it may be anſwer'd, That tho' *moral Entities* owe their Original to Impoſition, and therefore cannot be call'd *Neceſſary* in an abſolute Senſe; yet they do not proceed from ſuch looſe and wandering Principles, as that on this Account all Knowledge about them ſhould be weak and uncertain. For, the very Nature of Man, aſſign'd him by the Wiſdom and Goodneſs of the Almighty Creator, requir'd the Inſtitution of the chief Part of them; and theſe at leaſt cannot be ſaid to be unſettled and uncertain. This will appear beyond Diſpute, when we come to enquire into the Origin of the *Law* of Nature. Beſides, human Actions are chiefly on this account call'd *Moral*, becauſe they are not *neceſſary*, but *free*;

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[a] *'Tis not barely the Event of Things* (ſays *Fabius* in *Livy*, Lib. xxii. Ch. xxxix.) *which communicates this Knowledge, for that is only as the Inſtructor of Fools: but it is the ſame immutable Reaſon which was, and will be ſo as long as the World continues in its preſent Condition.* [b] *Vide* 2 Sam. x. 12. [c] *Vide D. Cumberland De. L. Nat. Ch.* iv. §. 4. *n.* 4. [d] *Ethic. Lib.* vi. *Ch.* xii. [e] *Senec. De Benef. Lib.* vii. *Ch.* vii. *De Homine, Ch.* x. [g] *Ch.* vii. §. 13. and *Lib.* viii. *Ch.* i. §. 5.

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[1] See *Montagne's Eſſays, Lib.* i. *Ch.* xxiii. *P.* 76. *in fol.* And *Charron, Of Wiſdom, Lib.* iii. *Ch.* i. Here alſo we may obſerve, that ſome Events are not probable ſometimes, according to the Senſe of an antient Poet, cited by *Ariſtotle, Rhetor. Lib.* ii. *Ch.* xxiv. Τάχ' ἂν τις εἰκὸς, &c. *Any Man may aſſert it as a Probability, That many unlikely Things befal Men.* See Mr. *Bayle's Hiſtor. and Critical Diction. Tom.* i. *P.* 94.

[2] In the ordinary Couſe of Life we muſt not expect a clear Evidence, but are obliged, for the moſt part, to act by Probabilities. It is a judicious Maxim of *Deſcartes's*, and, long before him, laid down by *Seneca*: *We muſt not expect a certain Knowledge of the Truth, which is hard to find out; but we muſt follow Probabilities. All our Actions are grounded on this. So we ſow, ſail, marry,* &c. *tho' we know the Event uncertain. We go, where Reaſon, not Truth leads: If we tarry till we can know what will happen well, and what is certain Truth, we may ſit ſtill for ever. I will not fear to follow Probabilities.* Sen. de Benef. Lib. iv. Ch. xxxiii. *Arnobius* has a like Paſſage, in the Place where he anſwers the Pagans Objections againſt the Faith of Chriſtians.

[3] It is certain, that Politicks, as well as Phyſick, is a conjectural Science, as Mr. *Bayle* expreſſes himſelf, in his *Reply to the Queſtion of a Province, Tom.* i. *P.* 570. But whatever that famous Philoſopher ſays, who, according to his Cuſtom, pretends to gather from thence ſome Arguments for Scepticiſm, *P.* 565. yet if he would ſeriouſly examine true Politicks, he would find that moſt of its Principles and Maxims have a Certainty in them, which comes very near a Demonſtration; and as to thoſe Things which look like Problems, their Obſcurity proceeds rather from the Difficulty of Application, Ignorance of ſome Circumſtances, or Want of Attention, than any abſolute Impoſſibility to eſtabliſh a Rule of Certainty concerning them. See what Mr. *Hertius* ſpeaks here, and the Diſcourſe of Mr. *Buddeus, De Scepticiſmo Morali*, §. 26. The Boaſting of the Scepticks proceeds from the Obſervation of the Behaviour of bad Politicians, and ambitious Sovereigns, and not from the Principles and Maxims which ariſe from the natural Deſign of civil Government, and the publick Good, ſeparate from the private Intereſt of ſome Perſons.

[4] Our Author nevertheleſs explains the fundamental and principal Queſtions of Politicks in the two laſt Books of this Work.

[5] For, ſome pretend that the Determination of what is morally Good or Evil, depends upon the Will of the Sovereign.

yet from hence it does not follow, that upon the laying down of certain Principles, ſuch Affections may agree to theſe Actions, as may be undoubtedly *demonſtrated* concerning them. For 'tis evident, that the Acts which fall under the Conduct of the Law of Nature, do in themſelves contain an intrinſical Force and Power, directing towards a ſociable Life, tho' the actual Exerciſe of them depends on the Free-will of Man. While we deliberate, we are properly ſaid to be *free*, and the Effects which are to proceed from our Actions are, with Reſpect to the *Freedom*, rightly term'd Contingent: but when we have once determin'd which way to act, the Connection between our Actions and the depending Effects is neceſſary and natural, and conſequently capable of Demonſtration. Neither do *they* argue any Thing to the Purpoſe, who deny the Poſſibility of paſſing a clear Judgment on human Deeds, upon Account of the great Variety of Circumſtances, any one of which ſeems to put a new Face, and a new Quality on the Action; whence it happens, that Legiſlators can ſeldom frame ſuch a Law as ſhall admit of no Exception, and where there ſhall not be frequent Occaſion to neglect the Letter of the Statute, and to have Recourſe to Equity for Relief. Becauſe indeed there are eſtabliſh'd Principles, by which it may be ſhewn how much Weight and Force any Circumſtance bears in affecting, or varying any Action. And theſe very Principles are the Occaſion, that Law-givers are frequently leſs anxious about excepting from their Decrees ſome particular Caſes involv'd in extraordinary Circumſtances [1], but proceed with more Security in the Uſe of general Words. For they take it for granted, that the Judges, whoſe Duty it is to examine particular Actions by the Rule of the Law, will be very well able to underſtand what Power any Circumſtance has over any Fact [a] [2]. But hence it cannot be inferr'd, that conſtant and perpetual Decrees ſometimes fail; but we ought rather to conclude, that 'tis not worth while for Legiſlators, in their written Laws, to preſcribe any Thing about Caſes that very rarely happen, ſince ſuch may be eaſily determin'd by the Judges out of the Principles of the Law of Nature [b].

VI. But to make the Knowledge of the Law of Nature, of which we are now treating, and which includes all moral and civil Doctrines that are genuine and ſolid, to make this Knowledge, we ſay, fully come up to the Meaſure and Perfection of *Science*, we do not think it neceſſary to aſſert, with ſome Writers, that there are ſeveral Things honeſt or diſhoneſt of themſelves [3] and antecedent to all Impoſition, and ſo to make theſe Things the Object of our natural and perpetual Law, in Oppoſition to poſitive Laws, where Matters are Right or Wrong, juſt as the Law-giver was pleas'd to make them either. For, ſince Honeſty (or moral Neceſſity) and Turpitude are Affections of human Deeds, ariſing from their Agreeableneſs or Diſagreeableneſs to a Rule, or a Law; and ſince a Law is the Command of a Superior, it does not appear how we can conceive any Goodneſs or Turpitude before all Law, and without the Impoſition of a Superior [c]. And truly, as for thoſe who would eſtabliſh an eternal Rule for Morality of the Actions, without Reſpect to the Divine Injunction and Conſtitution, the Reſult of their Endeavours ſeems to us to be the joining with GOD Almighty ſome coeval extrinſical Principle, which He was oblig'd to follow, in aſſigning the *Forms* and *Eſſences* of Things. Beſides, 'tis acknowledg'd on all Hands, that GOD created Man, as well as every Thing elſe, according to his own Free-will. From whence it evidently follows, that it muſt needs have been his Power and Pleaſure to endue this Creature with whatever Kind of Nature his Wiſdom thought fit. And how then ſhould it come to paſs, that the Actions of Mankind ſhould be veſted with any Affection or Quality proceeding from intrinſical and abſolute Neceſſity, with-

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[a] *And hence chiefly we are to draw the Reaſon of it*, §. 3, 4, 5, 6. de Legib. Laws are to be enacted, *as* Theophraſtus *us'd to ſay*, with Regard to Things, as they moſt commonly fall out, not as they ſometimes happen beſide Expectation. Little particular Caſes and accidental Exceptions, are not worth the Notice of a Legiſlator. [b] *Add. D. Cumberland de Legg. N. Ch.* iv. §. 4. *n.* 1. [c] *Selden de J. N. & G. Lib.* i. *Ch.* 4.

Mr. BARB. *NOTES.*

[1] By theſe Principles (adds this Author) the following Maxims of the Roman Lawyers are to be explained: *Laws are to be made* (ſays *Theopraſtus*) *about ſuch Things as commonly happen, and not about ſuch Things as fall out unexpectedly and by Chance: For what happens once or twice, Lawgivers paſs over.* Dig. Lib. i. Tit. iii. *De Legibus, Senatuſconſ. & longâ conſuetudine, Leg.* iii. i. e. In a Word, Laws are made about Things that commonly happen, and not for extraordinary Caſes, which may fall out once or twice by Chance. See *Ariſtot. Ethic. ad Nicom. Lib.* v. *Ch.* xiv. and what is ſaid *Lib.* v. *Ch.* xii. §. 16 and 21 following.

[2] We muſt own, that becauſe of this infinite Variety of Circumſtances, we can hardly come to a final Deciſion in our Examination of all particular Caſes; yet that does not at all ſhake our moral Certainty, nor leſſen the Uſe of it; for the Impoſſibility of doing any Thing without us, either by the Uſe of our Senſes, or with the Help of Inſtruments, as to make a ſingle Line perfectly right, a ſingle Surface exactly round or plain, a ſingle Body compleatly regular, or whatever elſe may be reduced to the like Nature; ſuch an Impoſſibility (I ſay) can't deſtroy the Truth or Benefit of the Principles of Geometry, concerning the Meaſure of Lines, Superficies, and Solids. It is ſufficient that they come ſo very near Exactneſs, that nothing conſiderable can be deſired to make them uſeful to us; and ſo we may arrive at our Ends as well by the Principles of Morality, as by thoſe of Geometry. It is true nevertheleſs, that Things moral, ſuch as God and Man, with their mutual Acts and Relations, can't be known ſo diſtinctly and exactly, as mathematical Queſtions, and ſo moral Concluſions can't be ſo perfectly known. But as to the Method, Rules of Demonſtration, and inferring one Thing from another, they are all exactly the ſame in Geometry and Morality; and there is no more Need of an abſolute Exactneſs for the Uſe of Life, than to meaſure the Diſtance of Place, or Extent of a Field. *Cumberland. De Legib. Nat. Ch.* iv. §. 4. *n.* 1. It is thought neceſſary to give the Reader this Paſſage entire, which our Author only refers to.

[3] To remove all Equivocations, and leave no Place for Cavil, we ought to obſerve, That we muſt own Things honeſt or diſhoneſt of themſelves, or in their own Nature, 1. By Way of Oppoſition to human Appointment, as the Agreements or Opinions of Men. 2. In Reſpect of the Subject, with Relation to which they are thought ſo. As for Example, There are ſome Acts which agree to GOD no way, *i. e.* which he can't do without derogating from his Perfections, and ſo contradicting himſelf. There are Actions alſo, which of themſelves agree, or diſagree with the human Nature in our preſent State. But if we underſtand that an Action is honeſt, or diſhoneſt in its own Nature, without any Relation to the Appointment of GOD, or the Laws which GOD hath impoſed upon us by our Creation, in this Senſe the Propoſition is falſe. *Specim. Controverſ. Ch.* v. §. 7. See *Lib.* ii. *Ch.* iii. §. 4, 5. following.

out Regard to the Inſtitution, and to the good Pleaſure of the Creator [1]? So that in reality, all the Motions and Actions of Men; upon ſetting aſide all Law, both divine and human, are perfectly *indifferent* [2]: And ſome of them are therefore only ſaid to be naturally honeſt or diſhoneſt, becauſe that Condition of Nature, which God has freely beſtow'd on Man, ſtrictly enjoins the Performance or the Omiſſion of them [3]. Not that any Morality inheres of itſelf, and without all Law, in the bare Motion, or the meer Application of natural Power [a]: And therefore we ſee Beaſts every Day doing ſuch Things without Fault or Sin, in committing which Man would have been guilty of the higheſt Wickedneſs. Yet are not the natural Motions of Men and of Beaſts in themſelves different, but ſome Actions of Men are by the Authority of a Law inveſted with a moral Quality, which does not at all touch or affect the Proceedings of Brutes.

Nor will it be to the Purpoſe for any one to object, That ſince Men are endu'd with Reaſon, which is wanting in Beaſts, therefore there muſt be a natural Difference between human and brutal Actions. For, if we conſider Reaſon, as uninform'd with the Knowledge and Senſe of Law, or of ſome moral Rule, it might perhaps even in this Condition, furniſh Man with the Faculty of acting more expeditiouſly and more accurately than Beaſts, and might aſſiſt the natural Powers by an additional Shrewdneſs or Subtilty. But that it ſhould be able to diſcover any Morality in human Actions, without reflecting on ſome Law, is equally impoſſible, as that a Man born blind ſhould make a Judgment on the Diſtinction of Colours [4].

Another Argument in favour of our Opinion is ſuggeſted by *Oſiander*, in his Notes on *Grotius, de Jure Belli & Pacis*, p. 60. *If* (ſays he) *there were any ſuch Thing as moral Good or Evil before all Law, how could there be any Obligation to make ſuch a Difference in our Actions, ſince all Obligation proceeds from the Command of a Superior? For moral Good or Evil involve a Reſpect to a Perſon acting either of thoſe ways; and if that Perſon be determin'd by no Obligation, he cannot be ſaid properly to act well or ill.*

But here we deſire it ſhould be well obſerv'd, That this Indifference of the natural Motion in human Actions is by us maintain'd and eſtabliſh'd only in reſpect to Morality: For otherwiſe Actions enjoin'd by the Law of Nature have, from the Determination of the firſt Cauſe, a native Force in themſelves of producing Effects good and uſeful to Mankind; as Actions forbidden by the ſame Law are productive of contrary Effects. But this Goodneſs and Illneſs, which an Action bears naturally and of itſelf, can never conſtitute any new Thing in Morals, which are quite beyond its Reach and Concern. For there are many Things highly conducing to the Happineſs and Advantage of a Man [5], which are not morally good, as neither being voluntary Deeds, nor Performances of any Law [b]; and many Actions which contribute to human Welfare, do in the ſame manner promote the Benefit of Beaſts, in whom certainly they cannot bear any moral Quality. Thus the abſtaining from mutual Hurt, the moderate uſe of Meat and Drink, the Care of Progeny or Off-ſpring, are equally ſerviceable in the Preſervation of rational and of irrational Kinds; and yet Beaſts are never ſaid to perform Actions *morally good* [c]. So tho' all human Actions falling under the Guidance of the Law of Nature, may be finally reſolv'd into that natural Strength and Force which they bear in advancing the Profit or the Harm of Men [6], conſider'd either in a ſingle or in an united State; yet it does not follow on the other Hand, that whatever Thing is endued with a natural Power of doing good or harm to any Species of Animals, is therefore the Object of the ſame Law.

Another Objection againſt the Doctrines we are now eſtabliſhing, is taken from that Paſſage in *Ariſtotle*'s Ethicks [7]: *Every Action and every Affection does not admit a Mediocrity: For there are ſome Affections which involve a kind of Pravity in their very Name, as Malice, Impudence, and Envy, and* ἐπιχαιρεκακία, *or rejoicing at another Man's Misfortune; and likewiſe ſome Actions, as Adultery, Theft, and Murder. Now theſe and the like being evil directly and in their own Natures, are not called Vices with relation to any Exceſs or Defect; for abſolutely, and without any Degrees to be guilty of them, is to commit Sin.* But 'tis by no means a good Conſequence, that becauſe we have ſome Names of Actions or Affections, which of themſelves, and without any Exceſs or Defect,

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[a] Plato in Sympoſ. *This is the Nature of every Action, to be in itſelf neither good nor vicious; as what we are now doing, drinking, ſinging, arguing. Neither of theſe, conſider'd by itſelf, is honeſt or diſhoneſt; but the Manner of performing it gives every Action its proper Denomination. For what is done right, we call good, and what is done wrong, evil or indecent. The ſame Rule the Philoſopher aftewards applies to Love.* [b] *Such are a Quick Apprehenſion, Knowledge, Memory,* &c. [c] *Add. D. Cumberland, De L. N. Ch.* v. §. 9.

Mr. Barb. *NOTES.*

[1] See *Note* 4. upon *Ch.* i. §. 4.

[2] This will appear more plain from this Conſideration: There are ſome Actions, in which the phyſical Motion is entirely the ſame, but the Morality is very different; the one being accounted good, or at leaſt allowable, the other evil and unlawful: As for Example; To kill a Man is a Wickedneſs in a Thief, but a good Action, or at leaſt an allowable one, in an Executioner, a Soldier, or a Perſon that fights in his own Defence, *&c.* ſo that the Action in itſelf may be reckoned altogether indifferent.

[3] Plato, in his Treatiſe of Banquets, ſpeaks to the ſame Effect. The Nature of all our Actions is ſuch, that they are neither honeſt nor diſhoneſt in themſelves, as to drink, ſing, diſcourſe, and ſuch like Actions; but 'tis the Manner of doing, that denominates the Action; for what we do well, and according to our Duty, is honeſt, but what we do ill is diſhoneſt.

[4] Here we muſt diſtinguiſh between ſuch Terms and Expreſſions, as denote purely and ſimply the Motion of our natural Faculties, and thoſe Terms and Expreſſions which ſignify to us an Action purely moral, *i. e.* a phyſical and moral Motion. As for Example: To labour, to kill, to ſpeak, ſignify only certain natural Motions, and thoſe indifferent: But when we ſay, He laboured to kill his Neighbour, He ſlew an innocent Perſon, when he had no Right to kill, He ſpake ill of his Neighbour, theſe are bad Actions. And theſe are good ones, or at leaſt allowable ones, To labour in our Calling, Slay an unjuſt Aggreſſor, Speak ſincerely, *&c.* There are alſo ſome ſimple Terms, which in themſelves contain both a phyſical Motion and Morality. As for Example, Adultery, Inceſt, Theft, *&c.* as our Author ſpeaks in his *Diſſert. Academ. p.* 733, 734.

[5] Such are (ſaith Biſhop *Cumberland, De Leg. Nat. Ch.* v. §. 9.) a Quickneſs of Wit, Knowledge of ſpeculative Sciences and divers Arts, an happy Memory, Strength of Body, the Help of outward Things, *&c.*

[6] See what our Author writes, *Lib.* ii. *Ch.* iii. §. 21.

[7] *Ethic. ad Nicom. Lib.* ii. *Ch.* vi.

imply Vice; therefore there are ſome Actions and Affections bad in themſelves, without Reſpect to any Law: becauſe theſe Terms or Names do not ſignify bare natural Motions and Acts, but ſuch entire moral Motions and Acts, as are repugnant to ſome Law, and ſo take in and expreſs the whole Compaſs of a moral Deed [1]. For why, for Example, are Envy and its vile Conſequents, which we but now mention'd under the *Greek* Name of ἐπιχαιρεκακία, reputed evil Affections, but becauſe the Law of Nature ordains, that a Man ſhould never be a Stranger to his own Kind, but ſhould bear a Part in the Pleaſures and in the Sorrows of his Neighbours; to which Rule it is an open Contradiction, to receive any Joy from the Calamity of others, and to repine at their Happineſs and Succeſs [a]? And ſo what elſe is Impudence, but a wicked Firmneſs and Hardineſs of Mind in the Commiſſion of ſuch Things as the Law bids him be aſham'd of? For not to be aſham'd, or not to bluſh, can never be a Fault, when we are not by ſome Law ſuppos'd and enjoin'd to do otherwiſe. After the ſame Manner, Adultery is the Pollution of another Man's Wife, whom the Laws appropriate to her Husband. Theft is the taking away of another Man's Goods, againſt the Conſent of the Owner, who by the Law is made the ſole Diſpoſer of them. Murder is the killing of a Perſon in his Innocence, and againſt the Laws. Inceſt is a Conjunction with ſuch a Perſon as the Laws oblige us to abſtain from, upon account of the Reverence which Men are by Law likewiſe taught to pay to Nearneſs of Blood. And the ſame Judgment is to be made of other Vices. But now, if from all theſe you take away the Reſpect to the Law, and the Morality inherent in ſuch Actions, the bare natural Fact will involve no Abſurdity or Contradiction: For in a natural and abſolute Senſe theſe are altogether indifferent Things; to have Conjunction with your neareſt Relation, or with the ſame Woman who is enjoy'd by another, ſuppoſing he has no peculiar Right to her, as he cannot have without Law; to take away the Life of a Creature of the ſame Species with your ſelf; to take a Thing which another Man had deſign'd for his Uſe, tho' he had obtain'd no Right by Law to exclude others from their Share in its Poſſeſſion. And the Reaſon why ſo few Perſons can conceive and apprehend ſuch a natural Indifference as we are maintaining, is only this, becauſe, from our Infancy, we are taught to deteſt ſuch Practices; and this Abhorrence being imprinted on our tender Minds, ſeems to grow into a kind of natural Judgment; ſo that it ſeldom enters into Mens Heads to diſtinguiſh between the *Materiality* and the *Formality* of thoſe Actions, or between our Performance of them as natural, and our Commiſſion of them as moral Agents [2]. Hence it appears that *Grotius* had not conſider'd this Matter throughly [3], when among thoſe Things to which the Power of GOD himſelf does not extend, becauſe they involve a manifeſt Contradiction, he reckons [b] the Malignity of ſome human Actions. Indeed 'tis impoſſible that twice two ſhould not make four, becauſe twice two and four are really the ſame Thing, and only differ in Name, and in our Manner of conceiving them. But the Contradiction which appears in Actions repugnant to Nature's Law, is of a much lower Degree, and can never riſe to an *abſolute* Impoſſibility. And upon the ſame Account he derives this Malignity from ſuch Actions as compar'd with right Reaſon: For in the very Terms of right Reaſon, when apply'd to Man, there inheres a Reſpect to the Law of Sociableneſs enjoin'd to human Race by the Creator. Thus at the ſame rate he alledges [c] for a Proof of the Independency of ſome of Nature's Laws, the *neceſſary* Agreement and Diſagreement of Things to rational and ſocial Nature. But Man obtain'd a ſocial Nature from the good Pleaſure of GOD ALMIGHTY, not from any immutable Neceſſity; and conſequently the Morality of Actions, agreeable or diſagreeable to him as a ſocial Creature, muſt be deriv'd from

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[a] Add. *Stob.* Serm. cxi.

[b] De *J. B. & P. Lib.* i. *Ch.* i. §. 10.

[c] Ibid. §. 12.

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[1] It is is true, that we ſometimes confound the poſitive Idea and phyſical Action with its moral Relation, though they are really two very diſtinct Things. As for Example, To drink Wine, or any other ſtrong Liquor, till we loſe the Uſe of our Reaſon, is that which we call Drunkenneſs; but as that Word imports, in its ordinary Uſe, a moral Turpitude in the Action contrary to a Law, Men are obliged to condemn every Thing that hath a Tendency to that, which we call Drunkenneſs, as an evil Action, and contrary to the moral Law; but if a Man happen to have his Brain diſturbed, by drinking a certain Quantity of Wine, which was preſcribed him as a Medicine for the Recovery of his Health, though we may call ſuch an Action Drunkenneſs, conſidering it as a Name of a mixt Nature, yet 'tis plain, that if we compare it with the Law of GOD, our ſupream Rule, 'tis no Sin, nor a Tranſgreſſion of that divine Law, though Drunkenneſs is ordinarily taken in that Senſe. Mr. *Locke*'s *Eſſay of the human Underſtanding*, *Lib.* ii. *Ch.* xxviii. §. 16. There is a great Uſe of this Remark in the Queſtion of Lying, which is treated on, *Lib.* iv. *Ch.* i.

[2] Here's a tacit Anſwer to an Objection that may be offered. There are ſome Men that have as natural an Abhorrence of ſome Vices, as others have of Meats. Now ſuch an Horror being a kind of natural Motion, or Paſſion, it ſeems that our Senſe of the Turpitude of ſuch an Action ought to be looked upon as a natural Quality, and not as a moral one, reſulting from the Law of GOD. This Difficulty is ſpecious, and the Author ſeems to give it an Anſwer, which, that we may underſtand, let us unfold his Words; *Cuſtom being a ſecond Nature*, as the Proverb is, it happens, that ſome Perſons, of a more elevated Genius, conceive, from their Cradle, ſuch an Horror againſt ſome Vices of a more heinous Nature, that they retain it the reſt of their Lives. This ſort of Antipathy proceeds more from a confuſed and indeliberate Thought, than a diſtinct Knowledge and Reaſoning about the Contrariety of thoſe Vices to the Law. As for Example, It is certain, that in the firſt Ages of the World, Marriages between Brother and Siſter were in Uſe, and authorized by the Diſpoſition of human Affairs at that Time, ſo that the moſt of our Divines and Lawyers acknowledge the Prohibition of theſe ſort of Marriages to be only of poſitive Right; nevertheleſs, the Uſage of them being long ſince aboliſhed by moſt Nations, Men have entertained ſo great an Averſion to them, not only becauſe they are forbidden by their Laws, but upon the Account of the Impreſſions of their Education, that they look upon it as a monſtrous Thing for a Brother and Siſter to have a carnal Love one for another. And it ſeems as if their Senſes were lock'd up in that Reſpect, for we may ſee young Men converſe all their Days with their Siſters of extraordinary Beauty, and yet be under no Temptation, though very amorous towards others of their Sex. Such as have theſe Impreſſions regard not the Laws, nor the phyſical Motion of the Action, but are ſtrongly perſuaded that they ariſe from a Turpitude in the Action, as contrary to the Nature of Man, as exceſſive Cold, or Heat, Grief, or other phyſical Qualities deſtructive to his Being. *Pufend. Letters & Specim. Controv. Ch.* v. §. 5. See *Plato*, cited *Lib.* ii. *Ch.* iv. §. 3. *Note* 4. and *Plutarch*, *De Virtut. Moral. Tom.* ii.

[3] See the Defence of *Grotius*, *Lib.* ii. *Ch.* iii. §. 4. *Note* 5.

the ſame Original and Spring; and muſt be attributed to Man, not by an abſolute, but by an hypothetical Neceſſity; or upon Suppoſal of that Condition which God was pleas'd freely to beſtow on Mankind above the Privileges of the inferior Creation. Nor can this Opinion of *Grotius* find any Shelter or Protection in thoſe Places of Scripture which he quotes to ſhew, that God Almighty permits himſelf to be judg'd according to the original Laws, and therefore they muſt be abſolutely immutable: For without doubt God declar'd to Mankind from the very Beginning of Things, that he would be a *Rewarder of the Good*, and an *Avenger on the Wicked*, Heb. xi. 6. and that he would *render unto every Man according to his Works*, Rom. ii. 6. From which Declaration his Veracity not permitting him to go back, *Abraham* had Reaſon to make that Appeal which we find *Gen.* xviii. 25. *Shall not the Judge of all the Earth do right*[a]? But how does it follow hence, that [1] human Actions have any moral Quality antecedent to the divine Impoſition? Nor does it at all appear how the ſame Concluſion can be drawn from the fifth Chapter of *Iſaiah*, where God is pleas'd to refer the *Cauſe between him and his Vineyard*, to the Judgment of *Iſrael* and *Judah*, and concludes, that he may lawfully neglect the farther Care and Culture of it, ſince the degenerate Fruit made ſo ill a Return to his Pains. And laſtly, from that Place in the ſixth of *Micah*, where God is ſaid to *have a Controverſy with his People, and to reaſon with Iſrael*, it ſeems to be hinted, that Men may by their own Judgment underſtand the Equity of returning Thanks for Benefits receiv'd; but we cannot thence infer, that, becauſe Men who have a Senſe of Kindneſs, are oblig'd to be grateful, therefore this Gratitude is not commanded by any Law, but is of itſelf, before all Law, a neceſſary Duty. From all that we have urg'd on this Head, it may appear, that the Sentence which is frequently in the Mouths of moſt Men, [2] *That the Precepts of natural Law are of eternal Verity*, is ſo far to be reſtrain'd and limited, that this Eternity ought to reach no farther than the Impoſition and Inſtitution of God Almighty, and the Origin of human Kind. Tho', to ſay the Truth, the Eternity which we improperly attribute to the Laws of Nature, is only to be rated in Proportion to the Oppoſition they bear to *poſitive Laws*, theſe being ſubject to frequent Alterations, while thoſe remain fixt and unchangeable.

VII. It may be farther objected, and with ſome Face of Probability among vulgar Judges, That Honeſty and Turpitude muſt needs inhere in ſome human Actions of themſelves, and by the Force of their own Nature, not by the Power of external Impoſition; for this Reaſon, becauſe our very Blood ſeems to have a natural Senſe of wicked Deeds, which it expreſſes by ſpreading a ſudden Redneſs over the Face, whenſoever we are touch'd, either with the Memory of them, or with the Reproach. Now they ſay 'tis very improper to attribute a natural Effect to a moral Quality; but, on the contrary, that ſince ſuch a certain Motion of the Blood raiſing a Redneſs in the Face, reſults in the Manner of a natural Effect from an ill Action, that Illneſs or Pravity muſt likewiſe be applied to the Action, as a natural and a neceſſary Affection or Quality. In return to which, in the firſt Place, we confeſs that the moſt wiſe Creator has implanted in the Minds of Men the Paſſion of Shame, to ſerve as it were for a Guard and Defence to Virtue, and for a Bridle to wicked Deſigns. And it is likewiſe probable, that unleſs God had deſign'd Man for an Agent, who was to frame his Proceedings by a Law, he would never have mingled ſuch a Paſſion in human Conſtitution, ſince without that Suppoſition it does not appear to be of any Uſe at all in the World. But indeed it is no manner of Contradiction, that a moral Quality owing its Original to Inſtitution, ſhould produce in Man (tho' not directly and immediately) a natural Effect: For [3] the Soul being united by the cloſeſt Ties to the Body, while itſelf apprehends moral Concerns, and is affected with them, may at the ſame Time eaſily raiſe a peculiar Motion in ſome Part of the Body. Beſides, we ought to obſerve, that Shame does not only ariſe from the Pravity of Actions, but alſo from any Fact, tho' not morally evil, which we think will leſſen our Character and Eſteem: For, according to *Des Cartes*'s Definition, it is nothing elſe but *a Species of Sorrow, founded upon Self-love, and proceeding from a Senſe or Fear of Diſgrace*[b]: Or, as *Ariſtotle* ſpeaks[c], *it is a certain Grief and Confuſion at Things which appear hurtful to our Reputation*: For, Man is a moſt ambitious Creature, and highly conceited of his own Excellency, whence he takes an extraordinary Pleaſure, if he can find out any Advantage or Perfection in himſelf, on the Strength of which he may brag, and ſwell, and carry himſelf above the Dimenſions of his Neighbours. And whenever he apprehends theſe Talents to be the leaſt impair'd, and to weigh lighter in common Account, he immediately conceives the deepeſt Regret in his own Mind. Now the Heart, that chief Seat of human Excellency, being affected with this Paſſion, preſently ſends up the Blood to be an

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[a] Add. *Ezek.* xviii. 25. *Rom.* iii. 6.

[b] De Paſſion. Art. ccv.

[c] Rhetor. *Lib.* ii. *Ch.* vi. init.

Mr. Barb. *NOTES.*

[1] What *Grotius* infers from hence is no direct Conſequence. He alledges theſe Paſſages, to prove, that God conſents that Men may judge (as we may ſay) of his Conduct, by the Principles of the Duties he impoſes on them, to which he himſelf conforms, as much as the great Diſtance between the Creature and Creator will permit. See the Diſcourſe of Mr. *Noodt*, *Of the Power of Sovereigns*, with the *Note* of the *French* Tranſlator, printed, *A. D.* 1707.

[2] Thoſe who have firſt ſpoken of the Eternity of the Laws of Nature, muſt mean it in Oppoſition to the Novelty and frequent Changes of the Civil Laws; for they aſſert only, that natural Light had not its Beginning in the Times of *Minos*, *Solon*, or *Lycurgus*, but exiſted before any civil Society, and is as antient as Mankind. Further, That this Right is not ſubject to change, as Civil Laws are, which are aboliſhed according to the Neceſſities of a State, or the Humour of Sovereigns; but it remains the ſame in all Times and Places, and ſhall end only with Mankind. In fine, 'Tis no ways neceſſary to maintain, that the Law of Nature is co-eternal with God; for ſince it has no Regard to him, and is only contrived for Men, on whom it is impoſed; to what Purpoſe is it to ſuppoſe, that it had a Being before Men? But if we ſay, that he had them from all Eternity in his Preſcience, we attribute nothing thereby to the Law of Nature, but what's common to every Thing that exiſts. *Pufend. Apolog.* §. 26.

[3] See the Paſſage of Plutarch, §. 6. *Note* 10, and what goes before and follows it.

outward Sign of it in the Face. But becauſe [1] Man does not only value himſelf upon Account of abſtaining from Evil Deeds, but for ſeveral other Things, which are not endued with any moral Quality, if he ſuffer in any of theſe latter Points, he is equally liable to *Shame:* Thus we ſee many Perſons who cannot forbear bluſhing at their Lameneſs, or Baldneſs; at a Wen, a Crump-back, or any other Deformity of Body; at ſome particular Diſeaſes; at Poverty; bad Cloaths; at faultleſs Ignorance, or at harmleſs Miſtakes, and at [2] many other Things, which are by no Means morally Evil [a]. And among Sins, thoſe eſpecially put a Man to the Bluſh, which directly argue a Lowneſs and Dejection of Mind, and which for that Reaſon make us appear more contemptible [b]; nor has the Fear of this Contempt the ſame general Power, but only when we are in Danger of ſuffering it from thoſe Perſons, whoſe Eſteem and good Opinion we are particularly coveteous of enjoying. And thoſe deſperate Wretches who have once ſinned themſelves out of all Care of Credit, are not afterwards [3] touch'd with the leaſt Bluſh, upon the Commiſſion of the vileſt Wickedneſs [c]. Whatever we have urg'd againſt the natural, the abſolute, and the neceſſary Goodneſs or Pravity of human Deeds, does not at all ſeem to rob moral Knowledge of its requiſite Certainty, for this would remain fixt and unmov'd, tho' the Morality of our Actions depended entirely on Impoſition.

VIII. But if this Doctrine be true which we have aſſerted, what will become of that *moral Latitude*, which is ſo much talk'd of, and ſo frequently oppos'd to *mathematical Strictneſs?* Does not that ſeem to detract ſomewhat from the Certainty which we maintain? This Doubt will be clearly ſolv'd, if it be conſider'd how far we affirm Demonſtration to prevail in theſe Notions, and in what Things this *Latitude* is to be found. Demonſtrations therefore are here chiefly employ'd about moral Qualities, ſo far as thoſe Qualities appear, for certain, to agree to ſuch Actions or Perſons: When we enquire (for Example) whether ſuch an Action be juſt or unjuſt, whether ſuch a Right, or ſuch an Obligation accrue to ſuch a Perſon, conſider'd in general, or as that perſonal Capacity is common to others with him. Now all theſe Kinds of Truths we maintain to be ſo clearly and certainly deducible from their genuine Principles and Cauſes, that no Man in his right Wits, can entertain a Doubt concerning them. And tho' we ſhould diſcover ſome little Latitude, or ſomething analogous to Latitude, in the Queſtions; yet that would not be able to prejudice the Certainty of them in itſelf. As for the Goodneſs or Pravity of Actions, as they denote their Agreeableneſs or Repugnancy to the Rule of the Law, in this Reſpect they ſeem capable of no Manner of Latitude, but whatever declines from Good muſt immediately be pronounc'd Evil. Yet under other Conſiderations, at leaſt with Reſpect to Men, they admit of ſomething like Latitude; Latitude, properly ſpeaking, being applicable only to Quantity. And firſt, Becauſe in Laws the Force and Power of obliging Men is not always of the ſame Tenour and Degree, but appears more ſtrict in commanding and forbidding ſome *Actions*, and more looſe about others. Whence it comes to paſs, that we are forc'd to diſtinguiſh between Law and Equity, or between what's rigorouſly and exactly juſt, and [4] what's equal and fair to be done. The Difference between which Things is this, We lie under a more neceſſary Duty of performing the former, but the latter engage our Obedience with a gentler Tie, and with an inferior Obligation. Yet theſe laſt have a wider Object than the firſt; the Offices of other Virtues being extended much farther than thoſe of Juſtice. It happens likewiſe very commonly, that among Men, and in human Courts, ſmaller Deviations from the Law ſcarce fall under Conſideration or Animadverſion. Many Things too are ordain'd and commanded in ſo weak and indifferent a Manner, that they ſeem to engage Men rather by affecting their Modeſty than their Honeſty: So that thoſe who perform them deſerve Commendation, thoſe who omit them are not obnoxious to Reprehenſion. And among theſe Matters *Grotius* [d] ſeems to reckon *Concubinage*, *Divorce*, and *Polygamy*, before they were forbidden by the Law of GOD: *Theſe* (ſaith he) *are ſuch Things as Reaſon itſelf tells us it is more honeſt to abſtain from; yet not ſo, as that (ſetting aſide the Divine Precept) they include any grievous Fault.*

But of theſe we ſhall treat in their proper [e] Place. Hither likewiſe is to be referr'd that Paſſage of *Ariſtotle* [f]; *He that declines but a little from right Dealing, whether to the Exceſs, or to the Defect, is not charg'd with Guilt; but he that tranſgreſſes in a larger Meaſure, becauſe his Faultineſs diſcovers and betrays itſelf by its Bulk.* It may happen too that a Thing in itſelf ſhall be unobliging and indifferent, and yet the Performance, or the Omiſſion of it ſhall either always, or however at ſome certain [5] Juncture, be more for our Advantage and Uſe. To this Caſe belong thoſe Paſſages of St. *Paul* in his firſt Epiſtle to the *Corinthians*, Chap. vi. ver. 12. Chap. vii. ver. 6, 7, 8, 9. Chap. x. ver. 23. And that Obſervation of *Grotius* [g], *That ſometimes by*

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[a] Add. *Sirac. Ch.* xlii. 9, &c.
[b] Vid. *Ariſtot.* Rhet. *Lib.* ii. *Ch.* vi.
[c] Add. *Cartes* de Paſſion. art. ccvii.
[d] *Lib.* i. *Ch.* ii. §. 6.
[e] *Lib.* vi. *Ch.* i.
[f] *Ethic. Ch.* ult.
[g] *Lib.* i. *Ch.* i. §. 10.

Mr. BARB. *NOTES.*

[1] So far from that, that we are ſometimes aſhamed that we have done Things that we believe to be good, and not done Things that are evil. See PLUTARCH's Treatiſe of *Falſe Shame, Tom.* ii. *p.* 528. *Ed. Wech.*

[2] SENECA in his *Letters, Numb.* 11. proves, that Bluſhing is the Effect of our Temperament, and that diverſe Cauſes produce it. As for Example, *Pompey* the Great could not help Bluſhing, when he appeared in a great Aſſembly; and *Fabianus* the Philoſopher and Orator bluſhed, when he came but to give an Evidence before the Senate. SENECA ſays, it proceeds not from Weakneſs of Spirit, but from Suprize; for what a Man is not accuſtomed to, diſturbs ſuch as are ſubject to Bluſhing.

[3] TACITUS has a like Remark, *Annal.* xi. *Ch.* 26. *Ob magnitudinem infamiæ, &c.* The Greatneſs of the Infamy gives Pleaſure to the Crime, in the Minds of ſuch as have caſt away all Senſe of their Honour. Which Mr. *Hertius* cites.

[4] So that Equity includes not only what is really and fully due to any one, although he cannot require it of us in Strictneſs by any written Law, but all that is due to another upon a Principle of Humanity, or Charity, or any other Virtue, which is ſuch, that if we do not our Duty, he to whom we ought to do it can't complain of any Wrong done him; ſo that the Right from whence this Obligation ariſes, is that which is call'd by our Author, Imperfect. See *Ch.* i. §. 19, 20. foregoing, and *Ch.* vii. §. 7, 11. 16. *Book* iii. *Ch.* i. §. 3. and *Ch.* iii. §. 16. and *Ch.* iv. §. 6. *Book* viii. *Ch.* i. §. 1.

[5] We may add, *or with Relation to certain Perſons.* See what I have ſaid in my Treatiſe *of Games*, printed in 1709. *Lib.* iii. *Ch.* vi.

an abuſe of Words, thoſe Things which Reaſon ſhews to be honeſt, or better than the contrary[1], *tho' they are not enjoin'd, yet ſhall be call'd Dictates or Ordinances of the Law of Nature.* From all that has been ſaid, we may underſtand whether, and in what Manner there may be ſaid to be Degrees of Good. If then we conſider Good in a ſtrict Senſe, for a Congruity to the Law, 'tis as impoſſible there ſhould be any Thing better than what is good, as that there ſhould be any Thing ſtraighter than what is properly ſtraight. Yet one Good may be pronounced better than another, according to the different Degrees of Neceſſity which are found in both, and upon Account of which, if they cannot be both perform'd, one of them manifeſtly gives Place to the other. To this Purpoſe, ſee *Matth.* viii. 21, 22. where it was a good Thing to bury a dead Father, but a better to follow our Saviour: *Acts* vi. 2. where it was a good Thing to miniſter to the Poor, but a better to preach the Goſpel: On which Point we ſhall be larger hereafter[a]. Laſtly, when Actions, in themſelves lawful and indifferent, are meaſur'd and rated according to their Uſefulneſs or Expedience, one of them is declar'd better than another, as it is more advantageous to the preſent Circumſtance or Occaſion[2].

IX. According to our Doctrine already deliver'd, muſt that Place of *Grotius*[b] be explain'd, about the Cauſes of Doubt in moral Actions; where he ſays, *There is not an equal Certainty to be met with in Morals and Mathematicks; which therefore happens, becauſe mathematical Sciences treat of Forms, as diſtinct and abſtracted from all Sorts of Matter, and becauſe the Forms themſelves are generally ſuch as will admit of no Medium, as we can find nothing which is not either crooked or ſtraight. But in Morals the leaſt Circumſtance alters the Matter; and the Forms, of which they treat, have commonly ſome intervenient Latitude, by Reaſon of which they ſometimes approach nearer to one Extream, and ſometimes to the other. Thus between Things abſolutely commanded, and abſolutely forbidden, there are ſome Things left indifferent; but this Medium of Indifference ſometimes inclines nearer to the Injunction, ſometimes to the Prohibition. Whence frequently ariſes an Ambiguity, ſomewhat like what we meet with in Twilight, or in Water not perfectly hot.* As to this Aſſertion, we muſt confeſs, that, as about other Actions, ſo eſpecially about making War, a Doubt may probably ariſe; either becauſe the Fact which occaſions the War is not yet fully made out, or whether it be of ſo great Conſequence as to deſerve a Proſecution by Arms, where the Caſe is ſo deſperate, and where the attending Miſeries are ſo numerous; or whether in the preſent Juncture and Condition of the Commonwealth, it be a moot Caſe which Courſe ought to be taken, either to return the Injury in an hoſtile Manner, or rather conceal the Affront, and defer the Satisfaction, leſt an untimely Purſuit of Revenge ſhould draw greater Misfortunes on the State. But that the Cauſes of Doubting in ſuch Caſes proceed from the Uncertainty of moral Matters, this we abſolutely deny. The Reaſon why the Demonſtrations in Mathematicks are ſo very accurate, is not the Abſtraction from *Matter*, but another, that we ſhall produce by and by. *That in Morals the leaſt Circumſtance alters the Matter*, is an ambiguous Expreſſion. If this be the Senſe of it, That the leaſt Circumſtance alters the Quality of an *Action*, that is, turns it from Good to Evil, this Variation does not at all injure the Certitude of moral Knowledge. For a Line that recedes never ſo little from Straightneſs, degenerates into Crookedneſs, and yet no Uncertainty ariſes hence in geometrical Operations. But if this be the Meaning of the Place, that the leaſt Circumſtance either raiſes or leſſens[3] the Quantity of an *Action*; this, at leaſt in human Regard, is not always true; for trifling Accidents and Punctilio's ſeldom weigh any Thing in the Sentence of a moral Judge. Yet, if we grant this Suppoſition, it will not in the leaſt diminiſh the Certainty of Morality; ſince even in Mathematicks the ſmalleſt Acceſſion, or the moſt inconſiderable Loſs, varies the Quantity. Lawful or indifferent Things, which compoſe the Medium between Commands and Prohibitions, we have already obſerv'd only in this Reſpect to incline ſometimes more to one Hand, ſometimes to the other, as it appears moſt expedient and uſeful ſometimes to perform them, ſometimes to omit them. Yet even hence nothing of Uncertainty can ariſe, nor is any ſuch Medium form'd, as we can clearly underſtand either to be Good or Ill. So that thoſe Examples and Inſtances of *Twilight* and *lukewarm Water*, are improperly applied to the preſent Caſe; they being of that Kind of *Media* we call *Media Participationis*, as *lukewarm Water* partakes of hot and cold together. But thoſe *Media*, which we call *Media Negationis*, as are indifferent and lawful Matters, poſſeſs not the leaſt Share of either the Extreams, but equally deny them both. For we ſay in the ſame Manner, Good is not Indifferent, and Evil is not Indifferent; and it does not appear, how a *Medium* of this Nature can prove a Cauſe and an Occaſion of Uncertainty.

X. Yet as to the *Quantities* which are uſed in Morality, *they*, we confeſs, are capable of ſome Latitude; and it's chiefly on this Account, that mathematical Knowledge is eſteem'd to have ſo much higher Degrees of Niceity and Exactneſs than moral. The Reaſon of this depends on the different Conſtitutions of natural and of moral Quantity: For natural or phyſical Quantities may be accurately compared, and meaſured, and divided into the moſt equal Parts; becauſe they are repreſented as the Affections of material Things, which are the Objects of our Senſes. Whence we may preciſely determine, what Rule and Proportion they bear to one another, eſpecially if we employ the

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[a] Lib. i. Ch. iii. §. 8. & Lib. v. Ch. xii. §. 23.

[b] Lib. ii. Ch. xxiii. §. 1.

Mr. Barb. *NOTES.*

[1] Such is, for Example, the Cuſtom of covering thoſe Parts of the Body which diſtinguiſh Men from Women: To which we may refer what St. *Paul* ſays of the Cuſtoms of his Times, 1 *Cor.* xi. 14. Nature itſelf teaches us, *That if a Man have long Hair, 'tis a Shame to him; but if a Woman have long Hair, 'tis her Honour,* as *Frederick Gronovius* explains theſe Words, in his *Notes*; but our Author gives them another Turn, *Lib.* ii. *Ch.* iii. §. 22.

[2] There are other Principles by which the reſpective Quality of moral Actions may be determined. See *Ch.* viii. §. 5. with the *Note.*

[3] As for Example, It renders a Fault more or leſs excuſable, and a Crime more or leſs enormous.

aſſiſtance of Numbers, by the Application of which all Queſtions of this kind are moſt exquiſitely ſolv'd. And beſides, thoſe Quantities are the Effect of Nature, and conſequently immovable and permanent. On the other hand, moral Quantities proceed from the Impoſitions and the Eſtimation of intelligent and free Agents, whoſe Judgment and Pleaſure not falling under natural Dimenſions, the Quantities which they thus conceive and determine, cannot be circumſcribed by any ſuch Meaſure, but retain, as it were, ſomewhat of the Looſeneſs and Liberty of their Original. Nor indeed did the Ends for which moral Quantities were firſt introduced, require any ſuch punctual Minuteneſs [1]; but it was ſufficient for the Uſe of human Life, that Perſons, Things, and Actions ſhould be more groſly rated and compar'd together [2]. Thus we diſcover a Latitude in the Value or Eſteem of Perſons; by which, tho' we underſtand that one Perſon is to be preferr'd to another, yet we cannot exactly determine whether he exceeds him in a double, or treble, or quadruple Proportion of Worth. The like Latitude occurs in the Valuation of different Things, and of Actions belonging to Commerce; on the account of which we can ſcarcely fix any [3] ſettled Price on any other Things beſides thoſe which the Civilians call *Res fungibiles* [a], *conſumable Goods*, that is, ſuch as we borrow for our preſent Uſe, upon Condition of repaying them in the ſame Quantity and Quality: As to the reſt, we eſteem them equal and indifferent, and to be determin'd by the private Bargains and Agreements of particular Men. And ſo likewiſe the Proportion between many Faults and Puniſhments is adjuſted with ſome Latitude: For who, for Example, can tell preciſely how many Laſhes, and how ſmartly laid on, come juſt up to the Guilt of ſome particular Piece of Thievery? But in ſuch Caſes we aſſign what Proportion we think fit, with great Looſeneſs and Security. We find too a very remarkable Latitude in many Buſineſſes and Affairs of Life [4]. Human Lawgivers are not us'd to cut every Thing to the quick. *The Laws, and the Philoſophers* (ſays [b] *Tully*) *clear Subtilties in a different Manner: The Laws no otherwiſe than as Things may be felt and handled, by reaſon of their Groſsneſs; but the Philoſophers, as they may be diſcern'd by Reaſon and Underſtanding.* And in the Deciſion of Cauſes 'tis a Maxim vulgarly known, That the Judge does not concern himſelf with every petty Circumſtance. And ſo when ſuch a Number of honeſt Men are appointed [5] Arbitrators of any Controverſy, there is fair room for Latitude in their Judgment and Sentence [6]. Farther, in executing vindictive Juſtice, there is an Indulgence made of a convenient Latitude, not only on the Part of Clemency, but of Severity too. To which purpoſe is that Saying of *Tacitus* [c]: *All great Examples have ſomewhat of Injuſtice; but the Injury they do to particular Perſons is recompens'd by the common Advantage they bring to the Publick:* And that of *Jaſon* in *Plutarch* [d], *'Tis neceſſary that thoſe ſhould act unjuſtly in ſmall Matters, who intend to maintain Juſtice in the grand and chief Concerns* [7]. Moſt Virtues likewiſe, beſides Juſtice, admit a free Looſeneſs and Latitude in the Exerciſe of them; as for Example, Pity, Liberality, Gratitude, Equity, and Charity. And ſo, in common Life, we apply the Names of Habits under a Latitude of Signification [8]. Thus we call him a juſt Man, who commits (tho' deliberately) but a few Pieces of Injuſtice. Laſtly, we may obſerve, that if in moral Conſideration ſome Quantities are brought to an exact Standard, and a punctual Meaſure, as the Price of ſome Commodities, the Periods of Time [9] ſettled by Law, and the like; yet this preciſe Determination does not ſo much proceed from the Things themſelves, or from the Times, as from the Inſtitution and Will of Men [e]. From all theſe Remarks we conceive the Difference between mathematical and moral Demonſtrations to appear very clear and evident; and it is no more than this, that the former are chiefly employ'd about Quantity, which is in its own Nature diſpos'd for the niceſt Diviſion

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[a] To underſtand what is meant by theſe Terms, ſee *B.* v. *Ch.* vii. §. i. [b] Off. iii. *Ch.* xvii. [c] *Annal.* xiv. *Ch.* xliv. [d] *De Sanitat. tuend. & Præcept. Reipub. gerend.* See alſo *Ariſtot. Rhet. Lib.* i. *Ch.* xii. [e] Add. D. *Cumberland* De L. N. *Ch.* viii. §. 14.

Mr. Barb. *NOTES.*

[1] See the Words of Biſhop *Cumberland*, §. 5. *Note* 2.

[2] The Author treats here of Quantities moral, which are the Matter of moral Actions. He ſpake in §. 8. of the Quantity or Degree of Extent, which he conceived to be in the ſame Actions, in certain Reſpects.

[3] *Quæ functionem in ſuo genere recipiunt*, is an Expreſſion of the Civil Law; about which, ſee the Author, *Lib.* v. *Ch.* vii. §. 1.

[4] This is the Foundation of that excellent Expreſſion of the *Pagan* Philoſopher Seneca: *Quam anguſta Innocentia eſt, &c.* De Irâ. *Lib.* ii. *Ch.* xxvii. *How little is the Virtue of that Man, whoſe Goodneſs extends no farther than the Law? How much larger is our Duty than the Rules of the Law direct? How many Things do Piety, Humanity, Liberality, Juſtice, and Fidelity require of us, which the Laws give no Commands for? What the Law forbids not, Honour and Conſcience reſtrains us from: As for Example, The Law puniſhes the Injuſtice of a Seller, when he has taken more than a juſt Price; but Philoſophy and Virtue order the Reſtitution of the leaſt Thing, which he has fraudulently got, more than the Worth of his Goods.* See Grotius, *Lib.* iii. *Ch.* x. §. 1.

[5] See *Lib.* v. *Ch.* xiii. §. 5. following.

[6] So when it is ordered, That one ſhall immediately pay a certain Sum, it is to be underſtood with ſome Limitations; for it can't be ſuppoſed, that he muſt go that very Moment, and deliver the Money into the Hands of him to whom 'tis to be paid. *Digeſt. Lib.* xlvi. *Tit.* iii. *De ſolutionibus & liberat. &c. Leg.* cv.

[7] Some Reflections made by Mr. *Bayle*, *Dict. Hiſt. & Crit. p.* 235 and 2317, are worth our Obſervation here. He ſays, *The publick Good requires, in ſome Caſes, that Juſtice ſhould depart from the Rigour of the Laws, becauſe an Injury done to a private Perſon is a leſs Evil, politickly ſpeaking, than the Advantage that redounds to the Publick by it, is a good*---------- For this Reaſon it is, that the Laws condemn to the moſt rigorous Puniſhments, ſuch Servants as lie with their Maſter's Wife or Daughter, tho' they alledge that they were by many Promiſes and Threatnings drawn into it: Thus a Footman was hang'd at *Paris* in 1698. For though the Excuſes be true, yet Juſtice will not releaſe them; that ſuch Perſons may expect no Favour, and ſo may be more cautious of offending. *Bodin* the famous Lawyer, ſpeaking of a Law made by King *Henry* II. againſt Women who made away their Children, ſo rigorous, that it might happen that an innocent Woman might ſuffer by it, ſays, "That the Uſe of profitable Laws ought not to be ſuſpended, upon the Account of ſome Inconveniences produced "by them." And thereupon, he quotes a Saying of *Cato*'s, *That there is no Law that is profitable for all, 'tis ſufficient that it is beneficial for the moſt Part, and generally.* Liv. *Lib.* xxxiv. *Ch.* iii. See *Montagne*'s *Eſſays, Lib.* iii. *Ch.* xiii. and *Charron of Wiſdom, Lib.* iii. *Ch.* ii.

[8] See *Ch.* vii. §. 6. following.

[9] *The Periods of Time ſettled by Law*, the *Latin* is *Tempora fatalia*, a Phraſe taken from the *Roman* Lawyers, who meant by it, ſuch a Term of Time, as after it no Appeal will lie againſt a Sentence given by Law. See *Cod. Lib.* vii. *Tit.* lxiii. *Leg.* ii. where you'll find *Tempora fatalium dierum*, and *fatales dies.*

and Determination; whereas the latter endeavour nothing farther than to prove for certain ſuch a *Quality* of ſuch a *Subject*, leaving the Deciſion of *moral Quantities* to the larger Scope and Range of human Will.

XI. But we muſt take heed of confounding this moral Certitude, which we have been ſo long eſtabliſhing, with that which is ſo often apply'd to Matters of Fact; as, when we declare (for Example) ſuch a Thing to be *morally certain*, becauſe it has been confirm'd by creditable Witneſſes: For, this latter Sort of moral Certitude is nothing elſe but a ſtrong Preſumption grounded on probable Reaſons, and which very ſeldom fails and deceives us. *Zeigler*, in his Notes on *Grotius*[a], has not ſufficiently diſtinguiſh'd this inferior Certainty from the former and the more noble Kind, while, tho' he grants the more general Precepts of Ethicks to bear an equal Evidence with the Propoſitions of any Science properly ſo call'd, yet he affirms, *That the particular Concluſions have a much ſhorter Degree of Certitude, and are often involv'd in dark Obſcurities, by reaſon that the Things themſelves, concerning which ſuch Concluſions are form'd, are many ways changeable and contingent:* And the Example he brings is this; *We have moral Certitude and Evidence, that an honeſt and ſerious Perſon, when he takes an Oath, ſwears truly. And yet this Evidence is not abſolutely ſuch, but conditionally, becauſe it is not directly impoſſible, but that a Man of theſe good Qualities may forſwear himſelf, ſince he may fall from his Virtue and Integrity.* But now that Certitude, by which we know Perjury to be an Evil, is very different from that by which we believe a good Man is not guilty of Perjury; nor is the latter Propoſition deduced fairly, as a Concluſion from the former. Thus, in the ſame Manner, the Faith we give to Hiſtorians is reckon'd morally certain, when they teſtify a Thing vaſtly remote from our Memory and Knowledge, and of which there is no real and demonſtrative Proof now extant; and eſpecially, if many agree in the Relation: Becauſe it is not probable that many Perſons ſhould join together by Compact, in putting a Trick on Poſterity, or ſhould entertain any Hopes, that the Lye would not in Time be diſcover'd. And yet for all this, if Occaſion were, we could produce Examples of many popular Fables that have paſs'd through ſeveral Ages, under the Colour and Character of Truth.

[a] *Lib.* ii. *Ch.* xx. *ſ.* 1.

CHAP. III.

Of the Underſtanding of Man, as it concurs to MORAL ACTIONS.

The CONTENTS of every Paragraph of the third Chapter.

I. *Two Faculties of the Underſtanding.*
II. *What is the Nature of the repreſentative Faculty of the Underſtanding.*
III. *The natural Underſtanding apprehends Things moral rightly.*
IV. *Conſcience, what it is, and how manifold.*
V. *A right and probable Conſcience.*
VI. *Rules for a probable Conſcience.*
VII. *Rules how to chooſe Things profitable.*
VIII. *A dubious Conſcience.*
IX. *A ſcrupulous one.*
X. *Ignorance, what it is, and how manifold.*
XI. *Error, of how many Sorts.*
XII. *Error in lawful Actions.*
XIII. *Speculative Error about neceſſary Actions.*
XIV. *Or indifferent ones.*
XV. *Practical Error.*
XVI. *Error in an ill Action.*

SINCE that Part of Knowledge which we have undertaken to explain, is chiefly employ'd in demonſtrating what's right and what's wrong, what's good and what's evil, what's juſt and what's unjuſt, in human Actions; in the firſt Place we are oblig'd to conſider and examine the Principles and the Affections of theſe *Actions*, and to ſhew how, by the Help of *Imputation*, they are conceiv'd to be morally join'd and connected to the Authors of them: In this Reſpect then, the Excellency of Man chiefly outſhines the Condition of brute Creatures, that he is endow'd with a moſt noble and exalted Soul, which exerts itſelf not only with a ſingular Light, as to the knowing and judging of Things, but alſo with a prodigious Quickneſs and Activity, as to the embracing or rejecting them. So that on this Score the Actions of Mankind ought to be rank'd in a much higher Claſs than the Motions of Beaſts, which proceed purely from the Spurs of Senſes, without the precedent Help of Reflexion[1], whatever *Charron*[b] has alledg'd to the contrary. That Power of the

[b] *De la Sageſſe. Lib.* i. *Ch.* xxxiv.

Mr. BARB. *NOTES.*

[1] Mr. *Charron*'s Words are theſe, *Man ſetting himſelf above, and calling himſelf Maſter of all Creatures, diſdains the reſt. He divides them into Parts, and allows them what Faculties and Powers he pleaſes. On the other Side, he degrades himſelf as it were in Spite; he groans, complains, blames Nature as a cruel Stepmother to him, and makes himſelf the Refuſe and moſt miſerable Creature in the World, both which are equally contrary to Reaſon, Truth, and Modeſty. Nevertheleſs, Beaſts can't be reaſonably debaſed to the Condition of meer* Automata; i. e. *Clock-work: Such an Opinion muſt proceed from Preſumption, and not a ſerious Conſideration of their Actions*; for, *as Mr.* LOCKE *ſpeaks very well:* ſhall we believe that Dogs and Elephants do not think, when we plainly ſee, that they can find out that in us which we can't diſcern in ourſelves? Do they not give us all the Demonſtrations imaginable of their Senſe, except that they can't tell us ſo? It is hard indeed to fix the Bounds of the Faculties of the Souls of Beaſts, tho' Mr. *Charron* aſſerts, that they can from Particulars infer Univerſals; but yet we have ſufficient Reaſon to be convinced, that Beaſts act with ſome Knowledge and Reaſoning. See Mr. LOCKE, *Lib.* ii. *Ch.* ix. §. 11, 14. & x. §. 10. & xi. §. 7, 10, 11. As alſo Mr. LE CLERC's Phyſicks, *Lib.* iv. *Ch.* xii. What Mr. *Puſendorf*'s Notion was in this Matter, is hard to know, for he allows Beaſts in one Place, what he denies them in another.

human Soul, which it bears as a Light for its Guidance and Direction, we commonly call the *Underſtanding*, and in this, as it is concern'd about voluntary *Actions*, we conceive two Faculties [1]: One is that by which, as by a kind of Mirror, the Object is ſhewn to the Will, with a general and confus'd Notice, whether it be agreeable or diſagreeable, good or evil. The other is that by which the Reaſons of Good and Evil, which in ſeveral Objects offer themſelves numerouſly on both Sides, are weigh'd and compar'd, and Judgment is given, what, when, and in what manner we are to act, and Conſultation taken about the moſt proper Means for the Accompliſhment of the propos'd End. And here it muſt be obſerv'd, that the Beginning of a voluntary Act ſhould regularly proceed from the Underſtanding, whence ariſes the vulgar Maxim,

-------------- *Ignoti nulla Cupido.*

Objects unknown can never move Deſire:

Although this Knowledge, which precedes the Acts of Volition, is not always diſtinct, becauſe a confus'd Notion is ſufficient to make the Will beſtir itſelf. And thus when we have not a tolerable Knowledge of a Thing, we cannot be ſaid properly and fully to deſire it; yet we may deſire to make Trial of it.

II. As to the former Faculty of the Underſtanding, we muſt remark, that it is of the Number of thoſe which are commonly call'd *natural Faculties* [2], contradiſtinct to the *free*; in as much as it is not in the Power of Man to apprehend Things otherwiſe than as the Images of them preſent themſelves to the Mind; nor can the Will by any Force hinder the Underſtanding from aſſenting to a Propoſition which appears clear and evident to it. But thus far a Man is at Liberty; he can more diligently conſider the Object in view, and more exactly weigh in his Mind the oppoſite Reaſons of Good and Evil, and ſo not ſtick at the outward Face and Semblance of Things, but pierce into the deepeſt Secrets of their Texture and Conſtitution. And after ſo ſtrict an Enquiry and Examination, he can pronounce a poſitive Judgment in the Cauſe before him. The Underſtanding being in this Reſpect, as in many others, like the Eye, that it makes a very important Difference in beholding Things with a roving and tranſitory Caſt, and in contemplating them with a fix'd and ſteady Application [a]. And hence 'tis eaſy to conceive, how far this Power of the Soul falls under the Culture and Cognizance of Laws. For ſince 'tis beyond human Ability, that the Underſtanding ſhould apprehend Things after another Manner than they appear; and ſince Credit or Aſſent cannot but anſwer the Idea of the Underſtanding, no Perſon can judge otherwiſe of a Matter, than as he appears to have conceiv'd it; nor can he by any juſt Law be compell'd to a contrary Judgment: For ſuppoſe a Man to be in the Wrong, yet [3] a bare Injunction and Command will never make him the wiſer. Yet becauſe many Things eſcape a negligent Searcher, which offer themſelves to the Notice of more curious Enquirers; and becauſe the Will may hinder the Underſtanding from contemplating ſome Truth, by preſenting other Objects to tempt and engage its Care; therefore an earneſt and aſſiduous Application of Mind is of vaſt Uſe in confirming the Judgment; and conſequently thoſe who are entruſted with a Care and Authority over others, ought to make all fair Proviſion for the Aſſiſtance and Direction of a ſerious Meditation: and they may likewiſe engage Men, by the Sanction of Puniſhments, to apply with Diligence thoſe Means which are moſt likely to diſpel the Clouds and Perplexities of Things, and to repreſent them in their genuine Colours and Condition [4].

III. Farther, ſince the Underſtanding performs the Office of a Light in our Courſe of Action; and ſince, when it doth not guide us aright, 'tis impoſſible but we ſhould loſe our Way; we ought to eſtabliſh this as a certain Principle, That there is both in the apprehending Faculty, and in the Judgment, a natural Rectitude, which, upon due Attention given, will not ſuffer us to be deceiv'd in reference to moral Things, and that neither of thoſe Powers are ſo far corrupted and deprav'd, as to put us under a Neceſſity of being miſtaken. For at the ſame rate it would follow, that becauſe a Glaſs ill cut preſents every Image in a diſtorted Confuſion, and becauſe the Tongue, when cover'd with the Tincture of the Jaundice, is not able to diſcern the Difference of Taſtes; therefore the Senſes, to which thoſe Offices belong, muſt be, in general, pronounc'd fallacious and uncertain. Neither could it be charg'd on us as Guilt, that we have done a bad Action, if we were not furniſh'd with a clear Diſcernment of Good and Evil; and it would be the higheſt Injuſtice to impute that Error as ſinful, which was beyond our Power to avoid or ſhake off. Therefore, unleſs we would utterly ſubvert and deſtroy all the Morality of acting, we muſt by all Means maintain, that the Underſtanding of Man is naturally right and certain, and upon ſufficient Enquiry and Meditation does always apprehend Things clearly, and as they are in their own

[a] *Add. D. Cumberland. De L. N. Ch.* ii. *§.* 9.

Mr. BARB. *NOTES.*

[1] To ſpeak truly, one Faculty cannot have another fixed in it, as in its Subject; becauſe every Faculty muſt have its proper Subject. *Faculties, or Powers* (ſays Mr. LOCKE) *belong only to Agents, and can only be attributed to Subſtances; and not to any other Power.* Hum. Underſtand. *Lib.* ii. *Ch.* xxi. *§.* 16.

[2] By *natural Faculties* is meant *paſſive Faculties,* which receive the Impreſſions of Objects, and do not properly act at all; for the Underſtanding is like the Eye, which diſcerns Ideas with the different Relations, without adding or diminiſhing any Thing; whether it only perceives the Objects, or judges what is, or is not to be done. For in the Underſtanding there is nothing but bare Perception or Reception of Ideas. The Determination from whence Action proceeds, is an Act of the Will only. The Diſtinction of the Schools; that is, Underſtanding is either ſpeculative or practical, is founded upon the Nature of the Objects it contemplates; and not upon the different Actions of the Soul: For the Soul is diſpoſed alike in the Perception of Good and Evil, Truth and Falſhood. See the *Searches after Truth, Lib.* i. *Ch.* ii. and Mr. *Clerc's Diſcourſe of Spirits, §.* 1. *Ch.* iii.

[3] *i. e.* Without any Reaſon or Motive.

[4] But if this fails, 'tis to no Purpoſe to have recourſe to Force and the Authority of the Sovereign. *Elem. Juriſpr. Univerſ. p.* 375. See *Lib.* vii. *Ch.* iv. *§.* 8. and 11.

Nature and Conſtitution: And likewiſe that [1] the practical Judgment cannot prove ſo far debas'd and degenerate (at leaſt as to the general Precepts of Nature's Law) as to excuſe the Acts proceeding thence from being imputed as if they were Effects of invincible Ignorance [a]. And here we deſire it ſhould be conſider'd, that we are not debating what Power the Underſtanding has about Matters which depend on peculiar Revelation from God, or what it can perform in ſuch extraordinary Caſes, without the ſingular Aſſiſtance of divine Grace; becauſe this is the Subject and Buſineſs of another Profeſſion. Neither are we concern'd to examine whether in ſpeculative Truths, requiring the moſt ſubtil Diſquiſitions of Mind, a Man may not through ill Information get ſuch firm Poſſeſſion of a falſe Tenet, as not to be able to recover himſelf out of the Miſtake: But we are diſcourſing only about the Power of the Underſtanding, as it is imploy'd in ſquaring our Actions according to the Dictates of Nature. And, as to this Point, we conceive that there's no Man of proper Years, and Maſter of his own Reaſon [2], ſo deſperately dull and ſtupid, as not to comprehend, at leaſt, the moſt general Rules of natural Law, and thoſe which are of the greateſt Uſe in common Life, and not to diſcern the Agreement they bear to the rational and ſocial Condition of Mankind. And though a Perſon through extream Idleneſs may poſſibly never have thought of one or two Precepts, or through precipitate Raſhneſs may have fram'd wrong Opinions of acting, or by bad Information, or a Mind corrupted with vicious Courſes, may have call'd their Truth and Neceſſity in queſtion, or have taken up other Rules of Action contrary to natural Suggeſtions; yet we do not by any Means acknowledge this Ignorance or this Error to be inſuperable, ſo as to hinder the Imputation of Deeds conſequent on ſuch a Principle. For theſe univerſal Edicts are ſo clearly publiſh'd and explain'd, and ſo cloſely interwoven with our Being, that no one can be overcome with ſo brutal a Sottiſhneſs, as not to be capable of apprehending and diſcerning them; ſince to this Buſineſs there is not requir'd any ſingular Force of Wit, any peculiar Shrewdneſs of Reaſon, but an ordinary Portion of natural Light is ſufficient, provided that the Mind be not vitiated and obſtructed by ſome Diſtemper. To which Purpoſe *Tully*'s Diſtinction about Folly and Madneſs is obſervable: *Folly* (ſays [b] he) *if aſſiſted with a due State of Health, is able to maintain a competent Set of Duties, and to keep up, in ſome manner, the Culture and the Methods of common Life; but Madneſs is a perfect Diſeaſe, that quite extinguiſhes the Sight of the Mind, and involves all its Objects in a general Obſcurity* [3].

IV. The Judgment paſs'd on moral Actions by the Underſtanding, as it is ſuppos'd conſcious of a Law, and therefore accountable to the Lawgiver, is commonly call'd *Conſcience*; which as it either [4] precedes, or follows the Action, we may, for Diſtinction ſake, branch into *antecedent*, and *conſequent:* This laſt is the reflex Judgment of the Underſtanding on Things done, or forborn [5], approving what's well, and condemning what's ill; the Attendants of which are either Tranquillity or Reſtleſneſs of Mind, according to the different Teſtimony it bears; and as it gives us Occaſion to expect either the Favour, or the Diſpleaſure of the Legiſlator, and either the Good-will, or the Hatred of other Men [c]. The former, coming before the Action, informs us what is good and what evil, and conſequently what to be done, and what to be omitted. But here it is carefully to be obſerv'd, that the Conſcience obtains no other Place in the Guidance of human Operations, than with reſpect to its being inſtructed in the Knowledge of ſome Law; ſince Laws only are the proper Rules of [6] acting. And therefore, if any Man will attribute to the practical Judgment, or the Conſcience, any peculiar Force or Ability of directing us in our Doings, owing neither its Original to, nor its Dependence on any Law; he will inveſt with a legal Power the vain Fanſy of private Men, and will bring the wildeſt Diſorder and Confuſion on the Affairs and Tranſactions of the World. For we muſt declare, that as far as our Diligence could reach in ſearching, the Word *Conſcience*, in this ſtrange Senſe, is neither to be met with in the holy Scriptures, nor in the antient *Latin* Authors; but it

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[a] *Vid. D. Cumberland. de L. N. Ch.* ii. §. 10. [b] *Tuſcul. Queſt. Lib.* iii. *Ch.* v. [c] Plin. Panegyr. *One Man may poſſibly deceive another, but there's none who can deceive himſelf; let him only look into his own Life and Conduct, and take his Merit and Character from his Heart.*

Mr. Barb. *NOTES.*

[1] See *Note* on §. 2.

[2] See the *Note* on *Book* i. *Chap.* i. §. 4. of the *Abridgment of the Duties of a Man and Citizen.* Printed at *Amſterdam* in 1707.

[3] *Cicero* cites this Caſe out of the Laws of the twelve Tables, but to a clear different Purpoſe from what our Author uſes it, *viz.* To prove a Difference between *Inſania*, Madneſs, and *Furor*, Fury; but our Author has no Regard to the Contexture of the Diſcourſe, and uſes the Words to this Senſe only, Folly is no Impediment to the comprehending the common Duties of Life; but to be ignorant generally of all the Principles of Morality, is a ſort of Madneſs. In other Circumſtances the Words might be ſo underſtood, but our Author miſtakes them here.

[4] This Diviſion is according to the Schools, Conſcience antecedent and conſequent; but our Author reverſes the natural Order, in defining the Conſcience, which follows, before that which preceeds the Action.

[5] *Pliny Panegyr. Chap.* lxxiv, *&c.* vide .

[6] This is true, but it hinders not, but that the Conſcience may be the immediate Rule of Action; for a Man can't conform himſelf to a Law, unleſs he know it, and if he do good without knowing it, he loſes his Pains, the Lawgiver regards it not. Neverthelefs it follows not, but that every one may do all that he believes either permitted, or commanded, after what Manner ſoever it comes into his Mind. Here are two Rules, which the moſt ſimple may, and ought to follow, to ſatisfy themſelves, upon all Occaſions, that the Motions of their Conſcience are according to the Law: 1. To conſider, whether they are not out of the State of determining concerning an Action, by ſuch clear Arguments as may ſatisfy any Man of Senſe. 2. To ſee that they have ſufficient Reaſons to do what their Conſcience leads them to, without farther Examination. In the firſt Caſe, 'tis evident, that we can't determine or attempt any Thing but with an unwarrantable Raſhneſs. In the other, we muſt of Neceſſity ſuſpend our Judgment and Action, till we are fully ſatisfied. All the Inconveniences and Evils which are conſequent upon a miſuſed Conſcience, come under the Breach of one or other of theſe Maxims, which are eaſy to be obſerv'd by ſuch as love their Duty. This appears chiefly in Matters of Religion, as every Man's Experience will teach him. See *Biblioth. Univerſ. Tom.* i. *p.* 343, 344. and *Parrhaſiana, Tom.* ii. *p.* 97. as alſo *Biblioth. Choiſie, Tom.* x. *p.* 336.

was firſt introduc'd by the Schoolmen, and has been maintain'd in theſe latter Ages by the crafty Caſuiſts, for the better ſecuring of Mens Minds and Fortunes to their own Authority and Advantage. But if we have regard to the true and genuine Signification of the Word, to do a Thing againſt Conſcience, is nothing elſe but to commit a voluntary Evil, knowing it to be ſuch; and is oppos'd to tranſgreſſing out of Ignorance and Miſtake. And this we mean by Conſcience in our preſent Enquiry, recovering it to its antient Import, and exploding the new Abuſes that have been obtruded on its Signification.

V. Conſcience rightly inform'd is of two Sorts; for either it clearly underſtands that the Perſuaſion which it holds concerning ſome Performance or Omiſſion, is built on certain Principles, and agrees with the Laws, which are the Rule of Action and of Conſcience; or elſe it eſteems, indeed, its Perſuaſion as true and certain, and ſees no Reaſon to doubt of it, tho' it cannot reduce it to a formal Demonſtration; but, on the contrary, relies chiefly on Arguments from Probability. In the former Caſe it is commonly term'd a [1] *right*, and in the latter a *probable Conſcience*. Concerning a *right Conſcience* this general Maxim is eſtabliſh'd, That every voluntary Action againſt its Suggeſtion, and the Omiſſion of any Action which it declares to be neceſſary, is Sin; and ſo much the more heinous Sin, as the Perſon had a more perfect Knowledge of his Duty; becauſe a Tranſgreſſion under ſuch Advantages argues a greater Pravity and Corruption of Mind [a].

The Difference of a *probable Conſcience* from a *right*, we conceive not to be in reference to the Truth of the Perſuaſion, but upon account of its Ignorance and Inability to reduce this Truth artificially into the Exactneſs of a Demonſtration; for which Reaſon it has not ſo evident and unſhaken a Knowledge of its Certainty. For (as the Logicians ſpeak) nothing is *probable* in itſelf, but only with reſpect to our Underſtanding. And by this Rule of Probability the greateſt Part of Mankind are ſteer'd and govern'd in their Proceedings. For few Perſons are able to apprehend human Duties as they flow from their firſt Origin and Foundation. And moſt Men rely with ſo much Security on the Tenor of common Life [b], on the unqueſtionable Authority of [2] unſuſpected Teachers, and on the manifeſt Decency or Conveniency of ſuch and ſuch Actions; that they think it a ſuperfluous Trouble to make a more curious Enquiry into the Reaſons and Foundations of them. In the ſame manner as the greateſt Number of Artificers are ſatisfy'd with performing their Work by Inſtruments mechanically prepar'd, and leave the Mathematicians to demonſtrate the Reaſons of their Operations. And Men are apt eſpecially to content themſelves with theſe probable Appearances, when the Propoſition in Debate is remov'd at a vaſt Diſtance from the firſt Principles; and therefore requires a tedious and troubleſome Deduction, which is commonly above the Capacity of thoſe who have not run the Courſe of the Sciences, nor cultivated their Reaſon by a learned Inſtitution. Yet hence can be drawn no Protection for that pernicious [3] *Probality* maintain'd by the later Caſuiſts, and eſpecially by thoſe of the Order of the *Jeſuits*, which reſolves itſelf into the ſole Authority of a ſingle Doctor, tho' deſtitute of Reaſons, and oppos'd by all other Judgments. For this Principle tends to the utter Subverſion of all Morality, and ſeems deſign'd only for the keeping under the Senſes and the Conſciences of Men, and making them depend entirely on the Pleaſure of the Prieſts: as has been prov'd at large by others [c]. We need only obſerve farther, that they act not at all fairly, when they confound Probability of Fact with Probability of Judgment, and of Law. For indeed, in Matters of Fact the Authority of one great and credible Perſon may raiſe a probable Preſumption, and obtain at leaſt half the Force of a full Proof. But in defining Matters of Law, 'twould be the higheſt Abſurdity and Raſhneſs to attribute ſo much to the Declarations of one Man, not grounded on good Arguments, and at the ſame time contradicted by Perſons of equal Rank and Power, as that it ſhould be ſafely admitted for the Square and Standard of Acting.

VI. For the Information and Direction of a *probable Conſcience*, there are many Rules commonly laid down, concerning which our Opinion is this, That they take place only where there ſeems to be a Claſhing between ſtrict Law and Equity; or when both ſides of the Queſtion are alike free from the Obligation of the Laws; yet ſo as that one of them may ſeem to approach nearer to Honeſty, or may appear more likely to produce ſome Convenience or Inconvenience than the other. For in Matters abſolutely determin'd by the Command or Prohibition of ſome Law, there is no room left for ſuch a free Choice, as that we may reject one Side, and take the other; becauſe poſitive Laws will not be ſatisfy'd with Equivalents, but demand a punctual Obedience to their Decrees. And therefore this Freedom of Election muſt be confin'd to indifferent Things, to which the Laws do not extend their Sphere and Authority. The chief Rules are theſe:

1. In a *probable Conſcience* two Opinions being propos'd, neither of them contrary to the Laws,

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[a] *See* Luke xii. 47, 48.

[b] *Vide Lib.* xi. *Ch.* cxi. § 13.

[c] *Vid. Lud. Montalt. in Lit. Provincial.* and upon them *Wendrochius*, and *Sam. Rachel.*

Mr. BARB. *NOTES.*

[1] This Epithet is not well apply'd, for our Author owns that a right and probable Conſcience are the ſame, a little lower: He ought rather to have called it a clear Conſcience; but his Diviſions are not exact: Theſe are better; an antecedent Conſcience is, 1. reſolved, 2. dubious. The reſolved Conſcience declares poſitively, not only about the Quality, but Execution of an Action; in which, if it miſtakes, 'tis erroneous; if it judges well, 'tis right; which will be clear or probable according as the Reaſons which Men give of their Opinions, are certain, or only probable. A dubious Conſcience is either ſimply ſo, when the Underſtanding hangs like a Balance, not knowing which Side to take, or whether the Action be good or evil, and ſo can't put it in Execution; or ſcrupulous, when we are determined about the Morality of the Action, and Execution of it, yet with ſome Fear of being miſtaken. *Gott. Gerh. Titius*'s *Obſerv. on Puſend. De Officio Hom. & Civ. Obſ.* xvii.

[2] See *Lib.* ii. *Ch.* iii. §. 13.

[3] See *Buddeus*'s Diſcourſe, *De Scepticiſmo Morali*, §. 31. in his *Analect. Hiſt. Philoſ.*

one of which is founded on better Reaſons, the other is more ſafe; either of the Two may be follow'd without Blame.

2. Two Opinions being propos'd, of which one is built on weaker Reaſons, the other is the more ſafe, the latter ought juſtly to have the Preference.

3. In a *probable Conſcience* a learned Man may follow that Opinion which ſeems to him to have the greateſt Degree of Probability, tho' perhaps it may appear different to others, unleſs he is under Apprehenſion of incurring ſome Inconvenience or Damage upon account of diſſenting from the common Judgment.

4. An unlearned Man may ſafely follow the Authority of wiſer Perſons.

5. A Subject, or one plac'd under the Command of others [1], may, upon the Order of his Superiors, fairly do a Thing which he does not certainly know to be unlawful, tho' in his private Judgment he does not think it very probable that it ought to be done.

6. In things of little Moment and Concern, [2] if there are probable Arguments alledg'd on both hands, either Side may be taken.

7. In things of great Moment [3] if there ariſe probable Arguments on both Sides, the ſafer Part is to be preferr'd, or that from which there cannot follow ſo great an Evil, tho' we are never ſo much miſtaken, as there might have done, had we err'd in the oppoſite Opinion.

VII. To proceed; tho' according to our preſent deſign, we are engag'd only to treat of what's good, and what evil, what juſt, and what unjuſt; leaving the enquiring about Things profitable and [4] unprofitable to another Part of Knowledge; yet it will not be much out of the Way, if we here conſider in ſhort, what Rules the Underſtanding ought to have regard to, in Deliberations concerning Uſefulneſs and Convenience; eſpecially becauſe the Directions already laid down depend very much on theſe; the Profit or Advantage of Things bearing a great Force in our Proceedings; according to that of the Apoſtle, 1 *Cor.* vi. 12. *All things* (that is, all Things which he had been there ſpeaking of) *are lawful for me*; [5] *but all things are not expedient.* And in Civil Buſineſs, Affairs are many times committed to the ſole Wiſdom and Conduct of the Perſon employ'd; in which Caſes a Man is conceiv'd to have acted ill, if, by Imprudence or by Negligence, he has taken the leſs profitable Courſe. In Debates therefore, ariſing about ſuch Things to which we are bound by any Neceſſity, or any determinate Obligation (for Neceſſity excludes all Deliberation and Debates, and determinate Obligations leave nothing to the Agent, but the Duty of Execution) this is laid down for a Foundation, That nothing ought to be undertaken, from which, in moral Eſteem (or as far as human Foreſight can pierce into the Obſcurity and Uncertainty of future Events) there does ſeem likely to follow as much Evil as Good [6], or more Evil than Good. The Reaſon of which Maxim is evident: For as much of Evil as any Thing has join'd with it, ſo much it loſes of its Goodneſs; and conſequently, when the Good and Evil are in equal Degrees, the former is ſwallow'd up by the latter, and the Thing is depriv'd of the Nature and Denomination of Good. Hence that Field is reckon'd very unprofitable, which does not in the Value of its Fruits exceed the Charges of Tillage [a]. For thoſe Matters which make the Subjects of ſuch Deliberations as we are now ſpeaking of, are undertaken purely on Account of the Uſe and Advantage which may accrue to us from them [7] [b]. As Corollaries from this general Truth, we may ſubjoin the three Rules eſtabliſh'd by *Grotius* [c]: 1. *If the Thing under Debate has an equal Efficacy or Ability for the Production of Good and Evil,* that is, if we may as eaſily gain as loſe by it, *we may then venture on it, when the good Conſe-*

Xenophon's *Words at* [b] *are inſerted according to the Original.*

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[a] Cato de R. R. i. 1. *A Field that is fertile, if it be at the ſame time chargeable, turns to little Account.*

[b] Xenophon. Rer. Græc. Lib. vi. *They are very far from deſerving Commendation, who having carried off Glory and Victory from many Encounters, do ſtill continue to engage, till being at length ſhamefully overcome, they loſe their former Honour and their former Labour. The Caſe is the ſame with thoſe Gameſters, who once meeting with a Run of good Fortune, are entic'd to venture on, till they loſe double to their former Gains, and, in Concluſion, are commonly Beggars. Theſe Examples ought to warn us in our Martial Affairs, that we never ſuffer our ſelves to be drawn into ſuch a Combat, where we muſt of Neceſſity either win all, or loſe all.*

Lucan. Lib. i. v. 282. Par labor atque metus pretio majore petuntur.
An equal Labour for a greater Prize.

Iſocrt. Archidam. *Two Things being propos'd, the one plain and evident, the other doubtful and perplex'd; would it not be ridiculous for you to reject that which is beyond Diſpute, and to chooſe that which is controverted and uncertain?* [c] *Lib.* ii. *Ch.* xxiv. §. 5.

Mr. Barb. *NOTES.*

[1] See *Lib.* viii. *Ch.* i. §. 6

[2] This hath Place commonly in Regard to thoſe Judgments, which we are obliged to make *ex tempore,* upon ſome urgent Occaſions, wherein Neceſſities of Life oblige us to act. See *Biblioth. Univerſ. Tom.* v. *p.* 344.

[3] As for Example, If the Debate be about putting a Perſon to Death, it is better to run the Riſk, and let a Criminal eſcape, than puniſh an innocent Perſon. This was the Deciſion, both of ſeveral antient Philoſophers, which are quoted by *Grotius, Lib.* ii. *Ch.* xxiii. §. 5. *n.* 2. and of the Emperor *Trajan,* who would have no Man condemned for Suſpicion, as he writes in his *Reſcript* to *Aſſid. Severus.* For it is better that the Crimes of the Guilty eſcape unpuniſhed, than that an innocent Perſon ſhould be condemned. *Digeſt. Lib.* xlviii. *Tit.* 19. *De pœnis, Leg.* 5. For, as Mr. *Bruyere* ſpeaks, in his Chapter of *Certain Cuſtoms, p.* 506. If a Criminal be puniſhed, 'tis a Terror to the Gang; but if an innocent Perſon be condemned, all honeſt Men are affrighted. In fine, War brings Evils upon many innocent Perſons: If then Judgments be divided, we muſt incline to Peace.

[4] The Author does not mean by the Word *Inutili,* unprofitable, but noxious, or hurtful, as he plainly uſes it, *Lib.* ii. *Ch.* i. §. 9. ſee the *Note,* and *Ch.* iii. §. 10. It is certain, that in Matters of Morality and Politicks, that which is oppoſed to profitable, is noxious.

[5] The Words of the Apoſtle have no manner of Connexion with what went before; but on the contrary, refer manifeſtly to what follows, either to the Liberty of eating certain Meats, without any Regard whether it offends others, or not; or rather, tho' St. *Paul* applies it indeed to that particular Subject, it is a general Maxim, and extends to all Things indifferent in their Nature. See *Ch.* ii. §. 8. *Note* 4. above.

[6] Here is a plain Inverſion of the due Order of Things, contrary to the right Way of Reaſoning, and Sequel of the Diſcourſe. This Blemiſh is ſo notorious, that 'tis a Wonder the Author did not mend it in his laſt Editions.

[7] Theſe Words of *Xenophon* are deſigned only to ſhew, that when one has got an Advantage or Gain, he ought to take Care to preſerve it, and not Run to the utmoſt Bounds of his Fortune.

quence is a greater Good, than the ill Conſequence is an Evil: that is, if we are like to gain more by being ſucceſsful in the Attempt, than we can loſe if we prove [1] unſucceſsful. Thus it would be no Raſhneſs or Imprudence to hazard Ten Pounds, ſuppoſe in a dangerous Adventure, when we may get an Hundred, if the Chance prove fortunate [a]. 2. *If the Good and Evil which may proceed from the Thing in Debate, appear equal, we may then chooſe it, with this Proviſion, that it has a greater Efficacy or Ability for producing the Good than the Evil:* that is, if 'tis more eaſy that Gain ſhould ariſe from it than Damage. In which Point we cannot omit the noble Argument of *Arnobius* [b]: "Since that (*ſays he*) is the Condition of future Things, that they cannot be felt or held by any anticipating Touch, is it not much the clearer Reaſon, of two Uncertainties, the Expectation of which is equally doubtful, rather to believe that which brings ſome Hopes along with it, than that which brings none? For in the former Caſe there can be no Danger, tho' the Matter expected never come to paſs: but in the latter we incur the higheſt Damage, if what we disbelieved ſhould not prove a Falſity in the final Event of Things [c]." 3. *If the Good and Evil ſeem to be unequal, and the Ability of the Thing to produce them not leſs unequal, then we muſt determine our Choice by one of the two Conditions, either that the Ability for producing Good compar'd with that for producing Evil, be greater in Proportion, than the Evil itſelf compar'd with the Good* (that is, if the Exceſs of Evil be leſs than the Ability for producing Good) *or, if the Good be greater, compar'd with the Evil, than the Ability for producing the Evil, compar'd with that for producing the Good:* that is, if the Power and Efficacy which ſeem to incline towards the Production of the Evil, be leſs conſiderable than the Degree by which the Good exceeds the Evil. To which we will add this fourth Rule, That where both the Good and the Ill Effect of a Thing, and likewiſe its Ability for producing of both, remain uncertain and undetermin'd, 'tis the Part of a wiſe and cautious Man to abſtain from ſuch a Matter, unleſs he is driven on it by urgent Neceſſity.

VIII. When the Judgment of the Underſtanding is at a loſs, and cannot diſcern whether a Thing be good or Evil, and conſequently, whether it ought to be perform'd or omitted, we call this a [2] *doubtful Conſcience.* Concerning which this Rule ought to be obſerv'd, That as long as the Judgment cannot, by the Force of any Arguments, be inclin'd to one Side more than to the other, the Action is to be ſuſpended; and that therefore, he who proceeds to do a Thing, about which his Conſcience ſtill hangs in an *Æquilibrium*, commits a [3] Sin; becauſe, as much as in him lies, he has trangreſs'd a Law. For he declares his Mind to this Effect: *I am not indeed certain, whether or no this Action is repugnant to the Laws; but whether it be or no, I am reſolv'd to undertake it. 'Tis good Advice* (ſays [d] *Tully*) *to forbear doing a Thing, where* [4] *we doubt whether it be fair and juſt, or foul and injurious: For when we are certain the Thing is juſt, we have a clear Light and Guide to proceed by; but to act with an unſettled Judgment, does not free us from the Thoughts and Intentions of offering an Injury. Grotius* [e] ſays, *That this Rule*, of abſtaining from a doubtful Action, *does not hold when we are oblig'd to do either this or that, and yet are unſatisfied in either, whether it be juſt or not; for then we are allow'd to chooſe that Side which appears leſs evil or unjuſt. For whenſoever we are under the Neceſſity of making a Choice, the leſſer Evil aſſumes the Character of Good.* This Obſervation, we think, ought rather to have a Place in Evils of Damage, than in thoſe of Morality; becauſe in the former it is reckon'd a Gain and an Advantage, to avoid a greater Evil by admitting a leſs. But it cannot be applied to moral Evils, without a very dextrous Conſtruction. Properly ſpeaking, therefore, of two moral Evils, neither is to be choſen. Yet it frequently happens, that two Laws, either both Affirmative, or one Affirmative and the other Negative, ſhall ſeem to claſh with one another; ſo that we cannot

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[a] *Comp. Epictet. Enchirid. Ch.* xxxv, xxxvi. [b] *Lib.* ii. [c] *Add. Penſees de M. Paſchal. Ch.* vii. [d] *Off. Lib.* i. *Ch.* ix. [e] *Lib.* ii. *Ch.* xxiii. §. ii. *n.* 2.

Mr. BARB. *NOTES.*

[1] Our Author, in his laſt Editions, quotes an excellent Paſſage of *Arnobius* to this Purpoſe: "Since future Things are of that Nature, that no Man can clearly diſcover them, nor foreknow their Events; no Man of Senſe, but of two Things equally uncertain, will chooſe that from which he may hope for ſome Good, rather than that from which he can hope for none." In ſhort, if the Evil that threatens us, has no Effect, we run no Riſque; whereas we are expoſed to very great Danger, and hazard All, if, when the Time comes, we find by ſad Experience, that we were not afraid without Cauſe. *Adv. Gentes, Lib.* ii. See *Lib.* ii. *Ch.* iii. §. 21. *n.* 6. Our Author miſtakes, in annexing this to the firſt Rule of *Grotius*, whereas Mr. *Paſcal*, in his *Thoughts, Ch.* vii. proves it ought to be joined to the ſecond.

[2] Mr. *Thomaſius*, in his *Inſtit. Juriſpr. Divin. Lib.* i. *Ch.* i. §. 59. affirms, That there is no ſuch Thing as a doubting Conſcience, becauſe Doubting is no Determination of the Soul, but a Suſpending the Judgment only. But Mr. *Titius* will not allow this to be a ſufficient Reaſon to take away the Diſtinction; for beſides the Suſpenſion, there is a Determination, by which the Conſcience is put upon an Action, the Doubts which ought to prevent it ſtill remaining.

[3] Mr. *Titius* (in his *Obſervat. on Puſend. Obſerv.* 19.) affirms, That this Maxim is not abſolutely true and without Reſtriction; For (ſays he) when an Agent has no more Intention to do Evil than Good, he is not Blame-worthy, unleſs the Action be found contrary to the Law; for he acts not according to the Nature of the Action in itſelf; and therefore whatſoever produces that Quality contrary to the Deſign of the Agent, hinders the Imputation of a Crime to him, if the Action prove evil. In fine, if we ſuppoſe the Agent to be careleſs whether he does Good or Evil, and that the Reaſons for and againſt him are altogether equal, his Diſpoſition, nevertheleſs, is corrupt before GOD, becauſe he has reſolved to act without a certain Knowledge that what he is about to do is good, or, at leaſt, harmleſs, and ſo he renders himſelf liable to fall into Error, and conſequently engages himſelf, as much as in him lies, in all the evil Effects. This hath Place in Matters of the greateſt Importance, as when we condemn any one, and do him any Miſchief any Ways: for the Juſtice of an Action ought to be ſo clear, that they to whom it is done, may acknowledge it ſuch. See *Parrhaſiana, Tom.* ii. *p.* 406.

[4] 'Tis a Maxim of Holy Scripture, which teaches us, *That whatſoever we do without Faith*, i. e. without a thorough Conviction of the Goodneſs of it, *is Sin.* And all the Heathen Wiſe Men, both *Greeks* and *Barbarians*, have given us the ſame Rule. *Qui in vero dubitat, male agit, cum deliberat:* He that doubts of the Truth, does Ill while he deliberates. *Publ. Syr.* See *Grotius Lib.* ii. *Ch.* xxiii. §. 2. The Scholars of *Zoroaſtres* had this Rule, If it be dubious, whether an Action be good or Evil, we muſt not do it, till we are informed by our Doctors. *Hyde in Sadder, Portâ* 30.

ſatisfy both at the ſame time[1]. In this Caſe ignorant Perſons are apt to fanſy, that a Compariſon is made between two Evils, or Sins of Omiſſion, and that we are to do that, which it would have been the greateſt Sin to have left undone. But in Reality, we do not here of two Sins chooſe the leſſer; but that Action, which without this claſhing and interfering had been a Sin, now ceaſes to be ſinful, when we are oblig'd to a contrary Duty, by the Force of a ſtronger Law. Thus, for Example, when there ſeems to be a claſhing between the affirmative Command, *Give Alms*, and the Negative, *Do not ſteal*, without doubt we muſt not be guilty of Thievery to gather Matter for our Alms; according to that of the Apoſtle, we *muſt not do Evil, that Good may come of it*. Yet in this Caſe, not to give Alms, is not properly a Sin, becauſe Affirmative Precepts exert not their Force of Obligation, when there remains no Supply of Matter to furniſh out the Action. So again, when a claſhing is made between the two Affirmative Precepts, *Obey God*, and *Obey the Magiſtrate*, no Queſtion but we ought to obey God rather than Men [a] [2]: Not becauſe, of two Evils the leaſt is to be choſen, but becauſe it is not an Evil to deny Obedience to the Magiſtrate, when it cannot be given without violating the Duty we owe to God[3]. For a weaker Obligation always yields to a ſtronger, when both cannot be fulfill'd together.

IX. To a *doubtful Conſcience* a *ſcrupulous* one is very nearly related; and this is, when the Judgment of the Underſtanding is poſſeſs'd with an anxious Fear, leſt the Thing which we fanſy to be Good, ſhould prove Evil, or *vice verſa*. Now when ſuch Scruples are founded on probable Arguments, the Action is to be ſuſpended, 'till they can be taken away and clear'd up, either by the Force of Arguments, or by the Authority of wiſe Men: But when they proceed only from a melancholy and a ſuperſtitious Softneſs and Indiſcretion, they are by all Means to be diſcouraged, and forcibly driven out of our Thoughts. Therefore 'tis a good Remedy which *Cartes* [b] preſcribes againſt Fluctuation of Mind, and the Bitings of Conſcience which precede an Action, *to accuſtom ourſelves to the forming of certain and determinate Judgments of all Things that offer themſelves to us.* But we muſt obſerve farther, that theſe Judgments ought to be drawn from genuine and ſolid Science, or from the Doctrine of the Laws of Nature, and from the Chriſtian Religion, purg'd from the vain Additions of ſuperſtitious Men. For tho' without this Security, the Mind may indeed be ſo far harden'd, as not to perceive any Fluctuation, or to feel any Remorſe of Conſcience; yet ſuch a Firmneſs and Obduracy is neither of long Continuance, nor free from the Imputation of Sin. Whence we cannot approve of the latter Part of *Des Cartes*'s Preſcription, where he tells us, *We ſhould always think our Duty is diſcharg'd, when we have done what we judg'd beſt, altho' we have made the worſt Judgment that can be.* For this is not to cure the Diſeaſe, but by an ill-temper'd Opiate, to bring a Drowſineſs and Stupidity on the Mind.

X. When the Knowledge of the Underſtanding is wanting, as to the Performance or the Omiſſion of any Thing, we call this *Ignorance*. Which, as far as concerns our preſent Deſign, may be divided, either with Reſpect to its [4] *Influence on the Action*, or with Reſpect to its *Origin*. With Reference to the former, it is of two Sorts, one being the Cauſe of the Thing ignorantly done, and the other not. The firſt may be call'd *Efficacious*, and the other *Concomitant*. The firſt is the Negation of ſuch a Knowledge in the Underſtanding, which, had it been preſent, would have hinder'd the Action. Such was *Abimelech*'s Ignorance, *Gen.* xx. 4, 5. who, had he known *Sarah* to have been *Abraham*'s Wife, had never entertain'd any Thoughts of taking her for himſelf. The latter is a Negation of ſuch a Knowledge in the Underſtanding, as would not have hinder'd the Fact, ſo that the Man, tho' he had known what he was indeed ignorant of, yet would have done the Thing nevertheleſs. As ſuppoſe a Man ſhould kill his Enemy by a chance Blow, whom he would otherwiſe have kill'd, had he known him to be in that particular Place, where he now threw his Weapon caſually, and without any Intention of Hurt[5]. Thus the Boy who flung a Stone at a Dog, and by miſtake

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[a] *This was the brave Declaration of* Socrates, I honour and eſteem you, O ye *Athenians*; but in point of Obedience, my Duty to God is to be ſatisfied before my Obligation to you. *Plato Apolog.*

[b] De Paſſion. Art. 170, & 177.

Mr. Barb. *NOTES.*

[1] See *Lib.* v. *Ch.* xii. §. 23.

[2] This Saying of *Socrates*, is by many learned Men compared with the Paſſage in the *Acts*, *Ch.* iv. xix. v. 29. but, as Mr. *Le Clerc* obſerves, *Ars Crit. To.* i. he ſpeaks of his Dæmon or Genius, and not of the True God.

[3] *Hierocles* ſpeaks much to this Purpoſe, in his Diſcourſe of the Honour and Obedience due from Children to their Parents, and therefore is worthy our Notice. His Words are, *Com. in aur. Pythag. Carmina*, p. 53. *Ed. Lond.* *If it happens that the Will of our Parents is contrary to the Law of* GOD, *what can they do, who fall under ſuch an Oppoſition of Laws, other than is uſually done, when any Duties are incompatible? For when the Choice of two Things is offered, the one Good, the other Evil, we muſt neceſſarily prefer the Good, if we can't fairly diſcharge ourſelves of both at the ſame time*, &c.

[4] The Diviſions of our Author are neither clear nor compleat enough; and therefore *Titius*, in his 23d Obſervation, rectifies them, by conſidering *Ignorance*, 1. With Reſpect to the Influence of the Object upon the Thing we act; whence ariſes *efficacious* and *concomitant Ignorance*. 2. With Reſpect to the Nature of the Object, conſidered in itſelf, which produces an *Ignorance of Law*, and an *Ignorance of Fact*. 3. With Reſpect to the Conſent of the Agent; whence reſults *voluntary* and *involuntary Ignorance*.

[5] This Definition comes near the Opinions of the Peripateticks, which diſtinguiſh the Sorts of Ignorance and Error, by the Sorrow or Penitence which the Agent ſhews, or not, after the Action, *Ethic. Nicom. Lib.* iii. *Ch.* ii. which, if it be allowed, ſcarce any one but would eaſily avoid the Imputation of his Crimes. But Mr. *Puſendorf*'s Definition, depends not only upon a falſe Suppoſition, but is incompleat, becauſe it agrees not to Actions allowable and indifferent. Nothing but want of Knowledge, which hinders acting, renders Error efficacious, and conſequently not to be imputed. Now ſuch Ignorance is thus diſtinguiſhed; 1. It is efficacious, when it reſpects the neceſſary Knowledge of the Action we are about, either as to the Nature of the Thing, or Intention of the Agent; ſuch Ignorance hinders Conſent, and being involuntary, can't be imputed. This may be eaſily applied to particular Actions, as well lawful as unlawful. On the contrary, 2. Concomitant Ignorance is that which reſpects that Knowledge which has no Relation to the Affair we are about, and which, not hindring Conſent, can't preſerve us from Imputation. It is voluntary or involuntary, and having no Influence upon the Buſineſs in Queſtion, can't contribute any thing to cauſe an Alteration. *Tit. Obſ.* 25.

hit his Mother-in-Law, and kill'd her, ſaid [1], Τ’ αὐτόματον ἡμῶν καλλίω βουλεύεται, *Fortune had a better Aim than I.* Some diſtinguiſh theſe two Species of Ignorance in this Manner, That what is done by the former ſhall be ſaid to be done *out of Ignorance*, what by the latter, to be done by *one that is ignorant*. Yet even in the latter Caſe, no Murder, according to the ſtrict and proper Senſe, is committed. For tho' that ill Affection of Mind was in itſelf vicious, yet it contributed nothing to the Fact. With Reference to its Origin, Ignorance is divided into *voluntary* and *involuntary*. The former is by ſome term'd *conſequent* and *vincible*, the latter *antecedent* and *invincible*. The former, whether it be directly *affected*, or proceeds only from Idleneſs and Unattention, is when a Man knows not that which he could, and ought to have known: the latter, when a Man knows not ſuch Things, as he had neither Ability nor Obligation to know. This *invincible Ignorance* is either ſuch *in itſelf* [2] *and not in its Cauſe*, or elſe both *in itſelf, and in its Cauſe too*. The former is, when in doing a Thing a Man is not able to overcome the Ignorance from which it proceeds, and yet is in Fault for falling into that Ignorance. Thus frequently when a drunken Man commits a Sin, he does not know what he is doing, yet he is culpable for not knowing it. The latter is, when a Man not only is ignorant of ſuch Things as could not be known before the Action, but is alſo free from any Blame upon the Account of his falling into that Ignorance, or his continuing in it. On this Point is obſervable what *Ariſtotle* has ſaid in his *Ethicks, Book* iii. *Chap.* i, ii. and what *Euſtathius* has commented on the Place. Where he diſtinguiſhes between what is done *by one being ignorant*, and what is done *out of Ignorance*. For Inſtances of the former, he brings the Actions of a drunken, or of an angry Perſon; for ſuch Men, tho' they often know not what they do, yet the Ignorance is not the Cauſe of their acting, but the Drunkenneſs, or the Anger, of which 'twas in their Power to decline the former, and to reſtrain the latter. He adds farther, that thoſe Perſons cannot be ſaid to do a Thing unwittingly, who ſin upon account of not knowing what was to be done, or what to be avoided, which Ignorance he calls *Ignorance in Election* [3], or *Ignorance of Univerſals* [4]: for theſe every Man was oblig'd to know. But that *Ignorance of Particulars* is the Thing, which renders an Action capable of being conſtrued involuntary. Theſe Particulars are, *who, what, about what, and in what, with what Inſtrument, for what Cauſe, and by what Manner.* All theſe no Man in his Senſes can be ignorant of together, becauſe he is at leaſt apprehenſive of his own acting, and therefore can reſolve the firſt Queſtion (*Who?*) But [5] in all the other Circumſtances Ignorance may intervene. Thus Perſons offend who ſay [6] what they ought not, not knowing that *what* they have ſaid ought to be kept ſecret. And the ſame is the Caſe of a Man who intending to ſhew his Friend ſome ſhooting Engine, ſhould let it go off, and kill him. An Inſtance of Ignorance *about what*, and *in what* (which are the ſame Thing) may be, when a Man kills his own Son, miſtaking him for his Enemy. *Ignorance of the Inſtrument* is, ſuppoſe a Man ſhould throw a pointed Spear at another, and kill him, taking it to have had no Point. *For what Cauſe* comes to be conſider'd in *Ignorance*, in ſuch a Caſe as this: Suppoſe a Man ſhould apply a Remedy to another, with deſign of preſerving his Health, and the Remedy ſhould (againſt his Knowledge) prove mortal. The laſt Circumſtance is, *in what manner*; as if a Man in teaching another ſhould intend only to give him a ſlight Blow, but ſhould by Accident deſperately wound him [7]. The *Roman* Lawyers have treated under a peculiar Head concerning *Ignorance of the Law*, and *Ignorance of the Fact* [8]. But they did not conſider Ignorance ſo much for the Force and Uſe it had in moral Actions, as for the Influence it had on Matters of Right, and as it made for the keeping, or [9] acquiring, or loſing of any legal Poſſeſſion or Qualification. But their numerous Reaſonings about both Kinds may be reduc'd to this ſhort Iſſue, That Ignorance of the Law is, for the moſt part, join'd with ſome Degree of culpable Negligence [10], but Ignorance of the Fact is not; and that therefore Equity

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Mr. BARB. *NOTES.*

[1] *Plutarch*, who mentions this Sentence, in two Places of his Works of Morality, makes this to be the Speech of the Step-Son, Οὐδ᾽ οὕτω κακῶς; 'twas not badly thrown. *De animi tranquil. p.* 467. *Ed. Wech.*

[2] This Diviſion is not very neceſſary, for only the laſt ſort of Ignorance is involuntary or invincible; for in Matters moral, voluntary comprehends not only what is formally conſented to, but what preceeds Conſent, if it be a neceſſary Conſequent of it. *Titius Obſ.* xxvii.

[3] *i. e.* When we are ignorant which of two Things propos'd to us is moſt advantageous, or with what View we muſt act; as for Example, when we prefer a profitable or agreeable Good before an honeſt one.

[4] Such is the *Ignorance* of the Law of Nature, at leaſt of its common Principles; and the *Ignorance* of the Civil Laws of the Government to which we belong: So that tho' we may kill or poiſon another without any ſuch Deſign, we can't innocently perſuade ourſelves thar Murder or Poiſoning is allowable.

[5] There are ſome other particular Circumſtances, the Ignorance of which is as inexcuſable as that of general Principles. As for Example, If one ſhall ſhoot off a Gun in a publick Place, and kill a Man, it will be no Excuſe that he thought no Man would paſs that Way, becauſe he muſt needs imagine that ſuch Places are much frequented.

[6] Thus ſays *Ariſtotle*; Æſchylus *the Poet, being accuſed for publiſhing the Myſteries of* Venus Eluſina, *was acquitted, becauſe he knew not, that thoſe Things which he had ſpoken were to be kept ſecret. For the Ignorance of a Thing as to the Quality, or what, conſiſts not in being ignorant of what is done, but of its being of ſuch a Nature, or having ſuch a Quality.*

[7] Two other Circumſtances may be added; as, 1. The Time; for we may be ignorant whether a Day be holy or not, a Feſtival, or Working-day, *&c.* 2. The Place, whether it be conſecrated or common.

[8] See the *Digeſt. Lib.* xxii. *Tit.* vi. and *Cod. Lib.* i. *Tit.* xviii. ſee alſo *Mr.* Daumat*'s Civil Laws in their natural Order, Part.* i. *Lib.* i. *Tit.* xviii. §. 1.

[9] Ignorance of Right (ſay the *Digeſt. Lib.* xxii. *Tit.* vi. *Leg.* vii.) hinders not from preſerving our juſt Due, but is of no Uſe to acquire any Thing. As to Crimes, their Judgment is, that Ignorance of what is forbidden by the Law of Nature, or Nations, or by the revealed Law, is altogether inexcuſable; but as to what is contrary to the Civil Laws, Ignorance or Error excuſes ſometimes, either wholly, or in part; in which Caſe Men are conſidered as having Means, or not, to know the Law.

[10] The Reaſon is, becauſe the Law may, and ought to be clear and determinate, but Facts are often very intricate, ſo that the wiſeſt Men can't unfold them; and thereupon, in Matters of Fact, when Ignorance is groſs, it can't be alledged as a Reaſon available. *Ibid. Leg.* ii. *&* vi. *&* ix. §. 5. ſee *Cujas Obſerv.* v. 39.

directs us to interpret [1] the former to the Man's Prejudice, and the latter not.

XI. When not only a Knowledge of the Truth is wanting in the Underſtanding, but a falſe Perſuaſion has intruded into its room, which paſſes itſelf for Truth, then we ſay a Man has an *erroneous Conſcience*, or that his Mind is poſſeſt by an *Error*. This Error is (like Ignorance) either vincible or invincible: The former is that which a Man could and ought to have overcome, by applying ſuch Diligence as is [2] morally poſſible, or as the common Condition of Humanity admits and allows: The latter is ſuch as a Man could not vanquiſh by all Diligence morally poſſible. Where it muſt be obſerv'd, that ſhould we approve of that Saying of the Emperor *Antoninus*, Book ix. Chap. xlii. *Whoſoever ſins, does in that decline from his propos'd End, and is certainly deceiv'd* [a]; yet if the Error were not inſuperable, the ill Actions proceeding from it cannot be exempted from the Number of Sins properly ſo call'd, nor ought to be pardon'd in Groſs by a promiſcuous Indulgence [3].

XII. But it ought eſpecially to be remark'd, that Error has different Effects in Actions, which a Man may undertake or omit as he pleaſes, or the Exerciſe of which is left to his free Will; and in ſuch Actions as are enjoin'd or forbidden him by the Law or the Command of a Superior. In the former kind of Actions, the Error is ſuppos'd to intercept our Conſent: And therefore thoſe Conſequences do not flow from it, which are otherwiſe apt to follow on ſuch an Action as we have thus conſented to; eſpecially if the Error did not ſteal on us thro' ſupine Careleſsneſs and Neglect. And therefore in Bargains an Error about a Thing, or about its Quality, upon Proſpect of which a Man was induc'd to come to ſuch an Agreement, renders the Bargain void. For in this Caſe the Man is not conceiv'd to have agreed abſolutely, but upon Suppoſal of the Preſence of ſuch a Thing or Quality, on which, as on a neceſſary Condition, his Conſent was founded: and therefore the Thing or Quality not appearing, the Conſent is underſtood to be null and ineffectual. Which Point ſhall be diſcuſs'd more fully in its proper Place.

XIII. But the Caſe ſeems to be very different in neceſſary Actions, or in ſuch as are commanded or forbidden by a Superior. Where we muſt firſt enquire, whether the Error ariſes in the Theory, or in the Practice; that is, whether a Man entertains a falſe Opinion concerning the Neceſſity of ſome Actions, thinking thoſe ought to be omitted which ſhould have been perform'd, or *vice verſa*; or whether ſome Error occurs in the very Exerciſe of an Action, by Means of which the Action is not applied ſo rightly as it ought to have been. The former Kind of Errors do not, in our Judgment, at all hinder the *Imputation* of an Action to the Agent, according as it ſhall appear to agree or diſagree with the Rules preſcrib'd him, becauſe they muſt upon all Accounts be eſteem'd ſuperable: For he that would reſtrain the Actions of another by a Rule, ought at the ſame Time to make a ſufficient Declaration of his Will, that it may be clearly known by the Perſon whom he is to oblige. For otherwiſe 'tis the moſt unjuſt Thing in the World to require Obedience to a Law, when either the Law is unknown, or the Diſcovery of its Senſe exceeds the Capacities of thoſe whom it affects. Therefore, if a Man *errs in Theory*, that is, if he fanſy a Thing to be commanded which is really forbidden, or, *vice verſa*, he is ſuppos'd not to have apply'd ſufficient Diligence, and therefore he cannot refuſe to bear the Imputation of Faults committed upon ſuch an Error. This Doctrine is by ſome Caſuiſts thus explain'd in other Words: If the Conſcience entertain a vincible Error about an evil Thing, the Man ſins, as well if he acts for it, as if he acts againſt it: That is, if he has perſuaded himſelf that an Action was commanded, which was indeed forbidden, or that an Action was forbidden, which was indeed commanded, he ſins by performing the former, and by the forbearing the latter; becauſe ſuch a Performance and ſuch a Forbearance are repugnant to the Law, but the Agent might and ought to have known the Law, according to its true Import and Signification: And yet [4] the ſame Man has ſinn'd no leſs, if he has forborn an Action which was indeed forbidden, but by him believ'd to be commanded; or if he has perform'd an Action really commanded, yet ſuch as he imagin'd to be forbidden. For tho' in theſe Caſes there be no external Acts repugnant to the Law, yet becauſe the Man thinks his falſe Notion and Conſtruction of the Law to be right, therefore the contrary Intention ſhall be imputed to him as Sin: For the evil Intention of the Agent makes the Action appear evil, at leaſt with Reſpect to the Agent himſelf. From all which it appears, that from an erroneous Judgment no Action can proceed which may be imputed as good and right to the Actor, and that when a Man is *falſly* perſuaded that ſuch a Thing is unjuſt [1], the Thing is unlawful for him to do, ſo long as his Perſuaſion ſhall continue uncorrected. *Add. Lib.* lxvi. §. 8. *D. of Thefts.*

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[a] *Add.* Arrian Epictet. *Lib.* i. *Ch.* xxviii. *&* *Ch.* v. §. 13.

Mr. Barb. *NOTES.*

[1] For 'tis a Rule of the Law, That Ignorance of the Law hurts any Man, but of the Fact not. *Digeſt. ibid.*

[2] See *Ch.* vii. § 16. The Queſtions about invincible Ignorance and Error, have been much debated in *France*, in order to maintain the Rights of Conſcience in Matters of Religion, againſt the Attempts of ſuch Teachers as are againſt a Toleration, and are for proſecuting all that differ from them; for which 'tis convenient that the Curious conſult the Books.

[3] It is certain, that when Men are arrived at the Heighth of Wickedneſs, they ſin not for ſinning's ſake, but are ordinarily ſeduced by their Paſſions, which on a ſudden divert the Mind from the Thoughts of their Duty; but tho' a Man conſiders not the Sin formally in the Inſtant of ſinning, he is not leſs to be blamed, becauſe his Ignorance reſpects Things which he might and ought to know; and ſo the Maxim of *M. Antonine*, if underſtood with the Reſtriction beforementioned, will rectify the Error of the philoſophical Sin of the Jeſuits. About which, ſee *Biblioth. Univerſ. Tom.* xv. In fine, Since we never reſolve upon an Action, but upon the account of ſome poſitive Knowledge, and a ſimple Defect of Light rarely carries us to any Action, Ignorance and Error are often confounded in Morality, and what is ſaid of the one, may be applied to the other.

[4] Moreover a Man likewiſe ſins as much in doing a good Action contrary to his Conſcience, as by doing a Thing evil in itſelf, in following the Motions of an erroneous Conſcience. The Reaſon is, becauſe in the firſt Caſe he directly and deliberately diſobeys God, which is the moſt aggravating Circumſtance of Sin; and beſides, all the Good that can be in the Action, can't be imputed to the Agent, who could not but be ſenſible that he had no Deſign to do it. Whereas in the other Caſe, there is no formal Contempt of the Authority of the Lawgiver; nay, on the contrary, there is a Deſign to obey him; which ſhews that the Action contains in it ſome moral Goodneſs, altho' in ſome Reſpects it may be accounted Evil, if the Error appears not unconquerable. See the *Philoſophick Comment.* &c. *Tom.* ii. *Ch.* viii.

XIV. But if a ſpeculative Error be entertain'd concerning a Thing indifferent; that is, if a Man ſhould be perſuaded that he ought to do, or to omit ſomewhat, which was indeed left free on both Sides, he will only ſin, if he acts contrary to what this falſe Opinion ſuggeſts, upon the account of the Pravity of his Intention, but will not ſin, if he acts according to the Directions of his Error. For indifferent Things are plac'd without the Bounds of the Law; which cannot be tranſgreſs'd by their Performance or Omiſſion: And that Error appears very harmleſs, which does not give Occaſion to ſin. Yet it is plain, the Actions undertaken upon the Motions of ſuch an Error, cannot obtain thoſe good Effects which otherwiſe follow the like Inſtances of Obedience to the Laws: Thus, if a Legiſlator had conſtituted ſuch a Reward to thoſe who comply'd with his Injunctions, this Reward could not be challeng'd by one, who through Error and Miſtake ſhould have obſerv'd ſome indifferent Things, fanſying them to be poſitively determin'd, and legally enacted.

XV. But 'tis much more uſual that an Error ſhould intervene in the Practice and Exerciſe of Actions commanded by the Laws: As ſuppoſe the true Object of the Action ſhould be remov'd, and another ſubſtituted in its Place; or if we ſhould miſtake the Time or Place of the Execution enjoin'd. Such Actions, as they are not follow'd by thoſe Effects which are otherwiſe due to Actions rightly apply'd; ſo neither are they attended with the Effects proper to bad Actions, becauſe the Error was not contracted by any culpable Negligence: Which ſome Authors thus expreſs in other Words, An intervening Error hinders the Action from being imputed on either ſide, making it neither good nor evil. *Whoever* (ſays *Seneca Herc. fur. v.* 1237.) *gave Error the Name of Wickedneſs?* Thus, tho' otherwiſe you would be freed from your Obligation by paying a Man what you owe him, yet ſhould you pay him undeſignedly, and by pure Miſtake, you will not indeed have committed a Sin, but you will by no Means have cancell'd the Obligation. Thus when a Man has, with an honeſt Intention, tho' with an inconſiderate Liberality, conferr'd a Kindneſs on a wicked Perſon, who will abuſe it toward the maintaining of his Diſorders; he cannot at all boaſt of having done a good Action, yet he ſhall be excus'd from any Share in the conſequent Wickedneſſes, and not be reckon'd to have contributed any Thing toward their Commiſſion. But when a Man has been particularly commanded to diſcover and obſerve preciſely the Object, the Place, or Time of acting, it will be a hard Matter for him to eſcape the Imputation of thoſe Effects which ſhall proceed from the ill applied Action, unleſs he can demonſtrate his Error to have been morally inſuperable and unavoidable. Thus if you give your Servant a ſtrict Charge to wake you at ſuch a certain Hour of the Night, it will not ſerve him for an Excuſe of his Default, to ſay, that he miſtook in telling the Clock; yet if by any Caſualty the Clock went wrong, or was out of Order, the Servant ſhall be free from all Offence and Blame.

XVI. It frequently happens too, that an Error intervenes in the Exerciſe of a bad Action, while the Actor miſſes the Object at which he aim'd. In which Caſe, the *Malice* of the Actor ſhall continue the ſame as if he had not miſtaken, but the Action itſelf ſhall be eſteem'd more or leſs heinous, according as the Object is on which it caſually lighted. Thus a Perſon who intending to kill his Enemy, accidentally kills another Man, ſhall be nevertheleſs guilty of Murther. *See Lib.* xviii. §. 3. D. *of Injuries*, & *Lib.* xiv. D. *L. Corneliam de Sicariis*, & *Grot. in Sparſ. Florum ad h. l.* Yet the Murther ſhall receive more or leſs Aggravation, according to the Dignity or Meanneſs of the Man, who has been ſo unfortunately ſlain. Hitherto muſt be referr'd the Caſe of a Man's killing another outright, whom he intended only to wound, or to hurt in a leſs Degree; for here the Fact itſelf muſt be the Rule to go by in Judgment: But when in the Exerciſe of a faulty Action, a Man by Miſtake lights on a lawful Object, ſuch an Action will be no farther evil, than as it flows from an ill Intention in the Actor; ſo that this Error ſhall hinder the Fact from coming under the Name of the Vice deſign'd to be committed. And therefore that Saying of *Seneca*, of the *Conſtancy of a wiſe Man*, *Ch.* vii. will not hold, at leaſt [2] in human Courts and

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[1] 'Tis on this Account that the *Roman* Law has decreed, that he that takes away any Thing from another, thinking that he does it without the Conſent of the Owner, commits a Robbery, tho' afterward he find that the Proprietor was willing he ſhould take it and have it for his own; but he that has as much as in him lies committed the Robbery, can't be proſecuted in Law as a Thief. The Law is this; If I againſt the Will and Conſent of the Owner, as I believe, do meddle with his Goods, tho' the Owner is willing I ſhould, whether am I guilty of Theft? And *Pomponius* ſays, I am a Thief: yet it is true, that if I am willing he ſhould have the Uſe of them, tho' he know it not, he can't be impleaded as guilty of Theft. *Digeſt. Lib.* xlvii. *Tit.* ii. *Of Thefts, Leg.* xlvi. §. 8.

[2] Indeed before God it is real Adultery; for, as the Author has obſerved more than once before, and as he hereafter ſpeaks, *Chap.* vii. §. 4. an evil Intention renders the Action evil, which otherwiſe is good and innocent, as to the Matter, and in itſelf: tho' a good Intention is not ſufficient to render an Action materially evil, or good. Whereas, on the contrary, if a Man deſigns to do a good Action, and happens (thro' Miſtake) to do an ill one, there is no doubt but God will accept of that Intention, as if he had effected the Good that he propounded to himſelf to do; and although it gives Place, by Accident, to ſome Sin of another Nature, 'tis no leſs commendable for the Good which he would have done, unleſs the Execution of a pious Deſign either become unprofitable, or be hindred by the Change of certain Circumſtances. So that the Maxim which our Author has laid down in the laſt Section, I mean, *That every Action, in doing of which we may fall into an Error, can neither be imputed to us as Good, nor Evil:* This Maxim, I ſay, had need be underſtood with ſome Reſtrictions. Nor is it generally more true, that theſe ſort of Actions muſt always want, before human Judicatures, thoſe Effects which they would have, if they were well applied. As for Inſtance, If a Man not knowing it, marries a Woman who hath a Husband already, or is a Relation within the Degrees forbidden, as he is no Adulterer or inceſtuous Perſon, ſuppoſing that it be a real Error; ſo their Children cannot be reputed Baſtards, provided that both the Father and the Mother be under an invincible Ignorance in that Reſpect. This is the very Example that Mr. *Hertius* alledges here, and we may alſo conſult his Diſcourſe of a *Suppoſed Marriage, Tom.* i. of his Commentaries and ſmall Works. Printed in 1700.

Conſideration [1], *That if a Man lies with his own Wife, fanſying her to be another's, the Man ſhall be an Adulterer, tho' the Woman be no Adultereſs.* Add. Sen. of Benefits, *Lib.* ii. *Ch.* xix. & *Lib.* v. *Ch.* xiii. in the End. And compare *Libanius Declam.* xxxv. *p.* 780. of *Morellius*'s Edition.

[1] Conſult alſo the new Letters of Mr. *Bayle,* written upon the Occaſion of his general Criticiſing upon Mr. *Maimbourg*'s *Hiſtory of Calviniſm,* Lett. ix. §. 12.

CHAP. IV.

Of the Will of Man, as it concurs in, or conſents to MORAL ACTIONS.

The CONTENTS of every Section of the fourth Chapter.

I. *Of the Acts of the Will.*
II. *Of the Liberty of the Will.*
III. *That the Will muſt of Neceſſity be indifferent,* i. e. *not forced to chooſe Good or Evil.*
IV. *How the Will is inclined to good Things, and to Goodneſs in general.*
V. *Certain Diſpoſitions of the Body ſtir up the Will.*
VI. *As alſo ſome Habits.*
VII. *And Paſſions.*
VIII. *Alſo Intemperance.*
IX. *Actions of a mixt Nature.*
X. *Involuntary, and forced Actions.*

THE moſt wiſe Creator being pleas'd to make Man an Animal governable by Laws, for this Purpoſe implanted a Will in his Soul, as an internal Directreſs of his Actions; that the Objects being propos'd and known, this Power might, by an intrinſick Principle, and without any phyſical Neceſſity, move itſelf towards them, and might chooſe that which ſeem'd moſt agreeable and convenient, and reject that which appeared unſuitable and incommodious. The Will is concern'd to govern human Actions by the Adminiſtration of two [1] Faculties, by one of which it is ſaid to act *ſpontaneouſly*, and by the other [2] *freely*. To *Spontaniety*, if we may ſo ſpeak, are attributed certain Acts and Motions, of which ſome are interior, commonly call'd [3] *Eliciti*, others exterior, generally term'd *Imperati*. The former are ſuch Acts as are immediately produc'd by the Will, and terminated in the ſame Power. Some of theſe are employ'd about the End, as Volition, Intention, Fruition; others about the Means, as Conſent, Election, and Uſe. *Volition* is that Act of the Will by which it is *ſimply* carried toward ſome End, without Regard had whether the End be preſent or abſent; or that Act by which the End is barely approv'd of. Others call this the Will of ſimple Approbation, by which a Thing is underſtood to agree with the Nature and Inclinations of ſome Perſon, though he has not yet actually and effectually mov'd himſelf towards the producing or obtaining of it. *Intention* (or *Proæreſis*) is *a Deſire efficacious toward the obtaining of an End*, or it is an Act of Will, by which it effectually tends toward an abſent End, and endeavours actually to produce or to acquire it. This Act being join'd with the Hopes and the Attempts of procuring an End, we may eaſily conceive what ſort of Things it is employ'd about: and they, to be ſure, muſt be Things poſſible in themſelves, and Things in our Power; as *Ariſtotle* has more largely obſerv'd, *Ethic. ad Nicom. Lib.* iii. *Ch.* iv. *Election* [4] *is concern'd only about thoſe Things which are in our Power. Every Man purpoſeth to do that alone which he imagines* [5] *himſelf able to compaſs.* Again, *Lib.* vi. *Ch.* ii. *What is already done, cannot be the Object of our Choice and Purſuit; for no Man conſults of what is paſt, but of what is to come, and is changeable and contingent. Whereas what is already done cannot be alter'd or recall'd. And therefore* Agatho *well ſays, This alone is beyond the Power of God himſelf, to make that never to have been done, which hath really been done.* For it enters into the very Definition of *Intention* or Προαίρεσις, that it may be made with Reaſon and with Thought. Tho' there be many Degrees of *Intention*, with Reference to its different Height and Force; yet as far as concerns the Occaſions and Purpoſes of civil Life, 'tis ſufficient to divide it into plenary and ſemi-plenary. The former is that by which the Will determines on any Thing after a full Examination

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[1] See what is ſaid about this unprofitable and ill-deſigned multiplying of Faculties in the ſecond Note of the firſt Chapter foregoing.

[2] Mr. LOCKE ſeems to have Reaſon to believe, That Liberty is nothing elſe but a Power properly appertaining to Agents, and not an Attribute or Modification of the Will, which is itſelf nothing but a Power. See his *Philoſophical Eſſay about the Underſtanding, Lib.* ii. *Ch.* xxi. where this whole Matter about the Will, and Liberty in general, is treated on at large. Mr. LE CLERC, in his *Latin* Treatiſe about Spirits, *Sect.* 1. *Ch.* iii. is of the ſame Opinion with Mr. LOCKE, as to the Seat of the Will (as I may ſpeak) but he elſwhere enters upon a more particular Matter of the Hypotheſes of that great Philoſopher, and ſhews, that his Notions are neither exact nor clear. See his *Choiſie Biblioth. Tom.* xii. *Art.* iii. *p.* 83, *&c.* and *Tom.* xvii. *Art.* vi. *p.* 236, 237.

[3] The Author makes uſe of the School Diſtinction here, of *Actus Eliciti*; i. e. Acts ſpringing up (as we may ſay) from the very Bottom of the Will; which being Terms not uſed in the *French* Tongue, they are better expreſſed by, *The immediate Acts of the Will.*

[4] Our Author in all this Quotation follows very unfitly ſome *Latin* Tranſlation, which had rendred the *Greek*, προαίρεσις, Election, inſtead of Deliberation, Conſultation, or Counſel.

[5] This Writer being deceiv'd by the *Latin* Interpreter, tranſlates, ὅσα οἴεται ἂν γενέσθαι δι' αὐτοῦ, *quæ ex ſeſe fieri poſſe exiſtimaverit*; i. e. *which he thinks may be done of themſelves*; which being a Miſtake, the *Engliſh* Tranſlator has truly avoided it, as I have done, by rendring it, *which he believes himſelf able to execute.*

amination of the Matter, and without being driven to it by the Violence of the Paſſions. The latter, when due Deliberation has not been taken, or when the Hurry of the Affections has created a Confuſion and Diſorder in the Reaſon. *Fruition* [1] is the Reſt, or the Delight of the Will in the End now obtain'd and preſent to it. To which is oppos'd Repentance, or an Averſion (commonly join'd with Shame or Grief) to ſomewhat which we have before deſign'd or affected. *Conſent* is our ſimple Approbation of Means, as we judge them proper for our Work: And theſe Means, when they are plac'd within our Reach and Power, imply the two remaining Acts mentioned in our firſt Diviſion; for *Election* determines, and *Uſe* applies them to the compaſſing of the End propos'd.

Thoſe Acts are call'd *Imperati*, or enjoin'd, which are perform'd by other human Faculties upon the Motion and Appointment of the Will.

II. *Liberty* is a Faculty of the Will, by which, all Requiſites of acting being given, it may out of many propos'd Objects chooſe one or more, and reject the reſt; or if one only Object be propos'd, may admit that, or not admit it; may do, or not do it. What we call the Requiſites of acting, ſome expreſs by the ſingle Term *Occaſion* [2]: now from theſe the laſt Determination of the Agent is conceiv'd as a diſtinct Thing, which being added to the other Requiſites, we immediately proceed to Action; and therefore thoſe Requiſites, mention'd in the Definition of *Liberty*, do not include that Share which the Man himſelf bears in the Action, but are contra-diſtinguiſh'd to it. But more particularly, we call [3] the Faculty of chooſing one or more out of many Objects, Liberty of *Specification*, or of *Contrariety*, and the Faculty concern'd in the Admiſſion or Rejection of one only Object, Liberty of *Contradiction*, or Liberty *of Exerciſe*.

Now *Liberty* is ſuppos'd to ſuperadd to Spontaneouſneſs, firſt an Indifference of Acts as to their Exerciſe; ſo that the Will is not oblig'd neceſſarily to exert one of its Acts, as to deſire or refuſe: For tho' in general it is impoſſible but it ſhould affect Good, and refuſe Evil, *as ſuch*, yet in Reference to any particular Object propos'd, it may determine on which Side it pleaſes, tho' perhaps it may ſeem to have a greater Propenſion toward the one than toward the other. Another Thing that *Liberty* ſuperadds to the Notion of *Spontaneouſneſs*, is the *Freedom of Determination*; ſo that the Will may, upon an internal Impulſe and Motion, exert either of its Acts of wiſhing or loathing, juſt in ſuch a Place, and at ſuch a Time. We muſt add farther, That tho' the Reaſon, which makes a Thing deſired or avoided, does not depend upon the Will, but upon the Condition of the Object, according as it bears the Face of Good or Evil; yet that Appetite, and that Averſion, which thus follow the Appearance of the Object, are not of ſo much Force and Sway, but that there ſtill remains in the Will a Liberty, whether or no it ſhall determine itſelf to any external Act about ſuch an Object; eſpecially ſince ſuch an evil Thing may bear the Countenance of Good, and conſequently be deſireable, as long as it ſhall be ſet in Oppoſition to a greater Evil. And therefore to refute that Notion of *Hobbes*, *De Homine*, *Cap.* xi. §. 2. that Appetite and Averſion neceſſarily follow our Pre-conception of ſome Pleaſure, or of ſome Uneaſineſs likely to proceed from the Object; no room being thus left for Free-will, we muſt carefully diſtinguiſh the Volition of ſimple Approbation, from effectual Intention or Προαίρεσις [4], of which the latter does not ſo neceſſarily depend on particular Objects. In the Words following this Aſſertion, he applies a very idle Piece of Nicety, while he obſerves, That *when we ſay a Man has free Will of doing this or that, we ought always to underſtand it with this Condition, If he pleaſes*; *for 'tis abſurd to ſay that a Man has free Will of doing this or that, whether he will or no.* For no Body is ſo ſtupid as not to apprehend this Contradiction: And 'tis extream fooliſh to add the very ſame Thing which the Propoſition aſſerted as a Condition to it. To ſay that a Man may freely will the doing of a Thing if he will, is the ſame thing as to ſay, *Peter* runs if he runs: And who would ever give this Clauſe the Name of a Condition? From what has been ſaid it likewiſe appears, how we are to judge of thoſe Notions laid down by Monſieur *Le Grand* in his Inſtitutions of Philoſophy, *Part* iii. *Art.* v. as if it were impoſſible for a Man not to deſire what he clearly and diſtinctly perceives to be good; and as if a Man ſinn'd only upon this Account, in not having a clear and diſtinct Perception of Evil [5].

III. But the chief Affection of the Will, and what ſeems immediately to flow from its Nature, is an *intrinſical Indifference*, upon the Account of which it is not reſtrain'd to any certain, fix'd, and unalterable way of acting; and which cannot be entirely extirpated by the Force of any external Means. And this Indifference we are the more firmly to aſſert and maintain, becauſe, upon the Removal of it, all the Morality [6] of human

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[1] This Term (*Fruition* or *Enjoyment*) is very improper (as any Man may obſerve) becauſe the Notion of it, which he here lays down, is the Effect of Fruition, and not Fruition itſelf. It is true, that the *Latin* word *Fruitio* comes ſomething near it; but it is very hard to find a word in *French* (or any other modern Language) fit to expreſs the Moraliſts Notion upon which theſe Diviſions are built.

[2] See *Chap* v. §. 5 following.

[3] This Diſtinction does not appear to be very neceſſary. The Liberty of Contrariety implies no more than a double Act of the Liberty of Contradiction. As for Example, If a Man is to chooſe, whether he ſhall read *Greek* or *Hebrew*, he conſults with himſelf, 1. Whether he ſhall read *Greek* or no, and reſolves in the Negative. Then, 2. Whether he ſhall read *Hebrew* or no, and chooſes the firſt. *This Inſtance is taken out of Mr. Le Clerc's Latin Diſcourſe of Spirits, Sect.* 1. *Ch.* iii. §. 12.

[4] That is to ſay, Altho' we can't but be ſenſible of ſuch Impreſſions as particular Objects make upon us, yet we are not neceſſarily carried to ſearch for them, or avoid them; but a Man may by Reaſon deny himſelf the Pleaſure which the Apprehenſion of it may flatter us with, and, on the contrary, expoſe himſelf to that Grief and Uneaſineſs, from which he might be exempted without thoſe Conſiderations, which have induced him to undergo them. See *Note* 5. upon *Ch.* v. §. 13. following.

[5] See the former Chapter, *Pag.* 32. *Note* 4. and *Chap.* v. §. 13. following.

[6] We may add to theſe Quotations another Saying of the ſame *Epictetus*; Ληϛὴς προαιρέσεως οὐ γίνεται, τύραννος οὐ γίνεται, *No Man is a Thief or a Tyrant of his own Will.* See *Gataker's* Notes upon *Marc. Antoninus*, *Lib.* xi. §. 36. where the Emperor quotes the Words of the ſame Philoſopher.

Actions is inevitably overthrown. So *Arrian* on *Epictetus*, Lib. i. Ch. xvii. *What can overcome an Appetite? Another Appetite. What can conquer a Deſire or an Averſion? Another Deſire, or another Averſion. You will ſay, He that threatens me with Death compels me. I deny it; 'tis not the terrible Propoſal which lays the Force upon you, but 'tis your own Choice which inclines you rather to the Commiſſion of ſuch a Deed, than to the Deſire of Death. In this Caſe therefore, as well as in all others, nothing compell'd you but your own Opinion; that is, nothing overcame your* Will *but your* Will. Idem Lib. i. Ch. xxix. *The* Will *is not conquerable by any Thing but by itſelf.* Add. *Simplic. ad Epictet.* Ch. i. p. 22. Of which wicked Deſign thoſe Men are in a great meaſure guilty, who fanſy ſome ſtrange Kind of phyſical Predetermination in human Deeds, by which the Motion in itſelf, and as it is a natural Being, is ſo determin'd by the firſt Cauſe, that it cannot be done in any other Manner; tho' it afterwards receive its Morality from the ſecond Cauſe. Nor are they in a leſs Fault, who from the Divine Preſcience would derive an abſolute Neceſſity on all our Proceedings. For tho' this Attribute of God cannot be deceiv'd, yet that it does not take away the Indifference of the Will, may be eaſily underſtood, if we either clear the Word *Preſcience* from the Imperfection which it ſeems to imply, as do all other Terms taken from human Things, and applied to the Divine Nature (ſince in God there can be no Succeſſion of Time) or if we ſay, that the Divine Concurrence does in ſuch a Manner accompany ſecond Cauſes, as ſtill to leave them the Power of acting in the way originally aſſign'd them by their Creator, not debaſing them with Reference to moral Actions from principal into meerly inſtrumental Cauſes. Add. *Lucian, Minoe, & Jupit. Confut. Anton. le Grand Inſt. Philoſoph. Cart.* p^{t}. 8. Ch. xvii, xviii. How prejudicial ſuch Notions are to a State or Kingdom, *Grotius* is well aware, when he obſerves, *Obſerv. de Dogmat. Reip. Nox.* That *thoſe who utterly diſcard the Doctrine of Free-will, can hardly avoid making GOD the Author of all Wickedneſs; an Attempt which* [1] Plato *himſelf declar'd ought not to be born with in a Commonwealth*; De Repub. Lib. ii. Τῶν κακῶν ἄλλ' ἄττα δεῖ ζητεῖν τὰ αἴτια, ἀλλ' οὐ τὸν Θεόν. *We ought to affix any other Cauſe of* Evil, *but never to refer it to GOD.* To the ſame purpoſe *Suetonius* ſpeaks well when he makes *Tiberius* (*Lib.* lxix.) a Contemner of all Religion, ſay, *Quod omnia fato agi crederet*, for *believing the World to be guided by Fate.* For thus *Proclus* (*ad Timæum*) divides Atheiſts into three Ranks and Orders; two of which he makes *thoſe who deny GOD the Care of human Actions and Affairs*; and *thoſe who attribute ſuch a Care to GOD, as impoſeth an abſolute Neceſſity on all Events, utterly depriving Men of their Freedom and Choice.* So alſo *Saluſt* the Philoſopher ſpeaks in his Book *De Diis & Mundo*: *To attribute Injuſtice, or Luſt, and Wantonneſs to the over-ruling Influence of Fate, is to make ourſelves good, and the Divine Natures wicked.* Again, in *Plautus* (*Aulular.* iv. 10.) when one ſays, *I believe this was the Will of the Gods, for otherwiſe I am certain it could never have come to paſs.* Another anſwers him merrily, *And I, for my part, believe, 'tis the Will of the Gods, that I ſhould take you and hang you up for a Raſcal.*

IV. For the right Underſtanding of this Indifference of the Will, ſomewhat ought to be premis'd concerning the Nature of *Good* in general: Now tho' Good by many [2] of the Philoſophers is conſider'd abſolutely, ſo that every Being really exiſtent may be pronounc'd Good; yet we without regarding this Signification, which we judge to be very uſeleſs, will only conſider *Good*, as it denotes Reſpect to others, and as it is ſaid to be Good *to* one, or *for* one. According to which Senſe the Nature of Good [3] ſeems to conſiſt in that Aptitude, by which one Thing is diſpos'd to benefit, preſerve, or compleat another; becauſe this Aptitude, depends either upon the Nature of the Things themſelves, or ſuch Properties as they have naturally, or by Virtue of human Induſtry; and therefore this *Good*, to which we may give the Name of natural, is firm and uniform, and has no Dependance on the erroneous and various Opinions of Men. But becauſe *Good* does not excite the voluntary Appetite of Man, unleſs it be known, at leaſt under a confuſ'd Notion; and becauſe Knowledge ariſing from Senſe, gives but a groſs Repreſentation of the genuine Natures and Conſequence of Things, ſo that the Underſtanding is often clouded with Error, and diſorder'd by the violent Noiſes of Senſe and Paſſion; hence it comes to paſs, that many Men inveſt things falſly with the Name and Notion of Good, and this is what we call *imaginary Good.* And farther, every particular Perſon, as he underſtands a Thing to make for his Profit, his Preſervation, or his Perfection, loves and deſires it; and, on the contrary, what he conceives to be Evil for him, he hates and

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Mr. Barb. *NOTES.*

[1] The whole Sentence of *Plato*, of which our Author cites only the laſt Part, is very emphatical; God, *becauſe he is good, can't be the Cauſe of all Things, as ſome aſſert, but is only the Cauſe of ſome few Things among Men; and no Cauſe of many; for good Things are much fewer than evil among us, and none can be the Cauſe of good Things but God; but we muſt ſeek out ſome other Cauſe of Evils than him.* Theſe Words are but a little before the Place where that Philoſopher delivers the Words which *Grotius* refers to, κακῶν ϗ αἴτιον, &c. *We muſt with all Zeal oppoſe them who aſſert, That* God, *who is good, is the Cauſe of any evil: Nor muſt it be endured in any well-governed City, that any Man whatſoever, either young or old, no not ſo much as a Poet by way of Fiction, ſhould but lightly, much leſs plainly, either ſpeak, or hear any ſuch Things, as are neither pious, convenient, nor conſonant in themſelves to be mention'd, when ſpoken.*

[2] All the Metaphyſicians.

[3] According to the Definition which Mr. *Locke* gives of Good (in his *Philoſophical Eſſay upon the Human Underſtanding*, Lib. ii. Ch. xx. §. 2.) every Thing is ſo called, which is proper to produce and increaſe Pleaſure in us, or to leſſen and ſhorten any Grief; or is able to procure or preſerve us in the Poſſeſſion of any other Good, or a Freedom from any Evil. And, on the contrary, every Thing is accounted Evil, which is proper to produce or increaſe Grief in us, or leſſen any Pleaſure; or is able to cauſe any Evil to us, or deprive us of any Good. This Definition, which reſpects the Effect chiefly, that Things good or evil work upon our Spirits, is conſequently more natural than that of our Author, which refers to the Diſpoſitions and Qualities of the Objects, as to the Effect which they produce, with relation to the Conſtitution of our Nature in general, not diſtinctly expreſſing the Senſe of Pleaſure or Pain, which in all Languages, and in the Opinion of all Men, are comprehended under the Notion of Good and Evil. In fine, Tho' the Philoſophers diſtinguiſh ſometimes between agreeable and profitable, and in ſome Caſes theſe two Things may be oppoſed one to the other, yet 'tis certain that every real Good is both agreeable and profitable, as every real Evil is diſagreeable and diſadvantageous, if not at preſent, yet at leaſt in the Conſequents, and at the End of a certain Time. *See Note 5. of the following Page.*

avoids. But as it is not requiſite to the Nature of Good, and to its Power of moving the Appetite, that it ſhould be conſider'd preciſely as Good only for the Perſon deſiring, and abſtracting from the Advantage of others; eſpecially ſince upon account of the Society and Conjunction of Men, the Good of others may redound to our Benefit and Uſe; ſo amongſt Mankind there is ſo fair an Agreement about the general Nature of Good, and its chief Parts and Species, that barely on the Score of their being divided about ſome Particulars, there's no manner of Reaſon either why we ſhould deny the univerſal, and unſhaken, and uniform Notions of Good, or why, in a State of natural Liberty, we ſhould make it depend on the bare Opinion of every private Man, in a State of Government on the ſole Judgment of the ſupreme Magiſtrate, as the only proper Meaſures and Rules for its Determination. Add. D. *Cumberland*, *De L. N.* iii. where he refutes *Hobbes*'s Notions of Good, *&c. Ch.* i. §. 20. As for the moral Good which appears in human Actions, it ſhall be diſcuſs'd by and by in its proper Place.

From the foregoing Obſervations this manifeſtly appears to be the Nature of the *Will*, that it is always deſirous [1] of Good in general, and always averſe to Evil in general: For it implies an open Contradiction, [2] not to incline towards that which ſeems agreeable, and to incline to that which ſeems diſagreeable to us. And therefore in this general Inclination of the Will there can be no Indifference admitted, as if it could (with the Appetite of ſimple Approbation) ſometimes deſire Good and ſometimes Evil. But they are the particular Goods and [3] Evils, which give room for the Indifference of the Wills of particular Men, who at different Times, and upon different Occaſions, are very various in their Scents and Purſuits. And there is this evident Reaſon why it ſhould be ſo, becauſe there are ſcarce any Goods or Evils which appear to a Man in their native Colours, and without ſuffering any Mixtures, but commonly they are blended and ſhuffled together; Good is adulterated with Evil, and Evil is ſweetned with [4] Good; to which, if we add the ſtrange Inclination which we find to ſome good Things in particular Perſons, and how all Men have not the Ability to diſtinguiſh ſolid and durable Enjoyments, from thoſe which are [5] only painted and tranſitory; we ſhall ſee how there muſt needs ariſe hence an infinite Variety in the Wills and Inclinations of Men; and how all purſue what they think their own good, but in different Paths, and by different Means. Beſides, many Men do not know what Things are good for them, and therefore do not deſire them; many more prefer the fair Face and Semblance of Evil to real and ſubſtantial Good, and ſo reject what they ought to deſire, and deſire what they ought to reject. To which purpoſe *Ariſtotle* well obſerves, *Ethic. ad Nicom. Lib.* iii. *Ch.* vi. That *to be deſireable by the Will, ſimply and properly ſpeaking, which is truly Good, but* that *to be deſireable by every particular Man which he imagines ſo.* What *Gunther* writes to *Ligurinus* may be here applied, *Lib.* iii. *ver.* 289.

------- Tantum falſa loquendo
Fallere nemo poteſt: veri ſub imagine falſum
Inſluit, & furtim deceptas occupat aures.

When Falſhood bare and undiſguis'd appears,
It never can deceive: but when it wears
The Garb of Truth, it cheats the heedleſs Ears.

Thus then in almoſt every Thing and every Action many Species of Good and Evil, both *real* and *apparent*, croud themſelves into our Thoughts, and when theſe have for ſome time variouſly agitated the Mind, and driven it one while to favour one, and one while another, at laſt the Will by an intrinſical Force determines itſelf to the embracing of one Object, and diſcarding the reſt. And an Action perform'd in this Manner, is call'd ſpontaneous or voluntary, which *Ariſtotle* thus defines, *Ethic. ad Nicom. Lib.* iii. *Ch.* iii. Τὸ ἑκούσιον δόξειεν ἂν εἶναι, οὗ ἡ ἀρχὴ ἐν αὐτῷ, εἰδότι τὰ καθ' ἕκαστα ἐν οἷς ἡ πρᾶξις. *That is to be eſteemed ſpontaneous, the Principle of which is in the Perſon acting, who likewiſe underſtands the Particulars in which the Action conſiſts. Euſtratius* comments on this Place to this purpoſe: *Both theſe Conditions are neceſſary to the conſtituting a ſpontaneous Action, that the Principle be in the Actor, and that the Actor know the Particulars. For he that acts out of Ignorance, has the Principle of acting in himſelf; and he that knows the Particulars, may yet act by the Conpulſion of others.* And therefore neither of theſe Conditions by itſelf can make a Thing properly voluntary.

Mr. BARB. *NOTES.*

[1] This is what is implied by that common Maxim, *That all Men naturally and unmoveably deſire their own Happineſs*; for true Happineſs conſiſts not only in the Enjoyment of all good Things, of which they are capable, but in a Freedom from all Evil; the leaſt Pain being ſufficient to mar our greateſt Pleaſure.

[2] The Quotations which are annexed by the Author a little lower (*viz.* at the End of the Paragraph in the *Engliſh* Tranſlation, and are noted by *a, b, c*) are more properly to be put in here, and eſpecially the laſt of them. I ſhall add, upon this Occaſion, a Paſſage out of the Emperor *Marc. Antoninus*, Πῶς οὐχ ὠμὸν ἐστι, &c. *Is it not a cruel Thing to hinder Men from purſuing Things, which they believe to be uſeful and agreeable to them? Lib.* vi. §. xxvii. See *Gataker*'s Notes upon the Place, where he has gathered ſeveral Sentences out of antient Writers to the ſame Purpoſe.

[3] Such are all thoſe that concern this Life.

[4] Every Object (ſays this Author in his *Abridgment of the Duties of a Man and Citizen, Lib.* i. *Ch.* i. §. 11.) makes different Impreſſions, as it works upon Man in different Places: As for Example, Some work upon him by way of Eſteem, or according to the great Value he has for himſelf. Other affect the Senſes with Pleaſure; and move him by Self-love, which engages him upon Self-preſervation. He looks upon the firſt as honeſt and convenient; the ſecond, as ſuitable; and the laſt, as profitable. Every one of theſe Goods in particular draws him with more or leſs Violence, according as the Impreſſions, which it makes upon the Heart, are more or leſs ſtrong. *See Note* 3. *of the foregoing Page.*

[5] Mr. *Locke* in his *Phil. Eſſay of Human Underſtanding, Lib.* ii. *Ch.* xxi. §. 58. ſpeaks well to this Purpoſe: *The preſent Judgment of Good or Evil, which we make, is always right. Indeed, Things conſidered as we actually enjoy them, are what they ſeem to be, ſo that in this Caſe, Good apparent and real are the ſame thing; for Grief and Pleaſure being eſteemed ſo as we feel them, and no more; the Good or Evil preſent is really no greater than it appears: and, by Conſequent, if every one of our Actions be reſpected in itſelf, without any regard to its Conſequences, we can never miſtake in our Choice of Good, but muſt always infallibly adhere to the better Part.* Compare theſe Words with what goes before and follows, where that great Philoſopher clears this Matter with much Solidity and Exactneſs.

V. But it does not always fall out that the Mind ſhall maintain a kind of *Æquilibrium*, and apply itſelf to acting or not acting, without any conſiderable Advantage on one Side more than on the other. But for different Reaſons, and by different Cauſes, it frequently bends with great Violence one way; and ſometimes external Violence bears ſo hard upon it, as to take away its Strength, and to diſable its Powers. As the Mariner does not always cut the Sea with an even and proſperous Gale, but ſometimes oppos'd by furious Winds, he hardly holds the Helm, and ſometimes being violently ſhaken out of his Seat and his Command, he is oblig'd to commit his Veſſel to the Rage of the Tempeſt.

Among the Things then which are forcible in drawing the Will to one Side, are the peculiar Genius's and Diſpoſitions of Men, by which many Perſons are render'd extreamly inclinable to ſome kind of Actions. Theſe Diſpoſitions ariſe in a great meaſure from the Nature of the Climate and of the Soil, as *Lucan. Lib.* viii. *ver.* 366. ſpeaks,

--------*Emollit gentes clementia cœli,*

--------The Heavens ſweet Clemency
Softens the Tempers of the Men.

And *Herodot. Calliop. It is the ſettled Appointment of Nature, that ſoft Soils ſhould breed ſoft Men; and that the ſame Land ſhould never be famous for the Excellency of the Fruits, and for the Vigour of the Inhabitants.* To which add *Charron de la Sageſſe, Lib.* i. *Ch.* xlii.) from the Temperature of Humours in Mens Bodies (occaſion'd by the Food, the Age, the Diet, the Health, the Studies and Purſuits of particular Perſons) from the Conformation of thoſe Organs, which the Soul employs in performing its Duties, and from the like Cauſes [a]. Concerning all which it muſt be in general aſſerted, That none of them, as they belong to the Production of a moral Action, are of ſo great Force and Vehemence, as to render it impoſſible for the Will to take [1] the contrary Side [b]. And tho' [2] as to ſome particular Impulſes [3] ariſing from the Difference of Conſtitutions, the Will ſometimes ſeems unable to hinder their Exiſtence, or their breaking out into Action, yet it may provide ſo far, as to ſee they ſhall not break out into Sin. Thus, if a Man be ſo far vanquiſh'd by the warm Motions of Love, as to raiſe his Paſſion above Reſtraint, a Power is ſtill left him of ſatisfying his Deſires in an innocent and lawful Manner. See 1 *Cor.* vii. 2. And thus *Plato* diſputes well, *De leg. Lib.* xii. "That however the moſt unnatural of Luſts had "prevail'd in the *Grecian* State, they might yet "be ſuppreſt by the Laws, if rightly fram'd and "apply'd." By the ſame Rule we muſt judge of what *Horace de Arte Poet.* and others have deliver'd concerning the different Manners and Inclinations of the ſeveral Ages of Life: Thus, for Example, if old Men are violently inclin'd to Covetouſneſs, yet 'tis in their Power to ſeek Wealth without injuring others, and without uſurping the proper Goods and Poſſeſſions of their Neighbours. Add. *Huart. Scrutin. Ingen. Ch.* v.

VI. Another Thing that inclines the Will vehemently to ſome particular Actions, is the frequent Repetition and Cuſtom of thoſe Actions; whence it comes to paſs that they are undertaken very freely and with great Diſpatch, and that when the deſired Object preſents itſelf, the Mind ſeems, by a kind of Magnetiſm, to be drawn towards it [4]. And theſe Inclinations being join'd with an exceeding Deſire and Dexterity of acting, paſs commonly under the Name of *Habits*, which, as they are concern'd about *moral Actions*, either good or evil, are call'd either Virtues or Vices. There's no Reaſon why we ſhould tire ourſelves to reckon up theſe according to their full Tale and Number, ſince moſt Authors, who have hitherto profeſſedly treated of moral Philoſophy, have fanſied the main Part of their Buſineſs and of their Science diſcharg'd, by explaining only the eleven Words that ſtand for ſo many Virtues. It will ſuffice to obſerve in general, that thoſe Diſpoſitions of the Mind are Virtues, by which a Man is inclin'd to Actions making for the Preſervation of himſelf, and of human Society; and that thoſe on the

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[a] Add. *Hobbs de Homine, Ch.* xiii. & *Bacon De Augment. Scient. Lib.* iv. *Ch.* i.

[b] *Horat. Lib.* i. *Epiſt.* i. *ver.* 39, 40.

Nemo adeo ferus eſt, ut non miteſcere poſſit,
Si modo culturæ patientem commodet aurem.

The fierceſt Soul to Temper may be brought,
If calm to Rules, and patient to be taught.

It is my Opinion (ſays *Socrates* in *Xenoph.* Apomnem. i.) *that whatever is good and honeſt, Men, by Exerciſe and Application, may attain.*

Mr. Barb. *NOTES.*

[1] A little Care and Diligence (adds this Author elſewhere) ſeldom fails of taming, and conſiderably amending theſe natural Diſpoſitions. But if ſometimes it doth not perfectly ſucceed, it at leaſt prevents the Commiſſion of ſuch outward Acts as are puniſhable in the civil Judicatory, and the Difficulty which we find in conquering theſe kind of Inclinations, is abundantly recompenſed by the Honour conſequent upon ſuch a Victory. *The Duty of a Man and Citizen, Lib.* i. *Ch.* i. §. 12.

[2] *Socrates*'s Words ſignify no more than this, as *Charpentier* has very well tranſlated them; *It is my Opinion, that all Virtue depends upon Exerciſe and Uſe; that is to ſay, to preſerve them, we muſt practiſe them*; and the Series of the Diſcourſe will not ſuffer us to doubt that this is *Socrates*'s Meaning. So that theſe Words are nothing to the Purpoſe of our Author, who being deceived by the *Latin* Tranſlation, thought they ſignified, *It is my Opinion that all Virtues may be acquired by Exerciſe.*

[3] See *Chap.* xiii. of *Tome* i. of Mr. *Bayle*'s Anſwer to the Queſtions of a Provincial, where you'll find ſome curious Paſſages about the Power of the Conſtitution. But if we reflect ſeriouſly upon this Matter, we muſt acknowledge, that thoſe over whom Nature has ſuch an abſolute Command, are commonly ſuch Men as will take little or no Pains to conquer their Inclinations, or have taken no proper Methods to do it. Theſe depraved Inclinations are a kind of natural Diſtemper, yet not altogether incurable; as *Cicero* very well obſerves, who alleges a notable Example to this Purpoſe, *viz.* that of *Socrates*, who freely confeſſed, that he was naturally inclined to thoſe Vices which a Phyſiognomiſt charged him as guilty of, but that he conquered them by the Aſſiſtance of Reaſon: *Cicero*'s Words are, *Qui autem naturâ dicuntur iracundi, &c. Such Perſons as are ſaid to be by Nature paſſionate, merciful, envious, or the like, are ſo made by ſome evil Diſpoſitions of the Mind, but are curable; as* Socrates *is ſaid, when* Zopyrus, *who profeſſed himſelf to know every Man's Nature by the Figure of his Face, had in a great Aſſembly loaded him with many Vices, for which he was laughed at by all the reſt; but* Socrates *cleared him of any Miſtake, by ſaying that he had once ſuch Inclinations, but he had maſtered them perfectly by his Reaſon.* Tuſc. Quæſt. *Lib.* iv. *Ch.* xxxvii. See alſo the ſame Author concerning *Fate*, Chap. v.

[4] We may add, *Or if it be abſent, it hopes for it with very great Expectation*; as our Author ſpeaks in his Abridgment of the *Duties of a Man and Citizen*, &c. *Lib.* i. *Ch.* i. §. 5, 13.

contrary are Vices, which addict us to Actions deſtructive of ourſelves, and of the Community to which we belong. And here Mr. *Hobbes* muſt fall under Cenſure for that Aſſertion in his Book *De Homine*, *Ch.* xiii. §. 9. where he declares, *That, except in civil Life, there can be no common Meaſure found out applicable to Virtues and Vices*, and that, conſequently, *in a State of Nature there can be no ſuch Meaſure eſtabliſh'd, by which, as by a Standard, thoſe Things which we call Virtues and Vices may be ſettled and determined.* For the Definition which we but now ſet down, will reach even to a natural State: and whatever Things are enjoin'd as Virtues in civil Communities, ought to agree to that Definition; and if any Things ſhould be ordain'd contrary to it, they ought to be reckon'd abſurd and unreaſonable Commands.

The Diverſity which appears in the Laws of ſeveral different Communities [1], does not hinder, but that there may be ſome univerſal and uniform Definition of the Virtues. For this Diverſity either is concern'd about ſuch Things as are plac'd without the Sphere of natural Laws, or it ariſes from hence, That what is really a Precept of the Law of Nature, is in one Place inveſted with the farther Force of a civil Law, and in other Places not; or laſtly, it is an Evidence, that ſome Legiſlators, in framing their Edicts, were not befriended by good Reaſon. Of which we ſhall have more to ſay by and by [2].

Farther, tho' Vices and ill Manners confirm'd by long Uſe and Habit, ſeem to paſs into a kind of ſecond Nature, ſo as not to be without great Difficulty reſiſted, as *Calpurnius Flaccus* ſpeaks, Declam. ii. *When Modeſty hath once loſt its Influence, no Ruin, no Horror appears deform'd to Minds bent upon Wickedneſs*; and *Lucian* againſt an unlearned Man, *A Dog that is accuſtomed to eat Tripes, can hardly be brought off from it*, (Add. *Bacon's Eſſays*, Ch. xxxvii) yet Actions proceeding from them ought nevertheleſs to be reputed voluntary. And altho' Actions which precede any Habit, and by which it is introduc'd, are undertaken with a fuller Intention, and with a more urgent Endeavour, than thoſe which are perform'd after the Habit has been contracted, when as it were without ſtaying for the Command of the Will, the other Faculties ruſh ſwiftly upon the Object: yet neither the Goodneſs nor Pravity of the Actions ſeem upon this Account to be at all diminiſh'd. For 'twould be a Thing of very ill Conſequence, if a good Action were therefore to be reckon'd leſs good, becauſe it has been often repeated, or if a Man were to be eſteem'd leſs a Sinner, becauſe he had frequently ſinn'd. Eſpecially, ſince every Man is the Cauſe of his own obtaining a Habit, or of his acting ſo ſuddenly and expeditiouſly. *Ariſtotle* has an Obſervation very cloſe to this purpoſe in his Ethicks to *Nicom. Lib.* iii. *Ch.* viii. Ουχ ὁμοίως δὲ αἱ πράξεις ἑκούσιοί εἰσι, καὶ αἱ ἕξεις. Τῶν μὲν γὰρ πράξεων ἀπ' ἀρχῆς μέχρι τέλους κύριοί ἐσμεν, εἰδότες τὰ καθ' ἕκαστα· τῶν ἕξεων δὲ τῆς ἀρχῆς, τῶν καθ' ἕκαστα δὲ ἡ πρόσθεσις οὐ γνώριμος, ὥσπερ τῶν ἀῤῥωστιῶν. ἀλλ' ὅτι ἐφ' ἡμῖν ἦν, οὕτως ἢ μὴ οὕτω χρήσασθαι, διὰ τοῦτο ἑκούσιοι. *Actions and Habits are not ſpontaneous in the ſame Manner; for as to our Actions we are Maſters of them from the Beginning to the End, becauſe we underſtand all the Circumſtances that belong to them: but of Habits the beginning only is properly in our Power, continual Additions being beyond our Knowledge or Prevention, juſt as it happens in the Increaſe of Diſtempers. But becauſe we had originally the Power of doing ſo, or otherwiſe, therefore the Habits likewiſe are to be conſtrued as ſpontaneous, upon account of the Principle whence they ſpring.* On which Place *Euſtratius* thus deſcants; *We have a Command only over the Beginnings of Habits, not over their Increaſe or their End. For the Progreſs and Improvement of them is unperceiv'd and unregarded, while they riſe and advance by ſilent Degrees; whence it happens, that ſome Men run deeper now and then into Wickedneſs and Vice than they intended* [3]. *This may be ſeen particularly in Drunkenneſs and Uncleanneſs, in which Men ſometimes going on freely and heedleſly, as if it were left to our Pleaſure whether we ſhould get a Habit or no, by a Continuance of bad Practice, contract a Habit before they are aware. Nor is it in Vices only that the Additions and Augmentations are undiſcover'd, but in Virtues likewiſe the Advances are made by ſuch ſecret Steps, that a Man may ſooner obſerve his own Proficiency, than he can know how he came by it.* [4].

VII. Thoſe Motions of the Mind which they call Paſſions or Affections, chiefly excited by the Appearances of Good and Evil, have likewiſe a great Force in driving the Will violently to ſome certain Actions, beſides their ill Influence on the Judgment, which they frequently cloud and obſcure [a]. How many theſe are, by what Means they are either rais'd or allay'd, and what Uſe and Service they have in Life, is moſt excellently ſhewn by *Des Cartes* [b] and his Follower *Le Grand* [c]; to whom may be added Mr. *Hobbes* [d]. It is enough to our Deſign, if we only remark, that however violent the Affections may prove, they can never quite extinguiſh the Force of our Will.

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[a] *Pindar* in his Olymp. Od. vii. ver. 55. ſays, ἀι δὲ φρενῶν, *A troubled Mind betrays into Miſtake the wiſeſt Heads.*

[b] *Cartes de Paſſion.* §. 50.

[c] *Le Grand. Inſt. Phil. Carteſ.* pt. 7. Ch. ix.

[d] *Leviath.* Ch. vi. & *de Homine*, Ch. xii.

Mr. BARB. *NOTES.*

[1] See what I have ſaid in my Preface, §. 3.

[2] See Book viii. Chap. i.

[3] The natural Conſequence of this is, that we muſt ever omit, and avoid, whatever has the leaſt Tendency in the World to engage us in an ill Cuſtom. See what I have ſaid in my Treatiſe of *Games*, *Lib.* ii. *Ch.* iii. §. 2.

[4] See the Author's Abridgment of the *Duties of a Man and Citizen*, *Lib.* i. *Ch.* i. §. xiii. and what he ſays in the following Chapter, §. 13.

But *that Men of the weakeſt Souls may obtain* [1] *an abſolute Command over their* [2] *Paſſions, if they uſe a ſufficient Diligence in managing and directing them*, as *Des Cartes* has prov'd [3]. *Ovid*'s *Medea* put a Cheat upon herſelf, when ſhe ſaid,

Sed trahit invitam [4] *nova vis.*

eſpecially ſince ſhe acknowledges, that the Judgment of Reaſon oppos'd her Paſſion.

-------aliudque cupido,
Mens aliud ſuadet, video meliora proboque;
Deteriora ſequor.-------- Metam. vii. 19, &c.

The Obſervation of *Grotius* on *Matthew* v. *ver.* 22. is very applicable to our preſent Purpoſe: He conſiders three diſtinct Things in Anger, the Πάθος or Affection, the Ὁρμὴ or *Impetus*, and the συγκατάθεσις or Conſent. The Πάθος or Faculty, enabling us to be angry, being implanted in us by Nature, cannot be extirpated; but it ſhould be rank'd among thoſe indifferent Things which we may make either a good or a bad Uſe of [5]. But becauſe that Part of the Mind where the Πάθη or Paſſions are ſeated, is in itſelf irrational, hence it comes to paſs, that without expecting the Judgment of Reaſon, the Ὁρμαὶ or ſudden Sallies, exert their Force; and unleſs theſe are diligently kept under, the συγκατάθεσις or Conſent certainly follows, when the Power of the Soul, which was conſtituted for the governing and reſtraining of the Affections, idly lets go the Reins, and permits itſelf to be dragg'd by thoſe it ought to guide. This συγκατάθεσις then, or Conſent, he declares to be voluntary, and to be perform'd at the free Pleaſure of Man: But he tells us farther, that from diligent Attention and Exerciſe, but more eſpecially from the *holy Spirit of God*, ſufficient Aſſiſtance may be obtain'd, even againſt theſe firſt Motions (which the Philoſophers compare to the twinkling of the Eyes) ſo as to hinder them from any long Continuance, or any forcible Sway.

Beſides, that Man is arm'd by Nature with ſome peculiar Inſtruments for moderating the Paſſions, and that he is engag'd by a ſtricter Neceſſity to reſtrain them, in as much as he incurs a far greater harm to his Health and Life from their Violence and Rebellion, has been fully made out by Dr. *Cumberland* [b]. To conclude this Point, ſince ſome of the Paſſions are excited by the Appearance of Good, others by the Appearance of Evil, and accordingly ſpur us on toward the pro-

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[a] *Senec.* de Ira. II. iv.

[b] De L. N. *Ch.* ii. §. 26, 27.

Mr. Barb. *NOTES.*

[1] This wholly depends upon our Endeavours timely to conquer theſe dangerous Enemies. 'Tis a known Speech of *Ovid*'s, *Remed. Amor. ver.* 91, 92.

Principiis obſta: Sero Medicina paratur,	Oppoſe beginnings: Med'cine comes too late,
Cum mala per longas invaluere moras.	When long Delays have haſten'd on our Fate.

Indeed, as Mr. *Montagne* ſays (*Eſſays, Lib.* iii. *Chap.* xiii.) if a Man looks cloſely into the Motions and Circumſtances of his Paſſions, which prevail uſually upon him, he may obſerve how they come, and abate a little of their Furiouſneſs and Courſe. They don't fall upon him all of a ſudden, and, as I may ſay, take him by the Throat, but they threaten, as it were, and creep on him by Degrees. *Seneca* has ſome fine Reflections of this Nature, which I can't paſs over without Notice (*Epiſt.* cxvi. at the End, and *De Irâ Lib.* ii. *Ch.* xii, xiii. which deſerve alſo our Peruſal) *Scis quare non poſſumus iſta? Quia nos poſſe non credimus, &c. Do you know why we can't command our Paſſions? 'Tis becauſe we can't believe we can. There's more in't. We love our Vices heartily, and therefore we become the Defenders of them, and inſtead of baniſhing them, we do all we can to excuſe them. Nature has made us able enough to reſiſt them, and to free ourſelves from their Dominion, if we would make uſe of our Forces, if we would rally them, and employ them wholly in our own Cauſe, or at leaſt would not turn them againſt ourſelves. Our only Hindrance is, we will not, and the Inability that we plead is a vain Pretence. There is nothing ſo hard but the Mind of Man may compaſs and accuſtom itſelf to it, by frequent and daily Meditations. There is no Paſſion ſo fierce and commanding, but Education and Care can tame. The Soul can govern itſelf as it pleaſes. Some have found out a Way to reſtrain Laughter altogether, others have forborn Wine, Venery, and all ſorts of Drinks; others have accuſtomed themſelves to long and almoſt perpetual Watching, unleſs with Slumbers for a ſmall Moment; others have learned to dance upon a Rope, to carry vaſt Burdens, which have ſeemed to be above all human Abilities, and to dive very deep into the Sea, and ſtay a long time without breathing.* See what ſhall be ſaid on *Chap.* v. §. 13. Note 6. & Heſiod de Oper. & Dieb. ver. 290, &c. Edit. Cleric.

[2] That is to ſay (as our Author ſpeaks in his Apology, §. 22.) at leaſt, that they do not produce any Action that is puniſhable in human Judicatures. Indeed if we examine all the Laws of the World, we ſhall find none that wholly excuſe Offences committed in a violent Paſſion; an Evidence, that all Legiſlators ſuppoſe, that it is in the Power of a Man to reſtrain his Paſſions. *Ariſtotle* has obſerved the ſame Thing in theſe Words, Τοιούτοις δ' ἔοικε, &c. *To theſe Things agree not only what's done privately by every one, but what's done by Law-givers themſelves, who puniſh and correct all ſorts of Offences, except ſuch as are done through Force or Ignorance, of which they are not the Cauſe.* Ethic. ad Nicom. *Lib.* iii. *Ch.* vii.

[3] Dict. loc. Art. v. & *Cicero* Tuſc. Queſt. *Lib.* iv. Ch. xiv. ſpeaks thus, *All Diſeaſes and Diſturbances of Mind ariſe from the Scorn and the Neglect of Reaſon.*

[4] There is a Place in *Xenophon*'s *Cyropædia, i. e.* the Book of *Cyrus*'s Education, which contains ſome notable Reflections to this Purpoſe: "A *Mede*, named *Araſpes*, maintains there, That Beauty has no Force naturally to incline a Man "to depart from his Duty, whether he will or no; for if it were ſo (adds he) it would have the ſame Effect upon all "Men, as Fire burns every one that comes near it. But we ſee that ſome are affected with Beauty, and ſome not; "one loves one Beauty, and another, another. In a word, 'tis a voluntary Thing, and every one loves whom he "pleaſes. A Father does not fall in Love with his Daughter, nor a Brother with his Siſter: Fear and Law reſtrain us from "entertaining a Deſire of ſuch Perſons as others love. Whereas were there a Law ſtrictly forbidding Men not to be "hungry, becauſe they have nothing to eat; or not to be thirſty, becauſe they have nothing to drink; nor to feel "Cold in Winter, and Heat in Summer; no Man would obey ſuch a Law, becauſe 'tis above their Power to do it. But "*Cyrus* objected to this Aſſertion, If it be in our Power to love or not, why can we not ceaſe to love as we pleaſe? "How comes it to paſs that Love tyrannizes over ſo many Men, who ſacrifice all to that Paſſion, and put themſelves "upon a thouſand mean Actions to pleaſe the Object loved? What is it that makes their Chains ſo ſtrong, and makes "them avoid all Means that may free them from their Slavery? *Araſpes* anſwers, They are Men of vicious and looſe "Tempers, lazy Souls, and Slaves to their Appetites, who tho' they wiſh a thouſand Times that Death might deliver "them from their Torments, yet they have not Courage to undertake it themſelves, tho' nothing were more eaſy, "if they deſired it. Men of this ſort ſcruple not to thieve to ſatisfy themſelves, and as they are in the Judgment of all "the World puniſhable, becauſe nothing could force them to rob another, ſo we may ſay, that the faireſt Countenance does not force a Man to love it, or ſeek that which he ought to abſtain from. So that a Man who gives himſelf "up to his Luſts, without Reſerve, abſurdly accuſes Love of conſtraining them, when as indeed 'tis nothing but his "own Weakneſs. Such as ſtand upon their own Honour and Integrity are ſubject to theſe Affections, as well as others, they love Money, fine Horſes, and handſome Women, but they eaſily paſs them by when they can't be attained without a Crime." 'This is the Subſtance of *Xenophon*'s Words, Καὶ ὁ νεανίσκος Ἀράσπης, &c. *Xen. de Inſtit. Cyr. Lib.* v. *Chap.* i. §. 5, 6, 7. *Edit. Oxon.* See alſo *Chap.* ii. §. vi. *Pag.* 19. *Note* 2.

[5] See *Seneca of Anger*, Lib. ii. Ch. iii, 4.

curing the one, and avoiding the other: This difference is obſervable between them; that the former Kind afford little or no Excuſe, if any Thing be done otherwiſe than it ought to be, by their Inſtigation; but the latter deſerve the greater Degree of Favour and Pardon, according as the threatning Evil which excited them was more ungrateful to human Nature. For 'tis much eaſier to want a Good, not neceſſary to the Preſervation of Nature, than to admit an Evil tending to the Deſtruction of our Nature: Whatever *Ariſtotle* [a] has affirm'd to the contrary in that Maxim of his, Χαλεπώτερον ἡδονῇ μάχεσθαι, ἢ Θυμῷ; [1] *It's harder to reſiſt Pleaſure than Anger.* When a Man has done an ill Action out of Obedience to an itching Luſt, he is ſuppos'd for the ſake of the preſent Pleaſure, voluntarily to run the Hazard of bearing whatſoever Evil may thence enſue; and therefore when he has already had the Enjoyment, which he thought equivalent to the Evil that might ariſe from it, he cannot upon any Pretence plead for the Mitigation of that Evil. But he that has done amiſs upon the Fear of an impending Evil, has all the Infirmity of human Nature apologizing and interceding in his Behalf, ſince the only Cauſe of his Miſcarriage was his being willing to admit what he imagin'd to be the leaſt of the Evils likely to befal him. But of thoſe Caſes we ſhall hereafter have a larger Field to conſider and determine, *viz.* in *Lib.* viii. *Chap.* iii. §. 19, 21.

VIII. *Laſtly,* The Vice [2] of *Drunkenneſs* is a great Inciter of the Will to ſome particular Kinds of Actions; and this is procur'd either by Drink, or by ſome other Sorts of Fumes, or by Opium, a Thing of ſo univerſal Uſe in the Eaſtern World, the Effect of which is, that it diſturbs and drives along the Spirits of the Blood with a moſt violent Motion, and by theſe Means renders Men extreamly prone to Luſt in the firſt Place, *Propert. Lib.* iv. *El.* 9. *ver.* 6.

——*Potæ non ſatis unus erit.*

——Her Sparks ſhe doubles in her Drink.

and not much leſs to Anger and Raſhneſs: Upon which Account *Lycurgus* us'd to call Wine an evil Potion (or a magick Draught) becauſe it chang'd and turn'd Mens Minds. *Hygin.* Fab. cxxxii. *Iſocrat.* ad *Demonic. The Mind, when debauch'd with Liquor, is in the ſame Condition as a Chariot that has loſt its Driver: The latter is not more fatally hurried into Danger, than the former into Sin.* And for the ſame Reaſon the *Cretians* receiv'd this, among other Laws, of their famous *Minos,* Μὴ συμπίνειν ἀλλήλοις εἰς μέθην [b], *Not to drink with one another ſo far as to Diſorder and Exceſs.* Among the *Indians* Drunkenneſs lies under the heavieſt Cenſure, being rank'd in the Number of their five moſt heinous Sins, which are ſaid to be theſe: 1. To *lie with one's Mother,* which takes in both a Mother in Law, and the Wife of a Maſter or Teacher. 2. *To kill a* Brachman. 3. *To ſteal Gold.* 4. *To be drunk.* 5. *To converſe and keep Company with Perſons guilty of any of theſe Crimes* [c]. *Mahomet* too, under the Notion of Religion, found Means to prohibit his People the Uſe of Wine, tho' they were naturally more addicted to it than moſt other Nations [3].

Whoſoever is voluntarily guilty of this Vice, ſince he knew, or at leaſt might preſume what Effects would follow it, can with no more Reaſon deſire to be freed from the Imputation of Faults committed under its Guidance, than he can with a good Grace complain of a Shower of Rain falling into his Houſe, when he himſelf,

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[a] *Ethic. Nicom. Lib.* ii. *Ch.* ii. [b] *Plato, Minoe.* Add. *Plin. Lib.* xiv. *Ch.* xxii. *Ariſtoph.* Veſp. *Drunkenneſs is all Miſchief and all Terror: It tears down Gates and Doors, and defies Oppoſition. And then you pay for it doubly the next Morning, in your Pocket and in your Head.*

[c] *Manil.* Aſtron. *Lib.* v. 226.

Ardeſcit vitio vitium, vireſque miniſtrat
Bacchus, & in flamma ſævas exſuſcitat iras.

One Vice adds Fewel to another's Fire,
And *Bacchus* makes their Fury blaze the higher.

Mr. Creech.

Mr. Barb. *NOTES.*

[1] Our Author might have obſerved, that *Ariſtotle* contradicts himſelf, for elſewhere he thus ſpeaks, χαλεπώτερον τὸ, &c. *It is harder to bear Grief, than to abſtain from Pleaſure, Lib.* iii. *Ch.* xii. See alſo the Beginning of *Chap.* xv and *Lib.* vii. *Ch.* vii. where he maintains, that *Intemperance* is more voluntary and ſhameful than the Tranſports of *Anger. Muretus* endeavours to prove the Truth of the firſt of theſe contradictory Propoſitions in his poſthumous Comments, printed at *Ingolſtadt,* 1602, but his Reaſons are very weak; and I don't obſerve that he ſpeaks any Thing about thoſe Places that I ſhall quote preſently, to reconcile them with that he was treating of. He had a good Opportunity, and I doubt not but he might have prevented ſo palpable a Contradiction. All that can be ſaid for *Ariſtotle* is, that after he had advanced ſuch a Paradox, he thought it neceſſary to maintain his Propoſition, and forgetting himſelf, reaſon'd at length from the Light of common Senſe and Experience; for the Philoſophers hold this as a conſtant Maxim, *That he that yields to Pleaſure is more to blame than he that is overcome with Grief, becauſe 'tis eaſier to conquer the firſt than the laſt. Ariſtotle* does but repeat what his Maſter *Plato* aſſerted before him. Α Θ. Νῦν ἂν πότερα, &c. Ath. *Shall we ſay that he is worſt who is conquered by Grief, or by Pleaſure?* Cl. *He ſeems to me worſe who is conquered by Pleaſure, for we all agree, that he who is conquered by Pleaſure is ſhamefully baffled by himſelf, but the former is vanquiſhed by grief.* To this we may add the Authority of the Imperial Philoſopher *Marcus Antoninus, Lib.* ii. *Ch.* x. where he thus ſpeaks: Theophraſtus, *in his Compariſon of Crimes, following the common Opinion, determines as a great Philoſopher,* That thoſe which come from Luſt, are greater than thoſe that proceed from Anger; for thoſe that are moved by Anger ſeem to act againſt Reaſon, contrary to their Purpoſe, and with a ſecret Remorſe; but they that follow their Luſts, and are conquered by their Pleaſure, appear more intemperate, and effeminate in their Faults. So that it is with great Reaſon and Truth, which is an Honour to Philoſophy, that he adds, *The Crime that is done with Pleaſure, is greater and more puniſhable, than that which is committed with Sorrow and Grief.* Indeed he that is angry reſembles a Man, who having received an Offence, is provoked by Grief to revenge himſelf, whereas the Voluptuary is moved by his own Paſſion to do an Injuſtice for his own Satisfaction. See further what is ſaid on *Chap.* vi. §. 14. *Note* 4.

[2] This Author elſewhere joins thoſe ſort of Vices, which deprive us of the Uſe of our Reaſon, either for a Time, or for the reſt of our Life. But, to ſpeak truly, the Effect of thoſe Vices, as well as Drunkenneſs, is not ſo much to incline the Will to certain Things, as entirely to deſtroy the Principle of human Actions, becauſe in that a Man knows not what he does. *Titius Obſ.* xxxvii. *upon* Pufendorf *of the Duty of a Man and Citizen,* Chap. i. §. 15.

[3] See what is related in the *Univerſal Library,* concerning the Inhabitants of *Siam, Tom.* x. *p.* 529.

out of a petulant Humour, has been pulling off the Roof. *Plautus* [c] has a merry Jeſt to this purpoſe; *Wine* (ſays he) *would be too cheap at the Price it now brings, if a drunken Man might do whatever he pleas'd, without being call'd to an Account.*

Yet in indifferent Actions, which are left to every Man's Pleaſure to perform or omit, Drunkenneſs is allow'd this Favour, that the Effect which would have follow'd any ſuch Action, had it been [1] deliberately perform'd, ſhall now be utterly invalid, ſince the overtaken Perſon acted with much Diſadvantage.

And thoſe Cauſes which we have hitherto reckon'd up, are the moſt conſiderable among ſuch as impoſe a kind of phyſical Biaſs and Tendency on the Will. That which morally inclines it moſt, or at leaſt, *ought to incline it*, is *Obligation:* And yet this, how great ſoever, neither takes away the Will's intrinſick Liberty, nor renders the Action voluntary, tho' the Luſts and Paſſions may ſtrive vehemently to oppoſe it. Hither may be referr'd that Sentence of *Ariſtotle*, ἄτοπον τὰ ἀκούσια φάναι, ὧν δεῖ ὀρέγεσθαι, *'Tis abſurd to call thoſe Things* involuntary, *which we ought to deſire and to purſue*, Ethic. Nicom. *Lib.* iii. *Ch.* iii.

We ſay, Obligations ought *to incline the Will*; for ſuch is the perverſe Diſpoſition of human Minds, that frequently the very forbidding of a Thing, raiſes a Deſire of doing, or of enjoying it [2], as *Ovid* Amor. iii. 4. ſpeaks,

Nitimur in vetitum ſemper, cupimuſque negata.
Quicquid ſervatur, cupimus magis; ipſaque furem
Cura vocat. ————
———— *Juvat inconceſſa voluptas.*
Cui peccare licet, peccat minus: Ipſa poteſtas
Semina nequitiæ languidiora facit.

We court the more what Men the leſs will grant;
Warm when deny'd, and fiercer by Reſtraint.
What's cloſely kept, improves in our Belief;
To hoard the Gold is to invite the Thief.
Forbidden Pleaſures have a quicker Taſte.
They that have Freedom uſe it leaſt; and ſo
The *Power* of Ill doth the Deſign o'erthrow.
Sir *Charles Sidley.*

Which Unhappineſs, if we conſider its cloſer and nearer Cauſes, may be referr'd, partly to the vicious Curioſity of Mortals, who admire every Thing that they are Strangers to (which Opinion is ſtrongly confirm'd by the Harſhneſs of the Edict, and by the Care and Trouble of Obedience) and partly to the Hatred and Obſtinacy which we bear towards the Forbidder, whence we diſdain that our Liberty ſhould be abridg'd by a Perſon who looks ſo ill in our Eſteem; whereas, on the contrary, it's the Nature of Love to make us willing to comply with the Commands and Deſires of the Party we affect.

IX. It is farther obſervable, That ſometimes upon the Approach of extraordinary Dangers, and ſuch as are ſuppos'd to exceed the common Strength and Firmneſs of human Minds, the Will is ſo vehemently urg'd and preſs'd, that it gives Conſent to ſomewhat, which had it been free from that Neceſſity, it would have utterly abhorr'd. Actions of this Kind have the Name of *mixt*, being partly voluntary, and partly involuntary. Thus far they are to be eſteem'd voluntary, in as much as their Principle is in the Agent, who is acquainted with the Nature and Circumſtances of the Thing he is going about: And in as much as the Will for the preſent Time and Neceſſity, inclines toward them as toward a leſſer Evil, or toward one Part of an Evil, when otherwiſe a greater or an entire Evil muſt be undergone: And this leſſer or partial Evil turns into a kind of Good, when both it and the Evil compar'd with it, cannot be both avoided together. *Ariſtotle Ethic. ad Nicom. Lib.* v. *Ch.* vii. ſays, *A leſſer Evil, if it be compar'd with a greater, may be eſteem'd a kind of Good.* So *Quinctil.* Inſtit. vii. Ch. iv. *In comparing Evils, that which appears lighteſt, muſt paſs for Good.* Ariſtot. Ethic. iii. 1. *Simply and abſolutely ſpeaking, no Man in his Wits willingly throws away his own Goods, but for the Security or Preſervation of himſelf and others. Such Actions then are to be accounted* mixt, *tho' they approach nearer to voluntary than to involuntary.*

But the ſame Actions are likewiſe in ſome Degree involuntary, becauſe the Will ſeems to be driven on them contrary to its Inclinations, and would never undertake them, if the impending Evil were by any other Means poſſibly to be eſcap'd. For which Reaſon they have this Quality in common with involuntary Actions, that the moral Effects and Conſequences attending Actions meerly voluntary, do in theſe, in a great Meaſure, if not totally, fail [3]. For tho' ſometimes a Man may have ſo ſtrait an Obligation laid upon him, that even upon the Threats and Apprehenſions of Death, the moſt terrible of natural Evils, [1] he ought not to recede from it; yet where this does not expreſly appear, it is not eaſily preſum'd and ſuppos'd, as being too ſharp and rigorous for the Condition of Humanity: And where there is no ſuch ſevere Obligation impos'd, it would be downright Folly not to come off as cheaply as we can, and not to ſuffer as ſmall a Share of Evil as we may compound for. And therefore many Things, which [2] would have deſerv'd Reprehenſion, had they been undertaken without ſuch a Neceſſity, when they are done under the Urgency of ſo hard a Caſe, are commended by all fair and equitable Judges; [3] other Things deſerve Pity rather than Revenge; others again are for the ſame Reaſon, either entirely, or for the moſt part [4] excus'd, and in others the Odium and Fault of the Action is devolv'd upon the Perſon [5] who reduced him to that unhappy Extremity[6], the Man who perform'd the Deed being declar'd innocent. *Ariſtotle* diſcourſes well on this Point[7], *Ethic. ad Nicom.* Lib. iii. Ch. i. *For theſe kind of Actions*, ſays he, *Men are ſometimes commended, when for the ſake of great and honeſt Things, they have ſuſtain'd ſome Indecency or Hardſhip. To ſome Things, tho' we allow no Praiſe, yet we grant a Pardon, when a Man has done what he ought not, upon the fear of Evils exceeding human Nature, and not tolerable by mortal Strength. And there are ſome Things perhaps, which no Man can be forc'd or compell'd to commit, but ought rather to endure the utmoſt Extremities, and Death itſelf.* Add. *Euſtrat.* ad loc. But I queſtion whether it were proper (eſpecially for a Chriſtian Biſhop) to give this Example of a *mixt* Action, *Familiarity with another Man's Wife, though in itſelf foul and ſinful, yet ceaſeth to be ſo, if undertaken on the Account of killing a Tyrant.*

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[c] *Aulular.* iv. x. 20.

Mr. Barb. *NOTES.*

[1] If we will make a more curious and exact Diſtinction of the Effects of Drunkenneſs, we muſt obſerve how a Thing may be imputed to a Man which is done in his Wine, according to the ſeveral Degrees of Drunkenneſs, *viz.* The one moderate, which does not hinder a Man's acting freely, and with Deliberation; the other ſtrips him entirely of the Uſe of his Reaſon. This laſt Sort, if it be alſo involuntary in the Original, that is to ſay, if a Man falls not into it by his own Fault, brings forth Actions altogether involuntary, and conſequently furniſhes him with a ſufficient Excuſe; but if Drunkenneſs be voluntary in its Principle, then we muſt diſtinguiſh Actions indifferent from Actions unlawful. As to the firſt, If a Man, for Example, make a Contract, that hinders the Effects of an Imputation, becauſe thoſe ſort of Actions require a particular Knowledge of what is done, and the Fault which went before them, and from which they derive their Original, is not ſufficient to make it of Force. See *Lib.* iii. *Ch.* vi. §. 5. But it is not the ſame in unlawful Actions; for if a Man be in an Eſtate, from whence 'tis his Fault if he fall, becauſe he might and ought to hinder it, his perfect Drunkenneſs will not excuſe him from the Crimes which he has committed thro' Exceſs of Wine. And if he puts himſelf into that Condition on purpoſe to execute ſome ill Deſign, he deſerves a double Puniſhment. *Titius Obſerv.* xxxviii.

[2] See *Montagne's Eſſay, Lib.* ii. *Ch.* xv. *p.* 451, &c. Edit. Fol. at *Paris*, 1657.

[3] The Author ſpeaks nothing here of good Actions, or indifferent, but contents himſelf to ſpeak of ill ones only. Mixt good Actions are accounted for nothing; and every one may ſee the Reaſon. Indifferent Actions done in the ſame Manner, can no more be imputed to the Agent, for tho' there is a kind of Will, it is not ſufficient to produce an Obligation. The Injuſtice of the Author of Violence, rendring him incapable of acquiring any Right by that Action, which is not fully voluntary, and conſequently laying no Obligation upon him, who never conſented, but with Regret. *Titius Obſerv.* xl. See *Lib.* iii. *Ch.* vi. §. 10.

X. Laſtly, ſince to make an Action voluntary, there is requir'd not only that the Principle of Motion be in the Agent, or that the Agent addreſs himſelf to work by the Impulſe of his own Will, but likewiſe that he knows what he is doing; upon the want of both, or of either of theſe Conditions, the Action is rendered involuntary, as *Ariſtotle* ſpeaks, *Ethic. ad Nicom.* iii. 1, 2. *Thoſe Things ſeem to be involuntary, which are done either upon Force, or upon Ignorance. An Action cannot be ſaid to have been perform'd involuntarily out of Ignorance, unleſs it be follow'd with Sorrow and Repentance.* [8] Now a Man is properly ſaid to *be compell'd*, when by the Force of a ſtronger extrinſical Power, he is brought to apply his Limbs otherwiſe than he would, ſo as to expreſs his Averſation and Diſſent by manifeſt Signs, and eſpecially by corporal Reſiſtance and Reluctancy. *As if* (to uſe *Ariſtotle*'s Examples) *the Wind, or Men ſuperior to us in Power, ſhould violently carry us any where againſt our Conſent.* Tully in his ſecond Book of *Invention*, Lib. ii. Ch. xxxii. gives an Inſtance after this Manner: The *Rhodians* had a Law, that whatever *beak'd* Veſſel ſhould at any time be found in their Harbour, it ſhould be condemn'd as Prize, and expos'd publickly to Sale. Now the Queſtion is, Whether a Veſſel of this kind, being driven into their Ports by a Tempeſt, ought nevertheleſs to ſuffer the common Penalty? 'Twas upon this Topick, that the Friends of the raviſh'd *Lucretia* [a] comforted her under her deep Affliction, by turning all the Guilt on the vile Author of the Crime, telling her, That *the Mind only properly ſinn'd, and not the Body; and that there could be no Fault where there was no Deliberation or Deſign.*

This Reluctancy in Civil Courts is preſum'd to have been us'd in ſuch Actions or Paſſions, as are not vulgarly thought to be willingly perform'd or undergone, and where all Signs of an actual Conſent are wanting; whence aroſe the Term of *interpretative Reluctancy.*

Thus, whereas by the *Jewiſh* Law a Virgin is ſuppos'd to have ſuffer'd Raviſhment, if ſhe loſt her Honour in the Field, without Witneſſes; yet *Philo* the *Jew* [b] denies the Favour of this Law to reach a Maid, who admitted a Debauch willingly, tho' in a Solitude: As neither can the ſame Law hurt a Maid in the City, who in the like Danger either could not cry out, or cried to no Purpoſe, and without Relief.

A *forc'd* Thing may be ſo either *in itſelf*, and

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[a] *Liv. Lib.* i. *Ch.* lviii.

[b] *De Legib. Special.*

Mr. BARB. *NOTES.*

[1] See *Lib.* ii. *Ch.* vi. § 2. following.

[2] As for Example, When a Woman, or Maid, ſlays the Man that makes an Attempt upon her Chaſtity. See *Lib.* ii. *Ch.* v. §. 11. following.

[3] Such is the Caſe of a Woman, who, in a Famine, is forc'd to eat her own Child, as it happened in the Siege of *Jeruſalem*, as *Joſephus* tells, *Lib.* vii. *de Bell. Jud. Ch.* viii. and as it befel the ſeven *Engliſhmen*, of which our Author ſpeaks, *Lib.* ii. *Ch.* vi. §. 3.

[4] As when a Woman, or Maid, ſlays herſelf to avoid the Loſs of her Chaſtity, with which ſhe is threatned by an extravagant Man, who will ſatisfy his Luſts at any Rate. See *Lib.* ii. *Ch.* iv. §. 19. following, where Mr. *Hertius* refers us to what the Author ſpeaks, *Lib.* ii. *Ch.* v. §. 15. of an Husband who ſlew his Wife's Gallant, or his Wife, when he took them in the Heat of their Luſt. But this is the Effect of a furious Anger, and Deſire of Revenge, which ought to be referred to §. 7. above, and not to mixt Actions, ſuch as our Author calls them. I ſay the ſame of an Example which Mr. *Hertius* gives of a Woman, that poiſoned her Husband and Son, becauſe they had killed a Son of hers by a former Husband. See *Valer. Max. Lib.* viii. *Ch.* i. in the End, and *Aul. Gell. Lib.* xii. *Ch.* 7.

[5] See the following *Chap.* §. 9. Mr. *Hertius* makes an Application, not very proper here, out of *Juſtin*, of the *Phoceans*, who ſeeing themſelves deprived of their Lands, Wives, and Children, went and robbed the Temple of *Delphos*, for the Hiſtorian reflects upon it as a Thing not to be excuſed altogether; though they that committed it were leſs worthy of Blame, than thoſe who had brought them to this Caſe of Deſpair. For ſo he ſpeaks, *The Fact of the* Phoceans, *though all Men abominated it upon the Account of the Sacrilege, yet the* Thebans, *by whom they were compelled to this Neceſſity, were more deteſted than they.* Lib. viii. Ch. i.

[6] Mr. *Puſendorf* might have joined with *Euſtratius*, another Biſhop more famous, who fell upon a looſe Thought about a Subject ſomething near it, but of more Difficulty. Read Mr. *Bayle*'s Dictionary under the Head *Acyndinus*. See further concerning theſe Sort of mixt Actions, upon the Account of which ſome Evil in itſelf is committed, what is ſaid upon the following *Chap.* §. 9. *Note* 2.

[7] See *Ch.* iii. §. 10. *Pag.* 30. aforegoing, about the beginning *Note* 5.

[8] In fine, *Sextus* did not uſe an immediate Force upon *Lucretia*, as when a Woman defends herſelf, as much as ſhe can, with her Hands, Feet and Teeth. She was not forced, any otherwiſe than ſuch are, who reſolve to caſt their Goods into the Sea for fear of Periſhing. She reſiſted his Threatnings of Death; but when *Sextus* threatned to expoſe her Reputation to eternal Diſgrace, ſhe did what he wiſhed, and ſlew herſelf. So that this Example does not well agree to this Place, where he is treating of mixt Actions. See *Mr.* Bayle'*s Dictionary*.

not in its Cauſes, or elſe both in itſelf and in its Cauſe. The firſt is, When a Perſon remains in ſuch a State at preſent, as to be unable to repel the offer'd Violence, and yet was in a Fault for getting into ſuch a State. Of this Kind was the Rape of *Dinah*, *Jacob*'s Daughter [a]; for the Virgin ought not to have wander'd among Strangers. The latter is, When the Perſon has, not by his own Fault, been brought into thoſe Streights, which now occaſion the Compulſion of him to any Fact. By the not being his own Fault, we mean, if he has done nothing but according to the Laws of Prudence and of his Duty. For if a Man performs the Office enjoin'd him, or uſes his Right any other way, and acts not raſhly or inconſiderately, whatever Violence over-powers him, he will have no Guilt imputed to him, and no Sin to anſwer for.

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[a] *Geneſis* xxxiv.

CHAP. V.

Of Moral Actions in general, and of their Application to the Agent, or their Aptneſs to be imputed.

The Contents of every Section of the fifth Chapter.

I. *What a moral Action is.*
II. *Its Matter.*
III. *Its Form, where we treat of a moral Cauſe.*
IV. *A moral Action conſider'd in itſelf is a poſitive Entity.*
V. *The Cauſe or Ground why a Thing may be imputed, or not.*
VI. *Things not to be imputed to a Man, are Things neceſſary.*
VII. *The Operations of our vegetable Faculties.*
VIII. *Things impoſſible.*
IX. *Things compell'd, where meer Execution is treated of.*
X. *Things done through Ignorance.*
XI. *Things done, or ſeen in a Dream.*
XII. *Evils to come.*
XIII. *But evil Actions, proceeding from an Habit, muſt certainly be imputed.*
XIV. *How other Mens Actions may be imputed to us.*

HAVING, in Purſuance of our Deſign, examined and explained the Will and the Underſtanding, as the Principles whence human Actions obtain the Privilege of being ranked in a different Claſs from the Operations of Brutes, the next thing which we are concern'd for, is the general Diſquiſition of moral Actions, ſince in diſcovering their Rectitude, or Pravity, the Science we are now engaged in is chiefly employ'd. Moral Actions then, are *the voluntary Deeds of Men conſider'd in common Life, as they include the Imputation of their Conſequences and Effects.* We call thoſe voluntary Deeds, which in ſuch a Manner depend on human Will as on a free Cauſe, that without its Determination (proceeding from its [1] internal Acts drawn forth by the previous Knowledge of the Underſtanding) they would never have been perform'd; and which therefore, as to their being done or not done, muſt be referr'd to the Power of Man. And theſe Actions are here conſider'd, not as they are bare Motions produc'd by ſome Power according to the natural Conſtitution of Things, but as they proceed from the Determination of the Will; a Faculty diſpos'd to embrace either Part of two contradictory Choices. For a voluntary Action contains ſomething *material* and ſomething *formal*; the firſt is nothing elſe but the Motion of a Power exiſting by Nature, or its Exerciſe conſider'd barely by itſelf; the other is the Dependence of that Motion or Exerciſe on the Determination of the Will, as on a Cauſe that is truly free, and acts by its own Reſolution. The Exerciſe conſider'd ſeparately and by itſelf, is, for Diſtinction ſake, rather call'd, *an Action of the Will*, or of the *willing Power*, in a Man, than a *voluntary Action.*

We may farther conſider the *Action* [2] *of the Will*, either in itſelf, and *abſolutely*, as it is a phyſical Motion, undertaken upon the previous Injunction of the *Will*, or elſe *reflexively*, as the Effects of it may be imputed to the Actor. Now *voluntary Actions*, as they comprehend this Reflexion, are, by a ſpecial Appropriation of the Word, call'd *human Actions*. And becauſe from theſe Actions, as they are perform'd *well* or *ill*, as they are agreeable or repugnant to their Rule, the Law, one is ſaid to be a *good* or an *ill moral Man* (the Inclinations of the Mind reſulting from frequency of acting, being likewiſe term'd *Morals*) hence it comes to paſs that *moral Actions* ſeem only another Name for *human.*

II. The Eſſence of moral Actions, [1] according to the laſt Way of conſidering them, may be divided into two Parts or Notions, a *Material*

Mr. Barb. *NOTES on* §. 1.

[1] The Original is, *Actibus Elicitis*, which is better rendred, *Immediate Acts*. See §. 1. of the preceding Chapter.

[2] The Original is, *Actio Voluntatis*; which Expreſſion, tho' 'tis uſed in all the Editions, and his *Elements of the Univerſal Civil Law*, yet 'tis a plain Miſtake of the Author, contrary both to his own Diſtinction, and the following Part of his Diſcourſe; for he ſays poſitively, *When moral Actions include in*, &c. The *Engliſh* Tranſlator was not aware of this.

On §. 2.

[1] That is to ſay, As they are voluntary Actions, whoſe Effects may be imputed unto Men.

and a *Formal*. The material Part, or the Matter of a moral Action, is of a very wide Extent: Such may be firſt any phyſical Motion, whether it be of the locomotive Faculty; or of the ſenſitive Appetite; or of the external, or of the internal Senſes; or of the Underſtanding, ſo far as concerns the Exerciſe of Apprehenſion. For the Act of Judgment depends ſo much on the Quality which appears in the Object, that it is not capable of the Direction of the Will, tho' in forming of that Judgment, our Free-will and our Induſtry [2] are allow'd ſome Influence and Power. The Act of the Will it ſelf may likewiſe be the Matter of a moral Deed, if we conſider it in its natural Condition, or as it is preciſely taken, for an Effect produc'd by a *phyſical* Power, *as ſuch*. So likewiſe may be the Privation of any *phyſical* Motion, which a Man might have produc'd either in it ſelf, or in its Cauſe: For a Man may render himſelf obnoxious to Puniſhment, as well by Omiſſions as by Commiſſions. As alſo the Inclinations of the natural Powers toward certain Objects (acquir'd by the voluntary Actions that have already paſs'd) at leaſt ſo far as they are Spurs and Incentives to acting. Nor are my own Motions and Habits, or the Privations of either, alone the material Parts of my moral Actions; but the ſame Motions and Habits or Privations proceeding immedidiately from others [3], provided they could or ought to have been directed by my Will. Thus the *Spartan Inamorato's* were to [4] ſuffer for the Faults committed by their Minions [a]. Nay, the Operations of Brutes, of Vegetables, and of inanimate Things, may furniſh out the *Matter* of my moral Actions, when my Will ſhould have guided their Proceedings. Thus even in the Law of GOD, a Miſchief done by a goring Ox is imputed to the Owner, in caſe he knew before-hand that the Beaſt was faulty this way [b]. Thus a Vine-dreſſer is reſponſible, if, through his Negligence, the Vine has ſpent all its fruitful Strength and Vigour in ſending out numerous and unneceſſary Suckers. Thus the Damages by Fire are repairable by the Perſons who occaſion'd it; and Waſtes cauſed by the breaking in of the Sea, or of Rivers, are to be made good by him who has either broke down, or neglected to keep up the Banks. *Quinctilian* [c] has propos'd two Declamation Lemma's much to our preſent Purpoſe. *A Piper had play'd a Phrygian Ayre to a Man who was offering Sacrifice; the Man running Mad, and throwing himſelf down a Precipice, the Piper is accus'd as the Perſon who had caus'd his Death. A Club of young Perſons, who had frequent Meetings and Entertainments, one day made an Agreement to ſup together by the Sea-ſide; one of the Society being abſent, the others wrote his Name upon the Stone Table which they had reared: The young Man's Father at his Return from a long Voyage, landing in this Place, and reading the Inſcription on the Stone, took it for his Son's Monument, and hang'd himſelf for Grief. The Company is hereupon impeach'd as acceſſory to his Death.* Laſtly, the Admiſſions or Receptions of another Man's Deeds, as far as my Default contributed to their Production, may be the *Matter* of my own moral Actions. Thus a Rape is partly imputed to the Woman, if it appear that ſhe raſhly ventur'd into ſuch a Place, where ſhe might have expected to meet with ſuch violent Treatment.

III. The Formality of a moral Action conſiſts in the *Imputativeneſs* of it, if we may ſo ſpeak, by which the Effect of a voluntary Action may be imputed to the Agent, or eſteem'd as ſomething properly belonging to him, whether he himſelf phyſically produc'd that Effect, or whether he cauſed it to be produc'd by others. And from this Formality of the Action, the Agent likewiſe has a Share in the Denomination of Morality, being call'd a moral Cauſe. Whence we may eaſily underſtand, that the *Ratio Formalis* of a moral Cauſe, in Strictneſs and Propriety of Speech, conſiſts in Imputation, conſider'd with Reference to the Perſon in whom it terminates; and that therefore ſuch a Cauſe can be nothing elſe but a voluntary Agent, to whom the Effect is, or muſt be imputed, upon account of his being either wholly or partly the Author of it; and that therefore, whether it be Good or Evil, both are to be reckon'd as owing to him, and he is liable to give an Account for both. Thus one Man is the moral Cauſe of Hurt in another Man, whether he has made his Head ſwell by Blows of the Fiſt, or whether he has broke it with a Club, or whether he has ſet Dogs or Murderers upon him. Thus *Anah* was the moral Cauſe [1] of Mules, he being recorded in *Geneſis* xxxvi. *v.* 24. to have firſt found them out, or to have join'd the Mare and the Aſſes together for their Production. So *Jacob* was the moral Cauſe of the different Colours in *Laban*'s Sheep, *Chap.* xxx. *v.* 37. And thus *Lyſius* (*Orat. contra Ayorat*) pleading againſt an Informer, upon whoſe Accuſations many Perſons had been executed, calls

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[a] *Ælian. V. H. Lib.* iii. *Ch.* x. [b] *Add. Lib.* i. §. 1, 2, 3. *D. Si Quadrup. Lib.* ix. §. 5. *D. ad L. Aquil. Lex. Wiſigoth. Lib.* viii. *Tit.* iv. *Ch.* xvi. *V. Exod.* xxi. 29. [c] *Inſt. Orat. Lib.* i. *Ch.* x. *and Lib.* iii. *Ch.* vii.

Mr. BARB. *NOTES* on §. II.

[2] If we will find the Author's Meaning, we muſt remember what he has ſaid, *Ch.* iii. §. 2.

[3] That is, when one may or ought to engage others to do a certain Thing, or hinder him from it, or contribute towards the begetting a certain Habit, or prevent it, he is reſponſible for that which he did not properly do, and in which he was guilty of nothing but pure Negligence or Want of Acting, which is yet looked upon as a real Action in reſpect to the moral Effect. This reſpects all them who are charged with the Management of others. See §. 14. following.

[4] See *Ælian's Various Hiſtory, Lib.* iii. *Ch.* x. and Mr. *Perizonius*'s *Comment* on it. But that Example ſeems to be ill choſen, ſince there are many other which are commonly to be had. It is poſſible that this being ſo unlike our Opinions and Cuſtoms, made this Author think fit to give this Inſtance. For they pretended, that this Love, ſo dear and conſtant, had nothing but what was honeſt in it, and ſerved to inflame thoſe young Men who were the Objects of it with the Love of Virtue, tho' in Time it degenerated into an infamous Converſation, chiefly among the *Greeks*. See *Potter*'s *Antiquities of* Greece. Theſe Inamorato's being then, as *Ælian* ſpeaks, *The continual Guardians of thoſe they loved*, 'tis no wonder that they were to anſwer for their Behaviour.

On §. 3.

But *Moſes* does not ſay in that place, That that *Idumean* was the firſt that cauſed Aſſes and Horſes to couple together, and ſo was, morally ſpeaking, the Original of Mules. ימים is the Name of a People, and ſo ought to be tranſlated, not, He produced Mules, but, He fought againſt the *Jemians*, as Mr. *Bochart* has fully proved in his *Hierozoicon, Part* i. *Lib.* ii. *Ch.* xxi. However, had the Thing in itſelf been true, this Author might better have paſſed over this Example.

him *the manifeſt Cauſe of their Death.* So alſo Ovid. Heroid. *Epiſt.* ii. 147.

Phyllida Demophoon leto dedit, hoſpes amantem;
Ille neci cauſam præbuit, ipſa manum.
Poor *Phyllis* dy'd, by him ſhe lov'd oppreſs'd;
The trueſt Miſtreſs, by the falſeſt Gueſt:
He was the cruel Cauſe of all her Woe;
But her own Hand perform'd the fatal Blow.
Mr. Poley.

Yet it does not always happen, that a Man who has barely given Occaſion to the Fact of another Man, ſhould be [2] reputed the moral Cauſe of that Fact: and therefore the Sentence pronounc'd by *Piſo*, which *Seneca* ſpeaks of, was extream fooliſh as well as cruel, when ordering a Soldier to be led to Execution, upon Suſpicion of whoſe Murder another Soldier had before ſuffer'd Death, he gave his Reaſon in theſe Words [3], *I order you to be executed for being the Cauſe of the Condemnation of your Fellow Soldier.* There ſeems no great Neceſſity that we ſhould here, with the Author of the Treatiſe *De Principiis Juſti & Decori*[a], diſtinguiſh between a moral Cauſe by *it ſelf*, and a moral Cauſe by *Accident.* For a Cauſe by Accident is a Term of vaſt Obſcurity, and very likely to create and encourage vain Diſputes: And beſides, if we cannot rightly impute the Effect of an Action to a Man, we cannot upon any Account, call him a moral Cauſe by Accident, tho' he contributed never ſo much to the material Part of the Action. Yet thus far we muſt plainly acknowledge, that in weighing and rating the Greatneſs of the Imputation, it is a very important Query, whether the Action proceeded from ſuch a Perſon as the Principal, or as the Acceſſory? as likewiſe, whether the Agent directly intended ſuch an Effect, or whether it proceeded from his Inadvertency, or any other concomitant Reaſon? For if the laſt of theſe Caſes appear true, the Conſequence will be, that the Action ſhall not be imputed to the Perſon, as if committed againſt the Laws of Juſtice, but againſt thoſe of Prudence and Fore-ſight; and that therefore he ſhall not be reckon'd to have acted wickedly, but only raſhly or unadviſedly. It will not be amiſs to examine more cloſely what the above-mentioned Author lays down in the ſame place. Firſt, therefore, he eſtabliſhes this as a Maxim, *Whatever is Evil in its own Nature, ſo that it can never be chang'd into Good, yet may by Accident follow upon the Exerciſe, or upon the Defence of my Right, without my incurring the Guilt of Sin; and therefore I am not oblig'd to decline the Uſe of my juſt Right in ſuch Caſes. Grotius* likewiſe [4] propoſes a Rule much to the ſame Purpoſe, in his Third Book[b], but judiciouſly tempers it with [5] a good Reſtriction. But our Author proceeds: *A Sin is ſaid to follow by Accident upon another free Act, when upon the Uſe of a Thing, to which I have a Right, ſome Effect follows, which I have otherwiſe no Right to produce.* For an Inſtance in this Caſe may be alledg'd what Divines call Scandal or Offence *taken*; concerning which they tell us, That a Man ought not to omit an honeſt, a pious, or a due Act, though a wicked Perſon ſhould take never ſo much Offence at it; and this Rule they confirm by the Authority of our Saviour. But now this very Example might have taught our Author to lay aſide his Term of *Cauſa per Accidens*; ſince even in that reſtrain'd Senſe it would be little leſs than Impiety to call *him* the Cauſe of Evil, who is the Spring and Fountain of all Good. We ought rather to ſay, That a Man who exerts a good and neceſſary Action, is by no means the Cauſe of Sin in another Man, who ſhall thence take Occaſion of offending. Thus we commonly ſay, He who uſes his own Right, does no body any Wrong. But he further adds, *Since every Man has a Right of preſerving his Health, it is lawful, for the Recovery of Health, to make uſe of a medicinal Potion, tho' upon the taking of this Potion ſhould follow Diſtraction (for ſome little time) or Drunkenneſs, or (voluntary) Pollution, or Abortion* [6] (in caſe both the Mother and the *Fœtus* muſt otherwiſe infallibly periſh) and that therefore the Perſon who takes the Medicine is only the Cauſe of ſuch Effects by

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[a] *Velthuyſen, Pag.* 161.

[b] *Ch.* i. §. 4. *and Ch.* xi. §. 9.

Mr. Barb. *NOTES.*

[2] He muſt (as our Author ſpeaks in his *Elements of the Univerſal Civil Law*, p. 3, 4.) either do, or neglect to do ſomething that he was obliged to, otherwiſe another Man's Action has ſo neceſſary a Connexion with what he himſelf does or neglects, that it cannot otherwiſe happen. Further, we muſt conſider how far he, that gave the Occaſion, might know the Effect that would follow upon it, and that it is not neceſſary that he ſhould certainly know it, 'tis ſufficient that there was ſome Probability. I will explain this by an Example: If I leave a Piſtol charged, or ſome other dangerous Weapon, upon a Table, in a Room where every body has Liberty to come, I am not ſure that a Child, or any other Perſon will come, who, not knowing the Danger of the Weapon, will run the Hazard of killing or hurting himſelf, by meddling with it out of Curioſity; nevertheleſs, becauſe the Thing is poſſible, I might fear ſuch a Thing might happen, and I am certainly to anſwer for it. The ſame may be ſaid concerning the Good of which we have given Occaſion. As it can't be attributed to us, if we were the Cauſe of it without our Knowledge, and had no ſuch direct Deſign, ſo on the other ſide, 'tis not neceſſary that we be ſure of the Succeſs of what we undertake for another's Advantage; 'tis ſufficient, that we had Reaſon to believe it; for tho' the Effect was not obtain'd, the Intention is very commendable at all times; as, on the contrary, the Neglect is not altogether excuſable, although it luckily had no ill Conſequence.

[3] *Seneca*'s Words are (*De Ira. Lib.* i. *Ch.* xvi.) *Te duci jubeo, quia cauſa damnationis commilitoni fuiſti.*

[4] This Rule (according to *Grotius*) takes place in the juſt Defence of a Man's ſelf, which this Author explains in another place. And ſo it does alſo when we labour after the Recovery of what belongs to us; for if we can recover the full Value, we have a Right to take it, nevertheleſs, upon Condition that we return the Over-plus, if any be. So alſo we may cannonade a Ship full of Pirates, or an Houſe full of Thieves, altho' we know there are ſome Children, Women, or other innocent Perſons in it, who are in Danger of being involved in the Ruin of thoſe that deſerve it, *Lib.* iii. *Ch.* i §. 4. *Num.* i.

[5] He further adds, in the ſame place, *Num.* ii. That thoſe Things that a Man hath an indiſputable Right to do, are not to be allowed him to do in all Reſpects. Love to our Neighbour often hinders us from uſing that Right, and obliges us likewiſe to avoid thoſe Things which do, or may happen, contrary to our Intention, at leaſt, if the Advantage we aim at be not greater than the Damage which may juſtly be feared; or if there be an equal Probability of Benefit and Damage, or the Hope of the Benefit be not better grounded than the Fear of Damage; but this muſt be left to every Man's Judgment and Prudence. But this ought only to be obſerved, That where there is a Doubt, we ought to incline to that Side, that is more favourable to another than to ourſelves, as the ſureſt Part. See what follows, and *Ch.* xi. §. 8. of the ſame Book. See alſo what has been ſaid above, *Ch.* iii. §. 7.

[6] See *Book* vi. *Ch.* ii. §. 6. following.

Accident. On which Doctrine we only obſerve, that it had been much plainer to have ſaid, that thoſe Effects are not to be accounted Sins in the Caſes here mention'd. Neither do all the Examples brought by the ſame Author to illuſtrate the *moral Cauſe per ſe*, or that which is truly and properly ſuch, rightly hold. *For a Criminal*, as he ſpeaks, *who is to ſuffer, tho' he go on to the Place of Execution, and aſcend the Ladder*, cannot meerly upon this Account be call'd the *moral Cauſe* of his own Death, becauſe if he had refus'd to go willingly, he had been dragg'd along by the publick Officers. And yet there is no Reaſon why one Man who drinks immoderately, or another who waſtes his Strength in honeſt and neceſſary Labours, may not be reputed the *moral Cauſe* of their own untimely Deaths; tho' the former Perſon ſins, and the latter not; and tho' neither, properly ſpeaking, can be call'd a Murtherer. But ſuch a one we ſhould rightly call the *moral Cauſe of his own Death*, who is therefore condemn'd, becauſe he would not declare ſuch Matters as might demonſtrate his own Innocency.

IV. It muſt be farther obſerv'd, that this *Imputativeneſs* which we have made the *Formale* of a moral Action, bears the Nature of *a poſitive Form*, from which, as from the Spring and Root, all the Affections, Properties, and Conſequences of ſuch an Action reſult. And therefore a moral Action may be call'd a *Poſitive Being* (at leaſt in the Order of *Morals*, if not always in the Order of *Naturals*) whether the Matter of it be a phyſical Motion, or the Privation of a phyſical Motion. For to conſtitute a poſitive Being in Morality, 'tis ſufficient that we conceive ſomething in it, from which there ariſe true Affections of the ſame Kind; ſince as a *Non Ens* can have no Affections, ſo whatever has certain and poſitive Affections cannot upon any Account be ſtil'd a meer *Non Ens*.

V. Now, that a moral Action ſhould belong, or ſhould be *imputed* to any Man (in which we have aſſerted the *ratio formalis* of it to conſiſt) there can be no other Reaſon or Cauſe, but that the Man had Power and Ability to do it, or not to do it; to perform or omit it. And this is ſo manifeſt a Truth, that the moſt ignorant and unskilful Mortals, when they are accus'd of any Omiſſion, or of any Fact, think they cannot bring a fairer Excuſe, than to ſay in the firſt Caſe, *That they could not do it*, and in the other, *that they could not help it*. So that it is to be eſtabliſh'd as a prime Maxim in Morals, That a Man is accountable for thoſe Actions, the Performance, or the Forbearance of which were both in his Power: Or (what comes to the ſame thing) that every Action dirigible by a moral Rule, which a Man is able to do, or not to do, may be imputed to him: And, on the contrary, that whatever neither in itſelf, nor in its Cauſe, was in a Man's Power and Diſpoſal, cannot be rightly imputed to him [1]. Nor is it any Breach of this Rule, that ſometimes a Man is oblig'd to perform a Buſineſs depending on Chance, and conſequently not in his Power. For this Caſe can never happen, unleſs the Man voluntarily takes on himſelf ſuch an Obligation [2]. Thus much therefore is in the Man's Power, to bind himſelf to repair a Damage, proceeding from Cauſes not capable of human Direction. To conclude then, that an Action or Fact ſhould be imputed, it is ſufficient that it was not involuntary, acccording to our Diſcourſe in the preceeding Chapter, §. 10. and that it was ſubject to the Guidance of our Will. But to make an Omiſſion truly *imputable*, 'tis requiſite that there have been both Power and Opportunity for Performance, which Conditions of Power and Opportunity ſeem to conclude theſe four Things, *Firſt*, That the Object be ready at hand. *Secondly*, That we have a commodious Place, where we may neither be hindred by others, nor ſuffer any Evil from them upon our acting. *Thirdly*, That we have a convenient Time, in which we are not call'd to the Diſcharge of more neceſſary Duties, and which is equally ſeaſonable for thoſe who are to concur with us in the Action. And, *Laſtly*, That our natural Powers adminiſter ſufficient Strength for the Buſineſs. When any one of theſe Conditions is wanting without the Fault of the Man, it would be moſt abſurd and unjuſt to lay the Omiſſion of any thing to his Charge. *Cicero de Invent.* Lib. i. Ch. xxvii. *Occaſion or Opportunity is a Part of Time implying a Convenience of doing a thing, or not doing it.* See *Cartes* of the Paſſions. Art. 144, 145, 146.

VI. Thus much being premis'd in general, it will be worth our while to conſider more diſtinctly and in particular, what Things may be imputed to a Man, which proceed from a phyſical Neceſſity, or from any Cauſe placed beyond the Direction of Men. And therefore 'tis a ſimple [1] Practice they tell us of the Kings of *Mexico*, that at the Commencement of their Reign they us'd to promiſe their Subjects, that they'd take Care the Sun ſhould riſe and ſet at due Times; that Rain ſhould fall as often as there was Occaſion; and that the Land ſhould bring forth Fruit. Neither can it be imputed to Man, that natural Cauſes produce this and no other Effect, or that they produce it in this and no other way; as for Inſtance, that the Fire warms, and not cools us. Yet thus indeed the Effects of natural Cauſes furniſh large Matter for Imputation, as their active Force is drawn out, or confirm'd by Man, applying Actives to Paſſives, or exciting their internal Strength by proper Means. On which

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Mr. BARB. *NOTES on* Chap. V. §. v.

[1] *Culpam autem nullam eſſe, cum id, quod ab homine præſtari non potuerit, evenerit.* Cicer. Tuſcul. Quæſt. Lib. iii. Ch. xvi.

[2] See what is ſaid *Lib.* v. *Ch.* ix. following. Sometimes alſo we muſt anſwer for an accidental Miſchance without engaging in it, becauſe we have neglected to do a Thing which we were obliged to do, altho' the Neglect itſelf did not contribute at all to the unforeſeen Accident. See *Lib.* iii. *Ch.* i. §. 6. *Note* 3. and *Lib.* v. *Ch.* v. §. 3. following.

NOTES on Chap. V. §. vi.

[1] This Author ought to have mention'd the Hiſtorian who relates this Fact. Mr. *Titius* (*Obſerv.* 47.) relates a favourable Explication, which a certain Perſon (*viz. Kreb*'s Treatiſe *De Lig. & Lapid. Part.* I. *Claſs* II. *Sect.* ii. §. 1.) gives of this Promiſe. According to him it is the Effect of great Wiſdom, and theſe good Kings would have Men underſtand no more by it than this: *That a Prince by his good Laws, and by the Prudence and Juſtice of his Government, can in ſome meaſure ſo order the Stars and Elements, that they ſhall promote the good of his Subjects.* Upon this Foot their Aſſertion, as abſurd as it may ſeem at firſt Sight, is not altogether without Ground, and proves, that even the *American* Princes are leſs barbarous than many *European*.

Account a Plenty of Fruit is imputed to the Huſbandman, inaſmuch as his diligent Culture obtain'd it from the Earth: Thus the Damage of Fire is imputed to him that kindled it; and thus the varied Colour of *Laban*'s Lambs may be imputed to the Subtilty of his Shepherd *Jacob* [a]. A natural Effect may be farther imputed to a Man as he has mov'd the ſupream Cauſe and Director of all Things to determine [1] ſuch an Effect. Thus the *Three Years Drought* might be imputed to *Elias* [b]. As in fabulous Story a long Drought is ſaid to have ceas'd on the Prayers of *Æacus* [c]. Thus too, the Death of the Men who fell in the Peſtilence [d], might in ſome meaſure be imputed to *David*, tho' not to the Degree of a Murther.

VII. Neither may we impute to a Man the Actions and the Effects of vegetative Faculties which appear in his Body, as they ariſe from his Birth, or from other Cauſes beyond his Diſpoſal. Yet thus much is in a Man's Power, to ſupply thoſe Faculties with convenient or with unſuitable Objects, which may either maintain and cheriſh, or weaken and extinguiſh their Force; as alſo to diſtort and abuſe their proper Organs. Thus he to whom Nature has given a large, a ſound, and an able Body, is liable to no Imputation of Merit on that Score. But to correct a weak Conſtitution by Induſtry and Exerciſe, and to increaſe the natural Powers, gives juſt Occaſion for Commendation; and, on the contrary, to break or deſtroy the ſame Powers by Idleneſs and Petulancy, turns to a juſt Shame and Reproach.

Hence no Man can be fairly reprehended for a weak, or a tender, or a diminutive Body; for diſtorted, or for maim'd Limbs, or for want of Strength, provided that none of thoſe Infirmities were contracted by this Default. [1] *Ariſtotle* talks very pertinently to this purpoſe, *Ethic. ad Nicom. Lib.* iii. *Ch.* vii. Οὐ μόνον δὲ αἱ τῆς ψυχῆς κακίαι, &c. "Not only Faults of the Mind (ſays he) are "Voluntary, but thoſe of the Body too in ſome "Perſons, whom we therefore diſcommend. For "we do not blame thoſe that are naturally deformed, but thoſe who are grown ſo by neglect of "Exerciſe, and by a careleſs way of Life. And "the Caſe is the ſame as to any Meanneſs or Unſightlineſs ariſing from Diſtempers, or from the "maiming of any Part of the Body. For Men will "not reproach, but rather pity his Blindneſs who "had it from Nature, or from a Diſtemper, or from "an honourable Wound: But he will juſtly fall "under univerſal Scorn or Cenſure who has loſt his "Eyes by Drunkenneſs, or by any other kind of "Intemperance." *Plutarch de Audiend. Poet.* ſpeaks to the ſame Purpoſe: Ulyſſes *doth not upbraid* Therſites *with his Lameneſs, his Baldneſs, or his Crookback, but with his Scurrility and Impudence.* Thus the wiſe Poet ſilently derides thoſe who are aſham'd of Lameneſs, Blindneſs, or the like Defects; it being his Judgment, that nothing can be Blame-worthy which is not vicious, and nothing vicious the Cauſe of which is in Fortune, not in our ſelves. *As thoſe who bruſh or ſtrike Cloaths touch not the Body, ſo thoſe who cenſure others for their Imperfections of Birth or of Fortune, vainly and fooliſhly ſtrike the outward Parts, but never reach the Soul, nor thoſe Blemiſhes which really deſerve Reprehenſion and Correction.* Ibid. Add. *Sympoſ.* Lib. ii. Qu. i. Yet it was not without Reaſon, that among the antient *Gauls*, as *Strabo* relates, *Lib.* iv. *The young Men were fin'd for exceeding the Meaſure of their Girdle:* Becauſe they took it for granted, that ſuch a large Paunch, at ſuch early Years, could proceed from nothing elſe but Lazineſs and Gormandizing. So ſays *Nichol. Damaſcen.* de Mor. Gent. *The* Iberians *uſe a Girdle of a certain Meaſure, and whoever ſuffers himſelf to grow beyond thoſe Bounds, is look'd upon as highly infamous.*

The ſame may be ſaid of the other Faculties which Nature, and not our own free Pleaſure, has implanted in us; as that a Man has ſharp or heavy Parts, quick or dull Senſes, a firm or a deceitful Memory; unleſs theſe natural Abilites have been improv'd or impair'd by the Man himſelf. Hither muſt be referr'd that Obſervation of *Ariſtotle* in his Ethicks [e], *Many Things according to our Nature we do and ſuffer, which we are truly conſcious of, and yet which cannot be call'd Voluntary or Involuntary: as to grow old, and to die.* Theſe Things therefore are not proper Matter of Imputation. Neither can the getting of wicked Children be imputed to Parents, provided they have not encourag'd them in their Vices by ill Education. Whence the witty Turn of *Vindex* will not hold in ſtrict Truth, when he ſaid, *That* Nero'*s Mother was juſtly put to Death by her Son, for bringing ſuch a Monſter into the World* [f] [2].

VIII. It's evident likewiſe, That thoſe Things cannot be imputed, which exceed our Strength, either as to the Hindrance or the Performance of them: Provided that this Inability has not been of our own ſinful [1] Procurement. On which Foundation are built thoſe common Maxims, That Impoſſibilities are incapable of Obligation [2]; That no Man can be conceiv'd to have enjoin'd impoſſible Duties in a Law; and that therefore if any ſuch [3] Thing occur in a Statute, or a Co-

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[a] Gen. xxx. 37. [b] 1 Kings xvii. 1. James v. 17. [c] *Apollodor.* Lib. iii. Ch. xi. [d] 2 Sam. xxiv. 13, 17.
[e] Lib. v. Ch. x. [f] *Philoſt. Apollon.* Lib. v. Ch. x.

[1] We muſt explain the Words of our Author, who ſays only, *Ad eum effectum determinandum*, i. e. to determine that Effect; for it appears by the following Examples, and by the Nature of the Thing, that he treats here not only of the Exiſtence of the Effect, but alſo of its Non-exiſtence and Diſcontinuance.

NOTES on §. VII.

[1] *Plutarch*'s *Greek* is, Ὁ Θερσίτης ὑπὸ τοῦ Ὀδυσσέως, οὐ χωλὸς, οὐ φαλακρὸς, οὐ κυρτὸς, ἀλλ' ἀκριτόμυθος λοιδορεῖται —— Οὕτως Ὅμηρος καταγελᾷ τῶν αἰσχυνομένων ἐπὶ χωλότησιν, ἢ τυφλότησιν, οὔτε ψεκτὸν ἡγούμενος τὸ μὴ αἰσχρὸν, οὔτε αἰσχρὸν τὸ μὴ δι' ἡμᾶς ἀλλ' ἀπὸ τύχης γινόμενον. Καθάπερ γὰρ οἱ τὰ ἱμάτια μαστιγοῦντες, οὐχ ἅπτονται τοῦ σώματος, οὕτως οἱ δυστυχίας τινὸς, ἢ δυσγενείας ὀνειδίζοντες, εἰς τὰ ἐκτὸς ἐνσείονται κενῶς, καὶ ἀνοήτως, τῆς ψυχῆς δ' οὐ θιγγάνουσιν, οὐδὲ τῶν ἀληθῶς ἐπανορθώσεως δεομένων, καὶ δήξεως. Plut. p. 35. Ed. Wech. Tom. ii.

[2] The *Greek* is, Τὴν γὰρ μητέρα σὺν δίκῃ ἀπεκτονέναι, ἐπειδὴ τοιοῦτον ἔτεκε.

NOTES on §. VIII.

[1] In this laſt Caſe we may lawfully be treated in the ſame Manner as if we were in a State of acting. Otherwiſe, as ſoon as any Obligation we are under becomes in the leaſt puniſhable, or incommodious, we ſhall find a Way to avoid it, by putting ourſelves on purpoſe into a Condition unable to fulfil it.

[2] *Impoſſibilium nulla obligatio eſt.* Digeſt. Lib. l. tit. 17. [3] See Lib. iii. Ch. vii. §. 2, *&c.* following.

venant, or a *Will*, it is either to be eſteem'd as null, or elſe a more commodious Interpretation of it is to be found out [a]. To this Purpoſe we meet with a pleaſing Paſſage in *Herodotus* [b]; he tells us, that when *Themiſtocles* deſir'd a Supply of Money from the Inhabitants of *Andros*, ſupported by the two ſtrong Goddeſſes *Perſuaſion* and *Neceſſity*, the *Andrians* oppos'd him with two ſtronger Goddeſſes, *Poverty* and *Impoſſibility*. But here it muſt be carefully obſerv'd, that it is one Thing to be *phyſically*, and another Thing to be *morally impoſſible*. The former Impoſſibility lays an Obſtacle, which binds up the Will in ſuch a Manner, that either it cannot break out into Action, or elſe that it ſhall loſe all its Labours and Endeavours. But a moral Impoſſibility lays no Impediment ſurpaſſing the active Power which inheres in the Will, but on the contrary ariſes wholly from the Will itſelf. And in this Manner, we ſay, 'tis impoſſible that all Men ſhould conſpire together in delivering down a Lie to Poſterity, without any Proſpect of Advantage: Or that any Man ſhould lead a Life of ſuch exact Holineſs and Circumſpection [4], as not to offend (at leaſt through the Precipitancy of his Paſſions) in ſome ſmaller Inſtance of Duty. Hence the Author of the Treatiſe *De Principiis Juſti & Decori* [c] infers, *That a Legiſlator cannot indeed enjoin what is phyſically impoſſible, but he may exact Obedience to Things which include a moral Impoſſibility. Becauſe in this he commands nothing contrary to the Liberty of the Will, ſince all the Difficulty of obeying ariſes from the Will itſelf. Thus 'tis not impoſſible for any Man to frame a Lie* gratis; *and if not for any Man, then not for the whole Multitude; and yet 'tis certain that the whole Multitude will not do ſo. In the ſame Manner every Man has the Power of ſpeaking Truth, and conſequently a whole Society or Community; and yet 'tis moſt certain, that a Commonwealth will never be ſo happy, as to have all its Members abſtain from falſe Speeches: yet this Impoſſibility does not take away the Liberty of particular Men, or excuſe them from ſinning. Thus too we ſay, that the fulfilling of the Law is impoſſible, and yet that that Impoſſibility does not injure the Liberty of the Will. For 'tis equally impoſſible for a particular Man to obey* GOD's *Command in all Things, and for a Multitude to abſtain from all manner of Lying: And he is as able to preſerve himſelf from each particular Act of Sin, as the particular Citizens are to keep themſelves pure from Lies; and yet this is never likely to happen in the World.* Which Doctrine, as it is applied to Theological Points, we leave to be diſcuſs'd by the proper Profeſſors. But if it keep within the Bounds of human Courts, it does not appear why this ſhould not rather be admitted, than that Aſſertion of *Grotius* [d], where, ſpeaking of thoſe Sins which ſome call *Sins of daily Incurſion*, he ſays, *It may well be doubted whether ſuch as theſe may rightly and properly be called Sins, becauſe, though we are at Liberty as to the doing each Particular, yet we ſeem to loſe that Liberty, when we conſider them in general.* For how can theſe Failures, taken collectively, eſcape the Nature of Sin, when at the ſame time each Particular of them is acknowledg'd to be ſinful? Tho' indeed ſuch ſmall Slips are in human Cognizance ſcarce look'd upon as puniſhable.

IX. Neither can thoſe Things be imputed which a Man does or ſuffers [1] upon Compulſion: For they will belong, in moral Eſtimation, to him who offers the Force, and he that receiv'd or executed them is look'd upon only as an Object or an Inſtrument. 'Tis a Rule with *Dionyſius Halicarnaſſæus* [e] *That every Thing which is involuntary deſerves Excuſes.* And *Cicero* [f] argues with good Reaſon, when he ſays, *If we are oblig'd to pardon thoſe who hurt us out of Ignorance, we are not bound to thank thoſe who benefit us out of Neceſſity.* Now Compulſion is ſuppos'd to be apply'd, not only when the Principle of Motion is in another Man, who by Force bends the Members of a Perſon, to ſome Action or Suffering, of which the Perſon by ſtruggling and reſiſting, expreſſes his Abhorrence; but likewiſe, when a Man, by the Peril of Death or of any [2] other extream Evil, is put upon the

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[a] *Ovid.* de Pont. Lib. i. El. 7.

———————— *Nulla potentia vires*
Præſtandi, ne quid peccet amicus, habet.

So far can no Degrees of Power extend,
To purge all Frailty from a mortal Friend.

Quinctilian. Inſt. Lib. vi. *Ch.* iii. *We uſually reckon it inhuman to upbraid a Man with his ill Fortune; either becauſe it comes without his Fault, or becauſe it may be the Cenſurer's Turn to ſuffer next.*

[b] *Uran.*

[c] *Velthuyſen, p.* 174.

[d] *Lib.* ii. *Ch.* xx. §. 19.

[e] *Lib.* i.

[f] *De Invent. Lib.* i. *Ch.* xxx.

Mr. BARB. *NOTES* on §. VIII.

[4] Mr. *Hertius* alledges here the Encomium which *Valerius Paterculus* gives *Scipio Æmilianus, viz.* That in all his Life he never did ſpeak or think any Thing, but what was commendable, *Lib.* i. *Ch.* xii.

NOTES on §. 9.

[1] Our Author here ſpeaks of the Extremity that one is reduced to by the immediate Violence of a Perſon, who will force us to ſuffer, or do ſome thing. But he ought alſo to have ſet down what a Man is conſtrained to do by other Circumſtances, which are not leſs preſſing, and no leſs exclude all Imputation. In a word, we ought to reduce to this Head all the Effects of Neceſſity in general, of which we ſhall elſewhere ſee the Benefit, *Lib.* ii. *Chap.* vi. where the Paſſages in the Margin may refer to the Caſes of Neceſſity, which are omitted.

[2] Which he may ſuffer in that very Inſtant, as this Author adds, in his *Abridgment of the Duties of a Man and Citizen, Lib.* i. *Chap.* i. §. 24.

Execution of [3]ſome Enormity to which he is otherwiſe exceedingly averſe; yet ſo that he ſhall not be the Author of the Deed, but the other Perſon who compell'd him to it. Examples of the former kind are, when a Man by Superiority of Strength violently thruſts another upon a third Perſon, or ſtrikes him with a forcible Bend of the other Man's Hand: Or when any one commits a violent Rape upon a Woman that did not provoke his Lewdneſs by her own Fault. Her Body indeed, in this Caſe ſuffers Diſhonour, but the Blemiſh doth not reach her Soul. *The Body is ſtain'd, but the Mind is pure*, ſays *Lucretia* in *Livy*, *Lib.* i. *Ch.* 58. See *Hen. Stephens*'s elegant Diſcourſe on that Story in his *Apolog.* for *Herodot. Ch.* xv. But a Nymph will not have the Benefit of this Interpretation, when with a faint Reſiſtance ſhe lets her Ring be ſtolen off from her [4] *digitus male pertinax*, as *Horace* calls it. An Inſtance of the latter Compulſion may be when a Sergeant, or a Guardsman is commanded to kill a Man whom he knows innocent, under Pain of being immediately kill'd himſelf upon Refuſal: For he can by no Means lie under an *Imputation* in this Caſe, ſince nothing is enjoin'd him but the bare Execution, which in itſelf is agreeable enough to his Perſon and Character, and ought not to be refuſ'd upon the Hazard of loſing his Life: Eſpecially ſince tho' he threw away himſelf, he could not by that Means ſave the other innocent Party. Yet it muſt be confeſs'd, that the bare Execution of ſome Acts is ſo very foul and deteſtable, that it is a generous Bravery for a Man rather to die, than to apply his Body to ſuch Operations, tho' if committed, the Fault of them would not light on himſelf, but on others. To which Caſe the Paſſage of *Ariſtotle* relates, abovecited: An Inſtance of it may be, Suppoſe a Man ſhould be commanded to commit a Rape on his own Mother, which Fact, in *Oedipus*, tho' committed out of invincible Ignorance, yet tormented him ſo, as to make him tear out his own Eyes. But when *Ariſtotle, Ethic. Nicom. Lib.* iii. *Ch.* i. alledges for an Inſtance of a *forced* Action, the doing a *baſe Thing*, upon the Command of a [5]Tyrant who has our Parents or Children in his Hands, and will ſave or kill them, according to our Obedience or Diſobedience; what he then calls αἰσχρόν τι, or a *baſe Thing*, [6] muſt be underſtood in a limited Senſe, ſo as not to reach thoſe more odious Villanies we are now ſpeaking of.

X. *Ignorance* likewiſe takes off all Imputation, ſo far as it renders the Action involuntary [a]. This Point may be illuſtrated from ſeveral Paſſages of *Ariſtotle*'s Morals; *Magn. Moral. Li.* i. *Ch.* xxxiv. Ὅταν μὲν γὰρ ἡ ἄγνοια αἰτία ᾖ τοῦ πρᾶξαί τι, οὐχ ἑκὼν τοῦτο πράττει, &c. “ Whenſoever (ſays “ he) Ignorance has been the Occaſion of doing “ a Thing, that Thing is not done willingly, and “ conſequently cannot be injurious. But when a “ Man is himſelf the Cauſe of his own Ignorance, “ and out of that Ignorance commits a Deed, he “ plainly offers an Injury, and may in Juſtice be ac- “ countable for the Crime. This is the Caſe of “ drunken Men, who if they commit any Diſor- “ der under that Condition, without Diſpute do a “ real Injury, ſince they themſelves have been “ the Cauſes of their Ignorance. For 'twas in “ their Power, whether or no they would tipple “ themſelves ſo far out of their Senſes, as to “ make them (for Example) beat their own Father. “ The ſame Rule will hold in all other Inſtances of “ Ignorance, the Cauſe of which is in the Agent; “ ſo that he who injures another upon the Strength “ of thoſe Pleas, is nevertheleſs properly unjuſt. “ But thoſe Perſons cannot by any Means be called “ *unjuſt*, who offend out of Ignorance, not of their “ own procuring. For ſuch Ignorance is to be

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[a] *Xenophon.* Cyropæd. Lib. iii. *I take all thoſe Things which Men commit thro' Miſtake, to be done againſt their Inclination and Deſign.* Euripid. Hippol. Coronat. ver. 1334. *Your Ignorance and Error cleanſe the Deed from ſinful Stain.*--------

Mr. Barb. *NOTES.*

[3] Our Author then believes, that this laſt ſort of Compulſion, as well as the firſt, excludes all Sorts of Imputation. He explains himſelf better upon this Head, in his *Abridgment of the Duties of a Man and Citizen, Lib.* i. *Ch.* i. §. 24. where he maintains, That we can have no more Ground to impute the Actions committed in the like Circumſtances, than to the Spear, or Ax, that is uſed to kill an Enemy with; *At leaſt*, ſays he, *whoever is reduced to that Neceſſity, is not under any Obligation to ſacrifice himſelf for the Perſon to whom he ſees himſelf conſtrain'd, upon Peril of Life, to do ſome great Miſchief.* I own that this Sort of Compulſion much leſſens a Sin, but yet it doth not ſeem to me (as Mr. *Titius* remarks, *Obſerv.* xl. and xlviii.) to free it from all Imputation at the Judgment-Seat of God. For indeed the Inſtance of the Spear and Ax is not well apply'd, for they are Inſtruments purely paſſive; whereas a Perſon forced by the Threatnings of ſome great Evil, without any phyſical and irreſiſtible Violence, acts with a kind of Will, and conſents in ſome Manner to the Action, viſibly evil, which he performs. So that tho' before a civil Judicature he ought not rigorouſly to be puniſhed for the like Action, he can't attempt it without Hurt to his own Conſcience. Here alſo we may apply thoſe Principles which we ſhall lay down, *Lib.* ii. *Ch.* vi. §. 2, 3, following, for in the Example which our Author there alledges, of an Officer, who was commanded, under Pain of being put to Death himſelf, to put a Perſon to Death, for a Crime of which he knew him innocent, the Evil he does to ſuch an one, is as great as if he would warrant it himſelf, otherwiſe this Execution were an uncertain Means, becauſe it depends entirely on him who laid the Obligation on him. And who is there that can aſſure himſelf, that the Perſon who forces a Man to do ſuch Things, ſhall have a greater Reſpect for him that executes his Orders, than for him againſt whom he has uſed this Force? This laſt Reaſon has yet a great Strength, as any one may ſee, when a Son is forced to lie with his Mother: An Action which our Author ſeems to take ſome Pains to excuſe, when he is treating of the Caſe of Compulſion. See what is ſaid upon *Lib.* ii. *Ch.* vi. §. 2. and upon *Lib.* viii. *Ch.* i. §. 6. *Note* 4. and Mr. *Thomaſius*'s *Divine Civil Law, Lib.* ii. *Ch.* ii. §. 149, and 161, *&c.* as alſo *Wherner's Elements of the Law of Nature and Nations, Ch.* ii. §. 9, 10.

[4] The Author refers to theſe Words of *Horace, Lib.* i. *Od.* ix. *Pignuſque direptum Lacertis, aut Digito male pertinaci.* See alſo to the ſame Purpoſe, *Lib.* ii. *Od.* xii.

--------------- *Aut facili Sævitia negat,*
Quæ poſcente magis gaudeat eripi.

[5] Mr. *Puſendorf* unwarily followeth a bad *Latin* Tranſlator, who has rendred theſe Words ill, though plain enough in themſelves. They that do it, ſhall eſcape, and they that will not do it, ſhall periſh, as if the *Greek* had been, πράξαντες, whereas it is, πράξαντος, *He that does it.* The *Engliſh* Tranſlator has amended this Fault.

[6] But why muſt this Caſe be excepted, if our Author's Principles be ſound? Or what Rule doth he give us to diſtinguiſh theſe ſorts of Things, where Force excludes not Imputation? The Truth is, we muſt either excuſe every Act of Compulſion, how infamous ſoever it be in itſelf, or account every Thing vicious, which we cannot do innocently of ourſelves, and in our own Name, let the Threatnings of him that would conſtrain us, be never ſo terrible. See *Note* 3. of this Paragraph. The Change of our Author, and the ſmall Connexion there is between his Notions in this Matter, ſhew that he had not conſidered it with ſufficient Attention.

"eſteem'd Natural; as when little Children ſtrike "their Parents, their natural Ignorance, which is "the Cauſe of the Fact, hinders it from being "ſtil'd *Unjuſt*; the Ignorance not at all depending "on their own Power". So alſo *Seneca Phœniſ. vel Thebaid.* ver. 249.

——— Aliquis intra viſcera
Materna letum præcocis fati tulit;
Sed nunquid & peccavit?

——— An Infant with untimely Fate,
Dies in the Womb before the Gift of Light;
And has it therefore ſinn'd?

But this muſt be extended no farther than *human* Conſideration.

But in reference to Infants, it is farther obſervable, that we chide and beat them for ſome Actions, not becauſe in human Judgment they be ſtrictly Crimes, but meerly for the ſake of Amendment, that they may not prove troubleſome to others by ſuch Tricks, or may not get an ill Habit when they are little, and ſo keep it when they are grown up. And the ſame muſt be ſaid of delirious Perſons, provided their Diſeaſe was not occaſioned by their own Fault. For the Blows given to one in this Condition, have no more the proper Nature of a Puniſhment anſwering to a Fault, than thoſe we give to a kicking Horſe, to break him of that Cuſtom. *Vid. Anth. Matthæ. de Crimin. Proleg. Ch.* ii. §. 5, 6, 7, 8.

But he who is the Cauſe of his own Ignorance, and who has wittingly and willingly hindred himſelf from the Knowledge of thoſe things, which he might, and ſhould have known, is in the ſame Caſe as if he had offended upon Knowledge and Deliberation. *Ariſtot. Magn. Moral. Lib.* i. *Ch.* ix. *We then blame diſeas'd, or deform'd Perſons, when we judge them to have been the Authors of their own Diſtemper or Diſfigurement; becauſe it was in their Power to have kept ſound and perfect.*

And more fully, *Ethic. Lib.* iii. *Ch.* vii. *Legiſlators correct and puniſh thoſe who commit Evil, provided they did it neither upon Violence and Compulſion: nor out of ſuch Ignorance as they did not themſelves occaſion. For otherwiſe, Ignorance it ſelf is puniſhable, when contracted by the Perſon's own Fault. Hence there is a* [4] *double Puniſhment ordain'd againſt Drunkards, becauſe the Spring of that Vice is in a Man's ſelf, he having the Power of avoiding it; and therefore what he doth through Ignorance in that Condition, is nevertheleſs to be charged upon him. In like manner they puniſh thoſe who plead Ignorance of the Laws, when the Points were eaſy, and ſuch as ought to have been known. The Caſe is the ſame with all that are ignorant by their own Neglect, they being Maſters of their own Powers, and capable of Diligence and Application.* Ignorance of Univerſals, and that which we were oblig'd to know, does not take off Imputation; but only Ignorance of Particulars, and of what concerns the preſent Fact. *Ariſtot. Ethic. Lib.* iii. *Ch.* ii. *He that is ignorant of his Duty or Intereſt, ought not to be ſaid to act againſt his Will; for Ignorance upon Choice doth not produce an involuntary, but a wicked Action. An Ignorance of Univerſals renders Men liable to Reprehenſion; but an Ignorance of Particulars, or of the Circumſtances of the Action, deſerves Pity and Pardon, in as much as the Perſon thus offending doth truly proceed involuntarily.* An Example of this Ignorance is thus given by *Tully, de Invent. Lib.* ii. *Ch.* xxxi. *There was a Law in ſome certain Place, forbidding to ſacrifice a Calf to* Diana; *now a Company of Mariners being in Diſtreſs at Sea, made a Vow that if they gain'd the Port which was now in ſight, they'd offer a Calf to the Deity who preſided there. It happen'd that in that very Port there ſtood a Temple of* Diana, *to whom no Calf was to be offer'd by the Laws; but the Mariners not being acquainted with theſe Laws, offer'd the Calf which they promis'd: and upon this Fact they are accus'd*[5].

If an Action be done without any malicious Deſign, and not with Ignorance voluntarily contracted, but ſuch only as crept in by Inconſideration and Inadvertency[a], the Imputation is not altogether taken away, yet it is conſiderably diminiſhed. And thus far only may we allow the Saying of *Quinctilian, Inſt. Lib.* i. *Ch.* vi. *Even an Error is commendable in thoſe who follow great and noble Guides.* Vide *Ariſtot. Ethic. Lib.* v. *Ch.* x. Hither we may refer the Caſe propos'd by *Ariſtotle*[b], of a Woman that gave a Love-potion to her Gallant, of which he died. Now the *Athenian* Judges abſolved the Woman from this Indictment, becauſe ſhe did the Fact undeſignedly, and only miſs'd the Effect of her Potion, and procur'd his Death inſtead of his Love, which was her only Aim. But to make this Sentence equitable, it muſt have been ſuppos'd as a Principle, that the Woman never ſo much as thought the Potion ſhe adminiſtred was any way hurtful. For otherwiſe it were more rational to proceed according to [6] the Law of the *Roman* Lawyers. Add. *Anth. Matth. de Crimin. ad l.* 48. *D. tit.* 5. *Ch.* v. §. 6.

XI. Farther, Since the Images form'd by the Fancy in Sleep are not in our Power, nothing can be imputed to us which we ſeem to do in a Dream,

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[a] *Theſe are properly the* ἁμαρτήματα *of* Ariſtotle.

[b] *Magn. Moral. Lib.* i. *Ch.* xvii.

Mr. Barb. NOTES on §. x.

[4] The one for being drunk, and the other for having done wickedly in their Drunkenneſs, for he treats not of all Sorts of Drunkenneſs, but only of ſuch as do ſome Injury in their Wine. *Ariſtotle* alludes to a Law of *Pittacus*, of which he ſpeaks, *Polit. Lib.* ii. *Chap.* xii. Our Author quotes it, *Lib.* viii. *Chap.* iii. §. 21. where we ſhall ſee upon what it is grounded.

[5] *Apud quoſdam lex erat, ne quis Dianæ vitulum immolaret. Nautæ quidam, cum adverſâ tempeſtate in alto jactarentur, voverunt, ſi portu---potiti eſſent, ſe vitulum immolaturos. Caſu erat in eo portu fanum Dianæ, &c.*

[6] The *Roman* Law is this, That when one gives a Potion to cauſe a Miſcarriage, or to cauſe Love, although the Party who gives it has no Deſign to do Evil, nevertheleſs by reaſon of its Conſequences, he ſhould be condemned, beſides ſome Part of his Goods Confiſcated, either to the *Quarries*, if he were of a mean Condition, or to Baniſhment into ſome Iſle, if he were of a good Family. But if the Man or Woman, who had taken the Potion, died of it, he was condemned to Death without Mercy, *Digeſt. Lib.* xlviii. *Tit.* xix. *de Pœnis Leg.* xxxviii. §. 5. In fine, that we may have a juſt Idea of invincible Ignorance, as to Imputation, let that be remembred which we have obſerved *Chap.* iii. §. 10. *Note* 2. For Ignorance purely concomitant, in the Manner we have explained it, be it vincible, or invincible, doth not hinder Imputation, and to know whether it be invincible or no, we muſt judge according to common Eſtimation, *Titius Obſerv.* xlv. See *Chap.* vii. §. 16. following.

only as far as by thinking on ſuch things [1] in the Day-time with Delight, we have fix'd the Ideas deeply in our Minds [a]. Hence the Man whom *Tacitus* [b] ſpeaks of, and reports to have ſeen the Emperor *Claudius* in his Sleep, cover'd with a *Crown made of Ears of Corn*, was not guilty of any Crime. And the Fiſherman in *Theocritus* [c] entertain'd a very vain Scruple, when he appear'd concern'd for an Oath he had made in his Sleep, never to venture out again to Sea [d]. Neither was *Julius Ceſar* guilty of Inceſt, upon account of his ſtrange Dream, recorded by *Sueton.* [e]. Yet *Byblis* was not altogether innocent, when, as *Ovid* tells the Story, *Met*. ix. 469.

Sæpe videt, &c.

In Sleep ſhe oft does the lov'd Shadow ſeem
To graſp, and joys, yet bluſhes in her Dream.
Mr. *Oldham*.

Nor is *Plutarch* [f] much out of the way, when he maintains, that a fair Argument may be drawn from a Man's Dreams, as to the Temper and Compoſure of his Mind: and therefore 'twas a good Saying of *Epicurus*, That *a wiſe Man will be like himſelf, even in his Sleep* [2]. *Diog. Laert. Lib*. x. Some apply to this Purpoſe *Pſal*. xvii. 3. *Vid. Claudian Præf. ad Lib*. iii. *de Raptu Proſerp. Theocrit Idyll*. 22.

——————Καὶ γὰρ ἐν ὕπνοις
Πᾶσα κύων ἄρτως μαντεύεται.—

The hungry Dog preſages in his Dream
A mighty Spoil of Cruſts.——

XII. Laſtly, It is againſt Reaſon, that the *Imputation* of any future Crime ſhould be as it were *antedated*, or that it ſhould affect us backwards: unleſs, perhaps, the future Crime ſhould depend on ſome [1] paſt or preſent Act of ours, as a neceſſary Effect does on its Cauſe: For it is a common thing to impute the Effect to him to whom the Cauſe properly belong'd. Indeed it is not at all abſurd, that by *Imputation* of *Favour* a future Deed ſhall procure ſome good Thing to the Agent, or to ſome Body elſe, long before it is perform'd. For ſince any Man may (if he pleaſes) do a Kindneſs *gratis*, it is certainly in the Power of a Benefactor, who knows what will afterward happen, to confer a preſent Favour under ſome Term and Condition hereupon to be fulfilled. But ſince ill Actions cannot be imputed, but by way of Debt or Guilt, it would be the higheſt Abſurdity, to reckon ſo far backwards, as to lay Imputation on Perſons who neither had any Knowledge of Futurity, nor any Obligation or Power to hinder the Thing from being done; nor, laſtly, any Communication of Action with the Author of the Fact [g] [2].

XIII. Beyond theſe Exceptions no Human Action ought to be reckon'd involuntary or incapable of Imputation, tho' to undertake it be never ſo contrary to right Reaſon, or tho' any Diſorder of Mind violently hurry us into the Commiſſion. Indeed *Plato* [h] lays it down for a Rule, That "in "thoſe Injuries which 'tis impoſſible to repair, no "Man is voluntarily injurious, becauſe no Man is "willing to admit the greateſt of Evils into any "of his Concerns, and much leſs into thoſe Things "which are moſt dear to him, and moſt excellent "in themſelves; ſuch as is his Soul [i]." To the ſame Purpoſe *Ariſtippus* ſays in *Diogenes Laertius*, "That all Miſtakes (by which he means all ſmaller Offences) "deſerve Pardon, becauſe no Perſon is "miſtaken willingly, but as he is compell'd by

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[a] *Nonn. Dionyſ. Lib*. iv. ——————Ἀντίτυπον γὰρ
Ἔργον ὅπερ τελέει τις ἐν ἤματι νυκτὶ δοκεύει.

——————Fancy's idle Play
Mimicks by Night the Labours of the Day.

[b] *Ann*. 11. *Ch*. iv. *See Ammian. Marcellin. Lib* xv. *Ch*. ii. [c] *Idyll*. 22. [d] *See* Evagrius'*s Oath made in a Dream, in* Sozomen, *Hiſt. Eccl. Lib*. vi. *Ch*. xxx. [e] *Cæſ. Ch*. vii. Nam viſus erat per quietem matri ſtuprum intuliſſe. [f] *De Profect. Virtut. Sent.* [g] *Cicero de Invent. Lib*. i. *A* Remote *Argument is ſuch as depends on a Cauſe and Principle too far diſtant. For Inſtance, If* P. Scipio *had not married his Daughter to* Tiberius Gracchus, *by whom ſhe brought forth the young* Gracchi, *the Seditions had been prevented which thoſe Brothers rais'd in the State: And therefore all thoſe Diſturbances are chargeable on* P. Scipio. [h] *De Leg. Lib*. v. [i] *Vid. Timæum, P.* 1085. & *Marſil. Ficin. Præfat. ad Plato, Lib*. ix. *de LL.* & *Apulei, de Philoſophia.*

Mr. Barb. *NOTES on* §. XI.

[1] See what Mr. *Bayle* ſays, concerning ſuch as have dreamed that they were preſent at the Meetings of Magicians and Sorcerers, in his *Anſwer to the Queſt. of a Provinc. Tom*. 1. *P*. 304, 305.

[2] Some of theſe Quotations of our Author are not much to the Purpoſe. He puts the Third Book of *Claudian de Raptu Proſerp*. for the Second, and one Work for another; for his Quotation is taken out of his Preface to his Poem in VI. *Conſul. Honori. Omnia quæ ſenſu volvuntur vota diurno, Pectore ſopito reddit amica quies*. See *Lucretius Lib*. iv. ver. 959, &c. and *Cicero*'s *Somn. Scip. Ch*. i. Here he ought to have ſpoken of the Actions of ſuch as walk in their Sleep, who have beaten, wounded, and killed others, while they were in that State. The Canon Law in the *Clementines* propounds ſuch a Suppoſition, and determines, that their Actions are involuntary, and conſequently not puniſhable. *Si furioſus, aut infans, ſeu dormiens hominem mutilet, vel occidat, nullam ex hoc irregularitatem incurrit, Leg. de Homicid. vol.* & *caſ. Lib*. v. *Tit*. 4. But Mr. *Hertius* adds, with Reaſon (in his Treatiſe *De Paræm. Jur. Germanic. Lib*. iii. *Paræm*. 1. §. 4.) That if a Perſon that walks in his Sleep, being advertiſed of what he does in his Sleep, does not ſecure his Arms, and take other neceſſary Precautions to hinder him from doing any Miſchief whatſoever, he is not excuſable. See *Tiraquel. de Pœn. temper. Cauſ*. 5. Mr. *Thomaſius* has publiſhed a Treatiſe of the Laws about Sleep and Dreams, which is the XI. of his Diſputations held at *Leipſik*, and are collected into one Volume, Printed 1695.

NOTES on §. XII.

[1] 'Tis in the Original, *Preſent or Future*, which is a plain Miſtake, and ought to be corrected thus, *Preſent or Paſt*, for that a future Crime be imputed by way of Retroſpection, upon the account of ſome Action, which it is neceſſarily conſequent upon, that Action muſt neceſſarily be produced. This is ſo true, that the Author himſelf, in his *Elements of Univerſal Civil Law, P*. 368, from whence theſe Words are copied, expreſſes himſelf exactly ſo. Neither the *Engliſh* Tranſlator nor Mr. *Hertius* were aware of this Miſtake, which quite ſpoils the Senſe.

[2] *Remotum eſt, quod ultra quàm ſatis eſt, petitur, hoc modo: Quod ſi non P. Scipio Corneliam filiam Tiberio Graccho collocaſſet, atque ex eâ duos Gracchos procreaſſet, tantæ ſeditiones natæ non eſſent; quare hoc incommodum Scipioni aſcribendum videtur*. Cicero de Invent. Lib. i. Ch. xlix. See alſo the Thought of *Vindex* above, §. 7.

"ſome Perturbation of Mind." And the Emperor *Antoninus* frequently advanceth the like Doctrine [a]. But *Ariſtotle* hath in many Places refuted this Opinion. As when [b] he recites the following Argument of *Socrates* [1], deſign'd to prove, that *it was not in our Power whether we would be good or bad:* "Becauſe, ſuppoſing we ſhould aſk any one, "whether he had rather be juſt or unjuſt, no Man "would chooſe Injuſtice; whence it ſhould appear, that if ſome Men are wicked, they are not "wicked of their own Accord, and conſequently "none are of their own Accord good." In Confutation of which *Ariſtotle* hath us'd theſe Reaſons; "That it would be abſurd for a [2] Lawgiver to "enjoin good Actions, and to forbid and to puniſh Evil, unleſs both were ἐφ' ἡμῖν, *in our "Power:* And that otherwiſe there would be no "manner of Cauſe why Virtue ſhould meet with "Praiſe, or Vice with Diſgrace and Reproach. In another Work [c] he handles the Point more at large, and with good Reaſon [3] rejects that common Argument of the *Stoicks*, *All deſire and follow what appears good to them; but now no Man is Maſter of his own Fancy, but the Ends he purſues appear to him juſt, according as he is inclin'd and diſpos'd.* For in ſpight of this Objection, the Underſtanding of what is juſt, and what unjuſt, muſt be acknowledg'd both to be in the Power of Man, and to be attainable without much Difficulty or Labour [d]. In the ſame Place *Ariſtotle* well obſerves, that as Ignorance contracted by our own Fault doth not render an Action involuntary, ſo neither can an ill Habit, or a Mind corrupted by Frequency of ſinning [4]. "If (ſays he) a Man, "not out of Ignorance, does Things which "may denominate him unjuſt, he is voluntarily, unjuſt; but he cannot, at his Will and "Pleaſure, turn from unjuſt to juſt again (but this we are to underſtand [5], either in a compound Senſe, *i. e.* that he cannot be juſt and unjuſt at the ſame Time; or elſe in this Meaning, that the bare Will cannot preſently aboliſh a confirm'd Diſtemper of the Mind; tho' by long and earneſt Endeavour it may be overcome) "no more than "a ſick Man can be ſound again when he pleaſeth, tho' his Sickneſs, perhaps, was voluntary, "occaſion'd either by his intemperate Way of "Life, or by his Diſobedience to the Orders of "his Phyſician: Such a Perſon at firſt had it indeed in his Power not to be ſick; but when he "hath once neglected his Health, it is not in his "Power to reſtore it: In the ſame Manner, as "one, who hath thrown a Stone out of his Hand, "cannot recover it again, though at firſt he had "the Power of throwing or not throwing it. "Thus the unjuſt and the intemperate, at firſt "might have been otherwiſe, and therefore were "voluntarily ſuch, but being once under thoſe "Conditions, they are not at Liberty to be without them; that is, before they have reform'd "and corrected themſelves [6]".

It may not be amiſs to caſt an Eye upon what the

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[a] *Lib.* iv. §. 3. *Lib.* vii. §. 22, 62. *Lib.* viii. §. 14. *Lib.* xi. §. 18. [b] *Magn. Moral. Lib.* i. *Ch.* ix. [c] *Ethic. Lib.* iii. *Ch.* vii. [d] *Vid Euſtrat. ad loc.*

Mr. BARB. *NOTES on* §. XIII.

[1] Σωκράτης ἔφη, οὐκ ἐφ' ἡμῖν γενέσθαι τὸ σπουδαίους εἶναι ἢ φαύλους· εἰ γάρ τις, φησὶν, ἐρωτήσειεν ὅντινα οὖν, πότερον ἂν βούλοιτο δίκαιος εἶναι, ἢ ἄδικος, οὐθεὶς ἂν λέγοιτο τὴν ἀδικίαν ——— δῆλον ὡς εἰ φαῦλοί τινές εἰσιν, οὐκ ἂν ἑκόντες εἶησαν φαῦλοι· ὥστε δῆλον ὅτι οὐδὲ σπουδαῖοι, *Magn. Moral. Lib.* i. *Ch.* ix. We may obſerve, that there is ſomething of Truth in this Notion, *viz.* That ordinarily Men do not ſin for nothing, nor do any ill Thing purely and ſimply for Evil-doing. 'Tis a common Maxim uſed by *Saluſt*, *Men are wicked for Rewards, take away them, and ſcarce any Man will do Evil. Orat.* 2. *de Repub. Ordinan.* See *Lib.* iii. *Ch.* i. §. 1. *Note* 5. following, and *Lib.* viii. *Ch.* iii. §. xix. *Note* 1, 2. The Uſe of this Principle is to make us merciful to our Neighbours Faults, a Conſequence which the Emperor *Antoninus* draws from moſt of the foregoing Places; but when we deal with our ſelves, as we never are ſevere to our own Faults, let us turn the Balance, and always ſay, as *Max. Tyrius*, though a *Platoniſt*, expreſſes himſelf pithily and in a few Words. Ἑκούσιον ἡ μοχθηρία ——— μισεῖται τὰ ἑκούσια *Diſſert.* xli. *p.* 426. *Edit. Davis.*

[2] The *Greek* of *Ariſtotle* runs thus: Ὁ δὴ τοιοῦτος λόγος οὐκ ἔστιν ἀληθής· διὰ τί γὰρ ὁ νομοθέτης οὐκ ἐᾷ τὰ φαῦλα πράττειν, τὰ δὲ καλὰ ϗ σπουδαῖα κελεύει; ϗ ἐπὶ μὲν τοῖς φαύλοις ζημίαν τάττει, ἂν πράττῃ· ἐπὶ δὲ τοῖς καλοῖς, ἂν μὴ πράττῃ; καί τοι ἄτοπος ἂν εἴη ταῦτα νομοθετῶν, ἃ μὴ ἐφ' ἡμῖν ἐστὶ πράττειν· ἀλλ' (ὡς ἔοικεν) ἐφ' ἡμῖν τὸ σπουδαίοις εἶναι, ϗ τὸ φαύλοις, ἔτι δὲ μαρτυροῦσιν οἵ τ' ἔπαινοι ϗ ψόγοι γινόμενοι· ἐπὶ μὲν γὰρ τῇ ἀρετῇ ἔπαινος, ἐπὶ δὲ τῇ κακίᾳ ψόγος· ἔπαινος δὲ ϗ ψόγος οὐκ ἐπὶ τοῖς ἀκουσίοις. *Ariſt. Mag. Mor. Ch.* ix.

[3] The *Greek* is, Εἰ δέ τις λέγοι, ὅτι πάντες ἐφίενται τοῦ φαινομένου ἀγαθοῦ, τῆς δὲ φαντασίας οὐ κύριοι, ἀλλ' ὁποῖός ποθ' ἕκαστός ἐστι, τοιοῦτο ϗ τὸ τέλος φαίνεται αὐτῷ. *Ethic. ad Nicom. Lib.* iii. *Ch.* vii. He anſwers to this, That as every one is himſelf the Cauſe of that Diſpoſition which cauſes Things to appear to us after a certain Manner, ſo he is in ſome Senſe the Cauſe of that Appearance, as theſe Words import, εἰ μὲν οὖν ἕκαστος ἑαυτῷ τῆς ἕξεώς ἐστί πως αἴτιος, ϗ τῆς φαντασίας ἔσται πως αὐτὸς αἴτιος. See *Euſtratius*'s Comment on the Place.

[4] The *Greek* is, Εἰ δὲ μὴ ἀγνοῶν τις πράττει, ἐξ ὧν ἔσται ἄδικος, ἑκὼν ἄδικος ἂν εἴη· οὐ μὴν ἐάν γε βούληται, ἄδικος ὢν παύσεται, ϗ ἔσται δίκαιος· οὐδὲ γὰρ ὁ νοσῶν, ὑγιής· ϗ εἰ οὕτως ἔτυχεν, ἑκὼν νοσεῖ, ἀκρατῶς βιοτεύων, ϗ ἀπειθῶν τοῖς ἰατροῖς· τότε μὲν οὖν ἐξῆν αὐτῷ μὴ νοσεῖν· προεμένῳ δὲ, οὐκ ἔτι· ὥσπερ οὐδ' ἀφέντι λίθον, ἔτι αὐτὸν δυνατὸν ἀναλαβεῖν· ἀλλ' ὅμως ἐπ' αὐτῷ τὸ βαλεῖν, ϗ ῥῖψαι· ἡ γὰρ ἀρχὴ ἐπ' αὐτῷ· οὕτω δὲ ϗ τῷ ἀδίκῳ, ϗ τῷ ἀκολάστῳ, ἐξ ἀρχῆς μὲν ἐξῆν τοιούτοις μὴ γενέσθαι· διὸ ἑκόντες εἰσί· γενομένοις δὲ οὐκέτι ἔξεστι μὴ εἶναι. *Ethic. Nicom. Lib.* iii. *Ch.* vii.

[5] That is to ſay, that Sinners, as ſuch, can't deſire to be good Men. See the *Art of Thinking*, *Part.* iii. *Ch.* xviii. §. 6.

[6] Now that a Man may hinder himſelf from yielding to a Paſſion, and may reform an ill Habit at length, if he pleaſes to take the Pains, appears not only from the ſecret Checks which he finds in himſelf when he ſins, and the inward Senſe he has of the Freedom of Will by which he acts, but alſo by Experience. It oftens happens, that in the very Moment when a Man offends, the Preſence of ſome conſiderable Perſon, or of a Magiſtrate, who has Power to puniſh the Action, is of Force to prevent the Commiſſion; and there are ſome Men who can curb themſelves in, when their Paſſions are ſtrongeſt: Sometimes alſo a ſmall Thing is able to make us reſiſt a Temptation. Suppoſe, for Example, a Drunkard by Profeſſion, being in perfect Health, and free from all Cares, comes thirſty into a Tavern, where he finds his Companions with Glaſs in Hand, who doubts, but that upon a Wager, he could, and would reſiſt all Allurements of the Objects which might tempt him, and the moſt earneſt Entreaties of his Comrades? Since then the Hopes of a ſmall Gain, or a little Vainglory, is able to oblige him to abſtain from a Thing he loves ſo well, why may he not be able, by little and little, wholly to abſtain from it, being moved with better Arguments, and a Principle of Virtue? It is certain, at leaſt, that if a Prince reſolves to make ſevere Laws againſt Drunkenneſs, and ſees them well executed, he'll ſoon put a Stop to that Vice. 'Twas by this Means that the Madneſs of Duelling, not long ſince ſo very common in *France*, *Brandenburg*, *Saxony*, &c. is almoſt quite laid aſide, becauſe of the ſevere Prohibitions of that pernicious Cuſtom; and we ſhould ſee fewer Examples of it, if the Laws againſt it were not eluded, by making a Duel paſs for a ſingle Rencounter.

See

the Author of the Treatiſe *De Principiis Juſti & Decori*, *p.* 165, &c. hath advanced on the Subject of moral Habits. "Thoſe moral *Habits* which "we commonly call Evil, are not (ſays he) really "[7] Sins, nor worthy of Puniſhment, if conſi"der'd in themſelves; becauſe they do not touch "the Effect with any moral Cauſality, ſo long "as they continue *Habits*, but only as they break "out into *Acts*. And if they prove a Hindrance "to Virtue, this is done by an *elicit Act* of Mens "Will, which Will is then the Cauſe of the "moral Vice. But to eſtabliſh a moral Cauſe ſu"perior to the Will, is to take away the Nature "of that Faculty, it is to turn one *elitit* into an "*enjoin'd* Act, and to attribute to Habits an ac"tual Efficacy of operating without any Opera"tion. For we operate only by the Will, and "nothing truly moral can work before the *elicit* "Act of that Power, from which alone proceeds "the Morality of any Performance. For an ill "*Habit* before the Act of the Will, is only a "*phyſical* Thing, or a *Mode* of the Soul; but "when the Soul works ſinfully by the Will, "then the *Habit* ceaſeth, and is ſuperſeded. The "Efficacy by which ill Habits diſpoſe the Mind "to ill Actions, is different from that (for In"ſtance) by which lewd Diſcourſe inſtils Wan"tonneſs into the Minds of the Hearers: Becauſe "that Diſcourſe may be properly ſaid to *work* an"tecedently to the Will of him to whom it is ap"plied, though the Effect doth not always follow." Which abſtruſe Doctrine may fitly enough be explained by this Similitude: Splayneſs of Foot in itſelf, and as long as the Foot reſts, is not a Fault againſt the Rules of Dancing, but when the Spark makes an ill Step; the moral Cauſe of that Miſcarriage is not the *turning out of the Toes too far*, conſider'd in itſelf, but the Will of him that hath ſo awkwardly mov'd them.

The ſame Author adds, That "the Reaſon why "we hate ill Habits, is partly becauſe the Perſons "got them by ill Actions, and partly becauſe they "are more prone to ill Actions on the Account of "them:" And that *tho' they are Diſeaſes of the Mind, yet they do not deſerve Puniſhment in themſelves, but becauſe they were voluntarily contracted*. As if we ſhould ſay, when we beat an unlucky Boy that puts out his Ankle by a wanton and negligent Leap, the Reaſon why we beat him, is not the putting out his Ankle (*in itſelf*) but the idle Leap that caus'd it.

XIV. A Man is not only liable to have his own Actions imputed to him, but likewiſe the Actions of other Men. Yet this cannot rightly be, unleſs he has ſome way or other efficaciouſly concurr'd in their Production. For otherwiſe Reaſon will never ſuffer that the Effect of a moral Action ſhould be transferr'd from one to another; unleſs this other Perſon had ſome Influence on the Action, by ſome Performance, or ſome Omiſſion of his own. *Arrian. Epict. Lib.* i. *Ch.* xxviii. [1] *No Man ſuffers for the Fact of another.* Marc. Antonin. *Lib.* viii. §. 53. *Unto my Free-will my Neighbour's Free-will (as his Life, or his Body) is altogether indifferent. For although we are all made one for another, yet have our Minds and Underſtandings each of them their own proper and limited Juriſdiction. Elſe another Man's Wickedneſs might be my Evil; which* God *would not have, that it might not be in another Man's Power to make me unhappy.* Thus when a Sound arrives at our Ears againſt our Conſent, the bare *Hearing* can be no Crime, if we proceed no further; unleſs, as [2] *Lucian De Imagin.* ſpeaks, *You fanſy any Crime in the bare Act of Hearing.* Though ſometimes indeed a quiet and ſilent Hearing is conſtrued as a Token of Conſent. And 'twas on this Account that the brave *Germanicus*, when on the News of *Auguſtus*'s Death, his ſeditious Soldiers offer'd him the Empire, ſtarted immediately in Confuſion from his Seat of Command, *as if he had been already tainted with Rebellion*, Tacit. Annal. *Lib.* i. *Ch.* xxxv. So alſo [3] *Themiſt. Orat.* xix. *Heretofore, in Crimes of this ſort, no Diſtinction was made between Misfortune and Guilt: it being judg'd as heinous to hear a villanous Propoſal, though againſt one's Will, as to contrive the Plot, or to attempt the Execution. But this was indeed to cenſure and reproach Nature for framing our Ears flat and open, and for not putting it in our Power to cloſe and contract them, as we do our Eyes or our Mouth: ſince theſe alone, of all our Inſtruments of Senſe, are plac'd beyond our Will and Command, lying ready to receive of Neceſſity every Thing that flows in, like a Houſe without Gates or Doors. But you at length, have reſtor'd our Faculty of Hearing to its juſt Character of Innocence.*

Sometimes, then, it happens that an Action is not *imputed* to the immediate Performer of it, but to him who commanded it to be done. As when a Superior, under the Penalty of the ſevereſt Evils, and ſuch as he is really able to inflict, enjoins a Subject the bare Execution of ſome Deed. Thus,

Mr. Barb. *NOTES.*

See *Chap.* iv. §. 7. *Note* 2. foregoing, and Mr. *Clerc's Ontology*, *Chap.* xiii. §. 4. In a word, we may ſay, with an antient *Greek* Poet, That it is, in truth, hard to reform an ill Habit, that is become almoſt natural, but not impoſſible, ſince we have ſeen ſeveral Perſons reform their Manners by good Advice given them by others, as his Words ſhew,

Τὸ γὰρ ἀποστῆναι χαλεπὸν
Φύσεως ἣν ἔχει τις ἀεί.
Καί τοι πολλοὶ ταῦτ' ἔπαθον.
Ξυνόντες γνώμαις ἑτέρων
Μεταβάλλοντο τοὺς τρόπους.
Ariſtoph. Veſp. ver. 1446.

[7] Very well, but they are anſwerable for their evil Diſpoſitions, becauſe they have brought them on themſelves, by their own Fault. In ſhort, all theſe Reaſonings contain nothing in them but the idle Speculations of ſubtil Philoſophy.

NOTES on §. XIV.

[1] The *Greek* of *Arrian* runs thus: Δι' ἀλλότριον ἔργον πταίει οὐδείς, &c. *Antoninus*'s thus, Τῷ ἐμῷ προαιρετικῷ τὸ τοῦ πλησίον προαιρετικὸν ἐπίσης ἀδιάφορόν ἐστιν, ὡς καὶ τὸ πνευμάτιον αὐτοῦ, καὶ τὸ σαρκίδιον· καὶ γὰρ εἰ ὅτι μάλιστα ἀλλήλων ἕνεκεν γεγόναμεν, ὅμως τὰ ἡγεμονικὰ ἡμῶν ἕκαστον τὴν ἰδίαν κυρίαν ἔχει· ἐπεί τοι ἔμελλεν ἡ τοῦ πλησίον κακία ἐμοῦ κακὸν εἶναι· ὅπερ οὐκ ἔδοξε τῷ Θεῷ, ἵνα μὴ ἐπ' ἄλλῳ ᾖ τὸ ἐμὲ ἀτυχεῖν. *Marc. Antonin. Lib.* 8. §. 56.

[2] *Lucian*'s *Greek* is this, Ἔκλος εἰ μή τινα νομίζεις ἀκροάσεως εὐθύνην εἶναι. *Apolog. in fine.*

[3] *Themiſtius*'s Words (*Orat.* xix. *De humanitate Theodoſii*, *p.* 230. *Ed. Par. Hard.*) are, Καὶ πάλαι μὲν οὐ διεκέκριτο ἐν τῷ τοιῷδε ἐγκλήματι ἀδίκημα δυστυχήματος, ἀλλ' ἐν ἴσῳ καθειστήκει τὸ βουλεῦσαί τι τῶν ἀθέσμων, καὶ τὸ πυθέσθαι μὴ προελόμενον· καί τοι τῆς φύσεως ἔγκλημα ἦν τοῦτο, οὐ τοῦ ἀνθρώπου, ὅτι τὴν ἀκοὴν ἐποίησεν ἀναπεπταμένην, καὶ οὐχ ὥσπερ τὰ βλέφαρα καὶ τὸ στόμα ἐφ' ἡμῖν κλείειν καὶ ἀνοιγνύναι, οὕτω καὶ τὰ ὦτα· ἀλλ' αὕτη μόνη σχεδὸν ἡ αἴσθησις ἐκπέφυγε τὴν ἐφ' ἡμῖν ἐξουσίαν, καὶ δέχεσθαι ἀνάγκη πᾶν τὸ προσπίπτον αὐτῇ, ὥσπερ οἴκημα ἄθυρον καὶ ἀνεῳγμένον. Σὺ δὲ τὴν μὲν ἀκοὴν ἐξεῖλες παντάπασι τῶν ἐγκλημάτων.

as [4] *Procopius Hiſt. Goth. Lib.* i. well obſerves, "An Ambaſſador, at the Command of him whom he repreſents, ſpeaks ſuch and ſuch Words; in which if there appear any Fault or Offence, it ought not to be charged on him, but on his Maſter, whoſe Orders and Inſtructions he is under a Neceſſity of obeying." When the *Roman* Senate declar'd the League with the *Samnites* to be baſe and inglorious, and voted the delivering up the General, the Author of it, to the Enemy, it was a very ſenſleſs Propoſal mov'd by one of the grave Fathers, that the ſame Puniſhment ſhould be inflicted on the Perſon who held the *Swine* during the Ceremony of making the Agreement [a] [b]. When *Mithridates* put to Death *Attilius* and other Conſpirators againſt his Life, he pardon'd *Attilius*'s Freed-men, who were of the Company, ὡς δεσπότῃ διακονησαμένους [c], *as Perſons that only obey'd thier lawful Maſter.*

But it's more uſual that the Action ſhall be imputed both to the Performer and to the Commander of it. And this is chiefly done in theſe three Ways: Either, that the Commander ſhall be the principal Cauſe of the Action, and the Performer, the inferior and acceſſary Cauſe, or that both ſhall be deem'd equally guilty, or that the Commander ſhall be the inferior Cauſe, and the Performer the Principal. And in all Caſes the Concurrence to another Man's Action is made either poſitively or privately, by ſome Commiſſion or Omiſſion.

Firſt then, he is eſteem'd the principal Cauſe of an Action committed immediately by another Man, who commands ſomething to be done by one under his Power and Sway, or who by his bare [5] *Authority*, not eaſily to be reſiſted, moves a Man to the Performance of ſome Deed, which he could not have enjoin'd by Command or Power, properly ſo call'd. And this laſt was the Caſe of *Piſo* in [6] *Tacitus*, whom *Tiberius* himſelf *excuſed from having any Guilt in the Civil War, ſince as he was a Son he could not decline his Father's Orders* [d]. But now his Father, by his paternal Right and Power, could not have oblig'd him to engage in ſuch a Crime, and therefore he was mov'd only by his *Authority*.

Secondly, He who gives a Conſent neceſſarily requiſite to the Performance, and without which the Agent had not proceeded. *Comp. Valer. Max. Lib.* ii. §. 8. §. 2. [7] *Liban. Progymn. He is to ſuffer for the Fault, without whoſe Leave it had not been committed.* Id. ibid. *They are not ſo properly to be accounted the Authors of Crimes, whoſe Hands commit them, as they who gave the Power and Authority of committing them.*

Thirdly, He who ought to have forbidden an ill Action, and did not; provided he had a full Obligation thus to prohibit it, and that upon the Account of that Obligation other Men had a Right of exacting ſuch a Prohibition from him. *Vide Lib.* xlv. *D. ad L. Aquil. Lib.* ii. *De Noxal. act. Lib.* i. §. 1. *D. famil. furt. fec.* Seneca Troad. *Qui non vetat peccare cum poſſit, jubet.* Not to forbid a Sin, when in our Power, is to command it. *Sophocl. Philoctet.* [8] *—— Men are influenc'd into Vice by bad Inſtructors.* On this Score *Diogenes* beat a Schoolmaſter, whoſe Boys were too much given to their Bellies, *Not imputing the Fault* (as [9] *Plutarch* ſays) *to them for not learning better Things, but to him for not teaching them. Libro, virtutem doceri poſſe.* Vide Ælian. Lib. iii. Ch. x. Juvenal. Sat. xiv. 233.

> *Nemo ſatis credit tantum delinquere, quantum*
> *Permittas; adeo indulgent ſibi latius ipſi.*
>
> All think too ſtreight th' Indulgence they receive;
> And to themſelves a kinder Licenſe give.

Add. Lib. iv. §. 2. *D. De Offic. Proconſ.* Thus *Meſſalinus* in *Tacitus An.* 4. [10] adviſed, that a Decree of

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[a] *This Cuſtom of uſing Swine at Times of Pacification, is accounted for,* Livy, Lib. i. Ch. xxiv. *Si populus Rom. prior defecerit publico Conſilio, dolo malo; Tu illo die, Jupiter, P. Rom. ſic ferito, ut ego hunc Porcum hodie feriam: tantoque magis ferito, quanto magis potes polleſque. Id ubi dixit, Porcum Silice percuſſit. To this Purpoſe,* Virg. En. viii. 641. ---- *Cæſa jungebant fœdera Porca. See Mr.* Kennet's Rom. Antiquities, Part ii. Ch. xvii. [b] Cicero de Invent Lib. ii. *Ch.*xxx. Mamertin. Paneg. i. *Whatever is tranſacted by his Commiſſion, is properly the Deed of the Emperor. Seneca Troad.* Ad authores redit ſceleris coacti culpa. *The Guilt of Miſchief acted upon Force turns on the Authors------* [c] *Appian. B. Mithridat.* [d] *Add. Lib.* xxxvii. *Princ. D. ad L. Aquil. Lib.* ix. §. 2, &c. *D. De Injuriis; Ant. Matth. de Crimin. Proleg. Ch.* i. §. 13.

Mr. BARB. *NOTES on* §. XIV.

[4] The *Greek* is this, Λόγους δὲ, ὅσους ἂν ἐκ τοῦ πέμψαντος ἀκηκοὼς εἴπῃ, οὐκ αὐτὸς τὴν ἐντεῦθεν αἰτίαν, ἤν γε οὐκ ἀγαθοὶ τύχωσιν ὄντες, εἰκότως ἂν λάβοι· ἀλλ᾽ ὁ μὲν κελεύσας φέροιτο ἂν δικαίως τὸ ἔγκλημα τοῦτο, τῷ δὲ πρεσβευτῇ τὸ τὴν ὑπουργίαν ἐκτελέσαι ἀρκέσει μόνον. *Procop. Hiſt. Goth. Lib.* i. Among the *Greeks*, where a Maſter had an abſolute Authority over his Slaves, theſe were looked upon as meer Tools, whatever they did, whether Good or Evil, employed by their Maſter. See Baron *Spanhemius* upon *Callimachus Hymn. in Cerer.* Yet we ought to obſerve, that an Action perform'd at the Command of a Superior, is not altogether excuſable at the Judgment-Seat of GOD, eſpecially if he doth any Thing which he knows clearly to be Evil in itſelf. See §. 2. *Note* 9. So that we muſt by no means approve the Opinion of the Antients. That it is a ſort of Virtue to commit a Fault in Obedience to a Maſter, as the Poet ſpeaks, *Pro Dominis peccare, etiam virtutis loco eſt.* Publ. Syr. ℣. 567.

[5] Authority here, ſignifies not a Power, or Command, which one has over another, but the particular Reſpect which a Perſon bears in his Mind to another, either upon the Account of his Merit, or Superiority, or ſome other Reaſon, which engages him to pay a great Deference to his Will and Pleaſure (for which Reaſon the *French* Tranſlation renders it, *La Conſideration*, Reſpect, or Regard) according to *Livy*'s Diſtinction, ſpeaking of K. *Evander*, *Authoritate magis quàm imperio regebat ea Loca*, Lib. i. Ch. vii. He ruled more by his Authority than Command. And, on the contrary, of a King of *Numidia*, named *Capuſa*, *Quum magis jure gentis quàm Authoritate inter ſuos, aut viribus obtineret Regnum.* Lib. xxix. Ch. xxix. He obtained the Kingdom more by Law of the Nation, than by any Authority he had with his People, or Power to oblige them. *Tacitus* alſo ſpeaks of the antient *German* Kings, *Mox Rex, vel Princeps, prout ætas cuique, prout nobilitas, prout decus bellorum, audiuntur, authoritate ſuadendi, magis quàm jubendi poteſtate,* Ch.xi. Then the King or Prince, as every one was more aged, noble, or warlike, was liſtened to more for perſuaſive Eloquence than commanding Power.

[6] *Tacitus*'s Words are, *Poſt quæ Tiberius Adoleſcentem* [*Piſonem*] *crimine civilis Belli purgavit: Patris quippe Juſſa nec potuiſſe filium detrectare.* Tacit. Annal. Lib. iii. Ch. xvii. num. 1.

[7] The *Greek* runs thus, Οὐ γὰρ μὴ συγχωρήσαντος οὐκ ἄν ποτε ἐπέπρακτο, τοῦτον ἡγεῖτο δίκην τῶν πραχθέντων ὀφείλειν — Δεῖ τὰ ἀδικήματα νομίζειν οὐ τῶν ταῖς χερσὶν ἐργαζομένων μᾶλλον, ἢ τῶν τὸ δυνηθῆναι δεδωκότων. *Liban. in Progymn. p.* 12. *D. Ed. Morel.*

[8] The *Greek* is, Οἱ δ᾽ ἀκοσμοῦντες βροτῶν διδασκάλων λόγοισι γίγνονται κακοί. ver. 386.

[9] His Words are, Παιδὸς ὀψοφαγοῦντος, ὁ Διογένης τῷ παιδαγωγῷ δάκτυλον ἔδωκεν. Ὀρθῶς οὐ τοῦ μὴ μανθάνοντος, ἀλλὰ τοῦ μὴ διδάξαντος, τὸ ἁμάρτημα ποιήσας. *In Libro, Virtutem doceri poſſe.*

[10] *Tacitus*'s Words are, *Maſſalinus Cotta-------- cenſuit cavendum eſſe Senatûs conſulto, ut quanquam Inſontes Magaſtratus, & culpæ alienæ neſcii, provincialibus Uxorum criminibus, perinde quàm ſuis plecterentur.* Tacit. Annal. Lib. iv. Ch. xx. num. 5.

Senate ſhould paſs to puniſh the Magiſtrates for the Crimes committed by their Wives, in Relation to the Government of the Provinces, whether they themſelves were concern'd or unconcern'd in the Fact. And thus too, by the *Engliſh* Laws, the Husband is obliged to anſwer and to make Satisfaction for the Wrong his Wife doth to another, either by Word or Deed; becauſe he neglected to uſe his Power of reſtraining her. Nay, if the Husband and Wife commit *Felony* together, the Wife is accounted neither a Principal nor an Acceſſary in the Crime, becauſe ſhe is ſuppos'd to have acted upon Neceſſity, by virtue of the Obedience ſhe owed her Husband [a].

Fourthly, He who commands, or hires a Perſon to perform a Villany [b].

Fifthly, He who aſſiſts; as he who brings and holds the Ladder, while a Thief gets into a Window: He who ſtrikes the Money out of a Man's Purſe, that another Rogue may pick it up: He that drives away a Man's Cattle, that his Comrade may ſeize them, and carry them off [c].

Sixthly, He that conceals or receives ſtolen Goods. *Phocylid.* Ἀμφότεροι κλῶπες, καὶ ὁ δεξάμενος καὶ ὁ κλέψας. *They that receive are arrant Thieves no leſs than they that ſteal.* Plato LL. Lib. xii. *He that knowingly takes into his Keeping ſtolen Goods, ſhall be eſteem'd equal in Guilt to the Thief himſelf.* Lib. i. Princ. D. de fugitivis. Add. Ch. i. D. de receptatoribus, & Edict. Reg. Theodoric. Ch. cxvi. *Concerning the Aſſiſtants or Abettors in Adultery, ſee* Lib. viii. Lib. ix. D. ad L. Julian de adulter. [11] Periander *the Tyrant of* Corinth *threw all the Bawds into the Sea,* Heraclid. de Polit. Add. Anth. Matth. de Crimin. Proleg. Ch. i. §. 11. & ad Lib. xlviii. D. tit. 10. Ch. i. & ii.

Seventhly, He who did not aſſiſt the ſuffering Party, tho' he was oblig'd to do ſo. [12] *Cicero Off.* i. *He that doth not, when he is able, guard and protect an injur'd Perſon, is as much in Fault as if he ſhould deſert his Parents, his Country, or his Friends.* Add. Anth. Matth. de Crimin Proleg. Ch. i. §. 15. Thus Soldiers, who are hired for a Guard in a Journey, if, on the Approach of a Number of Villains, whom they are able to grapple with, they refuſe to fight, they are to be reckon'd themſelves among the Villains. Thus a Fire ſhall be rightly imputed to the Watchman, who ſaw it kindling, yet neglected to ſtop it, or call for Help [d]. Thus among the *Egyptians*, if a Man on the Road ſaw another kill'd, or ſuffering any Violence, and did not reſcue him though he was able he was obnoxious to capital Puniſhments. And if the Man was too weak to give Aſſiſtance and Deliverance, he was oblig'd to diſcover and proſecute the Actors: Upon Default thereof, he received a ſet Number of Blows, or was injoin'd a three Days Abſtinence from Victuals [e]. And thus *Abas* King of *Perſia*, to clear his Country of Thieves, publiſh'd an Order, that whenever any Perſon was kill'd, or plunder'd, the Inhabitants of the next Town ſhould be accountable for the Fact [f]. So with [13] the *Spartans*, he that did not reprove a Perſon who offended in his Preſence, was puniſh'd as a Partner in the Crime. So [14] *Cato* exhorting the Magiſtrates to put the Laws in Execution againſt Offenders, told them, "That thoſe who were able "to reſtrain wicked Doers, and yet neglected this "Power, did plainly aſſent, and contribute to their "Enormities [g]." As for the Silence and the Diſſimulation of the Magiſtrates, *Plato* [h] has given thoſe Crimes their due Cenſure: *The ſecond Enemy to a State* (ſays he) *is the Man, who, tho' he be not ſtrictly a Partner in this Villany* (he means Treaſon) *yet while he enjoys the higheſt Offices in the Commonwealth, does not obſerve the Conſpiracy; and if he does obſerve it, out of a timerous Baſeneſs neglects to ſuccour and to deliver his Country.* The Story of *Scedaſius*'s Daughters in *Plutarch, Amator. Narration. Grotius ad* Prov. xxix. 24. *He that knows the Thief, and doth not, when requir'd upon Oath before a Magiſtrate, diſcover him, is in Guilt equal to him,* Vide Levit. v. 1. [15]

For the ſame Reaſon, if a Keeper, who has undertaken the Care of a Madman, prove negligent, and the Madman happen to do any Hurt, the Keeper ſhall be anſwerable for the Fact, tho' the Madman be not capable of *Imputation. Vide Lib.* xiv. *D. De Offic. Præſid.*

Thoſe Perſons are reckon'd the inferior, or leſs principal Cauſes of other Men's Actions, who have adviſ'd, commended, or cajol'd them before the Facts, in ſuch a Manner, as that their Counſel, or Praiſe, or Flattery, has had any Weight in promoting their Undertakings. For otherwiſe, a Man who barely commends a Crime, and yet by his Commendation contributes nothing to it, ought not to be puniſh'd for the Crime itſelf, but ſhould ſuffer for his ill Thoughts and Deſigns [i]. It will not be very unjuſt to reckon thoſe in the ſame Claſs,

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[a] Chamberlain's *Preſent State of* England. *p.* i. *Ch.* xvi.

[b] *Vide Anth. Matth. d. Lib.* §. 12. *& ad Lib.* xlviii. *D. tit. Ch.* iii. §. 16.

[c] *Add. Lib.* liv. §. 4. *Lib.* lxvi. §. 2. *D. De furtis.*

[d] *Add.* Ezech. xxxiii. *v.* 6.

[e] *Diodor. Sic. Lib.* i. *Ch.* lxxvii. *Add. Lib.* vii. *D. Nautæ caup. Stab. Lib.* ii. *Lib.* vi. *D. ad L. Pompeiam de Paricid. Lib.* vii. *d. Ch. Lib.* ix. §. 1. *D. ad. D. Cornel. de falſ. Lib.* vi. §. 8. *D. De re militari.*

[f] *Vide Pet. de Valle Itinear. p.* ii. *Epiſt.* i.

[g] *Vide Lib.* ii. *D. De noxal. act. Lib.* vii. *L. qui ſine manumiſſione, t.* 1. *De Magiſtratibus conveniendis.*

[h] *De LL. Lib.* ix.

[i] *Ovid. Triſt. Lib.* v. *El. ult.*

Qui monet ut facias quod jam facis, ille monendo
Laudat, & hortatu comprobat acta ſuo.

Who prompts you to *go on*, approves the Ways
You took before; and his *Advice* is *Praiſe*.

So in the Conſtitutions of the Lombards, Lib. i. tit. 9. §. 25. *He that ſtands by and encourageth the Commiſſion of any Villany, is himſelf adjudg'd an Actor in it.* Add. Rom. Ch. i. ult: Quinctil. Declam. 255. *To commit a Villany, and to approve of it, are Actions naturally reſembling each other,* Anth. Matth. De Crimin. Proleg. Ch. i. §. 9, 10, & 14.

Mr. BARB. *NOTES.*

[11] The Greek is Τὰς προαγωγοὺς πάσας κατεπόντισε. As to thoſe who are Procurers for Adulterers, ſee *Digeſt. Lib.* xlviii. *Tit.* 5. *ad Legem. Juliam de Adulteriis, Leg.* viii, *&* ix.

[12] *Cicero*'s Words are, *Qui autem non defendit, nec obſiſtit, ſi poteſt, injuriæ, tam eſt in vitio quàm ſi parentes, aut amicos, aut patriam deſerat.* De offic. Lib. i. Ch. vii. Mr. *Hertius* cites alſo *Ariſtotle de Mirab. auſcult.* where he ſpeaks of a certain Road of *Italy* between *France* and *Spain,* in which the Inhabitants neareſt the Place were obliged to indemnify Travellers, if they had had any Thing taken from them, or received any Wrong or Injury.

[13] *Plutarch*'s Words (*Inſtit. Lacon.*) are theſe, Ὁ δὲ μὴ ἐπιπλήττων παρόντος αὐτοῦ ἁμαρτάνοντα, ἔνοχος ἦν τῷ ἴσῳ ἐπιτιμίῳ, ὥσπερ καὶ ὁ ἁμαρτών.

[14] *Plutarch*'s Words are, Παρορμῶν δὲ τοὺς ἄρχοντας ἐπιτιμᾷν τοῖς ἁμαρτάνουσιν, ἔλεγε τοὺς δυναμένους κωλύειν τοὺς κακῶς ποιοῦντας, ἐὰν μὴ κωλύουσι, κατακελεύειν. *Plut. Apophthegm.*

[15] The Author himſelf a little lower ſays, *Nothing is to be imputed to the Madman*; whereupon it would have been better to have put this Example among thoſe Actions for which a Man is as much reſponſible as if they had been actually done by him. See *Dig. Lib.* i. *Tit.* 18. *De Offic. Præſid. Leg.* 14.

who by their Recommendation have preferr'd a Man to the Care and Management of any Buſineſs, ſince 'tis decent they ſhould bluſh for his Faults and Miſcarriages [a].

But as to the Matter of *Counſel*, it's worth while to run over the Diſputes of the [16] *Civilians*, where they are arguing whether the Words *Ope* and *Conſilio*, *by Help* and *by Counſel*, are to be underſtood in a Conjunctive, or in a divided Senſe. For if *Counſel* imports the ſame as Intention or Deſign, he only will be guilty of another Man's Theft, who aſſiſted him in it, not out of Imprudency, but with premeditated Wickedneſs [b].

If Counſel has been given without Help, it will be requiſite to enquire, whether it were General or Special. The former kind is, for Example, when a Man, hearing another complain of Poverty, adviſes him to ſupport himſelf by Stealing; and ſuch a Counſellor will not, in human Cogniſance, paſs himſelf for a Thief. But if a Man has given ſpecial Counſel to another, as, if he has ſhewn him what way to break into a Houſe, told him the fitteſt Time, and where the Things be that may be moſt conveniently carried off, or how he may hide himſelf after the Fact, ſuch an one will have a very ſtrong Twang of the Thief [c]. It is farther obſervable, in reference to Counſel, and other like Influences on other Mens Actions, that by them the Guilt is only communicated; but not wholly devolv'd from the Actor to the Exhorter, unleſs the former were under an [17] Obligation to put his Advice in Practice. Hence *Diodotus* in *Thucydides* [d] complains with good Reaſon, "That "the Orators in a State ſhould be accountable for "their Advice, and the People not at all account-"able for hearkening to them." He adds [18], *If he that believ'd, as well as he that perſuaded a Buſineſs, were liable to be puniſh'd, you would proceed much more wiſely in your Judgments. But now, when you fall into Paſſions on any Diſappointment of your Hopes, you only puniſh him who gave the Advice, and not your ſelves, who have always born ſo great a Share in the Miſtake, or Miſcarriage.* Hence Mr. *Hobbes* [e] thus declares in general, *This is alſo incident to the Nature of Counſel, that whatſoever it be, he that asks it cannot in Equity accuſe or puniſh it: For to ask Counſel of another, is to permit him to give ſuch Counſel as he ſhall think beſt; and conſequently he that gives Counſel to his Sovereign (whether a Monarch, or an Aſſembly) when he asks it, let it pleaſe or diſpleaſe, cannot be puniſh'd, becauſe he gave it to ſuch as were willing to hear it, whatſoever it ſhould be.* But he here ſhould have added, *If the Counſellor gives his Opinion* bona fide, *and has a perfect Knowledge of the Matter in Debate.* For it is a Piece of Wickedneſs to pretend to give a Judgment about a Thing which we are unacquainted with. He preſently ſubjoins; *But if one Subject gives Counſel to another to do any thing contrary to the Laws, whether that Counſel proceed from evil Intentions, or from Ignorance only, it is puniſhable by the Commonwealth, becauſe Ignorance of the Laws is no good Excuſe, where every one is bound to take notice of the Laws to which he is ſubject.*

Hence that Maxim in *England*, commended ſo highly by Dr. *Bates* [f], cannot be receiv'd without ſome Limitation; *That the King can never miſtake, nor do any Man an Injury, becauſe all the Fault and Puniſhment is deriv'd, as it ought to be* [19], *on his Miniſters and Counſellors, whoſe Duty is to Admoniſh the Prince, to deny him their Aſſiſtance, when he enters on ill Deſigns, and rather to quit their Places than to obey him, when he commands the doing of any thing contrary to the Laws.* Add. Gell. Lib. i. Ch. iii. Where he tells us of *Chilon*, that he was troubled with Remorſe of Conſcience, upon his having perſuaded the Judges to [20] abſolve a Friend of his manifeſtly guilty, and whom he himſelf had in private condemn'd. 'Tis a remarkable Story which we find in the ſame Author, *Lib.* xi. *Ch.* xviii. of a Perſon's being convicted as a *Man-ſtealer*, for hiding, with a Caſt of his Gown, a Runnagate Slave, who was paſſing within Sight of his Maſter.

It is doubtful, whether we ſhould rank under this, or under the former Claſs thoſe, who by their Example excite others to ſuch Sins, as they would have otherwiſe declined. *Matth.* xviii. *v.* 6. *Juvenal. Sat.* ii. 79.

——— *Grex totus in agris*
Unius ſcabie cadit, & porrigine porci;
Uvaque conſpecta livorem ducit ab uva.

From one infected Beaſt the Murrain reigns
O'er all the Drove, and ſpreads them on the Plains:
And one corrupted Grape its purple Neighbour ſtains.

Add. *Grot. Lib.* ii. *Ch.* xvii. §. 6. &c. *and Ch.* xxi. §. 2, &c. *Ant. Matth. de Crimin. Proleg. Ch.* i. §. 6, &c.

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[a] Vide *Socrat. in Xenophon. Apomn. Lib.* ii. *P.* 439. *Ed. Steph.* [b] *Lib* lii. §. 13. *D. de furtis.* [c] Vide *Ant. Matth. de Crimin. Proleg. Ch.* i. §. 7. [d] *Lib.* iii. *Ch.* xliii. [e] *Leviath. Ch.* xxv. [f] *Elench. Mot.* Part I.

Mr. Barb. *NOTES* on §. xiv.

[16] The Words of the *Roman* Law are, *Interdum quoque furti tenetur, qui ipſe furtum non fecit, qualis eſt is, cujus ope & conſilio furtum factum eſt.* Inſtit. Lib. iv. Tit. 1. *De obligationibus, quæ ex delicto naſcuntur* (and not *De furtis*, as this Author and *Grotius* cite it, for that's no Title in the *Inſtitutions.*) See alſo *Digeſt. Lib.* l. *Tit.* 16. *De verborum ſignif. Leg.* 53. §. 2. and *Lib.* xlvii. *Tit.* ii. *de furtis Leg.* 36. §. 1.

[17] Which does not commonly happen; but, on the Contrary, he is reſponſible for his Fidelity only, as Cicero ſpeaks very well, *Deinde, etiamſi te auctore, quid debet, qui conſilium dat, præſtare præter fidem,* i. e. If we adviſe others for the beſt, we are not anſwerable for the Event. *Lib.* xvi. *ad Attic. Epiſt.* 7. See Mr. *Hertius*'s *Notes* upon §. 12. of this *Chap.*

[18] The *Greek* is this, Εἰ γὰρ ὅ τε πείσας, καὶ ὁ ἐπισπώμενος ὁμοίως ἐβλάπτοντο, σωφρονέστερον ἂν ἐκρίνετε, νῦν δὲ πρὸς ὀργὴν ἥντινα τύχητε ἔστιν ὅτε σφαλέντες, τὴν τοῦ πείσαντος μίαν γνώμην ζημιοῦτε, καὶ οὐ τὰς ὑμετέρας αὐτῶν, εἰ πολλαὶ οὖσαι ξυνεξήμαρτον. *Thucyd. Lib.* iii. *Ch.* xliii.

[19] In *England*, it is common to lay all the Faults of the Prince upon his Miniſters, who are indeed very often moſt guilty of them, but the Fault of the Miniſters does not always excuſe the Fault of the Sovereign; for they have their Reaſon and Judgment, and may over-rule them; ſo that if they ſuffer themſelves to be govern'd by thoſe that are about them, 'tis their Fault. In moſt Affairs they ought to ſee with their own Eyes, and not leave themſelves to be biaſſed by a vicious and corrupt Miniſtry. But if they are not able to ſearch into the Bottom of Things themſelves, and diſtinguiſh between Good and Evil, they ought to leave the Governing the People to ſuch as are able, for I do not ſee but the Saying of *Charles Barromæus*, which he ſpake of bad Biſhops, who could not govern their Flocks, may be applied to Princes who manage ill. *If they are incapable of ſuch an Employ, why are they ſo ambitious as to ſeek it? If they are capable, why ſo negligent?* Mr. *Bernard*, in his *Nov. Rep. of Letters*, ſpeaks the ſame thing in plain Terms, which 'twere to be wiſhed Princes would conſider on as they are judiciouſly made.

[20] See the Reflections which Mr. *De Sacy* makes upon it, in his Treatiſe of *Friendſhip*, *Lib.* ii.

From all theſe Obſervations it is eaſy to perceive the Reaſon and the Limitation of thoſe common Axioms; *What a Man does by another, of that he himſelf is reckon'd the Author: We make thoſe things our own, to which we grant our Conſent*[a]. *That which, in Matters relating to us, is done by others upon our Command, obliges us our ſelves: That is eſteem'd our Action, the Execution of which we have impoſ'd on another*; and the like. As for that Communication of Actions, which reſults from the Union of a moral Body, it will be hereafter explain'd in its proper Place.

When one is ſaid to partake of another's Action, upon account of his own Permiſſion, or becauſe he did not hinder the Action, in this Caſe it is requiſite not only that he ſhould have been able by his natural Strength to have hindred it, but likewiſe that he ſhould have had an Obligation incumbent on him to hinder it. When either of theſe Two Conditions fails, nothing can be imputed to him, who gives another leave to act at Pleaſure. And therefore God Almighty is capable of no Imputation, upon the account of his Permiſſion of Sins. For he is not oblig'd to reſtrain them in ſuch a Manner, as to make them impoſſible to be committed: That is, by withdrawing our natural Strength, or extinguiſhing the Liberty of our Will: ſince upon the Removal of theſe, no ſort of moral Actions could be perform'd by Man[b].

That Permiſſion then of another Man's Action, is void of all moral Effect, which we give when to hinder the Action is beyond our Duty, or above our Strength; unleſs this Weakneſs and Inability is procur'd by our Fault, and unleſs the Ignorance aroſe thro' ſupine Negligence, and within that Degree of Diligence which we are oblig'd to obſerve.

Laſtly, Nothing can be *imputed* upon the account of permitting a good Action, which we might indeed, but ought not to have hinder'd. Thus he can impute nothing to me (or I owe him nothing) who has given me Permiſſion, or has not forbidden me to uſe my Right; that is, has done me no Injury.

[a] Lib. ii. tit. x. D. *Do eo per quem factum erit.* [b] *'Tis a notable Saying of* Lucian, de Merced. Conduct. God is not in the Fault, but the Man that makes it. *And thus we intend no more than a Jeſt, when we ſay, on ſome Occaſions,* Now I'll give it leave to rain, *or the like.*

CHAP. VI.

Of the Rule of Moral Actions, *or Law in General.*

The Contents of every Section of the ſixth Chapter.

I. *A Law differs from Counſel.*
II. *From a Bargain, or Covenant.*
III. *And from Right.*
IV. *What a Law is.*
V. *What an Obligation.*
VI. *How it comes to paſs that a Man is obliged.*
VII. *No Man is obliged to himſelf.*
VIII. *He that is to be obliged, muſt have a Superior.*
IX. *How a Man may lay an Obligation on another.*
X. *It can't be done by meer Force.*
XI. *Nor by any Excellency of Nature alone.*
XII. *What gives greater Force to an Obligation.*
XIII. *The Law-giver and Law ought to be known.*
XIV. *What are the eſſential Parts of a Law.*
XV. *What is the Permiſſion of a Law.*
XVI. *The Matter of Laws.*
XVII. *Who is obliged by a Law.*
XVIII. *The Diviſion of a Law.*

We come now to conſider of that moral Rule, or *Law*[a], by which moral Actions are to be ſquar'd, and according to their Agreement or Diſagreement with which, they acquire peculiar Qualities[1]. And here we muſt take Care in the firſt Place, accurately to diſtinguiſh *Law* from ſome other things which ſeem to bear ſome Relation to it, and which for that Reaſon are frequently confounded with it: And theſe are *Counſel*, *Covenant*, and *Right*. Now *Law* differs from *Counſel* in this, that by the latter a Man endeavours, with Reaſons taken from the Nature of the Thing, to induce another Perſon to ſome Performance or Omiſſion, over which Perſon, at leaſt as to the preſent Buſineſs, he has no proper Power, ſo as that he can lay any direct Obligation on him, but muſt leave it to his Pleaſure and Choice, whether he will follow the Counſel, or not[2]. Yet Counſel indeed may adminiſter Occaſion to an Obligation, inaſmuch as it furniſhes a Man with ſome Knowledge, by which an Obligation may be produc'd or increas'd. Thus, a Phyſician cannot by Virtue of any Power, or Command, order his Patient to take ſuch things, and to abſtain from others; but while he ſhews one thing to be conducive, and another pernicious to Health, the Patient

[a] *See* Book ii. *Ch.* i.

Mr. Barb. *NOTES on* §. I.

[1] Our Author ought to have treated in the beginning of this Chapter, of the Neceſſity of a Law in general, *i. e.* ſhew that it is not agreeable to the Nature of Man to live without ſome Law; which natural Order he follows himſelf, in his *Abridgment of the Duties of a Man and Citizen, Lib.* i. *Ch.* ii. §. I. See alſo what he ſays, *Lib.* ii. §. I.

[2] So the Civil Law teaches, *Nemo ex conſilio obligatur; etiamſi non expediat ei, cui dabatur; quia liberum eſt cuique apud ſe explorare, an expediat ſibi conſilium.* Digeſt. Lib. xvii. Tit. i. *Mandati.*

tient is bound to embrace the former, and to avoid the latter; not upon Account of any Right which the Phyſician holds over him, but by the Law of Nature, which commands every Man to take care of his own Life and Health. But Law, though it ought not to want its Reaſons, yet theſe Reaſons are not the Cauſe why Obedience is paid to it, but the Power of the Exactor, who when he has ſignify'd his Pleaſure, lays an Obligation on the Subject to act in Conformity to his Decree, tho' perhaps they do not ſo well apprehend the Reaſons of the Injunction. To which Purpoſe Mr. *Hobbes* [a] thus expreſſeth himſelf; *Counſel* (ſays he) *is a Precept, in which the Reaſon why we Obey, is taken from the Thing preſcribed: But Law, or proper Command, is a Precept, in which the Reaſon of our Obedience is taken from the Will of the Preſcriber.* For no Man can ſay, *Sic volo, Sic jubeo,* ſo I will, and ſo I command; unleſs

> ---------*Stet pro ratione voluntas,*

his Will is his Reaſon.

We obey Laws therefore, not principally upon Account of the Matter of them, but upon Account of the Legiſlator's Will. And thus, *Law is the Injunction of him, who has a Power over thoſe to whom he preſcribes; but Counſel, of him who has no ſuch Power. To do the Things enjoin'd by Law, is Matter of Duty; to do thoſe appointed by Counſel, is Matter of free Pleaſure. The End of Counſel is directed toward him who receives it:* And this End he is at Liberty to weigh and to approve. But tho' *Law* too has commonly ſome End directed towards thoſe who receive it, yet it does not leave them the Right of examining and rejecting this End, but actually determines it by enjoining it. *Counſel is only given to thoſe who are willing to have it, but Law reaches the unwilling.* Laſtly, *The Right of a Counſeller ceaſes at the Pleaſure of him who receives the Counſel; but the Right of a Law-giver cannot be taken away at the Pleaſure of thoſe on whom he impoſes the Law* [b].

II. Neither were thoſe Antients accurate enough in their Expreſſions, who frequently apply to Laws the Name of [1] *Common Agreements* [c]. For, beſides that, neither the Divine poſitive Laws, nor the Laws of Nature, had their Riſe from the *Agreement* of Men, and therefore that Title can only be attributed to *civil* Laws; even [2] theſe are not properly Covenants and Agreements, tho' there was indeed ſome Intervention of Compact at the Original of Civil Power. It is plain that the *Grecians,* as in their other politick Speeches, ſo in this too, had an Eye to their own Democratical Governments; in which, becauſe the Laws were made upon the Propoſal of the Magiſtrate, with the Knowledge, and by the Command of the People, and ſo, as it were, in the Way of Bargain or Stipulation, they gave them the Name of *Covenants* and *Agreements* before-mention'd. Tho' indeed, neither upon Account of the major Part of the Peoples conſenting or agreeing to them, can democratical Laws be properly ſtil'd Covenants. For this Agreement is only the Manner by which the ſupream Power, lodg'd in a general Aſſembly, exerts its Force; that being taken for the Will and the Decree of all, to which the greater Number gives Conſent.

So that the Efficacy of a Vote given in Council by any Member about framing a Decree, is very different from the Conſent which a Man declares at his Entrance on a Covenant: For in this laſt Caſe, a Perſon that diſſents is not bound, and the Party cannot proceed without him: Whereas in the former Caſe, even the diſſenting Party is tied and obliged by the Plurality of Votes.

The remaing Points of Diſtinction between a Compact or Covenant, and a Law, are obvious. For a *Compact* is a *Promiſe,* but a *Law* is a *Command.* In *Compacts* the Form of ſpeaking is, *I will* do ſo and ſo; but in Laws the Form runs, *Do thou ſo,* after an imperative Manner. In *Compacts,* ſince they depend, as to their Original, on our Will, we firſt determine what is to be done, before we are oblig'd to do it; but in *Laws,* which ſuppoſe the Power of others over us, we are in the firſt Place oblig'd to act, and afterwards the Manner of acting is determin'd. And therefore he is not bound by a *Compact,* who did not freely tie himſelf by giving his Conſent; but we are for this Reaſon oblig'd by a *Law,* becauſe we ow'd an antecedent Obedience to its Author [d].

III. As for the Term of *Right,* as it imports a Power of acting granted, or left free by the Laws, we muſt take care not to let it paſs for the ſame Thing as the Law itſelf: That is, When we are ſaid to have a Right by the Divine Law of doing ſuch or ſuch a Thing, we muſt not imagine that the ſame Thing is injoin'd and commanded by the Divine Law, and that therefore we may fairly do it, tho' it ſhould be forbidden by the Laws of Men. For, ſince a Man hath a Power of doing all ſuch Things as can proceed from his natural Abilities, except thoſe which are forbidden by ſome Law, hence, by common Cuſtom of Speech, thoſe Things which are not prohibited by ſuch or ſuch a Law, we are ſaid to have a *Right* of doing [3] by that Law. *Right* therefore, in this Senſe, denotes a Liberty; but *Law* includes ſome Bond

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[a] *De Cive, Ch.* xiv. §. 1.

[b] *Add. Dig. B.* 17. *Tit.* 1. *De Mandato.*

[c] Συνθήκη τῆς πόλεως. So *Ariſtotle Rhetor. ad Alex. Ch.* i, ii, iii.

[d] Vide *Hobbes loc. cit.* §. 2. *Add. Grot. Annot. in Matth. Inſcript. vocab.* καινὴ διαθήκη.

Mr. Barb. *NOTES on* Chap. VI. §. 2, *and* 3.

[1] Κοινὰς συνθήκας, ϗ ὁμολογίας, as the *Greeks* almoſt every where in their Writings do. So *Ariſtotle* defines the Law, Λόγος ὡρισμένος καθ᾽ ὁμολογίαν κοινὴν τῆς πόλεως. A Law is an Order decreed by the Common Agreement of a City, *Rhet. ad Alexandr. Ch.* i. See alſo *Chap.* ii, & iii. So *Iſocrates* calls an Act of Oblivion and Indemnity, συνθήκη πόλεως, the Covenant oft City. *Orat. adv. Callim. Dionyſius Halicarn.* ſays, Συνθήκας εἶναι κοινὰς πόλεων τοὺς νόμους. *i. e.* Laws are the common Agreement of the City, *Lib.* x. *ch.* iv. See alſo the *Digeſt. Lib.* i. *tit.* 3. *de Legib. Senatuſque Conſult. & Longa Conſuet. Leg.* i. & 2.

[2] Indeed the End of Civil Laws is to engage Men to the Obſervation of certain Things, by a Motive more prevalent than any natural Obligation, *i. e.* by the Fear of Puniſhment, which the Breaker of them muſt expect from certain Perſons inveſted with an Authority over them. But ſuppoſe a Number of Men ſhould ſeparate themſelves from any Civil Society, and agree together to obſerve certain Rules to act by, yet having no Sovereign Power provided with ſufficient Abilities to puniſh Tranſgreſſors, this Engagement could have no other Effect, than ſuch Agreements as are made by natural Right have, and by Conſequence could not oblige as a Law. *Element. Juriſprud. Univerſ. p.* 250.

[3] This Uſage is not ill-grounded, for the Liberty which the Laws leave us to do, or not do, certain Things, includes ſomething more than a negative Permiſſion. *See Note* 2. *on Paragraph* 15.

and Engagement, by which our natural Liberty is reſtrain'd [2].

IV. In general, a *Law* may conveniently enough be defin'd, *a Decree by which a Sovereign obligeth a Subject to conform his Actions to what he preſcribes* [1]. We call it a *Decree*, not as it remains in the Mind and Will of the Party decreeing, but as it is communicated to the Subject in ſuch a Manner, as to let him underſtand the Neceſſity of his conforming to it: And therefore the Term *Decree* is here equivalent to *Command*. And we think it an indifferent Matter, whether one ſhould call a Law a *Decree* or a *Speech*, provided it be not eſteem'd neceſſary to it, that it be promulgated either *vivâ voce*, or in Writing; ſince it is ſufficient that the Will of the Legiſlator be any way made known to the Subject, tho' it ſhould only be by the internal Suggeſtion of Natural Light. Therefore we take it to be an uſeleſs Piece of Subtilty and Niceneſs in Mr. *Hobbes* [a], when he maintains, that the Laws of Nature have no farther the Force of Laws, than *as they are promulgated in Holy Scriptures by the Word of God; and not as they are certain Concluſions apprehended by Reaſon, concerning the doing, or the omitting of Things.* For, from the bare Dictates of Reaſon, we do not only underſtand that the Obſervance of Nature's Laws is good and profitable to Mankind, but likewiſe that it is the Will and the Command of God, that Men ſhould govern their Actions by thoſe Rules; which is ſufficient to the Eſſence of a Law. Tho' ſtill indeed this Reply may be made, that natural Laws, even as they are the Dictates of Reaſon, cannot be conceiv'd any otherwiſe than in the Manner of Speeches, Propoſitions, or Sentences [2].

As to *Grotius*'s Definition [b], where he ſays the Law obligeth to *that which is Right*, we muſt obſerve, that he ſuppoſeth ſomewhat to be Juſt and Right before any Rule or *Law*; whence it muſt follow, that the Law of Nature doth not make what we call *Right*, but only denotes and points it out as a Thing already Exiſtent. Concerning which Hypotheſis we have already declar'd our Mind, *Ch.* ii. §. 6.

To conclude this Head, It is evident, that under the Name of *Laws*, not only thoſe are comprehended which belong to *Juſtice* ſtrictly ſo called, directing us, upon a full and perfect Obligation [3], to exhibit ſuch and ſuch Things to *others*; but thoſe too which are concern'd about the other Virtues, and which extend no farther than the Agent's own Perſon. For which Reaſon Laws may, and frequently are, made againſt Drunkenneſs [c], and other kinds of Intemperance, which Vices are ſo very prejudicial to the Parties committing them [4]. The ſame muſt be held as to [5] *Sumptuary Laws*, which preſcribe the Meaſure of Expences in Victuals, Cloaths, Building, and other Furniture or Proviſions. In which Particulars, if any Man offends, he doth no one an Injury, provided he defray the Charges out of his own Stock: And yet there's no Queſtion to be made, but that a Subject may by Laws be obliged to Frugality, which conduceth ſo highly to every Man's Intereſt and Advantage.

V. But ſince in the Definition of Laws it hath been aſſerted, that they proceed from a Superior, and that they have in themſelves the Power [1] of *obliging*, it ſeems neceſſary that we here ſhew what *Obligation* is, and whence it ariſeth; as alſo who is capable of receiving an Obligation, and how one Man can *oblige* another, or, which is the ſame thing, how it comes to paſs that one Man may, by Virtue of his Authority and Command, enjoin another ſuch and ſuch Duties.

Obligation, then, we have already defin'd, *Ch.* i. §. 21. as a moral operative Quality, by which a Man is bound to perform ſomewhat, or to ſuffer ſomewhat. In thus defining *Obligation* we conſider it as it inheres in the Perſon obliged. Biſhop *Cumberland*, *Ch.* v. §. 27. in his Definition proceeds another way, conſidering *Obligation* as it is an Act of the Legiſlator, by which he ſhews or declares, that Actions conformable to his Laws are neceſſary to be done by the Perſons for whom the Laws are ordain'd. The *Roman* Lawyers call it [2] *the Bond of the Law*, by which we are neceſſarily tied to this or that. For, by Means of it a kind of *moral Bridle* is put upon our Freedom of Action, ſo that we cannot rightly take any other way than what we are thus guided to. Not that it can ſo far reſtrain Mens Wills, as to render them unable to ſteer a different Courſe, tho' at their own Peril: For in this Senſe *Arrian*'s [c] Aſſertion will ever hold true, Προαιρέσεως ἀλλοτρίας οὐδεὶς κύριος, *No Man is Maſter of another's Will.*

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[a] *De Cive, Lib.* iii. §. ult.

[b] *B.* i. *Ch.* i. §. 9.

[c] In *Epictet. Lib.* iv. *Ch.* xii.

Mr. Barb. *NOTES on* §. iii, iv, v.

[2] This fully includes the general Notion of a Law. *See the ſame Note.*

[1] This Definition agrees only to obligatory Laws, *i. e.* which oblige us poſitively to act, or not. But we ſhall ſhew in our ſecond *Note* on §. 15. that the general Notion of a Law taken in the full Extent of it, as 'tis my Deſign to explain it there, comprehends that beſides a Permiſſion to act, or not act, in certain Caſes, as we judge convenient.

[2] To make the Arguings of the Author compleat, theſe Words ought to be added, *But this is no Foundation for Mr.* Hobbes*'s Hypotheſis.*

[3] To underſtand this Diſtinction of *perfect* and *imperfect* Obligation, ſee *Chap.* vii. of this *Book*, §. 7. and *Book* iii. *Ch.* iv. §. 3, &c. See alſo what has been ſaid before, *Ch.* i. §. 19. concerning *Power.*

[4] To this we may refer a Law of *Seleucus*, commanding, That *whoſoever of his Subjects happening to be indiſpos'd, ſhould drink pure Wine, unleſs upon the Advice of a Phyſician, if he recover'd, ſhould ſuffer Death, for exceeding the Bounds of Temperance without expreſs Orders.* Which Penalty was, no doubt, unreaſonably ſevere. *Ælian. in V. H. Lib.* ii. *Ch.* xxxvii. But the learned Dr. *Bentley* is of Opinion, that all the Laws which paſs under the Name of *Seleucus*, and of which we find divers Fragments in Authors, are all forged. See his *Engliſh Diſcourſe* on *Phalaris, p.* 335. and *Novell. de Repub. des Lett.* by Mr. *Bernard, June* 1699. *Art.* v.

[5] The Author will treat of them *Lib.* viii. *Ch.* v. §. iii. There is a curious academick Diſcourſe upon this Subject, among his more choice acadamick Diſſertations (which I ſhall ſometimes quote) printed at *Lunden* in *Sweden, Anno* 1675, and reprinted at *Amſterdam*, under the Title of *Analecta Politica*, i. e. *Politick Fragments*, ſome Years ſince, if I miſtake not.

[1] This is the Effect of all Laws obligatory, for as for the Laws of ſimple Permiſſion, of which we ſhall ſpeak *Note* 2. §. 15. the Effect is to give a moral Right, or Power, to have certain Things certainly and lawfully, or to do and require certain Actions of another, if we judge it convenient. See *Chap.* i. §. 19. 20. aforegoing.

[2] This Author gives the general Definition of the Inſtitutes, which properly reſpects Payments, or all other Engagements which Men enter into of their own Accord, with Relation to another; for thus it runs, *Obligatio eſt Juris vinculum, quo neceſſitate aſtringimur alicujus rei ſolvendæ, ſecundum noſtræ civitatis Jura. Inſtitut. Lib.* iii. *Tit.* 14. *princ.*

Now, altho' there are many other Things which have an Influence on the Will, in bending towards one ſide rather than the contrary, yet *Obligation* hath this peculiar Force beyond them all, that whereas they only preſs the Will with a kind of natural Weight or Load, on the Removal of which it returns of its own Accord to its former Indifference; *Obligation* affects the Will in a moral Way, and inſpires it inwardly with ſuch a particular Senſe, as compels it to paſs Cenſure itſelf on its own Actions, and to judge itſelf worthy of ſuffering Evil, if it proceed not according to the Rule preſcrib'd. And hence alone we may underſtand how ſufficient the Strength of the Obligation is to the bending and inclining the Will; ſince there's nothing but the Thoughts of that Good or Evil [4] which our Actions may bring on ourſelves or others, that can lay any Neceſſity of ſuch a Performance, or of ſuch an Omiſſion, upon the Mind of Man whilſt in Debate about future Concerns; ſuppoſing that the Will is allow'd its proper Liberty, and that ſuch Actions are to be exerted, as may be properly imputed to the Agent. And in this Reſpect chiefly, Obligation differs from downright Compulſion, that altho' both do ultimately repreſent ſome Object of Fear, yet Compulſion only ſhakes the Will with an external Force, and drives it on to the Choice of an ungrateful Thing, by the bare Senſe of approaching an imminet Danger: whereas Obligation doth farther engage the Perſon to acknowledge, that the Evil denounc'd againſt the Tranſgreſſion of ſuch or ſuch a Rule, doth not undeſervedly fall upon him, ſince by obſerving the Rule he might have declin'd and eſcap'd it.

VI. As to Man's being capable of receiving *Obligation*, one Reaſon how he comes to be ſo is, becauſe he is endu'd with Will, which can turn to either Side, and ſo guide itſelf by a moral Rule; unlike thoſe other Beings which by ſome intrinſical Conſtraint are determin'd to one and the ſame Way of acting. Whence it follows, that ſo far as no Neceſſity is interpos'd by any external Principle, Man muſt be conceiv'd to be perfectly free, and to have a Power of doing all thoſe Things which fall within the Sphere of his natural Strength and Ability. Nay, when he hath once determin'd and reſolv'd with himſelf, or when he hath once made any Choice, yet in the Determination, Reſolution, or Choice, conſider'd purely as they proceed from the Will, there is no ſuch Force, but that he may, at his Pleaſure, rightly change or relinquiſh them: unleſs there intervene ſome outward Reſtraint, forbidding any Alteration of the Will, when once ſettl'd and declar'd; for a Man upon once ſignifying his Will and Purpoſe, may put himſelf under ſuch a Condition as that it ſhall be unlawful for him afterwards to recede.

Now a Man is ſuppos'd to have chang'd his Will, not only when he expreſly declares his preſent Diſlike of his former Choice, but likewiſe when he hath done any Thing inconſiſtent with his preceding Reſolution. And from this Principle may be deduc'd the greateſt Part of what the Civilians deliver concerning *Repentance*, or the altering of a Purpoſe. For, if we enquire after the general and ultimate Cauſe, why to repent of a Deſign ſhould in ſome Acts be lawful, in others not, we ſhall find it to be no other but this, that ſome Acts are attended with an external Bond, which forbids any Change of Purpoſe once declar'd; whereas in the reſt, the Will is left to the Exerciſe of its intrinſick Liberty. The former Caſe uſually happens, when, upon Suppoſition of a Change in one Man's Reſolution, ſome other Man would be highly injur'd and [1] prejudic'd, and ſo Occaſion would be adminiſtred to the breaking off of all Society and Commerce amongſt Men. And therefore from a Signification of the Will, this other Man is ſaid *to obtain a Right*, by Means of which he is now impower'd to make the promiſing Party ſtand to his Word, and upon Default may proſecute him by Force, either ſuch as he himſelf can exert, or ſuch as proceeds from the ſupream Ruler, according as the Perſons live, either in a State of Nature or of civil Society. Therefore, when upon Declaration made of my Will, another Man doth not obtain a Right over me, I am then at Liberty to repent of what I have done. And ſuch a Right over us is then not obtain'd, when the Sovereign, under whoſe Power we live, hath not given another Man Authority to require and exact that from us, which we have ſignify'd as our Intention [2]. And hence it appears why poſitive Laws may be repeal'd by him that enacted them; becauſe they do not convey to the Subjects any ſuch Right upon the Legiſlator, by Virtue of which they may demand and require their Continuance. Tho' ſome Commonwealths have endeavour'd to preſerve the Perpetuity of their Laws, by obliging the Members to declare upon Oath, that they will not conſent to their Alteration. Nay, tho' at the End of the Statute or Ordinance a Clauſe ſhould be affix'd, pronouncing all Decrees that may hereafter be made contrary to this, to be null and void, yet ſuch a Clauſe cannot hinder the altering or reverſing of a Law by which no Man has obtain'd a Right. For 'tis abſurd that a former Decree ſhould diſannul a latter; ſince abſolute Power cannot bind and reſtrain itſelf; and ſince that which is in its

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Mr. Barb. *NOTES on* §. v.

[4] This is the Opinion of Biſhop *Cumberland*, whoſe Words our Author tranſcribes. Another *Engliſhman*, in a Work which we hoped would have been turned into *French*, embraces the ſame Notion. According to him, the Duty or Obligation of a Man can be nothing elſe but a Reaſon and Motive propounded after an agreeable Manner, and neceſſarily determining him to chooſe and prefer one Manner of acting before another; and that Reaſon or Motive can be no other than a great Degree of Miſery to be avoided, and Happineſs to be attained; which can't be avoided or gained by acting after any other Manner. He owns no other Obligation, and if there be any other, he believes, that if it be looked into with Care, it will be found to end in that. Mr. *Bernard* expreſſes Dr. *Gaſtrel*'s Senſe after this Manner, in his *Nov. De la Rep. des Lettres, April* 1700.

Mr. Barb. *NOTES on* §. vi.

[1] It is a Rule of the *Roman* Lawyers, *Nemò poteſt mutare conſilium ſuum in alterius injuriam*, i. e. *No Man can change his Purpoſe to another's Prejudice.* Digeſt. Lib. l. Tit. xvii. De diverſis Reg. Juris. Leg. lxxv.

[2] We ſhall hereafter treat of ſeveral Caſes in which 'tis lawful for a Man to change his Deſigns and Intentions. See chiefly *Lib.* iii. *Chap.* vi, vii.

own Nature ſubject to change [3] cannot be made fix'd and irrevocable [a]. The *Athenians* in *Thucydides* [b], laid up a thouſand Talents in the Citadel, denouncing a capital Penalty againſt him who ſhould either decree or perſuade the employing that Money to any Uſe, except in Caſe the City were attack'd by a hoſtile Fleet: And yet upon the Revolt of the Inhabitants of *Chios*, their Fears engag'd them to repeal that Decree [c]. When Princes [4] add expreſly in ſome of their Conſtitutions, that altho' they ſhould hereafter order any Thing to the contrary in a particular Edict, yet the Magiſtrates and Judges ſhall not obey or regard any ſuch Command, this Addition doth by no Means amount ſo high, as to prove they may not abrogate ſuch Conſtitutions, but rather ſhews, that the latter Orders are not ſerious, or that they dropt from them unawares. And ſometimes by this ſubtil Artifice they cut off and prevent the Importunities of ſawcy Petitioners, whom perhaps it would not be ſafe for them abſolutely to deny [d].

But there's need of diſtinguiſhing very nicely between the poſitive Law itſelf, and that Right which it occaſions to be obtain'd. The Law itſelf may be diſannull'd by the Author, but the Right acquir'd by Virtue of that Law, whilſt in Force, muſt ſtill remain: For, together with a Law, to take away all its precedent Effects, would be a high Piece of Injuſtice: For Example, [5] Suppoſe it were a Law in any State, that *as a* [6] *Man diſpos'd of his Poſſeſſions by Will, ſo the Right to them ſhould ſtand.* It would be very fair, in this Caſe, for the Sovereign to retrench this Liberty of Teſtaments, and to order that for the future all theſe Inheritances ſhall paſs to the Heirs at Law. Yet it would be unreaſonable to take away from Perſons what fell to them by Will, whilſt the former Law was in Uſe and Vigour. And by the ſame Rule we may judge of that Action of Pope *Boniface* VIII. when, out of Hatred to *Philip the Fair*, King of *France*, he recall'd all the Indulgences which his Predeceſſors had granted to the *French* Nation; which *Harry Stephens* hath ſo juſtly ridicul'd in his pleaſant Apology for *Herodotus* [e].

We muſt take Care likewiſe to diſtinguiſh the other Acts of Sovereigns from their Laws, leſt any ſhould imagine that all their juſt Donations, Alienations, or Compacts, may be retracted by themſelves, or [7], by their Succeſſors. For upon theſe Acts a Right is obtain'd by other Men, which ought not to be taken from them againſt their Conſent. Hence it appears, that when a Man renounceth his Right, it is not neceſſary to add expreſly, that neither he nor his Heirs will do hereafter any Thing contrary to that Renunciation; and that if they do attempt any ſuch Matter, it ſhall be eſteem'd void. For, ſince in Deeds of this Nature a Man plainly declares his receding from his Right to any Thing, and profeſſeth to tranſlate it on another Perſon, it would be evident, without that additional Clauſe, that he cannot (with any Force or Effect) afterwards diſpoſe of that Thing, having no longer any Right or Title to it. And for the ſame Reaſon, becauſe whilſt the Teſtator lives, no Man hath obtain'd a Right by Virtue of his Teſtament, he may fairly alter it, even tho' he had ſtrengthen'd it with a Clauſe, declaring all Wills that ſhould hereafter be made to be invalid. For this indeed carries Grounds enough to make us preſume the latter Will did not proceed from his ſerious Intentions; yet if that very Clauſe be revok'd in that latter Will, the former will be of no Virtue or Efficacy. And ſo in Deeds and Inſtruments of Conveyances and other Contracts, if a Diſpute ariſe about any Point, [8] that which bears the latter Date ſhall take Place of that which was made firſt.

VII. From what has been ſaid, we may likewiſe gather the Reaſon why a Man cannot be *oblig'd* to himſelf, or why he cannot enter into any Agreement or Promiſe purely directed to his own Perſon, no other Party being concern'd with him. For he who obtains a Right by any Obligation, may fairly wave that Right, when by ſo doing he injures not a third Man. But now in this Caſe the obliged and the obliging Party, or he that owes the Right, and he that obtains it, are one and the ſame. Therefore ſhould a Man never ſo much reſolve to oblige himſelf, yet the Obligation would be in vain, ſince he could excuſe himſelf from Performance at his Pleaſure: And he that can diſpenſe with himſelf in this Manner is actually free. Beſides, ſuch an Obligation could be of no manner of Uſe; becauſe when a Man gives or denies any Thing to himſelf, he neither gets by the Performance, nor loſeth by the Omiſſion [f].

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[a] Vide *Cicero.* ad *Attic.* Lib. iii. Ep. xxiii.

[b] Lib. ii. Ch. xxiv. Ed. *Oxon.* p. 98.

[c] Ibid. *Lib.* viii. *Ch.* xv. p. 476.

[d] Vid. *Cod.* Lib. v. Tit. viii. *ſi ex reſcripto nuptiæ petantur.*

[e] Cap. xl.

[f] Add. *Senec.* de *Benef.* Lib. v. Ch. vii, &c.

Mr. Barb. *NOTES on* §. vi.

[3] If Kings were infallible, as they would in the Caſe before us always take proper Meaſures, and command nothing but what is for the great Advantage of the State, we might believe that whatever Laws and Orders they make, ought never to be altered; but ſince the contrary is evident by Experience, it is as abſurd, as prejudicial to a Society, to affirm, That what is once reſolved and eſtabliſhed, in what Manner ſoever it is done, ſhould always continue in Force, whatever Inconveniences may ariſe from it. The antient Kings of *Perſia*, whoſe Laws were looked upon as unalterable, found themſelves often obliged to hinder their Effect by ſome latter Edicts, (See *Eſth.* viii. 8, &c.) and the Princes who in all Times have acted upon this Principle, altho' cloſely, muſt eaſily obſerve the bad Conſequences of it, if they were careful to do their Duty, unleſs they were intoxicated with a good Opinion of themſelves, and puffed up with a falſe Notion of Grandeur.

[4] See Mr. *Hertius's* Diſcourſe, entitled, *De Lege, Clauſulâ, ut nè abrogari unquam poſſit, munita,* i. e. *Of a Law ſtrengthened with a Clauſe, that it ſhall not be repealed,* which is the firſt of his third Tome of ſmall Tracts and Comments.

[5] So in the Civil Law, new Laws and new Conſtitutions have no Force but for the future, they meddle not with what's paſt; as theſe Words import, *Leges & Conſtitutiones futuris certum eſt dare formam negotiis, non ad facta præterita revocari. Cod. Lib.* i. *Tit.* xiv. *De Legib. & Conſtitut. Principum, Leg.* vii. See Mr. Daumat's Civil Laws according to the Order of Nature. *Tit.* i. *ſ.* 1, §. 13, *&c.* of the Preliminaries.

[6] It is a Law of the xii. Tables, *Ut quiſque legaſſet ſua rei, ita jus eſto,* i. e. *As every Man bequeaths his Goods, let Right be.* Inſtitut. Lib. ii. Tit. xxii. *De Lege Falcid.* in the Beginning. See alſo *Digeſt. Lib.* l. *Tit.* xvi. *De verbor. Significat. Leg.* cxx.

[7] See *Lib.* viii. *Ch.* x. following.

[8] See *Lib.* v. *Chap.* xii. §. 6.

But whereas it is ſometimes ſaid, that a Man is obliged to preſerve himſelf[1], the Meaning of this is no more, but that the Exerciſe of that Obligation, inherent in every Man, is terminated in a Man's own Perſon, but it hath likewiſe a reference to GOD, the Author of natural Law, as to him who hath a Right of requiring the Performance of that Obligation, and of puniſhing its Neglect: And therefore a Man is ſo far bound to conſult his own Preſervation, as he is a Servant of GOD, and a part of human Society, to which by the Divine Command he ought to ſhew himſelf a uſeful Member. In the ſame manner as a Maſter may rightly puniſh his Servant, and a Sovereign his Subject, who hath render'd himſelf unfit to diſcharge his proper Labours and Employments. Neither is this Maxim, that *a Perſon cannot oblige himſelf*, confin'd to ſingle Men, but extends to whole Bodies and Societies[2]. As for that which ſome Authors urge about a Man's ſwearing to himſelf, That he will, for Inſtance, refrain from this or that Enormity to which his evil Appetites incline him, this Obligation bears the Nature of a *Vow*, the exacting of which appertains to Almighty GOD[a].

VIII. Another Reaſon why, ſince the Will of Man is capable of conforming to a Rule, ſuch a Rule may be preſcrib'd to it, and an Obligation laid on it thus to conform, is, becauſe he ſtands under the Command of a ſuperior Power. Theſe two Conditions put together, render Men liable to Obligations, proceeding from eternal Principles. For when the Powers of any Agent are ſo tied up by Nature to an uniform way of acting, as that it cannot by its inward Motion ſteer a different Courſe, the Action thus produc'd is rather *phyſical* than *moral*, and ariſeth rather from Neceſſity than from Obligation. And, on the other hand, where a Perſon acknowledgeth no Superior, there can be no eſſential Principle apt to reſtrain his inward Liberty. And, altho' ſuch an one ſhould never ſo exactly obſerve a certain Method of proceeding, and conſtantly refrain from ſome kinds of Actions, yet this would not be taken for the Effect of any Obligation, but of his own free Pleaſure. It follows then, that he alone is capable of Obligation, who[1] can have Knowledge of a Rule preſcrib'd him, and hath a Will intrinſically free, able to ſteer contrary ways; which Will muſt, however, when a Rule is enjoin'd it by a Superior, be ſenſible that it ought not to recede from it. And that ſuch is the Nature of Man, every one's Obſervation may inform him.

IX. *Obligations* are laid on human Minds properly by a *Superior*, that is, by ſuch an One as not only hath ſufficient Strength to denounce ſome Evil againſt us upon Non-compliance, but hath likewiſe juſt Reaſon to require the retrenching of our Free-wills by his own Pleaſure. For when any one is endued with theſe Qualifications, ſo ſoon as he ſhall command any thing, and ſhall farther ſignify the good and evil Conſequent on Obedience and Diſobedience, there muſt needs ariſe in the rational Faculty, a Fear mix'd with Reverence, the former proceeding from his Power, the latter from the Conſideration of ſuch other Reaſons, as without that Motive of Fear, and barely by way of Counſel, ought to prevail on us to embrace the Command. Hence we conceive, that the Right of impoſing Obligations on another, or, which comes to the ſame Thing, the Right of commanding another, and of preſcribing Laws, doth not ariſe barely from Strength, or from the ſuperior Excellency of Nature[1]. Strength indeed, may of it ſelf ſo far bend me contrary to my Inclinations, as to make me chooſe rather, for a while, to obey another's Will, than to venture the Experience of his Force: But this Inducement ceaſeth, when once the Fear is over, and I ſhall then have no Reaſon why I ſhould not act rather according to my own Pleaſure, than according to *his*. And where a Man can bring no other Argument for my Compliance to his Orders, but Force and Violence, nothing hinders, but that if I judge it expedient for my Affairs, I may try all Means to repel the Violence, and to aſſert and vindicate my own Liberty[2].

X. It may not be improper here, to examine that Aſſertion of Mr. *Hobbes*, which he hath laid down in his Book, *De Cive*[b], and which runs thus, in the *Engliſh* Improvement of his *Leviathan*[c]. *The Right of Nature, whereby GOD reigneth over Men, and puniſheth thoſe who break his Laws, is to be deriv'd, not from his Creating them, as if he requir'd Obedience as of Gratitude for his Benefits, but from his irreſiſtible Power.* The Argument with which he defends this Notion is carried on to this Purpoſe: "All Right over others being either by "Nature, or by Compact, that Right may be ſaid "to be granted by Nature, which Nature doth "not take away." *Now ſeeing all Men, by Nature, had a Right to all Things, they had a Right every one*

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[a] Com. *Felden* ad *Grot. Lib.* ii. *Ch.* xiii. §. 1.

[b] *Ch.* xv. §. 5.

[c] *P.* 187.

Mr. BARB. *NOTES*, on §. VII, VIII, and IX.

[1] That is to ſay, That Man is the Object of the Duties that reſpect himſelf, but not the Foundation of them; and if he is obliged to preſerve himſelf (for Example) or improve himſelf, he is not the Cauſe of it himſelf altogether, as if he could lay an Obligation upon himſelf, but becauſe GOD will have him do ſo. See *Lib.* ii. *Chap.* iv. §. 16.

[2] This is, becauſe theſe Bodies are looked upon as a ſingle moral Perſon. See what is ſaid above, *Chap.* i. §. 13.

[1] Theſe Words ought to be added, *acknowledging a Superior, can*——and the Author himſelf has not omitted them in his Abridgment of the *Duties of a Man and Citizen, Lib.* i. *Ch.* ii. §. 4. where the reſt of this Sentence is found Word for Word.

[1] All the Power of obliging an intelligent Creature, as Man, is founded upon the Ability and Will which he hath to make himſelf happy, or leſs miſerable, than he would be, if he diſobeyed. If Man were ſuch a Creature, that he muſt neceſſarily be unhappy, or that it were impoſſible that his Miſery could be increaſed or diminiſhed, GOD might force him indeed to act after ſuch or ſuch a Manner, but he could not properly oblige him to it (*Gaſtrell* in his *Extract of the New Rep. of Letters.*) It were alſo in vain for an intelligent Being to pretend to ſubject another's Actions to a certain Rule, if it be not in his Power to reward his Obedience, and puniſh his Diſobedience, and that by ſome Good or Evil, which is not the natural Effect or Produce of the Action itſelf, for that which is naturally profitable, or unprofitable, works of itſelf without the Help of any Law. Mr. LOCK's *Philoſ. Eſſay, p.* 428.

[2] Terent. Adelph. *Malo coactus qui ſuum officium facit, &c.* He that doth his Duty out of Fear of Puniſhment, will be ſure to take care whilſt he is under Apprehenſion of being diſcover'd: but upon the Hopes of Privacy and Security, he never fails to give a Looſe to his old Inclinations.

of them to reign over all the reſt. But becauſe this Right could not be obtain'd by Force, it concern'd the Safety of every one, laying aſide that Right, to ſet up Men with ſovereign Authority, by common Conſent to rule and defend them: Whereas if there had been any Man of Power irreſiſtible, there had been no Reaſon why he ſhould not by that Power have rul'd and defended both himſelf and them, according to his own Diſcretion. To thoſe therefore, whoſe Power is irreſiſtible, the Dominion of all Men adhereth naturally by their Excellence of Power; and conſequently it is from that Power, that the Kingdom over Men, and the Right of afflicting them at his Pleaſure, belongs naturally to Almighty GOD, not as Creator and Gracious, but as Omnipotent. Now in this Diſcourſe there are ſeveral Things that deſerve to be cenſur'd. For, in the firſt Place, it may be queſtion'd, whether or no thoſe two Expreſſions, *A Right of Sovereignity* (upon account of Strength) *is granted by Nature*, and, *A Right of*, &c. *is not taken by Nature*, hang very well together. Becauſe in moſt Caſes, my not taking away a thing is by no means an Argument, that I therefore grant it. And ſince, *not to be taken away*, and *to be granted*, are different Things; ſuch a Right may ſeem to be *granted* by ſome other Principle than Nature, tho' Nature doth not *take it away*. Beſides, that Maxim, *All Men by Nature had a Right to all Things* [1], ought to be interpreted with great Caution. By *Right* [a], he means the Liberty which every Man hath of uſing his natural Faculties according to Reaſon. Therefore his Principle, in a ſound Senſe, will amount to no more than this; By Nature, that is, upon the Removal of all Law, every Man may fairly uſe his natural Strength againſt thoſe whom his Reaſon inſtructs him thus to deal with, for the ſake of his own Preſervation. But it doth not hence follow, that barely by natural Strength an *Obligation*, properly ſo call'd, may be laid on another: For to *compel* and to *oblige*, are very different Matters; and tho' natural Strength be ſufficient for the former, yet the latter cannot be perform'd by that Superiority alone. For, even according to Mr. *Hobbes*'s own Notion, as one Man hath a Right of *compelling others*, ſo thoſe others have a Right of *reſiſting him.* But now Obligation cannot ſtand with a Right of reſiſting; becauſe it preſuppoth ſuch Reaſons as inwardly affecting Mens Conſciences, make them conclude, by the Judgment of their own Mind, that they cannot *honeſtly*, and therefore *rightly* reſiſt. And though it be irrational, to contend violently againſt a ſuperior Strength, and by that means to draw upon ourſelves [2] greater Miſchiefs; yet there remains in us a Right of trying all Ways, either to drive off the Force, by the dexterous Application of other Force, or to elude it by Subterfuge and Eſcape: But neither can this Right conſiſt with that *Obligation* which is preciſely ſo term'd, and which *Grotius* commonly oppoſeth to *Extrinſical* [3]. So that, on the whole Matter, by bare Force, not the Right of Reſiſtance, but only the Exerciſe of it, is extinguiſh'd. We may explain the Point by the Caſe of Brutes, with which we Men live in a lawleſs State: Now thoſe of them which we can maſter by our Strength, we lay hold on, and employ in our Service; but if any of them eſcape our Power, we are not apt to complain of any Injury receiv'd from them. Nor can it be here replied, that Brutes are not capable of Obligation; and that therefore they cannot be tied and engag'd any other Way, than by Strength: For Mr. *Hobbes* himſelf acknowledgeth, , That a Captive in War, although capable of Obligation, yet is under none, whilſt he is reſtrain'd only by *natural Bonds*, and before the Interpoſition of any Faith, or Compact; and that therefore, ſuch an one may give his Conqueror the ſlip, or may aſſault him violently; ſo ſoon as he finds Opportunity. *Seneca de Ira. Lib.* ii. *Ch.* xi. *Nature hath ſo order'd Things, that he whoſe Greatneſs depends on the Fear of others, is not without Fear himſelf.* Were we diſpos'd to be tedious, we might farther ſhew, that this Maxim of Mr. *Hobbes* is meer Abſurdity and Nonſenſe, if applied to God Almighty. For how can Nature be ſaid to have *granted* any thing to God: Since Nature is either God himſelf, or, at leaſt, the Work of God? For theſe Reaſons therefore, and becauſe it ſeems unworthy of the Divine Goodneſs, we conclude, that the Right of Commanding, or the Sovereignty of God, as it denotes the Virtue of imprinting Obligations on Mens Minds, is not to be deriv'd from the bare Conſideration of his Omnipotence.

Neither do thoſe Arguments, brought by Mr. *Hobbes* from Scripture, prove the Truth of his Poſition. When God ſeems to have Recourſe to his Abſolute Power, about the Calamities ſent on *Job*, we cannot hence infer, that he hath no Right over his Creatures, but what ariſeth from that Power only. *Job* himſelf, at the beginning of his Sufferings, made a true Declaration, by what Right God had deprived him of his Goods, and of his Children: *The Lord gave* (ſays he) *and the Lord hath taken away:* That is, *why may not he recall at his Pleaſure, thoſe Things which he gave upon the ſame free Account?* But when his Grief had ſo far prevail'd on his Reaſon, as to make him enter into Expoſtulation with Heaven, then God, to repreſs the Inſolence of the Complaint, alledg'd his Power, ſince the Sufferer had now neglected to conſider the other Reaſons of the Divine Sovereignty and Command. And thus we commonly deal with obſtinate and refractory Subjects; when they refuſe to hear our *Reaſons*, we ſhew them our *Strength*, to make them underſtand not only their Sin, but their Folly too in oppoſing our Dominion. In the ſame Manner, if a Perſon complains of the Miſfortunes of good Men, and the Proſperity of the

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[a] Vide *De Cive, Ch.* i. §. 7.

[b] *De Cive, Ch.* viii. §. 2.

[c] *Add. Senec. ad Polyb. Ch.* xxix.

Mr. Barb. *NOTES* on §. x.

[1] See *Book* II. *Ch.* ii. §. 3.

[2] *Pindar. Pyth. Od.* 2. Ποτὶ κέντρον δὲ, &c. To kick againſt the Goad is a very dangerous Attempt.

[3] But this external Obligation impoſes alſo, according to *Grotius*, a Neceſſity of not reſiſting. All the Difference is this, That the internal Obligation has reſpect to Right, properly ſo call'd, by Virtue of which we act according to Reaſon, and agreeable to the Light of Conſcience, whereas an external Right, which produces an external Obligation, imports no more than Impunity to him that uſes this Right, and hinders not but that he may do Evil in the Uſe of it, altho' in this laſt Caſe he can't reſiſt lawfully. *Grotius*, among other Inſtances, gives an Example of the ill Treatment which a Priſoner of War receives from a Conqueror, and a Subject from his Prince. See *De Jur. Bell. & Pacis Prolegom*, §. 41. and *Lib.* i. *Ch.* iv. §. 3. and *Lib.* iii. *Ch.* vii. §. 6, 7.

Wicked, when he perſiſts deaf to the genuine Cauſes of that Proceeding, in the laſt Place, we confound him with Divine Omnipotence: As if we ſhould ſay, *You that fanſy your ſelf injur'd, go and try your Strength againſt GOD for Satisfaction.*

Nor is it a better Inference of Mr. *Hobbes*, when he ſays, that the Obligation of paying Obedience to GOD is incumbent on Men, upon Account of their Weakneſs. For this only could make it a piece of Folly in us, not to redeem our ſelves by obeying, from ſome greater Evil: But it doth not at all take away our Right of deſiring, and of endeavouring, by all Means, to eſcape the ſuperior Strength which thus oppreſſeth us. But ſuch a Right is utterly excluded by every true *Obligation.* Nor is this Conſequence good, *Of two Omnipotents, neither can oblige the other, therefore Men are oblig'd to GOD, only becauſe they are not Omnipotent*; were the Antecedent never ſo unqueſtion'd. Not to ſay, that the Fanſy of two Omnipotent Beings is [4] an impoſſible Suppoſition. Neither did our Saviour intend to aſſert his Right againſt *Saul* by that Argument, *It is hard for thee to kick againſt the Pricks*; but rather to reprove the Boldneſs and Vanity of *Saul*'s Deſign. Nor was that mighty Convert afterwards invited by *Ananias* into the *Chriſtian* Faith, barely by being inform'd how much above his Strength it was, to deſtroy that Profeſſion. We have applied ſo much the more Diligence to the confuting of this Opinion, the more Danger we apprehend of its being abus'd by violent and headſtrong Men. In *Thucydides* [5] the *Athenian* Ambaſſador ſpeaks to this purpoſe, *We follow the common Nature and Genius of Mankind, which appoints thoſe to be Maſters who are ſuperior in Strength. This Law is not of our making, nor are we the firſt who have uſed it; but we receiv'd it as it came down to us, and we ſhall leave it to guide the Practice of all Poſterity.* Dionyſ. Halicarn. Lib. i. *It is a Law of Nature common to all Men, and which no Time ſhall diſannul or deſtroy, that thoſe who have more Strength and Excellence ſhall bear Rule over thoſe that have leſs.* [6] *Brennus* (in *Plutarch*'s *Camillus*) calls it *a moſt antient Law, that which gives to the Valiant the Poſſeſſions of Cowards; derived from GOD himſelf, and reaching even to brute Creatures; for even amongſt theſe, Nature gives larger Privileges and Portions to the Strong than to the Weak.* *Livy* hath expreſs'd the Notion more conciſely, *Omnia fortium eſſe*, that *the World was made for the Bold and the Strong.* *Callicles* (in *Plato*'s *Gorgias*) purſues the ſame Argument: In the firſt place, he lays down this Suppoſition, That *Nature* and *Law* are many times contrary to each other: He inſtanceth in the Caſe of *Injury*; to *receive* which is by Nature the moſt baſe and vile, [7] as *the Treatment of a Slave, not of a free Subject*; yet to do an Injury is much worſe in the Conſtruction of the Law. He obſerves it to have been the Policy of Law-givers to encourage this latter Notion, ſo to order the uſeful Engines of Praiſe and Diſpraiſe, as to hinder others from growing too powerful for them; well knowing, that they were otherwiſe [8] an unequal Match for the Multitude. [9] *Now Nature herſelf* (ſays he) *as I imagine, ſhews it to be juſt and right, that the Good and the Strong ſhould have, in every thing, a larger Share than the Bad and the Weak.* And therefore, whereas *Xerxes* and *Darius* had both made uſe of this Pretence, the former againſt the *Grecians*, the latter againſt the *Scythians*; he ſays they did all this *according to the Law of Nature.* He complains that the rigid Doctrine of *Juſtice* damps and oppreſſeth the generous Spirits of young Men; or that, on the contrary, when any one breaks thro' thoſe formal Reſtraints, he ſeems to ſhake off his Ruſt, and to *ſhine in all the Splendor of natural Right.* On this Principle, he ſays, *Hercules* drove off *Geryon*'s Oxen, who neither ſold nor gave them him; *the Hero having a natural Right to the Oxen, and all the other Goods and Poſſeſſions of inferior puny Mortals.* And this is indeed the Maxim which the great Bullies of Mankind would have prevail in the World: *Hoc Ithacus velit, & magno mercentur Atridæ.* *Plutarch*'s Opinion is much more moderate, and might be admitted with leſs Exception, [10] *It is the firſt and principal Law of Nature* (ſays he) *that he whoſe Circumſtances require Protection and Deliverance, ſhould admit him for his Ruler who is able to reſcue and defend him.*

Mr. BARB. *NOTES.*

[4] See how Mr. *Locke* proves this, in one of his Letters written in *French*; becauſe it was to be ſhewed to a Perſon of Quality, who did not underſtand *Latin.* Two Omnipotent Beings are altogether inconſiſtent, becauſe we muſt neceſſarily ſuppoſe, that the one muſt always will what the other does; and in this Caſe, he, whoſe Will is neceſſarily determined by the other, conſequently has not that Perfection; for 'tis better to be free, than to be ſubject to the Determination of another's Will. But if they are not both reduced to the Neceſſity of willing the ſame Thing always, then the one may deſire to have that done which the other would not; in which Caſe the Will of the one muſt prevail over the Will of the other, and ſo he, of the Two, whoſe Power can't bring about what he would, can't be Omnipotent, becauſe he can't do ſo much as the other. So that there can't be two Omnipotent Beings, and conſequently not two Gods, *p.* 413. See alſo Mr. *Clerc*'s *Ontology*, *Sect.* iii. *Ch.* x. *§.* 3.

[5] Ἡγούμεθα γὰρ τό, τε θεῖον δόξῃ, τὸ ἀνθρώπειόν τε σαφῶς διαπαντὸς ὑπὸ φύσεως ἀναγκαίας, οὗ ἂν κρατῇ ἄρχειν, καὶ ἡμεῖς οὔτε θέντες τὸν νόμον, οὔτε κειμένῳ πρῶτοι χρησάμενοι, ὄντα δὲ παραλαβόντες, καὶ ἐσόμενον ἐς ἀεὶ καταλείψοντες, χρώμεθα αὐτῷ. *Thucyd. Lib.* v. *Ch.* cv. See alſo *Dionyſ. Halicarn. Lib.* i. *Ch.* v.

[6] *Brennus*'s Words, in *Plutarch*'s *Camillus*, are theſe, Οὐδὲν οὐδὲ ἡμεῖς γε δεινὸν οὐδὲ ἄδικον ποιοῦντες, ἀλλὰ τῷ πρεσβυτάτῳ τῶν νόμων ἀκολουθοῦντες, ὃς τῷ κρείττονι τὰ τῶν ἡττόνων δίδωσιν, ἀρχόμενος ἀπὸ τοῦ Θεοῦ, καὶ τελευτῶν εἰς τὰ θηρία. καὶ γὰρ τούτοις ἐκ φύσεως ἔνεστιν, τὸ ζητεῖν πλέον ἔχειν τὰ κρείττονα τῶν ὑποδεεστέρων.

[7] *Plato*'s Words are, Οὐδὲ γὰρ ἀνδρὸς τοῦτό γ' ἐστὶ τὸ πάθημα, τὸ ἀδικεῖσθαι, ἀλλ' ἀνδραπόδου τινός, &c.

[8] It appears plainly by this Place, as it is printed in all the Editions of the Original, that this Writer did not conſult the *Greek* Authors, which he quotes, nor, thro' Inadvertence, did he ſometimes throughly underſtand the *Latin* Tranſlation. *Callicles* in *Plato* ſays, οἱ τιθέμενοι τοὺς νόμους, οἱ ἀσθενεῖς ἄνθρωποι εἰσὶ καὶ οἱ πολλοί. Words both very clear and coherent with the former Diſcourſe; but *Marſilius Ficinus* having tranſlated them in an ambiguous Manner, unleſs one conſiders them throughly, thus, *Qui leges condunt, imbecilliores ſunt ac multitudo ipſa eſt*; Mr. *Puſendorf* thought that he had ſaid, *Law-givers are weaker than the People*, as if the *Latin* had been, *Imbecilliores multitudine ipſâ*, or in the *Greek*, ἀσθενέστεροι τῶν πολλῶν, whereas the Senſe of *Callicles* is, That the Laws were firſt eſtabliſhed by the People, who thought themſelves not ſtrong enough to defend themſelves againſt the Inſults of others, and chiefly by thoſe People, which ſuppoſed the Great ones to oppreſs them, and ſo I have render'd it, tho' the *Engliſh* Tranſlator did not mind it.

[9] Ἡ δέ γε (οἶμαι) φύσις αὐτὴ ἀποφαίνοι ἄν, ὅτι δίκαιόν ἐστι τὸν ἀμείνω τοῦ χείρονος πλέον ἔχειν, καὶ τὸν δυνατώτερον τοῦ ἀδυνατωτέρου. Ibid.

[10] Ὁ γὰρ πρῶτος (ὡς ἔοικεν) καὶ κυριώτατος νόμος, τῷ σώζεσθαι δεομένῳ, τὸν σώζειν δυνάμενον, ἄρχοντα κατὰ φύσιν ἀποδίδωσι. *Plutarch in Pelop. p.* 290.

XI. Others there are who derive the Origin of Sovereignty, or of the Power of impoſing Obligations on another, from Eminency or ſuperior Excellency of Nature, which they pretend is of itſelf ſufficient for that great Purpoſe. They draw a main Argument from the Nature of Man, in whoſe Mind, as in the moſt excellent Part, is ſeated the τὸ ἡγεμονικὸν, the *Directive Power*. To illuſtrate which, they alledge the Authority of *Cicero* [1], when he commends the *Latin* Phraſe *exire de poteſtate*, as applied to thoſe, who are carried away from rational Acting, by the Fury of their Paſſions and Luſts; ſuch Men being truly *gone out of the Power or Command* of their Minds. [2] *Ariſtotle* likewiſe is brought in to ſtrengthen their Party, becauſe he hath ſomewhere declared, that if a Man can be found excelling in all Virtues, ſuch an one hath a fair Title to be King. Thus the moſt ſuperlative Pre-eminence of God, would, they ſay, deſerve Veneration, though he had never created the World. Farther, to this Pre-eminence of Nature they add *Non-accountableneſs*; and affirm, That for this Reaſon only, if a Man uſeth brute Creatures (whom he ſo far excels) any otherwiſe than with Decency and Moderation, he may do it fairly and ſecurely, and they have no Right to complain of their hard Treatments: Becauſe when one contends with another about Matters of Right, he doth, as it were, compare himſelf with him, and is willing that both ſhould be judg'd by the ſame Law; but this cannot be admitted in two Natures ſo vaſtly different, that one may be ſaid to have been made for the ſake of the other. And therefore they pretend, that God declar'd Mens Right over Brutes, purely on Account of their ſuperior Nature. Whence, they tell us, if a Man, for abuſing his Cattle happen to be puniſh'd by the Magiſtrate, this is not done in Favour of the Beaſts, but for the ſake of the other Subjects, whoſe Intereſt it frequently is, that every one ſhould uſe well what he poſſeſſeth. On the ſame Score, they ſay, the Body ought not to complain, though it ſhould, by the Command of the Soul, be waſted and worn out in Labours; ſince it is in ſo high a Degree ſurpaſs'd by that Nobler Part.

But, to deliver our own Judgment, we cannot yet be perſuaded, that from a bare Tranſcendency of Nature, can ſpring a Right of impoſing *Obligation* on others, who have in themſelves a Power of being their own Governors and Directors. For neither doth a ſuperior Nature always imply a Fitneſs to Rule an Inferior; nor do the different Degrees of Perfection, in natural Subſtances, immediately denote a Subordination, and a Dependence of one upon the other. But rather, ſince the Perſon who is to receive the Obligation, hath in himſelf a Principle of guiding his own Actions, which he may judge ſufficient for his turn; there appears no Reaſon why he ſhould ſtand preſently convicted in his own Conſcience, if he acts rather by his own Pleaſure, than at the Will of another, who in Nature excels him. And therefore tho' that Notion of the *Epicureans* was moſt ſenſeleſs and impious, in which they deſcrib'd the Gods, as enjoying their own Happineſs with the higheſt Peace and Tranquillity, far remov'd from the troubleſome Care of human Buſineſs; and neither ſmiling at the good, nor frowning at the wicked Deeds of Men; yet they rightly enough inferr'd, that upon this Suppoſition, all Religion, and all Fear of Divine Powers, was vain and uſeleſs. For who will worſhip another, that is neither willing to aſſiſt, nor able to injure him [3]? The Contemplation of ſo noble a Being as this, may indeed excite Wonder in us, but it can never produce Obligation. Beſides, we *Chriſtians* confeſs, that there are created Spirits endued with a Nature far ſurpaſſing our own; and yet we acknowledge no Sovereignty that they bear over us, immediately on their own Account. *Apocalypſ.* xxii. 9. *Mar. Antonin.* Lib. vi. Ch. xliv. *If the Gods do not at all regard or order human Affairs (which yet it is the higheſt Impiety to imagine) to what Purpoſe are our Sacrifices, our Supplications, and our Oaths, and our other Acts of Worſhip, by which we ſuppoſe the Divine Powers to be ever preſent and converſant amongſt us?* Cicero de Natur. Deor. Lib. i. Ch. ii. *There have been Men in the World, who thought the Gods not in the leaſt concern'd about human Affairs. Were this Opinion admitted for true, there could be no ſuch Thing as Piety, Holineſs, or Religion amongſt Men: For to pay theſe Regards to the Divine Nature, is moſt agreeable to Goodneſs, and to Purity, provided they take Notice of our Actions, and are the Authors of any Benefits and Advantages in our Lives. But if the Gods are neither able nor willing to help us, nor at all beſtow their Care and Obſervation on our Proceedings, and ſo derive no Bleſſings, no Favours upon Mankind, to what End is our Worſhip, our Honours, and our Prayers, the Tribute which we now pay to the Immortal Beings? As no Virtue can ſubſiſt in Hypocriſy and Shew, ſo eſpecially Piety would be ſoon loſt in that Diſguiſe; and then farewel to all Holineſs, and all Religion; which being once baniſh'd the World, what could follow but the Miſery of utter Diſorder, of univerſal Confuſion?* And again, *What Piety can you owe to him from whom you have receiv'd no Benefit? Or how can he claim any Thing as his Due, who hath no Merit to plead in his Behalf?* Idem de Nat. Deor. Lib. ii. The common Title which our Anceſtors gave *Jupiter* was, *Optimus Maximus*, *moſt eminent in Goodneſs and in Greatneſs*. In which we find Goodneſs or Beneficence preferr'd to Greatneſs; it being a more noble, and more excellent, as well as the moſt acceptable

Mr. Barb. *NOTES on* §. xi.

[1] *Tully's* Words are, *Itaque nihil melius, quàm quod eſt in conſuetudine ſermonis Latini, cum exiſſe ex poteſtate dicimus eos, qui effrænati feruntur, aut libidine, aut iracundia,* Tuſc. quæſt. Lib. iii. Ch. v. To which Words it may be convenient to add another Paſſage of *Cicero's*, which will ſhew that the former is very well apply'd, *Qui igitur exiſſe ex poteſtate dicuntur, idciro dicuntur, quia non ſunt in poteſtate mentis, cui regnum totius animi à naturâ tributum eſt.* They therefore who are ſaid to go beyond their Power, are ſo term'd, becauſe they are not under the Command of the Underſtanding, to which Nature has given the ſupreme Government of the Soul.

[2] See this Author's Treatiſe *De Republica, Lib.* iii. *Ch.* xvii.

[3] The *Greek* of *Antonine* is, Εἰ δ' ἄρα περὶ μηδενὸς βουλεύονται (οἱ Θεοὶ) πιστεύειν μὲν οὐχ ὅσιον, ἢ μηδὲ θύωμεν, μηδὲ εὐχώμεθα, μηδὲ ὀμνύωμεν, μηδὲ τὰ ἄλλα πράσσωμεν, ἅπερ ἕκαστα ὡς πρὸς παρόντας καὶ συμβιοῦντας τοὺς Θεοὺς πράσσομεν. And *Tully's Latin* is, *Sin autem Dii neque poſſunt nos juvare, neque volunt, nec omnino curant, nec quid agamus animadvertunt, nec eſt quod ab his ad hominum vitam permanare poſſit, quid eſt quod ullos Diis immortalibus cultus, honores, aut preces adhibeamus?* See alſo *Tully de Nat. Deorum, Lib.* ii. *Ch.* xxv.

Prerogative to be good, than to poſſeſs the higheſt Degrees of Majeſty and Strength. *Ovid. de Pont. Lib.* ii. *El.* ix.

Nunquid erit quare ſolito dignemur honore
Numina, ſi demas velle juvare Deos?

What Vows would to regardleſs Powers be paid?
They loſe their Altars, if we loſe their Aid.

The Inſtance about Brutes is nothing to the purpoſe; for they are not held by Obligation, but only by Force, or by the Enticement of Food: Neither would they act contrary to their Natures, ſhould they endeavour to throw off the Yoke and the Authority of Men. As to the Argument about the Soul, when that is ſaid to bear a Sovereignty over the Body, the Speech is figurative: For Sovereignty, or Command, is not properly underſtood but between two *Perſons*, or two compleat Natures; and the Body is ſubject to the Soul, by Virtue of the *phyſical* Combination, not of any moral Tie. Laſtly, the Citation from *Ariſtotle*, if a King were to be conſtituted by free Election, the Crown ought to be given to the moſt deſerving Perſon [4] [a]; yet would not he bear the Sovereignty by a Right deriv'd purely from his ſuperior Gifts and Excellencies, but by Virtue of the Donation made him by the Conſent of the Electors.

XII. It muſt be acknowledg'd therefore as a certain Truth, That neither Strength, nor any other natural Pre-eminence, is alone ſufficient to derive an Obligation on me from another's Will; but that it is farther requiſite, I ſhould either have receiv'd ſome extraordinary Good from him, or ſhould voluntarily have agreed to ſubmit my ſelf to his Direction. *Plin. Paneg. Chap.* xxxviii. [1] *Nature doth not ordain amongſt Men as ſhe doth amongſt Beaſts, that the Power and the Sovereignty ſhall paſs to the ſtrongeſt.* For, as we naturally yield and give up ourſelves to ſome ſingular Benefactor, [2] ſo if it appears that this Benefactor both intends my Good, and can conſult it better than I my ſelf am able, and, farther, doth actually claim the Guidance of me, I have no Reaſon in the World to decline his Government and Sway. Eſpecially if it ſo happen, that I am beholden to him for my very Being, *Acts* xvii. 24, *&c.* For he who firſt conferr'd on Man the Benefit of free acting, why may not he, by his own Right, retrench that Freedom in ſome Particulars? And then, as for the other Caſe, he that conſents to admit another for his Sovereign, declares, by this his own proper Act, that he will conform to his Sovereign's Pleaſure. Though indeed to make a lawful Sovereignty ariſe from Conſent, it is farther neceſſary, that by this new Subjection no Prejudice be offer'd to the well-grounded Right of a third Perſon, and that the one Party may juſtly have ſuch Subjects, and the other Party as juſtly ſuch a Governor. From theſe two Springs we conceive all thoſe Obligations to flow, which do, as it were, caſt an inward Tie and Reſtraint upon the Liberty of our Wills. But becauſe 'tis beyond the Power of any moral Bonds, utterly to ſuppreſs our natural Freedom of acting; and becauſe ſuch is either the Lightneſs, or the Wickedneſs of moſt Mens Minds, that they deſpiſe theſe Grounds of Dominion, as feeble Reaſons for Obedience; hence there ariſeth a Neceſſity of adding ſome further Motive, which may work on our diſorderly Luſts with a ſtronger Effect than the bare Senſe of Decency and Honour. And this Addition is the more requiſite, in as much as, generally ſpeaking, the Wickedneſs of one Man tends to the Damage of another: Whereas we ſhould be more willing to leave a Man to his own Guidance, provided his Sins would incommode no Body but himſelf. Now there is nothing which could have ſuch an Effect as this, but the Fear of ſome Evil to be inflicted upon our violating an Obligation, by ſome ſtronger Power, whoſe Intereſt it was, that we ſhould not have thus offended. So that Obligations receive their final Strength and Authority from Force, and from a Suppoſition that he, whoſe Buſineſs it is to ſee them obſerv'd, is furniſh'd with ſo much Power, either originally inherent in himſelf, or conferr'd upon him by others, as to be able to bring ſome conſiderable Evil on the Diſobedient. For amongſt wicked Subjects, *he* muſt needs be a very precarious Ruler, whom they can deſpiſe without Danger. On the contrary, *his* Dominion is ſettled on a firm Bottom, who, in the firſt Place, bears a juſt Title to it, and, beſides this, hath ſo much Force always at his Command, as is ſufficient to reduce the Seditious, and to reſtrain the Tranſgreſſors. [3] *Sophocl. Ajac. Flagellif.* ver. 1092.

Nor Laws, nor Governors could ſtand ſecure,
Without the Guard of Fear; nor mighty Chiefs
Secure the Faith of Armies, but ſuſtain'd
By awful Dread, and Shame of doing ill.

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[a] *So far the Saying of* Cyrus *will be true,* That no one ought to be a Governor, who is not better than his Subjects. *Plutarch. in Apophthegm. And in the ſame Senſe we muſt take what* Socrates *urgeth in* Xenophon. De rebus memorab. Lib. iii. p. 453, 454. Ed. *H. Steph.*

Mr. Barb. *NOTES.*

[4] *Plutarch*'s Words are, Ἀρχεῖν δὲ μηδενὶ προσήκειν, ὃς οὐ κρείττων ἐστὶ τῶν ἀρχομένων.

[1] *Pliny*'s *Latin* is, *Nec uti inter pecudes, ſic inter homines* [*Lex Naturæ*] *poteſtatem & imperium valentioribus dedit.*

[2] This and the following Reaſons ſerve rather to make an Obligation ſtronger and more reaſonable, than to eſtabliſh it upon a ſure and proper Foundation; for, in my Judgment, there is properly but one general Foundation of an Obligation, to which all others may be reduced, and that is, our natural Dependence upon the ſupream Authority of God, who has given us a Being, and being Almighty, can puniſh thoſe that diſobey him; and, on the contrary, reward thoſe that obey him. From hence ariſeth all lawful Authority, upon the Account of which one Man commandeth another; for that is lawful only, when it is conformable to the Will of God, known to us, either by Revelation, or the mere Light of Nature. But if amongſt Men, the immediate Reaſon why they ought to be ſubject to the Command of another is ordinarily this, That they have voluntarily conſented to it, that Conſent, and all other Engagements whatſoever, which they enter into, being obligatory upon the Account only of that Maxim of natural Right, which tells us, That every one ought to obſerve what he has engaged himſelf to. See *Lib.* ii. *Ch.* iii. §. 20. following.

[3] The *Greek* of *Sophocles* is, Οὐ γάρ ποτ' οὔτ' ἂν ἐν πόλει νόμοι καλῶς
Φέροιντ' ἂν ἔνθα μὴ καθεστήκοι δέος,
Οὐκ ἂν στρατός γε σωφρόνως ἄρχοιτ' ἔτι
Μηδὲν φόβου πρόβλημα μηδ' αἰδοῦς ἔχων.

Arrian[4] *Epict. Lib.* i. *Ch.* xxix. *p.* 164. *Ed. Cantab. 'Tis not Man who is the Lord of another Man, but Life and Death, Pleaſure and Pain, are the proper Sovereigns whom we obey: Take away theſe, and bring me before* Ceſar, *and ſee how little Majeſty without Terror can prevail upon a Man's Reſolution.*

From our Diſquiſitions on this Head, ſome Temper may be found and applied to that Maxim, which ſome have more crudely utter'd, that *Right and Law is nothing elſe but what pleaſeth the ſtronger Party:* For indeed Laws can hardly obtain their outward End and Effect, unleſs they are ſupported and arm'd with Strength, ſo as to be able, upon Occaſion, violently to force a Compliance. *Solon.* as he us'd to ſay of himſelf, atchiev'd the greateſt Things, ὁμοῦ βίην τε ϗ δίκην συναρμόσας, *by coupling together Juſtice and Strength*, Plutarch Solon. *p.* 86. *Ed. Wechel.* And there is no Argument of greater Efficacy in human Affairs, than that which *Scylla* in *Ovid.* (*Metam. Lib.* viii. *ver.* 59.) uſeth concerning *Minos*,

In cauſaq; valet, cauſamq; juvantibus armis.

With a good Cauſe, he brings as good a Sword
to ſecond it.--------

Even all that Pleaſure, and Joy of Conſcience, upon Performance of our Duty, and thoſe Horrors and Tortures of Mind, which are the conſtant Attendants of Sin, both which we are in Piety oblig'd to admit and acknowledge, proceed from the Strength and Power of Almighty God, who can as eaſily make ſuch Wretches their own Puniſhers, as contemn the Authority and Reſtraints of other Men. *Juvenal. Sat.* xiii. *v.* 193. & *ſeqq.*

-----------------------------*Cur tamen hos tu*
Evaſiſſe putes, quos diri conſcia facti
Mens habet attonitos, & ſurdo verbere cædit,
Occultum quatiente animo tortore flagellum?
Pœna autem vehemens, ac multo ſævior illis
Quas aut Cæditius gravis invenit, aut Rhadamanthus,
Nocte dieque ſuum geſtare in pectore teſtem.

But why muſt thoſe be thought to *'ſcape*, that feel
Thoſe Rods of Scorpions and thoſe Whips of Seeel,
Which *Conſcience* ſhakes, when ſhe with Rage
(controuls,
And ſpreads amazing Terrors thro' their Souls?
Not ſharp Revenge, nor *Hell* itſelf can find
A fiercer Torment, than a guilty Mind;
Which Day and Night doth dreadfully accuſe,
Condemns the Wretch, and ſtill the *Charge* renews.
Mr. Creech.

And indeed it highly concerns the common Good of Mankind, that all Men believe and confeſs the Certainty of a divine Tribunal, incapable of the leaſt Corruption, where Judgment is to be paſs'd on thoſe, who, by Means of Cunning, Colluſion, or Strength, have declin'd the juſt Performance of their Duty. Hither may be referr'd that of *Plutarch* (*adverſ. Colot.*) *'Tis eaſier to build a City without Ground to hold and ſupport it, than to make a Commonwealth either unite or ſubſiſt, without the Acknowledgment of a* God *and a Providence*[5].

They,

Mr. Barb. *NOTES.*

[4] The *Greek* of *Arrian* is, Ἄνθρωπος ἀνθρώπου κύριος οὐκ ἐςὶ, ἀλλὰ θάνατος ϗ ζωὴ, ϗ ἡδονὴ, ϗ πόνος, ἐπεὶ χωρὶς τούτων ἄγαγέ μοι τὸν Καίσαρα, ϗ ὄψει πῶς εὐςαθῶ.

[5] *Plutarch*'s Words are, Ἀλλὰ πόλις ἄν μοι δοκεῖ μᾶλλον ἐδάφους χωρὶς, ἢ πολιτεία, τῆς περὶ θεῶν δόξης ἀναιρεθείσης παντάπασι, σύςασιν λαβεῖν, ἢ λαβοῦσα τηρῆσαι. But our Author treats more largely elſewhere, of the Uſe of Religion in the Life of Man, and ſhews us, how it is the principal and moſt ſtrong Bond of Society. In the independent State of Nature, if there were no Fear of a Deity, ſo far as every one found himſelf able to oppreſs another with Impunity, they would attempt any Thing as they pleaſed: Honeſty, Modeſty, and Fidelity would be eſteem'd meer Chimera's and empty Names; no Man would take himſelf obliged to do any Good but upon the Account of his own Impotency. Further, without Religion no civil Society can be maintained; the Fears of temporal Puniſhments, the moſt ſolemn Oaths and Engagements to be faithful Subjects, the Reputation of keeping our Engagements inviolably, and the Knowledge of the Cares of our Kings and Governors, to ſecure us from the Inconveniencies of our natural State, are not of themſelves ſufficient to keep Subjects to their Duty; for Death being the only Thing in the World which is moſt feared by them who believe no God, we can't but acknowledge the Truth of that Maxim, *He that knows to die, knows not to be forced.* He that has Reſolution enough to die bravely, is capable of attempting any Thing againſt his Sovereign, and he can't want ſome ſpecious Motives or Pretences to entertain ſuch a Deſign; as for Example, The Deſire he hath to avoid the Evils which he apprehends from the preſent Government, an Endeavour to procure himſelf the Supream Power, but above all, the Juſtice, which he may fanſy himſelf to do by ſuch an Attempt, either becauſe his King may ſeem to him not to diſcharge his Duty, or becauſe he flatters himſelf, that if he were in his Place he could do much better. Such Pretences as theſe readily preſent themſelves, when Men have a Mind to put ſuch Projects in Execution, and they may effect their Deſigns, if the Prince neglects in the leaſt to ſecure himſelf againſt the Attempts of Aſſaſſins (in ſuch Caſes, who can anſwer for his Guards themſelves?) or ſeveral Perſons conſpire together againſt him, or in a foreign War, his Subjects revolt to the Enemy. Beſides, Subjects themſelves would do many Injuries one to another; for as in Civil Judicatures Sentence muſt be given according to the Acts and Proofs that are evident, all the Crimes, from which ſome Profit may be acquir'd, may paſs for good Management, which every Man applauds himſelf for, as often as he is ſo lucky as to commit them without Witneſs. No Man would exerciſe any Acts of Charity, or do any friendly Offices, were it not for the certain Hope of ſome Glory or Advantage, which would redound to him by it. If the Senſe of all Chaſtiſement from Heaven were baniſhed, no Man could depend upon another's Fidelity, every one would live in perpetual Diſquiet, thro' Fear and Suſpicion of ſome Deceit, or baſe Uſage from their Equals. Nor would Sovereigns themſelves be better diſpos'd than their Subjects to good Actions. For having no Principle of Conſcience to keep them in, they'd ſell all Offices, yea, Juſtice itſelf; they'd aim at nothing but their own Intereſt, to which they'd ſacrifice the Happineſs of their Subjects. And if they apprehended their Subjects to revolt, they'd endeavour to weaken them as much as poſſible, as the only Way to maintain their Authority againſt Attempts of the Oppreſſors. The Subjects, on the other Side, for Fear of Oppreſſion, would ſeek all Occaſions to ſhake off the Yoke, and in the mean Time live in Diſtruſt one of another. The Husband and Wife, at the Diſagreement that happens between them, would lay hold on the Sword or Poiſon to deſtroy each other, and live in Fear of their Children, Servants, and the reſt of their Family. For ſince without Religion there is no Conſcience, it will be hard to diſcover theſe ſort of Crimes, which are uſually committed in ſecret, and are ſeldom diſcovered, but by ſuch Means as ariſe from a guilty Conſcience. *The Duties of a Man and Citizen, Lib.* i. *Ch.* iv. §. 9. Thus our Author explains this Point, and Experience verifies his Aſſertion. We may add to this, two Examples, which the excellent Author of *Parrhaſiana* makes uſe of to prove the ſame Thing. *The Hiſtory of* China (ſays he) *tells us, that the great Men among the* Chineſe *believe neither the Being of a* God, *who governs all Things, nor the Immortality of the Soul, and ſo we ſay that the Virtue of the* Chineſe *conſiſts in nothing but a profound Diſſimulation of their Vices.* Mem. de La Chine Tom. i. Lib. v. and Tom. ii. Lib. i. Among the *Jews*, the *Sadducees* who denied the Immortality of the Soul, tho' they believed a God, and tho' they rejected a Providence, made it appear by their Converſation, that they could not be of that Opinion, but they muſt be Enemies to Society. For *Joſephus* ſays of them, *De Bel. Jud.*

They, therefore, who would preſcribe Laws to others with any Effect and Validity, muſt build their Power on the Foundations which we have here eſtabliſhed.

XIII. But that a Law may be able to exerciſe its directive Force, there is required in the Perſon for whom 'tis made, a Knowledge both of the Law-giver and of the Law. For how can any Man pay Obedience, who neither apprehends to whom it ſhould be paid, nor to what Duties his Obligation binds him? And here it will be ſufficient, that a Man hath once been Maſter of ſuch a Knowledge: For he that forgets what he once knew, is not at all looſ'd from his Obligation, ſince he might well have ſecur'd his Remembrance, had he taken up, as he ought to have done, a real Deſire and Reſolution of obeying. Now to the Knowledge of the Legiſlator, 'tis hardly poſſible any Man ſhould be a Stranger. For, as to natural Laws, that they have the ſame Author with the Univerſal Frame of Things, none can be ignorant, that will but make Uſe of their ordinary Reaſon. Much leſs can the Author of civil Laws be hid from the Apprehenſion and Notice of his Subjects: Since he is conſtituted, either [1] by the expreſs and open Conſent of thoſe Subjects, or elſe [2] by their tacit Agreement, whilſt they any way ſubmit to his Command. How we arrive at a Senſe of natural Laws by the Contemplation of human Condition, we ſhall hereafter have occaſion to explain. Civil Laws are convey'd to the Subjects Knowledge by a Promulgation, publickly and [3] perſpicuouſly made. In which there are two Conditions which ought to be clear and certain; firſt, That the Laws proceed from him who hath the chief Command in the State; and, ſecondly, That the Meaning of the Laws is ſuch, and no other. The former Condition is then known, when the Sovereign promulgates a Law, either by his own Voice, or by Perſons of his Deputation. That theſe Perſons publiſh Laws by the Command and Authority of the Sovereign, there is no Queſtion to be made, if it appear that they have been [4] employ'd uſually by the Sovereign, in declaring his Will; if the Laws are brought into Uſe at judicial Proceedings, and if they contain in them nothing derogatory to the Sovereign's Power. For it is not to be ſuppos'd that a Miniſter ſhould vent that for a durable Decree of his Prince, which is not ſo, or that he ſhould impudently uſurp ſo extravagant a Power; ſince in an Enterprize of this Nature, there could be no hopes of Concealment, or of eſcaping due Puniſhment for ſo inſolent an Offence. As to the other neceſſary Point, that the Senſe of a Law may be clearly apprehended, it is incumbent on the Promulgators, to uſe the greateſt Plainneſs that the Thing is capable of: Contrary to that Management of *Caligula*, who wrote his Laws in ſmall Letters, and fix'd them in a high Place, in this Manner only ſhewing them to the People [a].

If any thing in the Laws ſeems obſcure, the Explication of it is to be ſought, either from the Legiſlator, or from thoſe Perſons who are by him appointed to judge according to the Laws. For it is their Buſineſs, obſerving a right Interpretation, to apply the Laws to particular Caſes, or upon the Propoſal of ſuch or ſuch a Fact, to declare the Sovereign's Pleaſure concerning it [b].

We cannot here but obſerve, that the Notion maintain'd by ſome Authors, *That the Conſent of the People is requiſite to make Laws oblige the Subject in Conſcience*, is neither true in the Laws of Nature, nor in the Civil Laws of monarchical or ariſtocratical Rulers; nor indeed at all, unleſs it be underſtood of implicit Conſent; as a Man by agreeing to the Sovereignty of another, is at the ſame time ſuppoſ'd to have agreed to all the future Acts of that Sovereignty. Though it would really be very uſeful, and contribute much to engaging the Subjects in a voluntary Obedience, if the Laws could be made with their Conſent and Approbation; eſpecially ſuch as are to paſs into their Lives and Manners. Agreeable to this is *Pericles*'s ſaying in *Xenophon. Apom. Lib.* i. *P.*418. *Ed. Steph. Whoever, either by written or unwritten Commands, enjoins another to do a Thing, without perſuading him that he ought to do it, ſeems to me, not to uſe Law, but Violence.* Comp. Sanderſon de Oblig. Conſcient. Prælect. 7. §. 22 [5].

XIV. As in the Sovereign, or in him who is to govern another by Laws, two things are requiſite,

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[a] *Dio Caſſ. in Excerpt. Piereſc. Lib.* lix.

[b] *Comp. Hobbes de Cive, Ch.* xiv. §. 11, &c. and *Leviath. Ch.* xxvi.

Mr. BARB. *NOTES on* §. XII, XIII.

Jud. Lib. ii. *Ch.* xii. *The* Sadducees *are rude and inhuman to one another, and as cruel to their own Countrymen the* Jews, *as to Strangers.* In fine, that Religion may produce all the good Effects to Society which naturally reſult from it, it is neceſſary that we have right Apprehenſions of the Deity; otherwiſe, if we form to ourſelves a Deity too merciful, or ſuch an one as favours our Sins, either by his Example, or any other Way, Religion will be ſo far from firmly upholding Society, that it will utterly deſtroy it. So that according to the Principles of the Heathens, every one may reaſon as he in the Poet does, *As miſerable a Mortal as I am, ſhall not I be wiſer than the greateſt of the gods?* Teren. Eunuch. Act. iii. Scen. v. Wherefore we muſt think that the virtuous Heathens either did not believe what was commonly reported among them, about the Vices of their gods, or were not aware of the Conſequences that naturally followed from the Principles of a Religion ſo monſtrous. See what ſhall be ſpoken, *Ch.* iii. *Lib.* ii. §. 19. *Note* 2. and *Ch.* iv. §. 3. *Note* 4.

[1] This is done either when a Multitude of Men joins together to make up a Civil Society, or when a Society already formed takes an Oath of Fidelity to their Sovereign. We ſhall treat more at large of this Subject, *Lib.* vii.

[2] This hath place always when we enjoy the Protection of a State, and of the Laws eſtabliſhed; for we muſt be ſuppoſed to conſent tacitly to ſubmit ourſelves to the Laws, tho' we have not formally engaged to do it, as *Plato* obſerves in the Caſe of the Citizens of *Athens*, who had Liberty to go whither they would, unleſs they ſubmitted to the Government of that famous Wealth, ὃς δ' ἂν ὑμῶν παραμείνη, ὁρῶν ὃν τρόπον ἡμεῖς [οἱ Νόμοι] τάς τε δίκας δικάζομεν, καὶ τ' ἄλλα τὴν πόλιν διοικοῦμεν, ἤδη φαμὲν τοῦτον ὩΜΟΛΟΓΗΚΕΝΑΙ ἘΡΓΩ ἡμῖν, ἃ ἂν ἡμεῖς κελεύωμεν ποιήσειν ταῦτα. In *Criton*, and in the next Page, the *Greek* is, ἔργῳ, ἀλλ' οὐ λόγῳ.

[3] In the antient Times, before the Invention of Writing, Laws were compoſed in Verſe, which were frequently ſung in publick, that Men might remember them, *Ariſtot. Problem.* §. 19. *Problem.* xxviii. *Horat. de Arte Poet.* ver. 399.

[4] This Author, in his *Abridgment of the Duties of a Man and Citizen, Lib.* i. *Ch* ii. §. 6. ſays, *That it is the Buſineſs of their Employ*; a Circumſtance worth our Obſervation. For we may doubt of the Validity of the Action of any Miniſter, or Magiſtrate, which belongs not to his Office, unleſs it plainly appears that the ſupream Governor hath given him a Commiſſion extraordinary.

[5] The *Greek* of *Xenophon* runs thus, Πάντα δοκεῖ, φάναι τὸν Περικλέα, ὅσα τις μὴ πείσας ἀναγκάζει τινὰ ποιεῖν, εἴτε γράφων εἴτε μή, βία μᾶλλον, ἢ νόμος εἶναι.

that he underſtand what is fit to be preſcrib'd, and that he have ſufficient Strength to denounce and to execute ſome Evil on thoſe who ſhall not conform to his Rules (for we ſuppoſe the Perſons for whom the Laws were made, to have both Power and Inclination to diſobey them) So every Law conſiſts of two Parts; in one is defin'd and declar'd what is to be perform'd, or omitted; in the other is ſignify'd, what Evil ſhall be incurr'd by thoſe who tranſgreſs in either reſpect; and this latter part is uſually term'd the *Sanction* of a Law; about which Biſhop *Cumberland* [a] hath open'd a wide Field of Enquiry, whilſt contrary to the general Opinion of the Lawyers, "He maintains that the Sanction of Laws is made, not only by Puniſhments, but by Rewards too, and more principally by the latter than by the former. That as to the Sanctions of the Laws of Nature, it is impoſſible by any natural Signs, more openly and more forcibly to perſuade Men to do a Thing [1], or to judge with good Authority, that ſuch a Duty is commanded by the Governor of the World, than if ſuch Acts are grac'd by him with natural Rewards. That, altho' in the Sanction of Laws by Men, uſe is made of negative Conceptions, and of Words properly expreſſing them, yet in the Nature of Things, that which drives us on to Action, is ſome poſitive Good, which we hope to preſerve, or to acquire upon keeping off thoſe things that would have a contrary Effect. That Privations and Negations do not move the Will of Man, and that the avoiding of Evil is by no means its Object, any farther than as it denotes the Preſervation of ſome Good. That, whatever Strength is uſually aſcribed to natural Puniſhments and Evils, in engaging Men to ſhun and decline them, is all to be reſolv'd into the attractive and impulſive Force of thoſe Goods which the Puniſhments or Evils would deprive them of. That, thus all thoſe Things which are commonly ſaid to be done for the ſake of eſcaping Death or Want, might be more properly affirm'd to proceed from the Love of Life, or of Riches. That, unleſs Life went before it, Death would ſignify nothing, and that the former would never be fear'd, if the latter were not firſt deſir'd. That, the Nature of Things moves our Affections more ſtrongly with the Love of a preſent Good, or the Hope of a future, than with the Hatred of a preſent, or the Fear of a future Evil; and that good things are deſir'd upon account, not of the oppoſite Privation, but of their inward Agreeableneſs to our Natures. That, civil Laws receive a firmer Eſtabliſhment from their End [2], the publick Good, a part of which is communicated to every honeſt Subject, than from the Penalties they threaten, the Fear of which can prevail only on a few Men, and thoſe the moſt wicked in the Commonwealth." To this purpoſe Biſhop *Cumberland* diſcourſeth. On whoſe Opinion we may firſt obſerve, That if we would comprehend under the Term of *Sanction*, even the good Things and the Rewards following the Obſervation of Laws; it is requiſite, that thoſe good Things ſhould really proceed from our Obedience, and be, as it were, bought and purchas'd by it. But now 'tis apparent, that all the good Things we poſſeſs, we do not obtain by conforming to Laws; and therefore thoſe which we any other way acquire, do not come under the Notion of Rewards. Thus, our Selves, our Lives, and all the natural Benefits we enjoy, are not paid to us as the Rewards of fulfilling any Law, but the Divine Goodneſs freely conferr'd them on us, before we could ſo much as think of any Law to be fulfill'd. Neither is the Continuance of theſe good Things (ſince it proceeds from the inward Force of natural Subſtance) deriv'd from any Performances of ours, but is the Gift of our Great Creator, who [b] *makes his Sun to ſhine on the Evil and on the Good, and ſendeth Rain on the Juſt and on the Unjuſt.* Thus likewiſe, what a Man gets by his proper Labour and Induſtry, he doth not directly and principally aſcribe to his own Obedience, but to his Creator, who gave him the Strength, and to himſelf, who rightly employ'd it. Yet this Effect indeed, we may obtain by Laws, both the Preſervation of thoſe good Things which either the free Bounty of Heaven, or our own Diligence hath procur'd us, from the Incurſions and Aſſaults of other Creatures, that might otherwiſe hurt or deſtroy them; and likewiſe the Increaſe of the ſame Enjoyments by various Methods and Means: And therefore theſe Advantages only, in as much as 'tis in the Power of the Legiſlator to make them good, are properly to be eſteem'd Rewards. And that theſe may have a perfect Force, in diſpoſing Men to Obedience, the Legiſlator is to ſignify, that ſuch Effects will moſt certainly follow ſuch a Cauſe.

We may obſerve farther, That altho' the Will may be incited to an Action, by the Propoſal of ſome Good likely to proceed from that Action, yet this Conſideration doth not impoſe any Neceſſity [3] of Performance, unleſs it be ſtrengthned with the Commination of ſome Puniſhment, to be incurr'd upon Non-compliance. And therefore, that any good Effect proceeds by natural Conſe-

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[a] *De Leg. Nat. Prolegom.* §. 14. & *Ch.* v. §. 40.

[b] *Matth.* v. 45.

Mr. Barb. *NOTES on* §. xiv.

[1] Theſe Words, *ut quicquam agant, i. e.* that they may do any thing, which are omitted in all the Editions of this Work, either by the Neglect of the Author, or careleſsneſs of the Printers, quite ſpoil the Senſe. The *Engliſh* Tranſlator has not taken the Pains to conſult the Original, where theſe Words are expreſſed diſtinctly, *Ch.* v. §. 42. He hath alſo careleſly copied out a Fault in the Impreſſion, in theſe Words, *aut cum Authoritate judicare*, for *indicare, i. e.* to judge, *for* to ſhew his Authority, which makes the Senſe diſagreeable.

[2] Theſe Words, *Which wiſe Legiſlators and good Citizens have propounded with a Deſire of*, ought to be added to render the Senſe of Biſhop *Cumberland* more clear, tho' they be not in the Original.

[3] Mr. *Locke* proves in a moſt ſolid Manner, "That it is not the moſt poſitive Good, but Uneaſineſs (as he calls it) that uſually determines the Will. That is to ſay, that Good, nay the greateſt Good, tho' we judge it ſuch, does not determine the Will, at leaſt, to deſire it with an Earneſtneſs proportionable to its Excellence; yet this Deſire makes us uneaſy, becauſe we are deprived of it. As for Example, perſuade a Man, as long as you pleaſe, That Wealth is more advantageous than Poverty; make him to ſee and confeſs, that ſuitable Conveniencies of Life are to be preferred before a ſordid Indigency, if yet he be contented with this latter Eſtate, and finds no Inconveniency in it, he'll perſiſt in it contrary to your Advice, his Will is not inclined to any Action whereby he will renounce it. *Eſſay of hum. Underſtand. Lib.* ii. *Ch.* xxi. §. 35. See the following Part of the Chapter.

quence from any Action, is indeed a Token of the ſuperlative Bounty of our Creator, who is ſo willing to confer that Good on us, and ſo kindly invites and perſuades us to embrace it. Yet this muſt not preſently be thought a neceſſary Argument, that he at the ſame time commands us, by performing the Action, to acquire ſuch a Good. He might perhaps judge it ſufficient to have offer'd us ſo fair an Occaſion of receiving his Munificence. But if ſome Evil be farther pronounc'd againſt us upon Omiſſion, then there can remain no doubt, but that the Action is really and directly enjoin'd. To which we may add, that the Minds of Men [*] are mov'd more forcibly by the Infliction of Evil, than by the Poſſeſſion of Good. It muſt be confeſs'd, that the Acquiſition of Good hath very powerful Charms; eſpecially when it is freſh, and join'd with the Deliverance from ſome preſent Evil. But the Senſe of this Pleaſantneſs wears off in a long courſe of Poſſeſſion; and when once that Motion of Mind ceaſeth, which either the Abſence of the Good, or the freſh Enjoyment of it rais'd, there remains ſcarce any thing but a dull Acquieſcence and Contentment. Whence it comes to paſs that many Perſons, then only begin to value their good Things, when they either have loſt, or are in danger of loſing them. But *Grief*, into which all Evils and all Privations of Good are at laſt reſolv'd, is not itſelf a bare Privation, but a Thing of a moſt poſitive Nature, and of ſuch prodigious Strength, as to be able ſo far to extinguiſh all [5] Senſe and Value of Happineſs, as ſometimes to make us deſire ſo ſevere a Remedy as Death, for its Cure.

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[*] The famous Mr. *Bayle* maintains the contrary Opinion in his Treatiſe upon a Comet, ſaying, *That a Man has more Love for Joy, than Hatred to Sorrow*; which Paradox he pretends to prove thus; *No Man* (ſays he) *ſcruples to put himſelf into an uneaſy and ſorrowful Condition, provided it carries a Shew of Mirth and Pleaſure--- This appears from the Examples of ſo many young Maids, who being tranſported with the Expectations of ſome preſent Pleaſure, ſuffer themſelves to be led into ſuch Actions, as they are ſenſible will produce a long Train of Miſeries: As alſo by the Example of great Numbers of Men, who have found a thouſand times, that the eating of certain Meats, and their drinking too much, has cauſed terrible Pains in them, who will not yet reſtrain their Appetites from them, when they have occaſion.* But 'tis my Opinion, that theſe young Maids and Drunkards do not uſually think of the bad Tendency of their Actions, ſo far are they from determining, after they have exactly compar'd the preſent Pleaſure with the Miſery that will follow. 'Tis not then a Time of Reflection; we might do it when we are ſerious, and the Object and Occaſion being at a Diſtance, our favourite Paſſion is ſilent; but when the Heart is briskly attacked in a ſenſible place, all theſe good Reflections vaniſh, we dream of nothing but the greateſt Satisfaction, and never trouble ourſelves with what may happen. *The preſent Pleaſure, unleſs it be very ſmall, and next to nothing, fills the narrow Capacity of our Soul, and ſo engroſſes the whole Mind, that it troubles not itſelf to think at all of Things abſent* (as Mr. *Locke* ſpeaks, *Eſſay of Hum. Underſt.* p. 326.) The Orator *Eſchines* ſpeaking of thoſe who engage themſelves in ſome great Wickedneſs, ſays, *That they neither conſider of the Diſgrace or Puniſhment, which they bring on themſelves, but are wholly employed with the Thoughts of that Pleaſure they ſhall obtain, if they compaſs their Deſign*; Οὐ γὰρ τὴν αἰσχύνην, ὐδ᾽ ἃ πείσονται κηφθέντες λογίζονται· ἀλλ᾽ ἐφ᾽ οἷς κατορθώσαντες ἐυφρανθήσονται, τούτοις κεκήλωνται. *Orat. in Timarch. p.* 197. *Ed. Gen.* But if, notwithſtanding the Earneſtneſs of the Deſire which the Preſence of the Object excites, there are ſome Intervals which invite them to conſider the Conſequence of the Action, they always have a great Inclination to flatter themſelves. *They think, that tho' the Conſequence is important, nevertheleſs 'tis not ſo certain, but that it may happen otherwiſe, or at leaſt that it may be avoided by ſome means or other; as by Induſtry, Courtſhip, change of Behaviour,* &c. (Mr. *Locke* of *Hum. Underſt.* p. 328.) Furthermore, the prevailing Power of preſent Pleaſure, by which they are hurried, is, properly ſpeaking, a real Sorrow, for in the Fit of a violent Paſſion, the earneſt Deſire, which is inflamed by the Nearneſs and Allurements of the Object, cauſes ſuch an Uneaſineſs, as affects us in the ſame Manner, as what we ordinarily call Grief, and the Uneaſineſs preſent being greater, determines the Will, as Mr. *Locke* has very well prov'd, altho' the future Sorrows, to which Men expoſe themſelves by ſuffering themſelves to be carried away by the prevailing Power of preſent Pleaſure, may be ſeen at a Diſtance, and as a greater Evil in its own Nature than what they feel themſelves actually preſſed with, the Deluſion cauſed by a ſmall Difference of Time, inclines the Mind to chooſe the worſt part. *Moſt of our Pleaſures* (ſays *Montagne*, according to the Opinion of the Heathen Wiſemen, *viz. Seneca*, Ep. li, &c.) *tickle and embrace us, to ſtrangle us, as the Thieves which the* Egyptians *call* Philetas, *did; and if the Head-ach ſeize us before Drunkenneſs, we abſtain from overmuch drinking, but the Pleaſure going before deceives us, and ſo conceals the Conſequence from us.* See the ſame Thought in two Comick Poets quoted by *Athenæus* in his *Deipnoſophiſts, Lib.* i. &xv. whoſe Words *Gataker* recites in his Preface to *Marcus Antoninus*. *If at the ſame Moment* (ſays Mr. *Locke*) *that a Man takes the Glaſs into his Hand, the Pleaſure that he finds in drinking were accompanied with that Pain in the Head, and Qualms of Stomach which never fail to ſeize ſome Men ſome few Hours after they have drunk to Exceſs, I do not believe that any Man would, upon theſe Conditions, put the Cup to his Lips, whatever Pleaſure he might have by drinking.* So that in the Examples alledged by Mr. *Bayle*, and in other like Caſes, none can propound to himſelf to undergo any Uneaſineſs or Sorrow, provided it paſſes with us for Pleaſure, but he aims to free himſelf from ſome Uneaſineſs, or Grief that lies upon him, which his Paſſion, or erroneous Judgment, hinders him from comparing fully with the Decree or Certainty of Sorrow at a Diſtance. The other Reaſon of Mr. *Bayle* is, That Men ſtick not to paſs thro' many Sorrows and Uneaſineſſes, provided at length they can arrive at Pleaſure. *The* Corſars (ſays he) *having received an Affront, will hide themſelves five Days together in the Buſhes to wait for their Enemy, being well contented to feed on the Roots of Graſs all that while, on Condition, that they may have the Satisfaction of ſeeing their Ambuſh ſucceſsful.* But we may rather ſay, that the Uneaſineſs or Grief which theſe Men have conceived at the Affront given them by their Enemy, who has provoked, and the eager Deſire of Revenge with which they are poſſeſſed, renders them inſenſible of thoſe leſſer Diſturbances which are cauſed by the Coldneſs of the Weather, or an hungry Appetite. We can obſerve very few Men, who will willingly undergo any great Pain or Trouble, to arrive at the Enjoyment of thoſe Pleaſures of which they are moſt ſenſible, but when indeed only ſome ſmall Inconvenience, or little Uneaſineſs, which they think can hardly be born, attends, there needs no great Reſolution to open a way to the Poſſeſſion of that Object which has made ſo great Impreſſions upon our Heart. But the Proſpect of ſome great Evil abates the Eagerneſs of the ſtrongeſt Paſſions, and fills pliable Minds with ſuch a Fear, as keeps them from ſwallowing the Baits of Pleaſure: But if ſometimes to ſatisfy theſe Deſires, Men run themſelves chearfully into great Troubles and ſharp Sorrow, we muſt think, that as ſoon as they are ſenſible of what they have done, they'll immediately repent of their Raſhneſs and Imprudence; the Pleaſures, whoſe ſweet Morſels have drawn us away, will then appear to have been bought too dear, and we ſhall renounce, with all our Hearts, the Hopes of all we once accounted Delightful, to be delivered from the Evil we endure; a Proof ſufficient that we have not well conſulted our own Good, or that the Violence of our Paſſions ſo blinded us, that we did not perceive all the Bitterneſs of the Sorrow, into which we have ſo blindly thrown our ſelves. To come then to the Subject our Author is on, Suppoſe that two Law-givers, willing to ſettle the ſame Law, ſhall propound, the one great Rewards to ſuch as obſerve it, and the other ſevere Puniſhments to ſuch as break it: Do we think that the firſt would more effectually engage Men to Obedience, than the other? No Body, I believe, will venture upon the affirmative; for there may be many Men who will not much regard the greateſt Rewards that can be given, and being contented with their preſent Condition, aſpire not to any higher Degree of Happineſs: But how few are there who will not be affrighted at the Proſpect of a great Puniſhment, tho' they do not attentively conſider it? For one Man who will yield to a Temptation in ſpite of ſuch Threatenings, we ſhall find a thouſand who will not in the leaſt be affected with the Hopes of the greateſt Rewards; eſpecially, if to deſerve them, they muſt offer Force to any ſtrong Inclination, I ſhall add one more Remark, which is this, If a Man were more ſenſible of Good than Evil, thoſe Sins into which Men fall for fear of Trouble, ought to be puniſh'd with greater Severity, than thoſe which are drawn into the Love of Pleaſure. Now this Conſequence which naturally flows from the Principle of Mr. *Bayle*, is contrary to the Judgment of all the wiſeſt Legiſlators and moſt able Philoſophers, as well as the conſtant Practice of all the Judicatures of the moſt civiliz'd Nations; and I am apt to think, that Mr. *Bayle* himſelf would not approve of a more gentle Treatment towards that young Maid who (as he inſtances) ſuffered herſelf to be carried away with the Prevalency of a preſent Pleaſure, than of her who yields to the Threatenings of a furious Spark. See *Chap.* iv. §. 7. *Notes* there, and what the Author farther ſays, *Lib.* viii. *Chap.* iii. §. 19. as alſo *Grotius*, *Lib.* ii. *Ch.* xx. §. 29. *N.* ii. with the Notes. I am aware alſo that in the ſame Book in which this Maxim, which has occaſion'd this large Note, is contained, theſe Words, which will confirm my laſt Reflection, are found, *I much doubt* (ſays Mr. *Bayle*) *whether the Prevalency of that Pleaſure which hurrieth us, will be able to diminiſh the Crime*, p. 341.

Hence, we think, civil Legiſlators have ſufficient Grounds and Reaſons for chooſing to make the *Sanction* of their Laws conſiſt rather in Puniſhments than in Rewards. The Obſervance of human Laws is indeed advantagious enough in general, as it ſecures the Poſſeſſion and Enjoyment of thoſe Bleſſings which attend a civil Life: But were the Exerciſe of common Virtues enforc'd by the Propoſal of particular Rewards, 'twere impoſſible to furniſh Stock enough for ſo profuſe a Bounty. On the other hand, [6] the denouncing of Puniſhments was the ſureſt way to make Men ſhake off that heavy Drowſineſs, with which moſt of them are beſotted and benumm'd: And becauſe generally the Tranſgreſſion of the Laws is join'd with the Hurt of others, and with ſome imaginary Good of the Offender, therefore it ſeem'd moſt expedient to repreſs the enticing Allurements of Sin, by repreſenting the frightful Image of that Pain and Grief which was unavoidably to follow it. Thus we find that civil Laws do always come enforc'd with a Penalty denounc'd againſt Tranſgreſſors, either expreſly defining the kind of Mulct or Puniſhment; or elſe intimating, that it is left undetermin'd to be ſettled by the Diſcretion of the Judges, and of thoſe who are to take care of putting the Laws in Execution. Indeed the *Roman* Lawyers tell us of ſome Laws, which were *imperfect*, *viz.* ſuch as have no Puniſhment enacted for Offenders, as *Macrobius* ſpeaks [7], or which wanted this penal Sanction. Such a one they reckon the *Lex Cincia* [8], which had no other Clauſe added at the End to enforce it, [9] but this, *He that doth otherwiſe, ſhall be accounted to have done wickedly.* But I ſhould conjecture, that in that Law either the Infamy alone was thought a ſufficient Puniſhment, or it was left to the Power of the Cenſors to fix ſome further Mark of Diſgrace on the Delinquents in this Point. That ſuch Perſons were not altogether unpuniſh'd, we may fairly conclude from *Tacitus* [10] *Cicero de Legibus*, Lib. ii. Ch. ix. [11] *The Puniſhment of Perjury is from Men Diſgrace, and from Heaven Destruction. Livy, Lib.* x. Ch. ix. gives us an Inſtance of another Law ſeemingly *imperfect.* [12] *The* Valerian *Law*, ſays he, *when it had forbidden the ſcourging, or the beheading of a Man, who ſhould make an Appeal, only added, that whoever acted thus, acted wickedly. This I ſuppoſe (ſo great was the Modeſty of Men in thoſe Days) might be thought a ſufficient Tie for a Law: But in our Times ſuch a Simplicity of Expreſſion would be us'd in no Threats, but thoſe which were deſign'd for Jeſts.* In the ſame Rank we may place the Law of [13] *Zaleuchus* mention'd by *Diodorus Siculus*, Lib. xii. Ch. xx. *Let no Citizen proſecute his Enemy with implacable Hatred, but let him ſo maintain Enmity with him, as if he were ſhortly to return into Favour and Friendſhip. He that doth otherwiſe, let him be reputed a Man of a fierce and barbarous Diſpoſition.* Unleſs you'll ſay, that in this Caſe, as well as the former, the Infamy may well be interpreted as a Puniſhment. And ſo likewiſe in thoſe other Laws recited immediately after by the ſame Author, *Lib.* xii. *Ch.* xxi. *Let not a free Woman, unleſs ſhe be drunk, go attended with above one Maid. Let her not ſtir out of the City in the Night-time, unleſs when ſhe goes to proſtitute herſelf to her Gallant. Let her not wear golden Ornaments, nor Garments interwoven with Gold, unleſs ſhe deſigns to act the Courteſan.*

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[5] One ſmall Pain is ſufficient to ſpoil all the Pleaſures we enjoy. The Reaſon of it is, becauſe ſo long as we are toubled with any Uneaſineſs, we can't think our ſelves happy, or in the way of Happineſs, becauſe every one looks upon Grief and Uneaſineſs as Things inconſiſtent with Happineſs. Mr. *Locke* of *Hum. Underſt.* p. 299.

[6] The Original being ſo confuſed in this Place, that the Author's Reaſonings quite loſe their Force thereby, I have thought fit to remedy it, by tranſplanting two ſmall Sentences, and changing the Connection, *viz.* after *De leur Loix*, put, *Car il falloit*, &c. thus in the *Engliſh* Tranſlation, after *Rewards*, Lin. ix. put, *The denouncing of Puniſhments*, Lin. xii. and reading to, *follow it*, return to, *The Obſervance*, &c. *Lin.* v. and ſo go on at *Lin* xii. becauſe to put the firſt Periods into a Parentheſis, as the Author does, makes an harſh Confuſion.

[7] *Inter Leges quoque illa imperfecta eſſe dicitur, in qua nulla deviantibus pœna ſancitur.* Macrob. *in* Somn. Scip. Lib. ii. Ch. xvii.

[8] The *Cincian* Law is ſo called from *M. Cincius* the Tribune, who propoſed it, *A. U. C.* 549. It forbad all Advocates and Pleaders to take any Money or Preſents, from whence *Plautus* calls it *Muneralis.* See *Tacit. Lib.* xi. *Ch.* v.

[9] The Latin is this: *Qui ſecus fecerit, improbé feciſſe videbitur.* It is not known whence our Author took theſe Words: But theſe ſort of Laws do not make void what was done againſt their Prohibition. *Imperfecta Lex eſt, veluti Cincia, quæ ſupra certum modum donari prohibet, exceptis quibuſdam cognatis, & ſi plus donatum ſit, non reſcindit*, i. e. *Cincius*'s Law is an imperfect one; becauſe, tho' it forbids all immoderate Fees and Gifts, unleſs to ſome Kindred, yet if more be given, it makes them not void. *Ulp. Inſtit. Tit.* i. §. 1. See *Lib.* iii. *Ch.* vii. §. 6. following.

[10] Who ſays, *Annal.* xiii. §. lxii. *Suillii opprimendi gratiâ repetitum credebatur Senatuſconſultum, Pœnaque Cinciæ Legis adverſus eos qui pretio cauſas oraſſent*, i. e. The *Cincian* Law was made to ruin *Suillius.*

[11] *Perjurii Pœna divina, exitium, humana, dedecus. Cicero* de Legibus, Lib. ii. Ch. ix.

[12] The *Latin* is, *Valeria Lex, quum eum qui provocaſſet, virgis cædi, ſecurique necari vetuiſſet, ſiquis adverſus ea feciſſet, nihil ultra, quam improbè factum, adjicit. Id (qui tum pudor hominum erat) viſum, credo, vinculum ſatis validum Legis. Nunc vix ſeriò ita minetur quiſquam.* But here, by the Bye, we may obſerve, that the laſt Words of this Paſſage are much varied in the Manuſcripts, where they are greatly corrupted. *Gronovius* the Father faintly conjectures, that they ſhould be read thus, *Nunc vix ſi ſummas pœnas minetur quiſquam*; and he builds it upon two of the beſt Manuſcripts, which read thus, *Nunc vix ſi ſummo ſerio minetur*, &c. Others add, *Ita, ad ſervata*, which being joined with the former Readings, and keeping to the Senſe, we may gather the true Reading to be, *Nunc vix ſi ſummos cruciatus minetur quiſquam*, i. e. *Men at this Day can hardly be kept to their Duty by the plaineſt Denunciation of the moſt ſevere Puniſhments.*

[13] Diodorus Siculus's Greek, is, Προστάττων μηδένα τῶν πολιτῶν ἐχθρὸν ἀκατάλλακτον ἔχειν, ἀλλ' οὕτω τὴν ἔχθραν ἀναλαμβάνειν, ὡς ἥξοντα πάλιν εἰς σύλλυσιν καὶ φιλίαν· τὸν δὲ παρ' αὐτὰ ποιοῦντα, διαλαμβάνεσθαι παρὰ τοῖς πολίταις ἀνήμερον καὶ ἄγριον τὴν ψυχήν——— Γυναικὶ ἐλευθέρᾳ μὴ πλείω ἀκολουθεῖν μιᾶς θεραπαινίδος, ἐὰν μὴ μεθύῃ, μηδὲ ἐξιέναι νυκτὸς ἐκ τῆς πόλεως, εἰ μὴ μοιχευομένην. μηδὲ περιτίθεσθαι χρυσία, μηδὲ ἐσθῆτα παρυφασμένην, ἐὰν μὴ ἑταίραν· μηδὲ τὸν ἄνδρα φορεῖν δακτύλιον ὑπόχρυσον, μηδὲ ἱμάτιον ἰσομιλήσιον, ἐὰν μὴ ἑταιρεύηται, ἢ μοιχεύηται· διὸ καὶ ῥᾳδίως ταῖς τῶν προστίμων αἰσχραῖς ὑπεξαιρέσεσιν ἀπέστρεψε τῆς βλαβερᾶς τρυφῆς καὶ ἀκολασίας τῶν ἐπιτηδευμάτων, οὐδεὶς γὰρ ἐβούλετο τὴν αἰσχρὰν κόλασιν ὁμολογήσας, καταγέλαστος ἐν τοῖς πολίταις εἶναι. See *Montagne*'s Eſſays, *Lib.* i. *Chap.* lxiii. *Digeſt. Lib.* xl. *Tit.* 7. *De Religioſis, & Sumptib. Funer. &c. Leg.* xiv. §. 14. & *Lib.* xlvii. *Tit.* 12. *De Sepulchr. viol. Leg.* iii. §. 4.

Let not a Man wear a Ring allied to Gold, or a Garment approaching near to Mileſian *Richneſs, unleſs he be guilty of Fornication, or of Adultery. Thus*(as the Hiſtorian proceeds to obſerve) *by ſuch ſcandalous Exceptions and Conditions, he eaſily diverted his Subjects from the Purſuit of Luxury and of Intemperance. For no one could bear the expoſing himſelf to his Fellows by ſo foul a Diſgrace* [a].

Thus then, there are two Parts of a Law, one *Definitive*, and the other *Vindicative*, which is the penal Sanction. Theſe, we ſay, are two Parts of the ſame Law, and not two Species of Laws. For as it is loſt Labour to ſay, *Do this*, if nothing follow beſides; ſo it is abſurd to ſay, *You ſhall undergo a Penalty*, unleſs it have been before ſignified by what Means we ſhall render ourſelves obnoxious to this Suffering. We muſt therefore take Notice, that the whole Strength and Force of a Law properly conſiſts in declaring what our Superior is pleas'd we ſhould perform or omit, and what Penalty we ſhall incur upon Default. Whence alſo it may be underſtood in what Senſe the Power of obliging is attributed to the Law. For, properly ſpeaking, the Power of obliging, or laying an inward Neceſſity on Perſons to act in ſuch a Manner, is in him who bears the ſovereign Command. But the Law is only the Inſtrument of Sovereignty, by which the Ruler makes his Pleaſure known to his Subject, which being once diſcover'd, an Obligation to Obedience is produc'd in them by Virtue of his ſupreme Authority. Hence too it appears, that the vulgar Diſtinction of the Power of a Law, into *directive* and *compulſive*, was ill made; unleſs by the compulſive Power we underſtand the penal Clauſe. For the proper Efficacy of a Law conſiſts in *directing*, as it declares the Will of the Sovereign, and denounceth Threats againſt the Subject, if he prove diſobedient. But the *compulſive* Power, or the Power of exacting from the Subject a Conformity to the Rule [14] preſcrib'd them by decreeing and actually inflicting Penalties, is properly in the Perſon of him who made the Laws, or of him who hath the Care of their Execution. *Liban.* Orat. V. *Laws were of no Force without Judges to put them in Execution. Bare Statutes have neither Ears to hear our Cauſe, nor Feet, nor Hands, to haſten to us and defend us: But all the Aſſiſtance which Juſtice gives us, is convey'd by its Miniſters.* Tho' 'tis a common Thing with Writers to attribute to the Laws themſelves ſuch Effects, as in a ſtrict Senſe belong to the ſupreme Power. Of which kind of Speech, that one Paſſage of *Apuleius* [b] may be a ſufficient Inſtance, *Quod eſt lex in urbe, dux in exercitu, hoc eſt in mundo Deus. What the Law is in a City, what the General is in the Army* [16], *ſuch is* GOD *in the World.* When *Livy* ſays [17], *The Commands of the Laws are more powerful than thoſe of Men*; this is ſo far true in Democracies only, that the Magiſtrates cannot recede from the Laws, nor over-rule their Force.

Legiſlators, *as ſuch*, are ſaid to *compel*, only *morally*; not that by any natural Violence they ſo conſtrain a Man, as to render it impoſſible for him to act otherwiſe than as they direct; but becauſe, by declaring and exhibiting a Penalty againſt Offenders, they bring it to paſs that no Man can eaſily chooſe to tranſgreſs the Law; ſince, by reaſon of the impending Penalty, Compliance is in a high Degree preferable to Diſobedience.

XV. Now by attributing thus to Laws the Power of *obliging*, we immediately exclude *Permiſſions* from the Number of true and proper Laws: Tho' *Modeſtinus* [c] tells us, the [1] Virtues of Law are to *command*, to *forbid*, to *permit*, to *puniſh*. For [2] *Permiſſion* is not properly an Action of the Law,

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[a] Add. Lib. xi. Tit. vii. D. *De Relig. Sumptibus Funeral.* & Lib. iii. §. 4. *Leg. de Sepulchro violato.*

[b] *De Mundo, p.* 749. Ed. *in uſum Delph.*

[c] *Lib.* i. *D. Tit.* iii. *L.* 7.

[14] The Original is, *ab ipſis*, for *ipſis præſcriptam.*

[15] This Author cites only the *Latin* Verſion of *Libanius*'s Oration V. He has ſome Declamations, but I have never ſeen his Orations.

[16] The Senſe of this Paſſage is certainly taken out of *Ariſtotle*, who ſpeaks exactly the ſame Thing in his Book *De Mundo*, *Chap.* vi.

[17] *Imperiaque legum potentiora, quàm hominum.* Tit. Liv. Lib. ii. Chap. i.

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[1] The Words of the *Digeſts* are, *Legis virtus* [*hæc*] *eſt, imperare, vetare, permittere, punire, Digeſt.* Lib. i. Tit. iii. Leg. vii.

[2] This is not always true, for every one knows, that Laws ſometimes poſitively grant certain particular Privileges and Rights: If we carefully reflect upon the Nature of moral Things, we ſhall find that the general Notion of a Law, as it implies a Conſtitution by which a Superior orders the Actions of ſuch as are ſubject to him, includes not only an Obligation to do or not do certain Things, but alſo a Liberty to do or not do others. So that Liberty imports always a Conceſſion, either expreſs or tacit, which is a poſitive Thing. And indeed on what are all the Rights we have founded, but upon the poſitive Will of our Superior, by Virtue of which we may defend ourſelves, or require the Protection of the Law againſt all them who endeavour to moleſt us in the Enjoyment of ſome lawful Right? Farther, Right and Obligation are two relative Notions, which always go Hand in Hand. And why may we not allow a Law of meer Permiſſion, as well as a Law obligatory? Certainly, if this Law be neceſſary to impoſe upon us a Neceſſity of acting, or not acting, the other is no leſs neceſſary to put us in a State of acting or not acting with Security and Impunity, as we think fit. *Grotius*, who, like this Author, affirms, that Obligation is the Eſſence of all Law, ſeems tacitly to acknowledge in the ſame Chapter (*Lib.* i. *Ch.* i. §. 17.) that *Permiſſion* is comprehended in the Notion of a Law. We muſt therefore allow, That the Law of meer *Permiſſion* is an Ordinance or Conſtitution by which a Superior gives to thoſe that are ſubject to him, a Right, or moral Power to have Things ſafely and lawfully, or to do and require of another certain Actions, if he judges convenient. See what Mr. *Titius* ſpeaks much to the ſame Purpoſe in his *Obſerv. on Puſendorf*, l, li. Mr. *Selden* has already maintained the ſame Opinion, and uſes a Compariſon very proper to make it underſtood, *viz. All the Boundaries which divide my Field from my Neighbour's, ſet out the Extent of his Field as well as mine; ſo the obligatory Right, which determines what Actions are commanded and what forbidden, being once ſettled, there neceſſarily follows a Right of meer Permiſſion, which has for its Object all other Actions, about which the Lawgiver has determined nothing authoritatively, and conſequently permits every Man to do, or not to do, as he pleaſes.* De Jure Nat. & Gent. Lib. i. Chap iv. Again, We muſt remember, that there is a great Difference between the Permiſſion of human Laws and divine; for the Permiſſion of divine Laws is always abſolute, ſo that every one has a full Right to do all that they permit, provided the Things permitted are not forbidden by any human Law, to which he ought to ſubmit, in Obedience to ſome other divine Law; but as to human Laws, the Permiſſion which they give is for the moſt part imperfect, which implies only Impunity in human Judicatures, as our Author explains himſelf a little lower. Nevertheleſs I am aware, that this Author forgetting his Principles, ſeems to allow, beſides a Law of meer Permiſſion; for ſpeaking of the Goodneſs or Evil of Actions in the following Chapter, §. 3. he ſays expreſly, *By a Law I mean always here a Law which indiſpenſibly obliges to ſome Thing, and not a Law that only permits.* Legem neceſſitantem, non permittentem. *Grotius* alſo ſpeaking of the firſt Right of the Occupant, ſays, *It is founded upon the natural Right of bare Permiſſion.* Eſt hoc jus ex jure naturæ permittente. *Lib.* ii. *Ch.* iii. §. 5.

but the Negation of an Action. Whatſoever Things the Law *permits*, thoſe it neither *commands* nor *forbids*, and therefore it really doth nothing at all concerning them. Some maintain, that there is nevertheleſs a kind of Obligation in *Permiſſions*; not indeed affecting him to whom we ſay a Thing is *permitted*, but binding up a third Perſon from giving him any Hindrance, in caſe he undertake what the Law thus permits. Tho' this is by many reſtrain'd to ſuch Things as are fully and perfectly permitted, ſo as not to take in thoſe leſſer and imperfect Permiſſions, which may be more properly ſtil'd Indulgences or Connivances. Thus, for Example, the Laws of ſome Countries permit the killing of a Wife taken in Adultery; yet they do not forbid others from uſing their utmoſt to hinder her Death. But if we would be accurate and exact in our Way of talking, even this Effect doth not properly reſult from the Permiſſion of the Law, but from every Man's juſt Liberty [3]. For about thoſe Things in which the Law gives me no Stop or Hindrance, I have a perfect Freedom of acting, the chief Effect of which is, that no Man ought to diſturb me in the harmleſs Exerciſe of it. So that for a Law expreſly to permit thoſe Things to which we claim a ſufficient Licence by their not being prohibited, which cannot well fall under Doubt or Diſpute, ſeems little better than uſeleſs and ſuperfluous. As likewiſe, it is not always neceſſary, that when any prohibiting Law is repeal'd, an Act hitherto *forbidden*, ſhould by an expreſs Ordinance be declar'd *permitted:* Since upon Removal of the former Impediment, our natural Liberty doth, as it were, revive and recover itſelf. There are indeed two ſpecial Caſes, in which civil Lawgivers are wont to uſe expreſs *Permiſſion:* Firſt, when Licence and Impunity is indulg'd to ſuch an Act, within ſuch a Meaſure; and, ſecondly, when the Licence or Impunity is to be purchas'd by ſome Fine or Burthen. Of the former Caſe, ſome give an Inſtance in the Laws of moſt Countries permitting Uſury, within ſuch a fix'd Degree: Of the latter, in the Conſtitutions of ſome Places, where Women are allow'd to proſtitute themſelves, upon Condition of paying a certain Tax [4]: which whether it be well or ill done we are not now to diſpute [a], [5].

Legal *Permiſſion* is divided into *Plenary*, which gives a Right of acting, and makes the Deed altogether lawful; and *leſs Plenary*, which either affords Impunity, or Freedom from Impediment, or both. Now that ſeveral Things find an Impunity amongſt Men, is occaſion'd by ſome of theſe Reaſons: Either, that the Matters exceed the Reach of human Courts and Cognizance, as do the Faults of Kings; or, that human Law hath either determin'd nothing plainly about ſuch an Action, or hath declar'd it ſhall be lawful; or, laſtly, becauſe civil Ordinances frequently leave many Things to the Modeſty and common Honeſty of every particular Man [b].

Some have more accurately obſerv'd concerning theſe *Permiſſions* of Civil Laws and Civil Courts, that they are made either by the Action of the Law, or only tacitly. To the former they refer the Omiſſion, or paſſing by of a Matter, not ſimply, and, as it were, by Accident, but when the Deſign and the Form of the Law run in ſuch a Manner, that the Legiſlator ſhews his Intent of making a full Enumeration of Particulars: For, in ſuch a Caſe he is ſuppos'd to have *permitted* whatever he hath not expreſly reckon'd up amongſt Things prohibited; provided the Matter be not repugnant to natural Honeſty. Thoſe Things are underſtood to be tacitly forbidden, which the civil Power lets paſs by conniving at, tolerating, or diſſembling; either for the preſent only, or for a longer Time, ſo as to let them obtain the Force of Cuſtoms. Yet a Permiſſion granted by a civil Law, cannot cauſe that an Action ſhall not be contrary to the divine Law, or ſet it beyond the Fear of the divine Puniſhment.

We may farther remark, that when a Thing is ſaid to be *permitted*, which is not determin'd by the [6] expreſs Command or Prohibition of any Civil Law, we are not to cavil at the Words of the Law, but to conſider the Scope and Intention of it. For many Things are contain'd in the Senſe of the Laws, and are ſuppos'd to be really implied by them, either as they are neceſſary Conſequences, or upon account of their near Affinity and Reſemblance to the determin'd Caſes. Regard is likewiſe always to be had to natural Law, or to common Honeſty, which is the perpetual Supplement of civil Decrees. *Laſtly*, Thoſe Things which are tolerated only for a Time, or upon the Score of Neceſſity, cannot fall under the proper Notion of *Rights*. All [7] which Obſervations are chiefly to be underſtood of the moſt perfect or *plenary Permiſſion* [c].

XVI. The *Matter* of *Laws* in general, is whatever *can be done* by thoſe Perſons for whom the *Laws* are made, at leaſt at the Time of their Promulgation. For if any Man afterwards, by his own Fault, loſeth his Ability to fulfil the *Law*, the Force of the *Law* doth not thereupon ceaſe and expire; but the Legiſlator hath Power to puniſh him, for rendering himſelf thus incapable of conforming to the Rule preſcrib'd him. But, otherwiſe, to make ſuch a *Law* as the Subject cannot fulfil, and yet hath not loſt his Power of fulfilling by his own Fault, is not only a moſt vain,

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[a] Vid. *Evagr. Hiſt. Eccleſ. Lib.* iii. *Ch.* xxxix. *Of the Tribute paid by common Strumpets, which* Anaſtaſius *the Emperor took off*. See *B.* viii. of our Author. *Ch.* i. §. 3.

[b] Vid. *Digeſt. Lib.* l. *Tit.* xvii.

[c] Vid. *Bœcler.* in *Grot. Lib.* ii. *Ch.* i. §. 9.

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[3] But the free Uſage of this Faculty in ſuch and ſuch Caſes, is an Effect of the Permiſſion of the Sovereign Legiſlator, who has impoſed Laws upon us in giving us a Being. See *Note* 2. above.

[4] See *Evagrius*'s Eccleſ. Hiſt. *Lib.* iii. *Chap.* xxxix. about a Tribute called *Chryſargyrus*, which was levied upon the Curtezans, and which was aboliſhed by *Anaſtaſius*, as our Author there obſerves.

[5] See what is ſaid, *Lib.* viii. *Chap.* i. §. 3.

[6] In all the Editions of *Puſendorf* it is printed *Volente aut Jubente* (and therefore the *Engliſh* Tranſlator renders them, *the expreſs Command*) but the Author would have ſaid, *Vetante aut Jubente*, as the Connection of the Diſcourſe requires, for *Velle & Jubere* ſignify the ſame Thing.

[7] See *Lib.* v. *Chap.* xii. §. 17. following.

but a moſt unjuſt Deſign[1]. As to the ſubject Matters which employ the particular Species of Laws, we ſhall more conveniently conſider them in their proper Place.

XVII. To know who is capable of being oblig'd by a Law, we need ſeek no further than to the Right of the Legiſlator; which certainly takes in all thoſe who are ſubject to his Command. What Perſons the Legiſlator intended to oblige, is plain enough from the Law itſelf. For in all Laws it is ſignified whom they concern; either by expreſs Determination, made ſometimes by a general Sign, ſometimes by a Reſtriction to certain Individuals; or elſe by ſome Condition or Reaſon, which a Subject finding in himſelf, at the ſame time apprehends that he therefore ſtands *oblig'd* by ſuch a Law. Regularly then, a Law obligeth all Perſons ſubject to the Legiſlator, whom the Reaſon of the Law reacheth, and to whom [1] the Matter of it may be applied. For otherwiſe, Tumults and Confuſions would continually ariſe amongſt Subjects, the Prevention of which Diſorders was a principal Reaſon why Laws were firſt introduc'd. And therefore no body ſhall be eſteem'd exempted from a Law, unleſs he can ſhew his peculiar Privilege. Yet this indeed frequently happens, that a Man may be exempted from the Obligation of a Law, *after* the Time of its being enacted, and this we call being *diſpens'd with*. For if the Legiſlator may rightly abrogate or repeal a Law, he may as fairly ſuſpend the *Effect* of it in ſome certain Perſon. *Diſpenſation* differs from *Equity*[2], with which it is generally confounded, in this Reſpect, that the former cannot be granted, but by one endued with Legiſlative Power; whereas an inferior Miniſter of Juſtice, not only *may*, but *ought* to apply the latter; ſo that if he follow the ſtrict Letter of the Law, in a Caſe where there is room for an Equitable Conſtruction, he ſhall be judg'd to act contrary to the Mind and Intention of the Legiſlator. *Diſpenſations* therefore depend on the free Grace of the *Lawgiver*, but *Equity* on the Office and Duty of the *Judge*. In granting Diſpenſations[3], great Prudence is to be us'd, leſt by a promiſcuous Indulgence, the Force and Authority of Law be enſeebled: or leſt, if the ſame happen to be denied to Perſons of the like Condition, Occaſion ſhould be given to Anger and Reſentment, whilſt Men of equal Circumſtances are not admitted to equal Favours. *Plutarch* hath recorded ſeveral Inſtances of very nice and ſubtil Diſpenſations. As when *Ageſilaus* ſuſpended the Laws for one Day, with this Form, *Let the Laws ſleep to Day*[a][4]; to hinder thoſe Perſons who had fled in an Engagement, from ſuffering the uſual Diſgrace. So when *Demetrius* deſir'd to be admitted at once into all the *Athenian Myſteries*, whereas it had ever been a Cuſtom to celebrate the greater *Myſteries* in *November*, and the leſſer in *Auguſt*, *Stratocles* publiſh'd a Decree, that the Month *March*, in which *Demetrius* viſited *Athens*, ſhould be call'd, firſt *November*, and then *Auguſt*[b]. What the ſame Author reports of *Demoſthenes* is more plauſible: *Demoſthenes*, upon his being recall'd from Baniſhment, lay under a Pecuniary Mulct, and the Law forbidding that he ſhould be entirely diſcharg'd from it without Payment, they invented this Way of eluding the Law; they had a Cuſtom of giving Money to the Man who prepar'd and adorn'd the Altar, at the Time of Sacrificing to *Jupiter* the *Deliverer*: This Office, and this Money, they decreed *Demoſthenes*; and under that Pretence allotted him fifty Talents, the Sum in which he had been amerc'd. The *Lacedemonians* made uſe of much ſuch another Evaſion in Reference to *Lyſander*. It was a Law amongſt them, that no Man ſhould bear the ſame Office above once[5]; but now reſolving to let *Lyſander* have again the chief Power in a Naval Expedition, they gave[6] *Aracus* the Formal Command of the Fleet, but join'd *Lyſander* with him[7] in a private Station, with expreſs Orders, *That the General ſhould never act contrary to his Advice*[c]. I know not whether the *Spaniſh* Cuſtom mention'd by *Naudeus*[d], may not be reckon'd likewiſe amongſt theſe nice *Permiſſions*: "In *Spain*, he ſays, "when they deem a Man to be guilty of Treaſon, they appoint Judges to ſit on him in ſecret, "who form a Proceſs, and condemn him to ſuffer "Death; after which they ſeek by any means to "put the Sentence in Execution. And this they "practiſe as a Salvo to their Conſciences; that

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[a] *Plutarch Apophthegm. Lacon. & Ageſil. Appian. Libyc.* [b] *Idem Demetr. & in Alexandr. p.* 672, *&* 679. [c] *Diodor. Sic. Lib.* xiii. *Ch.* c. *Plutarch Lyſand. Add. Valer. Max. Lib.* vi. *Ch.* v. §. 3. [d] *Coups d'Eſtat. Ch.* iii. *p.* 198.

Mr. BARB. *NOTES on* §. XVI and XVII.

[1] It is neceſſary that what is forbidden ſhould produce ſome Advantage, either to thoſe for whom the Law is made, or to others; for 'tis not reaſonable that the natural Liberty of Subjects ſhould be reſtrain'd, and no Profit thereby redound to any body, *De Offic. Hom. & Civ. Lib.* i. *Ch.* ii. §. 8. See what is ſaid, *Lib.* vii. *Ch.* ix. §. 5. Laws are made only about ſuch Things as commonly happen, as is obſerved above, *Ch.* xi. §. 5. Again, as to what concerns our natural Right in particular, we ought to take Notice, with Mr. *Titius* (*Obſerv.* 59.) That natural Right, which is obligatory, has for its Object ſuch Actions as carry with them ſome Convenience, or Inconvenience, neceſſary for the human Nature, as hath been proved, *Lib.* ii. *Ch.* iii. As for all other Actions, which we may call indifferent, the natural Right of ſimple Permiſſion leaves every one at Liberty to diſpoſe of them as he pleaſes. But moſt of theſe laſt are for the moſt Part regulated in different Manners, by the poſitive Laws of GOD and Man, as the legiſlative Power ſees convenient.

[1] See *Lib.* v. *Ch.* xii. §. 10. following.

[2] See *Lib.* v. *Ch.* xi. §. 21. following, as alſo his *Abridgment of the Duties of a Man and Citizen, Lib.* i. *Ch.* ii, §. x. Farther, to ſpeak properly, what he here calls *Equity*, ought to be called, *An Interpretation according to Equity*; as *Titius* ſpeaks, *Obſerv.* 62. See a little Treatiſe of *Grotius*'s upon this Subject, printed in the latter Editions of his Book *De Jure Bel. & Pac.* which is entitled, *De Æquitate, indulgentia, & facilitate.*

[3] See Mr. *Bayle*, in his *Divers Obſervations about a Comet*, *p.* 456. and the ſecond Volume of his *Parrhaſiana*, *p.* 178.

[4] The *Greek* of *Plutarch* is, Καὶ φήσας, ὅτι τοὺς νόμους δεῖ σήμερον ἐᾷν καθεύδειν, ἐκ δὲ τῆς σήμερον ἡμέρας κυρίους εἶναι πρὸς τὸ λοιπόν.

[5] The Word *bis*, being omitted in all the Editions of this Author, ſpoils the Senſe quite; and therefore as the *French* Tranſlator adds, *deux fois*, ſo the *Engliſh* puts in, *above once*.

[6] Here's a great Miſtake in all the Editions of the Original, putting *Aratus*, the Name of a General of the *Achæans*, a very different Perſon from this Admiral, for *Aracus*.

[7] The *Latin* ſays, *Privatus*, as the *Engliſh* Tranſlator renders it, but ſurely our Author meant *Legatus*, a Deputy; but however that be, 'tis ſafeſt to follow *Plutarch*, who calls him, Ἐπιστολεὺς, i. e. *Præfectus Claſſis*, a Counter-Admiral, at leaſt. See further about theſe ſorts of intricate Diſpenſations, in *Montagne*'s *Eſſays*, *Lib.* i. *Ch.* xxii.

“ they may not be accus'd of Injuſtice in puniſhing Men capitally, without a legal Knowledge of their Crime.”

XVIII. Law may be beſt divided, with reference to its Original, into *divine* and *human*; the former having *God*, and the latter *Man* for its Author. But if we conſider Law as it bears a neceſſary Agreeableneſs to the ſubject [1] Matter, in this Reſpect we divide it into natural and poſitive. The former is that which is ſo exactly fitted to ſuit with the rational and ſocial Nature of Man, that human Kind cannot maintain an honeſt and a peaceful Fellowſhip without it: or, in other Words, that which carries in it a natural Goodneſs, or a Uſefulneſs ariſing from its internal Efficacy, towards Men in general. Though there be alſo a farther Reaſon of this Denomination; in as much as this Law may be found out and known by the ordinary Sagacity of Men, and from the Conſideration of human Nature in Common.

Poſitive Law is that which doth not by any means flow from the general Condition of human Nature, but from the ſole Pleaſure of the Lawgiver; tho' theſe Laws ought likewiſe to have their Reaſon and their Uſes; in reference to that particular Society for which they are enacted.

Some are us'd to call *poſitive* Law by the Name of *Voluntary*: Not as if the Law of *Nature* [a] did not proceed from the Will of God, but becauſe no *poſitive* Law had ſuch an Agreeableneſs with human Nature, as to be neceſſary in general for the Preſervation of Mankind, or, as to be known and diſcover'd without the Help of expreſs and peculiar Promulgation. And therefore the Reaſons of this Law are not to be drawn from the general Condition of human Race, but from the particular, and ſometimes the [3] temporary Advantage of ſeparate Communities. So that upon the Union of Men in Societies, they are fix'd and determin'd by the Pleaſure of Superiors. We may improve our Notion of *poſitive* Law by that Paſſage of *Ariſtotle* [a] [4], where he ſays, *That Laws proceeding from Inſtitution and Uſefulneſs, bear ſome Reſemblance to Meaſures: For the Meaſures of Wine and Corn, for inſtance, are not every where the ſame; but greater where the Merchants buy, and leſſer where they ſell.*

Divine Law is again divided into *natural* and *poſitive* [b]: But *human* Law ſtrictly taken, is only *poſitive* [5]. Of the particular Species, we ſhall diſcourſe in their Place [6].

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[a] Vide, *Ethic. ad Nicom. Lib.* v. *Ch.* x. *Et Vid. Lib.* xv. *D. de condit. Inſtit.*

[b] *Divine natural Law is diſtinguiſh'd from poſitive, becauſe this is alterable by the Authority that made it; that is not, but is Eternal and Immutable. See what our Author ſays in* Book ii. Ch. iii. §. 4.

Mr. Barb. *NOTES on* §. XVIII.

[1] The Text here is either corrupted, or not clear. It may be rectified partly from his *Elements of univerſal civil Law*, where our Author thus expreſſes himſelf; *Quantum autem ad materiam, quædam cum ipſa humanæ naturæ, quâ talis, conditione maniſeſte congruunt, & ex eâ fluunt*, i. e. As to the Matter (of Laws) ſome plainly agree with the human Nature, as ſuch, and others flow from it. And partly from his *Abridgment of the Duties of a Man and Citizen, Lib.* i. *Ch.* ii. §. 16. where he ſays, *Sed ſi lex conſideretur prout neceſſariam, & univerſalem Congruentiam cum hominibus, vel minus, habet, &c. i. e.* If the Law be conſidered, as it has a neceſſary and univerſal Agreement with Men, though in the loweſt Degree, &c. The *Engliſh* Tranſlator is ſo far from clearing this Paſſage, that he has made it more obſcure, by taking it in a wrong Senſe; for he underſtands by the Word *Subjectis*, in the Original, the *Subject*, or *Matter* of the Law; whereas the Author plainly treats of the *Perſons* upon whom a Law is impoſed.

[2] See what we have ſaid, *Ch.* i. §. 4. and *Ch.* ii. §. 6. with the *Notes.*

[3] The Author here cites *Vitellius*'s Reflection, *Morem accommodare, prout conducat,* i. e. *To accommodate the Cuſtom to the Intereſt of State.* Tacit. Annal. Lib. xii. Ch. vi.

[4] *Ariſtotle*'s Words are, Τὰ δὲ, κατὰ συνθήκην, καὶ τὸ συμφέρον τῶν δικαίων, ὅμοιά ἐστι τοῖς μέτροις· οὐ γὰρ πανταχοῦ ἴσα τὰ οἰνηρὰ, καὶ σιτηρὰ μέτρα, ἀλλ' οὗ μὲν ὠνοῦνται μείζω, οὗ δὲ πωλοῦσιν ἐλάττω.

[5] This is an eſſential and diſtiguiſhed Character between Laws natural and poſitive, the firſt are immutable, ſo juſt every Way, that no Authority can change or abrogate them lawfully; whereas poſitive Laws are ſo arbitrary, that as a lawful Authority may eſtabliſh them, ſo he may change and aboliſh them as he ſees Occaſion.

[6] *Grotius* (*Lib.* i. *Ch.* i. §. 15.) affirms, That there is a Divine voluntary Right, that obliges all Men, as ſoon as they come ſufficiently to their Knowledge; and adds, That this Right hath been publiſhed upon three Occaſions, *viz.* 1. At the Creation of our firſt Parents. 2. After the general Deluge. 3. By the Goſpel. This great Man did not proceed to Particulars; but, ſome Years ſince, Mr. *Thomaſius*, Profeſſor at *Hall* in *Saxony*, compoſed a Syſtem of the Divine poſitive univerſal Laws, in his *Inſtitutions of Divine Civil Law*, printed in 1702. But this able Lawyer being none of thoſe who count it an Honour to defend what they have once aſſerted, right or wrong, did, at length, own himſelf miſtaken, and pulled down his own Building, when he found the Foundation to be weak. See his *Select Obſervations*, made at *Hall*, *Tom.* 6. *Obſervat.* xxvii. and his *Principles of the Law of Nature and Nations, drawn from common Senſe*, printed in 1705, and again in 1708. Others affirm, That all the Laws which relate to a Divine poſitive Right, either oblige all Men in all Ages, Places, and Nations, or may be deduced from Principles of natural Right, which we ſhall prove true as to ſome, in *Lib.* vi. *Ch.* i. §. 35. *Note* 2.

CHAP. VII.

Of the Qualities *of* MORAL ACTIONS.

The CONTENTS of every Section of the ſeventh Chapter.

I. *How many are the Qualities of moral Actions.*
II. *A neceſſary, lawful Action.*
III. *The Goodneſs or Evil of Actions, in what they conſiſt.*
IV. *A good Action muſt have all Thing requiſite, an evil one is made ſuch, by wanting one Condition.*
V. *GOD can't be the Cauſe of any Evil.*
VI. *Juſtice is either in Perſons or Actions.*
VII. *What is the Juſtice of Actions.*
VIII. *Univerſal and particular Juſtice.*
IX. *Juſtice diſtributive.*
X. *Commutative.*
XI. Grotius'*s Opinion about Juſtice.*
XII. Ariſtotle'*s Judgment upon the ſame.*
XIII. Hobbes'*s Opinion of Juſtice and Wrong.*
XIV. *What is an unjuſt Action.*
XV. *What an Injury is.*
XVI. *An Injury is done by Deſign and Choice only, where the Nature of a Fault is treated of.*
XVII. *No Wrong is done to any Man that wills it.*

OUR next Buſineſs is to conſider the *Qualities* of moral Actions: Now according to theſe Actions are ſaid to be *neceſſary*, or *not neceſſary*, *lawful* or *allow'd*, and *unlawful* or *diſallow'd*, *good* or *evil*, *juſt* or *unjuſt*. So that the Qualities of moral Action muſt be Neceſſity, Licenſe, or Allowance, and the Oppoſites of theſe, which want proper Names; together with Goodneſs and Illneſs, Juſtice and Injuſtice [1].

II. A *neceſſary* Action is that which by Virtue of the Law, or the Command of a Superior, the Perſon to whom the Law or the Command is given, is bound abſolutely to perform. For in this conſiſts the Neceſſity of moral Actions, that they ought not to be omitted, nor yet to be done in another Manner than what was enjoin'd; though by our natural Power and Strength we are able either to omit them, or to do them in another Manner. Yet it is uſual for the Lawyers to ſay abſolutely, that a Thing which wants only this moral Neceſſity, *cannot be done* [a]. To a *neceſſary* Action is oppos'd not only a *forbidden* Action, expreſly prohibited by the Laws, or other Orders of the Superior, but likewiſe a *lawful* or an *allow'd* Action, which the Laws neither command nor forbid, but leave it to every Man's Pleaſure, whether he will undertake or decline it [2]. *Cicero pro Balb.* Ch. iii. *There are ſome Things which we ought not to do, tho' we might lawfully do them: But on the other Hand, whatever we cannot lawfully do, it's very certain we ought not to do.* Now by the common Uſage of Speech, not only thoſe Things are ſaid to be *lawful*, which neither divine nor human Law forbids, and which therefore may be undertaken without Sin or Blame, but likewiſe thoſe Things which altho' prohibited by the Laws of Nature, yet the Laws of particular States ſo far permit, as not to impoſe a Penalty on them in human Cogniſance; leaving them to every Man's private Conſcience and Honour [3]. *Tully*'s Obſervation is admirable to this Purpoſe, *It is not* lawful (ſays he) *for any Man to ſin; but we commit an Error in Speech, whilſt we ſay that ſuch a Thing is* lawful, *which is indeed tolerated or allow'd.* The former kind of Actions we may call *perfectly lawful*, the latter *imperfectly*. So [4] *Lampridius* reports of the Emperor *Severus*, that *he had ſome Thoughts of prohibiting the publick Profeſſors of Lewdneſs: But he feared this might rather increaſe Debauchery in private; Men naturally affecting what is unlawful, and purſuing with Eagerneſs and Fury any Practice which hath been forbidden them.*

But farther than this, we ſometimes in a very looſe Senſe, term even thoſe Things *lawful*, which all Men agree and confeſs to be the moſt baſe and vile; whenſoever the Perſon who performs them is Maſter of ſo much Strength, as to be too big for human Puniſhment or Reprehenſion. *Senec. de Clement. Lib.* i. *Ch.* xviii. *Tho' we commonly ſay, All Things are lawful towards a Slave, yet there are indeed ſome Things which common Nature for-*

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[a] *Nam quæ facta lædunt pietatem, exiſtimationem, verecundiam noſtram, & (ut generaliter dixerim) contra bonos mores fiunt: nec facere nos poſſe credendum eſt.* Dig. Lib. xxviii. Ch. vii.

Mr. BARB. *NOTES.*

[1] The Morality of human Actions may be conſider'd two ways, 1. In the Manner the Law diſpoſes them, in which Reſpect they are either permiſſive or neceſſary. The firſt are ſuch as the Law gives Right poſitively to do, if we will, and not, as our Author affirms, upon the Account of which the Law orders a Thing to be done in ſuch a Manner; for this Definition agrees to ſuch Actions only, as are allow'd by an imperfect Permiſſion, of which he ſpeaks a little lower. 2. As they agree, or diſagree with the Law, and ſo Actions are either good, or bad, or indifferent. This Diviſion ſeems more exact than our Author's. *Titius Obſerv.* lxiv, lxv. See our *Notes* on *Chap.* vi. §. 2. and our *Notes* on this *Chap.* §. 5. *Note* 5.

[1] *Nam quæ facta*, &c. For we ought to ſuppoſe thoſe Things impoſſible to be done, which prejudice Piety, Reputation, Honour, and, in general, good Manners do forbid or hinder.

[2] Ἃ γὰρ οὐ κεκέλευσαί τις ποιεῖν, ταῦτα οὐδὲ μὴ ποιεῖν, κεκώλυται, *i.e.* What a Man is not ordered to do, that he is not hindered from doing. *Liban. Declam.* xvi. The Author himſelf cites this Paſſage in his later Editions.

[3] There are ſome Things not to be done, tho' lawful; but whatever is not lawful, that ought not to be done. *Tully*'s Words are, *Etſi peccare nemini licet, ſed ſermonis errore labimur; id enim licere dicimus, quod cuique conceditur.* Tuſc.Quæſt. Lib. v. Ch. xix.

[4] This Quotation making little to our Author's Purpoſe, and containing ſomething obſcene in it, 'tis no Damage to omit it, and inſtead of it put ſome of the Sayings of the *Roman* Lawyers, *viz. Digeſt. Lib.* l. *tit.* 17. *De diverſ. Reg. Juris, Leg.* cxliv. *Every Thing is not honeſt that is lawful.* And *Leg.* cxcviii. *We ought to conſider, not only what is lawful, but what is alſo honeſt.* Mr. *Stryck*, Profeſſor at *Hall* in *Saxony*, has publiſh'd a Diſcourſe of the Law of what's lawful, but not honeſt, reprinted in 1704 in *4to*, where we may find a particular Account of Things permitted and authorized by Cuſtom, which in themſelves are contrary to natural Honeſty, and much more to Chriſtianity, altho' the Author had but little of his Matter from any certain Places.

bids us to act towards a Man, one of our own Species and Condition [5].

III. We call that Action *good* morally (for the other kind of Goodneſs, term'd Natural or Material, by which a Thing or an Action tends to the Benefit or Perfection of any one [1], is explain'd in another Place. Tho' we muſt obſerve, that in the Precepts of natural Law, and in moſt civil Conſtitutions, it goes along with this moral Goodneſs, and amongſt rational Creatures [2], ſeems to give the firſt Spring or Occaſion to it) or in moral Eſtimation, which is agreeable to the Law, and that Action *evil*, which is diſagreeable. Inaſmuch as the *ratio formalis*, the proper and diſtinguiſhing Nature of the Goodneſs or Illneſs of Actions, conſiſts in a *Relation* determining them towards a directive Rule; and this Rule is what we term a Law (under which Name we here mean a *neceſſitating*, and not a *permitting* Law, and if it be human we ſuppoſe it not contrary to thoſe which are Divine) [3] for when a deſign'd Action is form'd according to the Rule preſcrib'd, and exactly agrees with it, it is ſaid to be *good:* Whereas, if it is undertaken againſt the preſcrib'd Rule, or varies from it, it is call'd *Evil*, and, in one Word, *Sin*. Now it is plain, that any directing Rule; for inſtance, the Mariner's Compaſs is ſaid to be *the Cauſe* of his right Sailing, and of his coming to the Port, not ſo much in regard that the Ship takes a Courſe falling in with its Direction, as becauſe the Pilot guides himſelf by it in managing the Steerage: In like Manner, a Law is ſaid to be the Cauſe of Rectitude in an Action, not when the Action, however intended, is agreeable to it; but when the Action proceeds from the Dictate of the Law, and from ſome Dependence on it; that is, from an Intention of paying Obedience to its Injunctions. Whence, if a Man by Chance, or without thinking of any Obedience to a Law, performs a Thing preſcrib'd by that Law, he may indeed be ſaid to have done *rightly*, or *not ill*, in a negative, rather than in a poſitive Senſe; but he cannot be ſaid to have done morally *well*, no more than one that by diſcharging a Gun at venture and random, hath brought down a Bird, can be ſaid to have ſhot ſkilfully, and like a Markſman.

IV. Farther, ſince the Law determines either the Diſpoſition of the Agent, or elſe the Object, or the End or the Circumſtances of the Action; an Action is morally Good or Evil for one of theſe Reaſons, either becauſe the Agent is ſo diſpos'd as the Law requires him to be, or otherwiſe; or, becauſe the Action is directed towards the proper Object, with that End, and thoſe Circumſtances which the Law preſcribes, or with the contrary. But here it muſt be obſerved, that to make an Action good, 'tis neceſſary, that it not only conform to the Law in all its *material* Requiſites and Conditions; but likewiſe, that in reſpect of its *Formality*, it be exercis'd, not out of Ignorance, or any other Cauſe, beſides the Intention of paying Obedience to the Law. And therefore an Action, tho' otherwiſe on the Account of the Matter of it *Good*, may, by Reaſon of the bad Intention of the Agent, be imputed to him as *Evil*. For a Man who deſigning an ill Thing doth a good one, hath by no means a Title to any Reward for his Service: As he in *Valerius Maximus* [a] who intending to kill *Jaſon*, luckily broke his Impoſthume. Upon the ſame Account, he who miſpends his lawful Power in ill Service, is guilty of Sin: As a Judge, ſuppoſe, who abuſeth his Authority of puniſhing Offenders, to the ſatisfying his own private Reſentments. For which Reaſon the *Carthaginians* ſentenc'd their Generals to Death, if they had undertaken an Enterprize, tho' with good Succeſs, yet with ill Counſel and Deſign [1]. *Liv.* xxxviii. *Ch.* xlviii. *Val. Max. Lib.* ii. *Ch.* vii. §. 1. *Extern.* But, on the other Side, an Action as to the *Matter* of it Evil, cannot [2] by virtue of the honeſt Intention of the Agent, be turn'd into Good. Whence the Reaſon is clear, why a Man cannot uſe his own Sins as Means for the Attainment of any virtuous End, or why we muſt not *do Evil that Good may come of it*, Rom. iii. 8. For to render an Action Evil, it's ſufficient that it be incongruous to the Law, in any one Point or Condition, whether *Material* or *Formal:* That is, If either the Diſpoſition of the Agent, or the Object, or the End, or any one of the Circumſtances contradict what the Law directs. 'Tis a moſt vain Diſtinction of ſome Men, when they affirm, that an Action, as to the Subſtance of the Work, may be good, altho' the End required by the Law be not intended by the Agent. For the End makes a main Part of the very Eſſence of a moral Action, inaſmuch as it enters into the

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[a] *Lib.* i. *Ch.* viii. §. 6. *Extern.*

[5] The whole Chapter treating of a Maſter's Power over his Slaves, is worth peruſing.

[1] See *Book* i. *Ch.* iv. §. 6. and *Book* ii. *Ch.* iii. §. 21.

[2] *Seneca*'s Words, *Ep.* cxx. may ſerve as an excellent Comment upon our Author's Notion, *Nobis videtur obſervatio collegiſſe, & rerum ſæpe factarum inter ſe collatio, per analogiam noſtro intellectu & honeſtum & bonum judicante -------Noveramus corporis ſanitatem, ex hâc cogitavimus eſſe aliquam & animi. Noveramus corporis vires, ex his collegimus eſſe & animi robur. Aliqua benigna facta, aliqua humana, aliqua fortia, nos obſtupefecerant, hæc cœpimus tanquam perfecta mirari*, i. e. " Our Notions " of Goodneſs and Honeſty are the Reſult of the Reflections and Compariſons, which the Mind makes by Analogy, upon " ſuch Things as it often ſees and obſerves. We know that there is ſuch a Thing as Health of the Body, and from thence " we conclude, that there muſt be alſo an Health of the Soul. We know that the Body hath Force and Strength, and " from thence we infer, that the Soul alſo hath its Force. We are wrapped with Admiration at the View of ſome eminent " Acts of Goodneſs, Humanity, and Courage, and we begin to look upon them as Patterns of Perfection. "

[3] The two following Periods not being well placed in the Original, muſt be a little varied to make the Diſcourſe coherent.

[1] Theſe two Paſſages cited by our Author are nothing to the Purpoſe; and, tho' clear in themſelves, are miſtaken by him in this whole Diſcourſe. The firſt is that of *Livy*, where *Cn. Manlius*, anſwering thoſe that conteſted with him about the Honour of the Triumph, under a Pretence that he had managed the War againſt the *Gallogræci*, or *Galatians*, with ſufficient Conduct, ſays, That he was ſure to carry his Cauſe, tho' it were not before a *Roman*, but *Carthaginian* Senate, who are ſaid to crucify their Generals, if they acted by bad Advice, tho' they were ſucceſsful; for ſo are his Words, *In quo confiderem equidem, cauſæ meæ, etiamſi non apud Romanum, ſed Carthaginienſem ſenatum agerem, ubi in crucem tolli imperatores dicuntur, ſi proſpero eventu pravo conſilio geſſerunt.* The other Paſſage is out of *Val. Maximus*, whoſe Words are much the ſame about this Cuſtom at *Carthage*. Mr. *Pufendorf* believes that theſe Words, *pravo conſilio*, ſignify *with a bad Intention*, whereas they plainly ſignify, *without taking good Meaſures*; as *Montagne* rightly takes them, when he ſays, *The* Carthaginians *puniſh'd the ill Conduct of their Captains, although they made Amends for it by their good Succeſs.* Eſſays, Lib. iii. Ch. viii. p. 693. Fol.

[2] What is Faulty, 'tis no Matter with what Intention it is done. *Publ. Syr.* ſee the next *Chap.* §. 2, 3.

Intention, which is a Principle of the greateſt Force in determining the Action's Quality. Hence it is ſinful to direct an Action, not only to an ill End, but likewiſe to any other End, than what is preſcrib'd by the Law, *Matth.* vi. 5. *Juv. Sat.* 8. *v.* 215. *Cauſa facit rem diſſimilem.* Nor is an accompliſh'd Fact only, or ſuch as hath obtain'd its End, accounted Wickedneſs, but even a commenc'd Enormity: And this latter is by Civil Laws ſometimes puniſh'd with equal, or however with little leſs Severity than the former; according as they find it neceſſary to repreſs a Villany in its firſt Riſe and Appearance. *Senec. de Conſtant. Sapient. c.* 7. *All Villanies before the Accompliſhment of the Work are compleat in reſpect of the Guilt*[3].

V. This *Goodneſs*, and this *Evil* of Actions, as they conſiſt *formally* in ſuch an Agreeableneſs or Diſagreeableneſs to the Law, as we have been ſpeaking of, ſo they depend entirely on him as their efficient Cauſe, who performs an Action which the Law either commands or forbids. For his Determination ſo conſtitutes the Action in the Rank of *Moral Beings*, that it muſt be imputed to him, and to him only [1]. And therefore thoſe Men have tormented themſelves with a needleſs Fear, who, leſt they ſhould ſeem to make God Almighty the Author of Sin, have plac'd the *ratio formalis* of an evil Action, in the *Privation of Conformity to the Law* [2]. For tho' the Poſition of any *Form* neceſſarily infers the *Privation* or Abſence of the contrary Form; yet how miſtaken muſt he be in his Opinion, who would ſeek for the Eſſence of a Thing in this Privation? Nor will *he* find himſelf any great Proficient in Wiſdom, who hath arriv'd to know that Straightneſs is the Privation of Crookedneſs, and Crookedneſs the Privation of Straightneſs. But theſe Inventions and theſe Fears of Men, both proceeded from their Ignorance of moral Things. God, the Author of all natural Beings, need not, and ought not to be eſteem'd the Author and Cauſe of all moral [3], all notional, and all artificial Beings. Some looſe Thinkers muſt needs be touch'd with a ſtrange Itch of Wit, when they imagine they have given us an extraordinary Specimen of their Philoſophical Subtility, in numbering God among the Cauſes of our ſinning. For a Man, who hath the leaſt Inſight into the Conſtitution of Morality, will judge nothing more abſurd, than to enquire whether or no *He* be the *Cauſe* of an Action, who forbids it by a Law, and puniſheth it for being done after his Prohibition. As for God's concurring to the Phyſical Part of an Action, he can with no more Reaſon be on this Account ſtil'd the Author of Sin, than one who hath furniſh'd an Artificer with Materials to work upon, can be reckon'd the Cauſe of a Deformity in his unſkilful Work. Wherefore, to uſe the Term or Name of *Cauſe* in a Signification ſo very improper, and ſo remote from common Senſe, is to join our Pride and Ambition in offering an Irreverence to the Divine Nature. *Philo Judæus de profug* [4]. *What greater Inſtance of Blaſphemy can there be, than to make GOD, and not our ſelves, the Author of Evil? Maxim. Tyr. Diſſertat.* iii [5]. *Theſe dreadful Names of Furies, Fates, and Deſtinies, what are they but the ſpecious Pleas and Excuſes of human Wickedneſs, by the Means of which we are wont to charge our own Faults upon the Providence of Heaven? When, alas! theſe, and all the other Miniſters of Terror, and over-ruling Neceſſity, which we ſo often complain of, are Monſters of our own making, and ſuch as we carry about us in our Breaſt.* Idem. Diſſert. xxv. Let the Wretch who ſins upon Choice, take all the Guilt upon himſelf, and let God be clearly juſtified [6].

VI. We are, in the next Place, to diſcourſe of

Juſtice,

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[3] *Seneca*'s Words, *Omnia ſcelera, etiam ante effectum operis, quantum culpæ ſatis eſt, perfecta ſunt.* The Scholars of *Zoraſtres* ſay, *We muſt baniſh every Sin from our Hands, Tongue, and Thought.* In Sadder, Porta lxxi. They add elſewhere (*Porta* xxv.) *as alſo from our Eyes.* See what this Author ſays afterwards, *Lib.* viii. *Ch.* iii. § 14.

§ v. [1] That is, as the immediate Author of the Action; for, as our Author himſelf ſhews at large, *Ch.* v. § 14. the Actions of another may alſo ſometimes be imputed to a Perſon.

[2] This Notion much reſembles *Ariſtotle*'s Opinion of the Principles of natural Bodies, among which he ranks Privation. See the *Art of Thinking*, Part iii. Ch. xviii. § 1. where the Author ſeems to have taken the Expreſſion from *Montagne*'s *Eſſays, Lib.* ii. *Ch.* xii. *p.* 393. Fol. *Ed. Par.*

[3] The Author underſtands by this, the Operations of our Underſtanding.

[4] *Quæ poteſt eſſe blaſphemia gravior, quàm contendere, non ex nobis mala provenire, ſed ex Deo?*

[5] The *Greek* is, Ἔοικε δὲ ταυτὶ τὰ ὀνόματα εἶναι μοχθηρίας ἀνθρωπίνης εὔφημοι ἀποστροφαί, ἀναθέντων αὐτῆς τὴν αἰτίαν τῷ Δαιμονίῳ, καὶ ταῖς Μοίραις, καὶ Ἐριννύσι—— Ἡ δὲ Ἐριννὺς, καὶ ἡ Αἶσα, καὶ οἱ Δαίμονες, καὶ ὅσα ἄλλα διανοίας ἡμαρτημένης (for ſo it muſt be read, with *Heinſius* inſtead of εἱμαρμένης) ὀνόματα, ἔνδον ἐν τῇ ψυχῇ καθειργμένα.

[6] Our Author treats here only of Actions morally good or bad, *i. e.* fully agreeable, or plainly contrary to ſome Law in Force. But he ought alſo to have ſpoke ſomething of Actions morally indifferent, *i. e.* which every one may lawfully do or not do, according as he pleaſes, by virtue of a Law of ſimple Permiſſion. See §. 1. *Note* 1. That then we may have a true Notion of this laſt ſort of Actions, we muſt obſerve, that the Term *Indifferent* may have three Significations, which ought to be carefully diſtinguiſh'd; for, 1. If we ſay, that an Action may be indifferently either commanded, or forbidden, or permitted by the Law, even in this Senſe we muſt acknowledge all human Actions are not indifferent; as for Example, Man-ſlaughter can't be commanded nor permitted, becauſe it is ſo great a Prejudice to the human Nature. 2. But if we conſider our Actions, as Motions purely phyſical, and with a Relation to any Rule, in one Word, without a Regard to any Law, 'tis certain that in this Reſpect all Actions are indifferent. See *Ch.* ii. §. 6. aforegoing. Laſtly (and 'tis in this Senſe that our Author treats of it here) if we conſider an Action as freely permitted by the Law. This is an Action morally indifferent, which we may in a negative Senſe call good, becauſe it is not evil. Now there can be no Difficulty in judging of theſe ſort of Actions; for what elſe can thoſe things be, which are neither commanded nor forbidden, by any Law, Divine or Human, and which we have Power to do, or not do, as we ſee fit? The Schoolmen fooliſhly affirm, That Dancing (for Example) conſider'd abſtractly in it ſelf, is morally indifferent; but it ceaſes to be ſo in the very Moment when we look upon it as a particular Action, done by ſuch, or ſuch a Perſon, at ſuch, or ſuch a Time, in ſuch, or ſuch a Place, with ſuch, or ſuch an Intention; for an Action thus ſtripped of all its Circumſtances is a meer Chimera and Nothing. So that if Dancing be morally indifferent, it muſt be ſo with relation to certain Circumſtances, of Perſons, Times, and Places. It ſignifies nothing to ſay that every particular Action that is done with a good or bad Intention, ought to be good or bad, for this Concluſion is not abſolutely true. An Action done with a good Intention is good only in a negative Senſe, that is to ſay, either not evil, or indifferent, ſo far as ſome Law has formally preſcribed it, for there are a great Number of Actions done for a lawful End, which are not commanded by any Law, and conſequently can't paſs for ſuch as are good poſitively. This is almoſt all taken out of Mr. *Titius*'s *Obſerv.* lxv. 'Tis along ago ſince that learned *Engliſhman Thomas Gataker* ſpake ſomething like this againſt the vain Subtilties of the Schoolmen, about Actions indifferent. See his Treatiſe of the Uſe and Nature of Lots, printed at *London*, 1619. *Chap.* v. §. 4. where he mentions the famous Diſtinction of the *Stoicks*, and cites, among others, a Paſſage of *Aulus Gellius*, who has the ſame Notions, which I ſhall ſet down here, becauſe he expreſſes the ſame thing well in it. *Omnia, quæ*

in

Juſtice, concerning which, it ought to be our firſt Obſervation, that the Signification of this Term as applied [1] to *Perſons*, is very different from that, by which it denotes an Attribute of *Actions*. For when we uſe [2] it with regard to *Perſons*, to be *juſt*, imports as much as to delight in acting juſtly, to ſtudy after Juſtice, or to endeavour in every thing to do what is juſt: And to be *unjuſt*, is to neglect Juſtice, or to think it ſhould be meaſur'd, not according as it is really due, but as it ſuits with preſent Advantage. So that a *juſt Man* may perform ſeveral *unjuſt Actions* [3], and an *unjuſt Man* ſeveral *juſt Actions*. For he is to be eſteem'd a juſt Perſon, who doth juſt Things in Obedience to the Law [4], and unjuſt Things only thro' Infirmity; and he an unjuſt Perſon, who doth juſt Things in Fear of the Puniſhment annex'd to the Law, and unjuſt Things either out of Perverſeneſs and Pravity of Mind, or for the procuring of Glory, or any other ſeeming Benefit. *Hobbes de Cive*, *Ch.* iii. §. 5. And to the ſame Purpoſe *Pliny*, in his *Panegyr. Ch.* lvi. *A wicked Man may do many Things, in themſelves commendable: But to deſerve Commendation in his own Perſon, is the Prerogative of a Man truly good and virtuous.* [5] Philemon *in* Strabo. *Serm.* ix.

He is not Juſt who barely acts no Wrong,
But he who ſpares, when fraught with Power to (harm:
Nor will the Conqueſt of a puny Luſt
Enſure his Triumph; but a Strength of Soul,
Fit to ſuſtain the united Force of Sin,
And foil Temptation in its laſt Attack.
Solid in Worth, and generous Honeſty.
Nor bent with crooked Guile, nor brib'd with (Praiſe,
He courts the *Virtue*, and contemns the *Fear*.

Archytas De viro bono & beato [6]. *As he who hath ſome time or other been guilty of Immodeſty, Injuſtice, or Timerouſneſs, is not to be reckon'd in the Number of bad Men, ſo neither is he who hath perform'd ſome Acts of the oppoſite Virtues, immediately to be rank'd amongſt the good. But the true Judgment of Perſons is to be made, not from any ſhort Period of acting, but from the whole Courſe and Tenor of Life. Agathias, Lib.* v. hath left a very judicious Cenſure of thoſe People in *Conſtantinople*, who upon a terrible Earthquake in the City, had contended with each other in the Performance of good and pious Works. *All this they did* (ſays he) *for a certain Time; ſo long as the Impreſſion of the Fright was freſh and ſtrong upon their Apprehenſion. But when the Calamity began to abate, moſt of them return'd to their former Looſeneſs of Practice. Now ſuch a ſudden Motion of the Mind, ſuch a Fit, as it were, of Goodneſs, cannot be call'd true Juſtice, or ſolid and fruitful Piety, ſuch as is wont to be form'd in Men by right Opinions and conſtant Application; but an nunnatural Diſguiſe, an ill-contriv'd Stratagem, a meer huckſtering in Holineſs, taken up as a Preſervative againſt the common Evil. Virtue upon Neceſſity is juſt as long liv'd as the Fear that occaſions it.* Hence it appears, that the Definition of [a] Juſtice ſo much in vogue with the *Roman* Lawyers, in which they call it, *A conſtant and perpetual Inclination to give every* [7] *one their Due*, belongs to the Juſtice of *Perſons*, not to that of *Actions*. And this we take to be very inconvenient: Inaſmuch as the Science of *Law* is chiefly imploy'd about the Juſtice of *Actions*, and toucheth on the Juſtice of *Perſons* only by the bye, and in ſome few Particulars.

VII. The *Juſtice of Perſons* differs from their *Goodneſs* chiefly in this, that *Goodneſs* barely denotes a Conformity to the Law, but *Juſtice* farther includes a Reſpect to thoſe Perſons towards whom the [1] Action is perform'd. So that we apprehend that Action to be *juſt*, which with full Deſign and Intention is applied to the Perſon to whom it was due. And therefore *Juſtice*, in this Senſe, will be nothing elſe, but the right Application of the Action to the Perſon. We ſhall chooſe to divide Juſtice chiefly with Regard to the Matter which is owing, or which bears a Relation to another by way of Debt or Due.

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[a] *Inſtit. Lib.* i. *tit.* i. *Digeſt. Lib.* i. *tit.* i. §. 10.

in rebus humanis fiunt, ſicut docti cenſuerunt, aut honeſta ſunt, aut turpia; wherein he omits the third Member of the Diviſion, as other good Authors do, for the Reaſon which Mr. *Noodt* gives us, in his Book entitled *Probabilia Juris*, i. e. *The Probabilities of the Law, Lib.* i. *Ch.* xii. *Quæ ſuâ vi recta aut honeſta ſunt, ut fidem colere, patriam defendere, amicos diligere, ea fieri oportet, ſive imperet Pater, ſive non imperet. Sed quæ his contraria, quæque turpia & omnino iniqua ſunt, ea nè ſi imperet quidem. Quæ vero in medio ſunt, & à Græcis tùm* ἀδιάφορα, *tum* μέσα *appellantur, ut in militiam ire, rus colere, honores capeſſere, cauſas defendere, uxorem ducere, uti juſſum proficiſci, accerſitum venire, quoniam & hæc & his ſimilia per ſe ipſa neque honeſta ſunt, neque turpia, ſed proinde ut à nobis aguntur, ita ipſis actionibus aut probanda ſunt, aut reprehendenda; propterea in ejuſmodi omnium rerum generibus patri parendum eſſe cenſent, &c.* Lib. ii. Chap. vii. See alſo *Velthuyſen of the Principles of Juſtice and Decency*, p. 19, &c.

§. vi. [1] This is not only true concerning Juſtice, but alſo concerning all Morality in general, *i. e.* concerning ever Virtue and Vice.

[2] We muſt indiſputably treat of the Juſtice of Actions, before that of Perſons, becauſe this laſt ſuppoſes the firſt, as appears by the Definition which our Author gives of it. The Way to underſtand theſe Expreſſions, *to do juſtly, to delight in Juſtice*, is not to be ignorant what Juſtice is.

[3] *Laudabilia multa etiam mali faciunt, ipſe laudari, niſi optimus, non poteſt*, Plin. Panegyr. Chap. lvi. *Sinners themſelves do many Things commendable, but only the beſt Men deſerve Commendation.*

[4] There is alſo a Caſe when we may do juſtly in a negative Senſe, *i. e.* not unjuſtly, altho' the Thing in itſelf be not juſt. This happens when a Man is really in an Error, or ignorant, as it often comes to paſs, both in reſpect to Right and Fact. On this Ground *Grotius* maintains, and that with good Reaſon, That War may ſometimes be juſt on both Sides. See his Book *De Jure belli & Pacis, Lib.* ii. *Ch.* xxiii. §. 13. and what ſhall be ſaid, *Lib.* viii. *Ch.* vi. §. 4. *Note* 2.

[5] The *Greek* is, Ἀνὴρ δίκαιός ἐστιν, οὐχ ὁ μὴ ἀδικῶν·
Ἀλλ' ὅστις ἀδικεῖν δυνάμενος μὴ βούλεται.
Οὐδ' ὃς τὰ μικρὰ λαμβάνειν ἀπέχετο·
Ἀλλ' ὃς τὰ μεγάλα καρτερεῖ μὴ λαμβάνων.
Ἔχειν δυνάμενος καὶ κρατεῖν ἀζημίως·
Οὐδ' ὅς γε ταῦτα πάντα διατηρεῖ μόνον.
Ἀλλ' ὅστις ἄδολον γνησίαν τ' ἔχων φύσιν
Εἶναι δίκαιος, καὶ οὐ δοκεῖν εἶναι θέλει.

(6) Οὔ τοι δὲ ἀκολασταίνοντα ἔν τισι καιροῖς, οὐδὲ τὸν ἀδικάσαντα, οὐδὲ τὸν ἀποδειλιάσαντα ἐς τὼς κακὼς τακτέον ἄνδρας, οὐδὲ μὰν τὼς τούτων τι κατορθώσαντας ἐς τὼς ἀγαθὼς——.—— τὰν δὲ ἀληθινὰν κρίσιν οὐ πόθ' ἕνα καιρὸν ἀποβλέποντας, οὐδ' ἐπὶ χρόνω τι πλῆθος, ἀλλ' ἐπὶ πάντα τὸν βίον.

[7] *Juſtitia eſt conſtans & perpetua voluntas jus ſuum cuique tribuendi*, Inſtit. Lib. i. tit. i. de Juſtitia & jure. Digeſt. Lib. i. tit. i. §. 10. See the Explication of this Definition, in Mr. *Noodt*'s *Probabilia Juris, Lib.* iii. *Chap.* i, ii.

§. vii. [1] There is not properly any Difference between Goodneſs and Juſtice; for, as our Author himſelf ſhews us above, the Idea of a good Action contains in it the Notion of an Object agreeable. We may better diſtinguiſh good Actions according to the threefold Object which they may have, *viz.* God, other Men, and ourſelves. Thoſe that have God for their Object, are comprized under the general Name of *Piety*: Thoſe that have other Men for their Object, are contained in the Term of *Juſtice*; and thoſe that directly regard ourſelves may be reduced to *Temperance* or *Moderation*. This Diviſion, which is the moſt common, ſeems to be the plaineſt and moſt natural.

But we muſt obſerve beforehand, that ſome Actions may be call'd *pure*, and others *mixt*. The former are perform'd and finiſh'd by the Motion of ſome of our Powers applied in ſuch a certain Manner to the Object; of this Kind are honouring, paying Duty and Reſpect, loving, hating, comforting, praiſing, diſpraiſing, *&c.* the Product of all which is nothing elſe but the cauſing the Object to be really affected, or to be thought affected by the Action in a certain Way, either with Complacency or Diſſatisfaction. But the latter, or the *mixt Actions*, are join'd with the transferring of ſome Advantage or Diſadvantage on the Perſon towards whom they are exercis'd; and therefore their Effect conſiſts principally in ſome Operation, either profiting or hurting another Man in his Perſon or in his Goods [2]. Again, there are ſome Actions which make a great Part of Commerce amongſt Men, and are valu'd at a certain Rate; others have no Price or Rate impos'd upon them: Concerning which Difference we ſhall enquire farther hereafter [3]. Laſtly, we muſt take Notice that ſome Things are *due* to us *perfectly*, others *imperfectly*. Thoſe Things which are due to us in the former Manner, if voluntary Payment be not made, we may conſtrain the Debtor to diſcharge, if we live in a natural State, by Arms and main Strength; if we are Members of the ſame *civil Society*, by preferring an Action againſt him in Courts of Juſtice. But what is due to us in the latter Way, we ought neither to claim by Methods of Hoſtility, nor to extort by legal Proceſs. It is uſual [4] with *Latin* Authors, to expreſs *perfect Right* by the help of the Word *Suus*, as when they ſay a Man claims ſuch a Thing, *ſuo jure, by his own Right*. Now that ſome Things ſhould be thus *due* to us *perfectly*, and others *imperfectly*, the Reaſon amongſt thoſe who live in a State of natural Liberty is, the great Diverſity of Precepts in Nature's Laws, of which ſome conduce to the very Being, others only to the well-being of Society: And therefore, ſince there's leſs Neceſſity of performing theſe latter than the former, Reaſon ſhews that the former may be requir'd and executed by more ſevere Courſes and Means; whereas in regard to the latter, it is meer Folly to apply a Remedy more grievous than the Diſeaſe. Beſides, there uſually paſſeth between Men ſome Covenant about the former, but not about the latter; and conſequently, ſince they are left to every Man's Conſcience and Modeſty, it would be very improper to extort them violently from another [5], unleſs in Caſes of extraordinary Neceſſity. In civil Communities this Difference ariſeth from the particular Laws and Conſtitutions allowing or diſallowing an *Action* in ſuch or ſuch Caſes. Tho' moſt Commonwealths do in theſe Points follow the Tract of the Law of Nature; except where they have ſome particular Reaſons adviſing the contrary.

VIII. When, then, we exhibit to another either Actions or Things due to him only by *imperfect* Right, or when we exerciſe towards another, Actions not coming under the Head of ſtrict Commerce, we are ſaid to have obſerv'd *general*, or *univerſal Juſtice*. As when a Man ſupplies another with his Counſel, Goods, or Help, as he hath Need; or when he performs the Offices of Piety, Reverence, Gratitude, Humanity or Beneficence towards thoſe to whom he is in Duty bound to pay them. This Kind of Juſtice only enjoins that the Debt be paid, not conſidering whether the Thing given in Payment be equal to the Reaſon why it is due, or not. Thus a Man ſufficiently diſchargeth the Duty of Gratitude, if he make all the Return that his Abilities will allow; tho' perhaps the Kindneſs he hath receiv'd were in Value much greater [1].

But when we perform towards another Actions falling under Commerce, or ſuch as transfer any Thing on another, to which he had a *perfect Right*, this is call'd *particular Juſtice*.

IX. Now this *perfect Right* accrues [1] either to ſingle Perſons by a Covenant (tacit or expreſs) made with ſome Society, in order to their being admitted Members of it; or to a Society by a Covenant made with ſingle Perſons, in order to the receiving them into the ſame Community: Or, laſtly, from [2] Pacts made between any Parties concerning Things or Actions falling under Commerce. When we pay thoſe Things which are due upon the Pact of a Society with a Member, or of a Member with a Society [3], upon the Accounts juſt now ſpecified, we are ſaid to exerciſe *diſtributive Juſtice*. For whenever a Man is receiv'd into a Society, a Pact is either expreſly, or, at leaſt, tacitly made between the *Society* and the *Member* now to be introduc'd, by which the *Society* engageth to give him a juſt Share and Proportion of the *Goods* which it enjoys as a common Body: and the *Member* promiſeth, that he will bear his proper and equal Part of thoſe *Burdens* which conduce to the Preſervation of the *Society*, conſider'd *as ſuch*. The exact Determination of the proper Share of Goods to be aſſign'd to the Member, is made according to the Rule and Value of the Pains or Charges employ'd by him, towards preſerving the common Society, in Proportion to the Pains or Charges contributed by the other Members. On the other Hand, the Determination of the proper Share of Burthens to be laid on the Member, is made according to the Value of the Benefits receiv'd by him from the Society, conſider'd in proportion to the Advantages which the reſt of the Members enjoy. Hence, ſince it generally happens, that one Member contributes more towards the Preſervation of the Society than another, and that one likewiſe exceeds another in deriving Advantage from it, the Reaſon is very apparent, why, upon the Suppoſal of many Perſons, and of this Inequality amongſt them, we ought, in the Exerciſe of *diſtributive Juſtice*, to obſerve a *comparative* Equality: Which conſiſts in this, that what Proportion the Merits of one Perſon bear to the Merits of another, ſuch Proportion ſhall his Reward bear to the other's Reward. [4] For, as *Philo Judæus de Monarchia. Lib.* ii. *p.* 640. *Ed. Genev.* obſerves, *'tis high Inequality to give equal Honours to thoſe who are not equal in Merit.* Arrian. Epictet. Lib. iii. Ch. xvii. *This is a ſettled Law of Nature, that he who is more excellent, ſhould on that very Account have a larger Share of good Things, than he who is leſs.* Thus, for Inſtance, if ſix Things of the ſame Value are to be diſtributed amongſt *Caius*, *Seius*, and *Titius*, upon Suppoſition, that *Titius* exceeds *Caius* in a triple Proportion, and *Seius* in a double, *Titius* ſhall have three, *Seius* two, and *Caius* one. Nor is it requiſite to this Equality, that the Reward fully anſwer and come up to the Merits of the Perſon; but 'tis ſufficient, that what Proportion the Service of the one bears to the Service of the other, the ſame Proportion there ſhould be between their Shares of the common Benefits. And the ſame Rule muſt be follow'd in diſtributing *Burthens*.

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[2] For Example, a Gift, a Loan, a Theft, Murder, *&c.*

[3] See *Book* v. *Ch.* i. §. 5.

[4] As for Example, When we ſay, *Ille ſuo jure hoc poſtulat*. See *Grotius*; *Lib.* i. *Ch.* i. §. 5. with *Gronovius*'s firſt *Note*. And we alſo ſay ourſelves, We muſt render to every one their own; we wrong no Man, when we require our own.

[5] We could not otherwiſe diſcern ſuch as are truly good, from ſuch as do juſtly againſt their Will, if there were no Duty to which we might be conſtrained.

§. VIII. [1] It is nevertheleſs no great Virtue to own an Obligation to ſuch as have done us Good, provided that the Acknowledgment does not much ſurpaſs, in its Effects, the Obligation we have to our Benefactors; for, according to the Maxim of JESUS CHRIST, *If you love thoſe only, that love you, what Thanks have you?* Matth. vi. 46.

§. ix. [1] This Diviſion is not compleat, becauſe it contains in it the Obligation we are in to another, by Virtue of ſome Engagement that we are entred into, or of a Society to which we are joined. Now there are Things which our Neighbour may require of us in Strictneſs, without any Relation to a particular Society, Promiſe, or Convention; as not to do them any Injury, to make good a Damage done them, and to look upon them as Beings equal with ourſelves. It would pleaſe me better, with Mr. *Buddeus* (*Elem. Phil. pract. Part.* II. *Ch.* ii. §. 46.) to divide particular Juſtice, which we may more ſtrictly call *rigorous Juſtice*, into that which Equals Uſe one towards another, and that which Superiors exerciſe towards their Inferiors. The firſt may be ſubdivided into ſeveral Sorts, *viz.* The Duties which a Man may in Strictneſs exact of all other Men, and a Citizen of every Perſon ſubject to the ſame Government. The other contains divers Kinds, as there are divers Kinds of Societies, where ſome command and others obey, which is much the ſame as *Grotius*'s *Jus Rectorium & Æquatorium*, *Lib.* i. *Ch.* i. §. 3. The Epithet of *Univerſal*, given to the other general ſort of Juſtice, is alſo very improper. We had better call it *imperfect* Juſtice.

[2] Our Author here uſes the Term *Convention*, but it muſt be underſtood in a large Senſe, which comprehends perfect Promiſes, of which he ſpake, *Lib.* iii. *Ch.* v. §. 7. which confer upon him, to whom the Promiſe is made, a perfect Right to require the Accompliſhment. For in theſe ſort of Promiſes, the Acceptation of him to whom the Promiſe is made, is a kind of Engagement on his Part. See *Lib.* iii. *Ch.* v. §. 1.

As for what Mr. *Hobbes* [2] alledgeth, to overthrow this *reſpective Equality*, that *I may of my own Goods diſtribute leaſt to him that deſerves moſt, and moſt to him that deſerves leaſt, provided I pay but for what I bargain'd for*; and uſeth the Authority of our Saviour, in the xxth of St. *Matth. ver.* 13, *&c.* to confirm his Opinion: All this, if rightly conſider'd, makes nothing to the Purpoſe. For in the Place of Scripture above-cited, it is ſhewn indeed that *he* doth not offend againſt *Commutative* Juſtice (which governs the Contracts about Hire, *&c.*) who out of his Liberality gives to ſome a larger Reward than their Service deſerves; or who, to the Wages due upon this *commutative* Juſtice, adds ſomething out of free Bounty, which is comprehended under *univerſal* Juſtice. But how doth this affect our *diſtributive* Juſtice, the Buſineſs of which is nothing elſe, but to aſſign to many Perſons their proper Shares of a Thing, to which all of them have a *perfect*, though (in regard to the Quantity) an *unequal* Right? And then as for the word *Diſtributing*, which occurs in the Inſtance alledg'd from Scripture, this doth not in the leaſt make the Act fall under Juſtice, ſtrictly call'd *Diſtributive*; but only hints that the Labourers were *many*, to every one of whom their Wages were to be paid according to *commutative* Juſtice [5].

To clear the Doubts rais'd on this Head by *Grotius*, in his firſt Book and firſt Chapter, we need only obſerve, that his [6] *expletive* Juſtice doth not exactly come up to *commutative*, nor his *attributive* to *diſtributive*; and that his Diviſion is not founded on the ſame Bottom as ours. For *ours* is chiefly taken from the *Matter* which is owing, and from the *Cauſe* of owing it; but *his* from the *Manner* and the *Degree* in which a Thing is ow'd. Whence the Reaſon is evident why the parting of Gain in Contracts of Societies, is by him referr'd to *expletive*, and by us to *diſtributive* Juſtice. The obſerving of [7] Geometrical Proportion in theſe Caſes, is indeed only accidental; ſince 'tis not neceſſary, that the Members ſhould have contributed unequal Shares, but they might as well have contributed equally, and then in parting the Gains a *ſimple* or ſtrict Equality muſt have been follow'd. As for that Caſe ſtated by *Grotius*, *If* [8] *one Man only be found fit for a publick Office, his Reward ſhall be aſſign'd him according to ſimple, or* Arithmetical *Proportion*; it muſt be farther enquir'd, whether the Man had a *perfect*, or [9] *imperfect* Right to this Office. If the latter, the Caſe will then belong to *univerſal* Juſtice: If the former, we agree to *Grotius*'s Remark, that the Species of Proportion call'd *Geometrical*, is, tho' generally, yet not always follow'd in *diſtributive* Juſtice. Nor have we taken the Difference of our two Kinds of Juſtice from their making uſe of a different Proportion. And ſo, for the other Inſtances of *Grotius*, *the aſſigning of Legacies* belongs not to *diſtributive Juſtice*, but to *univerſal*: And *when a City or State repays out of the common Stock, what ſome particular Members have expended on the publick Account*, *commutative* Juſtice is exercis'd, and not *diſtributive*. Becauſe the Reaſon of the Debt ariſeth, not from that Pact by which the Society firſt admitted the ſaid Members, but from a particular, and a very different Contract.

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[2] *De Cive*, iii. §. 6.

[3] We muſt remember this Reſtriction, for otherwiſe a Society may treat with any one of its Members, as it would treat with another Society, or as particular Perſons treat one with another.

[4] *Philo*'s Words are, Τὸ γὰρ τοῖς τὰς ἀξίας ἀνομοίοις ὅμοια ἀπονέμειν, ἄνισον. *Arrian*'s, Νόμος οὗτος φυσικὸς, τὸν κρείττονα τοῦ χείρονος πλέον ἔχειν, ἐν ᾧ κρείττων ἐστί. The true Meaning of which Word is, That 'tis a Law of Nature, that good Men, as ſuch, ſhould have the Advantage of Sinners; and if ſo, they are nothing to our Author's Purpoſe.

[5] *Hobbes* gives another Example, ſee the next Section.

[6] Our Author will explain and examine more largely this Definition of *Grotius*, in §. 11. of this Chapter.

[7] To underſtand what *Geometrical* Proportion is, the beſt way is to give an Example of it: When I ſay then, Six is to Two, as Twelve is to Four, there is a *Geometrical* Proportion; becauſe Two is as often found in the Number Six, as Four is found in the number Twelve.

[8] *This is to ſuppoſe a Thing impoſſible* (ſays *Gronovius* the Elder, in his *Notes*) viz. *That all Citizens, one only excepted, ſhould be equal, which can only happen when they can have but one Noſe, Mouth, Eyes, and, in a Word, a Face exactly alike.* See Mr. *Vander Meulen* in his *Comment on* Grotius, *Tom.* i. *Page* 31.

[9] See *Lib.* iii. *Ch.* i. §. 3. following.

X. When we exhibit to another Things or Actions due [1] upon reciprocal Pact, and coming into Commerce, this is call'd *commutative* Juſtice. And ſince Pacts of that Kind tend to this Iſſue, that for a Thing or Action of my own, falling under Commerce, I receive from another an equivalent Thing or Action, at leaſt ſuch as I eſteem equivalent; the Reaſon is hence obvious, why in this Species of Juſtice a *ſimple* Equality is requir'd, which we commonly call [2] *Arithmetical* Proportion, but that the ſtrict Mathematicians will allow it that Title, we dare not engage. The Thing or Action then, coming in Commerce to another, ought to be anſwer'd by ſomewhat exactly of the ſame Value in moral Eſtimation. For, the Objection of Mr. *Hobbes* [a] that *if we ſell our own Goods at the higheſt Price that can be, we do no Injury to the Buyer, who inclin'd and conſented to the Bargain*, ſhall be examin'd at large hereafter [3]. As for *vindicative* Juſtice, which, according to our Notion, conſtitutes a particular Species, it will be conſider'd in a more convenient Place [4].

XI. It may be worth our while to take farther Notice of [b] *Grotius*'s Opinion concerning Juſtice, which he, neglecting the uſual Diſtinction of *general* and *particular*, divides into *expletive* and *attributive*. This Difference is founded on the Diverſity of that Right which one Man hath to receive any thing from another, which, as we have already obſerv'd, is either *perfect* or *imperfect*; the latter being alſo term'd *Amplitude*, in Oppoſition to *ſtrict Right*. Therefore an Act belongs to *expletive* Juſtice, when we render that to another which is due to him by a *perfect* Right; but to *attributive* Juſtice, when we render that which is due to him only by an *imperfect* Right. Now the Reaſon of theſe two Appellations of Juſtice ſeems to be this; whatſoever is due to me by *perfect* Right, is conceiv'd to be already in ſome Meaſure *my own* [1], and conſequently ſo long as it is withheld, ſomewhat of my own is ſuppos'd to be wanting. (Thus even Names and Titles are reckon'd Part of our Patrimony, and may paſs in Payment to others.) So that if a Man pays me what is my Due by a *perfect* Right, he gives me no new Thing, but only fills up the Place of a Thing which before was abſent, and which in the mean Time [2] was ſupplied by an Action. For Example, a Man who hath borrowed a Book out of my Study, when he reſtores it, doth not properly increaſe my Study, but only [3] fills up a Place made empty on his Account. But ſuch Things as I have only an *imperfect* Right to receive, I cannot reckon my own, nor put them into my Patrimony; ſince they depend entirely on the Modeſty and common Honeſty of another Man, who may not, by any violent Means, be compell'd to pay them. And therefore 'twould be ridiculous, if a Beggar, for Inſtance, ſhould make over to a Shoe-maker, for the Price of a Pair of Shoes, an Alms which he *expects* to receive from ſome rich Perſon. Thus then, he who renders to another any thing due by *imperfect* Right, doth properly *attribute*, give or add to him ſomewhat which he could not before call *his own*. For this Reaſon *Grotius* calls *attributive* Juſtice the Companion of thoſe Virtues which tend to the Benefit and Advantage of others, as Liberality, Mercy, Humanity, and the like. For theſe Dues Men receive only by *imperfect* Right. When he adds to theſe, *Providentia rectrix*, or *State-providence*, he is, in our Judgment, chiefly to be underſtood of the Diſtribution of thoſe Rewards, to which the Subjects have only an imperfect Right; in which, tho' a greater Liberty may be taken than in giving thoſe which are due upon Contract, yet it would be, perhaps, moſt adviſeable to proportion every Man's Share to his Merits, as the ſureſt Way to prevent Strifes and Complaints [4]. Thus *Iſocrates* (*Areopagit.* p. 247, 248. *Ed. Pariſ.*) obſerves of the old *Athenian* Miniſters: *One Thing which prov'd of great Advantage to them in the Management of the Commonwealth was this; that whereas there are two ſorts of Equality, one which gives exactly the ſame Portion to each Man, and another which proportions Mens Shares to their particular Merits, they were not ignorant which of theſe two was moſt beneficial to a State: But rejecting that as unjuſt, which dealt out the ſame Allotment to good and bad Men without Diſtinction, they choſe the other which aſſigns Honours and Puniſhments according as every Man deſerves, for the ſureſt Guide of their Proceedings.*

Why *Grotius* forbore the Uſe of the common *A-*

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[a] *De Cive*, *Ch.* iii. §. 6.

[b] *Lib.* i. *Ch.* i. §. 8.

§. X. [1] The Engagement is not always mutual. Underſtand this in the Manner I have mention'd before, §. 8. Note 2.

[2] This Author obſerves here with Reaſon, that he uſes not the Words *Arithmetical Proportion* in the Senſe of the Mathematicians, tho' we find that *Plutarch*, *De amore fraterno*, uſes it for an exact Equality; but he ſpeaks of it a little lower, §. 12. properly, when he relates the Opinion of *Ariſtotle*.

[3] *Viz.* Lib. v. *Ch.* iii. §. 10.

[4] *Viz.* Lib. viii. Ch. iii. §. 5.

§. XI. [1] *Id apud ſe quiſque habere videtur, de quo habet actionem*; *habetur enim quod peti poteſt*, i. e. Every one ſeems to be in Poſſeſſion of that for which he may have a juſt Action; for that is poſſeſſed that may be required, *Digeſt. Lib.* l. *Tit.* 16. *De verborum ſignificatione, Leg.* cxliii.

[2] The Author underſtands by this, either the Act of Engagement into which a Man is entered, or the Right a Man hath to require his Due, which Right he expreſſes by the Phraſe, *To have an Action againſt another.*

[3] *Gronovius* the Father, and Mr. *Vander Meulen*, in their Notes upon *Grotius*'s Treatiſe, *Of the Right of War and Peace*, affirm, That this Diſtinction bears much the ſame Senſe, as the ordinary one of Juſtice *commutative* and *diſtributive*, and that, as in *Latin* the Word *Explere* ſignifies ſometimes to ſatisfy, Juſtice *expletive* is ſo called, becauſe by the Practice of it we ſatisfy thoſe to whom we owe any thing which they have a Right to require, by way of Return of what they have received. But all this is of little Importance.

[4] Μέγιστον δ' αὐτοῖς συνεβάλετο πρὸς τὸ καλῶς οἰκεῖν τὴν πόλιν, ὅτι δυοῖν ἰσοτήτοιν νομιζομέναιν εἶναι, καὶ τῆς μὲν ταὐτὸν ἅπασιν ἀπονεμούσης, τῆς δὲ πρὸς τὸ προσῆκον ἑκάστοις, οὐκ ἠγνόουν τούτων τὴν χρησιμωτέραν, ἀλλὰ τὴν μὲν τῶν αὐτῶν ἀξιοῦσαν τοὺς χρηστοὺς καὶ πονηροὺς, ἀπεδοκίμαζον ὡς οὐ δικαίαν οὖσαν· τὴν δὲ κατ' ἀξίαν ἕκαστον τιμῶσαν, καὶ κολάζουσαν προῃροῦντο. But here we muſt take notice of a Miſtake in our Author, who has rendered κολάζουσαν, *pramia*, for *pœnas attribuit*, he renders *Rewards* for *Puniſhments.*

riſtotelian Terms, he himſelf gives this Reaſon, becauſe the Word Συναλλακτικὴ doth not come up to the full Import of *Expletive*; for, that he who is poſſeſs'd of my Goods ſhould reſtore them again, doth not proceed from any συνάλλαγμα or [5] Commutative Contract, and yet it belongs to *Expletive* Juſtice: That is, tho' I have a perfect Right of retrieving what is my own, from any Poſſeſſor, yet my Action is not founded upon any Contract made between us about the Reſtitution; but 'tis ſufficient to my Purpoſe, if I can prove my ſelf to be the true Maſter and Proprietor of the Thing thus withheld. It is clear then, that there may be an Act of *expletive* Juſtice without any συνάλλαγμα or Contract. Neither doth the other Term διανεμητικὴ fully anſwer that of *attributive*; becauſe it ſuppoſeth a Neceſſity of many Perſons, amongſt whom the Diſtribution is to be made. But now *attributive* Juſtice may be exercis'd towards a ſingle Perſon, when he alone is fit to receive ſuch an Honour, or ſuch a Reward.

XII. *Ariſtotle*'s Opinion concerning the Species of Juſtice, as far as we can apprehend, ſeems to be this: *General* Juſtice, which he calls *the Univerſal* [1] *Exerciſe of Virtue towards others*, is a Duty which belongs to all Men. Particular Juſtice he divides into three Kinds. Firſt *Diſtributive*, which [2] takes in the Partition of Honours or Money, or other Things capable of being divided amongſt the Members of the ſame State. Secondly, *Corrective*, which conſiſts in rectifying [3] *Commutations*: And of theſe ſome are *Voluntary*, others Involuntary. The former are made without Conſtraint, as Buying and Selling, Hiring and Letting to Hire, in Loans, Uſury, and Suretiſhip. The latter conſiſts in [4] Crimes, when Men are forc'd to a *Commutation* againſt their Wills: For Inſtance, when my Goods paſs to a Thief; for then there ariſeth an Inequality, he having *more*, and I *leſs* than we ought. The Correction then of this Inequality is made by taking from him what he had above his Due, and reſtoring it to me. Thus, ſuppoſe a Man, by the Fraud of the Seller, gives nine Shillings for a thing that is worth but ſix; three Shillings are to be taken from the Seller and given to the Buyer, to make an Equality. Now between theſe three Numbers, 3, 6, 9, there is properly an *Arithmetical* Proportion, the third Number exceeding [5] the ſecond juſt as much as the ſecond exceeds the firſt [a]. Theſe two Kinds of Juſtice belong properly and principally to thoſe who bear ſome high Command in a State. For 'tis the Duty and Office of ſuch, and not of private Perſons, to diſtribute the publick Goods amongſt the particular Members; and to correct the Inequalities which ariſe either in Contracts or Crimes, by reducing them to a Parity. *It is the Buſineſs of the Judge to reduce thoſe things to an Equality, which upon account of an Inequality are unjuſt* [6].

The third Species of Juſtice aſſign'd by *Ariſtotle*, is *Retaliation*, which ſerves to regulate the *Commutations* made between Man and Man, by comparing Things that are different and unequal, and reducing them to a Geometrical Proportion. To give an Inſtance, Were a pair of Shoes to be exchang'd for a Horſe, the Queſtion would be, how many times the Price of the Horſe contains the Price of the Shoes, which ſuppoſing to be twelve times, the Rule of *retaliating* or compenſating is, that twelve Pair of Shoes be given for one Horſe [b]. And this Species of Juſtice belongs as well to Men of private, as of publick Capacities. As for our former Remark, that the other Species aſſign'd by *Ariſtotle*, concern'd principally the Magiſtrates and Judges; this will be eaſily granted by any who take a cloſer View of his moral Works: For they will find, that in ranging and marſhalling the Virtues, he had always in his Head the Idea of ſome *Grecian* State; in which time all the Subjects had not the ſame Duties to perform, 'tis no Wonder that he hath given us ſome Virtues applicable only to Men of particular Quality and Degree.

XIII. Mr. *Hobbes* [c] hath advanc'd one ſingle Notion of Juſtice to comprehend every Kind; making it nothing elſe but a keeping of Faith, and fulfilling of Covenants; which Opinion he borrow'd from *Epicurus* [d]. *Commutative Juſtice*, he ſays, *takes place in Contracts, as in Buying and Selling, Hiring and letting to Hire, Lending and Borrowing, Exchanging, Bartering, and the like.* [1] *Diſtributive* Juſtice (tho' improperly ſo call'd) is, he ſays, *the Juſtice of an Arbitrator, when being truſted by them who make him Arbitrator, if he perform his Truſt, he is ſaid to diſtribute to every Man his own.* Nor will he allow any other Equality to be obſerved but this, that ſince we are all equal by Nature, one Man ought not to arrogate to himſelf more Right than he allows another, unleſs he hath obtain'd a greater Right than ordinary, by the Intervention of Covenants. Farther, ſince, according to his Sentiments, an Injury, or an unjuſt Action, or Omiſſion, is nothing elſe but the Violation of a Covenant; he hence infers, that we cannot offer an Injury to a Man, unleſs we have before covenanted with him. This Aſſertion is founded on his old Maxim, of *the Right of every Man to all Things*, which he hath ſtretch'd far beyond its juſt Limits; ſo that he imagines, before any Covenant is made, by which one Man might transfer his Right to another, every Man hath a Right of doing to others what he pleaſeth; and thus, only uſing his Right, he cannot be ſaid to commit an Injury [a]. But we ſhall by and by [2] ſhew, that this *Right of every Man to all Things* can be extended to no farther Senſe than this, That Nature allows a Man to uſe all ſuch Means as Reaſon ſhall judge conducible to his firm and laſting Preſervation: As indeed Mr. *Hobbes* himſelf in his Definition of *Right* [b], inſerts the *Uſe of Reaſon*. But now ſound Reaſon will never adviſe us, out of our own Pleaſure and Humour, to put ſuch Affronts on another, as cannot but provoke him to War, or to a reciprocal Deſire of hurting us. Beſides it implies a manifeſt Contradiction to ſay, that upon the Suppoſal of many Men equal in Rights, each of them hath a Right to all Things; ſince the Right of one Man to all Things, if it hath any Effect, muſt extinguiſh the Rights of the reſt; and if the Right hath no Effect upon the others, it is uſeleſs, abſurd, and ridiculous: For, in moral Account, *not to be*, and *not to be effectual*, are much the ſame. And indeed, how can we call that a Right, which another may oppoſe with an equal Right? Who would ſay, I had the Right, of commanding a Man, if he, by the ſame Right might deſpiſe my Orders? Or, that I had a Right of beating another, when he too had a Right of returning my Blows, and, if he pleas'd, with Advantage and Increaſe? 'Tis certain therefore, that he that doth theſe Things to another, hath no Right of doing them, and conſequently is injurious. On the contrary, the other Party hath a Right that ſuch Things ſhould not be put upon him, and is therefore injur'd. Thus we ſee, that ſuch *Right* as being violated produceth an Injury, is not only acquir'd by Covenant, but was given at firſt by Nature, without the Intervention of any human Act: And ſo the Aſſertion, that an Injury can be done to no Man unleſs we have transfer'd [3] ſomething on him by Covenant or Gift, is falſe and unreaſonable.

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[a] Vide *Felden ad Grot. Lib.* i. *Ch.* i. §. 8.

[b] Vide *Ariſtot. Ethic. Lib.* v. *Ch.* viii. & *Michael Epheſ. in loc. eund.*

[c] *De Cive*, Ch. iii. §. 6. & *Leviath. Ch.* xv.

[d] *In Diog. Laert. Lib.* x. *circ. fin.*

[5] We muſt not take the Term συνάλλαγμα, *Exchange*, or *Contract*, in the natural and ordinary Signification, but in the Senſe that *Ariſtotle* uſes the Word. See the next Paragraph, and *Gronovius*'s Notes upon *Grotius*.

§. XII. [1] Theſe are *Ariſtotle*'s Words, Ἡ μὲν δικαιοσυνη τῆς ὅλης ἀρετῆς οὖσα χρῆσις πρὸς ἄλλον. *Ethic. Nicom.* Lib. v. Chap. v.

2 *Ariſtotle* further goes on and ſays, Τῆς δὲ κατὰ μέρος δικαιοσύνης —— ἓν μὲν ἐστὶν εἶδος, τὸ ἐν ταῖς διανομαῖς ἢ τιμῆς, ἢ χρημάτων, ἢ τῶν ἄλλων, ὅσα μεριστὰ τοῖς κοινωνοῦσι τῆς πολιτείας —— ἓν δὲ, τὸ ἐν τοῖς συναλλάγμασι διορθωτικὸν, τούτου δὲ μέρη δύο, τῶν γὰρ συναλλαγμάτων τὰ μὲν ἑκούσια ἐστὶν, τὰ δὲ ἀκούσια. ἑκούσια τὰ τοιάδε, οἷον πρᾶσις, ὠνὴ, δανεισμὸς, ἐγγύη, χρῆσις, παρακαταθήκη, μίσθωσις —— τῶν δὲ ἀκουσίων, &c. Ibid.

[3] By the Word Συνάλλαγμα, which ſignifies a *Contract*, *Exchange*, or *Commutation*, *Ariſtotle* means every Action by Virtue of which we are obliged to do any thing to another, whether at preſent, or for the future: In a word, every Affair in which we may have Commerce one with another. So that we muſt take this Term in the Senſe that it is commonly uſed in, for we ſhall afterwards ſee that it is to be taken in a more large Signification, which would extreamly perplex us, if we ſhould follow *Ariſtotle*'s Notion without Examination, or it were neceſſary to know his Idea.

[4] By Crimes, we underſtand all ſorts of Injury done to another.

[5] This Sentence, which was not in the firſt Edition of all, is ſo very much corrupted in all the others (the laſt of 1706 not excepted) either thro' the Fault of the Printers, or Overſight of the Author, that we can make no Senſe of it: His Words are, *Quia exceſſus, quo poſterior numerus priorem ſuperat, ſunt æquales.* Doubtleſs he intended to have ſaid, *Exceſſus, quo poſterior numerus ſecundum ſuperat, & exceſſus, quo ſecundus priorem ſuperat, ſunt æquales*, as the *Engliſh* and myſelf have tranſlated it. In fine, an Arithmetical Proportion is found alſo between four Degrees of Magnitude, of which the firſt exceeds the ſecond, or is exceeded by it, in an equal Quantity, as the third exceeds the fourth, or is exceeded by it; as for example, five is to ten, as ſeven is to two.

[6] So *Ariſtotle* ſpeaks, Ὥστε τὸ ἄδικον τοῦτο, ἄνισον ὂν ἰσάζειν πειρᾶται ὁ δικαστής. *Ariſt. Ethic. ad Nicom. Lib.* v. *Ch.* viii.

§. XIII. [1] We ought to obſerve, That Mr. *Hobbes* owns no Equality to be obſerv'd as to the Price of Things, which are the Matter of Contracts. See his *Leviathan*, *Ch.* xv.

The other Poſition of Mr. *Hobbes* [c], that Juſtice as well as Property owes its Original to civil Conſtitutions, we ſhall hereafter conſider and refute.

Indeed, ſo far is it from being rational to reſolve all Juſtice into Performance of Covenants, that, on the contrary, before we can know whether any Covenant is to be perform'd, we ought to be certain that it was entred upon, either by the Command, or with the Permiſſion of the Laws of Nature; that is, that it was *juſtly* made [d].

From what hath been here offer'd, it is farther evident, that altho' otherwiſe *Damage* and *Injury* are very different Things, and though it be poſſible that [4] the Injury of an Action may redound to one Man, and the Damage to another; yet the Inference which Mr. *Hobbes* draws from this Conſideration will not hold, that a bare Damage, and not an Injury is done to him, who is either hurt, or hath ſomething taken from him, by a Man with whom he had paſs'd no Covenant. Nor do the Inſtances which he brings to countenance this Conjecture, make very much to the Purpoſe [e]. *When the Maſter*, ſays he, *commands his Servant to give Money, or to do a Kindneſs to a third Perſon*; *if it be omitted*, *the Injury is done to the Maſter*, *but the Damage to the third Perſon*. But indeed, if the Servant does not pay the Money which is due, as he is order'd, the Creditor ſhall ſuffer no [5] Damage ſince his *Action* remains good againſt the Maſter. Nor, if a Servant, being commanded to do a Kindneſs to another Man, fails in performing it, ſhall the other Man incur any Damage: Tho' he is indeed guilty of Theft, or the like Crime, if he intercept and keep for his own Uſe, what he ought, on his Maſter's Account, to have deliver'd to others. For, beſides that from the not receiving of a Kindneſs which is not ſtrictly due, Damage properly ſo call'd cannot ariſe [f], the other Perſon may complain to the Maſter, who will be ſure to compel the Servant to his Duty. And tho' we ſuppoſe the Servant to have been never ſo far from doing an Injury to the third Perſon, yet for all this, 'tis certain he did not what by *Right* he ought to have done; becauſe he affords the other Man ſufficient

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[a] Vid. *Gaſſend. Syntagm. Phil. Epicur. par.* iii. *Ch.* xxvi, xxvii. [b] *De Cive, Ch.* i. §. 7. [c] *Lev. Ch.* xv. [d] *Dr.* Cumberland *De L. L. N. Ch.* viii. §. 6. [e] *De Cive, Ch.* iii. §. 4. [f] Vid. *Grot. Lib.* ii. *Ch.* xvii. §. 2.

[2] *Viz.* Lib. iii. Cap. v. §. 3.

[3] This Expreſſion of Mr. *Hobbes* is founded upon his great Principle, That every Man hath a Right to every Thing; for, according to him, in every Engagement we yield to another the Right which we had to certain Things, and to break an Agreement is to require, in ſome Meaſure, what we had granted.

[4] This ought to be underſtood either of one and the ſame Action, in which ſeveral have concurred, but ſo as that ſome have acted without an evil Intention, and others with a Deſign to injure; or of an Action done by a ſingle Perſon, but in ſuch a Manner, as that the Effect redounds to ſeveral others, and in Reſpect to ſome it is an Injury, but in Reſpect to others it is a ſingle Damage; as if a Man, deſigning to kill another, ſhould ſlay or hurt a third Perſon, contrary to his Intention.

[5] He may receive one at leaſt for the preſent, if he had a neceſſary Occaſion for it, and becauſe he had it not in Hand, he ſuſtained ſome Loſs, or loſt an Occaſion of getting ſome Advantage. Further, it may happen, that his Maſter might become altogether inſolvent, or not in a Capacity of paying for a long Time; when any of theſe Inconveniencies happen from this, that a Maſter has given Money to his Servant to pay his Creditor, the Creditor has a full Right to require, that the Servant pay him that Sum, as a Thing belonging to him, tho' he knows nothing of his Commiſſion; for the Servant, by keeping the Money, does what in him lies to cauſe the Creditor to loſe his Debt. We may alſo add, the Deceit of the Servant has fruſtrated the Liberality of his Maſter; for tho' theſe Works of Charity are in their own Principle not rigorouſly due, yet from the Moment that a Maſter determines to do ſome Good to the Poor, and he is actually kept out of that Money, that ſhould enable him to give, the Servant, by keeping it, robs the Poor of it, as much as if he had already received it; for Men have a true Right to that which is lawfully given, in reſpect of the Donor, inſomuch as that he can't demand it again, unleſs upon ſome extraordinary Reaſons. See *Book* V. *Chap.* iv. §. 1. *Note* 1. following.

Grounds of a Complaint againſt him. His other Inſtance Mr. *Hobbes* thus propoſeth in his *Leviathan*, Ch. xv. p. 75. *Private Men may remit to one another their Debts, but not Robberies, or other Violences whereby they are endamag'd: Becauſe the detaining of a Debt is an Injury only to themſelves, but Robbery and Violence are Injuries to the Perſon of the Commonwealth.* Which we are willing enough to admit, provided he will not hence infer, that in Crimes an Injury is not likewiſe done to the particular Perſon who is hurt. But as he propoſeth the ſame in his Book *De Cive*, Ch. iii. §. 4. it is by no Means to be endur'd. He ſays, that *in a State, if any one hurts another, with whom he hath not covenanted, he damageth the Party on whom he brings the Evil, but he doth an Injury only to him who holds the ſovereign Power in the State.* For, if one of my Fellow-Subjects hurts me by Violence, doth he offer an Injury to the King only, and not to me? Or ſuppoſe we ſhould grant, as Mr. *Hobbes* deſires, that when Men live in a natural Liberty, each of them hath a Right to all Things, yet will this hold good amongſt the Members of the ſame Republick, who own one common Maſter? As to what he ſubjoins, that *if the Perſon who receiv'd the Damage, ſhould accuſe the other of injuring him, he would be anſwer'd in this Manner, What are you to me? Why ſhould I act according to your Pleaſure, rather than my own, ſince I don't hinder you from acting by your own Will, rather than by mine?* 'Tis ſo far from being true, that *if no particular Covenants have interven'd, this way of ſpeaking will not be free from Reprehenſion*, that we ſhould rather imagine a Man to be out of his Senſes, who ſhould hope by ſuch a way of arguing to ſatisfy the Complaints of one whom he had hurt. Yet one Thing Mr. *Hobbes* hath well remark'd, that *the Term of Injuſtice ſignifies with Reference to the Law, but the Term of Injury with Reference both to the Law, and to the particular Perſon.* For, when an *unjuſt* Thing is done, all may call that *unjuſt*, or it is *unjuſt* to all. But an *Injury* may have been done, not to me, or to him, but to a third Perſon, and ſometimes to no private Subject, but to the State only; as when a Man is kill'd in a Duel, for Inſtance, upon a fair Challenge. For in this Caſe, the Party who receiv'd the Hurt, cannot complain of having an *Injury* done him, ſince he himſelf agreed to the Chance of the unlawful Combat: But the Legiſlator may, however, proſecute the Survivor for tranſgreſſing his Prohibition.

XIV. Having arriv'd to know what Juſtice is, we may eaſily ſettle our Notions of *Injuſtice*, and of its ſeveral Species. An Action, then, is *unjuſt*, either when we apply it deſignedly, to a Perſon to whom we ow'd a different Action, or when we deny another ſomewhat which was really his due. That is, We are equally guilty of a Breach of Juſtice, by doing any Evil to another which we had no Right to do, and by taking from another, or denying him any Good which he had a fair Title to require. [1] For good Things are of that Nature, that they may be given to any Man without a Reaſon, provided a third Perſon is not defrauded thereby: And the *Evils* likewiſe which a Man hath merited, we may without Injury withhold from him, if at the ſame Time we do not endamage others by our Forbearance. An unjuſt Action, therefore, either brings upon another Man what it ought not to bring upon him, or denies and withholds what it ought to give him. For the Denial or Omiſſion of an Action, is, in moral Account, itſelf an Action.

XV. But an unjuſt Action, proceeding from Intention, and treſpaſſing on the perfect Right of another, is, in one Word, call'd *Injury*. Which if we would exactly ſtate, we muſt again obſerve, that a Man may be hurt three ways; either, if he be denied what he ought to have [a], or if that which he now hath for his own be taken from him, or if ſome Evil be put on him by another, who had no juſt Right of doing it. As to the firſt of theſe Ways, Things may be ſaid to be due to a Man, either by the bare Law [1] of Nature, yet ſo as that he hath no perfect Right to them; of which Kind, are the Offices of Humanity, Beneficence, and Gratitude: Or elſe by Covenant, and that either ſuch as is expreſs and particular, or ſuch as is contain'd under our Obligation to Civil Laws, by which we engage ourſelves to perform thoſe Things towards others, which the Laws command us to exhibit. If Things of the latter Kind are denied a Man, an *Injury* is properly done; but there is no proper Injury in the Denial of Things which belong to the former Kind; tho' there be a Sin indeed committed againſt the Law of Nature. Yet neither doth the Law of Nature itſelf allow of compelling another by Violence to pay theſe Duties (eſpecially if the compelling Party have no Power and Authority over the other) unleſs upon urgent Neceſſity: Since the Nature and Property of thoſe Offices requires that they be perform'd voluntarily, and without the Motive of Fear. Thus far therefore, and no farther, will the Maxim of Mr. *Hobbes* hold true, That *an Injury cannot be done, but to a Man with whom a Covenant has been made.* But when we ſtudiouſly and induſtriouſly bring an Evil on another Man, unconſenting and unprovoking, either by taking from him any Good which he poſſeſſeth, or by poſitively inflicting on him an Evil: In theſe Caſes an Injury is always done, whether a Covenant hath interven'd, or not. For Nature hath given this Right to every Man, that no Evil be offer'd him from another Man, without his own preceding Demerit: Nor is it allowable for any Perſon, unleſs when provok'd, to hurt another, any farther than the due Exerciſe of Government ſhall require. We add, *unleſs provok'd*, becauſe to make an

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[a] *Marc. Anton. Lib.* ix. §. 5. *It often happens that there may be Injuſtice in the not doing of a Thing, as well as in the doing.*

§. xiv. [1] The three following Sentences ſeem ill placed in the Original, and therefore ought to be altered; and another Expreſſion ſhortned, becauſe it contains a needleſs Repetition.

§. xv. [1] *Ex mero Jure Naturæ*, by which our Author underſtands what he elſewhere calls *abſolute Duties*; that is to ſay, ſuch as are grounded upon the original Conſtitution of our Nature, and which every Man is obliged to perform to another Man, conſidered preciſely as ſuch, in Oppoſition to thoſe who ſuppoſe ſome other Eſtabliſhment, or other human Act, and which they call *Duties conditional*. See *Lib.* ii. *Chap.* iii. §. the laſt, following.

3 Action

on properly *Injurious*, there is requir'd the τὸ πρότερον, *that it be done firſt*: For *Ariſtotle* tells us [1], that *he who returns another what he firſt ſuffer'd from him, cannot be ſaid to do an Injury*.

XVI. In an *Injury*, properly ſo call'd, it is farther requir'd, that it proceed from Intention and deliberate Deſign of hurting or vexing another. And therefore the Harm which is done caſually in Ignorance and unwillingly, is not us'd to come under the Name of *Injury*. As ſuppoſe a Soldier that is exerciſing himſelf, in the uſual Place, at caſting his Javelin, ſhould ſtrike it through a Man that paſs'd by accidentally: Or, if a Lopper of Trees ſhould let fall a Bough upon a Perſon who had no Right to be in that Place. So *Antiphon*, an antient Orator, defends a Young-man who had unfortunately kill'd a Child with a Caſt of his Javelin: [1] *He was engag'd*, ſays he, *in no forbidden Exerciſe, but in his proper and neceſſary Buſineſs; nor by himſelf, but with his Companions in Arms: Nor did he ſtrike the Youth by an unſkilful Throw, at a Diſtance from the Mark: but he guided the Weapon with exact Art and Care, and was ſo far from doing any Thing amiſs, that he rather ſuffer'd in having his Throw ſpoil'd, and in being hindred from hitting what he ſo well aim'd at*.

Ariſtotle [2] tells us, *That the doing of a thing juſtly or unjuſtly, depends on its being done voluntarily or involuntarily*. And again, That *when we do a Hurt beſide Reaſon, it is only a Misfortune; but when we do a Hurt which is not beſide Reaſon, and yet not out of Malice, then we commit an* Ἁμάρτημα, *or Treſpaſs*. On which Place *Michael* of *Epheſus* thus comments: *Of Hurts, ſome are done out of Ignorance and againſt our Wills, others with our Knowledge and Conſent. Thoſe which are done out of Ignorance, are again divided into ſuch as are done without any Likelihood, and beſide all Expectation; and ſuch as are done, tho' involuntarily, yet not beſide all Expectation and Probability. Therefore after the Philoſopher hath ſaid, that all Hurts proceeding from Ignorance fall under the general Names* [3] *of Errors or Treſpaſſes, he then makes a kind of Subdiviſion, and tells us, that thoſe which are done beſide Reaſon are Misfortunes, and thoſe which are done not beſide Reaſon are properly Treſpaſſes. Now thoſe Things are beſide Reaſon which happen very rarely and unexpectedly; as if a Man by ſuddenly thruſting open a Door ſhould ſtrike his Father, who ſtood accidentally behind it; or if, whilſt he is exerciſing himſelf at his Javelin, in a Place thro' which none are wont to paſs, he wounds ſome body who happen'd to come by when the Weapon was flying. For theſe, and ſuch like Accidents, fall out beyond all Thought and Expectation. But Actions done indeed ignorantly, but not beſide Likelihood or Probability, are call'd Treſpaſſes. For, a Man who exerciſing his Bow and Arrows in a Place commonly frequented, ſtrikes any Perſon, doth properly treſpaſs; as a Man is then always ſaid to do, when he himſelf was the Principle and Cauſe of the Unluckineſs of the Action: But now the Man whom we ſpeak of, was no doubt the Principle and Cauſe of what he did, ſince he* [4] *voluntarily choſe ſuch a Place to ſhoot in, where it was probable ſome body or other would paſs by.*

An Ἁμάρτημα, or *Treſpaſs* of this Nature, is what the *Civilians* properly term *Culpa*, or a *Fault*; which they ſay is committed through *Negligence* or *Unſkilfulneſs*, when a Man is either careleſs or ignorant of ſuch things as he ought, and was able to have known, and to have obſerv'd. Of *Faults* they make three Degrees, anſwerable to the Degrees of Diligence, by the Omiſſion of which the Fault is contracted. Firſt then, there is a [5] general Diligence of all Men, not work'd out by Labour and Wit, but deriv'd, as it were, from common Senſe. Next to this, there is a Diligence more improv'd [6] proper to every Man in his own Affairs; and which is requir'd by Nature in the Management of human Life, according to each Perſon's Capacity and Parts. Laſtly, there is a Diligence of the greateſt Exactneſs and Accuracy, us'd only by the moſt knowing and experienc'd Men [7] in their own Buſineſs and

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[1] Ὁ γὰρ διότι ἔπαθε, καὶ τὸ αὐτὸ ἀντιποιῶν, οὐ δοκεῖ ἀδικεῖν. *Ariſt. Ethic. ad Nicom. Lib.* v. *Chap.* xv. See what is ſaid, *Lib.* ii. *Chap.* v. and *Lib.* iii. *Chap.* i. §. 7.

§. xvi. [1] *Antiph.* Orat. 7. p. 56. Edit. *Hanov.* 1619. Οὔτε γὰρ ἀπειργημένων, ἀλλὰ προστεταγμένων ἐξεμελέτα· οὔτε ἐν γυμναζομένοις, ἀλλ' ἐν τῇ τῶν ἀκοντιζόντων τάξει ἠκόντιζεν· οὔτε τοῦ σκοποῦ ἁμαρτὼν, εἰς τοὺς ἀφεστῶτας ἀκοντίσας, τοῦ παιδὸς ἔτυχεν, ἀλλὰ πάντα ὀρθῶς ὡς ἐπενόει δρῶν, ἔδρασε μὲν οὐδὲν ἀκούσιον, ἔπαθε δὲ, διακωλυθεὶς τοῦ σκοποῦ τυχεῖν

[2] Ἀδίκημα δὲ καὶ δικαιοπράγημα ὥρισται τῷ ἑκουσίῳ καὶ ἀκουσίῳ —— Ὅταν μὲν οὖν παραλόγως ἡ βλάβη γένηται, ἀτύχημα· ὅταν δὲ μὴ παραλόγως, ἄνευ δὲ κακίας, ἁμάρτημα. Ethic. ad Nicom. Lib. v. Chap. x.

[3] A little before the Words which he is about to quote, are theſe, Τὰ μὲν μετ' ἀγνοίας, ἁμαρτήματά ἐστιν. And here, to ſpeak by the Bye, *Grotius, Lib.* iii. *Chap.* xi. §. 4. *Num.* 2. renders ἁμάρτημα, *Infortunium, a Misfortune thro' Miſtake*, whereas he ſays in another Place, that it ſignifies, *Culpa aliqua*; I am amazed that neither Mr. *Courtin*, in his Tranſlation, nor *Gronovius* the Father, in his Notes, did amend this Slip in their Author.

[4] We may call it, *An indirect Will*, becauſe he did not directly and formally intend to hurt any Man; but he did, or neglected to do a Thing, from whence a Damage did redound, which was occaſioned (as may eaſily be preſumed) by that Action or Omiſſion.

[5] *Lata culpa eſt nimia negligentia*, i. e. *non intelligere, quod omnes intelligunt*. Digeſt. Lib. l. Tit. xvi. *De verborum ſignif.* Leg. ccxiii. §. 2. See alſo *Leg.* ccxxiii. and *Lib.* xxii. *Tit.* 6. *De juris & facti ignorantia, Leg.* ix. §. 2. It would be (for Example) a great Fault, if having borrowed a Robe, you leave it in your Porch, where the firſt Comer may carry it away.

[6] *Si cum diſtrahere deberet, non fecit, lata culpa, non levi, & rebus ſuis conſueta negligentia; hujuſmodi rei rationem reddet*, Digeſt. Lib. xxxvi. Tit. 1. Ad Senatuſconſultum Trebellian. Leg. xxii. §. 3. *Si venditor eam diligentiam adhibuiſſet in inſula cuſtodienda, quam debent homines frugi & diligentes præſtare*, &c. Lib. xviii. Tit. vi. *De periculo & commodo rei vendita*, Leg. xi. *Si nihil appareat conveniſſe, talis cuſtodia deſideranda eſt a venditore, qualem bonus paterfamilias ſuis rebus adhibet*, Lib. xviii. Tit. i. *De contrah. empt.* Leg. xxxv. §. 4. *Si quis non ad eum modum, quem hominum natura deſiderat, diligens eſt*, &c. Lib. xvi. Tit. iii. *Depoſiti vel contra* Leg. xxxii. It would (for Example) be a ſmall Fault, if when a Man has received a Thing to keep, he leaves it in his Chamber, and puts it not in his Trunk, or forgets to take out the Key of the Trunk where it is. In fine, the Lawyers ordinarily call this ſort of Negligence by the Name of *Culpa*, *i. e.* a Fault. See, for Example, *Digeſt. Lib.* ix. *Tit.* ii. *Ad Leg. Aquiliam, Leg.* xxxi. but ſometimes we mean by it one of the two other ſorts, of which we may judge by the Sequel of the Diſcourſe.

[7] *In lege Aquiliâ & leviſſima culpa venit*, Digeſt. Lib. ix. Tit. ii. Leg. xliv. *In rebus commodatis talis diligentia præſtanda eſt, qualem quiſque diligentiſſimus pater-familias ſuis rebus adhibet*, Lib. xiii. Tit. vi. *Commodati vel contra, Leg.* xviii. A Fault of this Nature does not excuſe (for Example) him that hath borrowed any Thing for his Uſe, if the Thing lent be loſt. See *Lib.* v. *Ch.* iv. §. 6. following. This alſo would be a very ſmall Fault, if through Heedleſneſs a Man ſhuts the Chamber where he has laid the Thing entruſted to him, but badly, and going away forgets to ſee whether he has well turned the Key of his Door.

Concerns [8]. To this laſt kind of Diligence they oppoſe their *Culpa leviſſima*; to the ſecond, their *Culpa levis*, and to the firſt, their *Culpa lata*. As to this *Culpa lata*, they obſerve, that it is equivalent to Malice and Deceit, in Contracts and other civil Buſineſs, and in Caſes of Reparation for Damages [9]. But that [10] in criminal Matters it bears not ſo hard an Interpretation; where however it doth not take away, but only extenuate the Guilt. The Effects of the *Culpa levis* and *Culpa leviſſima* they ſhew at Large, when they treat about Performances of Contracts.

The *Treſpaſſes* we have hitherto ſpoken of, are ſuppos'd to be done without Intention. But now if a Man through the Violence of his Paſſions, and only with an imperfect and ſemiplenary Intention is driven to hurt another, this Hurt ſhall not be exempted from the Name of *Injury*, altho' the Man be not immediately, for ſuch a Fact, branded with the Character and Stile, of *Unjuſt* [11]. *Ariſtotles*'s Diſtinction is excellent in this Caſe: *An ill Thing*, ſays he, *done with Knowledge, but without Deliberation, is unjuſtly done; ſuch are the Effects of Anger and of other natural and neceſſary Paſſions. For Perſons who offend on ſuch Accounts, commit Injuſtice indeed; yet they are not for this Reaſon accounted unjuſt and wicked Men, becauſe the Hurt did not proceed from any meditated Malice. But when a Man hurts another out of Choice and Deſign, then only he incurs the Name of unjuſt and wicked. Hence Facts proceeding from Anger, are always interpreted as done adviſedly; for the Principle and Cauſe of ſuch Miſchances, is not the angry Perſon, but he who provok'd him to Anger.*

XVII. *Laſtly*, It is requiſite to the making an Action properly *Injurious*, that it be done to a Perſon againſt his Will. For 'tis a Maxim in every Man's Mouth, that *volenti non fit injuria, Nothing can be an Injury when the Party is willing to receive it. Ariſtotle* ſays, [1] *A Man with his own free Conſent may be hurt, or may ſuffer things which are in themſelves unjuſt; but he cannot properly be injur'd, except it be againſt his Will.* See *Dig. Lib.* l. Tit. 17. *De diverſ. reg. Juris. Nemo videtur fraudare eos, qui ſciunt & conſentiunt.* The Reaſon of which is, that both the Good which I take from a Man, and the Debt which I withhold from him, with his Conſent, are, as it were, *Gifts* from him to me: But now, who will ſay I do an Injury, by taking what is *given* me? Nor can that be eſteem'd Evil which a Man deſires to receive; ſince all Evil neceſſarily includes an Abhorrency of the Will from embracing it. But then it muſt be ſuppos'd, that the Man enjoys the full Uſe of his Reaſon, and is not tranſported with the Violence of any extravagant Affection [2]. Hence *Ariſtotle, Ethic.* Lib. v. Ch. xv. gathers, that a Man who in a Paſſion lays violent Hands on himſelf, doth an Injury not to himſelf, but to the State, which he robs either of a General,

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[7] Add. *Ant. Matth.* de Crimin. Proleg. Ch. iii. §. 2, 3. Mr. *Hobbes*'s Definition which he gives in his Book *De Cive*, Ch. iii. §. 7. is founded upon a wrong Suppoſition, that *Injury conſiſts in nothing but the Violation of a Covenant.*

[8] In all things which are not capable of an exact and mathematical Meaſure, we may always diſtinguiſh three Degrees at leaſt, *viz.* two Extreams and a Mean, which ſometimes comes neareſt the Firſt, and ſometimes the Laſt. If we admit of a greater Number, we muſt determine juſt to a Point, where each Degree begins and ends, without which there will be no way to diſcern them: But 'tis not neceſſary when we confine ourſelves to Three. It ſufficeth then to conſider here Watchfulneſs as well as Negligence, either as being raiſed to an higher Degree, or as ſinking to the lower, between which is the Medium, which inclines ſometimes to one Side, and ſometimes to another. Now theſe middle Degrees (as we may ſay) muſt be meaſured according to the Nature of thoſe things, which are the Objects of our Cares, as they are more or leſs conſiderable, and conſequently require more or leſs Caution. This Comment is taken out of Mr. *Titius*'s Obſervations *Ratiocin. in Comp. Jur. Laut. Obſ.* 397. See alſo a curious Diſcourſe of Mr. *Thomaſius*, entitled, *De uſu Pract. Doctr. diffic. Jur. Rom. &c.* printed at *Hall* in *Saxony*, 1705.

[9] *Magna negligentia culpa eſt, magna culpa dolus eſt*, Digeſt. Lib. l. Tit. xvi. De verbor. ſignif. Leg. CCXXVI. See alſo *Lib.* xvi. *Tit.* III. *Depoſiti vel contra, Leg.* XXXII. and Mr. *Noodt*'s *Probabilia Juris, Lib.* i. *Ch.* xiii. §. 8, 9, 10, 11, 12.

[10] *In lege Corneliâ dolus pro facto accipitur, nec in hâc lege culpa lata pro dolo accipitur*, Digeſt. Lib. xlviii. Tit. VIII. *Ad Leg. Corn. de Sicariis & Veneficiis Leg.* VII. There is a Caſe, or as Mr. *Titius* ſpeaks, a groſs Fault in unlawful Actions, which renders them culpable, as well as Deceit, or a bad Intention; as for Example, If a Man orders another to be ſtricken with a Sword, with a Deſign only to hurt him, expreſly forbidding the Perſon commiſſioned to ſlay him, to whom he would have it done, he ſhall nevertheleſs be thought directly and maliciouſly to have murdered that Perſon, if he die of the Wound, which may and often does happen, and deſerve to be treated as a Murderer. For he indirectly willed it; and being the Effect of a formal ill Deſign, it ought to be looked upon as a malicious Act, and not as a ſingle Fault. See a like Caſe, *Digeſt.* xlviii. *Tit.* xix. *De Pœnis Leg.* xxxviii. §. 5. So thoſe that fight a Duel, have a Deſign often only to wound and hurt one another, yet this hinders not but if one of them be killed, the other ſhall be counted a Murderer.

[11] The *Greek* is, Ὅταν δὲ, εἰδὼς μὲν, μὴ προβȣλεύσας δὲ [ἡ βλάβη γένηται] ἀδίκημα· οἷον ὅσα τε διὰ θυμὸν, ϗ ἄλλα πάθη, ὅσα ἀναγκαῖα ἢ φυσικὰ, συμβαίνει τοῖς ἀνθρώποις· ταῦτα γὰρ βλάπτοντες ϗ ἁμαρτάνοντες ἀδικȣ̃σι μὲν, ϗ ἀδικήματά ἐστιν· ȣ μέν τοι πω ἄδικοι διὰ ταῦτα, ȣδὲ πονηροί· ȣδὲ γὰρ διὰ μοχθηρίαν ἡ βλάβη· ὅταν δ᾽ ἐκ προαιρέσεως, ἄδικος ϗ μοχθηρός· διὸ καλῶς τὰ ἐκ θυμȣ̃ ȣκ ἐκ προνοίας κρίνεται· ȣ γὰρ ἄρχει ὁ θυμῷ ποιῶν, ἀλλ᾽ ὁ ὀργίσας. Ethic. ad Nicom. Lib. v. Chap. x. See alſo *Cicero* de Offic. Lib. i. Chap. ix. with *Grævius*'s Notes.

§. xvii. [1] Ethic. Lib. v. Chap. 11. Βλάπτεται μὲν ȣ̃ν τὶς ἑκὼν, ϗ τὰ ἄδικα πάσχει· ἀδικεῖται δὲ ȣδεὶς ἑκών.

[2] Theſe Limitations are not ſufficient to prove the Maxim he is ſpeaking of true, and therefore the Philoſopher *Hermias* with Reaſon maintains, That no Man muſt make uſe of the Ignorance of a Seller, to his own Advantage, unleſs he will incur the Guilt of doing a great Wrong. A good Maxim, which every one ſhould practiſe (*Phot. Biblioth. p.* 1044.) as Mr. *Bayle* obſerves in his *Hiſtorical* and *Critical Dictionary*. To ſet this important Matter in a due Light, I ſhall borrow ſome judicious Reſtrictions made by Mr. *Placette*, upon this Maxim in his Treatiſe of *Reſtitution, p.* 74, *&c.* I. The Conſent of the Sufferers ought to be counted for nothing, unleſs it be abſolutely free and voluntary. Now there are three Orders of things which may hinder that Liberty, ſo that his Conſent is not ſo full and entire, as to authorize what he ſuffers, *viz.* In the firſt Rank is every Thing that debars us of the Uſe of Reaſon, as Infancy, Folly, and Drunkenneſs; in the ſecond, Fear and Force; and in the third, Ignorance, Heedleſneſs, and Error. As to the firſt, there is no Difficulty; as to the ſecond, we will ſuppoſe that Fear or Force proceeds directly or indirectly from him who gives his Conſent; laſtly, as to the third, That Conſent is of no Uſe, becauſe he that gives it knows not what he conſents to, nor ſees the Prejudice which he does himſelf by it; for if he be ignorant in whole or in part, his Conſent is not voluntary, and no Man can, without Injuſtice, make an Advantage of his Ignorance. Indeed Ignorance renders the Actions which it produces more involuntary, than Fear does, for this does not render an Action involuntary, but when it is cauſed by him that is to get by it; whereas Ignorance has always that Effect, whatever be the Cauſe of it. I own, that the Injuſtice is the more notorious, when he that gets by the Action deſignedly leads him that gives his Conſent, into the Error; but this does not diſannul the Contract, when the Gainer is not the Cauſe of that Ignorance: But he that buys precious Jewels at a low Price, of an ignorant Perſon that knows not the Value of them, does him an Injury, if knowing it himſelf he doth not advertiſe him of it. II. There are two ſorts of Rights; the one when we are ſo much Maſters of a Thing, that we can diſpoſe of it as we pleaſe, ſuch is that which every Man

ral, or a Soldier, or an Artificer, or the like, according as his Station was. Upon which Account it hath been a Cuſtom in moſt Commonwealths, to puniſh ſuch Offenders even after their Death, by affixing ſome Mark of Diſgrace on their Bodies, and on their Memory. Add. *Mich. Epheſ. ad loc.*

dictum. Tho' *Ariſtotle*'s Reaſoning in that Place, (*the Law commands not a Man to kill himſelf; but what it doth not command it forbids*) is falſe and abſurd; unleſs we ſay, that by κελεύει, *commands*, he rather means *permits*.

has of his own Goods. The other we can't renounce, becauſe a ſuperior Law forbids it; ſuch is that, which every Man has over his own Life; for we may defend our ſelves againſt an unjuſt Aggreſſor, tho' we can't deprive our ſelves of it. The Maxim which imports, *That we can't do an Injury to ſuch as conſent*, has Place only in Reſpect to the firſt Sort; for, as to the laſt, which are in their Nature unmoveable and unalterable, a Conſent given to the Violation of them is ever null and void. Thus when an Husband lecherouſly conſents to the Debauching of his Wife, that does not hinder but that Crime is really Adultery. III. Altho' the Conſent of him that is deprived of a thing, may be ſufficient to acquit him that deprives him of the Injury, in Reſpect of the Perſon deprived; yet we ought to take Care, that a third Perſon, who has ſome Intereſt in the Thing, be not injur'd. As for Example, a Wife, Child, or Creditors. IV. Laſtly, The Conſent of him that is deprived of any Thing belonging to him, muſt be known to him that does it, if not by a full Aſſurance, yet by a probable Preſumption, grounded upon good Reaſon; for if it afterwards appears, that the Perſon who was thought to conſent, did not, tho' the Action might be innocent, when it was done, yet he ought to make good the Injury done thereby, tho' he did not think he did any.

CHAP. VIII.

Of the Quantity [*or* Eſtimation] *of* MORAL ACTIONS.

The CONTENTS of every Section of the eighth Chapter.

I. *The abſolute Quantity of moral Actions.*
II. *What Intention is requir'd to make an Action good before GOD's Tribunal.*
III. *What Intention is ſufficient in human Judicatures.*
IV. *What is a perfect and compleat Action.*
V. *The relative Quantity of Actions.*

HAVING done with the *Quality*, it comes next in our way to ſay ſomething of the *Quantity* of moral Actions; or to conſider on what Account they fall under different Rates and Meaſures. Now we find the voluntary Deeds of Men to be capable of undergoing a double Meaſure or Valuation, either abſolutely in themſelves, or relatively towards one another. As to the abſolute Eſtimate, the Caſe is very different in good and in evil Actions. For in a good Action, if we conſider it formally and preciſely, we diſcover nothing which bears an Analogy to Quantity: Since the Goodneſs of it conſiſts only in an Agreeableneſs or Conformity to the Law, which doth not appear capable of Meaſure. Hence good Actions, conſider'd, as we ſaid, preciſely as to their *Form*, are not better one than the other; tho' they ſurpaſs each other in Excellence as to their *Matter*, with Regard to the Condition of the Object, and to the Intenſeneſs or Strictneſs of the Obligation. But now, an evil Action, as declining from the legal Rule, is conceiv'd to bear a greater or a leſs Diſtance from it; and on that Account may, even conſider'd *formally* and *in itſelf*, be eſteem'd *greater* or *leſs*: In the ſame manner as one crooked Line may recede farther from a right Line than another doth. For *Zeno*'s Argument in *Diogenes Laertius*[a] is not worth confuting: *All Sins*, ſays he, *are equal*; *for* [1] *as nothing is truer than Truth, nor falſer than Falſity, ſo neither can Deceit be greater than Deceit, nor Sin than Sin. As he that is an hundred Furlongs from* CANOPUS, *and he who is only one Furlong diſtant from the ſame City, may be ſaid both alike not to be at* CANOPUS; *ſo he that ſins leſs, and he that ſins more, are both at an equal Diſtance from doing well.* But becauſe this Diſtance between evil Actions and the Law, if any one will exactly compare them with other Kinds of Quantity, may have ſome Likeneſs to a Right-lined Angle, whoſe Greatneſs is meaſured by the Arch of a Circle, having ſtraight Lines drawn from the Circumference to the Center; therefore when I was young, and ſtudied the Rudiments of the Law, I compar'd them to a Circle[2]; but in my riper Age I have thought it better to lay aſide ſuch Niceties, and explain them more plainly.

II. Farther, ſince to the Goodneſs of an Action it is requiſite, not only that what the Law commands be fully done, but likewiſe, that it be done with ſuch Intention as is agreeable to the ſaid Law; it appears hence, that to make an Action be eſteem'd perfectly Good, there is a Neceſſity, not only that the Preſcription of the Law be anſwer'd in all its Parts; but beſides, that the only thing which prevail'd on the Mind of the Agent, and put him on ſuch a Proceeding, was a Deſire of paying ready Obedience to the Legiſlator. And for this Reaſon, ſince we are, in the Divine Law, commanded *to love* GOD, *with all our Hearts, and with all our Souls, and with all our Strength, and our Neighbour as our ſelves*, Mark xii. 30, 31. 'tis manifeſt, that no Action can be approv'd by GOD Almighty as entirely Good [1], but ſuch an one as was undertaken with the fulleſt Intention, and in which the Agent propos'd nothing elſe to himſelf, but a Compliance with the Pleaſure of his Creator. Eſpecially, ſince the Divine *Searcher of Hearts* cannot but diſcover the leaſt Wavering in our Reſolutions, and the ſmalleſt Obliquity in our Deſigns. Whoever conſiders this Point as he ought, will find but very little Inclination to boaſt of his Uprightneſs towards God.

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[a] *Lib.* vii. See *Cicer. Paradox. Ch.* iii.

Mr. BARB. *NOTES on* Chap. VIII. §. I.

[1] His *Greek* is this, Ἀρέσκει δὲ αὐτοῖς ἴσα ἡγεῖσθαι τὰ ἁμαρτήματα —— Εἰ γὰρ ἀληθὲς ἀληθοῦς μᾶλλον οὐκ ἔστιν, οὐδὲ ψεῦδος ψεύδους, οὕτως οὐδὲ ἀπάτη ἀπάτης, οὐδὲ ἁμάρτημα ἁμαρτήματος. καὶ γὰρ ὁ ἑκατὸν σταδίους ἀπέχων Κανώβου, καὶ ὁ ἕνα, ἐπίσης οὐκ εἰσὶν ἐν Κανώβῳ, οὕτω καὶ ὁ πλεῖον, καὶ ὁ ἔλαττον ἁμαρτάνων, ἐπίσης οὐκ εἰσὶν ἐν τῷ κατορθοῦν. *Diog. Laert. in Zenon.* Lib. vii. *Seg.* 120.

[2] Theſe are the *Elements of the Univerſal Civil Law*, printed at *Hay* in *Saxony*, 1660. and reprinted at *Francfort* on the *Mein* in 1680. *p.* 311.

III. But in human Account ſo exact a Diligence is not requir'd. For, ſince our Earthly Lawgivers propoſe as the chief End of their Conſtitutions [1] the Benefit of their Subjects, which commonly proceed from the outward Performance and Exerciſe of the Actions, whatever the Intention of the Actor may be; hence they are uſually ſatisfied if the exterior Action be conformable to their Injunctions. And ſo much the rather, becauſe they are unable to dive into the Receſſes of Mens Minds, nor can at all underſtand the Intention of any Agent, but by Conjectures, and by Signs obvious to their Senſes, which are by no means infallible Guides in diſcovering our inward Sentiments and Purpoſes. Therefore they value good Actions only as they appear to Senſe, or ſo far as the Reach and Condition of human Sagacity, and the Uſe of civil Life do admit or require; and are not very ſolicitous how full or ſincere the Intention of the Agent was, provided his exterior Work deſerve their Approbation [2]. Yet in evil Actions, even amongſt human Judges, more Regard is had to the Intention. And where this ſhall appear to have been abſolutely wanting, as happens in things done upon invincible Ignorance or Error, the Action ſhall be accounted involuntary: And ſuch an Action, as it is not uſually *imputed* to the Agent, ſo is it conceiv'd to be deſtitute of all Moral Quantity. But otherwiſe, an evil Action, undertaken upon Knowledge and Deliberation, as it proceeds from a former and fuller Deſign. And ſince an ill Intention is to mortal Judges ſcarce more evident than a good one, by reaſon of their Incapacity to ſearch into the Heart; they are us'd to ſettle this Point by the Help of various Indications and Conjectures, which we ſhall elſewhere explain at large [3].

IV. With Regard to the *Matter* of moral Actions, that good Action is eſteem'd Perfect in its Kind, which hath attain'd its utmoſt Complement, or to which no Part is wanting that it ought to have. Thoſe which decline from this Perfection, are reckon'd inferior in a greater or leſs Degree, according to their Diſtance from it; whether the Cauſe of this Defect be, that the Action was deſtitute of ſome Part which ſhould have made it compleat; or that it was [1] only attempted, and not actually perform'd. On the other Hand, of evil Actions, that is reckon'd the worſt in its Kind, which hath fully arrived at the End propoſed; and every one is leſs evil, according as it falls ſhorter of this final Completion.

And here we muſt obſerve a twofold Difference in [2] the *Objects* of Actions, as ſet down in Laws. For ſome admit of a Diviſion, others do not: or, to ſpeak more plainly, ſome are ſo conſtituted, that when we exerciſe an Action about them, we muſt either entirely perform, or entirely omit them, or do what's directly contrary to them: But in others, it is poſſible to perform ſome one Part only, and to omit the reſt; or ſomething may be done which is oppoſite to them, not directly, but in an inferior Degree. We may likewiſe conſider Objects under a ſecond Diſtinction: For ſome of them contain things into which they may be divided, as into ſo many Species. Thus the Affirmative Law of the [3] ſixth Commandment enjoining us to ſuccour our Neighbour in

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§. ii. [1] See the precedent *Chapter*, §. 3, 4.

§. iii. [1] See Mr. *Noodt's Diſcourſe about Liberty of Conſcience*, tranſlated into *French*, and printed at *Amſterdam* in 1707, and what I have ſaid in my *Treatiſe of Sports, lib.* iii. *ch.* vi. §. 19.

[2] When the Intention is dubious or equivocal, we ought to incline to that Side which is moſt favourable to the Agent. There is a pretty Paſſage to this Purpoſe in *Plutarch*, which it may be pleaſant to read here. Ἐν μὲν γὰρ τοῖς εὐδοκιμοῦσιν ἔργοις, καὶ πράγμασιν ἐπαινουμένοις, αἰτίαν φαύλην ὑποτίθησι, καὶ κατάγεται ταῖς διαβολαῖς εἰς ὑποψίας ἀτόπους περὶ τῆς ἐν ἀφανεῖ προαιρέσεως, οὐ πράξαντος αὐτοῦ [which laſt Words ſhould rather be read τοῦ πράξαντος αὐτὸ] τὸ πεπραγμένον ἐμφανῶς οὐ δυνάμενος ψέγειν —— εὔδηλον ὅτι φθόνου καὶ κακοηθείας ὑπερβολὴν οὐ λέλοιπε. *De Herodoti malignitate.* They, who like *Herodotus* can't deny that an Action is praiſe worthy in it ſelf, and can find no plain Reaſon to blame it, will pry into the Secrets of the Heart, and ſuppoſing them to be evil, endeavour by their Calumnies to create Suſpicions in other Mens Minds, manifeſtly arrive at the Heighth of Envy and ill Nature. *I obſerve* (ſays Mr. *Montagne* very well) *that the greateſt Wits of our Time employ their Ingenuity to darken the Splendor of the brave and generous Actions of the Antients, by puttiug a bad Interpretation upon them, and deviſing ſome vain Cauſes and Occaſions of them. A cunning Cheat! Leſt I ſhould grant an Action to be very excellent and good, I will find out five hundred vicious Intentions,* Lib. i. Chap. xxxvi. The famous Mr. *Bayle*, in his *News Letters* upon Mr. *Maimbourg's Critical Hiſtory of* Calviniſm, *Let.* xii. §. 12. affirms, That the Laws of Charity, which oblige us to put a favourable Conſtruction upon the Actions of our Neighbour rather than a diſadvantageous, are altogether contrary to Reaſon, but I have endeavoured to invalidate his Proofs of that Poſition in my *Treatiſe of Sports, Lib.* i. *Ch.* iii.

[3] See *Lib.* viii. *Chap.* iii. §. 19, 20.

§. iv. [1] An Attempt is counted for an Action, when the Impediment of performing ariſes from an Impoſſibility coming on it by ſome unforeſeen Accident, or invincible Hindrance, and not from any Refuſal or Diſcouragement in the Perſon acting. *Seneca* has a fine Paſſage to this Purpoſe, of which Mr. *Hertius* cites a Part; 'tis this, *Quædam ejus conditionis ſunt, ut effectum præſtare debeant; quibuſdam pro effectu eſt, omnia tentaſſe, ut efficerent. Si omnia fecit ut ſanaret, peregit Medicus partes ſuas. Etiam damnato reo, oratori conſtat eloquentiæ officium, ſi omni jure uſus eſt. Laus imperatori etiam victo, & duci redditur, ſi & prudentia, & induſtria, & fortitudo muneribus ſuis functa eſt.* Omnia fecit, *ut beneficium redderet; obſtitit illi fælicitas tua. Nihil incidit durius, quod veram amicitiam experiretur. Locupleti donare non potuit, ſano adſidere, fælici ſuccurrere. Gratiam retulit, etiamſi tu beneficium non recepiſti.* De Benef. lib. vii Ch. xiii. "Some things are of that Nature, that they muſt produce an Effect; in other things 'tis the ſame with an Effect to have endeavoured. The Phyſician has done his Office, if he has done all he can to cure. The Pleader, if he has urged the Law well; and a General, if he hath managed with Courage and Conduct, tho' a ſuitable Succeſs do not follow. Thanks is ſufficient, where no Requital can be made."

[2] The Original expreſſes itſelf thus, *Objecta Actionum*, i. e. The *Objects of Actions*, but the Object of Action can neither be commanded nor forbidden, but the Perſon who does, or not does a thing; and ſo our Author himſelf uſes it in the next Paragraph. Doubtleſs he means, the *Matter* of Actions, and the Miſtake ariſes from hence, that in his *Elements of the Univerſal Civil Law*, he had ſaid (*p.* 317.) the *Objects* of Laws; for in changing the Expreſſion, he was not aware, that *Actions* would not well fit the Place of *Laws*.

[3] Our Author calls this the Fifth, and the next Commandment the Sixth, according to the *Lutheran* Diviſion of the Decalogue.

all Neceſſities and Diſtreſſes of his Body, contains under it in the Manner of different Species, the Preſervation of his Life, of his Members, of his Health, the turning away of any Thing that doth, or may grieve, or moleſt him, the ſupplying him with Food in Time of Famine, *&c.* And the oppoſite or negative Law, in the ſame Commandment, forbidding us to hurt the Body of our Neighbour, comprehends, in like manner, Murther, Maiming, Wounds, Stripes, Threats [a], *&c.*

Thus too the affirmative Law, in the [3] ſeventh Commandment, enjoining Chaſtity, contains under it, Purity of Thoughts, Modeſty of Words and Geſtures, Abſtinence from unlawful Love, *&c.* And the oppoſite Law, forbidding Unchaſtity, comprehends Adultery, Fornication, obſcene Speeches and Geſtures, and impure Imaginations. For, to give an Inſtance in this Caſe, obſcene Words do not reſpect Adultery in the Way of a Part or Degree: But becauſe the divine Lawgiver was pleas'd, for Brevity ſake, to comprehend many *ſpecial* Acts under one general Law, hence it comes to paſs, that he who commits ſimple Fornication, doth as fully and entirely ſin againſt the ſeventh Commandment, as he that is guilty of Adultery. Therefore, as to theſe Objects, when what the Law commands is not perform'd, we muſt of Neceſſity either quite omit, or do directly the contrary. But other Objects of Actions, as determin'd in Laws, are in ſuch a Manner diviſible, that they ſeem to conſiſt of [4] *integral* Parts. So that here it is not neceſſary we ſhould do all, or omit all, or perform the contrary; but 'tis poſſible to perform one Part, and to let the reſt alone. For Example, the Law commands me to pay the Labourer his full Hire; now I may perhaps pay him ſome Part of it, and keep back the reſt. But when I not only deny a Man his Due, but farther take ſomething from him, or bring any Evil upon him, this Act will be quite of another Species, and bear no Reference or Affinity to the former.

V. Beſides all this, ſince one may be concern'd about a more noble, another about a more ignoble Object; and ſince one may produce more Good or Evil than another; it is plain, that upon this Account likewiſe, amongſt good Actions ſome are far better than others, and amongſt ill Actions, ſome far [1] worſe than others. *Horace*'s [b] Inſtance may ſerve to illuſtrate this Truth;

Nec vincet ratio hoc, tantundem ut peccet, idemq;
Qui teneros caules alieni fregerit horti,
Et qui nocturnus divûm ſacra legerit.———

Reaſon will never call't an equal Sin,
To rob an Orchard and a ſacred Shrine.

Add. Cicero pro Muræn: Where he ſmartly refutes the *Stoicks* Notion, that *all Sins are equal.* And his *Paradoxes, Chap.* iii. as alſo *Montaign*'s *Eſſays, Lib.* ii. *Chap.* ii. in the Beginning, and *Gaſſendus Phil. Epic. Tome* iii. Yet in many Caſes *Horace*'s Reaſoning will hold good, *Lib.* i. *Epiſt.* xvi.

———*De mille fabæ modiis quum ſurripis unum,*
Damnum eſt, non facinus pacto mihi lenius iſto.

When from a thouſand Pecks you ſteal but one,
Leſs Loſs is felt, but no leſs Guilt is ſhown.

And this is the *relative* Eſtimation of Actions, which is treated of at large, *Book* viii. *Chap.* iii.

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[a] *Vid. Lib.* xlvii. *Tit.* x. *D. De Injuriis.*

[b] *B.* i. *Sat.* iii. *v.* 115, 116, 117.

[4] We muſt underſtand them of Parts really diſtinct one from the other, and which conſequently can exiſt ſeparately.

§. v. [1] Since this Author does not expreſs himſelf either diſtinctly, or largely enough upon this important Subject here, and in the Place, *Lib.* viii. to which he refers us, treats of evil Actions only; I ſhall give you an Abridgment of what he ſays in his *Elements of univerſal Civil Law. The relative Quantity of Actions may be conſider'd,* 1. *In reſpect to the Object. For the more noble the Object is, the more is that good Action, done to that Object, better than another; and, on the contrary, an evil Action the more criminal.* See *Lib.* viii. *Chap.* iii. §. 18. 2. *In Reſpect to the State and Condition of the Agent. And ſo a Benefit conferr'd by an Enemy, is more conſiderable, than that which is received from a Friend. And, on the contrary, an Injury done by a Friend is more ſharp, and affects more than that done by an Enemy.* See the ſame Place, §. 20. 3. *In Reſpect to the Actions themſelves, according as we take more or leſs Pains to do them. A good Action, the more difficult it is, the more excellent and more commendable, otherwiſe all Things are equal. On the contrary, the more eaſily an evil Action may be avoided, the more enormous it is above others of the ſame Kind.* 4. *In Reſpect to the Effect and Conſequences of an Action, on which account an Action is better or worſe, accordingly as the good or bad Conſequences are, or may be foreſeen and prevented.* 5. *In Reſpect to the Circumſtances of Time and Place.* See the Place already quoted. In fine, 'Tis evident from this Compariſon of good Actions one with another, that ſome are more excellent than others, according as the Practice of ſome ought to give Place to the Practice of others, ſince we can't diſcharge all at the ſame Time. See what is ſaid about this, *Lib.* v. *Chap.* xii. §. 23.

CHAP. IX.

Of the Imputation *of* MORAL ACTIONS.

The CONTENTS.

I. *Of actual Imputation.*
II. *Of Imputation thro' Favour.*
III. *Of Imputation from Debt.*
IV. *What can be effectually imputed to another.*
V. *Merit, and Demerit what.*
VI. *How the Effects of Moral Actions may be aboliſhed.*

WHAT Conditions are required to make an Action capable of being *imputed*, or of being conſider'd as really belonging to a Perſon, we have formerly ſhewn at large: It remains, that we ſee how and by what Means it may be actually *imputed*, ſo as to produce ſome moral Effect, either in the Agent, or in ſome other Man. And here we muſt firſt of all diſtinguiſh between thoſe Actions which are directed by Law, and thoſe which are left to every Man's free Pleaſure. Actions of the former Kind are then ſaid to be *imputed* to the Agent, when the Legiſlator or Sovereign declares him to be the Author of them, and at the ſame Time decrees [1], that the ordinary Effects of ſuch Actions ſhall redound on him, or ſhall be conceiv'd as inherent in him. But the latter Kind of Actions are then ſaid to be *imputed*, when he, who without being bound by any Neceſſity, hath exercis'd them for the Uſe and Benefit of another Man, doth ſignify, that he undertook ſuch an Action for the other Man's ſake, and out of an Intention to oblige him. The latter Senſe of the Word *Imputatio* is moſt frequent in Claſſick Authors, and the former more in Uſe with the Divines and Moraliſts. But there is between them this manifeſt Difference, the former tends from the Legiſlator or Sovereign toward the Agent, but the latter proceeds from the Agent, and reſts in the Perſon, for whoſe Sake or Uſe the Action was perform'd.

II. The former Kind of *Imputation* is ſubdivided into *Imputation of Favour*, and *Imputation of Debt*. *Imputation of Favour* is when a Man, out of pure Benevolence, derives upon another the Effects of an Action perform'd by a third Perſon; which Effects the ſecond Party had no Right to, without the Grant of the firſt. Or, when one, out of free Kindneſs makes a larger Effect redound to the Performer of a certain Action, than the Action would otherwiſe of itſelf have produc'd. But this laſt Inſtance will hold good in Matters of Reward only [1], not in Matters of Puniſhment. For, as ſuch is the Nature of good Things, that they may be given to another *gratis*, without any Colour or Condition; ſo, if a Man is not willing to confer a good Thing on another, by the Name of a pure Gratuity, he may lawfully do it under the Notion of rewarding him for ſome *imputed* Action, which either did not otherwiſe belong to him, or could not have given him a Right of demanding ſuch a Benefit. But, on the other hand, common Reaſon will not allow me, on the ſame Pretence, to derive on another the Effects of an evil Action, which he is not really guilty of, and without the *Imputation* of which, theſe Effects would not follow his natural State and Condition. And therefore 'tis very incongruous and abſurd, that either for a Fault purely another's, I ſhould have thoſe Things taken from me, which Nature gives every Man, on the very Account of his being a Man; or that, under the ſame Colour, ſuch Things ſhould be impos'd on me, as Nature, by an Indulgence univerſal to all Mankind, hath forbidden us to ſuffer without Reaſon. A Prince, for Example, may *impute* the Father's Merits to a Son not illuſtrious by his own Atchievements; and may, on the Account of thoſe Merits, load him with Honours not otherwiſe his Due. But to puniſh the Innocent for the Father's Crime, is (ſtrictly ſpeaking) unreaſonable [2]. This indeed may happen, that the Father's Fault ſhall be the Occaſion of not conferring on the Son, or of taking from him, thoſe Things which he was neither to receive nor to retain, but under certain Conditions. But a Perſon thus dealt with, cannot be ſaid to ſuffer an Evil, which his natural State would otherwiſe have made him a Stranger to. For Nature, in this Caſe, gave no Security to the Children that they ſhould certainly poſſeſs the Parents Goods, or that they ſhould be admitted to the like Poſts of Honour: But their Right to thoſe Goods, or thoſe Honours, proceeded on theſe Conditions and Proviſo's, that the Parents ſhould deliver them down ſafe and untainted, and ſhould not fall under ſuch and ſuch Penalties by their Crimes. Nor can he, by any Means, be ſaid to be in a worſe Condition than human Nature admits or allows, who having no paternal Inheritance, is forced to work out his Fortunes by his own Induſtry.

It is juſt, likewiſe, ſo far to proceed againſt innocent Children upon Account of their Parents Demerits, as to oblige them to quit the Kingdom or State. For no Man hath a Right from Nature of living in this or that Territory; but [3] every one attains to ſuch a Right by ſome Act of his own, or of other Men: And it may be a Condition of keeping this Right, that he ſhall loſe it in caſe his Parents are found guilty of ſome particular and high Offences. It is not repugnant to Reaſon, that the Poſſeſſion of a Right ſhould depend on contingent Terms. Though, that the Laws of ſome Countries are too rigorous and ſevere in this Point, no Man can pretend to deny.

III. *Imputation of Debt* conſiſts in this, that thoſe Perſons, whoſe Intereſt it concerns that an Action be done or not done, do declare that the ſaid Action belongs to the Agent, and that the Effect aſſign'd to that Action ſhall redound or fall upon him. Hence, if in any Law a certain Reward be decreed to ſuch or ſuch a good Action, ſo ſoon as the Sovereign, or the Guardian of the Laws ſhall underſtand that particular Action to have been perform'd by any Man, 'tis manifeſt, that the Man hath immediately a Right of demanding the promis'd Reward. But when a Man is enjoin'd to do a Thing, ſolely by the Authority of the Commander, and without any ſuch Propoſal of a Reward, he ought to reſt ſatisfied with the bare Approbation of his Superior, and to eſteem it a very ſufficient Recompence, that he hath avoided his Diſpleaſure, which would neceſſarily have follow'd upon Default. On the other Side, when an ill Action hath been committed, ſo ſoon as the Author of it is diſcover'd, he hath Reaſon to fear the Execution of the legal Penalty.

As to inferior Perſons, to whom neither the

Mr. Barb. *NOTES on Chap.* ix. §. 1.

[1] That is to ſay, adjudging to him the Rewards, and decreeing to him the Puniſhments inflicted by the Law, with all their Conſequences.

§. II. [1] The Author will explain, *Lib.* v. *Ch.* xii. §. 12. the Diſtinctions which the civil Lawyers make in treating upon Bargains and Laws, of Things, 1. Odious. 2. Favourable. and, 3. Mixt. But here he treats only of Things advantagious and diſadvantagious.

[2] See what is ſaid, *Lib.* viii. *Ch.* iii. §. 31.

[3] See *Lib.* viii. *Ch.* xi. §. 6, 7. following.

Guardianſhip, nor the Execution of the Laws do belong, if they either approve a good Action, or reprehend a bad one, their Judgment can affect only the Credit and Character of the Agent. According to that elegant Saying of *Diodorus Siculus* [1], *Praiſe is a kind of Reward of Virtue putting us to no Charges, and Diſpraiſe is a Puniſhment of Vice inflicting no real Wound.*

It is farther to be obſerv'd, that when the Intereſt of many Perſons is concern'd in the doing or the not doing of an Action, if one of thoſe Perſons ſhould forgive and not *impute* it to the Agent, he cannot by this Means abate any thing of the Right of the others, which he hath no Power to controul. Thus, if a Man hath done me an Injury by an illegal Fact, I may forgive him for my own Part and Concern, but at the ſame Time I do not in the leaſt derogate from the juſt Pretenſions of the Publick, and of the Sovereign Authority. And thus too the Pardon which GOD Almighty is pleas'd to vouchſafe to repenting Sinners, doth not at all impair or hinder the Proceedings of human Judicature. But when all the Perſons whom the doing or the not doing of a thing concerns, agree that they will not *impute* it, in ſuch a Caſe the Deed is conceiv'd to be Null and Void as to all moral Effects. Now the Perſons concern'd in a Thing's being done or not done, are either the Objects or the Directors of the Action; that is, thoſe towards whom the Action is perform'd, and to whom it brings either Good or Evil, and thoſe who have a juſt Power of guiding and ſuperviſing ſuch an Action. For which reaſon, if, in Caſe of an Injury, the Deed be forgiven by the Perſon to whom it was offer'd, by the civil Magiſtrate, and by GOD Almighty, in moral Eſtimation it ſhall be ſuppos'd undone, and conſequently ſhall be attended with no ill Effect.

IV. Very different from the Imputation of which we have been ſpeaking, is that by which the Agent is ſaid to *impute* an Action, which he might have omitted, to the Party for whoſe Sake and Uſe he perform'd it. A Man who hath exactly fulfill'd the Command of his Superior, may indeed expect the Approbation of his Performance, as from all others, ſo eſpecially from him who enjoin'd it. But he cannot lay claim to any farther Reward, unleſs ſuch as is expreſly promis'd in the Law [a]. For the ſame Reaſon, no Man can demand that it ſhould be *imputed* to him, in order to the giving him any *Right*, that he hath abſtain'd from a bad Action, forbidden by the Laws, or by any Command of his Superior; but he muſt be ſatisfied that his Obedience hath pleas'd him who requir'd it. For ſince upon acting contrary to the Law, he would have juſtly incurr'd a conſiderable Evil, to eſcape ſuch a Puniſhment muſt paſs with him for a Reward. Hence in *Seneca*'s *Controverſies*, *Lib.* iv. *Controv.* vii. when a Man, who being taken in Adultery by a Tyrant, had forc'd the Sword out of his Hand and kill'd him, deſir'd a Gratification from the State, he is put off with this Rebuke, *imputat nobis quod deprehenſus in adulterio mori noluit. He reckons we are indebted to him, becauſe being taken in Adultery he had the Senſe to ſave his own Life*: And [2] *Tully*, in his ſecond *Philippic*, denies himſelf to have any Obligations to *Antony* upon account of his not being murder'd by him: *Where lies the Kindneſs to me* (ſays he) *in your keeping your ſelf from ſo horrid a Villany?* Others maintain the Reaſonableneſs of our preſent Aſſertion from this Topick, that the Omiſſions of ill Actions are purely *non Entia*, and conſequently can have no poſitive Affections or Properties. Tho' to ſuch an Argument it might perhaps be anſwer'd, That even theſe Omiſſions may, in moral Account, paſs for Entities, as they are the real and actual Reſtrictions and Confinements of our natural Powers.

But now, if for the ſake of another Man, I do what I might rightly and properly have omitted, or omit what I might fairly and conveniently have done, it is highly reaſonable, that I ſhould *impute* my Service to him; or, that I ſhould, by virtue of my Right, demand of him to acknowledge my Kindneſs, and his own Obligation, according to the Quality and Condition of it. This *Imputation* cannot rightly be laid, unleſs there was in the Actor a real Intention of procuring ſome Good to the other Man; and in the Receiver an expreſs, or, at leaſt, a preſumptive Conſent to admit it. For no Man can *impute* or *reckon* to us a Service forc'd upon us againſt our Will: And it would be a much higher Degree of Impudence, to charge ſuch a Fact to us for a Kindneſs, as was perform'd either without any Regard to our Benefit, or perhaps with a Deſign to hurt us. Thus he muſt be extreamly fooliſh, who would deſire a Reward from a Man whom he [3] had reſtor'd to Health by breaking an Impoſthume, otherwiſe incurable, whilſt he intended to give him a mortal Stab. Yet [4] *Marius Celſus*, in *Tacitus* [b], when he was brought before *Otho* as one of *Galba*'s Servants and Confidents, immediately confeſſing his Loyalty to his old Maſter, propos'd it as an Example, how faithful he would be to the new Emperor; and thus reckon'd he had already oblig'd *Otho* by ſticking reſolutely to *Galba*. And thus *Eudoxia*, when ſhe was married to the Emperor *Theodoſius*, ſent for her Brothers, by whom ſhe had been formerly expell'd her Father's Houſe; and was ſo far from reſenting their Injury, that ſhe rather paid them Thanks, as the Authors of her Promotion: Since unleſs ſhe had been driven from Home, ſhe had never ſeen *Conſtantinople* [c].

When the Parties concern'd and intereſted do agree in defining the Rate at which a Thing ſhall be rckon'd or *imputed*, in this Caſe a Covenant intervenes, expreſſing how far, or to what Value the *Imputation* ſhall extend, and beyond which it ſhall not reach in any Buſineſs or Tranſaction [a]. *For Merit* (as Mr. *Hobbes* [b] obſerves) *preſuppoſeth a Right, and* implies, *That the Thing deſerv'd is due by Promiſe.*

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[a] *See* Luke xvii. 9, 10. [b] *Hiſt.* Lib. iv. [c] *Zonar.* *Tom.* iii. *Add* Gen. xlv. 5. Lib. xx.

§. iii. [1] *Diodorus*'s Words are, ἐστιν ὁ μὲν ἔπαινος ἔπαθλον ἀρετῆς ἀδάπανον, ὁ δὲ ψόγος τιμωρία φαυλότητος ἄνευ πληγῆς. *In Excerpt. Piereſc.*

[2] See *Lib.* viii. *Ch.* iii. §. 16. following.

§. iv. [1] This Example had been better plac'd a little lower, where the Author ſpeaks of thoſe who do ſome Service without any ſuch Deſign, and by Conſequence have ſome other Motive for their Actions.

[2] *Tully*'s Words are, *Quale autem beneficium eſt, quod te abſtinueris nefario ſcelere?* Philip. 2. *Ch.* iii.

[3] See *Tully, De Nat. Deor. Lib.* iii. *Ch.* xxviii. and *Plutarch de Capiendâ ex Inim. Utilit.*

[4] *Tacitus*'s Words are, *Celſus conſtanter ſervatæ erga Galbam fidei crimen confeſſus, exemplum ultro imputavit, Hiſtor. Lib.* i. *Ch.* lxxi. *Numb.* 2.

V. Hence 'tis eaſy to gather what is the Force of *Merit*, or what Actions are properly meritorious, which ſome Men would vainly *ſet to the Account of* God himſelf. Now the main Spring of all Merit is the Performance of a Work which we did not owe: or, which the Perſon towards whom it is exercis'd, had no Right of requiring from us. For he that performs a Thing which he lay under a full and perfect Obligation of doing, only diſchargeth his neceſſary Duty, and lays no Foundation for any conſequent Merit. *M. Senec.* Cont. Lib. i. Ch. viii. [1] *Give me leave to perform ſome Service to my Country, which may properly be a Piece of Merit: What I have hitherto done in the common Courſe of Arms, is not owing to me, but to the Laws. Julius Capitolinus*, in his Life of *Antoninus Pius*, reciting the Reaſon of the Emperor's obtaining that Title, from lending his Hand to ſupport his antient Father-in-Law, in the Preſence of the Senate adds, *This Action was really no great Argument of Piety: Since the Debt we owe our Parents is ſuch, as rather denominates a Man impious if he neglects, than pious if he pays* [2]. Neither is it fair to *impute* a Thing which we do not owe to a Perſon againſt his Conſent; and much leſs, if our doing of ſuch a Thing did not turn to his Benefit. Whence it is clearly apparent, that no Man can pretend to any Merit with Reference to Almighty God, even tho' it were poſſible for him to pay a full Obedience to all the Divine Laws. And that, therefore, God cannot any other way become a Debtor to mortal Men, but upon account of his free Promiſe, the Breach of which would be repugnant to his [3] Goodneſs; not that any *Right*, properly ſo call'd, is thence deriv'd to us. Indeed no Actions enjoin'd by Virtue of a ſupreme Authority, do produce Merit towards the Enjoiner. For tho' both the Sovereign of Heaven, and the inferior Rulers of the Earth, are wont frequently to confer certain good Things on thoſe who comply with their Commands, in order to the encouraging and exciting their Obedience; yet to the Payment of theſe good Things they are not bound by the Merits of the Agent, or as in the manner of Covenants; but by their own free Offer and Promiſe: And therefore they cannot be ſo properly call'd *Rewards* as *Gratuities* in the ſtricteſt Senſe of that Word [c].

But notwithſtanding all this, if the Legiſlator do expreſly declare, that upon the Performance of ſuch or ſuch an Action, the Agent ſhall have a Right of demanding ſuch a Reward; there's no doubt to be made, but he may fairly and juſtly require it. But the bare Omiſſion of forbidden Actions is utterly unable to produce any Merit, or any Matter for Boaſting or for Praiſe. *Philoſtrat. de Vit. Apollon. Tyan.* Lib. vi. Ch. i. [4] *It is not an Act of Juſtice to abſtain from Injuſtice, nor an Act of Prudence to have declin'd a fooliſh Reſolution, nor of Valour not to deſert one's Colours, nor of Temperance not to fall into the baſe Effeminacy of the* Medes; *nor will a bare negative Goodneſs entitle you to any Commendation: When we eſcape Puniſhment, but yet do nothing worthy of Honour and Reward, ſuch an Indifference cannot reaſonably be call'd Virtue.* Add *Luke* xviii. 11. *Ammian. Marcell.* Lib. xxx. Ch. xi. *To forbear Plunder and Rapine, is a falſe Foundation for Praiſe.*

It remains then, that the only Actions whereby we cannot obtain Merit towards other Men, are ſuch as we do not owe them; at leaſt, not by a full and perfect Obligation: Whether natural Reaſon either commands or adviſeth them in general, leaving the Application of them to particular Perſons in our Power; or whether they are only not enjoin'd by the civil Laws. For whatſoever I owe another as a full and proper Debt, to that he hath already a Right, and therefore when I pay ſuch a Due, I do not, properly ſpeaking, part with any thing which I have then a Right of retaining or of otherwiſe applying, becauſe upon denying and keeping it back, I ſhould bring a real Injury and Damage on the Perſon to whom I ſtand engag'd. And therefore ſince Things which I owe in this Manner, do already belong, in ſome reſpect, to another Perſon, and I have no longer a Power to diſpoſe of them as I pleaſe, they cannot be proper Matter for the founding of Merit. But when I perform any thing towards another Man, which I was not bound to pay by any *perfect Obligation*, ſuch a thing really paſſing from me, and accruing to him, leaveth in me either a perfect or an imperfect Right of receiving an equivalent Return. And this is properly *Merit* [d]; the Retribution or Payment of which, when it is determin'd by expreſs Covenant, we call *Wages*: But when as to the Manner, the Time, and the Quantity, it is left to the Equity of the other Party, it bears the Name of *Reward.* Now upon ſuch Accounts and Conſiderations we may receive four Kinds of Things, [5] Corporeal, Incorporeal, Moral, and [6] notional. Of the firſt Sort are, Money, Land, &c. Of the ſecond, the Grant of Privileges and Immunities: Of the third, Honours and Dignities: Of the laſt, Statues, Inſcriptions, Crowns, and the like Tokens and Teſtimonies of Worth. Add. *Montaigne*'s *Eſſ. Lib.*ii. *Ch.*vii.

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[a] Comp. *Matth.* xx. 13, 14.

[b] *Leviath.* Ch. x.

[c] *Euripides Rheſ.* Rewarded Virtue gives a double Joy.

[d] Add. *Senec. de Beneficiis, Lib.* iii. *Ch.* xxi, xxii.

§. v. [1] The *Latin* of *Seneca* is this, *Sine me aliquod meritum in patriam conferre, adhuc militia mea Legis munus eſt.* And *Julius Capitolinus*'s Words are, *Quod quidem non ſatis magna pietatis eſt argumentum, quum impius ſit magis, qui iſta non faciat, quam pius, qui debitum reddat*, Ch. ii.

[2] The Author might have added here, the Words which an antient Rhetorician makes his Son ſpeak, when his Father would hinder him from going to War the fourth Time, to ſecure him from the Danger. *Sine me aliquod meritum in patriam conferre, adhuc militia mea Legis munus eſt*, Seneca Controv. Lib. i. Contr. 8. Suffer me to do a meritorious Service to my Country, for as yet I have done no more in War than I was obliged to do by the Law.

[3] Or rather his Veracity; which this Author himſelf mentions in his Elements of *Univerſ. Juriſpr.* and therefore unfitly omits it here. For it is properly out of his Goodneſs that God at firſt promiſes a Reward to our imperfect Performance; but his *Veracity*, that he performs ſuch Promiſe. See *Nehem.* ix. 8. 33. 1 *John* i. 9. where he is called *Juſt*, who departs not from the Truth, neither in his Diſcourſe nor Deportment.

[4] The *Greek*, Μὴ γὰρ εἶναι δικαιοσύνην, τὸ μὴ ἀδικεῖν——οὔτε γὰρ φρόνησις, τὸ μὴ ἀνοήτως τι ἐνθυμεῖσθαι· οὔτε ἀνδρεία, τὸ μὴ λείπειν τὴν τάξιν· οὔτε σωφροσύνη, τὸ μὴ εἰς τὰς τῶν μοιχῶν ἐμπίπτειν· οὔτε ἄξιον ἐπαίνου, τὸ μὴ κακὸν φαίνεσθαι. πᾶν γὰρ ὃ τιμῆς τε καὶ τιμωρίας ἴσον ἀφέστηκεν, οὔπω ἀρετή.

[5] See the Explication of this Diſtinction of the Lawyers, *Lib.* iv. *Ch.* ix. §. 7.

And thus, as hath been ſhewn, *Merit* ariſeth from thoſe Actions which we do not owe to others; and chiefly as they are uſeful and beneficial to them. On the contrary, from evil Actions, eſpecially ſuch as damage or injure others, ariſeth *Demerit*; by Virtue of which a Man is oblig'd to make Satisfaction for the Harm he hath done: But in general, all evil Actions produce a Guilt, by which the Agent is ſuppos'd liable to undergo ſome Penalty: Which Point we ſhall hereafter find more Room to explain. See *Lib.* viii. *Ch.*iii.

VI. As the actual applying of *Imputation* cauſeth the Effects of moral Actions to exiſt; ſo the ceaſing, and as it were the recalling of it, doth diſſolve and extinguiſh thoſe Effects. And as to this Matter, the Caſe is very near the ſame in good Actions and in evil. For both good and evil Actions, whilſt they are *ſuch*, or ſo long as they are enjoin'd or prohibited by the Laws, muſt neceſſarily be attended with *Imputation*; at leaſt [1] in the firſt and plain Import of that Term. But when a Law is repeal'd, the Action about which it was concern'd can no longer be *imputed*. The Imputation of an Action not properly due, he alone can remit, whoſe Intereſt it is that the Effect or Conſequence of the Action ſhould be made good. Therefore if he who hath perform'd a Work remits the Imputation, the Wages otherwiſe due cannot on any account be demanded. But to make this Releaſement or Remiſſion, is not in the Power of the Perſon for whom the Work was done; it being the Creditor's Part to forgive, and not the Debtor's. So likewiſe to take off the Imputation of an ill Action, as to any Force and Efficacy, belongs to thoſe whoſe Intereſt it is that ſuch an Action be attended with its due Effects; that is, to the Party injur'd, and to the Maker and Guardian of the Law, not to the Author of the Fact.

The *Civilians* reduce the chief Ways by which Crimes are cancell'd or extinguiſh'd in Human Courts, to theſe Five. Firſt, when the Puniſhment defin'd by the Law ſhall be compleatly undergone: For no Man is puniſh'd twice, and with equal Severity for the ſame individual Fault. Though many Puniſhments indeed leave a kind of laſting Stain behind them [a], and frequently after the Completion of a corporal Puniſhment, moral Puniſhment or Infamy, with its ſcandalous Marks, continues. Secondly, he whom the Judges have acquitted, paſſeth in Human Eſteem for an innocent Perſon. The third Way is, when the Delinquent dies. Tho' ſometimes in extraordinary Crimes, for a Terror to others, Severities are ſhewn on the Body, the Goods, and the Memory of Wretches after they are dead. Fourthly, by Length of Time Crimes are ſo far taken away, as that the Author cannot be afterwards try'd on the ſame Account. *Senec. Oedip* [2].

Latere ſemper patere, quod latuit diu. V. 826.
What long hath lain conceal'd ſhould ever lie.

Tho' *Lyſias* (Orat xii.) denies that a Crime can be blotted out by any Space of Years. The fifth and laſt Way is the procuring of Pardon for the Offence from the ſovereign Power [b].

As the Effects of an evil Action do ſo long lie dormant, as the Action is either conceal'd, or throughly diſſembled or pardon'd (as it were) beforehand: So when once theſe Effects have broken out in Publick, their *moral* Part may indeed be effac'd, but not their *phyſical*. For what is once done, cannot in a phyſical or natural Senſe be render'd undone; but it may be ſo order'd, as that it ſhall no longer have any moral Effect in civil Life. Thus a Man who hath been whipp'd for a Miſdemeanor, muſt ſtill keep the Scars and Signs in his Back, tho' all the Diſgrace and Scandal of the Puniſhment may be remov'd by a Decree of the Government. And when the Imputation is taken off, the Action is to all Intents and Purpoſes, no more than if it had never been done [c].

We need only add by way of Remark, that thoſe Authors are ſtrangely overſeen, who in order to the taking away the Guilt of an evil Action, beſides the Non-imputation, or the Forgiveneſs of it, require the Infuſion of ſome contrary Quality, or of the Habit of Juſtice and Honeſty: In the ſame manner, as by plaiſtering over a Wall we rid it of the Spots that were in it before; and as we drive away an ill Smell by burning Frankincenſe in a Room. Which Miſtake was occaſion'd by their Ignorance of moral Things, and becauſe they imagin'd that moral Qualities were produc'd and deſtroy'd in the ſame way as phyſical: The Abſurdity of which Notion is plain enough from what we have before deliver'd.

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[a] Vid. *Sueton. Claud. Ch.* xvi. [b] *All which are treated of at large, by* Anton. Matthæus *de Crimin. ad Lib.* xlviii. *D. Tit.* xix.

[c] *And thus we are to underſtand thoſe Sentences of* Ovid de Pont. *Lib.* i. *El.* i.

Eſtque pati pœnam quam meruiſſe minus.
'Tis leſs to feel, than to deſerve our Doom,
Pœna poteſt demi, culpa perennis erit.
The Penalty may ceaſe, but ne'er the Crime.

Mors faciet certè, ne ſim cum venerit exul,
Ne non peccarim mors quoque non faciet.
Death's kind Releaſe may end my baniſh'd State,
My Sin will live, and mock the Power of Fate.

[6] Our Author underſtands by this a thing, that ſerves only to raiſe ſome high Thoughts of our ſelves in our Minds, and ſignifies ſomething done for that by human Inſtitution.

§. vi. [1] To underſtand this, we are to know, that this Author (in his *Elements of Univerſ. Juriſpr. p.* 357.) divides Imputation into Simple and Efficacious: Simple Imputation conſiſts in ſimply approving or diſapproving an Action, ſo far as there redounds no Effect from it to the Agent. And this Sort of Imputation may be made indifferently by any, whether he hath any Intereſt or no in the Action that is done, or not done. An Efficacious Imputation is that which produces ſome Effect, with Relation to the Agent; and this belongs to thoſe, whoſe Intereſt it is, that the Action be done or not.

[2] Our Author here quotes the Words of *Seneca*'s *Oedipus*, where an Old Man adviſes *Oedipus* to keep that always ſecret, which had long lain hid. This can hardly be thought to our Author's Purpoſe: For, it plainly appears by what follows, and is ſpoken by the ſame Old Man, that he intends nothing about the Imputation of Crimes, for (thus he ſays) *Sæpe eruentis veritas patuit malo.* v. 827. they who make ſuch Diſcoveries, often endamage themſelves by laying open the Truth.

OF THE
LAW of NATURE
AND
NATIONS.

BOOK II.

CHAP. I.

It is not agreeable to the Nature of Man to live without LAWS.

The CONTENTS.

I. *Whether a Law may be impoſed on Man, is doubtful.*
II. *What Freedom of Will is.*
III. *What ſort of Freedom of Will is in God.*
IV. *What is the Freedom of Beaſts.*
V. *Man too Noble a Creature to be allowed ſuch a Freedom.*
VI. *The Corruption of ſuch a Freedom.*
VII. *The Variety of Mens Tempers.*
VIII. *Man's natural Weakneſs and Rudeneſs.*

I. HAVING in the preceding Book explain'd the Condition of moral Things in general, together with the moſt frequent Uſes of the Common Terms (which Notices, if inſerted otherwiſe, and only as Occaſion ſerv'd, would have interrupted us in our Buſineſs, and broken the Series of our Undertaking) we come now to fall more directly on our main Deſign; and the firſt Enquiry we are here to make, is, whether it would be convenient or not for Men to paſs their Lives without the Reſtraint of any Law. Whence it will evidently appear, why the All-wiſe Creator hath not inveſted them with ſuch a wild Liberty, as ſhould impower them to act merely as they liſt, and as their wandring Inclinations lead them; without being under the Reſtraint of any Rule, [1] Neceſſity, or Law. For ſince GOD Almighty has been pleas'd to endue Man with a Will (that is, with a Power working by a kind of internal Impulſe, and enabling him to incline towards ſuch things as appear agreeable to him, and to turn from ſuch things as ſeem inconvenient or unpleaſant) and with ſuch a Will as cannot be compell'd; a Doubt may be rais'd, whether it did not become the Divine Goodneſs to allow him the full Range of this flexible Faculty, without any Limit or Impediment. For to what Purpoſe, ſome will ſay, did GOD firſt make us intirely free to all Things, and afterwards confine us to certain Bounds and Rules? And as the Motion of our Joints is render'd uſeleſs by the Reſtraint of Chains and Fetters; ſo may the Liberty of the Will ſeem vain and of no manner of uſe, if we can incline to many things which muſt of Neceſſity be forborn, and if we can be averſe to many things, which we muſt as neceſſarily purſue and undertake.

II. In tracing this Point to its proper Spring, we think it convenient firſt of all to ſhew, that an abſolute Liberty would be ſo far from being uſeful, that indeed it would be deſtructive to human Nature; and that therefore the binding and reſtraining it with Laws is highly conducive to the Good, and to the Safety of Mankind. And this Conſideration rightly purſued, will at the ſame time diſcover what Scope may be fairly indulg'd, and how far the Reins may be given to our Freedom. Here then we muſt know, that Liberty in general implies, *an internal Faculty of doing and of omitting, things according to the Direction of our Judgment*. When we call it [2] a *Faculty* or Power, we intimate, that the Perſon to whom this Liberty is

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Mr. BARB. *NOTES on Chap* i. § i.

§. i. [1] Our Author does not treat here of a phyſical, but moral Neceſſity, ſuch as is explain'd, *Lib.* i. *Chap.* vi. §. 14. *ad fin.* and *Chap.* vii. §. 2. Neceſſity is no more than an Obligation.

§. ii. [2] Our Author ſays only, *A Faculty*, which Term implies no more than a Power of Acting, or Moving, *&c.* for there are Faculties purely Paſſive, and therefore I have added this Definition of a Faculty to do, or not, that we are to underſtand by it, a Power of Acting or Moving, not only it ſelf, but communicating a Motion to other Things, and modelling them after a certain Manner.

applied, is Maſter of ſufficient Strength for many Performances, and has a Force and Ability not only to move himſelf, but to imprint Motion on other Things, and to affect them in a certain Manner. We term this Faculty *internal*, to ſignify that its Force and its Motion ariſe from an inward Principle, contrary to that outward and violent Impulſe, which is the Cauſe of Movement, rather in a Log than in a Man. Laſtly, we add *according to the Direction of our Judgment*, to hint that the Motion is not rais'd at a Venture, or by ſome blind kind of Force; but that the Agent is ſuppos'd, in ſome Degree at leaſt, to have had a Knowledge of the Object, and to have determin'd himſelf to Action after ſome ſort of Deliberation, ſo that the immediate Reaſon of his acting ſhall be, becauſe he was pleas'd to act. At the ſame Time it will be underſtood, that all Rubs and Hinderances, which may [2] either prevent the Motion, or turn it another Way, ought to be ſuppos'd abſent, when we ſtate the Notion of Liberty in Perfection and without Alloy.

III. Matters being thus ſettled, if we caſt our Eyes over the univerſal Frame of Things, we ſhall find that many have no Liberty at all, ſuch as are all inanimate and vegetative Creatures. Others enjoy ſeveral Kinds of Liberty, and in ſeveral Degrees. An univerſal Liberty, void of all Hinderance and of all Defect, is applicable only to GOD Almighty; this is conceiv'd as the moſt noble Attribute of his moſt perfect Eſſence, admitting no Bounds or Circumſcription, and intimately join'd with Omnipotence. And therefore, the Reaſon why GOD doth not do [1] ſome Things, or why he doth not always do [2] all Things, is not to be fetch'd from the Deficience of his Liberty, but from his own abſolute Pleaſure [a]. So likewiſe when we ſay, he cannot do all Things, this does not proceed from any outward Impediment, whether [3] natural, or moral; but from his own Intention and Deſign, which we Mortals endeavour to conceive in Proportion to his Greatneſs and his Excellency. In which Senſe we are to interpret that common Saying, *That* GOD *is a Law to himſelf.* Thus too the Juſtice which we aſcribe to GOD, is not to be ſuppos'd to bear a Regard to any Obligation, or to any Right in another Perſon, as the Nature of human Juſtice neceſſarily implies. But in as much as he has ſhewn, both by his Works and by his Revelations, that ſuch a Manner of acting is ſuitable to his moſt compleat Nature, hence we come to expreſs it by the ſame Term which denotes our own equitable Dealings towards other Men. Thus the Reaſon why GOD's Promiſes do not fail, is not becauſe his Liberty is reſtrain'd by any Obligation ariſing from his Promiſe; but becauſe it is agreeable to the divine Excellency to let us not expect in vain, what he commands us to expect; or becauſe to violate a Promiſe, implies ſome kind of Imperfection, from which the ſupreme Nature is moſt immenſely remov'd. Upon which account, we Men do not challenge the divine Promiſes as of Right belonging to us, but receive them with Humility and Reverence, as Gratuities proceeding from GOD's free Pleaſure. For 'tis not here as in human Promiſes, where there lies an Obligation to Payment, where the Promiſe turns into a Debt, and what was before free, is brought under a Neceſſity: But thoſe Things which GOD performs upon Promiſe, do as fully retain the Nature of Gifts and Benefits, as thoſe Things which he diſpenſes without any ſuch ſeeming Engagement. Thus may we weak Mortals faintly repreſent the divine Liberty; but that alone which we can determine with Certainty about it is, that it ſurpaſſes, in an infinite Manner, both our Notion and our Condition [b].

IV. Brute Creatures which are plac'd below our Degree of Being, do however enjoy a Liberty proper to their Nature and State. But this Liberty cannot be otherwiſe than very ignoble, ſince the Power of theſe Animals is confin'd to ſuch narrow Bounds, and ſince ſuch is the Dulneſs of their Senſes, and ſuch the Lowneſs of their Appetite, that they are concern'd about very few Objects, and regard even thoſe but very negligently and ſuperficially; nor are excited by any Thing but what is extremely groſs and perpetually obvious, and tends to the Service of their Belly. As to other Matters, they have no Cuſtom, no Law, no Right to bind them, in tranſacting either with one another [1], or with Mankind. Amongſt a few of them there is ſome Semblance of Marriage, but of ſuch as is obſerv'd in the bare Act of Conjunction, and in ſome Shew of Love or Liking, not in any Strictneſs of ſerious and conſtant Fidelity. Moſt of them, as ſoon as they have ſatisfied their luſtful Deſires, retain no farther Mark of Love, no Senſe of Shame, no Regard of Offſpring. Some indeed are moſt paſſionately fond of their Young, but then their Kindneſs continues no longer than till they are able to provide for themſelves. After this Period, all Love is loſt and forgot on both Sides; the Dams take no Care or Notice of their Progeny, and the Progeny do not ſhew any Gratitude, any Senſe of Debt or Duty to their Dams. Thoſe Beaſts which feed on Fleſh, tear and devour without Diſtinction, whatever is agreeable to their Palate; and many when they fall out, pull one another in Pieces without Regret. Being ignorant of the Laws of Propriety, whenever a ſharper Hunger than ordinary pinches them, we may ſee them fighting furiouſly for the common Paſture or Prey; and what ſome

[a] *See* Pſalm cxv. 3. Epheſ. i. 11.

[b] *Add Cumberland De Legg. Nat. Ch.* vii. §. 6.

[2] There are, in general, two ſorts of Obſtacles or Impediments, which hinder us from acting according to our own Wills, the one phyſical, as Bonds, Fetters, Priſons, *&c.* The other Moral, as a Bond, Law, Government, Authority, *&c. Elem. Jur. Univerſ. p.* 20.

§. III. [1] For Example, doth not make ſeveral Moons to circulate round the Earth, as may be ſeen to go round the Planets of *Jupiter* and *Saturn*. *Apologia Pufend.* §. 7.

[2] As to create every Day new Kinds of inanimate Bodies or Animals, *Ibid.*

[3] See *Note* 2. of §. foregoing. When we ſay that GOD can't do a Thing abſolutely, as for Example, Lye, or be worſe than his Word: for ſince there is no Being ſuperior to GOD, to lay any Obligation upon him, nor more powerful than he, to hinder him from doing as he pleaſes, or to conſtrain him to abſtain from certain Things, and do others, the Inability which we attribute to GOD can proceed from nothing but his own good Pleaſure, and infinite Perfections, *Ibid.* See *Chap.* iii. §. 5, 6. following.

§. IV. [1] See *Chap.* iii. §. 2. following.

have laid up or ſeiz'd for their private Uſe, the others make no Scruple to invade and to devour. Nor is there among them any ſuch Thing as Eſteem, as Honour, as Command, as Prerogative, unleſs ſuch as is deriv'd purely from Superiority of Strength. It muſt be confeſt, that Likeneſs of Kind does produce in ſome Creatures a Shew of Friendſhip and of Society. Hence many delight to live in Herds, and thoſe which are more fierce than others, have ſome Averſion to preying on their own Kind. Thus *Juvenal* obſerves, *Sat.* xv. *ver.* 159, *&c.*

——————————Parcit
Cognatis maculis ſimilis fera: quando leoni
Fortior eripuit vitam leo? quo nemore unquam
Expiravit aper majoris dentibus apri?
Indica tigris agit rabidâ cum Tigride pacem
Perpetuam: ſævis inter ſe convenit urſis.

Beaſts of one Kind from other each refrain:
No weaker Lion's by the ſtronger ſlain:
Nor from his larger Tusks the Foreſt Boar
Commiſſion takes his Brother Swine to gore.
Tyger with Tyger, Bear with Bear you'll find,
In Leagues offenſive and defenſive join'd.
Mr. Tate.

But, not to ſay that there's ſomething of a Poetical Figure in theſe Expreſſions, we may only take notice, that this ſeeming Relation is but a very weak Bond for a laſting Friendſhip: ſince 'tis immediately broken whenever the Concerns of the Belly intervene. Thus you ſhall ſee a Litter of Puppies play very lovingly together, but throw a Piece of Meat amongſt them, and you breed a dangerous and a general Quarrel. The Reaſon why ſome Creatures exerciſe a little Shadow of Duty, Love, Faith, and Gratitude towards Men, is purely to be referr'd to Cuſtom, and to their Deſire of being ſupplied with Food. If theſe Obſtacles are once remov'd, and if they find themſelves of ſufficient Strength, Man himſelf cannot eſcape their Violence, if he unhappily provokes them. The Liberty of Brutes then is not reſtrain'd by any intrinſical and moral Tie: Tho' their external Motions are often violently put under Confinement by Men. Now if any one is ſo curious as to enquire on what Account brute Creatures are allow'd ſo unbounded a Freedom, the plain Reaſon ſeems to be, becauſe God Almighty has not given them a Mind capable of the Knowledge of Right and of Law. There was indeed no Occaſion to be ſo very careful and exact in enſuring the Safety and Preſervation of ſuch Beings, as are not only produced by Nature with ſuch vaſt Fertility and with ſo little Pains, but are likewiſe denied the Privilege of an immortal Soul; and whoſe Life conſiſts in nothing elſe, but in the curious and accurate Diſpoſition of the little Parts of Matter, with the additional Benefit of Motion. Hence God is pleas'd, in producing and in deſtroying theſe inferior Animals, to give us frequent Inſtances, and evident Tokens of his Power. Another Reaſon why Brutes had no need of the Reſtraint of Laws, is, becauſe their Appetite is rais'd by nothing elſe but by Hunger, or Thirſt, or by ſalacious Deſire, for their Satisfaction in all which Enjoyments Nature has made ſuch large Proviſion. Neither is it likely, that their unlimited Way of proceeding ſhould render them very hurtful and deſtructive to Mankind, ſince we are enabled, by our ſuperior Strength and Cunning, to prevent any ſuch unhappy Effects[a].

V. Now why the great Creator ſhould not indulge us Men in ſo lawleſs a Liberty, many Reaſons may be given, ariſing both [1] from the primitive and from the acceſſory State and Condition of human Nature. The Dignity of Man, and his Excellency above all the other Parts of the animal World, made it requiſite that his Actions ſhould be ſquar'd by ſome Rule; without which no Order, no Decorum, no Beauty can be conceiv'd. Hence it is his greateſt Honour that he has obtain'd an immortal Soul, endu'd with the Light of Underſtanding, with the Faculties of judging and of chooſing Things, and with an admirable Capacity for Arts and Knowledge. On which account he is juſtly term'd,

Sanctius——animal, mentiſq; capacius altæ
———Et quod dominari in cætera poſſet.

an Animal bleſt with Loftineſs of Mind and with Sanctity of Reaſon, and fram'd for the Dominion and Sovereignty of all the reſt[b].

Farther, That the Soul was deſign'd by the All-wiſe Creator for a much nobler End than to ſerve only as Salt to keep the Body freſh, may be gather'd from this Conſideration, that the greateſt and moſt ſhining Part of its Faculties are ſuch as contribute either little or nothing to the Preſervation of the Body, which [2] might be ſecur'd without any ſuch mighty Parade, without ſo great and pompous a Proviſion. It's plain, that the Power and the Activity of the rational Soul [3] is chiefly exercis'd about ſuch Things as belong [4] to the Worſhip of God, and to a Life [5] of Society and of Civility. And 'tis principally for the Service and Furtherance of theſe Great Ends, that it can [b] from known Things infer and explain thoſe which are leſs known, that it can diſcern and judge what is agreeable and what diſagreeable to it; that it can form univerſal Notions by Abſtraction from Singulars; that it can by proper Signs communicate its Notions to others, can form Inventions, can apprehend the Nature of Numbers, Weights, and Meaſures, and compare them with one another; that it can perceive the Beauty and the Force of Order and Method; that it can either raiſe, or repreſs, or moderate Affections; that it can hold in Memory an endleſs Compaſs of Things, and call out, as it were at its Beck, any Part of the Stock which it has Occaſion to uſe; that it can turn its Sight inward upon itſelf, recollect its own Dictates, and by them judge of its Actions, whence ariſes the Force and the Authority of Conſcience. Of all theſe Powers and Abilities there would be very little Uſe, or rather none at all, in a lawleſs, a brutal, and an unſociable Life [a]. Now the more Gifts GOD has beſtow'd on Man, and the greater Inlargements he has granted to his Wit and Mind, the more baſe and unſeemly would it be, that all theſe noble Endowments ſhould ruſt for want of Culture and Regulation, ſhould be vainly ſpent and ſquander'd away without Uſe, without Order, and without Grace. Nor was it altogether in vain, that GOD indued Man with a Mind apprehenſive of Accuracy and of Decency; but it was without doubt intended, that he ſhould ſo employ the Powers he had receiv'd, as to manifeſt the Glory of his Creator, and to promote his own true Intereſt and Happineſs. The Heathen Poet was able to make ſuch an Inference as this:

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[a] Add *Charron of Wiſdom, B.* i. *Ch.* xxxiv.

[b] *Solinus* (cap. iii.) calls Man a Being *whom Nature has preferr'd to all others in Excellency of Senſe, and in Capacity of Reaſon.*

§. v. [1] We muſt underſtand by the *Primitive State,* that in which Man was when he came out of the Hands of his Creator, conſidered purely and barely as a Man, before he had any Uſe of his Faculties, where his acceſſory State (*poſt ſuperveniens*) is that wherein he is left to himſelf, and conſequently ſuppoſes the Uſe of his Faculties. The firſt is treated of in this Paragraph, and the other in the three following.

[2] This appears from the Example of ſome Beaſts which live a long Time, as Stags; and of ſome Trees, as the Oak, which continue a long Time, tho' they have no Senſe. *Cumberland, Chap.* ii. §. 4.

[3] The Sagacity of our Mind conſiſts not in finding out what ſort of Meats, Exerciſe, or Medicines are proper to lengthen out our Lives here; for the moſt able Phyſicians and Philoſophers have had but a very imperfect and uncertain Knowledge of thoſe Things. *Ibid.*

[4] See *Chap.* iii. §. 20. following, *Note* 2.

[5] *Cicero* obſerved this, when he reckoned up the Advantages of Men above Beaſts in theſe Matters, in theſe Words, *Eademque natura, vi rationis, hominem conciliat homini ad Orationis & ad vitæ Societatem——Nec vero illa parva vis naturæ eſt, rationiſque, quod unum hoc animal ſentit, quid ſit ordo, quid ſit quod deceat, in factis, dictiſque qui modus,* i. e. "Nature by the Force of Reaſon renders Men fit for Converſation——Nor is this a ſmall Force of Nature and "Reaſon, that Man only is ſenſible what Order is, and how both Words and Actions are to be moderated." *De Offic. Lib.* i, *Chap.* iv. See alſo *De Legibus, Lib.* i. *Chap.* vii.

-------- *Quis dubitet hominem conjungere cœlo?*
Eximiam natura dedit linguamq; capaxq;
Ingenium, volucremq; animum; quem deniq; in unum
Deſcendit Deus atq; habitat, ſeq; ipſe requirit.

Then who can doubt that *Man*, the glorious Pride
Of all, is nearer to the Skies alli'd?
Nature in *Men* capacious Souls has wrought,
And given them Voice expreſſive of their Thought.
In *Man* the God deſcends, and joys to find
The narrow Image of his greater Mind.
Mr. CREECH.

VI. Another Reaſon why it was inconvenient to allow Man the ſame extended Liberty as Brutes, [1] was his prodigious Corruption and Degeneracy ſo many Degrees beyond theirs. That we charge him thus, no one will wonder, who has had the Curioſity to reflect a little on the various Purſuits and Inclinations of Mankind. Beaſts are ſolicited only by their Belly and by their Luſt: And then their Luſt has ſome Shew of Temperance, provoking them only at certain Times and Seaſons, and being exercis'd not for empty and ſuperfluous Pleaſure, but for Increaſe and Propagation of their Kind. *Oppian Cyneg. Lib.* iii. *v.* 151, 152.

Ὀυ γάρ τοῖς θήρεσσι νόμος γαστὴρ ὅτε πλήθει
Ἐις λέχος ἐρχομένοις τελέειν φιλοτήσιον ἔργον.

Beaſts in their Joys a decent Temp'rance keep;
Nor offer Love, when 'tis the Time for Sleep.

But the carnal Deſires of Men do neither obſerve any ſet Times for their Eruption [2], nor are by any Means ſo moderate in their Heat, as to make no farther Efforts than are neceſſary for the Preſervation of human Species. Again, the Hunger of Beaſts is eaſily ſatisfied with ſuch Food as Nature has ſpread in all Places for their Suſtenance; nor do their Meals ſtand in need of the Formality of Furniture, or of the Incentives of Sauce. And when they find this Appetite reliev'd and quieted, they put an End to their Buſineſs and their Care. (Nor are they very forwardly diſpos'd to Rage or Miſchief [3], provided they are unprovok'd, and that their two chief Deſires are at reſt.) But now the Food of Man muſt not only ſatisfy his Belly, but tickle his Palate [4]. Nature has taken care that Beaſts ſhould have no need of other Cloathing beſides what ſhe has given them. But Man turns the Infirmity of his Nakedneſs into an Occaſion of Vanity and Pride. Beſides, do not Men float in a whole Tide of Affections and Deſires, utterly unknown to Beaſts? Covetouſneſs [5], Ambition, Vain-glory, Envy, Emulation, Contentions of Wit, Superſtition, the Care of future Things, and the Spur of Curioſity, do all claim Entertainment in human Breaſts, and yet are Strangers to the dumb Creation. *Manilius Aſtron. Lib.* iv.

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[a] Add. *Cumberland de Legg. Nat. Ch.* ii. §. 4. *who likewiſe in the* 33*d Section of the ſame Chapter, has drawn moſt admirable Proofs from the Frame and Structure of Human Bodies.*

[b] See *Chap.* 3. §. 10. following, *Note* 5. and *Cicero de Nat. Deor. Lib.* 2. *chap.* 59.

§. VI. [1] *Lycurgus*, an antient Poet, quoted by *J. Lipſius* upon *Seneca, Epiſt.* ciii. ſays, That were it not for this, no Laws need be made for Man; and that Man is naturally a fierce Beaſt, who differs nothing from them we call ſo, but that he lifts up his Head towards the Heavens. His Words are theſe,

Φεῦ πῶς πόνηρον ἐστὶν ἀνθρώπων φύσις
Τὸ συνάλον· Οὐ γὰρ ἄν ποτ' ἐδιήθη νόμου
Οὐδ' τι τῶν ἄλλων διαφέρει θηρίων
Ἄνθρωπον; Οὐδὲ μικρὸν, ἀλλὰ σχήματι.
Πλάγι' ἐστὶ τ' ἄλλα, τοῦτο δ' ὀρθὸν θηρίον.

Mr. *Hertius* has collected together abundance of Authorities about this Matter, which we may find in his *Elements of Civil Prudence, Part* I. *Sect.* i. §. 5, *&c.* I know they are not all to the Purpoſe, nor taken at the firſt hand; for the firſt of them gives a juſt Suſpicion to the contrary. *Seneca* ſays indeed, *Cæterum idem ſemper de nobis pronunciare debebimus, malos eſſe nos, malos fuiſſe, invitus adjiciam, & futuros eſſe.* De Benef. Lib. i. Ch. x. But there is not one Word of what Mr. *Hertius* adds, as if it were ſubjoined in the ſame Place, *Vis amplius dicam? Homo eſt omnium animalium peſſimum, ac deterrimum, quo nihil pejus, ac atrocius.* See *Lib.* vii. *Ch.* i. § 4. *Note* 5. following.

[2] Διὸ ἀνοσιώτατον, καὶ ἀγριότατον [τῶν ζώων ἄνθρωπος] ἄνευ ἀρετῆς, καὶ πρὸς ἀφροδίσια καὶ ἐδωδὴν χείριστον. *Ariſtot. Pol. Lib.* i. *Ch.* ii. *in fine*, Man without Virtue is the moſt profane and wild Creature, as to Venery and Eating.

[3] *Nunquam enim illas [feras] ad nocendum, niſi neceſſitas miſit, aut fame, aut timore, coguntur ad pugnam. Homini perdere hominem libet.* Seneca Epiſt. ciii. " Nothing but Neceſſity drives the Beaſts to hurt one another, either Hunger " or Fear forces them to fight. Men take a Pleaſure in killing one another."

[4] To compleat the Senſe, we may add, out of this Author's *Abridgment of the Duties of a Man and Citizen, Lib.* 1. *Chap.* iii. §. 4. And he often deſires more Food than his Stomach can digeſt, as well as that which reſpects Revenge, in the Enumeration of thoſe Paſſions of Man, which are unknown to Beaſts. Of which the Author ſpeaks a little lower.

[5] *Uni (animantium) ambitio, uni avaritia, uni immenſa vivendi cupido, uni ſuperſtitio, uni ſepulturæ cura, atque etiam poſt ſe de futuro.* Plin. Nat. Hiſtor. Lib. vii. Prœm.

----------------Nullo votorum fine beati
Victuros agimus ſemper, nec vivimus unquam,
Pauperiorq; bonis quiſque eſt, quo plura requirit:
Nec quod habet numerat, tantum quod non habet optat.
Quumq; ſui parvos uſus natura repoſcat,
Materiam ſtruimus magnæ per vota ruinæ,
Luxuriamq; lucris emimus, luxuq; rapinas,
Et ſummum cenſus pretium eſt effundere cenſum.

Why ſhould deluding Hopes diſturb our Eaſe,
Vain to purſue, yet eager to poſſeſs?
With no Succeſs, and no Advantage crown'd,
Why ſhould we ſtill tread on th' *unfiniſh'd* Round?
Grown grey in Cares, purſue the ſenſeleſs Strife,
And ſeeking how to live, conſume a Life?
The more we have, the meaner is our Store,
The unenjoying craving *Wretch* is poor.
But Heaven is kind, with bounteous Hand it grants
A fit Supply for Nature's ſober Wants:
She asks not much, yet Men preſs blindly on,
And heap up more, the more to be undone:
By *Luxury* they *Rapine*'s Force maintain,
What that ſcrapes up, flows out in Luxury again;
And to be ſquander'd, or to raiſe Debate,
Is the great only Uſe of an Eſtate.

Mr. Creech.

Liban. Declam. 9. *Is not a Man a mild and peaceable Animal, ſo far as Words go; but in Reality ſavage and ungovernable? For when do we hear of Lions undertaking an Expedition againſt Lions? When do wild Beaſts war againſt their own Kind? What Perjury do we find amongſt them? What Breach of Covenants? What Perfidiouſneſs and Avarice, what inſatiable Love of Riches? What Intemperance, what Adultery can we lay to their Charge?* Whoever conſiders and examines the unhappy Variety of Contentions and Quarrels that continually ariſe amongſt Men, will find that the greateſt Part of them proceed from ſuch Inclinations and Propenſions, as never diſturb the Peace of Brutes[a]. Now in ſo violent a Fierceneſs, and in ſo wide a Diverſity of Affections and of Deſires, what a Life would Men lead, were they deſtitute of the Benefit of Law to unite and to compoſe them? We ſhould ſee nothing but a furious Multitude of Wolves, of Lions, of Dogs tearing and devouring one another. Every Man would indeed be a Lion, a Wolf, a Dog, to his Neighbour, or rather a Monſter, more pernicious and more ſpiteful than the fierceſt of theſe Creatures; ſince Man, of all Living Things, is the moſt able to hurt Man, and, if left to his own furious Paſſions, the moſt willing. And ſince Men are continually bringing ſo many Evils and Miſchiefs on one another, while they now live under the Force of Law, and under the Fear of Puniſhment, what would become of the World, if they were left to the wild Sway of their Corruptions, if they had no inward Bridle to curb their Inclinations and to check their Purſuits. *Add.* Ariſtotle' *Problems, Sect.* 29. *Queſt.* 7. Plin. *Nat. Hiſt. Lib.* xviii. *Proem.* Jamblichus *Protrept. Ch.* xx. *That Men ſhould maintain a Familiarity with one another, and at the ſame time live contrary to the Laws, is an impoſſible Thing: For by this Means they would ſuffer more Injury and Damage, than if every Man led a ſeperate Life by himſelf. On theſe Accounts, and for theſe Neceſſities, Law and Juſtice are to be admitted as it were for Sovereigns amongſt Men, without the Government of which they could not continue or ſubſiſt.*

VII. It is ſtill farther obſervable to our Purpoſe, that a much greater Variety of Diſpoſitions may be diſcover'd in Men, than in Beaſts. All the ſeveral Kinds of irrational Creatures are for the moſt Part indu'd with the ſame Inclinations, and rais'd and incited by the ſame common Appetites and Affections. We may underſtand a whole Species by the Knowledge of one ſingle Member of it. But amongſt Men there are *not more Heads than Wits*; and every one is equally zealous in giving the Preference to his own Opinion, and to his own Poſſeſſions. So *Horace, Sat.* i. *Lib.* ii. ſpeaks.

----Quot capitum vivunt, totidem ſtudiorum millia.

As many Men as live, of them the Brain
As many thouſand Studies entertain.

Philemon *in* Stobæus, *Speech* 2. [a] *If a Man ſhould get together thirty thouſand Foxes, he'd find that they not only have all one Nature, but all one Method and Tenour of Life. But amongſt US, as many Bodies as there are, ſo many ways of Living may we diſcover.* Plin. Pan. *There are no Things in the World more likely to diſpleaſe all, than ſuch as are done with an Aim of pleaſing all.* Nor are all mov'd with a ſimple and an uniform Deſire, but with Propenſions as vaſt in their Number, as they are various in their Mixture and Compoſitions. Nay, the ſame Man is very frequently unlike, and unequal to himſelf, and what he once moſt eagerly deſir'd, he ſhall at another time moſt ſtrongly abhor:

-----Magno curarum fluctuat æſtu,
Atq; animum nunc huc celerem, nunc dividit illuc;
In parteſq; rapit varias, perq; omnia verſat [b].

This Way and that he turns his anxious Mind,
Thinks, and rejects the Counſels he deſign'd;
Explores himſelf in vain through ev'ry Part,
And gives no Reſt to his diſtracted Heart.

Mr. Dryden.

Neither is there a leſs Difference in their Studies, their Inſtitutions, and their Inclinations to imploy and exert their Vigour of Mind, as appears from the numberleſs Profeſſions, and the endleſs Methods of Living. [a] *Quintus Calaber. Lib.* i. Now as the more Voices there are, the more harſh and unpleaſant would be the Sound, unleſs they join'd in Conſort and Harmony; ſo would human Life be nothing elſe but Noiſe and Confuſion, were not the jarring Diſſonance compos'd and ſweetned by Law, and turn'd into a muſical Agreement. As Things ſtand, this exceeding Variety of Parts and of Diſpoſitions, is at the ſame time an Ornament and an Advantage to Mankind; ſince, when it is thus rightly temper'd, there naturally reſults from it ſo admirable an Order and Grace, as could not have been produc'd by an univerſal Likeneſs. And beſides, there was likely to be much leſs Claſhing and Conteſt in ſo vaſt a Multitude, whilſt their various Humours and Inclinations led them to quite different Objects of Choice. The ſame wiſe Counſel Providence ſeems to have us'd in ſpreading ſo wonderful a Diſtinction of Features over the Faces of Men. For ſince different Offices are to be diſcharg'd, and different Behaviour to be us'd towards different Perſons; there would ariſe a moſt wild and fatal Diſorder, if all Men exactly reſembled one another, and could not be diſtinguiſh'd but by artificial Marks, which would be liable to ſo many counterfeiting Cheats. *Add.* Dr. *Cumberland*, *de L. N. Ch.* ii. §. 28. And there lies this farther Secret in this natural Diſtinction, that one Face pleaſes the Fanſy of one Man, and one ſeems more agreeable to another; ſo that out of the univerſal Stock, every Man may chooſe what he thinks moſt beautiful, and what may engage his Affection with the ſweeteſt Comfort and Delight.

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[a] Add. *Charron of Wiſdom, B.* 1. *Ch.* xxxiv. *n.* 12. and *Ch.* xxxix. *n.* 11. [b] *Virg. Æn.* viii. *v.* 19. Add. *Charron de la Sageſſe, Lib.* i. *Ch.* xxxiv.

§. VII. [a] His Words are, Ἐὰν τρισμυρίας ἀλώπεκας τὶς συναγάγοι, μίαν φύσιν ἁπαξάπασιν ὄψεται, τρόπον δ' ἕνα· ἡμῶν δὲ ὅσα καὶ τὰ σώματα τὸν ἀριθμὸν καθ' ἑνὸς, τοσούτους ἐστὶν καὶ τρόπους ἰδεῖν. And *Pliny*'s *Nulla magis omnibus diſplicent, quam quæ ſic fiunt, tanquam omnibus placeant.*

[a] His Words are,

Πᾶσι δ' ἄρ' ἀνθρώποισιν ὁμὸν γένος, ἀλλ' ἐπὶ ἔργα
Στρωφῶντ' ἄλλος ἐπ' ἄλλα ————

All Men indeed have th' ſame Original,
But them to divers Works their Genius's call.

VIII. Beſides all this, it was inexpedient for Man to live without Law upon account of his exceeding Weakneſs; which is our laſt Reaſon. A few Days will ſet a Brute Creature in a Condition of providing for himſelf; nor is he in any great Need of the Company of others for his Aſſiſtance and Support. But Man, from his firſt coming into the World, undergoes a long and tedious Courſe of helpleſs Infirmity. *Quinctilian Declam.* 306. *The Frailty of human Nature appears moſt in its Beginning and early Growth. The Beaſts ſee* [1] *their Young, immediately after the Birth, ſtanding on their Feet, and ſeeking for the Dug; but we are forc'd to take up the helpleſs Infant, and to protect him from the Cold; and, after all this Nicety and Care, it is not unlikely, he may die between the Arms of the Parents and the Boſom of the Nurſe. Add.* Plin. N.H. Lib. vii. Præfat. What a Length of Years is requir'd, and what Diligence of Information, to enable him by his own Strength to accommodate himſelf with Food and Cloathing? Let us ſuppoſe a Man bred up by another, juſt ſo far as to be able to walk, and without hearing a Word ſpoken, inſomuch that he ſhall be deſtitute of all Inſtruction and Diſcipline, and enjoying no Knowledge, but ſuch as ſprouts naturally from the Soil of his Mind, without the Benefit of Cultivation; let us ſuppoſe the ſame Man to be left in a Wilderneſs or Deſert, and entirely depriv'd of the Company and of the Aſſiſtance of others: What a wretched Creature ſhould we at laſt behold! A mute and an ignoble Animal, Maſter of no Powers or Capacities, any farther than to pluck up the Herbs and Roots that grow about him; to gather the Fruits which he did not plant; to quench his Thirſt at the firſt River, or Fountain, or Ditch that he finds out in his Way; to creep into a Cave for Shelter from the Injuries of Weather, or to cover over his Body with Moſs, and Graſs, and Leaves. Thus would he paſs a heavy Life in moſt tedious Idleneſs; would tremble at every Noiſe, and be ſcared at the Approach of any of his Fellow-Creatures, 'till at laſt his miſerable Days were concluded, by the Extremity of Hunger, or of Thirſt, or by the Fury of a ravenous Beaſt. That Mankind therefore do not paſs their Life in a more forlorn, and a more deplorable Condition than any other living Thing, is owing to their Union and Conjunction, to their Intercourſe with the other Partners and Companions of their Nature. The Divine Saying, *'Tis not good for Man to be alone*, is not to be reſtrain'd to Matrimony, but ſeems to belong in general to any Society with other Men. But now without Law, 'tis impoſſible that any Society ſhould be either introduc'd or maintain'd in Strength and Quietneſs. And conſequently, unleſs Man had been deſign'd for the baſeſt and the moſt wretched Part of the animal Creation, it was not by any Means convenient that he ſhould live looſe from all Direction and Obligation of Law. *Plutarch*'s Philoſophy could teach him, that a general and unbounded Licenſe of Acting was diſagreeable to the Condition, and to the Dignity of Man. [2] *Thoſe Perſons only* (ſays he, *De Audit.*) *who live in Obedience to Reaſon, are worthy to be accounted* Free. *They alone Live as they* will, *who have learnt what they ought to* will. *Thoſe who give the Reins to unworthy Practices and Purſuits, uſe an imaginary Freedom, to purchaſe a real Diſſatisfaction.*

From all theſe Remarks it is ſufficiently evident, that the natural Liberty of Man, ſuch as really and truly agrees to him, and not only in an abſtracted Senſe, muſt always be underſtood as guided and reſtrain'd by the Ties of Reaſon, and by the Laws of Nature [3].

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§. viii. [1] *Quintilian*'s Words are, *Caducum circa initia animal; homines ſumus, nam ferarum, pecudumq; fœtibus eſt ſtatim ingreſſus, & ad ubera impetus: nobis tollendus infans, & adverſus frigora nutriendus: ſic quoque inter parentum manus, gremiumq; nutricis ſæpe labitur.* And *Theocritus*'s, theſe, Ἄλλου δ' ἄλλον ἔθηκε θεὸς γ' ἐπιδευέα φωτῶν, i. e. *GOD made Man to want each others Help.* To theſe we may add the fine Deſcription of *Seneca*, *Quid eſt homo? imbecillum corpus, & fragile, nudum, ſuâpte naturâ inerme, alienæ opis indigens, ad omnem fortunæ contumeliam projectum, quum benè lacertos exercuit, cujuſlibet feræ pabulum, cujuſlibet victima, ex infirmis fluidiſque contextum, & lineamentis exterioribus nitidum; frigoris, æſtus, laboris impatiens: ipſo rurſus ſitu, & otio iturum in tabem, alimenta metuens ſua, quorum modo inopia, modo copia rumpitur; anxiæ, ſolicitæq; tutelæ, precarii ſpiritus, & male hærentis, quem pavor repentinus, adjectuſque ex improviſo ſonus auribus gravis excutit: Soli ſemper ſibi nutrimentum vitioſum & inutile,* i. e. What is Man? His Body is frail and weak, naked and defenceleſs, wanting Help, and expoſed to Misfortunes; when he is arrived at ſome Strength, a Prey to Beaſts, every Body's Sacrifice; made up of Infirmities, tho' of a neat Compoſure, unable to undergo Heat, Cold, or Labour; growing diſeaſed by Idleneſs; ſuſpecting his Food, by Want and Plenty of which he is ſometimes ruin'd; anxious and ſolicitous; of a precarious and inconſtant Mind, which a ſudden Fear and Noiſe diſtracts; his Nouriſhment is vicious and unprofitable to himſelf alone, *De Conſol. ad Marciam. Ch.* xi. Our Author ſeems to have had theſe Words in his Thoughts, becauſe he expreſſes himſelf much to the ſame Effect.

[2] His Words are, Τῷ λόγῳ τοὺς ἑπομένους ἄξιον ἐστι μόνους ἐλευθέρους νομίζειν. *Μόνοι γὰρ, ἃ δεῖ βούλεσθαι, μαθόντες, ὡς βούλονται ζῶσι, τοῖς δὲ ἀπαιδεύταις καὶ παραλόγοις ὁρμαῖς καὶ πράξεσιν ἔνεστι, καὶ μικρὸν ἐν πολλῷ τοὶ μετανοοῦντι ἑκούσιον. De audit. in princip.*

[3] See *Buddei Elementa Philoſophiæ practicæ, Part* II. *Ch.* iii. where he is both particular and large in ſhewing how People incorporated into Society, are under a Neceſſity of having Laws impoſed upon them.

CHAP.

CHAP. II.

Of the natural State of MAN.

The CONTENTS.

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X. *The Manners of barbarous Nations do not make up the State of Nature.*
XI. *Natural Peace has no need of Covenants.*
XII. *Natural Peace is not to be trusted to.*

I. BY the natural State of Man in our preſent Enquiry, we do not mean that Condition which is [1] ultimately deſign'd him by Nature, as the moſt perfect and the moſt agreeable; but ſuch a State as we may conceive Man to be plac'd in by his bare Nativity, abſtracting from all the Rules and Inſtitutions, whether of human Invention, or of the Suggeſtion and Revelation of Heaven; for the Addition of theſe Aſſiſtances ſeems to put another Face on Things, and to frame human Life anew, by an exacter Model. By this wide Exemption we do not only exclude all the various Arts and Improvements, and the univerſal Culture of Life, but eſpecially civil Conjunctions and Societies, by the introducing of which Mankind was firſt brought under the decent Management of Order and Regularity. That we may be able to form clear and diſtinct Notions of this ſuppos'd State, we will firſt conſider it *in itſelf*, and examine eſpecially what Rights and what Inconveniences attend it; that is, what would be the Condition of particular Men, if there were no Arts or Inventions ſet afoot, and no Communities form'd and eſtabliſh'd in the World. And then, ſecondly, we will conſider it *in order to other Men*, whether in this Regard it bears the Semblance of Peace, or of War; that is, whether Men who live in a natural Freedom, ſo as neither to be ſubject to one another, nor to acknowledge a common Maſter, are likely to prove Enemies, or Friends. In this ſecond Conſideration the State we are ſpeaking of, is capable of a Subdiviſion, being either *full* and *abſolute*, and ſo bearing an equal Regard towards all Men in general; or elſe *limited* and *reſtrain'd*, as it has Reſpect only to a certain Part of Mankind. This double Notion of a State is anſwerable to the double Manner in which we may conſider the Men who are to compoſe it, either as each particular Man lives in a natural Liberty towards all others; or as ſome Men have entred into a Society between themſelves, but are join'd to all the reſt of the World by no other Ties, beſides thoſe of common Humanity.

II. Now to form in our Minds ſome Image of this natural State, ſuch as it would be, if deſtitute of all Arts and Aſſiſtances either invented by Men, or reveal'd by GOD, we muſt fanſy a Man thrown at a Venture into the World, and then left intirely to himſelf, without receiving any farther Help or Benefit from others, than his bare Nativity; we muſt likewiſe ſuppoſe him to be furniſh'd with no larger Endowments of Body or Mind, than ſuch as we can now diſcover in Men, antecedent to all Culture and Information; and laſtly, we muſt take it for granted, that he is not foſter'd under the peculiar Care and Concern of Heaven. The Condition of ſuch a Perſon could not prove otherwiſe than extreamly miſerable, whether he were thus caſt upon the Earth in Infancy, or in Maturity of Stature and of Strength. If an Infant, he could not but have ſadly periſh'd, unleſs ſome Brute Creature had, by a kind of Miracle, offer'd its Dugs for his Support; and then he muſt neceſſarily have imbib'd [2] a fierce and ſavage Temper, under the Nurſery and Tutelage of Beaſts. If in Perfection of Limbs and Size, we muſt, however, conceive him naked, able to utter nothing but an inarticulate Sound, a Stranger to all Inſtitution and Diſcipline, amazed and ſtartled at the Things about him, and even at his own Being: The Admonition of Hunger

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Mr. BARB. *NOTES on* Ch. II. §. I.

[1] If Mr. *Titius* (*Obſervat.* 452.) had conſidered well theſe Words, he would not have criticiſed upon our Author, as calling that Eſtate Natural very unfitly, which is contrary to Nature, *i e.* to the Intention of GOD, who appointed Man for Society. See what our Author ſays at the End of §. 4

§. ii. [2] This appears from an Inſtance which *Procopius* (*Lib.* ii. *Gothicorum*) relates of a Child nurſed by a Goat. Mr. *Hertius* alſo quotes *Harthknock*'s Hiſtory of *Poland*, *Lib.* i. *Ch.* ii. who relates ſomething like it of an Infant who had been ſuckled by a Bear, and being brought to *Warſaw*, was preſented to *Caſimire* King of *Poland*, in 1661. I ſhall alſo add at length a like Story which the ſame Mr. *Hertius* has ſet down in his Treatiſe of Society, the firſt Principle of the Law of Nature, *Sect.* 1. §. 8. yet leaving the Reader at Liberty to ſee into the Truth of it, tho' the Author warrants it. "In 1344 there was a Child found in *Heſſe*, who, as we underſtand ſince, was taken away by Wolves, when it was about three Years old, and wonderfully maintained by them. They carried it to a Tree, where they laid up the greateſt Part of their Prey, and in the Winter they dug a Ditch, into which they caſt Leaves, and Herbs, which they laid under the Child, lying themſelves by it to keep it from the Cold. They taught it to go on the Hands and Feet, and run like themſelves, inſomuch that by Cuſtom it would run as ſwift, and make as great Leaps. When he was firſt taken, they bound ſome Pieces of Wood to him, to reſtore him, and accuſtom him not to go like a Beaſt with his Face downward. He was carried to the Court of *Henry* Prince of *Heſſe*, and was often heard to ſay, That if it were not for him, he had rather live amongſt the Wolves again, than among Men." This Story is related by the Author of the Additions to the Hiſtory of *Lambert de Schaffnaberg*, about 1344.

would make him ſeize greedily on any Thing that was near him, his Thirſt would direct him to the firſt Water, and Dens or Trees would afford a Refuge from the Injuries of Weather. Should we ſuppoſe a Number of ſuch helpleſs Wretches thrown together by Nature on ſome uninhabited Soil, we cannot but think that they would ſo long however continue in a brutal Wildneſs and Diſorder, till at laſt, either by their own Wit and Experience, or by ſome Hints and Inſtructions taken from the Conduct of mute Creatures, they ſhould by Degrees arrive at ſome Method and Elegancy of Living, and as *Virgil* ſays,

——*Varias uſus meditando extunderet artes*;
Studious Need might beat out uſeful Arts.

This will eaſily be acknowledg'd by any one that looks about on the numerous Improvements and Aſſiſtances which we make uſe of in our daily Actions, and at the ſame Time conſiders how difficult it would be for any Man to invent all theſe of his own Head, if he were not put in the Way by the previous Labour and Guidance of others; and how great a Part of theſe Ornaments and Conveniencies of Life, would at once enter into the Thoughts of the Generality of Mankind. Hence it is no Wonder that the Heathen Writers, who underſtood not the true Origin of Men as deliver'd in holy Scriptures, ſhould make ſo foul a Repreſentation of their primitive State.

Quum prorepſiſſent primis animalia terris,
Mutum & turpe pecus, glandem atq; cubilia prenſant
Unguibus & pugnis, dein fuſtibus, atq; ita porro
Pugnabant armis, quæ poſt fabricaverat uſus.
Donec verba, quibus voces ſenſuſq; notarent
Nominaq; invenere; dehinc abſiſtere bello,
Oppida cœperunt munire, & condere leges,
Ne quis fur eſſet, neu latro, neu quis adulter.

When the firſt Fathers of our human Brood,
Dirty and dumb crawl'd from the teeming Mud;
A War began with Nails, and Fiſts, and Heads,
For Acorn Banquets, and for leafy Beds.
Cudgels came next in Play, and riper Hate
Arm'd them with ſurer Inſtruments of Fate.
At length their Voice grew Index of their Thought,
Joyful to name the Things for which they fought.
Now Rage began to cool, and Force to ceaſe,
And gen'ral Parlies work'd a gen'ral Peace.
Towns roſe, and Laws were ſettled, to remove
Invading Thefts, and check licentious Love.

This is *Horace*'s Deſcription, and we may expect a fuller from *Lucretius*.

Et genus humanum multò fuit illud in arvis
Durius, ut decuit, Tellus quod dura creâſſet.

Quod ſol atq; imbres dederant, quod terra creârat
Sponte ſuâ, ſatis id placabat pectora donum;
Glandiferas inter curabant corpora quercus;
Plerumque.

At ſedare ſitim fluvii fonteſq; vocabant.

Nec dum res igni ſcibant tractare, nec uti
Pellibus, & ſpoliis corpus veſtire ferarum:
Sed nemora atq; cavos montes ſylvaſq; colebant.
Et frutices inter condebant ſqualida membra,
Verbera ventorum vitare imbreſq; coacti.
Nec commune bonum poterant ſpectare, nec ullis
Moribus inter ſe ſcibant, nec legibus uti.
Quod cuique obtulerat prædæ fortuna, ferebat,
Sponte ſuâ ſibi quiſque valere & vivere doctus.
Et Venus in ſylvis jungebat corpora amantum,
Conciliabat enim vel mutua quamque cupido,
Vel violenta viri vis atq; impenſa libido.

—— *Illud erat curæ quod ſæcla ferarum*
Infeſtam miſeris faciebant ſæpe quietem.

Inde caſas poſtquam ac pelles ignemq; pararunt;
Et mulier conjuncta viro conceſſit in unum,
Caſtaq; privatæ Veneris connubia læta
Cognita ſunt, prolemq; ex ſe videre creatam.
Tum genus humanum primum molleſcere cœpit:
Ignis enim curavit, ut alſia corpora frigus
Non ita jam poſſent cœli ſub tegmine ferre.
Et Venus imminuit vires; pueriq; parentum
Blanditiis facile ingenium fregere ſuperbum.
Tunc & amicitiam cœperunt jungere habentes
Finitima inter ſe, nec lædere, nec violare:
Et pueros commendarunt muliebreq; ſæclum,
Vocibus & geſtu cum balbe ſignificarent,
Imbecillorum eſſe æquum miſererier omnium.
Non tamen omnimodis poterat concordia gigni,
Sed bona magnaq; pars ſervabant fœdera caſti;
Aut genus humanum jam tum foret omne peremptum,
Nec potuiſſet adhuc perducere ſæcla propago.
At varios linguæ ſonitus natura ſubegit
Mittere, & utilitas expreſſit nomina rerum, &c.

Then Man was *hard*, as hard as *Parent*-Stones,
And built on *bigger* and on *firmer* Bones.

Contented they with the *poor eaſy* Store
That *Sun* and *Earth* beſtow'd, they wiſh'd no more,
Soft *Acorns* were their firſt and chiefeſt Food.
When thirſty, then did purling Streams invite
To ſatisfy their eager Appetite.

They knew no Uſe of Fire to dreſs their Food,
No Cloaths, but wandred naked thro' the Wood.
They liv'd in *ſhady Groves*, and *Caves* confin'd
Were Shelter from the *Cold*, the *Heat*, and *Wind*.
No fix'd *Society*, no ſteady Laws,
No *publick* Good was ſought, no *common* Cauſe.
But all at War, each rang'd, each ſought his Food
By Nature taught to ſeek his *private* Good.
Then to renew frail Man's decaying Race,
Or *mutual Luſt* did prompt them to embrace,
Or elſe the *greater Vigour* of the Male,
Or ſome few *treacherous* Preſents did prevail;
Some *Acorns*, *Apples* ſome, ſome *Pears* beſtow,
The Thing the ſame, the Price was leſs than now.

The moſt they dreaded was the furious Beaſt,
For thoſe i'th' dead of Night did oft moleſt,
And lengthen into Death their ſlumbering Reſt.

But when they built their Huts, when Fire began,
And Skins of murther'd Beaſts gave Cloaths to Man;
When One to One confin'd in chaſt Embrace
Enjoy'd *ſweet Love*, and ſaw a *num'rous* Race;
Then Man grew ſoft, the Temper of his Mind
Was chang'd from *rough* to *mild*, from *fierce* to *kind*.

For us'd to Fire, his Limbs refus'd to bear
The piercing Sharpneſs of the open Air:
Luſt weaken'd him, and the ſweet playing Child
Tam'd his wild Sire, and into Peace beguil'd.
Then Neighbours by Degrees familiar grown,
Made Leagues and Bonds, and each ſecur'd his *own.*
And then by *Signs*, and broken Words agreed,
That they would keep, preſerve, defend, and feed
Defenceleſs Infants, and the Female Train;
A Right which Pity urg'd them to maintain.
Tho' this fix'd not an univerſal Peace,
Yet many kept their Faith, and liv'd at Eaſe;
Or elſe, almoſt as ſoon as it began,
The Race had fall'n, this Age ne'er ſeen a Man.
Kind Nature Power of framing Sounds affords,
And theſe at length Convenience turn'd to Words.
Mr. CREECH.

We have much the ſame Story in Proſe from *Diodor. Sic. Lib.* i. *c.* viii. *They tell us, that Men at their firſt Origin led an irregular Life, in the Manner of Beaſts; ſcattering themſelves about in Search of Food, which was preſented them by the ſavoury Herbs, and the Fruits which grew of their own Accord. But being infeſted on every Side with the wild Beaſts, they learnt by Uſe the Security of mutual Aſſiſtance; and being forc'd by Fear to unite in Society, they came acquainted by Degrees with their Similitude of Figure and Shape. The firſt Men, before any Inventions of Conveniency and Uſe, ſupported Life with great Labour and Trouble; being, as yet, deſtitute of Cloaths and Dwellings, unaccuſtom'd to the Relief of Fire, and Strangers to all ſweet and regular Food. Being ignorant of Stores and Proviſions, they neglected to ſecure ſo much of the Fruits of the Earth as was requiſite for neceſſary Suſtenance. And thus many periſh'd in the Winter by Hunger and Cold. But being afterwards inſtructed by gradual Experience, to ſpend that ſharp Seaſon in Caves, and to lay up a Stock of Neceſſaries, and finding out the Uſe of Fire and other Comforts and Supports, they began to introduce many Arts, and many Advantages of living.* Add, Lib. i. Ch. xliii. Cicero pro P. Sectio. *Who amongſt you does not know the Condition of Nature to have been once ſuch, that Men, in thoſe Days, before the Settlement of natural or of civil Laws, wandered ſeparately about the Fields, and poſſeſs'd no more than what they could get or keep by mutual Force, and Wounds, and Slaughters. Now between our preſent Way of Life, poliſh'd with Humanity and Civility, and that rude and barbarous Courſe, the only diſtinguiſhing Marks are* Law *and* Violence. *Vid.* de Invent. Lib. i.

Euripid. Supplic.

I praiſe the generous Pow'rs, that fenc'd our Life
With Rules and Graces from the lawleſs Herd;
By giving firſt a Soul, and next a Tongue,
The Soul's Interpreter; and Fruit for Food,
And kindly Rain to breed a future Store:
And cloſe Abodes, to skreen us from the Rage
Of threatning Skies; and Sails to wing our Courſe
To diſtant Shore, to join the Globe in Trade,
And mix the common Treaſures of Mankind.

It is a general Cuſtom with the Poets to attribute to the Gods the Invention of all Things uſeful in human Life. Vid. *Oppian. Halieut. Lib.* ii. *v.* 16, *&c.*

However fabulous theſe Accounts appear, yet ſo far the Authors of them were in the right, that upon Suppoſal of ſuch an Origin of Mankind [4], the Face of Nature would have born all theſe Features which we now eſteem ſo monſtrous and extravagant. In the ſame Manner being ignorant of the State of Paradiſe, they pleas'd themſelves in making Deſcriptions of a ſingular and conſtant Temperateneſs of Air, and of a ſpontaneous Fertility of the Earth, in the firſt and the golden Age of the World. Becauſe they thought it impoſſible that human Race could have been preſerv'd, as according to their Notion they were produc'd, if the Weather and the Seaſons had been then as changeable and as unſteady as now, and if the Support of Food had not been more eaſy to procure [a]. And indeed, tho' it is clear from the Authority of Scripture, that the primitive Mortals, by the divine Direction and Aſſiſtance [5], arriv'd at a very early Knowledge of the moſt neceſſary Arts (See *Gen.* iii. 21, 23. and iv. 17, 22.)

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[a] Vid. *Ovid. Metamorph. Lib.* i. *v.* 107. *Virg. Georg.* xi. *v.* 336. *Lucret. Lib* v.

At novitas mundi nec frigora dura ciebat,
Nec nimios æſtus; nec magnis viribus auras.

Nature, whilſt new, no cruel Cold brought forth,
Nor raging Heats; nor arm'd the ſtormy North.

[4] Altho' Mankind was never in ſuch a State of Nature as we have deſcribed, yet it is good to imagine what that Eſtate was, not only to convince us, how great an Advantage we receive one from another, and by that Means may be induced to a reciprocal Senſe of Love and Sociableneſs, but alſo becauſe it may happen, that every Man may be reduced to that Condition, either altogether or in Part. Such an one, for Example, may an Infant be, who is left in a Deſert, where no Man paſſes; and if this Infant, who is thus forſaken by his cruel Parents, lives to grow up without any human Aſſiſtance, he'll repreſent to us perfectly that State of Nature we are now ſpeaking of. Nay, a Perſon at Man's Eſtate, who by a Shipwreck, or ſome other Accident, is caſt upon an Iſland that is deſert and uninhabited, will find himſelf in ſome Degree of that State of Nature, becauſe he'll be forced to call to mind Arts, and other Conveniences of Life, that he may more eaſily provide for his Neceſſities. I have taken this out of the Academical Diſcourſe of our Author, *De ſtatu hominum Naturali*, §. 5.

[5] This appears from this Expreſſion in the firſt of thoſe Texts, *And God made Coats of Skins, and cloathed them*; which, according to the *Hebrew*, imports, that God taught them to make them; for otherwiſe how could the firſt Men, who were deſtitute of all neceſſary Inſtruments of Iron, and before there was any Cuſtom to kill Beaſts, in ſo little a Time find out that Invention, and bring it to any Perfection by their Induſtry? From hence we may infer, in my Opinion, that divine Providence inſtructed them in ſeveral other Things which were as neceſſary for human Life, and no leſs difficult to find out. So God commanded our firſt Parents to till the Ground, and get their Bread by the Sweat of their Brows, or to that End, 'tis probable, he taught them the Nature of the Grain, the Time of Sowing, and the Manner of Tillage and making Bread; which Things they could not have diſcovered of themſelves, but by long Experience and many Trials. The Hiſtories of *Greece* tell us, that the antient Inhabitants there, having loſt the Uſe of Bread-Corn, I know not by what Accident, lived upon Acorns and wild Fruits, before the Uſe of Husbandry was reſtored among them; whereas the Sacred Hiſtory tells us, that *Adam*'s eldeſt Son was an Husbandman, which ſhews, that the Art was well known before; and conſequently, ſo was the Uſe of Iron; for 'tis not neceſſary for us to underſtand what the Scripture ſays of *Tubal-Cain, Gen.* iv. 22. that he was the Inventor of Iron; for we may ſuppoſe the more plain Uſe of that Metal was before diſcovered, and that *Tubal-Cain* found out a Way of forging it into more curious Works; for 'tis ſaid only that he poliſhed all Works of Braſs and Iron. As to Fire, the Invention of it among the *Greeks* was looked upon as ſuch a conſiderable Thing, that they feigned that *Prometheus* brought it down from Heaven. 'Tis related of the Inhabitants of the *Canary* and *Philippine* Iſlands, and of an Iſle bordering on *China*, called *Los Jordenas*, that they knew nothing of Fire till the *Spaniards* arrived there; and perhaps they had been in this Ignorance many Ages, neither their own Ingenuity, nor any Chance, having

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which they daily improv'd and increas'd by their own Induſtry and Application; yet the Condition of Men had been moſt deplorable and baſe, if no Societies had been ſet on Foot, but every one had reign'd a ſeparate Prince in his own Family, and ſuffer'd his Children, when once grown up, to ſeek their Fortunes in a State of natural Liberty. And then we might pronounce of all Mankind, as *Euripides* does of the *Cyclops*, they would be

Νομάδες; ἀκούει δ' οὐδὲν οὐδεὶς οὐδενός·

as wandering Swains, never hearing, and never heeding one another. Hobbes has [6] been lucky enough in painting the Inconveniences of ſuch a State. *Out of Society* (ſays [a] he) *we are defended only by our ſingle Strength; in Society, by the Strength of all. Out of Society no Man is* [7] *ſure to keep Poſſeſſion of what his Induſtry has gain'd; in Society every Body is ſecure from that Danger. To conclude, out of Society we have* [8] *the Tyranny of Paſſions,* [9] *War,* [10] *Fear,* [11] *Poverty,* [12] *Filthineſs, Barbarity, Ignorance, and Wildneſs; in Society we have the Sway of* [13] *Reaſon,* [14] *Peace, Security,* [15] *Riches,* [16] *Decency of Ornament, Company, Elegancy, Knowledge, and Benevolence* [b]. And I believe there cannot be a more effectual Way found out to ſilence the Complaints and Murmurs of the common People, when they pretend to find Fault with the Miſcarriages and the Impoſitions of the Government, than if we would lay before them a true Proſpect of the Miſery and Confuſion which attends a natural State. Which trouble thoſe Perſons had certainly a right Notion of, who brought into a proverbial Saying, [17] *That unleſs there were ſuch Things in the World as Courts of Juſtice, Men would infallibly devour one another.*

III. What kind of Rights attend Men in a State of Nature we may eaſily gather, as well from that Inclination common to all living Things, by which they cannot but embrace and practiſe, with the greateſt Readineſs and Vigour, all poſſible Ways of preſerving their Body and their Life, and of overcoming all ſuch Things as ſeem to drive at their Deſtruction; as from this other Conſideration, that Perſons living in ſuch a State are not

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been able to gain the Uſe of ſo neceſſary a Thing. See *Geo. Hornius de Origin. Gent. Americân. Lib.* i. *Ch.* viii. *Lib.* ii. *Ch.* ix. We find alſo, that ſeveral Nations have been ignorant a long time of the Uſe of Iron, tho' they had Mines of that Metal in their Country. We muſt then believe, that the firſt Men were early inſtructed by divine Providence in theſe ſorts of Things, and many other Neceſſaries of Life. And if a long time after we diſcovered ſome People among whom the Uſe was loſt, 'twas becauſe they had choſe a barren Country, or becauſe ſome ambitious Perſons had forced great Numbers of Men, by their irreſiſtible Power, to fly into far diſtant Deſerts, where they wanted all the Inſtruments of Tillage uſed in the Places they had loſt; or ſome Colony going to ſettle itſelf in a far Country, neglected to carry thoſe Inſtruments, or loſt them by the Way, by ſome unknown Accident, after which 'twas very hard to recover them, becauſe Traffick was not yet ſettled. Nevertheleſs, ſome have endeavoured to ſupply this Defect, by making uſe of other Materials for the ſame End. Thus ſeveral People of *America* uſe, inſtead of Iron, Oyſter-ſhells, the Bones and Teeth of ſome Creatures, Canes, and ſuch like Things. See *Dapper*'s Deſcription of *America*. This is alſo taken out of our Author's Treatiſe quoted in the foregoing Note.

[a] De *Cive, Ch.* x. §. 1.

[b] Comp. *Polyb. Lib.* iv. *Ch.* xlv. Where he relates the Miſeries of the *Byzantines*, occaſion'd by their endleſs War with the *Thracians*.

[6] Our Author ought not to have approved Mr. *Hobbes*'s Words ſo generally, as Mr. *Titius* has obſerved (*Obſ.* 460, 461.) as I ſhall ſhew in this and the following Notes. And firſt, what Mr. *Hobbes* ſays is not abſolutely true; for what hinders but in a State of Nature, many may join together in their own Defence? I own, that ſuch a Protection, tho' founded upon an united Force, is not comparable to what is found in a well regulated Society; but this may in ſome meaſure be ſufficient to guard us from the Inſults that we are liable to in a State of Nature, becauſe 'tis not likely that we ſhall be attacked by ſo great a Number of Enemies at one time; for it often happens in a Civil Society, that private Perſons are oppreſſed by the Forces of the whole Body, an Inconvenience not to be feared in a State of Nature.

[7] On the contrary, In the State of Nature we ſeem to enjoy, for the moſt part, the Fruits of our Labour with greater Security; for poor Subjects are very often flea'd by evil Princes.

[8] This he ought alſo to have proved, for why ſhould our Paſſions have greater Command of us then? If the Fear of Laws keeps the People to their Duty, it will make a like Impreſſion upon the great ones, and Perſons of Quality, but they eaſily find out Ways to evade the Laws; for thoſe in whom the Paſſions reign with the greateſt Fury, and in a manner moſt prejudicial to Society, are beyond Contradiction theſe Perſons in Authority, of which we can't find any Examples in a State of Nature, nor can there be any in a Condition of doing ſo much Miſchief.

[9] Wars are not a neceſſary Conſequence of a State of Nature, and our Author proves it a little lower, §. 5. againſt Mr. *Hobbes*. There would be doubtleſs ſome Wars, but neither ſo furious, nor ſo cruel, nor with ſuch great Armies, as to lay waſte large Provinces and great Kingdoms.

[10] There want not as many Means to appeaſe and leſſen Fear. See what is ſaid *Lib.* vii. *Ch.* i. § 7. And in Civil Governments is there not often more Reaſon for terrible Apprehenſions from Princes and their Miniſters?

[11] Labour and good Huſbandry would eaſily furniſh us with all Things neceſſary for Life. None but Sluggards and Prodigals would fall into Poverty, and this often happens as well in civil Societies.

[12] This is founded upon the falſe Hypotheſis of Mr. *Hobbes*, that *A State of Nature is a State of War*. But that civil Societies are not free from theſe Inconveniences, the Empire of *Muſcovy* ſhews, as alſo do ſeveral People of *Aſia, Africa,* and *America*, which are neither leſs miſerable nor barbarous for having a King.

[13] Whence come thoſe Monſters of Ambition, Covetouſneſs, Pleaſure, Cruelty, and Inhumanity, which ordinarily reign in the Courts of Princes, and whoſe contagious Examples ſpread almoſt always to their Inferiors?

[14] The horrible Perſecutions which the Subjects ſometimes ſuffer, and the bloody Wars which often harraſs the moſt flouriſhing States and Empires, prove, that Peace and Tranquillity do not more ordinarily flouriſh in civil Societies, than in the State of Nature.

[15] How comes it to paſs that we ſee ſo many Families reduced to Beggary, and ſo many Subjects ruin'd by Extortion?

[16] Under theſe fine Names are often hidden Vanity, Sottiſhneſs, Folly, Pedantry, irregular Paſſions, and ſubtle Cheats. There is no good Thing that can be ſecured to us by Society, but it may have Place in a State of Nature. Further, this Beauty, Politeneſs, and Pleaſures of Life, of which Men boaſt ſo, are found only in great Cities; the ruſtick Behaviour is ſtill kept up every where in the Country, in the moſt civilized Kingdoms. Let us then, by way of Concluſion, make an exact Parallel between the States of Nature and Civil. Experience teaches us, that contrary to the natural Appointment of the Creator, and thro' Man's Corruption, both States are often troubleſome and unhappy; but Civil Government being a proper Means to reſtrain the Malice of Men, the Civil State, without Contradiction, may be more ſociable and happy than the State of Nature; but then we muſt ſuppoſe the civil Society to be well governed, otherwiſe, if a King abuſe his Power, or devolves the Management of Civil Affairs to Miniſters both ignorant and vicious, as it often happens, a Civil State is more unhappy than the State of Nature; which appears by the Wars, Calamities, and Vices which ſpring up from ſuch Abuſes, and from which the State of Nature is free. See what Mr. *Locke* ſays in his ſecond Treatiſe of Civil Government, *Chap.* i. §. 10. and *Chap.* xviii. §. 17. near the End.

[17] 'Tis a Proverb of the *Jewiſh* Doctors. See *Grotius. Lib.* i. *Chap.* iv. §. 4. *num.* 2.

ſubject to any Sovereignty or Command. For from the former Reflexion it follows, that Men plac'd after this manner in a natural State, may uſe and enjoy the common Goods and Bleſſing, and may act and purſue whatever makes for their own Preſervation, while they do not hence injure the Right of the reſt. From the latter Suppoſition it is clear, that they may uſe not only their own Strength, but their own Judgment and Will (provided they are form'd and guided according to the Law of Nature) for procuring their own Defence and Safety. And in this Reſpect likewiſe, the State we are treating of has obtain'd the Name of natural Liberty; in as much as, antecedently to all human Pact and Deed, every Man is conceiv'd to be perfectly in his own Power and Diſpoſal, and not to be controll'd by the Pleaſure or Authority of any other. On which account too, every Man may be thus acknowledg'd *equal* to every Man, ſince all Subjection and all Command are equally baniſh'd on both Sides. According to this Temperament, we ought to correct and explain thoſe Aſſertions laid down by Mr. *Hobbes*, in the Beginning of his Book *De Cive*, *That the firſt Foundation of natural Right, is the Liberty which each Man hath, to preſerve, as far as he is able, his own Life and Limbs, and to apply all his Endeavours towards the guarding his Body from Death, and from Pains.* From which it follows, That *ſince 'tis in vain to have a Right to the End, if one has not likewiſe a Right to the Means, therefore every Man has a Right of uſing all Means, and of doing all Actions, without which he cannot defend and enſure himſelf.* But now ſince in a natural State no Man is ſubject to another as to a Superior, to whoſe Pleaſure his own Will and Judgment ſhould be ſubmitted, hence *every Man is by natural Right a Judge, whether the Means which he uſes, and the Actions which he performs, are neceſſary to the Preſervation of his own Life and Limbs, or not:* For altho' in this Caſe one Man ſhould pretend to give Advice to another, yet the other not having ſubjected his Will and Judgment to his Controul, may ſtill judge of this Advice, whether it be proper and expedient to be follow'd, or not. And therefore he may, perhaps, do according as he was adviſ'd, but then it will not be for the ſake of the Counſellor, but becauſe he himſelf approves of the Propoſal; and conſequently he will at laſt act by the Determination of his own Judgment. From all which he concludes, *That Nature has given to every one a Right to all Things; that is, in a meer natural State, or before Men had bound themſelves to one another by any Covenants, it was lawful for every one, to do all Things whatſoever and againſt whomſoever he pleaſ'd; and to poſſeſs, uſe, and enjoy all that he would or could. Whence it may be underſtood, that in a State of Nature, Profit or Utility is the Meaſure of Right.* Which Notions, however paradoxical they appear at firſt View, yet no Man can fairly draw from them a Licence of doing *any* Thing to *any* Perſon, who conſiders that *Hobbes*, even in this State of Nature, ſuppoſes a Man ſubject to the Laws of Nature, and to the Government of [1] ſound Reaſon. But ſince ſuch an unbounded and injurious Licence could never, by any Man in his Wits, be thought a likely Means for the laſting Preſervation of himſelf, we muſt preſume that it was never granted or intended by Nature. And ſuppoſe ſome Man ſhould be ſo extravagant as to endeavour the putting it in Practice, it's plain his Experiment would turn in a high Manner to his own Prejudice and Miſchief. So that the only fair Senſe of *Hobbes*'s Principle is this; the Things which make for the Preſervation of Men, Nature has laid in common, before they have divided them amongſt themſelves by Covenant: And he that has no Superior, may by the Direction of his own beſt and ſoundeſt Reaſon, do any Thing that is truly conducible to his laſting Safety. But if that Philoſopher really intended his Words with the ſame Harſhneſs, and the ſame groſs Appearance which their Countenance bears, and to reject our kind and favourable Interpretation, the Fault is his own, and let him ſhift how he can to eſcape the perpetual Cenſure and Reprehenſion of wiſe Men. This is evident, that the Author of the *Theologico-Political* Treatiſe, who goes commonly by the Name of *Spinoza*, has deſcrib'd that *Right of all Men to all Things* which attend a natural State, in moſt horrid and barbarous Terms; and therefore it may not be improper to take the Trouble of diſcuſſing his Notions on the Point. *By the Right and Inſtitution of Nature*, he underſtands nothing elſe, *but the Rules of the Nature of every individual Thing, according to which we conceive every one of them to be naturally determin'd to a certain Manner of Exiſtence and of Operation. For Example, Fiſhes are naturally determin'd to ſwim, and the bigger of them to eat the leſſer; and therefore Fiſhes, by the higheſt natural Right, poſſeſs the Water; and by the ſame Right, the larger Kinds of them prey on the ſmaller.* Here it is obſervable, that by the Term of *Right* he does not expreſs any Law directive of an Action, but only the Power of acting [2] and what may be done without Injury, and that therefore 'tis by no Means a fair Concluſion, that one ought neceſſarily to do

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§. III. [1] Mr. *Hobbes*, as he himſelf ſays in a Note upon §. 1. of the ſecond Chapter, underſtands by right Reaſon, not as moſt do, the infallible Faculty, but the Power of Reaſoning, *i. e.* the proper and true Arguings which every one makes upon his own Actions, ſo far as they conduce to the Advantage or Detriment of other Men. If we ask him what is this true Reaſoning, he'll anſwer, It is founded upon the Principles laid down in the foregoing Chapter, §. 2, 3, 4, 5, 6, and 7. upon the State of War, wherein he ſuppoſes all Men to be naturally one againſt another; a falſe Suppoſition, which our Author will confute a little lower, §. 5, *&c.* So that we ſee, that according to Mr. *Hobbes*, all is reduced to every Man's Judgment, either well or ill founded. This appears clearly from what he poſitively maintains, *That in whatever Manner a Man deals with a Perſon, with whom he makes a Bargain, or Contract, he does him no Injury.* See above *Lib.* i. *Chap.* vii. § 13. If a Man ſins againſt God, or the Laws of Nature, 'tis, according to him, becauſe we pretend ſomething is neceſſary for our Preſervation, which we know in Conſcience not to be ſo. *Note on Chap.* i. §. 10. See alſo that on *Chap.* iii. §. 27.

[2] The Words of the Original, in all the Editions of *Germany* and *Holland* (for in that which the Author publiſhed at *Lunden* in *Sweden* in 1672, there is nothing of this Confutation of *Spinoza*) not excepting that which Mr. *Hertius* put out in 1706, the Words are placed as we find them in this *Engliſh* Edition, but they make a ſtrange Hotch-potch; for if we examine into the Sequel of the Diſcourſe, and the Deſign of the Author, we may eaſily diſcern them miſplaced; for theſe laſt Words, *And what may be done without Injury*, ought not to refer to the pure Faculty of acting, which may do a great deal of Injury, but to the Laws, which forbid doing an Injury to any Man, and therefore I have placed it in its right Order in my Tranſlation.

all thoſe things, which one has [3] a Right of doing. Farther, as it is an improper Acceptation of the Term of *natural Law*, to make it denote that according to which every thing acts by a certain and determinate Manner, ſo is it likewiſe improper to apply the Name of *Right* to that Power and manner of acting which appears in irrational Beings: For he alone can be truly ſaid to have a Right of acting, who acts on previous Reaſon and Deliberation. He proceeds to tell us, *That Nature abſolutely conſider'd has the higheſt Right of doing whatever it can; that the Right of Nature extends itſelf as far as the Power of Nature: For the Power of Nature is the very Power of God, who hath the higheſt Right to all things.* Here, if by *Nature abſolutely conſider'd*, [4] he means GOD in Conjunction with all created Things, we grant his Aſſertion, and willingly acknowledge in GOD the higheſt Right to all Things, yet ſuch a Right as is ſuited to the Perfections of his Eſſence. But if by Nature he underſtand the Univerſity of created Beings, as contradiſtinguiſh'd to the Creator, then we may deny the Power of Nature to be the Power of GOD himſelf, or that theſe two Powers have the ſame Latitude and Extent. The Power of Nature is indeed produc'd by GOD, but not in ſuch a manner as to exhauſt all the Power of the Divinity, but to contain itſelf within the Bounds preſcrib'd by its Author. His next Inference runs thus, *Since the univerſal Power of all Nature is nothing elſe but the Power of all the Individuals taken together, it follows that each Individual has the higheſt Right to all things that it can compaſs, or that the Right of each Individual extends itſelf as far as the determinate Power of the ſame Individual.* But 'tis beyond me to apprehend the Concluſiveneſs of this Argument, *The Power of all Nature is the Power of all the Individuals together, therefore each Individual has the higheſt Right to all Things.* For is it not rather true, that each Individual has a certain and definite Share or Portion of Right; and that therefore no particular Individual can fairly arrogate to itſelf that Right which is proper to all; as they make up one univerſal Nature? He adds, *And becauſe it is a ſupreme Law of Nature, that every thing endeavour as far as it is able to continue in its own State, and this not with any regard or reſpect to other things, but only to itſelf, hence it follows, that each Individual has the higheſt Right to this Advantage; that is, to exiſt and to operate as it is naturally determin'd.* Here, beſides that *Law of Nature* is us'd in an improper Senſe, it is apparently falſe as to Men at leaſt, that their Nature is ſo determin'd, as to make them endeavour their own Preſervation and Continuance [5] with reſpect to themſelves only, without any Care or Conſideration for others. Properly ſpeaking, thoſe things are ſaid to be *Naturally* determin'd which are tied to an uniform Method of acting; and are ſo contradiſtinguiſh'd to free Agents: And therefore Men, as to thoſe Actions which are left to their own Guidance and Direction, are determin'd to certain Ways and Courſes not by Nature, but by ſome Law; and conſequently they are not preſently inveſted with a Right of doing all things within the reach of their natural Powers and Abilities. But the Vanity of ſuch Reaſonings will more fully appear, if diveſting them of their dark Turnings and Intricacies we thus clearly propoſe them; GOD has the higheſt Right to all things; the Power of Nature is the Power of GOD, therefore Nature has a Right to all things: But the Power of Nature is the Power of all the Individuals together; therefore each Individual has a Right to all things. Let any Man judge whether the Connexion in this Argument be juſt, or not. *Spinoſa* very falſly declares, *That in this Point no Difference ought to be made between Men, and the other Individuals of Nature; or between Men who underſtand and exerciſe Reaſon, and thoſe who do not; nor between Men in their Wits, and Fools and Madmen.* For, as to the firſt Part of this Aſſertion, the Queſtion of Right ought not to proceed but about the Right of Men. And as to the latter Part, altho' ſome Men may have a quicker and ſome a ſlower Uſe of Reaſon, yet whoever has any Uſe at all of that Faculty may at leaſt underſtand thus much [6], in Order to his own Preſervation he has no Need of an unlimited Right to all Things, and that therefore ſuch a Right doth by no Means belong to him. As for thoſe who have no Manner of Uſe of Reaſon, 'twould be frivolous to diſpute about their Right; nor from the unhappy Circumſtances of diſeas'd Perſons, can we pronounce any thing about the natural Condition of Mankind: Nor is it impoſſible for any one of theſe poor Creatures to be preſerv'd otherwiſe than by a Right to all things. The Reaſon which he ſubjoins is equally vain and fruitleſs, *For whatſoever any thing acts by the Laws of its Nature, it acts with the higheſt Right; inaſmuch as it acts as it is by Nature determin'd, and cannot do otherwiſe.* Becauſe we deny Man when he acts by the Law of Nature, to affect a Right to all things, or to be determin'd by Nature to the Exerciſe of any ſuch Right. *Spinoſa*'s Concluſion therefore is falſe, *Amongſt Men, as they are conſider'd to live only under the Command of Reaſon; he who is not come to a Knowledge of Reaſon, or who has not yet acquir'd a Habit of Virtue, doth as well by the higheſt Right live according to the Laws of his Appetite, as he who directs his Life by the Laws of Reaſon. That is, as a wiſe Man has the higheſt Right to all things which Reaſon ſuggeſts, or according to the rational Laws of living; ſo an ignorant and ſenſeleſs Perſon has the higheſt Right to all things which his Appetite affects, or according to the Laws of living by Appetite.* But now the natural

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[3] In Reality, the meer phyſical Power of doing a Thing, does not prove that we are indiſpenſibly obliged to do it, nor that we can lawfully do it, if we will; at leaſt, it ſuppoſes what is in Queſtion, that a phyſical and moral Power are one and the ſame Thing.

[4] We may ſee plainly enough that *Spinoſa* does not acknowledge a GOD, or ſuch an intelligent Being as is altogether perfect. What he calls God is nothing but the World, which he ſuppoſes eternal, and not created.

[5] See §. v. below, and the following Chapter, where Society is treated of.

[6] This is ſo true, that Mr. *Hobbes*, whoſe Notions, at the Bottom, are not much diſtant from *Spinoſa*'s, makes a Neceſſity to come to ſome Agreements, which according to him are the Foundation of Juſtice, upon which it could not be poſſible to preſerve ourſelves, by making uſe of that boundleſs Right about every thing, and againſt all Men. See his Book *de Cive*, Ch. i. §. 11. 13. and Ch. ii. §. 3. *Spinoſa* himſelf, as our Author obſerves at the End of this Paragraph, aſſerts, *That it is more advantagious to follow the Maxims of Reaſon, than the Deſires of Nature only.*

State or the Command and Dominion of Nature, ſuppoſes Reaſon in Men, nor are other Laws preſcrib'd to the Sagacious, and others to the Simple. Thoſe who are govern'd purely by Appetite, are Subjects incapable of Right or Law. But when the Appetite in Men proceeds contrary to their Reaſon, they are ſo far from living by any Right, or by any Laws, that they are continually guilty of tranſgreſſing the Laws. The Corollaries which he deduces are no truer than the foregoing Propoſitions. *The natural Right of each Man is not determin'd by ſound Reaſon, but by Deſire and by Power. For all Men are not naturally determin'd to operate according to the Rules and the Laws of Reaſon; but on the contrary, all are born ignorant of all Things, and before they can attain to know the true and rational Way of Living, and acquire the Habit of Virtue, a great Part of their Age* (*altho' they have been well educated*) *paſſes away; and yet notwithſtanding all this, they are in the mean time bound to live, and to preſerve themſelves to the beſt of their Power; and this Obligation is fulfilled by obeying the ſole Motion of their Appetite, ſince Nature has yet given them no other Guide, denying them the actual Power of living by ſound Reaſon; and therefore they are no more oblig'd to live by the Laws of true Senſe and Judgment, than a Cat is oblig'd to live by ſuch Laws as are proper only to the Nature of a Lion.* For to make a Man oblig'd to live according to Reaſon, it is not neceſſary that he ſhould be *naturally determin'd* to act according to the Laws of Reaſon, that is, that he ſhould not be able to act otherwiſe; but it is ſufficient, that he has ſo much natural Power, as may enable him to abſtain from bringing Injuries and Troubles on other Men; than which nothing in the World can be more eaſy. Neither is the Manner and Method of preſerving himſelf ſo very difficult and laborious, as to make him ſtand in need of a Right to all Things. And then from him who through Defect of Age is yet in abſolute Ignorance, none can require a more accurate Direction of his Proceedings, than is conſiſtent with his low Capacity, and his ſmall and feeble Efforts of Reaſon. But that what is done in this State of Simplicity may not prove very hurtful or troubleſome to others, Nature has carefully provided; by giving it ſo little Strength of its own, and by commending the Care and Guidance of it to thoſe of maturer Years. The following Inference is as falſe as the former. *Whatſoever therefore any one, conſider'd only under the Command and Guidance of Nature, ſhall judge convenient for himſelf, either by the Direction of Reaſon, or by the Impulſe of his Paſſions, this by the higheſt natural Right he may deſire, and may ſeize upon by whatever means he can, whether by Force, or by Fraud, or by Entreaty, or the eaſieſt way he can think of; and conſequently he may reckon every one his Enemy, who would hinder him from ſatisfying his Inclinations.* As alſo this, *Whence it follows, that the Right and the Inſtitution of Nature, under which all are Born, and the moſt part Live, is averſe to nothing, beſides that which none can deſire, and which none can hinder; not to Contentions, not to Hatred, not to Anger, not to Deceit, nor abſolutely to any thing which it's poſſible for the Appetite to purſue.* This Aſſertion, if applied to Men, is manifeſtly falſe and abſurd. But if it includes all living Creatures, and be meant in this Senſe, that there is no Way or Manner of Self-preſervation, which ſome animate Being doth not follow and make Uſe of, out of natural Inſtinct, then it is nothing to the Purpoſe; ſince the only Queſtion is, whether Men have ſuch a Right to all Things, as they may uſe againſt all other Men. But that *Spinoſa* intended the latter Senſe, is evident from what follows, *And no wonder, for Nature is not reſtrain'd to the Laws of human Reaſon, which concern only the true Profit and Preſervation of Men; but comprehends an Infinity of other Things, which fall under the univerſal Order of all Nature, of which Man is but a little Part.* He afterwards confeſſes, that it is more convenient for Men to live according to the Laws and infallible Dictates of Reaſon, which point out their true Intereſt and Advantage. But then what occaſion was there for the feigning of ſuch a Right, as Man, if he intended to be ſafe, muſt neceſſarily relinquiſh; while other Animals, which exerciſe a kind of Right to all things, lie under no neceſſity of quitting it for their own Preſervation? Neither indeed, could ſuch an abſurd Abdication be neceſſary for Man, upon ſuppoſal, that Nature had inveſted him with the ſame Right.

IV. We are ready to acknowledge it for a moſt certain Truth, that all Mankind did never exiſt together in a mere natural State: Inaſmuch as upon the divine Authority of the Scriptures, we believe all human Race to have proceeded from one original Pair. Now it's plain that *Eve* was ſubject to *Adam*, *Gen.* iii. 16. and thoſe who were born of theſe primitive Parents, and ſo on, did immediately fall under paternal Authority, and under Family Government. But ſuch a State might have befallen Mankind, if, as ſome of the Heathens believ'd, they had, in the beginning of their Being, leapt out of the Earth like Frogs, or had come up from Seed, like *Cadmus*'s human Crop, *Ovid. Metamorph. Lib.* iii. *ver.* 122, 123. Which Fable is, methinks, a very exact Repreſentation of that State of Nature, and of that War of all Men againſt all, which Mr. *Hobbes* would introduce; where

> ——————— *furit omnis turba, ſuoq;*
> *Marte cadunt ſubiti per mutua vulnera fratres.*

> Rage hurries all; and in ſo blind a Fray,
> The ſudden Brothers fall a mutual Prey.

A State of Nature then did never naturally exiſt, unleſs qualified, and, as it were, in Part; namely, while ſome Party of Men join'd with ſome more in a civil Body, or in ſome Confederacy like that; but ſtill retain'd a natural Liberty againſt all others. (Tho' it muſt be own'd that the more and the ſmaller thoſe Societies were, into which Men at firſt divided, the nearer Approach was made to a meer natural State. [a] Thus

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§. iv. [a] The three Sentences following, in my Opinion, are unfitly placed, and may better be ranged thus, Thus in the primitive Age —— Liberty, And when of Old Mankind —— among Men, Therefore not the firſt Mortals, &c. Let the Reader judge.

of Old, when Mankind were parted into diſtinct Families, and now ſince they are fallen [3] into ſeparate Communities, thoſe might have been then, and may now be ſaid to live mutually in a State of Nature, neither of whom obey the others, and who do not acknowledge any common Maſter among Men. Thus in the primitive Age, when Brethren left their Father's Houſe, and ſet up particular Families for themſelves independent from any other, then they began to live in a natural State or Liberty. Therefore not the firſt Mortals, but their Offſpring, did actually exiſt in ſuch a State. Now a State of Nature thus temper'd and qualified, is attended with none of thoſe Inconveniences which follow a meer natural Liberty, eſpecially if we apply it to publick Communities: And beſides, it paſſes for the higheſt Pitch of Honour amongſt Mortals, by Virtue of the united Strength of the whole publick Body, to acknowledge no earthly Superior. So that Commonwealths, and the Governors of them, may fairly declare themſelves to be in a State of natural Liberty, while they are furniſh'd with ſufficient Strength to ſecure the Exerciſe of that grand Privilege. Whereas, when Men live ſingly in a meer natural State, it is no manner of Pleaſure or Advantage to them to own no Superior; inaſmuch as upon account of their own ſmall Force and Ability, their Safety muſt needs be in perpetual Doubt and Danger.

There are ſome indeed who maintain with great Eagerneſs, that ſuch a natural State either doth not at all exiſt, or is not rightly call'd natural; and they form their Argument in the following Manner. Nature inclines Men to an orderly Society or Fellowſhip; now there being no ſuch thing as Order without Government, it follows that there can be no Society without Government, and that therefore Government or Command ought rather to be ſtil'd Natural than Liberty. To ſtrengthen this Aſſertion, they alledge the Authority of *Cicero*, [4] *Nothing* (ſays he, *De Leg. Lib.* iii. *Ch.* i.) *is ſo agreeable to the Right and to the Condition of Nature, as Government: Without which no Houſe, no State, no Nation, not human Race in General, not the univerſal Nature of Things, not the World it ſelf could ſtand. For the World obeys GOD, and the Seas and the Earth obey the ſuperior Frame of the World, and the Life of Man is led in Conformity to the High and the Sovereign Law.* Hence they bring a general Accuſation againſt Mr. *Hobbes*, for feigning ſuch a State under the Name of Natural, as is unworthy of human Nature, and more agreeable to that of Beaſts, who are ignorant of Reaſon and of Speech. For that all Men have a Liberty of doing, of deſiring, of poſſeſſing all Things, no Reaſon, no Nature truly and rightly judging can adviſe. Sueh Inclinations may indeed flow from depraved Nature, but cannot be the Dictates of right Reaſon, which by deſiring Society, doth at the ſame time deſire an Order in Society, and by that means cuts off all ſuch licentious and irregular Motions. For what Order can be conceiv'd without tending to ſome firſt and principal Point? This firſt and principal Point muſt be Government, or the Sovereign Power in Society, without Regard to which, no Society can be deſir'd by thinking and ſpeaking Beings. Nature itſelf inſtructs us, That Government is eſſential to all Society, but that ſuch a Liberty as excludes all Government, tends to unnatural Confuſion. Add. *Bœcler. ad Grot. Proleg.*

What may be return'd in anſwer to all this Proceſs of Argument, is clear from the preceeding Doctrine. A meer natural State is a Repreſentation of Mens Condition abſtracting from all human Inſtitution; but doth not ſuppoſe that Nature intended Man for ſuch a Way of Life [5]. For by the ſame Allowance of Expreſſion, an entire Ignorance of all things may be ſaid to be natural to Man, or to be born with him; without implying any ſuch thing as that it ſhould be repugnant to Nature for Men to acquire very high Degrees of Knowledge. Beſides, we have been ſo cautious as to attribute no ſuch natural Liberty to Man, as ſhall be exempt from the Obligation of natural Law, or of divine Commands. But ſuch a Liberty as excludes all human Sovereignty and Superiority cannot be ſaid to contradict Nature, any more than it can be ſaid to reach as far as Infinite it ſelf. Government indeed is Natural; that is, it was the Deſign of Nature that Men ſhould conſtitute Governments amongſt themſelves. But this doth not make it e'er the leſs Natural, that he who himſelf bears the ſupreme Government and Command amongſt Men, ſhould himſelf be exempt from all other human Command, and in that Senſe ſhould enjoy a natural Liberty: Unleſs in the ſame Order, we can fanſy ſomewhat *before* the *firſt*, ſomewhat ſuperior to the Supreme. Upon the ſame Account it is in general very agreeable to Nature, that he who hath no Lord or Maſter ſhould govern himſelf and his Actions by the Guidance of his private Reaſon.

V. There is a Diſpute of much greater Conſequence, whether this natural State, in Regard to other Men, bears the Semblance of War or of Peace: Or, which comes to the ſame Thing, whether they who live in a State of Nature, that is, who do neither obey one another nor own a common Lord, ought to be reckon'd Enemies amongſt themſelves, or quiet and peaceful Friends? And here our firſt and chief Buſineſs muſt be to examine the Opinion of Mr. *Hobbes*, who as he calls his meer natural State not a ſingle War, but a War of all Men againſt all, ſo he maintains, that when ſome Men have agreed to enter into Society, they immediately quit their hoſtile State in Regard to one another, but ſtill continue againſt all the reſt of the World. Thus in his Book *de Cine*, *Ch.* ix. §. 3. *Every Man is an Enemy to every Man whom he neither ſerves nor obeys.* (He ought to have added, *and with whom he has no common Maſter.*) And again, *Ch.* xiii. §. 7. *The State of Commonwealths amongſt themſelves is Natural, that is, Hoſtile. And tho' they ceaſe to fight, yet this Intermiſſion muſt not be call'd a Peace,*

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[3] See *Plato* concerning this whole Matter, *De Legib. Lib.* 3. a good way from the Beginning. *P.* 680, 681. *Tom.* ii. *Ed. Steph.* and *Ariſtotle*'s *Politicks*, *Lib.* i. *Ch.* ii. p. 297. Edit. *Pariſ.*

[4] He means by it the Law. Theſe are his Words, *Nihil porrò tam aptum eſt ad jus, conditionemque naturæ (quod cùm dico, legem à me dici, & nihil aliud intelligi volo) quàm imperium, ſine quo nec domus ulla, nec civitas, nec gens, nec hominum univerſum genus ſtare, nec rerum natura omnis, nec ipſe mundus poteſt. Nam & hic Deo paret, & huic obediunt maria, terræque, & hominum vita juſſis ſupremæ legis obtemperat.*

[5] See *Ch.* iii. §. 13, and 16, following, at the beginning.

but a Breathing-time, during which each Enemy, obſerving the Motions and the Countenance of the other, rates his Security, not by Covenants, but by the Strength and Deſigns of his Adverſary. (He ſhould have added, *and by his own Force* [a].) He adds, in his *Leviathan*, Ch. xiii. *That War conſiſts not in Battle only, or the Act of Fighting, but in a Tract of Time wherein the Will to contend in Battle is ſufficiently known: And* that *therefore the Notion of* Time *is to be conſider'd in the Nature of War as in the Nature of Weather. For as the foul Weather lieth not in a Shower or two of Rain, but in an Inclination thereto for many Days together: So the Nature of War conſiſts not in actual Fighting; but in the known Diſpoſition thereto, during all the Time there is no Aſſurance to the contrary.* Nor indeed was Mr. *Hobbes* the firſt Inventor of theſe Notions; for we meet with ſomewhat much of the ſame Strain in *Plato*'s Firſt Book of Laws; where *Clinias*, a *Cretan*, is giving the Reaſons why the Law-giver of that Country introduc'd a great Number of Ordinances in Reference to military Affairs, he concludes, [1] *By which Conduct he ſeems to me to have accus'd many Men of extreme Folly and Ignorance, in their not being ſenſible, that all Cities are in a perpetual War with all. And that which we call Peace is no more than a bare Name, while in Reality Nature has ſet all Communities in an unproclaim'd War againſt one another.*

We may obſerve, by the Way, that ſome Authors have given a very unaccurate Explication of this great Queſtion; while they tell us, that by a natural State is underſtood that Condition by which we are conceiv'd to live ſingly, or out of Society; and that this is a State of War, that is, of Inclination to poſſeſs what another hath, and to drive the Owner from it; ſo that their whole Meaning amounts to this, that if Men liv'd without all Society, they would be engag'd in a perpetual Quarrel; or, if Men did not lead a Social Life, they would continue in a State of endleſs Diſcord. But now here's a great Impropriety committed, the oppoſing a State of Nature to a ſocial Life; for thoſe who live in a State of Nature both may, and ought, and frequently do, conſent to live Socially.

But ſince, upon this Quſtion rightly ſtated, are founded almoſt all the Pretenſions and all the Debates which can fall out between the Governors of one Commonwealth, and their Neighbours of other Countries or Dominions; we imagine it will not be loſt Labour, if we proceed to a cloſer and a ſtricter Diſcuſſion of the Arguments alledg'd on either hand.

VI. That the State of Nature then is a State of War, Mr. *Hobbes* endeavours in this Manner to demonſtrate. The Reaſon why Man is continually in Fear of Man, and conſequently in a State of War with him, he draws from this Principle, that Men have both the Power and the Will of hurting one another. That they have the Power of hurting one another, he ſhews by obſerving that Men of ripe and ſettled Age, are commonly equal in Strength. For tho' one may frequently have the Advantage of another in bodily Force, yet 'tis poſſible that the Weakeſt may kill the Strongeſt, either by ſecret Machination, or by Confederacy with others; in as much as the ſtouteſt Mortal has his vital Parts no better enſur'd from extreme Violence, than the moſt Puny and [1] Impotent Wretch [b]. Neither is it probable that a larger Degree of natural Cunning (in which, of two Men one commonly exceeds the other) ſhould be able to ſecure a Man's Safety, while he has no Guard and no Protector but himſelf. Farther, ſince the greateſt Evil that Men can bring upon one another is Death, and ſince this may as well be brought on the Stout by the Weakly, as on the Weakly by the Stout, he ſays it follows that thoſe who can bring on one another the greateſt Evil, muſt, in Effect, be of equal Power and Strength. As to the Will of hurting others, this, he ſays, is in ſome Men out of Neceſſity, and in ſome out of Luſt and Pleaſure. For while ſome are for living as they liſt, for arrogating to themſelves undue Honours, and for petulantly ſetting on their quiet Neighbours, it's impoſſible but that thoſe Neighbours, how modeſt ſoever they may be, and how willing ſoever to allow others an equal Liberty with themſelves, muſt neceſſarily defend themſelves againſt the Violence of their Aſſailants [c]: Beſides, he tells us, 'that the Will of

[a] *Juſt as* Oppian *deſcribes the State of Fiſhes,* Halieut. Lib. ii.

In mutual War they ſwim, and mutual Hate,
The Weak the Strong, the Smaller feed the Great:
Deſtructive Rage boils in the reſtleſs Flood;
Each frights and fears, purſues and is purſu'd.
And hence the ſcaly Tribes, with wakeful Eyes,
Still watch, and live, and die upon Surprize.
Unfixt, unwearied, all their Age they ſtray,
In Hopes, or Fears, to find, or prove a Prey.

[b] *Seneca de Ira. Lib.* i. *Ch.* iii. *There is no one ſo low or contemptible, who may not hope to wreak his Revenge on the greateſt Perſon. We are all ſtrong enough to do Miſchief.*

[c] *It is very probable there may be ſome Perſon like* Achilles,

Jura negat ſibi nata, nihil non arrogat armis.

Scorning all Judges and all Law but Arms.

Or like thoſe whom Manilius *deſcribes,*

Nec pacem a bello, civem diſcernit ab hoſte,
Ipſe ſibi lex eſt, & qua fert cunque libido,
Præcipitat vires: laus eſt contendere cunctis.

Nulla quies placet, in nullo ſunt otia fructu,
Sed populum, turbamq; petit, rerumq; tumultus,
Seditio, clamorq; juvat. ———

Who make no Difference between War and Peace,
But Friends and Foes with equal Fury ſeize.
They every Thing to wild Condition draw;
Their Will their Ruler, and their Sword their Law.
They ſcorn that Reſt which private Minds enjoy,
But fawn upon the Crowd, and court Employ,
Love Noiſe, and Stirs, and Tumults——— M. Creech.

§. v. [1] *Plato*'s Words are, Ἄνοιαν δή μοι δοκεῖ καταγνῶναι τ῀ πολλῶν, ὡς ȣ̓ μανθανόντων, ὅτι πόλεμος ἀεὶ πᾶσι διὰ βίȣ ξυνεχὴς ἐςὶ πρὸς ἁπάσας τὰς πόλεις———ἣν γὰρ καλȣ̃σι οἱ πλεῖςοι τῶν ἀνθρώπων εἰρήνην, τȣ̃τ' εἶναι μόνον ὄνομα, τῷ δ' ἔργῳ πάσαις πρὸς πάσας τὰς πόλεις ἀεὶ πόλεμον ἀκήρυκτον κατὰ φύσιν εἶναι· *De legibus. Lib.* i. *princ.*

§. vi. [1] *Seneca*'s Words are, *Deinde nemo tam humilis eſt, qui pœnam vel ſummi hominis ſperare non poſſit. Ad nocendum potentes ſumus.* We may add what *Q. Curtius* delivers in a Speech to the *Scythians, Leo quoque aliquando minimarum avium pabulum fuit. Nihil tam firmum eſt, cui periculam non ſit etiam ab invalido,* Lib. vii. Ch. viii. Num. 15.

hurting ariſes frequently from the Contention of Wit, while every Man thinks himſelf wiſer than his Fellows, and yet at the ſame time cannot bear the ſame Arrogance in others. Hence, he ſays, it comes to paſs that it is not only odious to contradict, but likewiſe not to conſent: For not to conſent to another in a Thing, is tacitly to accuſe him of Error in that Matter; and to diſſent in very many Things, is as much as to count him a Fool, in not being able to apprehend ſuch an evident Truth, as every one takes his own Opinion to be. Hence ſince all Pleaſure and Satisfaction of Mind conſiſts in this, that one be able to prefer one's ſelf to others, 'tis impoſſible but that now and then ſome Signs of Contempt towards others will break out; than which no Affront is more provoking to human Minds [a]. The laſt and moſt frequent Cauſe of a mutual Deſire of hurting, ariſes, according to *Hobbes*, from hence, that [b] many deſire one and the ſame Thing at once, which frequently they neither can nor will enjoy in common, nor yet divide: From whence it follows, that it muſt be given to the ſtronger; and who is the ſtronger, can only be known by Fighting [c]. Upon all theſe Accounts he declares it to be impoſſible but that Men ſhould live in perpetual Fear and Suſpicion of one another. And that ſince not only natural Paſſion but Reaſon too, recommends to every Man his own Safety in the higheſt Manner, and indulges him in the Uſe of all Means for the attaining of that End, the Fitneſs of which, no Superior being yet admitted, is to be determin'd by each Man's particular Judgment; hence there muſt neceſſarily ariſe a Deſire rather of preventing others, than of yielding to their Invaſion: From whence there will at laſt reſult a State of infinite War, of all Men againſt all; the Conſequence of which is, that it ſhall be lawful for any Man to do to any Man, either ſecretly or openly, whatever he ſhall think expedient for his own Affairs: In doing which, altho' his Reaſon ſhould ſometimes fail him, yet he would not offer an Injury to any Body, ſince Juſtice and Injuſtice have nothing to do but with Societies and eſtabliſh'd Corporations: Tho' a Man may indeed ſin againſt Reaſon, by uſing unfit Means for his own Preſervation.

VII. Theſe Notions are in ſome Meaſure tolerable, if propos'd only by way of Hypotheſis. And that *Hobbes* deſign'd them for nothing more, we may be apt to conclude from thoſe Words in the eighth Chapter of his Book *De Cive*; *But to return again to a natural State, and to conſider Men as if they were juſt now riſen out of the Earth like a Muſhrome, and of full Stature without any manner of Obligation to one another.* Yet in the 13th Chapter of the ſame Book, and frequently in other Places, he calls the State of publick Bodies, not by way of Suppoſition, but ſeriouſly and abſolutely, *natural*, that is, as he explains it, *hoſtile.* Which ſeeming Contrariety we may do him the Juſtice thus to reconcile; it ſhall be pure Hypotheſis, that all Men did at any time live together in ſuch a State of Nature, as they would have done if they had riſen ſuddenly in a great Multitude from the Earth: But what he ſeriouſly maintains ſhall be only this, that ſuch a natural State doth really exiſt amongſt ſome Men; that is, amongſt ſuch as are neither ſubject one to the other, nor to a common Maſter, as is now the Caſe of all eſtabliſh'd Communities. And this indeed is his own Judgment, as he has moderated it in his *Leviathan. Tho'* (ſays he) *there never had been any Time, wherein particular Men were in a Condition of War one againſt another; yet in all Times, Kings and Perſons of Sovereign Authority, becauſe of their Independency, are in continual Jealouſies, and in the State and Poſture of Gladiators,* &c.

But the contrary Opinion ſeems more reaſonable, as what is clearly favour'd by the Origin of Mankind, as related in the infallible Records of holy Scripture; which repreſent the natural State of Man, not hoſtile, but peaceful, and ſhew that Men in their true Condition are rather hearty Friends than ſpightful Foes. From theſe ſacred Hiſtories we learn, that the firſt Man being by divine Power produc'd out of the Earth, a Companion was ſoon join'd to him different in Sex, whoſe Subſtance was therefore taken out of him, to engage him immediately in the deepeſt *Love* and Affection for her, as being *Bone of his Bone, and Fleſh of his Fleſh*. This primitive and original Couple God Almighty was pleas'd to unite in the moſt ſolemn Manner, and with the moſt ſacred Tie; and ſince from them all human Race orderly deſcended, we may conceive Mankind mutually engag'd, not only by ſuch a vulgar Friendſhip as might reſult from Similitude of Nature [a], but by ſuch a tender Affection as endears Perſons allied by a Nearneſs of Race and of Blood: Altho' the Senſe of this kind Paſſion may be almoſt worn off amongſt the Deſcendents, by Reaſon of their great Diſtance from the common Stock. Now if any Man ſhould pretend to diveſt himſelf of this Affection, and entertain a Temper of Hoſtility againſt all others, he ought to be cenſur'd as a Revolter from the primitive and natural State of Mankind. Nor will it ſignify much here to object, that even from this Account of Matters it follows, that the natural State of Men is a State of War; in as much as if Societies were therefore inſtituted at the Beginning of the World, to make Men [1] live peaceably together, it muſt be true on the contrary Side, that without Societies, Men would not have liv'd peaceably, and that hence aroſe the Neceſſity of making Societies be born with them. To which we reply that our preſent Enquiries are not made after ſuch a natural State, as may be conceiv'd by the Help of Abſtraction, but after ſuch an one as really has been and is now in the World. And that therefore, ſince the firſt Mortals were plac'd in ſuch a State as inſpir'd them with Love, and not with Enmity, and ſince from this State all the reſt of Mankind deſcended, it is plain if Men were mindful of their firſt Original, they might be rather accounted Friends than Foes. Nor were Societies therefore eſtabliſh'd amongſt Men from the Beginning, to hinder a natural State from taking Place, but becauſe human Kind could not otherwiſe have been propagated and preſerv'd. But a State of Nature did then ariſe, when Men being largely multiplied could no longer be contain'd in one Society [2]. Hence it's Nonſenſe to ſay that without the Help of a ſocial Condition, Mankind at the Beginning of their Being would have liv'd like Enemies one to another, unleſs we firſt ſuppoſe, that in the Beginning of Things a Multitude of Men ſtarted up together, without being beholden to one another for their Production. *Ariſtot. Rhetor. Lib.* i. *Ch.* xi [3]. *Becauſe whatever is according to Nature, is pleaſant and agreeable, and becauſe thoſe Things which are allied in their Original have a natural Reſemblance to each other, all Things that are thus related, and thus alike, are, commonly ſpeaking, as mutually delightful as Man to Man.* Cicero De Fin. Lib. iii. Ch. xix. *Nature hath given Men an univerſal Recommendation to each other; on which account, every Man owes ſo much to his Neighbour barely for the ſake of being a Man like himſelf, as ſhould hinder him from ſhewing any Unkindneſs or Strangeneſs.* Idem De Nat. Deor. Lib. i. Ch. xxvii. *Do you not ſee how full Nature is of Charms and Engagements, as if ſhe intended to act the kind Procureſs to herſelf? Do you imagine there is any Monſter of Land or Sea, which is not delighted with the Fellow-Monſter of its own Race and Shape? And is it any Wonder then, that ſhe ſhould have inſtill'd this Principle into Man* (the moſt noble Member of her Family) *to think nothing ſo beautiful as Man?* Quinctil. Declam. v. *There is a publick*, or univerſal, *Kindred amongſt Men, derived from Nature their common Mother.* Add. M. Antonin. Lib. ix. §. 9. Where he proſecutes at large the Argument of the *Likeneſs of Nature, inclining Men to Unity and Love.* Add. & D. *Cumberland*, De L. N. Ch. ii. §. 18. We muſt interpret only of *particular* Love and Hatred that Saying of *Beliſarius* in *Procop. Hiſt. Vandal. Lib.* ii. Ch. xv. *By Nature Men have neither mutual Affection nor mutual Averſion. But their particular Actions, either by their Agreeableneſs inviting our Company and Friendſhip, or by their contrary Diſpoſitions provoking our Hoſtility, render ſome the Objects of our Love, others of our Hate.*

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[a] *Cicero* Off. i. *Ch.* xxvii. *Contraque falli, errare, labi, decipi tam dedecet, quàm delirare, & mente eſſe captum. To be miſtaken, deceiv'd, or put upon, is reckon'd no leſs Diſgrace, than to doat, or to be out of one's Wits.* Hora. Ep. i. Lib. ii.

Vel quia nil rectum, niſi quod placuit ſibi, ducunt;
Vel quia turpe putant, parere minoribus, & quæ
Imberbes didicere, ſenes perdenda fateri.

Or making their own Taſte the Rule of Wit;
Or to their Juniors ſcorning to ſubmit;
That what they *beardleſs* learnt, *All Beard* they ſhould forget.

Juvenal. Sat. xv.

——— ——— ——— *Summus utrinque*
Inde furor vulgo, quod numina vicinorum
Odit uterque locus, quia ſolos credit habendos
Eſſe Deos quos ipſe colit.

In furious Anger they each other mock;
Each calls the other's God a ſenſeleſs Stock,
His own divine, tho' from the ſelf-ſame Block.
One Carver fram'd them ——— Mr. TATE.

[b] *Cicero* Off. I. *Nam quicquid ejuſmodi eſt, in quo non poſſint plures excellere, in eo fit plerumque tanta contentio, ut difficillimum ſit, ſanctam ſervare ſocietatem. Whatever is of that Nature, as not to admit more than one to excel in it at the ſame Time, uſually proveth the Subject of ſo much Strife and Contention, as exceedingly to endanger the ſacred Peace of Society. Sit iſta in Græcorum levitate perverſitas, qui maledictis inſectantur eos à quibus de veritate diſſentiunt. Cicero de fin. bon. & mal. Lib.* ii. *Chap.* xxv. *It is a Perverſeneſs* not peculiar to *the Grecian Levity, to reproach thoſe from whom they differ in Opinion.* See alſo *Charron of Wiſdom, Lib.* i. *Chap.* vii. Edit. *Bourd.*

[c] Thus *Socrates* diſcourſeth, *Xenophon. Apomnem. Lib.* i. Φύσει γὰρ ἔχουσιν οἱ ἄνθρωποι τὰ μὲν φιλικὰ (δέονται γὰρ ἀλλήλων, ϗ ἐλεοῦσι, ϗ συνεργοῦντες ὠφελοῦσι, ϗ τοῦτο συνιέντες χάριν ἔχουσιν ἀλλήλοις) τάτε πολεμικά, τάτε γὰρ αὐτὰ καλὰ ϗ ἡδέα νομίζοντες, ὑπὲρ τούτων μάχονται, ϗ διχογνωμονοῦντες ἐναντιοῦνται, πολεμικὸν δὲ ϗ ἔρις ϗ ὀργή. ϗ δυσμενὴς μὲν ὁ τοῦ πλεονεκτεῖν ἔρως, μισητὸς δὲ ὁ φθόνος. *Men have partly a natural Propenſion to Friendſhip. For they ſtand in need of each other's Aſſiſtance, and are comforted with each other's Pity, and make the Return of mutual Thanks, upon receiving mutual Helps and Favours. And partly they are inclin'd to Enmity; for taking a Fancy to the ſame Things, as good and pleaſant, they muſt needs fall into Quarrel and Oppoſition about them. Now Anger and Contention are the proper Marks and Characters of Enemies. And then Envy, and Suſpicion, and Covetouſneſs never fail to produce the moſt violent Hatred.* Seneca de Ira Lib. iii. Ch. xxxiv. *The deſiring the ſame Thing, which ought to be the Band of Love and Friendſhip, is often the Cauſe of Hatred and Sedition. For theſe which they affect being perhaps ſmall, and not to be poſſeſs'd by one, unleſs he can take them forcibly from another, adminiſter Occaſion to fighting and reviling. Add.* Charron de la Sageſſe. Lib. i. Ch. xxxix. N. 8.

VIII. As to Mr. *Hobbes*'s Reaſons, they are eaſily anſwer'd. In the firſt Place, thoſe cannot immediately hurt one another, who are divided by Diſtance of Place; for he who is abſent cannot hurt me, except by ſome Body elſe who is preſent, and my Poſſeſſions cannot be deſtroyed unleſs by one upon the Spot: Therefore, ſince thoſe who live ſeparately, or at a Diſtance from one another, can offer no mutual Hurt ſo long as they continue thus diſtant, it doth not appear why ſuch Men ſhould not rather be reckon'd Friends than Enemies. For if any Perſon is more inclin'd to call them *Neuters*, he ought to underſtand, that the Term of Friendſhip may be there fairly applied, where there is neither Will nor Power to injure [1]. And then as for that Equality of Strength which *Hobbes* aſſerts, it is certainly more [a] [2] fit to reſtrain, than to provoke a Deſire of hurting. For no Man in his Wits is very fond of coming to an Encounter with his Equal, unleſs he is either driven upon it by Neceſſity, or by the Fairneſs of the Opportunity put in Hopes of Succeſs. Otherwiſe, to engage in an unneceſſary Fight, where the Blows one gives will be return'd with no leſs Force, and where the Event is meerly dubious; is no better than Foolhardineſs. For when two equal Combatants are ſo far engag'd as to put both their Lives in Danger, neither of them can poſſibly gain ſo much by the Victory, as he muſt loſe who is kill'd in the Fight; nor is it ſo much to have taken away another's Life, as to have hazarded one's own. For the Danger to which I expoſe my Life, takes from me more Good, than can poſſibly accrue to me from my Enemy's Life being in the ſame Danger; nor is his Safety increas'd upon account [3] of the Uncertainty of mine: But each Party is a Loſer, and yet the Loſs of neither turns to the Advantage of the other.

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[a] And ſuch is that ſpoken of in *Lib.* iii. *D. De Juſtit. & Jure.*

[b] *This is contrary to* Ariſtotle's *Notion of Friendſhip, who makes it to conſiſt, not only in doing no Injury to others, but in the real and outward Performance of Kindneſs towards them.*

§. VII. [1] The Original has it, *nè illi pacatè viverent, that they might not live in Peace.* A groſs Contradiction, tho' it be continued in all the Editions, even that of Mr. *Hertius* in 1706, and therefore I have changed the Words, and rendred them, *That they might not live in perpetual Diſcord*, as the *Engliſh* has alſo.

[2] Tradition has preſerved ſome plain Footſteps of it among the *Pagans.* See *Grot. de Ver. Rel. Chriſtianæ Lib.* i. §. 16. and the Interpreters upon *Acts* xvii. 26.

[3] The *Greek* of *Ariſtotle* is, Καὶ ἐπεὶ τὸ κατὰ φύσιν ἡδὺ, τὰ συγγενῆ δὲ κατὰ φύσιν ἀλλήλοις ἐστὶν, ἅπαντα τὰ συγγενῆ καὶ ὅμοια, ἡδέα, ὡς ἐπὶ τὸ πολὺ, οἷον ἄνθρωπος ἀνθρώπῳ, καὶ ἵππος ἵππῳ, καὶ νέος νέῳ—— Cicero's Words are, *Ex hoc naſcitur, ut etiam communis hominum inter homines naturalis ſit commendatio, ut oporteat hominem ab homine, ob id ipſum quod homo ſit, non alienum videri.* And again the ſame Author ſays, *Non vides quam blanda conciliatrix, & quaſi ſui ſit lena Natura? An putas ullam eſſe terra marique belluam, quæ non ſui generis belluâ maximè delectetur?* —— *Quid igitur mirum ſi hoc eodem modo homini natura præſcripſit, ut nihil pulcrius, quàm hominem putaret, eam eſſe cauſam quod Deos hominum ſimiles putaremus?* *Beliſarius*'s Words in *Procopius* are, Φύσει μὲν γὰρ, οὐδεὶς τῶν πάντων ἀνθρώπων οἰκείως ἂν ἢ ἐναντίως ἀλλήλοις ἔχοιεν, αἱ δὲ πράξεις ἑκάστων, ἢ τῷ ὁμοτρόπῳ ἐς ξυμμαχίαν συνάπτουσαι, ἢ τῷ διαλλάσσοντι τῆς γνώμης ἐς τὸ δυσμενὲς διακρίνουσαι, φίλους (ἂν οὕτως τύχοι) ἢ πολεμίους ἀλλήλους ποιοῦσιν.

§. VIII. [1] The Original imports, Word for Word, by the Will and Power not to hurt; but ſince our Author treats here of ſuch Men as are not in a Condition to do Injuries one to another, tho' they have a Deſire to do it, I believe that this Sentence may be better tranſlated, *A ſimple Want, if a Deſire to hurt, joined with an Impoſſibility to do it actually, may paſs for Friendſhip.*

Beſides, the Cauſes alledg'd by Mr. *Hobbes*, why Men muſt have a mutual Deſire of hurting, are only particular, and therefore cannot infer a Neceſſity of an univerſal War of all Men againſt all, but only a War of ſome particular Men againſt ſome others. And then it doth not always happen, as he would ſuppoſe, that modeſt and civil Men ſhould have a more fierce and inſolent Generation living near them; or if the Caſe be ſo, yet it is not neceſſary that the latter ſhould be in a Humour of invading the former. *Contention of Wit* prevails only amongſt Men exalted above the ordinary Level; the greater and vulgar Part of Mankind have none, or but very ſlight Touches of that Diſeaſe. Nor has the All-wiſe Creator been ſo unkind, or ſo ſparing in his Proviſions for human Race, that two Perſons muſt always lay Claim to the ſame Thing. Farther, the general Wickedneſs of Men may have ſo much Effect as to hinder any one from raſhly thruſting, or offering (as it were) his bare Breaſt to another, eſpecially if he has not a Knowledge of him [b] [4]. But, that this Suſpicion or Diffidence ſhould proceed ſo far as to the ſeizing, or the oppreſſing another, unleſs he hath declar'd a particular Deſire and Deſign to hurt us, no Man of Senſe will admit [5]. *Cicero* (*Off.* i. 7.) rightly calls it, *an Injury out of Fear, when he that is contriving to do another Man Miſchief, doth it by way of Prevention, ſuſpecting he ſhould otherwiſe ſuffer Hurt from the Quarter where he now offers it. Hobbes* is the more inexcuſable for maintaining that his natural State cannot be remov'd and broken up, but by letting in the Sovereignty of another, and by uniting in the ſame Commonwealth: For that thoſe Commonwealths, how diſtinct ſoever, which are allied by Friendſhip and by Leagues, ſhould ſtill continue in a State of mutual War, is a Contradiction evident to the common Senſe of Mankind. Nor ſhould we (as he would have us) diſcard all Peace, as not deſerving that Name, which is not ſufficiently firm and certain, any more than we ſhould forbear ſaying, that ſuch a Man is in Grace and Favour with another, becauſe the Wills of Men are ſubject to continual Alterations.

IX. We muſt likewiſe take ſpecial Care to obſerve, that we are not diſputing about the natural State of a meer Animal, govern'd by the ſole Impulſe and Inclination of the ſenſitive Soul; but of an Animal whoſe nobleſt and chiefeſt Part is Reaſon, the Sovereign and Controller of all other Faculties; and which, even in a natural State, has a common, a firm, and an uniform Meaſure to go by; namely, the *Nature of Things*; which, laſtly, is very free and ready in offering itſelf, ſo far as to inſtruct us in the general Precepts of Living, and the Dictates of natural Law. And thoſe who would rightly deſign and repreſent a State of Nature, ought by no Means to exclude the juſt Uſe of this Reaſon, but ſhould join it with the Operations of the other Faculties. Foraſmuch then as Man has not only the raſh Cry of his Luſts, but alſo the ſober Voice of Reaſon (not meaſuring itſelf purely by private Intereſt) to hearken to, if his wild Affections incite him to a War, ſuch as that extravagant one of all Men againſt all, his Reaſon will be more powerful in diſſuading him from it; and that chiefly by giving him theſe two Intimations, that a War undertaken without Provocation from the other Party, is both [1] unſeemly and unprofitable. For it is eaſy for any Man to gather thus much, that he did not exiſt of himſelf, but was produc'd by ſome Superior, who conſequently retains a Power and Authority over him. And when he finds himſelf ſpurr'd on as it were by a double Principle, of which one is wholly fix'd on Things preſent, the other can embrace in its Thought what is abſent or future; of which one drives him furiouſly on Dangers, Doubts, and Diſorders, the other conducts him to nothing but what is comely and ſafe; he will conclude without any Difficulty, that 'tis the Pleaſure of his Creator, he ſhould rather follow the latter Guide than the former. And when to this Conſideration is added, the exceeding great Benefit and Advantage of that quiet Condition which Reaſon adviſes, a Man cannot but naturally incline to Peace. Eſpecially, ſince if at any Time he ſhould happen to neglect his Reaſon, and follow his blind Paſſions, he would find by the ſad Event that he took the wrong Meaſures, and would be ready to wiſh thoſe Things to be undone, which were done againſt the Orders and Directions of his nobleſt Faculty. From all which we conclude, that the natural State of Men, altho' they be conſider'd as not united in Commonwealths, is not War, but Peace. And this Peace chiefly depends on the following Laws and Conditions; that no Man hurt another, who doth not aſſault and provoke him; that every one allow others to enjoy their own Goods and Poſſeſſions; that he faithfully perform whatever ſhall be covenanted for, and voluntarily promote the Intereſt and Happineſs of others, in all Caſes where a ſtricter Obligation doth not interfere. For ſince the natural State of Man includes the Uſe of Reaſon, we muſt by no Means ſeparate from it thoſe Obligations which Reaſon tells us we lie under. And becauſe every Man may diſcover it to be moſt for his Intereſt and Advantage, ſo to manage his Behaviour, as to procure rather the Benevolence, than the Enmity of others; he may eaſily preſume from the Likeneſs of Nature, that other Men have the ſame Sentiments about the Point as himſelf. Therefore it is very foul Play, in deſcribing this imaginary State, to ſuppoſe that all Men, or however, the greateſt Part of them do act with Diſregard and Defiance to Reaſon, which is by Nature conſtituted ſupreme Directreſs of human Proceedings; and ſuch a State cannot, without the higheſt Abſurdity, be call'd *natural*, which owes its Production to the Neglect, or to the Abuſe of the natural Principle in Man [a].

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[a] See D. *Cumberland De L. N. Ch.* ii. §. 29. Thus the *Scythians* argue in *Q. Curtius, Lib.* vii. *Ch.* viii. *The firmeſt Friendſhip is between Equals, and thoſe ſeem properly to be Equals, who have not made Experience of each other's Strength.* So *Cæſar* (*De B. C. Lib.* iii. *Ch.* x.) admoniſheth *Pompey*, that *this was the only Time to treat of Peace, whilſt both ſeem'd Equals, and each had good Confidence of his own Power. Florus* makes the like Remark on another Occaſion. *The* Romans *and the* Parthians, ſays he, *having try'd their Force againſt each other, and* Craſſus *on the Side of the former, and* Pacorus *of the latter, having given them Examples of their mutual Abilities, they renew'd their antient Friendſhip with equal Deference and Reſpect.* In *Thucydides, Lib.* iii. §. 11. *Edit.* Oxf. *Mutual Fear is* aſſerted to be the ſureſt Guard of States, *becauſe on either Side the doubting of their Safety would keep them from any open Attempt of Violence, though it were never ſo much in their Deſires.* [b] Plautus Aſinar. *A Man doth not ſhew himſelf a* Man, *but a* Wolf, *to another whoſe Temper and Deſigns he is not acquainted with.*

[2] In the *Latin* of *Q. Curtius* the *Scythians* thus ſpeak to *Alexander, Nam & firmiſſima eſt inter Pares amicitia, & videntur pares eſſe, qui non fecerunt inter ſe periculum virium. Cæſar*'s Words are, *Hoc unum eſſe tempus de pace agendi, dum ſibi uterque confideret, & pares ambo viderentur.* The Words of the Embaſſadors of *Mitylene* in *Thucydides,* are theſe, Τὸ δὲ ἀντίπαλον δέος, μόνον πιστὸν ἐς ξυμμαχίαν, ὁ γὰρ παραβαίνειν τι βουλόμενος τῷ [and not τὸ as it is commonly read] μὴ προέχων ἂν ἐπελθεῖν ἀποτρέπεται.

[3] The Original in moſt of the Editions runs thus, *Quoniam inde certa eſt mea,* which imports a contrary Senſe than the Author ſeems to intend, but in the Edition of *Frankfort* the Reading is true, *inde incerta,* as it is in Dr. *Cumberland,* from whence this Sentence is taken; and ſo I have tranſlated it, as alſo doth the *Engliſh* Tranſlator.

[4] See *Chapter* v. §. 6. and *Lib.* iii. *Ch.* vi. §. 9. and *Lib.* viii. *Ch.* v. *Note* 3. following.

[5] *Cicero*'s Words are, *Atque illæ quidem injuriæ, quæ nocendi cauſâ de induſtria inferuntur, ſæpe à metu proficiſcuntur, quum is, qui nocere alteri cogitat, timet, nè ſi id fecerit, ipſe aliquo afficiatur incommodo.*

§. IX. [1] It is in the Original, *inutile,* but the Sequel makes it evident, that it ought to be underſtood, *hurtful and prejudicial,* and not barely, *unſeemly and unprofitable.* See *Note* 1. upon §. 7. of *Chap.* iii. *Lib.* i.

X. It will be in vain for any one here to object, the ſtrange Barbarity which reign'd among moſt of the antient Nations and People; who ſeem to have had ſcarce any other Pleaſure, or any other Buſineſs, but the Purſuits of Plunder and [1] Prey; and amongſt whom Robbery paſs'd for one of the particular Profeſſions and Ways of Living. For thus *Ariſtotle* in his Politicks, reckoning up the ſeveral Callings or Lives of the Herdſmen, the Huſbandmen, the Fiſhermen and the Hunters, adds to the reſt the βίος λῃστρικὸς, *the Life of Thieves.* And afterwards, *War is in ſome ſort a natural Way of acquiring Poſſeſſion. For Hunting, or violently purſuing, is one of its chief Parts; and this may not only be uſed againſt Beaſts, but likewiſe againſt ſuch Men as, tho' they were born to obey, do yet refuſe Subjection.* We have numerous Teſtimonies to this Purpoſe in antient Writers. *Vid. Homer. Odyſſ.* iii. *v.* 73. and *Odyſſ.* ix. *v.* 252. on which Place *Didymus* tells us, that the *Profeſſion of Robbers amongſt the Antients was not infamous but glorious. Diodor. Sic. Lib.* iii. *Ch.* xlix. *The* Libyans *on no Account obſerve any manner of Right, or any manner of Faith towards Strangers. Cæſar* reports of the *Germans*, that *thoſe Robberies do not fall under Cenſure or Reproach, which are practis'd beyond the Bounds of each particular State:* And the Excuſe they alledge for them is, *That they ſerve for the Exerciſe of Youth, and the Diſcouragement of Idleneſs.* De B. G. Lib. vi. He tells us farther, *That every State reckon'd it the greateſt Honour and Glory to have as large Solitudes round them as poſſible, caus'd by their own Devaſtations: eſteeming it a noble Teſtimony of their Valour, that their Neighbours were forc'd to quit the Country, and that none are ſo hardy as to live near them. Mela, Lib.* iii. *Ch.* iii. gives the like Account of the *Germans* in general; but *Tacitus* ſpeaks in manner only of the *Vendredi*, a particular People amongſt them. Of the *Spaniards*, *Plutarch* (in *Mario*) reports, that *Robberies paſs'd amongſt them till that Time for gallant Adventures.* And *Thucydides* ſays as much of the antient *Grecians*, *Lib.* i. To the ſame Purpoſe ſome produce the *Roman* Law (*l. ult. D. De Colleg.*) where thoſe Covenants are declar'd valid which paſs between τῶν ἐπὶ λεῖαν ἐρχομένων, or οἰχομένων, *Perſons who unite on the account of Booty or Prey.* Tho' *Salmaſius, de Uſuris Lib.* i. *Ch.* xii. corrects the antient Reading into εἰς καπήλειαν, *on the Account of a drinking Match. Polybius, Lib.* iii. mentions it as a Clauſe in a League between the *Romans* and *Carthaginians*, that the former ſhould neither *drive Booty to* Maſtia *and* Farſeium, *beyond the fair* Promontory, *nor exerciſe Merchandize:* As if both theſe Practices had been then eſteem'd equally lawful. *Juſtin, Lib.* xliii. ſays of the People of *Phocis*, that *they ſupported themſelves by Piracy, which at that Time was look'd upon as Glory.* Sextus Empiric. Hypot. Lib. iii. Ch. xxiv. *To rob and ſpoil is reckon'd by no Means diſgraceful amongſt many of the barbarous Nations: Nay, the* Cilicians *are ſaid to have accounted theſe Adventures moſt highly creditable and renown'd, ſo as to pay Honours to the Memory of ſuch as died in their Proſecution. And* Neſtor, *in the Poet, having kindly receiv'd* Telemachus *and his Company, asks them,*

What, are you Rovers of the Plundering Trade—?

Now if Robbing had been then ſcandalous, it is not likely he would have entertain'd with ſo much Civility Perſons whom he ſuſpected of ſuch a Courſe. *Lib.* ii. *D. De Captio & Poſtlim. If there be a Nation, with which we have no Tye of Friendſhip, Hoſpitality, or League, we muſt not preſently eſteem them Enemies: Yet whatever of ours comes into their Poſſeſſion belongs to them; and even a free Man of our Country, if taken by them becomes their Slave.* Comp. Lib. cxviii. de verb. ſignific. *Dio Caſſius, Lib.* liv. ſpeaking of the *Rhætians, Often plundering,* ſays he, *their Neighbours the* Gauls, *they had driven Booty from the Borders of* Italy, *and had infeſted the* Romans *and their Allies in*

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[a] *This is moſt largely demonſtrated by Biſhop* Cumberland, *to whom the Reader is recommended for fuller Satisfaction.*

§. x. [1] Here our Author uſes *Virgil*'s Words, as he makes *Numanus*, ſirnamed *Romulus*, to ſpeak,

—————— *Semperque recentes*
Convectare juvat prædas, & vivere rapto. Æneid. ix. v. 612, 613.

their Paſſage through thoſe Parts: And it was then a receiv'd Cuſtom amongſt them, to deal in this Manner with all thoſe whom they were united to by ſolemn Leagues and Agreements. Iſocrates (*Panathen.*) obſerves of the *Triballians*, *There are no Men who obſerve a ſtricter Concord amongſt themſelves; but then they endeavour utterly to deſtroy all beſides; not only their Borderers and Neighbours, but any People to whom they can force an Acceſs. Add.* Grot. Lib. ii. Ch. xv. §. 5. This antient Hoſtility, amongſt other Reaſons that are given for it, might proceed, in a great meaſure, from the groſs Superſtition and Idolatry of thoſe Nations, by which every People imagin'd themſelves to have peculiar Gods, and thoſe only true ones[2]. Vid. *Juvenal. Sat.* 15.

In return to this vulgar Argument, 'tis ſufficient to ſay, that in thoſe blinder Ages of the World, the Dictates and Informations of ſound Reaſon were choak'd and ſtifled by the Prevalency of corrupted Manners. Yet it doth not follow from hence, that there was no Man, even in thoſe Nations, ſenſible enough to apprehend that the Laws of Nature were violated by this Courſe of Robberies and Spoils, or to diſallow that State to be natural, into which wild and ungovernable Men had thrown themſelves, in Neglect and in Contempt of the nobleſt Part of their Being. For that a promiſcuous Liberty of Rapine doth not flow as a Conſequence from a State of Nature, is evident, becauſe the like ill Effect is not ſeen in the State which different Commonwealths now bear to one another, which is really natural. Nor muſt we admit what *Hobbes* farther aſſerts, that *ſuppoſing Matters ſtood thus*, *Robbery or Pillaging would be contrary to the Law of Nature.* For thoſe who had plunder'd us in this Manner without Provocation, we might have treated with the like Violence, and have made Repriſals on their Poſſeſſions for the Loſs of our own: But then we could not have ſhewn ſuch rough Uſage to a third Perſon, who had offer'd no Injury or Moleſtation to us before. The Impudence of ſome Perſons, in breaking the Law of Nature, is no juſtifying Example for us to imitate. Nor is the Remark more tolerable which *Hobbes* ſubjoins, that *this Kind of Life was not without Glory to them who exercis'd it valiantly, and yet not cruelly. As it was the Cuſtom of ſome, who laid violent Hands on every thing elſe, to ſpare the Perſons Lives, and to paſs by the ploughing Oxen, and all the Inſtruments of Husbandry. Which they did, not as if they were oblig'd to it by the Law of Nature, but purely conſulting their own Glory, leſt their Cruelty ſhould betray their Cowardice.* A wondrous Glory indeed, to accompliſh only half a Villany, when to have carried it through, would not have turn'd to ſo much Advantage!

XI. When we affirm that the Exerciſe of a Peace towards all Men *as ſuch*, is the natural State of Man, we imply that it is inſtituted and eſtabliſh'd by bare Nature, without the Intervention of any human Deed; and that therefore it depends ſolely on that Obligation of natural Law by which Men are bound as they are reaſonable Creatures; and doth not owe its firſt Introduction to the Agreement and Covenant of Men. Hence to us it ſeems uſeleſs to frame any Pacts or Leagues, barely for the Defence and Support of this Univerſal Peace[1]. For by ſuch a League or Bond, nothing is ſuperadded to the Obligation of the Law of Nature; or, no Agreement is made for the Performance of any thing, which Men were not before by the Law of Nature bound to perform: Nor is the former Obligation rendred ſtreighter or firmer by ſuch an Addition. For we ſuppoſe both Parties to remain in a natural Equality, and conſequently not to be held to their Covenant by any other Tie, than that of Reverence towards GOD Almighty, and Fear of ſuch Evil as may fall on them if they break the Agreement. Though indeed there appears ſomewhat of Baſeneſs and Foulneſs in refuſing a Thing which one has expreſly engag'd to perform. As for the Power and Liberty which the injur'd Party hath, of proceeding againſt ſuch a Violator of Nature's Law, this is altogether the ſame, whether any antecedent Covenant hath been made, or not. Men of any tolerable Culture and Civility muſt needs abhor the entring into any ſuch Compact, the Heads and Conditions of which imply only thus much, that the Party concern'd ſhall not offend in ſome Point, which was before an expreſs Command of Nature. Beſides, we ſhould be guilty of great Irreverence towards GOD, ſhould we ſuppoſe, that his Injunctions had not already laid a ſufficient Neceſſity upon us, unleſs we ourſelves voluntarily conſented to the ſame Engagement; as if our Obligation to obey the divine Will depended on our own Pleaſure. Therefore in every Covenant ſome Matter is to be inſerted, the Performance of which the other Party could not have required from me, by a bare Right of Nature, or which by virtue of that Right only I did not fully and perfectly owe him; tho' it now becomes a true and abſolute Debt, upon my Declaration, and his Acceptance of my Conſent. Thus, as a Man who lets himſelf out to hire as a Servant to another, doth not ſet it down expreſly and immediately amongſt the Terms and Conditions of the Bargain, that he will not act perfidiouſly towards him, or that he will not pillage or plunder him; ſo *that* would be a ſhameful Agreement, in which a Man ſhould only bind himſelf not to break the Univerſal Peace towards another; that is, not to uſe ſuch a Right againſt him, as he obtains and exerciſes over Beaſts. Yet ſuppoſing any ſuch Robberies and Depredations, as we have been lately ſpeaking of, to prevail amongſt ſome Barbarous Nations, then, in order to the reſtoring the *Univerſal* Peace, there would be Occaſion to enter into Covenant, by which all Parties ſhould tie themſelves to the Practice of the Law of Nature towards one another. The Caſe is much the ſame, when two Nations, hitherto engag'd in War, ſhall, by Agreement, lay down their Arms on both Sides; for ſuppoſing that they do not come to any Terms of Settlement about particular Matters and Performances; then the only Thing concluded on and eſtabliſh'd, is that general and common Peace. We find indeed in Hiſtory, many Examples of Commonwealths reduc'd to ſuch Extremities, as to purchaſe of their Spoilers this [2] univerſal Peace and Forbearance of Injuries, not only by Compact, but by Tribute. *Claudian De Laudib. Stilicon. Lib.* i. *v.* 210, 211. ſays, that the Antients were obliged to do ſo, in theſe Verſes,

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[2] But this very Example may prove to our Author, that his Conjecture is not good, ſince the Poet ſets it down as a ſingular Example, and he could not but know, that the Heathens did not hate, and perſecute one another purely for Religion's ſake. The Truth is, it was their Ignorance of the Law of Nature, and of the true Religion, which cauſed them to approve of theſe publick Robberies. And if any Perſons looked upon them as unjuſt, yet they were forced, in a manner, to practiſe them, partly for their own Preſervation, and partly by way of Repriſal. We may find that the *Iſraelites* themſelves uſed them, as appears from the Example of *Jephtha*, *Judges* xi. 3. upon which Place conſult Mr. *Le Clerc*'s Comment. In fine, We may obſerve, that in the *Select Obſervations*, printed at *Hall* in *Saxony* for ſome Years, there are two Diſcourſes upon this Subject worth our reading, *viz.* the ſixth and ſeventh in *Tome* VII. thus entitutled, the one, *Hiſtoria de latrocinio Gentis in Gentem*; and the other, *Moralitas latrocin. Gent. in Gent.* The Author is *James Thomaſius*, the Father of Mr. *Thomaſius*, the famous Profeſſor of Law at *Hall* in *Saxony*.

§. XI. [1] See *Lib.* viii. *Ch.* ix. §. 2. following.

Illi terribiles, quibus otia vendere ſemper
Mos erat, & fœda requiem mercede paciſci.

——————Thoſe dreaded Foes,
Traders in Peace, and Huckſters of Repoſe.

If between Nations or People, hitherto not known to one another by Benefits or Injuries, by Peace or War, any common Leagues are made, without deſcending to particular Points or Conditions; ſuch Leagues are ſuppos'd to be entred on for the Eſtabliſhment of a Friendſhip, which is reckon'd to imply a cloſer Union, than is produc'd by that general Peace of Nature. Or elſe we may take them only for ſolemn Proteſtations made by both Parties, that they will for the future obſerve [3] their mutual Offices and Duties. In the ſame Manner as Perſons related, at their firſt Meeting, or their firſt Knowledge of one another, are us'd to make long Declarations and Promiſes to expreſs their mutual Benevolence and Love.

XII. After all, it muſt be confeſs'd, that this natural Peace is but too weak and uncertain, and ſuch as, without other Aſſiſtances, would prove but a very mean Defence to the Safety of Mankind; ſo that we might well enough expreſs, and repreſent it in *Ovid*'s Verſe [a];

Pax tamen interdum eſt; pacis fiducia nunquam,
A Peace which all pretend, yet none can truſt.

The Cauſe of which Unhappineſs is the great Wickedneſs of Men, their unbridled Luſt of Power, and their Deſire of encroaching on the Rights and Poſſeſſions of others. When *Micipſa* King of *Numidia*, in *Saluſt* [2], grew jealous of the growing Power of *Jugurtha*, we are told the chief Things that frighted him and ſet him on his Guard, were *the Nature of Mankind, covetous of Dominion and Government, and violently bent on gratifying its Deſires; and then the Advantage of Opportunity, which by the fair Hopes of Gain and Succeſs, is able to ſeduce Men to ambitious Practices, who were otherwiſe moderate enough in their Wiſhes and in their Purſuits.* Indeed theſe pernicious Charms of Avarice and of Ambition have taken ſo faſt hold on human Minds, that even the moſt mild and gentle Doctrine of our Saviour Christ, which is perpetually inculcating the Rules of Peace, of Kindneſs, of Good-will, of Propenſion to forgive Injuries, of Humility, of Contempt of Riches and worldly Power; hath not been able to extinguiſh the moſt unjuſt Oppreſſions, Treacheries, and Wars amongſt the Profeſſors of that holy Religion. So that *Plutarch*'s [3] Deſcription will too exactly hit the Character of ſome Chriſtian Princes, *whoſe Deſires, not Seas, nor Mountains, nor Deſerts, can ſtop and conclude; not the Bounds which ſeparate* Europe *and* Aſia *can circumſcribe. When ſuch ambitious Spirits border on one another's Poſſeſſions, it is ſcarce poſſible that they ſhould live ſatisfied with their proper Shares, and abſtain from mutual Injuries and Invaſions. In Effect they are continually engag'd againſt each other, Envying and Plotting being the neceſſary Conſequences of their Temper. As for the two Names of Peace and of War, they uſe them juſt as they do Money, not as they are determin'd by Reaſon, but according to Cuſtom and Convenience.* Nor doth *Paterculus*'s Remark affect only the *Romans* and *Carthaginians*, when he ſays [4], *Amongſt thoſe People, there was perpetually either a War, or a Preparation for War, or a deceitful Peace.* Therefore, as it is the Duty of an honeſt and good Man to reſt contented with his own Lot, and not diſturb the Portion of his Neighbour either by actual Invaſions, or by covetous Deſires: So it becomes a cautious and wary Man, and one who has a true Care and Concern for his own Safety, in ſuch a Manner to believe all Men his Friends, as that they may ſoon turn his Enemies; in ſuch a Manner to obſerve this Peace with all the World, as a State which may ſuddenly be converted into War [b]. And the famous Saying of *Dionyſius Halicarnaſſeus* [5], ſhould often run in our Thoughts: *So long as wicked Men have the Power of doing Miſchief, they cannot want the Will.* For which Reaſon *Euripides* [6], tells us, that *a prudent Diffidence is a moſt uſeful and advantageous Quality:* And that a wiſe Man ought [7] neither to act like a *Sheep*, nor like a *wild Beaſt*, to be neither tame in ſuffering Violence, nor furious in offering it [c].

Tacitus, in deſcribing the Manners of the *German*

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[a] *Vid. de Triſt. Lib.* v. *Eleg.* 2. *v.* 71.

[b] *Comp. Sophocl. Ajax. Flagell. v.* 688, *&c.*

[c] *Add. Hobbes de Cive, Ch.* xiii. §. 7, 8.

§. xi. [2] Our Author refers us to *Claudian*'s *Conſulat. Mallii.* but thro' Miſtake. See *Grotius, Lib.* i. *Ch.* iii. §. 22.

[3] *i. e.* Which the one could not require of the other in Strictneſs, or by virtue of any indiſputable Right, as appears from what our Author has ſaid a little before.

§. xii. [2] *Saluſt. Bell. Jugurth. Ch.* ii. *Terrebat eum* [*viz. Micipſam*] *natura mortalium avida imperii, & præceps ad explendam animi cupidinem; præterea opportunitas, ſuæque & liberorum ætatis, quæ etiam mediocres viros ſpe prædæ tranſverſos agit.*

[3] *Plutarch* in *Pyrrho, p.* 389. Edit. *Wechel.* Οἷς γὰρ οὐ πέλαγος, οὐκ ὄρος, οὐκ ἀνίκητος ἐρημία πέρας ἐστὶ τῆς πλεονεξίας, οὐδ' οἱ διαιροῦντες Εὐρώπην καὶ Ἀσίαν τέρμονες ὁρίζουσι τὰς ἐπιθυμίας —— Δυοῖν δὲ ὀνομάτων, ὥσπερ νομισμάτων, πολέμου, καὶ εἰρήνης, τῷ παρατυχόντι χρῶνται πρὸς τὸ συμφέρον, οὐ πρὸς τὸ δίκαιον.

[4] Vid. *Lib.* i. *Ch.* xii. *Aut bellum inter eos populos* [*viz. Romanos, & Pœnos*] *aut belli præparatio, aut infida pax fuit.*

[5] B. 6. Ἕως δ' ἂν παρῇ τὸ δύνασθαι πονηρὰ δρᾶν, οὐκ ἐκλείψει τοῖς πονηροῖς τὸ βούλεσθαι.

[6] *Eurip. Helen. v.* 1633, 1634. —————— Σώφρονος δ' ἀπιστίας
Οὐκ ἔστιν οὐδὲν χρησιμώτερον βροτοῖς.

[7] The *Greek* is, Μὴ ὡς πρόβατον, εἰ καὶ ἐπιεικής, ἢ βλάπτικον, ὡς θηρίον. We know not from whence theſe Words are taken. The *Engliſh* Tranſlator attributes them to *Euripides*, but without any Certainty.

Nations, hath left theſe two Characters of the *Chauci* and the *Cheruſci*, very remarkable for their Oppoſition [8]. The former he calls *a moſt noble People, who chooſing to maintain their Greatneſs by their Juſtice, living in Secrecy and Quiet, without Ambition, and without Inſolence, by never inviting War, they never feel it; by never doing, they never ſuffer Violence and Spoil. And this is the principal Mark of their Virtue and of their Power, that their Superiority is not obtain'd by Injury. Yet they have always Arms ready at hand for their Defence; and upon Occaſion could bring together a mighty Army: And their Numbers of Men and Horſes make them famous and terrible, in the midſt of their peaceful Repoſe.* The latter, he tells us, *Ch.* xxxvi. *were too fond of cheriſhing a long and a decaying Eaſe. This was more pleaſant to them than ſafe. For amongſt ſtout and daring People, 'tis never the true way to lie ſtill; and where Men are buſy in Action and Contention, Honeſty and Probity belongs to the Titles of Conqueror* [9]. *Thus the* Cheruſci, *who had once the Repute of Equity and Juſtice, now lie under the Imputation of Folly and Cowardice.* So true is the Obſervation of *Dio* the Orator [10], that *thoſe who are beſt prepar'd for War, may moſt ſecurely live in Peace.*

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[8] *Tacit. de Morib. German. Ch.* xxxv. *n.* 4, 5, 6. *Populus inter Germanos nobiliſſimus, quique magnitudinem ſuam malit juſtitiâ tueri; ſine cupiditate, ſine impotentiâ, quieti ſecretique, nulla provocant bella, nullis raptibus, aut latrociniis populantur. Idque præcipuum virtutis ac virium argumentum eſt, quòd, ut ſuperiores agant, non per injurias adſequantur. Prompta tamen omnibus arma, ac ſi res poſcat, exercitus; plurimum virorum, equorumque, & quieſcentibus eadem fama.*

[9] The ſame Author's Words are, *Cheruſci nimiam ac marcentem diu pacem inlaceſſiti nutrierunt, idque jucundius, quàm tutius fuit; quia inter impotentes, & validos, falsò quieſcas, ubi manu agitur, modeſtia, & probitas nomina ſuperioris ſunt. Ità qui olim boni æquique Cheruſci, nunc inertes, & ſtulti vocantur.*

[10] *Orat.* i. *De Regno. p.* 6. Ed. *Par. Morell.* Ὅτι τοῖς κάλλιστα πολεμεῖν παρεσκευασμένοις, τούτοις μάλιστα ἔξεστιν εἰρήνην ἄγειν.

CHAP. III.

Of the Law of Nature *in general.*

The CONTENTS.

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XXIV. *A Diviſion of the Law of Nature.*

I. SInce then it appears inconſiſtent with the Nature and the Condition of Man, that he ſhould live entirely looſe from all Law, and perform his Actions by a wild and wandering Impulſe, without Regard to any Standard or Meaſure; it follows, that we make Enquiry into that moſt general and univerſal Rule of human Actions, to which every Man is oblig'd to conform, as he is a reaſonable Creature. To this Rule Cuſtom hath given the Name of *natural Law*, and we may call it likewiſe the Law *univerſal* and *perpetual*; the former, in Regard that it binds the whole Body of human Race, the latter, becauſe it is not ſubject to change, which is the Diſadvantage of *poſitive* Laws. What this Law is, whence the Knowledge of it ariſes, what are the chief Marks and Tokens by which it is diſcover'd, what Matters are to be referr'd to that, and what to poſitive Conſtitutions; are Points which require the more careful Examination, becauſe if this Baſis and Ground-work ſhould be ill laid, whatever we afterwards build upon it muſt fall of Courſe. 'Tis [1] a good Rule of *Plato* (in *Cratyl, p.* 299. Edit. *Francof.*) *A Man ought to be very ſtrict and accurate in examining the firſt Principle and Foundation of Things, and no leſs copious and diſtinct in explaining them; inaſmuch as theſe Points being once clearly ſettled, the whole Scheme of Doctrine regularly follows.* And ſo much the more ought this Rule to be obſerv'd in our preſent Subject, the more Truth there is in that Remark of [2] *Lactantius, Lib.* iii. *Ch.* vii. *p.* 224. Ed. *Oxon. Becauſe in framing the Manners and forming the Model of Life, it is the higheſt and moſt fatal Danger to miſtake; we ought to apply the ſtricter Diligence to the Study of our Duty. In this great Point there is no Allowance for Error or Diſagreement, all*

Mr. BARB. *NOTES on Chap.* III.

§. I. [1] *Plato*'s Words are, Δεῖ δὴ περὶ τῆς ἀρχῆς παντὸς πράγματος παντὶ ἀνδρὶ τὸν πολὺν λόγον εἶναι, καὶ τὴν πολλὴν σκέψιν, εἴτε ὀρθῶς, εἴτε μὴ ὑπόκειται. Ἐκείνης δὲ ἐξετασθείσης ἱκανῶς, τὰ λοιπὰ φαίνεσθαι ἐκείνῃ ἑπόμενα.

[2] *Lactantius*'s Words are, *Et quoniam in diſponendo vitæ ſtatu formandiſq; moribus, periculo majori peccatur, majorem diligentiam neceſſe eſt adhiberi, ut ſciamus, quomodo nos oporteat vivere*——— *Hic vero nullus diſſidio, nullus errori eſt locus, omnes unum ſentire oportet, ipſamq; philoſophiam, uno quaſi ore præcipere, quia, ſi quid fuerit erratatum, vita omnis evertitur.*

ought to be of one Opinion, and to declare with a common Mouth the ſame Doctrine: Since the leaſt Slip may overturn the Rule and Order of Living. To the ſame Purpoſe *Diogenes Apollonias* (in *Diog. Laert.* Lib. ix. Segm. 57.) *Every Diſcourſe, in my Judgment, ought to take its Riſe from ſome clear and manifeſt Principle; and the Style made uſe of ſhould be plain and grave.*

II. The *Roman* Lawyers defin'd [1] the Law of Nature, to be *that Law which Nature teaches all living Creatures;* which therefore is not peculiar to Man, but is apprehended and obſerv'd by other Animals. So that according to this Hypotheſis, thoſe things muſt be ſaid to belong to the Law of Nature, which Brute Creatures either affect and purſue, or avoid and abhor: Whence it naturally follows, that there muſt be a Law common to Men and Beaſts. Which Opinion it's likely might proceed from that famous old Notion about [2] *the Soul of the World,* of which all other Souls were a kind of ἀποσπάσματα or Particles, being in themſelves all of the ſame Nature, but exerting different Operations, according as they fell on different Bodies, and met with different Organs for the Conveyance of their Strength and Powers. Nearly allied to this Fancy was the Μετεμψύχωσις, or Tranſmigration of Souls, according to which Men and Beaſts were thought to differ only in their corporeal Figure, having Souls altogether of the ſame Nature, and mutually lending to each other [a]. But the general Conſent of learned Men hath diſcarded this common Law of animate Beings: Inaſmuch as it is impoſſible to conceive how a Creature ſhould be capable of Law, and at the ſame time incapable of Reaſon. *Heſiod.* Op. & Dier. Lib. i. ver. 275.

Τὸν δὲ γὰρ ἀνθρώποις, νόμον (Δίκης) διέταξε Κρονίων,
Ἰχθύσι μὲν, καὶ θηρσὶ, καὶ οἰωνοῖς πετεηνοῖς,
Ἔσθειν ἀλλήλους, ἐπεὶ οὐ δίκη ἐστὶν ἐπ' αὐτοῖς.
Ἀνθρώποισι δ' ἔδωκε δίκην, ἣ πολλὸν ἀρίστη
Γίνεται ———

This Law did *Jove* for *human Race* ordain:
The Beaſts, the Fiſhes, and the feather'd Train
He left to mutual Spoil and mutual Prey,
But *Juſtice* gave to *Men.*

And altho' there are ſeveral Actions of Men and Beaſts very much alike, on the Performance of which the former are ſaid to have fulfill'd the Law; yet in Strictneſs and Reality they are extremely different, ſince they are done by Brutes out of ſimple Inclination of Nature, but by Men out of Obligation, of which thoſe other Creatures have no Senſe. And therefore we muſt ſuppoſe Authors to ſpeak figuratively, when they attribute to ſuch inferior and dumb Animals, Juſtice, Fortitude, Pity, Gratitude, or Chaſtity; only becauſe they perceive in ſome of their Proceedings the Shadow and Semblance of theſe Virtues [b]. For Things which ſeem alike in their external Face and Appearance, are by no means the ſame, if they proceed from different internal Principles. As for *Grotius*'s Opinion [c], that ſome Acts of other Creatures are diſpos'd in an extraordinary manner, by [4] an external *Reaſon* or Principle, as the Works of Bees and of Ants, and the Frugality which ſome ſeem to uſe about what they have got, for the Benefit of their Kindred and Off-ſpring; this is allowable only if we mean by it, that the Nature of theſe Creatures is in ſuch a manner temper'd by the Divine Creator, as to be capable of producing ſuch Actions; not that any outward Principle violently guides and ſteers them [5], as a Pilot doth a Veſſel. Nor is it difficult to underſtand, why they do not diſcover the ſame Cunning in other Matters equally obvious; if we ſuppoſe with [6] the new Philoſophers, that whatever *Form* irrational Animals enjoy, ariſes purely from the Figure and Diſpoſition of material Particles, and from the Variety of their Movements. Eſpecially ſince even amongſt Men we may find thoſe who are extremely quick and ready at ſome ſorts of Buſineſs, yet ſtrangely dull and heavy about others, not more difficult and abſtruſe: Which can proceed from nothing elſe, but from the particular Diſpoſition of their Parts, eſpecially of the Brain and Spirits [d]. Thoſe therefore who will have a *Law of Nature* in Brutes, becauſe they ſee them acting now and then with ſome Appearance of Regularity and of Deſign, abuſe the Term of *Law,* by an undue and unneceſſary Application.

Beſides, there can be found no dumb Creature

[a] Vid. *Virgil.* Æn. vi. 724, &c. *Ovid.* Met. Lib. xv. v. 75, &c.

[b] Vid. *Selden.* De. L. N. & G. ſecund. *Hebr.* Lib. i. Ch. v.

[c] Prolegom. De J. B. & P. & Lib. i. *De Ver Rel. Chriſtianæ.*

[d] Vid. *Plutarch. Conviv. Sept. Sapient.* p. 163. Ed. *Wech.*

§ II. [1] *Jus naturale eſt, quod natura omnia animalia docuit. Nam jus iſtud non humani generis proprium, ſed omnium animalium, quæ in terrâ, quæ in mari naſcuntur, avium quoque commune eſt.* —— *Videmus etenim cætera quoque animalia, feras etiam, iſtius juris perita cenſeri.* Digeſt. B. I. Tit. i. *Of Juſtice and Law.* Leg. i. §. 3. See *Inſtit.* B. I. Tit. ii. §. 1.

[2] 'Tis certain, that this was the Opinion of the *Stoicks,* as *Juſtus Lipſius* in his *Phyſiol. Stoic. Lib.* i. *Diſſ.* viii. and *Lib.* iii. *Diſſ.* viii. makes it appear, and moſt of the *Roman* Lawyers were of the ſame Principles as that Sect of Philoſophers, as Mr. *Gravina* has proved by many Examples. See his *Origines Jur. Civil.* printed at *Leipſick* in 1708. *p.* 80, &c. But it does not from hence follow, that the Definition of natural Right which *Ulpian* gives, is grounded on this Opinion, as after our Author, Mr. *Buddeus* in his firſt Diſcourſe of the Errors of the *Stoicks,* which is amongſt his *Analecta Hiſt. Philoſoph.* §. 6. and Mr. *Ludovici* in his *Delineatio Hiſt. Juris Divin. Nat. & Poſit. &c.* §. 14. affirm, who alſo quotes, *Ja. Thomaſ. Phyſic.* Chap. xxxviii. Queſt. xxxii. and *Hornius, De Subjecto Jur. Nat. &c.* for they ſuppoſe, as they neceſſarily muſt, that the *Stoicks* attribute Reaſon to Beaſts, but they take it for granted, by a *Petitio principii,* without Proof, ſince they alledge no Authority but the Definition itſelf, which they produce, to prove, that according to them, theſe antient Philoſophers muſt believe that Beaſts have Reaſon. The contrary appears by divers plain Paſſages. *In homine optimum quid eſt? Ratio* (ſays *Seneca*) *hâc antecedit animalia, Deos ſequitur—Quid in homine proprium? Ratio Epiſt.* lxxvi. *p.* 294, 295. See alſo his cxxiv. Epiſt. *p.* 621, 622. *Ed. Gron.* 'Tis certain that the *Stoicks* did not acknowledge a Law common to Man and Beaſts. *Cicero* is plain as to this Point, *Et quo modo hominum inter homines juris eſſe vincula putant, ſic homini nihil juris eſſe cum beſtiis.* De finib. bon. & mal. Lib. iii. Chap. xx. and *Diog. Laertius.* Ἔτι ἀρέσκει αὐτοῖς μηδὲν εἶναι ἡμῖν δίκαιον πρὸς τὰ ἄλλα ζῶα, διὰ τὸν ἀνομοιότητα, &c. *In Zenone,* Lib. vii. §. 129. p. 446. Edit. *Amſtel.* See what is ſaid upon §. 3. *Note* 10. following. As alſo *Cicero De Offic.* Lib. i. Ch. xvi. and *Grotius,* Lib. i. Ch. i. §. 11.

[4] The Original has it, *Principio intrinſeco,* contrary to the Connexion of this Diſcourſe, and the expreſs Words of *Grotius.* But Mr. *Hertius* has amended it in his Edition of 1706, and made it, *extrinſeco,* as it ought to be.

[5] See Mr. *Bayle*'s *Dictionar. Hiſtoric. & Critic.* Tom. iii. p. 2610. of the ſecond Edit.

[6] Neverthelefs our Author does not follow that Syſtem, as we may judge from many Places in his Works, which ſuppoſe the contrary. See what I have ſaid, *Lib.* i. *Chap.* iii. §. 1. *Note* 1.

which performs all the Duties and Offices of Man; on the contrary, there is ſcarce any rational Proceeding, to which ſome Brutes do not [6] act directly oppoſite. Yet in Harangues to the People, it is reckon'd a high Aggravation of a Crime, to ſhew, that even brute Creatures abhor the Commiſſion of ſuch Enormities. Thus *Plato* [a] ſays, that in arguing againſt the unnatural Vice of Pollution with the ſame Sex, it would be proper to appeal to the Nature of Beaſts, in whom we do not diſcover the ſame foul and monſtrous Practices [b].

III. Some Perſons indeed (rather I believe to ſhew their Wit, than out of any ſerious Deſign) have aſſerted this Community of Law between Men and Beaſts, and back'd their Aſſertion with a numerous Heap of Arguments, all which have been long ſince moſt ſolidly confuted. It ſhall be enough for us to touch lightly on the Proofs which they draw from Scripture. That Text then in *Gen.* ix. 5. *Your Blood will I require at the Hand of every living Thing*, according to ſome Expoſitors, imports only thus much, that God would revenge the Murther of a Man committed, not only by the Hands or the Weapon of another, but by the Fury of wild Beaſts ſet on him by the others Command. Inaſmuch as in the Antediluvian Times many violent Tyrants and Oppreſſors us'd to keep wild Beaſts, to ſerve for Executioners of thoſe who diſpleas'd or affronted them [1]. Others give this Interpretation, that God will ſometimes make even wild Beaſts [2] the Inſtruments of puniſhing Murtherers. Others again underſtood by *every living Thing* [3] only *every Man*, as if God only declar'd that no human Murtherer ſhould eſcape his Juſtice. In *Leviticus* xviii. 23. and xx. 15, 16. Command is given, that if any Man or Woman are found guilty of Beſtiality, [4] the Beaſt ſhall be ſton'd, without any Difference of Age. Yet the *Jews* obſerv'd ſuch a Difference of Years in regard to the human Parties of both Sexes; ſo that if a Boy were not above nine, and a Girl above three Years old, they maintain'd that no Puniſhment ought then to be inflicted, either on the Perſon, or on the Beaſt; becauſe they would not allow that the Pollution forbidden in the Law could be actually committed at ſuch an Age. Now when they ſton'd the Beaſt, they did not do it becauſe the Beaſt had properly offended; but partly leſt the Sight of that Creature ſhould incite ſome other Perſon to the like foul Paſſion, and partly leſt the Beaſt remaining alive ſhould keep up the ſcandalous Remembrance of the human Offender, who had ſuffer'd Puniſhment, *Gratian*, Cauſ. xv. Queſt. i. Ch. iv. *The Reaſon why the Beaſts were order'd to be kill'd, ſeems to have been becauſe they would renew the unhappy Remembrance of the foul Crime.* *Philo Judæus* (*De ſpecial. leg.*) adds a third Reaſon, *Leſt the Beaſt ſhould bring forth any deteſtable Monſter, ſuch as uſually proceed from unnatural Impurities, and ſuch as*

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[a] Lib. viii. De L. L. p. 913. Ed. *Francof.*

[b] *Senec. Hyppol.* v. 910, 911.

Feræ quoque ipſæ Veneris evitant nefas,
Generiſque leges inſcius ſervat pudor.

The Beaſts themſelves avoid enormous Love;
And Modeſty unconſcious and untaught,
Preſerves the decent Laws of Sex and Kind.

Add. *Oppian.* Cyneget. Lib. i. v. 239, &c. & *Halieut.* Lib. i. v. 702, &c. which laſt Place may well be urg'd againſt Parents who ſeem to have loſt their natural Affection.

[6] Mr. *Bayle* has made ſome Reflexions which may pleaſe the Reader, and therefore I ſhall give him them in his own Words: *It is a pretty Common-place in Morality, to compare Mens irregular Actions with the regular Motions of the Beaſts.* (See *Horace Epod.* vii. *Juvenal. Satyr.* xv. and *Boileau Sat.* viii.) But how finely ſoever it may appear, and however it may affect, it is nevertheleſs but a weak way of Arguing; for firſt, it may be eluded by way of Banter, and ſecondly may be more ſeriouſly anſwered by this Maxim:

Nil agit exemplum, litem quod lite reſolvit.

That Argument is of no Force,
Which when retorted is the worſe.

Barbara, the Wife of *Sigiſmond* the Emperor, deſigning to marry again after the Death of her Husband, one ſuggeſted to her the Example of the Turtle, which always remains ſingle after the Death of her Mate. To which ſhe anſwered, *If you will propoſe to me the Example of a Beaſt, inſtance in that of Pigeons and Sparrows.* Thus the firſt Sort of Argument is eaſily ſolved without any Inconvenience. Nor is the other more difficult, for the Man whom you'll ſend to School to the Beaſts, to learn his Duty, will reply, he deſires no better Maſters, for he'll tell you, *I ſhall learn of them to yield up Right to Force.* The ſtrongeſt Dog makes no Scruple to take the Morſel from his Fellow. How often do we ſee Dogs quarrelling for their Meat? Will not Chickens fight one with another in the Sight of their common Mother? Do not Cocks fight ſo furiouſly one with another, that nothing but the Death of one of them can end the Combat? Do not Pigeons, the very Image of Mildneſs, often come to Blows one with another? What more furious Quarrels are there than thoſe of Bulls? Does any Thing but Force decide Right among them in Matters of Love? (*Horace Lib.* i. *Sat.* iii. *v.* 110.) Can a more unnatural Barbarity be any where learned than at this School? Do not ſome Beaſts devour their own Young? Shall I not learn Inceſt from them? (*Ovid Metamorph.* Lib. x. v. 323, &c.) Muſt I learn to conform my ſelf ſo to them, as to lay up my Proviſions as the Ant does? *Horace Satyr*, Lib. i. Sat. i. v. 32, &c.) May not I reſcue myſelf from that hard Bondage which makes all Men groan, and wrings ſuch grievous Complaints from them as theſe?

——— *How bleſt are you,*
Wild Beaſts, that are, in loving, ty'd unto
No Laws but thoſe of Love! whilſt human Laws
Inhumanly condemn us for that Cauſe. Paſtor Fido.

This does not hinder but that ſuch Morality may be properly applied to the greateſt Part of Mankind, *Dictionar. Hiſtoric. & Crit. Tom.* i. *p.* 475, 476. See what our Author has ſaid, *Ch.* i. §. 4. *Grotius* alſo obſerves, that there is no Action commendable in Man, but God has impreſſed ſome Footſteps of it in the Beaſts which are deſtitute of Reaſon. *De Jure Bel. & Pac. Lib.* ii. *Chap.* xix. §. 2. *Numb.* ii. in the Notes. *Laſtly*, It is always certain, that no Right common to Man and Beaſts, can be eſtabliſhed, nor can the Inſtinct of Beaſts be taken for a Rule of natural Right, properly ſo called; and ſuch as take ſuch a Courſe run a great Hazard of falling themſelves into Scepticiſm, or leading others into it, by the manifeſt Uncertainty of the Maxims built upon ſuch weak Principles. See the Diſcourſe, *De Scepticiſmo Morali*, among Mr. *Buddeus*'s *Analecta Hiſt. Philoſoph.* §. 32.

§. III. [1] This is but a Viſion of ſome *Rabbi*. See *Selden* of the Law of Nature and of Nations among the *Hebr.* B. i. *Ch.* v. Ed. *Argent.*

[2] Some turn it thus, *God will require your Blood at the Hand of every Beaſt*; but the Propoſition in the Original will not bear that Tranſlation.

[3] I have corrected our Author's Expreſſion, *Others underſtand by every living Creature Man only*; as if *every living Creature* were in the Text of our Copies or Verſions, whereas it is found only in the *Samaritan* Copy, which is corrupted. See Mr. *Le Clerc*'s Notes upon this Paſſage.

[4] Our Author ſays, *the Beaſt ſhall be ſtoned*; but that's only a Conjecture of the Rabbins, for the Scripture determines not how the Beaſt ſhall be ſlain.

no pious Man can bear the Sight of [5]. Thus too, *Deut.* xiii. 15, 16. God commands the *Iſraelites*, in rooting out the idolatrous Nations, to deſtroy the very Beaſts; only to ſhew the Heinouſneſs of that Crime, not as if the Beaſts could be Partakers of it. It is obſervable, that if a *Gentile* living amongſt the *Jews*, had been polluted with a Beaſt, the Man only ſuffer'd Death, but the Beaſt eſcap'd [a]. According to the Law in *Exodus* xxi. 28. the goring Ox was to be ſton'd; not becauſe he had properly committed a Fault, but that he might not offer the like Hurt another Time, and that the Owner who had negligently kept him, might be puniſh'd by his Loſs: And hence they were not allowed to eat the Fleſh of ſuch an Ox. This Puniſhment was thought ſufficient when the Owner was but ſlightly in Fault, or when he was ignorant of the Fierceneſs of the Beaſt: Whereas if he knew him thus furiouſly diſpos'd, and ſtill neglected to keep him up, he paid for the Miſchief with his own Life, being made a ſad Partner in the Puniſhment. And here again the *Rabbins* tell us, that the Ox was ſton'd only when he had kill'd a *Jew*, not if a *Gentile* had periſh'd by his Violence. And indeed it was a Cuſtom in ſeveral other Nations, to deſtroy ſuch Things as had been the Inſtrument of any Miſchief, or of any Misfortune [6]. Thus it appears from the Orations of *Demoſthenes* againſt *Ariſtocrates*, and of *Æſchines* againſt *Cteſiphon*, that by the *Athenian* Laws, Stones, Clubs, Axes, and ſeveral other ſuch Things, when they had been made uſe of in the Commiſſion of Murther, were brought formally into Court, as it were in order to undergo a Penalty. Thus the Statue of *Theagenes* in *Thaſos* having unfortunately kill'd a Man by falling on him, the People order'd it to be dragg'd into the Sea [b]. St. *Ambroſe* calls the Copulation of Aſſes and Mares, by which Mules are produc'd, *forbidden*, not becauſe the Beaſts contract any Guilt in thoſe Practices, but becauſe Men are forbidden to procure any ſuch unnatural Mixture [d].

We may excuſe thoſe learned Compilers of the *Roman* Laws, by urging in their Defence, that by the Term of *the Law of Nature* [e], they meant that [7] Order inſtituted by the great Creator, chiefly in thoſe Things which make directly for the Preſervation of Nature, or of the Species and Individuals of all animate Beings. And it is the more probable, that they took it in ſuch a Senſe, becauſe [8] they ſet down as the chief Heads of this Law, only the Conjunction of Sexes, the Procreation and Education of Off-ſpring, and Self-defence. Many other Authors have us'd the ſame Terms in the ſame improper Manner; as particularly Mr. *Yves* of *Paris*, in his Treatiſe concerning the *natural Law ordain'd by God over all created Things*, and *Des Cartes*, in his Principles of Philoſophy. We may conclude this Point with the excellent Obſervation of *Plutarch* [f], *Nature*, ſays he, *as in thoſe Trees and Shrubs which we call wild, ſhe hath ſown the crude and imperfect Principles of true and pleaſant Fruits; ſo in Brutes hath implanted an imperfect Love of their Off-ſpring, not belonging to the Head of Juſtice, nor reaching beyond the Inducements of Profit and Advantage. But in Man, whom ſhe produc'd for a rational and a civil Being, for the Worſhip of God, for the Obſervation of Juſtice and of Laws, for the building of Cities, and for a ſocial and friendly Life; in Man, I ſay, ſhe has fix'd the Seeds of this Love in a fairer and in a more plentiful Manner: And in this ſhe hath follow'd the firſt Principles of his Body, and the original Ingredients of his Conſtitution.*

IV. Others make the Object of natural Law to be ſuch Acts as do in themſelves include a moral Neceſſity or Turpitude, and which are therefore in their own Nature either abſolutely requiſite or unlawful, and which we muſt of Conſequence ſuppoſe to be neceſſarily commanded, or neceſſarily forbidden by God. And this Mark, they ſay, diſtinguiſhes natural Law, not only from human, but from the divine poſitive Law, which doth not command or forbid Things in their own

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[a] Add. *Selden.* De J. N. & G. Lib. i. Ch. iv. & *Mornac. ad Leg.* vii. D. *De his qui effuderint vel dejec.* Lib. ix. Tit. iii.

[b] Vide *Div. Chryſoſt.* in *Rhodiac.* p. 340. Edit. *Morell.*

[c] *Hexaemeri*, Lib. v. Ch. iii.

[d] *Levit.* xix. 19. Vide *Selden* & *Ant. Matth.* De Crimin. *Proleg.* Ch. ii. §. 1. The Account which *Thuanus* (Lib. v.) gives of the Proceſs againſt the Mice in *Burgundy* is no more than a Jeſt.

[e] Lib. i. Tit. ii. D. *De Juſt. & Jure.*

[f] *De amore prolis*, Edit. *Wechel.* *p.* 495.

[5] Our Author hath forgot a fourth Reaſon, as conſiderable as any of them, which is this, That God, *that he might make us ſenſible how deteſtable ſuch abominable Crimes were to him, would have every Thing deſtroyed which contributed any way to the Commiſſion.*

[6] The Officers of *Lyons, Maçon,* and *Autun* in the xvth Age, paſſed ſeveral Sentences upon the Beaſts that annoyed their Country. Sometimes alſo they cauſed the Caſe of the Inhabitants and Beaſts to be pleaded judicially by their Advocates, who produced the Reaſons for each Party, before they paſſed Sentence. See the *Critical Hiſtory of ſuperſtitious Practices*, written by F. *Le Brun*, an Extract of which is found in the *News from the Republ. of Letters*, in *July* 1702. *Article* iv. *p.* 63.

[7] There is all the Evidence in the World to believe, that they underſtood by it what the Stoicks call, τὰ πρῶτα κατὰ φύσιν, as Mr. *Hertius* briefly obſerves. See *Aul. Gellius, Lib.* xii. *Chap.* v. & *Cicero De fin. bon. & mal.* who tranſlates it, *Prima ſecundum naturam, Lib.* v. *Ch.* vii. Not that they believed, that this natural Impreſſion, which inclines Men to preſerve themſelves and theirs, is exactly the ſame, as is obſerved in Beaſts, or that it eſtabliſhed a common Right in either of them; but they held, that this latter had ſome Relation to the former, and the Likeneſs of the outward Effects made this natural Right to be looked upon to be in ſome ſort common to Man and Beaſts, in a figurative Notion. See *Vinnius* upon the *Inſtitutes, Lib.* i. *Tit.* ii. *init.* This appears, in my Judgment, from the Manner in which *Ulpian* expreſſes himſelf, for he doth not ſay that the Beaſts are, *iſtius juris perita*, but only, *perita cenſeri*; that is, they did not properly know the Engagements of natural Right, but are only thought to know them. The ſame *Ulpian* ſays elſewhere, *That a Beaſt in hurting a Man, or doing him ſome Damage, does him no Injury, becauſe he doth not know what an Injury is*; from whence it follows, that there is no Right common to Man and Beaſt. *Pauperies eſt damnum ſine injuriâ facientis datum. NEC ENIM poteſt animal injuriam feciſſe, quod ſenſu caret.* Digeſt. Lib. ix. Tit. i. Leg. i. §. 3.

[8] *Hinc deſcendit maris atque fœminæ conjunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio.* Digeſt. Lib. i. Tit. i. *De juſtitia & jure*, Leg. i. *Nam jure hoc evenit, ut quod quiſque ob tutelam corporis ſui fecerit, jure feciſſe exiſtimetur.* Ibid. Leg. iii. This laſt Law, as it is placed, has Reſpect to the Right of Nations, as *Vinnius* upon the *Inſtitutes* has obſerved; and this appears by the Reaſon alledged by the Lawyer of *Florence*, from whom theſe Words are taken, for he appeals to Nature, which has eſtabliſhed a kind of Relation among us, by Virtue of which one Man can't, without a Crime, do any Evil to another. Our Author, who ought to have obſerved this, ſays, That divers learned Men, and among them *Yves* of *Paris*, in his Treatiſe *De Jure Nat. à Deo rebus creatis conſtituto*, and Mr. *Deſcartes*, in his Principles, have made a wrong Uſe of this Term, *natural Right.*

Nature neceſſary or unlawful [1], but by forbidding Things makes them unlawful, and by commanding Things makes them neceſſary: while the Things forbidden by the natural Law are not therefore evil, becauſe GOD hath forbidden them; but GOD therefore forbad them, becauſe they were in themſelves evil: And, on the other Hand, the Things enjoin'd by the ſame Law, are not made good or neceſſary by GOD's enjoining them; but were therefore enjoin'd by GOD, becauſe they were in themſelves ſimply good and neceſſary [a]. But now beſides that upon admitting this Opinion, it would remain a moſt perplexing Doubt what thoſe Acts are which we thus ſuppoſe in themſelves unlawful, and by what diſtinguiſhing Token they may be clearly known from others: We have already ſhewn in our former Book [b], that no Actions are in themſelves good or bad, honeſt or vile, till they are made ſo by ſome Law. Nor ought any Man to be ſhock'd with ſuch a Scruple as this; "If all "the Morality of human Actions depends on ſome "Law, might not GOD therefore have ſo fram'd "the Law of Nature, as to enjoin Things directly contrary to the preſent Duties? for Example, if amongſt the mutual Offices due from "Men to one another, he ſhould have put killing, "ſtealing, fornicating, and bearing Falſe-witneſs; and amongſt the prohibited Actions, Gratitude, keeping Faith, paying Loans, and the "like." For here, tho' it ſeems altogether a needleſs and an impudent Curioſity to enquire what GOD might have done, when it appears plainly what he hath done; yet if any Man ſhould perſiſt in ſuch Vanities, we may aſſure him, that ſuch a Doubt as we have been propoſing, implies a manifeſt Contradiction. For altho' GOD was not oblig'd by any Neceſſity to create Man (as I think thoſe Perſons have but a very narrow and unworthy Notion of the divine Power, who believe it would have diminiſh'd any Thing from GOD's Glory, not to have made theſe poor Inhabitants of the Earth [c]) yet when he once decreed to create him a rational and a ſocial Being, it was impoſſible but that the preſent natural Law ſhould agree to him; not by an abſolute, but [2] by an hypothetical Neceſſity. For ſhould Man have been engaged to the contrary Performances, not a ſocial Animal, but [3] ſome other Species of barbarous and horrid Creatures had been produc'd. Notwithſtanding all which, it remains for a certain Truth, that antecedently to the Impoſition of any Law, all Actions are to be eſteem'd indifferent. For by decreeing to create Man, that is, to create an Animal whoſe Actions ſhould not be all indifferent, GOD immediately conſtituted a Law for his Nature. Neither from our Aſſertion, that all Actions are in themſelves indifferent, before the Application of Law, doth it follow, that GOD could have order'd our worſhipping him with Blaſphemy, or [4] with Contempt; as *Vaſquez* [d] raſhly maintains. For a rational Creature, that is, a Creature indued with the Faculty of apprehending Things as they truly are, cannot form any other Conception of GOD than to acknowledge him a Being not only vaſtly his Superior in Nature and Dignity, but likewiſe his proper Lord and Governor in the higheſt Degree. For otherwiſe he would conceive a meer Idol, or indeed any Thing rather than a GOD. But now it is plainly contradictory, to ſuppoſe a Being at the ſame Time the moſt eminent and the moſt deſpicable; a Governor deſign'd purely to be inſulted on by his Subjects; and to expreſs our Acknowledgment of the Excellency and the Power of the divine Nature, by ſuch Signs as denote directly the contrary. Therefore to ſay that GOD cannot eſtabliſh ſuch horrid Abſurdities by a Law, doth no more detract from his Omnipotence, than to ſay, that he cannot die, that he cannot be untrue, that he cannot make Things undone, which have been already done.

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[a] Vide *Grot. Lib.* i. *Ch.* i. §. 15. *Num.* i. [b] *B.* i. *Ch.* ii. §. 6. [c] Vide *Job* xxxviii. *v.* 4. [d] Controv. Illuſtr. *Lib.* i. *Ch.* xxvii. *Num.* ix, *&c.*

§. IV. [1] *Grotius* (*Lib.* i. *Ch.* i. §. 15. *Num.* i.) criticiſes upon the Philoſopher *Anaxarchus*, as having ſpoke too generally, that *what Things* GOD *wills, he wills not becauſe they are juſt, but they are juſt becauſe he wills them.* This was the Occaſion; *Alexander the Great*, deſpairing of the Life of *Clitus*, his Favourite, whom he had ſlain in his Paſſion, becauſe he had ſpoken ſincerely to him, *Anaxarchus*, to comfort him, ſaid to him, in vile Flattery, Ουκ οἶσθα ὅτι τὴν Δίκην ἔχει πάρεδρον ὁ Ζεὺς, καὶ τὴν Θέμιν, ἵνα πᾶν τὸ πραχθὲν ὑπὸ τοῦ κρατοῦντος θεμιτὸν ᾖ καὶ δίκαιον; *Plut. in Alexand. p.* 695. *ed. Wech.* i. e. *Know'ſt thou not that the Poets ſay, that* Jupiter *has* Themis? *i. e.* Right *and* Juſtice *ſitting by him*, which ſignifies, That all that a Prince does is holy, right and juſt? By which *Anaxarchus* gives us to underſtand, That as GOD regulates Juſtice according to his Will, ſo a Prince can change, as he pleaſes, the Rules of Right and Wrong. This is juſt the Language of Flatterers, and the Principle of Mr. *Hobbes*, who deſtroys all Juſtice, and yields up plainly the Will of GOD to the Humour of Princes, ſince all that a Prince does being juſt, becauſe he does it, if he thinks good to do it, GOD muſt will it alſo, and approve of it as juſt. *Plutarch* elſewhere relating this Story, maintains that *Anaxarchus* did very ill to ſpeak ſo to *Alexander*, becauſe inſtead of adviſing him to repent of his Fault, he had laid down a Maxim, which would encourage him to do the ſame again. *The Truth is* (ſays he) *that* Jupiter *has not* Juſtice *ſitting on his Side, but is himſelf perfect Juſtice, and is more antient, as well as more perfect than all Laws.* This Fiction of the Antients tends to make us underſtand, that without *Juſtice*, *Jupiter* himſelf could not govern as he ought, Ουκ ὀρθῶς οὐδ' ὠφελίμως τὴν ἐφ' οἷς ἥμαρτε μετάνοιαν αὐτοῦ τῷ πρὸς τὰ ὅμοια θαρρύνειν ἰώμενος. Εἰ δὲ δεῖ ταῦτα εἰκάζειν, ὁ μὲν Ζεὺς οὐκ ἔχει τὴν Δίκην πάρεδρον, ἀλλὰ αὐτὸς δίκη καὶ θέμις ἐστὶ, καὶ νόμων ὁ πρεσβύτατος καὶ τελειότατος· οἱ παλαιοὶ οὕτω λέγουσι, καὶ γράφουσι, καὶ διδάσκουσιν, ὡς ἄνευ δίκης ἄρχειν μηδὲ τοῦ Διὸς καλῶς δυναμένου. *Ad Princip. indoct. Tom.* ii. *p.* 781. We may ſee by theſe Words, that this Philoſopher in eſtabliſhing the Will of GOD, as the Foundation of Right and Wrong, ſuppoſes at the ſame Time, that his Will is not purely arbitrary, but that he immutably follows what the Perfection of his Nature requires. See alſo the Reflexion which *Arrian* makes upon this Matter in his *Expedit. Alexand. Lib.* iv. *Ch.* ix.

[2] We underſtand by hypothetical or conditional Neceſſity, that which is founded upon ſome Suppoſition without which it could not be. And ſo in the Matter in hand, we muſt ſuppoſe the Will of GOD as a Condition, without which there could be no Law of Nature, ſince if GOD had not freely determined to ſend into the World ſuch a Creature as Man, we can't conceive that there ſhould be any Rule of Life given, which ſhould neceſſarily agree to the Conſtitution of a reaſonable and ſociable Creature. See *Lib.* i. *Ch.* i. §. 4. *Note* 4.

[3] That is to ſay, In caſe GOD had created a Creature like us in Body only, and in outward Shape, and by Reaſon of that Reſemblance had called him, *MAN*, this is only a Suppoſition, and a Reduction *ad abſurdum*, to make us underſtand the Ridiculouſneſs of the Hypotheſis. See alſo what our Author ſays in his *Diſſertationes Academ. p.* 747.

[4] Our Author obſerves here, that the Sacrifices of *Hercules* of *Lindus*, of whom, among others, *Lactantius* ſpeaks (*Inſtitut. Divin. Lib.* i. *Ch.* xxi. *p.* 98, 99. *Edit. Oxon.*) are the abominable Inventions of ſenſeleſs Men.

We may obſerve farther on this Argument, that if the Definition of natural Law is to be founded on that neceſſary Honeſty or Turpitude of ſome Actions, it muſt be always perplext and obſcure, and run round in an unconcluding Circle; as will appear to any Man who examines the Definition laid down by [5] *Grotius*. And Dr. *Cumberland* excellently remarks, *Ch.* v. §. 9. that in defining the Law of Nature, when we uſe the Word Good, we muſt mean natural, and not moral Good; ſince it would be the higheſt Abſurdity to define a Thing by ſuch Terms as ſuppoſe it to be already known; thoſe very Terms being deriv'd as Conſequences from it, and depending on it as to their own Evidence and Certainty.

V. Thoſe Authors who ſearch for the firſt Pattern, or the original Draught of natural Law in God himſelf, are divided into two Parties. For ſome placing the Spring and Fountain, as it were, of it in the divine Will, do thence conclude, that inaſmuch as that Will is in the higheſt Manner free, the Law of Nature may therefore be chang'd by God, or [1] the contrary be commanded, as is the Caſe and the Condition of poſitive Laws. Others affirm this natural Law to be founded after ſuch a Manner, in the eſſential Holineſs and Juſtice of God, as to repreſent and expreſs a kind of Image or Copy of thoſe Attributes. And hence likewiſe, they ſay, proceeds the Immutability of the Law of Nature: Inaſmuch as the divine Juſtice and Holineſs are utterly incapable of Change or Alteration. Concerning the former of theſe Opinions, we have this to remark, that it was indeed at firſt entirely free to the divine Pleaſure to produce or not to produce an Animal to whom the preſent Law of Nature ſhould agree. But that ſince God Almighty hath been pleas'd to create Man, a Being not poſſibly to be preſerv'd without the Obſervation of this Law, we have no manner of Reaſon or Colour to believe that he will either reverſe or alter the Law of Nature, ſo long as he brings no Change on human Nature itſelf; and ſo long as the Actions enjoin'd by this Law do by a natural Conſequence promote Society, in which is contain'd all the temporal Happineſs of Mankind; while the contrary Actions do by as ſtrong a Neceſſity deſtroy that Society: That is, ſo long as Beneficence, Kindneſs, Fidelity, Gratitude, and the like Practices, ſhall have a Power of engaging and of winning on Mens Minds; and Injuriouſneſs, Treachery, and Ingratitude, a Power of raiſing and provoking them. And therefore ſuppoſing human Nature and human Affairs to be fixt and conſtant, the Law of Nature, tho' it owed its original Inſtitution to the free Pleaſure of God, remains [2] firm and immoveable; unlike to thoſe divine poſitive Laws which depend in ſuch a Manner on the divine Will, as not to ſeem ſo neceſſarily requiſite to the good and ſafe Condition of Mankind in general. Beſides, tho' this Opinion be ſo far right, as it makes God the Author of natural Law, a Truth which no Man in his Wits can doubt of [3]; yet it ſtill remains an Uncertainty, by what Means this divine Will is to be known, and what Tokens there are to evince, that God intended to comprehend ſuch or ſuch a Thing under the Law of Nature. And the ſame Inconvenience attends likewiſe on the latter Opinion. For though no one can be guilty of ſuch horrid Impiety, as to aſſert that the Law of Nature contains any Thing in it repugnant to the divine Holineſs or Juſtice [4]; yet it would be very difficult to prove, that the ſame Law is ſo exact a Copy or Reſemblance of thoſe Attributes, that in what Mannerſoever God Almighty is pleas'd to deal with his Creatures, particularly with Men, in the ſame Manner the Law of their Nature commands Men to deal with one another. Nor doth it appear how a Right which is to obtain amongſt Perſons by Nature equal, can be copied from that tranſcendent Right, which the Creator uſeth towards his own Works; that is, how a Law impoſing a mutual Obligation on Men, can repreſent any Image of Omnipotency, which no Laws, no Obligations can reſtrain [5]. For that Argument drawn from Scripture, about Man's being created in the Image of God, is of no Force as to the preſent Caſe. For even thoſe who confeſs that Image to be loſt, do yet acknowledge the Senſe of natural Law to have ſtill remain'd in Man. Amongſt our ſelves we uſually call him a holy or righteous Perſon, who abſtains from groſſer Sins, and regularly obſerves his Duty: But now, who ever fram'd a Notion of the divine Holineſs by ſo unworthy a Model? He amongſt Men is accounted juſt, who makes it his conſtant Purpoſe and Reſolution to hurt no body, and to pay every one their Due: But in God it is Juſtice to deſtroy his Creatures, even in the moſt grievous and painful Manner. Neither can he ſo owe a Perſon any thing, as to be accus'd with doing an Injury upon withholding it. If he hath been pleas'd to promiſe any thing to Mortals, he indeed performs it: Not becauſe by virtue of ſuch a Promiſe they obtain a Right againſt God; but becauſe it would be ſome Kind of Derogation from his Greatneſs and Goodneſs, to command Men to expect any Favour from him, and afterwards to fruſtrate their Expectations. For he who breaks his Promiſe, either wants Power to perform it, or elſe through Inconſtancy or Diſhoneſty falls from the Engagement he had once well made, or elſe at the ſame Time of making his Promiſe, he was ignorant how the State and Condition of Things would be, when it was afterwards to be fulfill'd; all which Caſes imply ſome kind of Failing and Imperfection. Hence God *cannot* but obſerve his Promiſes, and Men *ought not* but to obſerve theirs: Hence human Promiſes turn into *Debts*, but divine Promiſes are made good out of pure *Favour*. What Rules the vindicative Juſtice of God proceeds by, is far above our Apprehenſion to diſcover. But thus much is certain, that they are not altogether conformable to the Methods of human Judicature. *Ariſt. Ethic. Nicom. Lib.* x. *Ch.* viii. [6] *What Kind of Actions ought we to attribute to the Gods? Shall we ſay they are juſt? But alas! it would ſeem moſt ridiculous to fancy that they are concern'd in driving Bargains, in reſtoring Loans, and the like Performances, which we reckon honeſt amongſt Men. Shall we call them valiant and brave, able to endure Hardſhips, and encounter Dangers? Shall we pronounce them liberal? Who then ſhall be the Object, or what the Matter of their Bounty? Certainly we muſt not oppreſs them with the Load of Money or Treaſures. In like Manner it would be an impertinent and troubleſome Commendation, to ſay they are temperate; inaſmuch as they have no inordinate Affections to govern and reſtrain. And ſo thus, if we run through the whole Train of human Actions, we ſhall find them all ſo mean and contemptible, as to be infinitely unworthy of the Heavenly Natures.* Catull. *ad* Manl. 68. *ver.* 141.

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[5] Our Author proves this in his Apology, §. 19. thus, If we demand of them who define the natural Law ſo, What Things are the Matter of this Law? They'll anſwer, Such as are honeſt or diſhoneſt in their Nature. If we again aſk them, What are thoſe? They can anſwer nothing elſe, than that they are the Matter of the natural Law. This makes well for the Schoolmen. But can't we ſpeak ſomething here in the Behalf of *Grotius?* I own, that the Notions of this great Man are not ſufficiently cleared and freed from vulgar Prejudices: But I am very much miſtaken, if he has not found out the Truth, and can't explain his Notion ſo, that when the Thing is ſearched to the Bottom, the Difference between him and our Author will prove a verbal Diſpute only. *The Right of Nature* (ſays *Grotius, Lib.* i. *Chap.* i. §. 10. *Num.* 1.) *conſiſts in certain Principles of right Reaſon, by which we know that an Action is honeſt or diſhoneſt morally, according to the neceſſary Agreement or Diſagreement it hath with a reaſonable or ſociable Nature.* So that it is no Circle; for if you aſk *Grotius* whence comes that neceſſary Honeſty or Baſeneſs of the Actions commanded or forbidden by the Law of Nature, he'll anſwer you, From the neceſſary Agreement or Diſagreement with a reaſonable and ſocial Nature. Very well. He ſeems to acknowledge alſo, with our Author, that this Neceſſity is not abſolute and independent upon the Will of God. This appears not only by the following Words, which finiſh *Grotius*'s Definition, *And by Conſequence* God, *who is the Author of Nature, orders or forbids ſuch an Action,* but by what he ſays in his Preface, where he expreſſes himſelf more fully, *The Law of Nature, as well that which conſiſts in our uniting in Society, as that which is ſo called in a more extenſive Senſe.* This Right, I ſay, altho' it flows from the internal Principles of Man (*i. e.* from the Conſtitution of the human Nature) may nevertheleſs, and that with Reaſon, be attributed to God, becauſe he has implanted ſuch Principles in us. I will now leave it to any Man, whether the Commentators upon *Grotius* have not miſtaken his Senſe, and if when he ſpeaks of honeſt or diſhoneſt Actions, he does not mean them in the ſame Senſe that our Author allows them, as I have ſhewed above, *Lib.* i. *Chap.* i. §. 4. *Note* 4. and *Ch.* ii. §. 6. *Note* 1.

§. v. [1] Mr. *Buddeus* eſteems them Scepticks who favour this Opinion: *For,* ſays he, *they may eaſily imagine that it is uncertain, whether* God *has not changed this or that Law, in this or that Caſe, and whether he does not command what we ſuppoſe forbidden, and on the contrary forbid what we believe commanded, ſince he may do it at all Times without any Hindrance, according to them.* De Sceptic. Moral. §. 32. p. 257.

[2] The Immutability of the natural Law is a Principle acknowledged by all ſuch as reaſon well. Hear what the *Roman* Lawyers ſay about this Matter. *Sed naturalia quidem jura, quæ apud omnes gentes peræquè obſervantur, divina quadam providentia conſtituta, ſemper firma atque immutabilia permanent; ea vero, quæ ipſa ſibi quæque civitas conſtituit, ſæpe mutari ſolent, vel tacito conſenſu populi, vel alia poſtea lege lata, Inſtitut. Lib* i. *Tit.* ii. §. 11. See alſo the *Digeſt. Lib.* i. *Tit.* i. *De juſtitia & jure. Leg.* xi. and *Lib.* iv. *Tit.* v. *De capite minutis, Leg.* viii. as alſo a Paſſage in *Cicero,* which is quoted a little lower, §. 20. *Note* 4. and Mr. *Noodt*'s *Probab. Juris, Lib.* ii. *Chap.* xi.

[3] Upon this it is that they ought to reflect, who lay down for the fundamental Principle of the Law of Nature, the Will of God, affirming, that there is no great Difference between that and our Author's Hypotheſis, whereas what we ſeek chiefly to know is, what is the general Rule, by which we may diſcover what is the Will of God, that we may draw from that Rule, by direct Conſequences, all the Maxims of the natural Law.

[4] In which Senſe we allow the Saying of *Euripides* (Hecub. v. 800.) God *himſelf acts by a Law, i. e.* by the Rules of Right and Wrong. See *Lib.* vii. *Chap.* vi. §. 3. *Note* 1.

Atqui nec divis homines componier æquum eſt.

No juſt Compariſon 'twixt Gods and Men.

From this Conſideration, that we ought not to admit any Law common both to God and Man, we may draw an eaſy Anſwer to thoſe Inſtances, which ſome give of God's diſpenſing with the Law of Nature, as when he commanded *Abraham* to kill his Son, and the *Iſraelites* to rob the *Egyptians*, of their Veſſels of Silver and Veſſels of Gold. For God the ſupreme Lord and Diſpoſer of all Things, hath a much higher and fuller Right over his Creatures, than one Man can have over another, who is by Nature his Equal. Therefore we cannot properly call it a Diſpenſation of the Law of Nature, when a Man by expreſs Command from Heaven, executes God's Right upon other Men, meerly as *His* Inſtrument. *Comp. Grot. Lib.* i. *Ch.* i. §. x. *Note* 6. None, I believe, can be ſo ſimple as to imagine, that when the Object is chang'd, or the Circumſtances varied, the Law it ſelf ſuffers Alteration. When *the Creditor hath forgiven a Debt*, it loſeth that Name, and therefore is no longer comprehended under the Law, which enjoins Payment. And as for the other Inſtance, when the Goods of a Perſon who gave a Thing *in Truſt*, are adjudg'd to the publick Treaſury, neither the Law is chang'd, nor its Object. For thus runs the Law, *He who receives a Thing* in Truſt, *ought to reſtore it either to him who committed the Thing* (being his own) *to his Charge, or to him on whom the Right deſcends* [7]. Now this Law cannot affect the Thief, becauſe the Thing was not *his own*; nor the former Owner, who is ſuppos'd to be at preſent a baniſh'd Man, becauſe the Propriety of all that was his paſſeth to the Publick.

VI. But neither do the Arguments which the

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[5] We muſt add here two important Obſervations. I. That there are ſeveral Acts of human Juſtice which can't be attributed to God, becauſe of the Excellency of his Nature. Such are a great Number of the Acts of univerſal Juſtice, and thoſe of particular Juſtice, which regulate Contracts, invented to carry on the Buſineſs and Neceſſities of Life. See *Pſal.* l. ver. 10, 11, 12. *Rom.* xi. 35. For who, for Example, dare reaſon thus? Pay your Debts, becauſe God pays his. Be grateful, becauſe God is kind to them that ſerve him. Obey your Governors, becauſe God is ſubject to his Superiors. Honour your Parents, becauſe God honours his. Are not theſe Arguings manifeſtly abſurd? II. Moreover, as we know God by his Works, and by aſcending from the Effect to the Cauſe, we can't know the Perfections of God, but by taking from the Perfections of the Creatures, and eſpecially from Man's, whatever is imperfect, and then attributing them to God, when they are ſo purified. Thus having obſerved that theſe are the Perfections of Man, to keep one's Promiſe, ſpeak the Truth, do no Man any Injury, diſtribute Juſtice impartially, we thence conclude, that they ought to be in him, who is the firſt Cauſe and abſolute Lord of the World, but in a moſt excellent Manner, and worthy of the ſupreme and ſovereign Being. It would be ridiculous then to eſtabliſh divine Juſtice upon the Foundation of human, becauſe this laſt is better known than the firſt, as Dr. *Cumberland, De Leg. Nat. Prolegom.* §. 6. and *Ch.* v. §. 13. acknowledges. I have taken this out of the Specimen *Controverſ. Pufendorf. motarum, &c. Ch.* iv. §. 4. and out of his *Epiſt. ad amicos p.* 262.

[6] *Ariſtotle*'s *Greek* is this, Πράξεις δὲ ποίας ἀπονεῖμαι χρεὼν αὐτοῖς; πότερα τὰς δικαίας; ἢ γελοῖοι φανοῦνται συναλλάττοντες, καὶ παρακαταθήκας ἀποδιδόντες, καὶ ὅσα ἄλλα τοιαῦτα; ἀλλὰ τὰς ἀνδρείους; ὑπομένοντας τὰ φοβερὰ καὶ κινδυνεύοντας, ὅτι καλόν; ἢ τὰς ἐλευθερίους; τίνι δὲ δώσουσιν; ἄτοπον δ', εἰ καὶ ἔσται αὐτοῖς νόμισμα, ἤ τι τοιοῦτον· εἰ δὲ σώφρονες, τί ἂν εἶεν; ἢ φορτικὸς ὁ ἔπαινος, ὅτι οὐκ ἔχουσι φαύλας ἐπιθυμίας; διεξιοῦσι δὲ πάντα φαίνοιτ' ἂν τὰ περὶ τὰς πράξεις, μικρὰ καὶ ἀνάξια θεῶν.

[7] See *Lib.* iv. *Ch.* xiii. §. 5. following.

Author [a] of the Treatiſe *De Principiis Juſti & Decori* produces, ſeem forcible enough to eſtabliſh a Twofold natural Law, *divine, and human, which, ſuppoſing the preſent Order of the World to continue, do fall in with one another* [1]. For inaſmuch as all Law implies Obligation, and that again preſuppoſes ſome external and ſuperior Principle, it doth not appear how we can, without Abſurdity, apply any ſuch Matter to GOD. And it is alike Impropriety to ſay, that [2] *GOD is oblig'd by himſelf, or by his own Eſſence.* Nor will that Text which he alledges, of *Rom.* i. 32. ever prove [3] ſuch a Law to be in GOD. For ſince the Gentiles, from the Dictates of their Reaſon, were able to gather the Knowledge of the Law of Nature, the next thing which they muſt infer, was, that GOD the Legiſlator would not ſuffer the Law to be violated without puniſhing the Offender. Therefore upon the Violation of that Law, there ariſes a Right to GOD (if it be decent ſo to ſpeak) of exacting Puniſhment; or upon Commiſſion of the Sin, GOD moſt juſtly executes what he before threatened. But who can conclude from hence, that GOD is obnoxious to Law? What follows is an ambiguous Expreſſion, *That the ſupreme Right of GOD over his Creatures is diſcover'd by natural Reaſon from thoſe Principles, which make the Foundations of natural Right and Equity amongſt Men.* For if this only be the Senſe of it, that in many Caſes GOD doth proceed in the ſame Manner in his Dealings with Men, as he would have them follow in their Tranſactions with each other; it will eaſily paſs without Contradiction [b]. For thus GOD by the natural Law, hath enjoin'd Men to keep their Promiſes, as he will firmly keep thoſe which he makes himſelf [c]. So he forbids human Judges to condemn the Innocent, declaring that he himſelf will acquit them in his own Judgments [d] [4]. But if it be meant to aſſert that GOD hath no more Right over his Creatures, than Men are allow'd to obtain over each other; there will be need of more convincing Arguments to make us believe, that the ſupreme Lord and Maſter hath no fuller Right over his Servants, than the Servants have over their Fellow-Servants, with whom Nature has ſet them on a Level: Or, to uſe *Grotius*'s [e] Terms, that the *Jus Rectorium*, and the *Jus Æquatorium*, the Right of Governors, and the Right of Equals are exactly the ſame Thing.

Neither muſt we let that Aſſertion paſs by unceſur'd, which the Author of the ſame Treatiſe lays down, *pag.* 52. *That GOD ought neceſſarily to eſteem the Laws of Nature as juſt, the Order of the Univerſe being eſtabliſh'd in the Manner we now behold: And that he cannot but own every Deviation from them to be indecent and unjuſt.* For without doubt thoſe imperious Terms, *GOD ought neceſſarily*, are very unſuitable to the Majeſty of an Omnipotent Legiſlator. Nor is here any Neceſſity to be diſcover'd in the Caſe [5], except ſuch as owes its Original meerly to the divine Pleaſure. The Reaſon which he ſubjoins is not ſtrong enough to maintain his firſt Poſition; *All Things*, ſays he, *which our Thoughts can imagine, have always ſome Kind of* σχέσις *or Relation, ariſing from the intrinſick Nature of the Thing, and which cannot be ſeparated from the Thing, without offering Violence to Reaſon.* For this Nature, and this adhering Relation, Things have not from themſelves, but from the free Will of GOD; and the Decrees of *his* Will cannot properly be called his own Law. Thus, the Reaſon why amongſt Men one Benefit obliges to the Return of another; why Violation of Covenants, Inhumanity, Pride, Slander, can never be allowable, is, becauſe GOD hath given Man a ſociable Nature, and as long as that Nature remains unalter'd, thoſe Things which are agreeable to it muſt be good and honeſt, and thoſe which are repugnant to it uncomely and unlawful. But who can hence infer, either that there is but one Law common to GOD and Men, or that Things are indued with any σχέσις or Habitude, independent from the divine Diſpoſal?

VII. Thoſe who found the Law of Nature on the Conſent of Mankind in general, or on the Agreement either of all, or however of the moſt, and the moſt poliſh'd Nations, ſeem chiefly to follow [1] *Ariſtotle*, as the Author and Patron of their Opinion. He, in his Ethicks to *Nicomachus*, *B.* v.

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[a] *Velthuyſen*, *p.* 253. [b] *See* Luke vi. 35. [c] Rom. iii. 4. Hebr. vi. 17, 18. [d] 2 Chron. xix. 6, 7. Rom. ii. 2. [e] *Lib.* i. *Ch.* i. §. 3. *n.* 2.

§. VI. [1] Our Author here breaks off his Diſcourſe in a ſtrange Manner, to confute a Writer which he had read over in too great Haſte. *Velthuyſen* does no where make two diſtinct Kinds of natural Right, one to which GOD is ſubject, and the other to govern Man; but that natural Right which he calls divine, as well as that which he calls human, is a Law only for Man. He has no Word that ſo much as intimates, that he would eſtabliſh a Right common to GOD and Men. He only endeavours to prove that the Law of Nature, which is taught us by Reaſon, is really a divine Law, and that GOD can't diſpenſe with it, but he muſt contradict himſelf, ſo far as the Conſtitution of Things is ſuch as he himſelf appointed at the Creation of the World. This appears both by the Coherence of his Diſcourſe, and by what he had before ſaid, *p.* 52, 53. I had not minded to juſtify this Author in this ſecond Edition of my Work, if I had not forgot it in my firſt. I know not how to read what follows in the Original.

[2] I know not what our Author means here, for theſe Words are not the Perſon's whom he confutes.

[3] Nor is this Mr. *Velthuyſen*'s Concluſion which he aims at. His Deſign was only to prove, that the Gentiles might know very well, that by breaking the Laws of Nature they diſobeyed GOD, and ſo deſerved his Corrections, ſo that he might juſtly puniſh with Death any that had ſinned againſt the Law of Nature. From whence it follows, that in ſinning againſt the Law of Nature they ſinned againſt the Law of GOD.

[4] Mr. *Velthuyſen* ſays not the leaſt Thing that tends that Way. He only aſſerts, that GOD, notwithſtanding his Almighty Power, does nothing but what's agreeable to his Perfections. *There is nothing*, ſays he, *of a worſe Conſequence in religious Matters, than to teach that GOD does many Things wherein human Reaſon can ſee no Juſtice. For, if this be allowed, we deſtroy all reaſonable Worſhip; Men will be obliged to renounce the Uſe of right Reaſon. They muſt do and believe, in reference to GOD, Things contrary to the Light of the cleareſt Reaſon, and conform to ſuch Notions as to them are incredible*, &c.

[5] I can't ſee that Mr. *Velthuyſen* intends any other Neceſſity here, than what is founded upon the Perfections of the Deity, who permits us not to will the End, without willing at the ſame Time the Means neceſſary to arrive at it, for this is the Principle he uſes, as well as our Author, to diſcover the Original of the Laws of Nature. See §. 12. following.

§. VII. [1] The *Greek* of *Ariſtotle* is, Φύσικον μὲν δίκαιον τὸ πανταχοῦ τὴν αὐτὴν ἔχειν δύναμιν, καὶ οὐ τῷ δοκεῖν, ἢ μή. And again, Ἐςὶ γὰρ ὃ μαντεύονταί τι πάντες, φύσει κοινὸν δίκαιον, καὶ ἄδικον, κἂν μηδεμία κοινωνία πρὸς ἀλλήλους ᾖ μηδὲ συνθήκη. See *Cicero*'s *Tuſc. Quæſt. Lib.* i. *Ch.* xiii, xiv. *The Conſent of all Men in any Point, is to be eſteem'd a Law of Nature.* And again, *The Conſent of all Men is the Voice of Nature.*

Ch. x. calls that *natural Juſtice, which bears the ſame Force in all Places, and doth not depend on particular Sentiments.* And in his *Rhetorick*, *Book* v. *Ch.* xiii. he tells us, *there is a general Right and Wrong, or Juſt or Unjuſt, believ'd and profeſs'd by all Men; although no Society ſhould be inſtituted amongſt them, and no Covenants be tranſacted.*

Now beſides, that this Way of proving the Law of Nature is only *à poſteriori* [2], and therefore cannot ſhew the Cauſe and Reaſon of the Thing; ſo is it very ſlippery and uncertain, and involv'd in an endleſs Maze of Doubts and Perplexities. To appeal to the Conſent of all Mankind, Mr. *Hobbes* [a] obſerves to be inconvenient upon this Account, becauſe at this Rate it would be impoſſible for a Man, actually uſing his Reaſon, to ſin againſt the Law of Nature. Inaſmuch as his Conſent being wanting, who is a Part of Mankind, the common Agreement muſt needs be maim'd and imperfect. Then again, becauſe it would not be fair to gather the Laws of Nature from the Conſent of thoſe who break them more frequently than they obſerve them [3]. For, as *Iſocrates* [b] ſpeaks, *It is a natural Misfortune which we all lie under, that we ſhould more frequently tranſgreſs than perform our Duty.*

Nor will it be a more happy Way of arguing to appeal to the Conſent of *all Nations.* For, were it poſſible for us to underſtand all the Languages of antient and modern People, yet we ſhould be ſtill far enough to ſeek in the Knowledge of their Manners and of their Inſtitutions. We cannot hit off this Difficulty by ſaying, that the Conſent of the moſt civiliz'd Nations is ſufficient, and that the Opinions of Barbarians are not to come into the Account. For, what Nation, any Ways able to manage and to preſerve itſelf, will own the Title of Barbarous? Or what Nation can take ſo much on itſelf, as to deſire its own Manners and Proceedings ſhould be the Standard in trying all others, and that whatever People did not exactly conform to its Model, ſhould be immediately [4] pronounc'd barbarous and ſavage? Heretofore the Pride of the *Grecians* cenſur'd all as *Barbarians*, who liv'd without the Bounds of their Country. The *Romans* afterwards ſucceeded them, as well in their Arrogance as in their Empire. And at the preſent, ſome few Nations here in *Europe* have the Vanity to prefer themſelves to the reſt of the World, in the Opinion of their own Civility and Improvements of Living. But there are not wanting other People, who imagine themſelves to have the Advantage of them in all Reſpects: And 'tis an old Proverb amongſt the *Chineſe*, that themſelves only have two Eyes, only the *Europeans* one, and all the reſt of the World are ſtark blind.

Some too there are, who fall foul upon our Learning, in proſecuting which we ſpend ſo much good Time; they will have it to be no better than a Prop, or a Crutch to ſupport and aſſiſt our Dulneſs: Inaſmuch as the good Diſpoſition of many Men carry them on to a natural Innocence and Probity, without Improvement or Ornament of Letters; and becauſe it requires no great Clerkſhip to be an honeſt Man. It is likewiſe too evident that high Attainments of Knowledge are not always bleſs'd with the Attendance of good Manners or of good Temper [c]. Many Nations we ſee pride themſelves in the tedious Pageantry of vain unneceſſary Things; deſpiſing thoſe who lead a Life of leſs Gallantry and more Simplicity. Yet were we to ſeek for Innocency and Integrity, we might, perhaps, find them much ſooner amongſt theſe plain and unartificial Mortals, than amongſt their ſtately and formal Neighbours. [5] 'Tis a ſhrewd Remark of *Juſtin, Lib.* ii. *Ch.* ii. ſpeaking of the *Scythians*; *It ſeems wonderful*, ſays he, *that meer Nature ſhould give* them, *what the* Grecians, *with the long Inſtitutions of their wiſe Men, and the Precepts of their Philoſophers could never attain; and that the politeſt Manners ſhould be diſtanc'd and outdone in the Compariſon with Barbarity. Of ſo much greater Benefit on one ſide was the Ignorance of Vice, than on the other the Knowledge of Virtue.* Vid. *Valer. Max. Lib.* i. *Ch.* i. §. 2. *Extern. & Sext. Empiric. Hypotyp. Lib.* ii. *Ch.* v. where we meet with ſeveral Things to the ſame Purpoſe.

Beſides, that ſuch a Conſent can be of no Force, appears from this farther Reflection; that the Number of Fools far exceeds that of wiſe Men; and that few Perſons have form'd their Opinions upon a full Search into the Foundations of Things; but moſt Men follow on in the Track of others, and yield an implicit Aſſent to their Notions, without applying their own Thoughts or Judgments to the Points in Debate. Farther, altho' we have a tolerable Aſſurance of the Conſent of moſt People, at leaſt as to the general Precepts of natural Law; and altho' we may preſume on the Conſent of the reſt, from the Principles of thoſe who are better known to us, yet it is more ſafe to conclude hence, what thoſe Nations eſteem juſt and equal amongſt themſelves, than what they think fair Ways of dealing with Strangers; all whom [6] are by ſome People accounted Enemies, and treated accordingly [d].

VIII. Tho' the common Uſe and Cuſtom of many Nations may ſeem to be alledg'd with more Force for proving a Thing to be lawful or allowable, than for the proving it to be actually commanded by the Law of Nature; yet that we cannot with any Security make ſo much as the former of theſe Concluſions ſeems probable from the great Variety and Contradiction diſcoverable in the Manners and in the Inſtitutions of the moſt famous People upon Record. So that we may well apply to the preſent Caſe, that Saying of [1] *Socrates* [a], οὐκ εἰς σπουδαίους γε διδασκάλους καταφεύγεις, εἰς τοὺς πολλοὺς ἀναφέρων. *You conſult no very expert Maſters, when you refer yourſelf to the Multitude for Inſtruction.* To the ſame Purpoſe *Plutarch* [b] obſerves, that *the Laws of Men are vaſtly different, ſome making one Thing to be good, and ſome another:* And *Tacitus*'s Deſcription of an Army compos'd of various Nations, may ſerve to repreſent the ſame wide Diſagreement. *Their Languages, their Manners, their Deſires,* ſays he, *are different; and while ſome will have one Thing to be lawful, and ſome the contrary, amongſt them all, nothing can eſcape as unlawful* [c]. To give ſome Account of this Variety by way of Specimen. *Ariſtotle* [d] reports of ſome ſavage Nations on the Confines of *Pontus*, that it is cuſtomary with them, to borrow one another's Children, to furniſh out their Feaſts. And theſe People he preſently after calls *Irrational*, *Wild*, and living only by *Senſe*. *Euſebius*, in his Book *de Præparatione Evangelicâ* [e], reckoning up the foul Cuſtoms and Manners which had been corrected by the Doctrine of the Goſpel, amongſt others, mentions the Pollution with Mothers and Siſters in *Perſia* (which *Diogenes Laertius* [f] too takes Notice of from the Authority of *Socion*) the eating of human Fleſh, and the murdering of Children under a religious Pretence amongſt the *Scythians:* He adds that the *Maſſagetæ*, and the *Derbices* us'd to kill their Relations when they grew very old, and make an Entertainment with their Bodies; that the *Tibareni* in *Cappadocia*, threw their antient Perſons down Precipices; that the *Hyrcanians* caſt out their Dead to the Birds, and the *Caſpians* to the Dogs, to be devour'd. Hither alſo may we refer thoſe foul Watchings and other Ceremonies, deſign'd for the Honour of their Gods, but mixt with all the licentious Practices of Adultery and Lewdneſs; as alſo the human Sacrifices barbarouſly murder'd on their Altars. The ſame excellent Author [g] gives the following Relations out of *Bardeſanes* the *Syrian*. *'Tis a Law amongſt the* Getulians, *that the Women offer their Bodies to whomſoever they pleaſe, eſpecially to Strangers; and that their Husbands ſhall not accuſe them on theſe Accounts, or pretend to cenſure them as guilty of Adultery. The ſame Liberty obtain'd amongſt the* Bactrians. *Whereas, on the contrary, amongſt the* Arabians, *all Adultreſſes were puniſh'd with Death, and if ſuſpected only, underwent ſome leſſer Penalty. In* Parthia *and* Armenia *it is provided by Law, that no Man ſhall be accus'd for killing his Wife, his Son, his Daughter, or his unmarried Brother or Siſter. Amongſt the* Atrians *petty Robberies are puniſh'd with Stoning; amongſt the* Bactrians *only with the Ignominy of being publickly defiled with Spittle. The wiſe Men of* Greece *are not aſhamed to court the Love of little beautiful Boys. In* Britain *many Men poſſeſs one Wife. In* Parthia *many Women belong to one Husband.* [2] *Sextus Empiricus* [h] the Sceptick, to ſhew that there is no Certainty in the Notions of Honeſty or Diſhoneſty, hath raked up a great Heap of theſe contradictory Cuſtoms and Inſtitutions. But he hath ſtumbled very fatally in the very Entrance of his Deſign, while he talks in this Manner: *Amongſt us Pollution with the male Sex is unlawful and abominable; yet amongſt the* Germans, *as is reported, it is no Diſgrace, but rather a faſhionable Practice.* For the *Grecians* were ſo ſcandalouſly addicted to this unnatural Vice, that *Plato*, in his 8th Book of Laws, thought there was need of urging ſome Reaſons to prove the Poſſibility of reſtraining it by publick Edicts. And that the *Bœotians*, *Sextus Empiricus*'s Countrymen, ought not to ſtand excepted from this Imputation, may be gather'd from a Paſſage in *Cornelius Nepos*'s Life of *Epaminondas*; though perhaps the vile Cuſtom had ceas'd in thoſe Parts before this ſceptical Philoſopher wrote. That it once prevail'd there, he himſelf afterwards relates. But what he reports of the *Germans*, is ſo groundleſs a Falſity, that 'tis wonderful how it ſhould enter into the Head of any one, who is the leaſt acquainted with the Manners and the Story of that Nation. He adds, that the *Cynick* Philoſophers, and *Zeno*, *Cleanthes*, and *Chryſippus*, eſteem'd the ſame foul Enormity an indifferent Thing. That ſome of the *Indians* thought it no Indecency to be familiar with their Wives in Publick. That in ſeveral Parts of *Egypt* for Women to proſtitute themſelves was look'd on as a creditable Profeſſion; and that 'twas uſual with the younger Sort firſt to get themſelves a Fortune by the jilting Trade, and then to marry. That the *Stoicks* held it to be no irrational Practice either to frequent the Stews, or to maintain one's ſelf by Pimping. That the *Perſians* contracted Marriages with their Mothers, and the *Egyptians* with their Siſters: The former of which *Zeno* maintain'd to be agreeable to Reaſon [i]. That *Chryſippus* permitted a Father to have Children by his Daughter, a Mother by her Son, and a Brother by his Siſter. That *Plato* allow'd the Community of Wives. That 'twas a receiv'd Cuſtom with many of the Barbarians to feed on Man's Fleſh; which the *Stoicks* themſelves approv'd of. That, amongſt many others, Adulteries paſs'd for indifferent Matters. That the *Scythians* offer'd Strangers to *Diana*; and kill'd their own Parents, when they arriv'd beyond the Age of Sixty Years. That by a Law of *Solon*'s at *Athens*, the Parents were impower'd to put their Children to Death. That the *Roman* Gladiators, after the Performance of their Murther, receiv'd Honours and Rewards. That Thieves amongſt the *Spartans* were puniſh'd, not for ſtealing, but for letting themſelves be catch'd. That the *Amazons*, if they happen'd to bear male Children, willfully made them Cripples, to prevent their Performance of any manly Actions or Exploits. He enlarges farther about the different Opinions in reference to the divine Nature, about the Diverſity of religious Rites and Ceremonies, about the various Manners of Burial, and the abſurd Procurements of Death [a]. *Tully* [b] reports that the *Egyptians, having their Minds overcome by wicked Errors, will ſooner let themſelves be cut in Pieces, than they will hurt a Serpent, an Aſp, a Cat, a Dog, or a Crocodile: And if they happen unawares to do any of theſe Creatures a Miſchief, they voluntarily undergo any Puniſhment. Busbequius* [c] informs us, that Theft is an honourable Practice amongſt the *Colchians:* And *Fran. Alvarez* that in *Abyſſynia* the Cuſtom is, for the Thieves to preſent a Part of their Booty to the King, keeping the reſt without Scandal for their own Uſe. *Philo Judæus de Temulentia, p.* 208, 209. Ed. *Genev.* [1] *And theſe Things may give us Warning not eaſily to credit thoſe Uncertainties, which being diffus'd thro' almoſt the whole World, have thrown both Greeks and Barbarians into common Errors of Judgment. I mean thoſe early Inſtitutions, thoſe national Cuſtoms, thoſe antient Laws, through the whole Sum of which we cannot find one in which all agree; but in every Country, People, City, Street, and even in every Houſe, the Men at leaſt, differ from the Women, and the Children from both. And indeed I do not wonder, that a confus'd and miſcellaneous Rabble, meer Slaves to Laws and Cuſtoms, however introduc'd, inur'd from the Cradle to yield Obedience to them no leſs than to Maſters or Tyrants, and having their Mind cow'd and broken by Severity and Blows, and not able to aſpire to any great and manly Attainments, ſhould believe the Traditions they receiv'd from their Anceſtors, and letting their Reaſon lie without Uſe or Exerciſe, affirm Things, or deny them unexamin'd and unobſerv'd. But I cannot forbear wondering at the Philoſophers; who, whilſt the greateſt Part of them pretend to hunt for the real Truth and Certainty of Things, dividing themſelves into ſo many Troops and Orders, pronounce of almoſt every Matter, great or ſmall, ever with Difference, and often with Contradiction.* Add. *Montaigne*'s *Eſſ. Lib.* i. *Ch.* xxii. and *Charron of Wiſdom, Lib.* ii. *Ch.* viii. §. 4, 7.

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[a] *De Cive, Lib.* ii. §. 1. [b] *Orat. ad Philipp.* [c] *Plato Epiſt.* x. *Firm Integrity, Faith, and ſincere Dealing, this I take to be the true Philoſophy.* [d] Add. *Montaigne's Eſſays, Lib.* i. *Ch.* xxx.

[2] That is, not from the Nature of the Thing it ſelf, but from ſome external Principle, as from the Conſent of People.

[3] The *Greek* is, Ἀλλὰ γὰρ πάντες πλείω πεφύκαμεν ἐξαμαρτάνειν, ἢ κατορθοῦν.

[4] *Charron* reckons this among the fooliſh Opinions that are in the World, to condemn and reject all Things, Manners, Opinions, Laws, Cuſtoms, and Obſervances, as barbarous and evil without Knowledge of them, meerly becauſe they are not uſed by us, and are not thought proper for our Practice. *Of Wiſdom, Lib.* i. *Ch.* vi. §. 9. *Numb.* 2. See alſo *Lib.* ii. *Ch.* viii. and *Ch.* ii. §. 5. Let the Reader further conſult Mr. *Bruyere*'s Characters in his *Chapt. of Judgments, p.* 420. and he'll find ſomething very ingenious and ſmart upon this Subject there.

[5] *Juſtin*'s Words are, *Prorſus ut admirabile videatur, hoc illis naturam dare, quod Græci longa ſapientium doctrina præceptiſque philoſophorum conſequi nequeunt, cultoſque mores incultæ barbariæ collatione ſuperari. Tanto plus in illis proficit vitiorum ignoratio, quam in his cognitio virtutis.*

[6] This appears eſpecially by the Example of Two of the moſt famous People in the World, I mean the *Greeks* and *Romans.* See *Parrhaſiana, Tom.* 1. *Page* 202, 203. and Mr. *Le Clerc*'s *Ars Critica, Tom.* i. *Part* II, §. 1. *Ch.* vi. §. 2, *&c.*

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[a] *Plato Alcibiad.* I. [b] In *Themiſtocl. Pyrrhon. Hypotheſ. Lib.* ii. *Ch.* v. *p.* 125. Ed. *Wech.* [c] *Hiſt.* 3. *Lib.* iii. *Ch.* xxxix. *in fin.* [d] *Ethic. Lib.* vii. *Ch.* vi. [e] *Lib.* i. *Ch.* iii. [f] *See his Preface, §.* 7. *with* Menage's *Notes.* [g] *Lib.* vi. *Ch.* viii. [h] *Pyrrhon. Hypotheſ. Lib.* iii. *Ch.* xxiv. [i] *Ibid. Ch.* xxiii. Zeno's *Speech, as there repreſented, reacheth the higheſt Degree of Looſeneſs and Impudence.*

§. VIII. [1] But here he ſpeaks of the Multitude or Populace, and not of the Conſent of ſeveral Nations.

[2] Theſe Remarks againſt *Sextus Empiricus*, in Favour of the *Germans*, contain only an uſeleſs Digreſſion, which might well be ſpared, as I have done.

IX. But that Notion of extracting the Law of Nature from the Manners and Cuſtoms of the World, is accompanied with this farther Inconvenience; that 'tis almoſt impoſſible to find any Nation, which is govern'd purely by natural Law; but every Country hath its own particular Laws ſuperadded, either in Writing or otherwiſe; to be made uſe of when the People have any Bargains or Tranſactions with their Fellow-ſubjects. And many times Affairs in Debate between whole Nations, are decided either by civil Law common to both, or by the Law of Nature, as it is not naked, but cloath'd, as it were, with many poſitive Additions. So that it is no eaſy Matter to diſtinguiſh what thoſe Nations admit for natural Law; and what for poſitive and civil. We may add to this Conſideration, that meer Uſe and Cuſtom when it hath born a long, and an unqueſtion'd Sway, frequently puts on the Face and Semblance of natural Reaſon. *'Tis manifeſt,* ſays *Agathias* [d], *that whatever Law or Inſtitution hath obtain'd thro' a long Courſe of Time amongſt many People, they certainly cry it up for moſt excellent and moſt equitable; and if any Thing be attempted contrary to it, this they reject as ridiculous, and unworthy of all Credit and Allowance.* We have a famous Example to this Purpoſe in *Herodotus* . *Darius*, for Experiment's ſake, put the Queſtion to the *Greeks*, who were under his Command, what Sum of Money he ſhould give them to feed on the Bodies of their deceas'd Parents, after the Manner of the *Indians*. Upon their Refuſal to comply on any Conſiderations, he ask'd ſome of the *Indians*, what they'd take to burn their dead Parents after the *Grecians* Faſhion, and not to eat them: But they ſetting up a general Outcry, deſired the King to have better Thoughts of them. Beſides, to have been inur'd in any Opinion from one's Infancy, is ſo forcible a Prepoſſeſſion, that altho' the Opinion be falſe, yet it ſcarce enters into any Perſon's Head to queſtion it; at leaſt it paſſes with an uncontrol'd Currency, amongſt Men of vulgar Parts and Capacities. [1] *Ariſtot. Problem.* §. 18. *Qu.* 6. *Thoſe Things which Men have at firſt made Choice of, and to which they have been accuſtom'd, in theſe they are not able to judge for the better. For their Mind is already corrupted by evil Prejudices and Prepoſſeſſion.* Cicero. Tuſc. Quæſt. Lib. iv. Ch. iii. *Some Perſons are tied and reſtrain'd in their Notions, before they are capable of judging what is beſt, and afterwards, in the weakeſt Part of their Age, either following the Opinions of ſome Friends, or taken with the Speech of the firſt Maſter they have heard, they give their Verdicts on Points which they do not in the leaſt underſtand, and being carried with the Violence, as it were, of a Tempeſt, to ſome particular Doctrine or Sect, they cleave to it as if they were hugging a Rock to ſave their Lives.* And a little after, *I know not how it comes to paſs, that moſt Men had rather continue in a Miſtake, and quarrel and fight in Defence of an Opinion which they have once lov'd and embrac'd, than to examine without Obſtinacy or Partiality, what is deliver'd with moſt Agreement on all Sides.* Add. *Mich. Montaigne*'s *Eſſ. Lib.* i. *Ch.* xxii. *Philo Jud. de Abrahamo p.* 294. B. Ed. *Genev. Inveterate Cuſtom uſually bears as much Force as Nature itſelf.* To the greateſt Part of Mankind we may apply *Sextus Empiricus*'s [2] Saying, *they follow the uſual Ways of Life without Thought or Reflection* [f]. And

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[a] Add. *Diog. Laert. in Pyrrho, Lib.* ix.
[b] *Tuſc. Quæſt. Lib.* v. *Ch.* xxvii.
[c] *Epiſt.* iii.
[d] *Lib.* ii. *Ch.* xx.
[e] *Thalia,* p. 112. *Gr.* Edit. *H. Steph.*
[f] *Pyrrhon. Hypoth. Lib.* iii. *Ch.* xxiv.

[1] *Philo*'s *Greek* is, Ἐκεῖ δ᾽ ἡμᾶς οὐ παρακαλεῖ μὴ λίαν τοῖς ἀφανέσι προπιστεύειν, ἃ σχεδὸν ἀνὰ πᾶσαν τὴν οἰκουμένην ἀνακέχυται, κοινὸν Ἕλλησιν ὁμοῦ καὶ βαρβάροις ἐπάγοντα τὴν ἐκ τοῦ κρίνειν ὄλισθον; τίνα οὖν ταῦτ᾽ ἐστίν; ἀγωγαὶ δήπουθεν αἱ ἐκ παίδων, καὶ ἔθη πάτρια, καὶ παλαιοὶ νόμοι, ὧν οὐδὲν ὁμολογεῖται ταὐτὸν εἶναι παρὰ πᾶσιν, ἀλλὰ κατὰ χώρας καὶ ἔθνη, καὶ πόλεις, μᾶλλον δὲ καὶ κατὰ κώμην καὶ οἰκίαν ἑκάστην, ἄνδρα μὲν οὖν καὶ γυναῖκα καὶ νήπιον παῖδα, τοῖς ἄλλοις διακέκριται· τὰ γοῦν αἰσχρὰ παρ᾽ ἡμῖν ἑτέροις καλὰ, καὶ τὰ πρέποντα, ἀπρεπῆ, καὶ τὰ δίκαια, ἄδικα—— Ἐγὼ δ᾽ οὐ τεθαύμακα εἰ συμπεφορημένος καὶ μιγὰς ὄχλος ἐθῶν καὶ νόμων τῶν ὁπωσοῦν εἰσηγμένων ἀκλεὴς δοῦλος, ἀπ᾽ αὐτῶν ἔτι σπαργάνων μὴ παρακούειν [for ſo it ought to be read, inſtead of ἀκούειν] ὡς ἂν δεσποτῶν ἢ τυράννων, ἐκμαθὼν, κατακεκονδυλισμένος τὴν ψυχὴν· καὶ μέγα καὶ νεανικὸν φρόνημα λαβεῖν μὴ δυνάμενος, πιστεύει τοῖς ἅπαξ παραδοθεῖσι, καὶ τὸν νοῦν ἐάσας ἀγύμναστον, ἀδιερευνήτοις καὶ ἀνεξετάστοις συναινέσεσί τε καὶ ἀρνήσεσι χρῆται; ἀλλ᾽ εἰ καὶ τῶν λεγομένων φιλοσόφων ἡ πληθὺς τὸ ἐν τοῖς οὖσι σαφὲς καὶ ἀψευδὲς ἐπιμορφάζουσα θηρᾶν κατὰ στίφη καὶ λόχους διακέκριται, καὶ δόγματα ἀσύμφωνα, πολλάκις δὲ καὶ ἐναντία οὐ περὶ ἑνὸς τίθενται τοῦ τυχόντος, ἀλλὰ σχεδὸν περὶ πάντων μικρῶν τε καὶ μεγάλων, ἐν οἷς αἱ ζητήσεις συνίστανται.

§. IX. [1] *Ariſtotle*'s Words are, Τί δ᾽ ἂν τίνες ἐξ ἀρχῆς ἕλωνται, καὶ οἷς ἂν συνεθισθῶσιν, οὐδὲ κρίνειν δύνανται τὰ βελτίω· διέφθαρται γὰρ ἡ διάνοια διὰ φαύλας προαιρέσεις· *Tully*'s Words are, *Nam cæteri primùm ante tenentur adſtricti, quàm, quid eſſet optimum, judicare potuerunt: deinde infirmiſſimo tempore ætatis aut obſecuti amico cuidam, aut una alicujus, quem primum audierunt, oratione capti, de rebus incognitis judicant, & ad quamcunq; ſunt diſciplinam quaſi tempeſtate delati, ad eam, quaſi ad ſaxum, adhæreſcunt.*

[2] *S. Empiricus*'s Words are, Ἕπεται δὲ ἀδοξάστως τῇ βιωτικῇ τηρήσει·

Euripides's

[3] *Euripides*'s Obſervation is no leſs true, that *the Traditions which we receiv'd from our Parents, and which are grown up with us, no Reaſon can confute, no Strength of Wiſdom can over-rule* [a]. To the ſame Head we may refer that Text of the [4] Apoſtle, 1 *Cor.* xi. 14. and that Remark in *Plato*, in his ſeventh Book of Laws, that our uſing one of our Hands more readily than the other, proceeds purely from Cuſtom: Inaſmuch as Nature equally favours both. Amongſt many People Honour and Reſpect are meaſured by the Length of Beards [b]; whereas, on the contrary, the greateſt Part of the *Americans* think it a brutiſh Indecency to appear with any Beard at all [c].

But all this while, we do not aſcribe ſo much Force to Cuſtom, that it ſhould be able in ſuch a Manner to deprave and ſeduce the Judgment of Reaſon, as to render the Truths concerning natural Laws impoſſible to be apprehended [d].

X. This ſtrange Diverſity of Laws and Manners, by which moſt Nations in the World contradict each other, hath, without doubt, been the Occaſion why ſome Men have aſſerted that there's no ſuch Thing as natural Law, but that all Law firſt aroſe from the Convenience and the Profit of particular States, and is incapable of any other Meaſure. Thus *Horace*, *Serm. Lib.* i. *Sat.* iii. *v.* 98, 111, *&c.*

Atq; ipſa utilitas, juſti prope mater & æqui.

Jura inventa metu injuſti fateare neceſſe eſt,
Tempora ſi faſtoſq; velis evolvere mundi.
Nec natura poteſt juſto ſecernere iniquum,
Dividit ut bona diverſis, fugienda petendis.

Of Mother Profit, Juſt and Right were born.

Turn o'er the muſty Annals of Mankind,
And you'll confeſs that Laws were firſt enjoin'd
Thro' Fear of Wrong: Meer Nature never knew,
Or Good, or Bad to ſhun, or to purſue.

Ovid Ep. Heroid. iv. *v.* 131, *&c.* makes his *Phœdra* declare her Mind to the ſame Purpoſe.

Iſta vetus pietas ævo moritura futuro,
Ruſtica Saturno regna tenente fuit.
Jupiter eſſe pium ſtatuit quodcunq; juvaret.

That Thread-bare Virtue only held its Sway,
Whilſt heavy *Saturn* rul'd the Sons of Clay.
Jove broke the dull Reſtraint; by *Jove*'s Decree
Profit is made the Teſt of *Piety.*

Photinus's wicked Counſel in *Lucan*, *B.* viii. *v.* 488. *Et ſeqq.* proceeds on the ſame Principles.

——— —— ——*Sidera terrâ*
Ut diſtant, & flamma mari; ſic utile recto.
Sceptrorum vis tota perit, ſi pendere juſta
Incipit; evertitq; arces reſpectus honeſti.
Libertas ſcelerum eſt, quæ regna inviſa tuetur.

As Fire from Water, as each heavenly Light
From Earth, ſo *Profit* ſtands remov'd from *Right.*
If nice Regards to Faith and Truth are ſhewn,
Your Scepter drops, and you unhinge your Throne.
The Way to fix all *hated* Reigns has been
To grant a general Liberty of Sin.

Ariſtippus too, and *Pyrrho* in *Diogenes Laertius* [e], deliver themſelves very groſsly concerning the Origin of Juſt and Unjuſt. But of all the Antients none diſputed this Point ſo largely as *Carneades* is ſaid to have done. His Arguments, as *Lactantius* [f] hath contracted them, are [2] to this Effect: That Men firſt inſtituted Laws to ſecure and to promote their own Advantage; whence they came to be ſo various according to their different Manners, and different Times; but that there was no ſuch Thing as natural Law in the World. That Mankind and all other animate Beings, are by the Guidance of Nature, carried on to the Purſuit of their own Profit; and that conſequently there can be no Juſtice; or, if there be, that it muſt be the higheſt Folly, inaſmuch as it would make a Man injure himſelf in conſulting the Conveniences of others. That all Nations famous for Empire and Command, and the *Romans* themſelves, who then reign'd Maſters of the World, if they would be juſt, that is, if they would reſtore every one his own, muſt return to their antient Cottages, and to their primitive Poverty [g]. In clearing up theſe Objections, it will not be amiſs to begin with *Tully*'s Remark, in his ſecond Book of Offices, *Ch.* iii. [3] *Profitable*, ſays he, *is a Word, which by the Corruption of Time and Cuſtom is perverted inſenſibly to the Signification of ſomewhat that may be ſeparated from Honeſty; ſo as to make ſomething honeſt which is not profitable, and ſomething profitable without being honeſt: An Error of the moſt pernicious Conſequence to the Life of Man.* On which Account, in his third Book of the ſame excellent Work, *Ch.* iii. he tells us, that *Socrates us'd to curſe the Authors who firſt divided theſe Names in Notion and Opinion, which were in Nature ſo inſeparably united.* For thoſe Maſters of falſe Politicks cheated the heedleſs Vulgar with the ambiguous Term of Profit; which is of two Kinds, as it is rated by two different Principles. One ſort of Profit is that which appears ſuch to the deprav'd Judgment of ill compos'd Affections; theſe being mov'd chiefly by preſent and tranſitory Advantages, and very little ſolicitous about future Concerns. [4] The other and the true Profit is adjudg'd ſo by ſound Reaſon, which doth not only conſider Things at hand, but weighs and examines the Effects and Conſequences which they are likely to produce. Which therefore muſt pronounce that alone to be truly profitable, which is univerſally ſuch, and which gives Aſſurance of Conſtancy and Duration [a], but can never judge it a deſirable Thing to enjoy a momentary Advantage, drawing after it a Train of endleſs Miſchiefs. 'Tis a moſt unhappy and a moſt dangerous Pleaſure, in the Heat of a Fever to relieve ourſelves with cold Water, which will be ſure afterwards to redouble our Tortures. Actions perform'd in Conformity to the Law of Nature have a double Excellency, not being only *Honeſt*, that is, conducive to the Preſervation and to the Increaſe of the Honour and the good Credit of Men; but likewiſe *Uſeful and Profitable*, promoting their Intereſt and Advantage, and contributing largely to their Happineſs. And this latter Quality is ſo far from being an unworthy Attribute of Virtue, that even in Holy Scripture, 1 *Tim.* iv. 8. *Godlineſs* is ſaid to be *profitable to all things, having both the Promiſes of this Life and of that which is to come.* On the other hand, thoſe Actions which contradict the Law of Nature, are always baſe and *diſhoneſt*, and tho' they now and then bear ſome Appearance of Profit and of Pleaſure, yet theſe Charms are quickly over, and never fail of being attended with a more conſiderable Croud of Evils and Misfortunes [b]. [5] *Tully* in his firſt Book of *Offices*, *Chap.* 4. talks admirably for our preſent Buſineſs. *Betwixt a Man and a Brute*, ſays he, *there is eminently this Difference; the one is carried on by Senſe, and to that only which is preſent, with little or no regard to what is either paſt or to come: Whereas the other, by the Benefit of Reaſon, ſees the Conſequence of Things; their Riſe and their Progreſs, and couples together Cauſes and Effects; compares Reſemblances of Actions and Events; tacks the preſent to the future; and ſo taking in his whole Life at a View, he prepares all Things neceſſary for the Uſe and Comfort of it.* Therefore 'tis ſo far from being true, that Civil Laws were firſt inſtituted for the ſake of this momentary and baſtard Profit, that it appears to have been their chief End and Deſign, to hinder Men from ſquaring their Actions by ſo falſe a Meaſure. For, ſhould any one reſolve to direct all his Proceedings to his own private Advantage, without any regard to the reſt of Mankind; ſince all other Men might as well take the ſame Courſe, there could not but ariſe the deepeſt Confuſion, and a kind of War of all againſt all, a State [6] the moſt unprofitable and the moſt inconvenient in the World. On the contrary, it is very manifeſt, that he who, by obſerving the Law of Nature, endeavours to win the Affections and the good Grace of others, may conceive much ſurer Hopes of Profit attainable by their Aſſiſtance, than he, who truſting to his own ſingle Power, takes the Liberty of treating others as he liſts [c]. Nor is it poſſible for Men to frame a Notion of any Profit, which will be their own Peculiar, or to which all Men will not have as good a Title as themſelves; ſince Nature hath never given any Man ſo large a Privilege, as to let him exerciſe any kind of Right againſt others, the Uſe of which they are not allow'd to turn again upon him. Therefore 'tis a great Miſtake to fanſy 'twill be *profitable* to you, to take away, either by Fraud or Violence, what another Man hath acquir'd by his Labour [d]; ſince others have not only the Power of reſiſting you, but of taking the ſame Freedom with your Goods and Poſſeſſions. And you have as little Reaſon to think it will prove *advantagious* to you to break your Faith; ſince your own Example may be made uſe of to your own Prejudice. *Iſocrates* in *Areopagitic.* p. 252. [7] *They judge thoſe who break* Faith *and Contracts, to injure the Poor more than the Rich. The latter, by loſing their Dependents, could ſuffer only ſome little Damage in their Revenues. The former, if they were thrown off by their Patrons, whoſe Support and Aſſiſtance they continually needed, muſt be reduc'd to extreme Indigence and Miſery.* [8] The ſame Orator, in *Orat. de Pace*, p. 285. Ed. *Pariſ.* placeth the chief Strength and Foundation of all his Advice to his Countrymen, in this Principle, that *there is more Gain and Profit in a peaceful Competency, than in a needleſs Purſuit of Abundance.* That *Juſtice is much more eligible than Injury, and the Care of their own Poſſeſſions, than the Deſire of other Mens* [e]. [9] Nor ſhould any preſume ſo much on his own Strength and Power, as to imagine that others will not repay him with ſuch Uſage as they receive from him: For all true Power ariſes from a Conjunction with other Men, whom 'tis impoſſible to keep together by your ſingle Force. So that if that falſe and ſpurious Profit were to be the Meaſure of all our Proceedings, the Life of the ſtouteſt Mortal would be as often in Danger, as it ſhould ſeem profitable to any one to rid him out of the Way: And whoever took ſuch a Courſe, would only ſet a fatal Pattern, and chalk out the Way to his own Deſtruction. On the whole Matter then, not Juſtice, but Injuſtice is really the higheſt Folly; which, tho' it may ſeem to ſucceed for the preſent, yet is neither general nor laſting; and tends to the Diſſolution and Deſtruction of human Safety; Men being chiefly guarded and ſecur'd from Dangers by Society and by Friendlineſs. Nor will this hold true only of particular Men, but likewiſe of whole States and Communities; there having never been any Commonwealth ſo powerful, or ſo well eſtabliſh'd, as not ſometimes to ſtand in need of their Neighbours Aſſiſtance; ſince no ſingle Kingdom could long bear up againſt the united Forces of a ſtrong Confederacy.

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[a] In *Bacchis, v.* 201, &c.

[b] Vide *Arrian. Epictet. Lib.* ii. *Ch.* xvi.

[c] Vide *Rochefort. Deſcript. Antill. p.* 2. *Ch.* viii. §. 6. & *Ch.* ix.

[d] Add. *Selden de J. N. & G. ſecund. Hebræos. Lib.* i. *Ch.* vi.

[e] *See Book* ii. *and Book* ix.

[f] *Divine Inſtitutions, Lib.* v. *Ch.* xvii.

[g] Add. *Grot. Prolegom. N.* 16, &c.

[3] *Euripides*'s Words are, Πατρὸς παραδοχὰς, ἅσθ' ὁμήλικας χρόνῳ
Κεκτήμεθ', οὐδεὶς αὐτὰ καταβαλεῖ λόγος,
Οὐδ' εἰ δι' ἄκρων τὸ σοφὸν εὕρηται φρενῶν.

[4] St. *Paul* in that Place ſhews us only the Power of Cuſtom, which is ſo ſtrong, that Nature it ſelf taught the *Corinthians*, that if any Man among them wore long Hair, it was a Shame to him, whereas if Women had long Hair, it was honourable.

§. x. [2] *Lactantius*'s Words are, *Ejus* [i. e. *Carneadis*] *Diſputationis hæc fuit ſumma: Jura ſibi homines pro utilitate ſanxiſſe, ſcilicet varia pro moribus, & apud eoſdem pro temporibus ſæpe mutata; jus autem naturale nullum eſſe. Omnes & homines & alias animantes ad utilitates ſuas, naturâ ducente, ferri: proinde aut nullam eſſe juſtitiam; aut, ſi ſit aliqua, ſummam eſſe ſtultitiam, quoniam ſibi noceret alienis commodis conſulens* ——— *Omnibus populis, qui florerent imperio, & Romanis quoq; ipſis, qui totius orbis potirentur, ſi juſti velint eſſe, hoc eſt, ſi aliena reſtituant, ad caſas eſſe redeundum, & in egeſtate & miſeriis jacendum.*

[3] *Tully*'s Words are, *In quo* [*verbo*] *lapſa conſuetudo deflexit de via, ſenſimq; eo deducta eſt, ut honeſtatem ab utilitate ſecernens, & conſtituerit honeſtum eſſe aliquid, quod utile non eſſet, & utile quod non honeſtum, qua nulla pernicies major hominum vitæ potuit adferri.*

Again, *Itaq; accepimus, Socratem execrari ſolitum eos, qui primum hæc naturâ cohærentia opinione diſtraxiſſent.*

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[a] *Marc. Antonin. Lib.* vii. §. 74. *Thoſe Actions are profitable or advantagious, which are agreeable to Nature.* [b] *See* Prov. xx. 17. v. 3, 4. —ix. 17, 18. —xxi. 6. [c] Add. *D. Cumberland, Chap.* ii. §. 29. *n.* 2. [d] *See* Prov. i. 13, 14, *&c.* [e] Which Aſſertion he afterwards proves at large, and which is much more to the preſent Purpoſe than that above-mention'd by our Author.

[4] As the Objects which are near us are commonly eſteemed greater than thoſe vaſt Bodies that are at a Diſtance; ſo in reſpect of Good and Evil, the preſent have the Advantage, and, in Compariſon of thoſe that are at a Diſtance, are always the greateſt: So the moſt of Men are like prodigal Heirs, believe a leſſer Good in preſent preferable to the Reverſion of a greater; and ſo for the preſent Poſſeſſion of a ſmall Thing, they'll part with a large Inheritance which would certainly come to them. This proceeds from a falſe Opinion. Every one ought to know, wherein conſiſts his Pleaſure, for what is abſent now, will one Day be preſent certainly, and then having the Advantage of Nearneſs, he'll ſee Things at their juſt Proportion, and ſo prevent in Time the unreaſonable Eſtimate he has ſet on them by reaſon of the unequal Meaſures. Mr. *Locke*'s *Eſſay of the Underſtanding, Lib.* ii. *Chap.* xxi. §. 93. See alſo, what goes before and follows.

[5] *Sed inter hominem & belluam hoc maximè intereſt, quod hæc tantum, quantum ſenſu movetur, ad id ſolùm, quod adeſt, quodque præſens eſt ſe accommodat, paululum admodum ſentiens præteritum aut futurum. Homo autem, quod rationis eſt particeps, per quam conſequentia cernit, cauſaſque rerum videt, earumque progreſſus & quaſi anteceſſiones non ignorat, ſimilitudines comparat, & rebus præſentibus adjungit, atque adnectit futuras, facilè totius vitæ curſum videt, ad eamque degendam præparat res neceſſarias.*

[6] Of the Word *Inutilius*, ſee *Note* 1. on §. 9. of *Chap.* ii. of this *Book.*

[7] This Paſſage of *Iſocrates* is nothing to our Author's Purpoſe, as any one may diſcern at the firſt Sight.

[8] Τὴν μὲν ἡσυχίαν ὠφελιμωτέραν καὶ κερδαλεωτέραν εἶναι τῆς πολυπραγμοσύνης, τὴν δὲ δικαιοσύνην τῆς ἀδικίας, τὴν δὲ τῶν ἰδίων ἐπιμέλειαν τῆς τῶν ἀλλοτρίων ἐπιθυμίας.

[9] "There are more Men that poiſon, ſteal, and cheat us, than there are againſt whom we can commit thoſe Crimes. "Every one is more liable to be offended, than offend; for among Twenty Perſons that are Equals, it is manifeſt "every one of them has leſs Power againſt the Nineteen, than they againſt him." *Bayle*'s *Dict. Hiſt. & Crit. Tom.* iii. p. 2745. *Col.* 2.

Quinctilian obſerves [10] that an *ill Example can never be truly advantagious; for tho' it may give ſome Delight as the Occaſion now ſtands, yet it afterwards draws on us a heavier Load of Miſchiefs. It is impoſſible*, ſays *Demoſthenes, Olynthiac.* 2. *to obtain any firm and durable Power by Injuries, by Perjury, and by Lies. Epicurus* himſelf, in his Notions of Juſtice, was very honourable and very fair, as *Gaſſendus* hath given us this ſhort Repreſentation of them[a]. *Juſtice not only never hurts any one, but, on the contrary, always carries along with it ſomething conducing to the Eaſe and Tranquillity of the Mind; which it likewiſe farther ſupports with the Hopes of wanting nothing that uncorrupted Nature can deſire. A Soul where Injuſtice hath taken up its Seat, cannot but be in perpetual Diſorder and Confuſion, whilſt when it attempts any thing with never ſo much Secrecy, yet it hath no Aſſurance that the Fact will always be undiſcover'd. And ſince Juſtice is deſign'd for the Promotion of the common Good, it's plain that nothing can be juſt which doth not tend to the Advantage of whole Societies, and of each Member in particular. And becauſe every one by the Guidance of Nature, deſires and purſues what is good for him, it is neceſſary, that whatever is juſt ſhould be according to Nature, and ſhould therefore be call'd natural. And this Juſtice is nothing elſe but the Pledge and Aſſurance of general Profit; for while it takes Place by the Univerſal Conſent of all Parties, there ariſes this common Advantage, that Men do not mutually give and receive Injuries, but live in Peace and Quietneſs together; which as it is good and profitable, ſo doth Nature incite every Man to embrace and to purſue it.* Tho' it it muſt be obſerv'd by the Way, That what *Gaſſendus* afterwards delivers about a different Profit, among different Perſons, and about a variable Juſtice, muſt not be admitted in regard to Natural Law, but only to Civil Conſtitutions. *Diodor. Sicul. Lib.* xxv. *Eclog.* I. *Epicurus*, in the Book which he calls *Settled Notions*, affirms, *That a Life led according to Juſtice is free from all Trouble and Diſquiet; but that Injuſtice is full of Diſturbance and Diſquiet.* Lucretius, Lib. v. 1151, &c.

Circumretit enim vis atque injuria quemque,
Atque unde exorta eſt ad eum plerumque revertit.
Nec facile eſt placidam ac pacatam ducere vitam,
Qui violat factis communia fœdera pacis.

Becauſe *diffuſive Wrong* can ſpread o'er all,
No State's ſecure; nay, oft' the Wrongs recoil
With double Force on the Contriver's Fall.
Nor can thoſe Men expect to live at Eaſe,
Who violate the common Bonds of Peace.

Mr. Creech.

In ſhort, any one is able to judge what a Contradiction it is almoſt to common Senſe, to make ſuch a *Profit* as is oppoſite to *Juſtice*, the Standard of Acting. [11] The Sophiſt *Protagoras* in *Plato*, p. 225. Ed. *Fran. Ficin.* though a Trifler in other Matters, yet had Wit enough to ſpeak ſmartly on this Point. *In other Habits*, ſays he, *if a Man pretend, for Example, to be an excellent Piper, when he doth not underſtand a Note, he either raiſes the Laughter or the Indignation of thoſe that hear him; and his Friends admoniſh him of his Madneſs and Vanity. But the Caſe is quite otherwiſe in Injuſtice. For ſuppoſe ſome Perſons know another to be really unjuſt, yet ſhould the Man himſelf confeſs that he is guilty of that Vice before Strangers, they would take it for granted, that he was out of his Wits; maintaining that ſuch a Wickedneſs is never to be diſcover'd, but the contrary Virtue always to be pretended to, whether it be really practis'd, or not. Not to counterfeit Juſtice therefore they take to be a ſenſeleſs Extravagance; ſince*

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[a] *Syntagm. Part* III. *Ch.* xxiv. & xxv. Vide *Ciceron. de Fin. Bonorum & Malorum, Book* I. *Ch.* xvi.

[10] *Nunquam prodeſt malum exemplum, etiamſi in præſenti occaſione quadam delectat, in futurum tamen altius nocet.* Declam. 255. Οὐκ ἔστιν, ὦ Ἄνδρες Ἀθηναῖοι, ἀδικοῦντα, καὶ ἐπιορκοῦντα, καὶ ψευδόμενον δύναμιν βεβαίαν κτήσασθαι.

[11] Ἐν γὰρ ταῖς ἄλλαις ἀρεταῖς (ὥσπερ σὺ λέγεις) ἐάν τις φῇ ἀγαθὸς αὐλητὴς εἶναι ἢ ἄλλην ἥντινοῦν τέχνην, ἣ μή ἐστι, ἢ καταγελῶσιν, ἢ χαλεπαίνουσι, καὶ οἱ οἰκεῖοι προσιόντες νουθετοῦσιν ὡς μαινόμενον. ἐν δὲ δικαιοσύνῃ, καὶ ἐν τῇ ἄλλῃ πολιτικῇ ἀρετῇ, ἐάν τινα καὶ εἰδῶσιν, ὅτι ἄδικός ἐστιν, ἐὰν οὗτος αὐτὸς καθ' αὑτοῦ τἀληθῆ λέγῃ ἐναντίον πολλῶν, ὃ ἐκεῖ σωφροσύνην ἡγοῦντο εἶναι, τἀληθῆ λέγειν, ἐνταῦθα μανίαν, καὶ φασὶ πάντας δεῖν φάναι εἶναι δικαίους ἐάν τε ὦσιν, ἐάν τε μή, ἢ μαίνεσθαι τὸν μὴ προσποιούμενον δικαιοσύνην, ὡς ἀναγκαῖον οὐδένα, ὅντιν' οὐχὶ ἀμωσγέπως μετέχειν αὐτῆς, ἢ μὴ εἶναι ἐν ἀνθρώποις. But I do not ſee how this Paſſage and the following one of *Quinctilian* make for our Author's Purpoſe, ſince they only prove the Maxim of the Duke of *Rochefoucaut*, That, Hypocriſy is an Homage which Vice pays to Virtue. Moreover, there is not any thing that can prove, that Profit may be oppoſed to Juſtice, and any Man's private Intereſt to the Publick. I ſhall alledge ſome more pertinent Authorities to this Purpoſe, out of *Seneca* and *Arrian*'s *Epictetus*. *Seneca*'s Words, *Epiſt.* 48. are, *Nec poteſt quiſquam beatè degere, qui ſe tantum intuetur, qui omnia ad utilitates ſuas convertit: alteri vivas oportet, ſi vis tibi vivere. Hæc ſocietas diligenter & ſanctè obſervanda eſt, quæ nos omnes omnibus miſcet, & judicat aliquod eſſe commune jus generis humani:* i. e. "'Tis not poſſible "for any Man to live happily who regards himſelf only, who minds his own Intereſt only; we muſt live to others Profit, "if we will advance our own. This Union in Society is carefully and ſacredly to be preſerved, which intermixes us to"gether, and teaches us, that there is a common Right of Mankind." *Arrian*'s Words in *Epictet. Lib.* i. *Ch.* xix. are, Καθόλου τε [ὁ Ζεὺς] τοιαύτην φύσιν τοῦ λογικοῦ ζώου κατεσκεύασεν, ἵνα μηδενὸς τῶν ἰδίων ἀγαθῶν δύνηται τυγχάνειν, εἰ μή τι εἰς τὸ κοινὸν ὠφέλιμον προσφέρηται, οὕτως οὐκέτι ἀκοινώνητον γίνεται τὸ πάντα αὑτοῦ ἕνεκα ποιεῖν· *i. e.* God hath diſpoſed the Nature "and Order of reaſonable Creatures in ſuch a Manner, that every one of them ſhould advance each other's Intereſts, ſo "as contributes to the publick Advantage; ſo that tho' we refer all to our private Advantage, we ought yet to do what in "us lies to promote that of others." *M. Antoninus* has many ingenious Reflections in his Works tending this way.

whoever makes a contrary Profeſſion deſerves to be driven out of human Converſe and Society [12]. *No Man is ſo bad*, ſays *Quinctilian* [a], *as that he deſires to ſeem bad.* And almoſt every Body ſpeaks more honeſtly than he either thinks or acts.

But the divine Providence hath ſufficiently confuted this pernicious Opinion, by making its boldeſt Patrons and Aſſertors feel the fatal Conſequences of it. To give an Inſtance or two. "*Lyſander*, that crafty Deſigner, who manag'd moſt Affairs by Cheats and Shuffles, who plac'd all Right in Profit, who affirm'd Truth and Lies to be indifferent Things, and either to be moſt valuable as it was moſt advantagious; who bragg'd that Men were to be deceiv'd with Oaths as Children with Dice or bounding Stones; as *Plutarch* [b] and *Polyænus* [c] give his Character; did he build his Fortunes on a firmer Bottom, than if he had made Truth and Honeſty the Mark and the Standard of his Proceedings [d]? *Ageſilaus* [e], who at other Times and in other Speeches, us'd to cry up Juſtice for the Queen of Virtues, without which, Valour and Fortitude would be of no Uſe, yet when *Phœbidas* had without Orders poſſeſs'd himſelf of the Fort *Cadmea*, defended that Boldneſs by ſuch kind of Rhetorick as this, That *the Action of* Phœbidas *was to be rated and judg'd of according to the Benefit and Advantage it brought to the State. Since whatever conduc'd to the publick Good of* Lacedemon, *was to be done at a Venture; whether Men were impower'd by Commiſſion for ſuch Performances, or not.* But was not this very Exploit the Occaſion of the *Spartans* miſcarrying in their Deſign of rendring themſelves Maſters of *Greece*?

XI. Theſe Foundations being ſettled, 'tis eaſy to ſolve the Objections of the oppoſite Party. 'Tis ridiculouſly weak to conclude, that ſuppoſing different States to have ſet up different Laws upon the Account of Profit, therefore there can be no perpetual or natural Law. For all civil Laws do either preſuppoſe or include the chief Heads of the Law of Nature, thoſe by which the Safety of Mankind is ſecur'd: Neither are theſe in the leaſt injur'd or impair'd by the particular Ordinances, which each Commonwealth finds a Neceſſity of ſuperadding, for its ſeparate Intereſt and Benefit. *Penal Laws*, or *Sanctions*, we acknowledge to have been inſtituted *out of Fear of Juſtice*, or to reſtrain the Wickedneſs of Men, when the bare Dictates of natural Law were found inſufficient for that Purpoſe. When *Horace* denies that Nature is able to diſtinguiſh betwixt Right and Wrong; we agree with him, if he means only that Nature which Man bears in common with Brutes; whereby Brutes themſelves, through the Information of their Senſes, do perceive what is agreeable to their Body, and what not; without the leaſt Apprehenſion of Honeſty or of Diſhoneſty. But if he means the rational Nature, we deny the Poſition, as abſolutely falſe. As for *Carneades* his Argument, that *if the* Romans *would be juſt, that is, if they would reſtore every one his own, they muſt return to their primitive Cottages; and that therefore Juſtice is Folly*; in vulgar Eſteem this may bear ſome Semblance of a plauſible Truth; but to thoſe who look farther into it, it will appear exceeding empty and trifling. For ſince whatever Right we aſſume upon others, they may in like Manner uſe againſt us; it can by no Means be profitable for us by injuriouſly ſeizing on other Mens Goods, to invite them to make Repriſals on our own. And in ſtating the Nature and the Definition of *Profit*, we are not to conſider what ſeems advantagious to ſuch or ſuch a Man, at ſuch a particular Time, to the Prejudice of others; but what is of univerſal and perpetual Benefit and Expediency. Thus, for Inſtance, let us ſuppoſe an Officer to have rais'd a vaſt Eſtate, by robbing the publick Treaſury: ſuch an one certainly imagines it would be Folly in him, to make an exact Reſtitution, and ſo to return to his firſt Narrowneſs of Fortune. But when the Prince, upon convicting him of Extortion, hath adjudg'd his Goods to the Treaſury, and his Perſon to the Goal or Gallows, do we then think he took a wiſer Courſe to raiſe himſelf in the World, than another Perſon who reſts contented with a competent Maintenance, innocently acquir'd? Thus I know not whether it had not been better for the *Roman* People to have ſate down with Satisfaction in the Enjoyment of that moderate Wealth which at firſt they got together, without the Expence of their Virtue or Honour; than when they had rifled and plunder'd all the whole World, to turn their Weapons upon themſelves, and to expoſe the feeble Carcaſs of their Empire to be torn in Pieces by the barbarous Nations. Nor do the other Arguments of *Carneades*, as ſet down by *Lactantius* [1], require any long or any laborious Reply. For if any think it a Piece of Wiſdom in the Seller of a Houſe, to diſſemble its being infected with the Plague, certainly it muſt be own'd for Wiſdom in the Buyer, if he either give falſe Money for his falſe Goods, or to puniſh the Author of the Cheat by the ſevereſt Methods. Laſtly, as for thoſe Caſes, whether it be fair [2] in a Shipwreck for a ſtronger Man to force a Plank from the Arms of a weaker, or in a Flight, for a ſound Man to diſpoſſeſs a wounded Soldier of his Horſe, preferring his own Preſervation to the Safety of his Fellow, we ſhall hereafter find Occaſion to diſcuſs and to determine them [a]. It will be ſufficient for the preſent to make this ſhort Remark, that Actions done upon extreme Neceſſity, and out of Conſternation of Mind ariſing from imminent Danger, and which do therefore meet rather with Excuſe, than with Approbation; ought by no Means to be eſtabliſh'd for common Rules of Proceeding [b].

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[a] *Inſtitut. Lib.* iii. *Ch.* viii. Ed. *Lugd. Bat. p.* 251.

[b] *Plutarch. Apophthegm. Lacon. p.* 229. Ed. *Wech.*

[c] *Stratag. Lib.* i. *Ch.* xlv.

[d] Vide *Cornel. Nep. Lyſand.*

[e] See *Plutarch*, in *Ageſil. p.* 608.

[12] *Nec enim eſt quiſquam tam malus, ut malus videri velit.*

§. 1. [1] *Bonus vir, inquit, ſi habeat ſervum fugitivum, aut domum inſalubrem, & peſtilentem, quæ vitia ſolus ſciat, & ideo proſcribat, ut vendat, utrumque profitebitur fugitivum ſervum, & peſtilentem domum ſe vendere, an celabit emptorem? ſi profitebitur, bonus quidem quia non fallet, ſed tamen ſtultus judicabitur, quia vel parvo vendet, vel omnino non vendet; ſi celaverit, erit quidem ſapiens, quia rei conſulet, ſed idem malus, quia fallet. Rurſus ſi reperiat aliquem, qui aurichalcum ſe putet vendere, cum ſit illud aurum; aut plumbum, cum ſit argentum; tacebitne, ut id parvo emat, an indicabit, ut magno? Stultum planè videtur malle magno.* Divin. Inſtitut. Lib. v. Ch. xvii. n. 5, 6, 7.

[2] Again, *Lactantius* adds, *Ibid.* n. 10, &c. *Nempe juſtitia eſt, hominem non occidere, alienum prorſus non attingere, quid ergo juſtus faciet, ſi forte naufragium fecerit, & aliquis imbecillior viribus tabulam ceperit? Nonne illum tabula deturbabit, ut ipſe conſcendat eâq; nixus evadat, maxime cum ſit nullus medio mari teſtis? Si ſapiens eſt, faciet, ipſi nimirum pereundum eſt, niſi fecerit. Si autem mori maluerit, quam manus inferre alteri, jam non juſtus ille, ſed ſtultus eſt, qui vitæ ſuæ non parcat, dum parcit alienæ.* Item: *Si acie ſuorum fuſa, hoſtes inſequi cœperint, & juſtus ille fuerit nactus aliquem ſaucium equo inſidentem, eine parcet, ut ipſe occidatur, an dejiciet ex equo, ut ipſe poſſit hoſtem effugere? Quod ſi fecerit, ſapiens, ſed idem malus; ſi non fecerit, ſtultus ſit neceſſe eſt, licet juſtus.*

XII. The Author of the Treatiſe *De Principiis juſti & decori*, in ſearching after the right Notion of the Law of Nature, follows this Method. In the firſt Place he lays down this confeſs'd Principle, *That there is a* God, *and that he created the World in Wiſdom*; which no Man in his Senſes will diſpute. He adds, that God *hath declar'd his Reſolution of exerciſing the Virtues of Truth and Juſtice, in his Government of the World* [c]. But here, beſides that it ſcarce ſeems right to conceive the divine Juſtice or Truth after the Manner of *Virtues*, it is ſufficiently manifeſt, that the Diſpoſition or the Inclination to Juſtice which we attribute to God [1], is very different from that which Men are to exerciſe towards one another: Inaſmuch as the former denotes that Method by which an infinitely great and good Creator is pleas'd to govern his intelligent Creatures; whereas the latter obtains only amongſt Perſons by Nature equal, and ſubject all alike to a common and a ſupreme Lord. Neither can it be at all made out that divine and human Juſtice are capable of the ſame Meaſure, from this Argument, that in holy Scripture we are frequently referr'd to the Example of God [d]: For in thoſe Paſſages the holy Spirit is pleas'd to follow the uſual Way of Reaſoning [2], *from a greater to a leſs*. But from theſe Principles the ſaid Author, *p.* 9, 10. concludes, that *in the Creation of the World* God *propos'd to himſelf ſome End. That he hath appointed Means ſufficient for the obtaining that End. That a Man ſhall certainly be puniſh'd, if he deviates from that Order which* God *would have us obſerve, in the Proſecution of the End propos'd by him to himſelf, and to Mankind. And on the contrary, ſhall certainly be rewarded, if he direct his Life according to the Order preſcrib'd by his Creator.* In fine, that *the Juſtice of* God *implies nothing elſe, but his lawful Diſtribution of Rewards and Puniſhments.* In Regard to this Doctrine, I queſtion whether it can be ſaid with any tolerable Senſe, that God *hath conſtituted an End, common to Man with himſelf*; or that the Order preſcrib'd by him to Man, that is, the Obſervation of the Law of Nature, doth produce the End for which God created the World. Nor can the Crudeneſs of the following Aphoriſm paſs with ordinary Digeſtions: *That the natural Neceſſity which is in* God *doth lay on Men a Neceſſity of purſuing Virtue, and of flying Vice.* Yet ſuppoſe we ſhould be brought to grant all this, and then ſhould guide our Search after the Law of Nature by ſome ſuch general Maxim and Rule, *Whatever Things are by Nature ſo diſpos'd, as to hinder the End which* God *propos'd in the Creation of the World; all thoſe Things are prohibited by the Law of Nature: But whatever Things are ſo naturally order'd, that the End before-mention'd cannot be obtain'd without them, thoſe are certainly enjoin'd or commanded by the ſame Law:* We ſhall ſtill be at a loſs to underſtand what neceſſary Relation every particular Precept of the Law of Nature bears to that End; whilſt the End itſelf is not perfectly diſcover'd by us. Thus, for Example, there would be need of a Train of Deductions, to make me apprehend, that the End for which the World was created cannot be attain'd without honouring one's Parents, or that Theft is repugnant to the ſaid End. 'Tis meer trifling therefore to ſtick upon ſuch general Terms, without calling in the Aſſiſtance of nearer and more diſtinct Principles. And the Foundation of the Law of Nature muſt be always left in the Dark by him who can make no farther Progreſs in the Queſtion, than to tire us with ſuch Repetitions, that [3] *ſince the World was made in Wiſdom and Order; and ſince Man hath his Part aſſign'd him in the univerſal Harmony; therefore that Order ought neceſſarily to point out to every Man his Duty, in every Action or Proceeding.*

XIII. Thus far moſt are agreed, that the Law of Nature is to be drawn from Man's Reaſon; flowing from the true Current of that Faculty, when unperverted [1]. On which Account the holy Scriptures declare it to be written in the Hearts of Men, *Rom.* ii. 15. This we judge to be a moſt manifeſt Truth, that altho' the ſacred Writings do throw in a more enlarged Light to direct us in the cleareſt View of Nature's Law [2], yet the ſame Law may without any extraordinary Aſſiſtance be found out and ſolidly demonſtrated, by the bare Force of Reaſon, ſuch as God firſt implanted and ſtill preſerves in Mankind.

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[a] See *Chap.* vi. *of this Book.* [b] Add. *Velthuyſen, de principiis juſti & decori, p.* 114, &c. [c] *Pſalm* xcvi. *v.* ult. [d] *Luke* vi. 36. *Matth.* v. 44, 45.—xviii. 33.

§. xii. [1] I do not ſee that *Velthuyſen* ſays any Thing that can intimate the contrary. His Notion is, That God hath diſpoſed all Things in a Manner ſuitable to his Perfections; and this is that natural Neceſſity of which he ſpeaks a little lower.

[2] Our Author ſays, That in thoſe Places of Scripture the Arguments are drawn, *à minori ad majus*, i. e. from the Leſs to the Greater; whereas 'tis evident that they are drawn juſt the contrary Way; for thus the Argument runs, and he himſelf ſpeaks ſo in another Place: "If God, who is the Lord of all the World, and has from all Eternity enjoyed a compleat "Happineſs, who is ſelf-ſufficient, and has no need of Pardon, is very merciful to his Creatures, who have provoked him "to Anger by their Sins, with how much greater Reaſon ought Men to have Compaſſion on their Brethren, whoſe Pardon "they themſelves often want, and whoſe Help they can't live without? If a Maſter hath Pity of his Servant, the Servant "ought much more to have Pity on his Fellows. If God cauſes the Sun to riſe on wicked Men, much more ought Men to "do good to their Enemies. Men, I ſay, who are ſo ſubject to offend one another, and who have ſo great Need of Aſ"ſiſtance one from another." *Specimen Controverſ. Chap.* iv. §. 5. To call this way of Arguing, *à minori ad majus*, is contrary to the Language of all Orators and Logicians. See *Ariſtot. Rhet. Lib.* ii. *Chap.* xxiii. and *Top.* ii. *Chap.* x. as alſo *Quinctil. Inſtit. Orat.* v. 10.

[3] 'Tis true, that this is not much to the Purpoſe, but we muſt own, that *Velthuyſen* did not much depend on it; and though he does not explain himſelf ſo diſtinctly as our Author, yet he lays down a Principle which reaches to the very Bottom of that which eſtabliſhes Society, in another Place, which is this, "That which is ſuch in general, and of that Nature that "Men can't diſpenſe with the Obſervation of it, without bringing a great Prejudice to all Mankind, or which if Mankind "ſhould permit to every Body, 'twould be to their great Damage, whatever is ſuch, ſay I, is forbidden by the Law of Na"ture." *Page* 115.

§. xiii. [1] Νȣ̃ν δ' ἔχων γνώσῃ ἀπὸ σεαυτȣ̃, ὅ, τι σοι πρακτέον ἐςι, ϗ ὅπως. *Being endued with a Soul, you may know from yourſelf, what and how you ought to act.* *Dio Chryſoſt. Orat.* x. *De Servis, p.* 150. Ed. *Morell.*

[2] See what I have ſaid in my Treatiſe of *Games, Lib.* i. *Chap.* iii. §. 2.

kind. Yet here we by no Means think it neceſſary to maintain, that the general Principles of natural Law are *innate*, or imprinted, as it were, upon Mens Minds, from their very Birth, in the Manner of diſtinct and actual Propoſitions, ſo as to be readily expreſs'd and utter'd by them, as ſoon as they arrive at the Uſe of Speech, without farther Inſtruction or Meditation. For that theſe native Idea's or original Characters are no better than unwarrantable Fictions [3], any one may diſcover, who will be ſo curious as to obſerve nicely the Steps by which Children make their Progreſs in Knowledge, clearing themſelves by little and little from the Ignorance of their Infant State. Nor is it a Conſideration of little Weight in this Point, that the holy Scriptures frequently deſcribe Infancy and Childhood [4] by the Ignorance, and riper Age by the Knowledge of Right and Wrong [a]. Dr. *Cumberland* muſt be our Guide and Maſter in theſe Diſquiſitions, who hath moſt clearly demonſtrated [b], that altho' we reject the Notion of thoſe innate Propoſitions, yet the Knowledge of the Law of Nature is truly and really imprinted on human Minds by GOD, as he is the firſt Mover and Director of them: Whence likewiſe any one may readily diſcover, that 'tis his Will and Command we ſhould act according to that Law. That Phraſe in *Romans* ii. 15. which is urg'd ſo hardly by ſome Authors, is certainly [5] figurative, and implies no more than a clear and certain Knowledge treaſur'd up in the Memory; of which the Perſons ſpoken of are convicted in their own Conſciences, by what Means ſoever thoſe Notions firſt enter'd into their Thoughts. Thus too thoſe Sins which in *Jeremiah* xvii. 1. are ſaid to be *engraven on the Tables of the Heart*, inaſmuch as they are actual Tranſgreſſions, could not be diſcover'd at the Nativity of the Offenders[c]. That Readineſs which we ſee in Children and in the ignorant Multitude, to diſtinguiſh Right from Wrong, is owing in a great Meaſure to Exerciſe and Uſe; whilſt from their early Years, and the firſt opening of their Reaſon, they obſerve good Things to be approv'd of, and evil Things to be exploded; the former to be attended with Praiſe, the latter [6] with Puniſhment. Their Minds are ſo fix'd and diſpos'd by daily Practice, and by the whole [7] Series of common Life, that few of them ſo much as doubt whether they may not proceed by other Methods. Whoever conſiders this Matter accurately, will diſcover, that 'tis very hard to give a Reaſon for many Practices, which yet the common People undertake without Scruple or Heſitation. To borrow an Inſtance from a late Author [d], *If a Man be found committing a Robbery, the Multitude preſently join Hands and Minds to purſue and to ſeize the Thief: But if upon a Quarrel one Man hath kill'd another, every Body wiſhes he may get off ſafe; at leaſt no Body willingly aſſiſts in the taking of him.* The Reaſon of ſuch a Difference the Vulgar underſtand not, which is this; *Every one is more in danger from a Thief, who deſigns to plunder wherever he can meet with Booty; than from an Actor of Manſlaughter, who intends Miſchief to none but to the Perſon who gave him Provocation.* Therefore when we acknowledge the Law of Nature to be the Dictate of right Reaſon, our Senſe and Meaning is this, that the Underſtanding of Man is endued with ſuch a Power, as to be able from the Contemplation of human Condition, to diſcover a Neceſſity of living agreeably to this Law; as likewiſe to find out ſome Principle by which the Precepts of it may be clearly and ſolidly demonſtrated [e]. Nor is it any Rub or Prejudice to this Doctrine, that the artificial Method of demonſtrating theſe natural Precepts is not known or apprehended by all Men; and that moſt Perſons both learn and obſerve the Law of Nature by Cuſtom, and by the common Courſe and Tenour of living. For we ſee every Day the common Mechanicks and Artificers performing many Things, either by Imitation, or by the compendious Direction of Inſtruments, the Proof of which they do not in the leaſt underſtand: And yet this doth not hinder ſuch Operations from being truly mathematical, or from being founded on ſolid Principles of Reaſon. Hence it likewiſe appears what Rule we are to meaſure our Reaſon by, in judging of its Fitneſs for the Diſcovery of natural Law: or whence we may be aſſur'd, whether ſuch a Dictate proceeds from right, or from deprav'd Reaſon. The Dictates of right Reaſon are true Principles, which agree with the Nature of Things well obſerv'd and examin'd; and which are deduc'd from other true and firſt Principles, by the Rules of good Conſequence. On the contrary, thoſe are Dictates of deprav'd Reaſon, in which a Man either lays down falſe Principles, or by a wrong Method deduces falſe Concluſions. For[8] at the ſame time as we affirm the Law of Nature to be imprinted on us by the Nature of Things, we imply that it is moſt true and infallible: Since Nature preſents us with nothing but what really exiſts, and produces no Effect that can be charg'd with Falſhood: All Falſity ariſing from the Miſtakes of Men, whilſt they either divide ſuch Notions as naturally cleave together, or join ſuch together as Nature hath ſeparated and plac'd at a Diſtance[a]. And this Courſe of Judging being duly follow'd, we need not fear that any one ſhall be able to foiſt upon us for natural Law, either the frantick Notions of his ill-purg'd Brain, or the irregular Deſires of his miſguided Mind. For 'tis in vain for that Man to make his Appeal to Reaſon, who cannot demonſtrate his Aſſertions from Principles of unqueſtion'd Truth, and ſuch as agree with the Nature of Things; inaſmuch as all Truth and all Rectitude conſiſts in the Agreement of Conceptions and of Propoſitions with the Things themſelves, which they are intended to expreſs. And he who hath not Parts enough to frame and unite the Chain of a Demonſtration, muſt ſupply that Defect by an exceeding Stock of Impudence, if he deſires any Regard ſhould be had to his vain Conjectures, when they run aſtray from the receiv'd Opinions of Mankind. Moreover, it is manifeſt to all thoſe who underſtand the Force and the Manner of Demonſtrations, that there is not only a Neceſſity that the Principles made uſe of be true, and the firſt or higheſt that we can aſcend to, but likewiſe that they be proper and peculiar to the Queſtion in Debate, and ſo very clear, that the Mind apprehending by their Means, the Cauſe of the Thing aſſerted, may reſt ſatisfied, and neither deſire nor want any farther Proof. Now againſt this Rule of finding out the Dictates of right Reaſon, thoſe Authors have not only tranſgreſs'd, whoſe Foundations of natural Law we have already examin'd: But thoſe too who think it ſufficient to build that Law on ſo ſlender a Bottom as this, *That natural Honeſty conſiſts in the Agreement of Reaſon and Appetite; the Rule of which Honeſty is the Excellency and the Dignity of human Nature, and that moſt noble End for which Providence ſeems to have given us the Dominion and the Poſſeſſion of the World.* For tho' we could argue never ſo fairly, this Action is ſuitable to the Excellency and the Dignity of Man, and therefore honeſt and to be perform'd; yet this doth not furniſh us with any clear and certain Knowledge, in which our Minds may reſt ſafely without farther Enquiry: But the Queſtion ſtill remains, in what that Excellency conſiſts, and by Virtue of what Cauſe it comes to agree to Mankind. Thus, if one ſhould ſay to a Clergy-man, It doth not become you to frequent Taverns and Houſes of Debauchery, becauſe ſuch Courſes are repugnant to the Dignity of the ſacerdotal Office; he ſays nothing but Truth, in all this, but he doth not alledge the laſt and the ſtrongeſt Reaſon, ſo as to ſet the Matter beyond Doubt and Diſpute[b].

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[a] Vid. *Jonah* iv. 11. *Deut.* i. 39. *Iſaiah* vii. 14, 15, 16.

[b] *Prolegom.* §. 5, 7, 8.

[c] Add. *Luke* ii. 51. *Proverbs* vii. 3.

[d] *De principiis juſti & decori*, p. 81.

[e] Add. D. *Cumberland*, De L. N. Ch. iv. §. 3.

[3] Our Author treats more at large of this in his Apology, §. 24. and in his *Specimen Controverſ.* Chap. iv. §. 23. But Mr. *Locke* has ſet it in its full Light in his *Eſſay upon Man's Underſtanding*. See alſo what I have ſaid in my Preface, §. 3.

[4] Our Author muſt underſtand here by Good and Evil, *Recti & Turpis*, Honeſty and Diſhoneſty; but that is not the true Notion of this Expreſſion in the ſacred Writers, who, according to the Idiom of their Language, would have us to underſtand by that Phraſe in general, *All that can't be known*, becauſe in Reality all Things that we know are either good or evil, *i. e.* profitable or hurtful; as is judiciouſly obſerved by *Lud. Capellus* in his Notes upon *Gen.* iii. 5. which it would be well to conſult; as alſo Mr. *Le Clerc*'s Commentary on the ſame Place. Nevertheleſs, if any Conſequence ought to be drawn from the Expreſſions of ſacred Writers in Matters of Philoſophy, in reſpect to which they commonly follow the moſt popular Notions, we might infer, that theſe Paſſages very much favour the Opinion of thoſe who deny innate Ideas, ſince he that ſays *all*, excepts nothing. In fine, we find this way of ſpeaking among the profane Authors. See Mr. *Le Clerc*'s *Ars Critica*, Part II. §. 1. Chap. ii. §. 26. pag. 153. Tom. i. and *Heſiod*'s *Theogonia*, v. 900.

[5] See *Grotius* in his Notes upon this Paſſage, and *Le Clerc*'s *Ars Critica*, p. 194, &c. Tom. i. 2d Edit.

[6] See Mr. *Locke*'s *Philoſophical Eſſay*, Lib. ii. Chap. xxviii. §. 10, 11, 12.

[7] Add to this the manifeſt Proportion that theſe Maxims have with the Light of right Reaſon for it is perceived by the moſt ſimple, the very Moment that 'tis propounded, and they underſtand it, tho' they would never have found it out themſelves, nor can they apprehend the Reaſons ſo well as to deliver their Thoughts diſtinctly about it. Further, it is certain, that no Man at the Age of Diſcretion, can reaſonably pretend an invincible Ignorance for his Excuſe; but yet it is no leſs true that Education, Inſtruction, and Example, are the ordinary Means by which Knowledge is conveyed into the Mind of Man, and without it either the natural Light would be almoſt wholly extinguiſhed, or we ſhould not attend to it. This Experience ſhews us, not only among ſeveral ſavage Nations, but even among the more civilized, there being many Men that make good this ſad and mortifying Truth. Whence we may conclude, that every one ought to take ſpecial Care to contribute as much as may be to the Inſtruction of others in their Duty, and to eſtabliſh, confirm, and ſpread abroad ſo neceſſary a Knowledge.

Altho', as hath been already obſerv'd, it is not in the Power of every Man, to deduce the Law of Nature artificially from its Principle: yet that it may be properly ſaid to be *known* to all Men enjoying the Uſe of their Reaſon, it is ſufficient, if even Perſons of tolerable Heads are able to apprehend the Demonſtration when propos'd by others, and clearly to perceive the Truth of it, by comparing it with their own natural Condition. As for the loweſt Degree of Mortals who are acquainted with the Law of Nature, chiefly by popular Information and by common Uſe, they ought to require no farther Proofs of its Certainty, than that firſt the Exerciſe of it is maintain'd by their Superiors, by whoſe Authority they are to be guided; and then, ſecondly, that they themſelves cannot find any probable Reaſons by which they might either confute or weaken its Force; and laſtly, becauſe they are every Day ſenſible of its Uſefulneſs, and of the Benefits which it confers upon Mankind. And upon this Account the Law of Nature appears to be ſufficiently promulgated; ſo that no Perſon of competent Years and of ſound Underſtanding, can by any Means plead invincible Ignorance of it.

For the eaſy Knowledge of what the Law of Nature dictates, *Hobbes*[c] commends the Uſe of this Rule, *When a Man doubts whether what he is going to do to another be agreeable to the Law of Nature, let him ſuppoſe himſelf in the other's Room.* For by this Means, when Self-love and the other Paſſions, which weigh'd down one Scale, are taken thence and put into the contrary Scale, 'tis eaſy to gueſs which way the Balance will turn[9]. *Moſchus* Idyll. V. *v.* ult.

Στέργετε τοὺς φιλέοντας, ἵν' ἢν φιλέητε, φιλῆσθε.
Love thoſe who court, that thoſe you court may love.

Add. *Selden* De J. N. & G. Lib. vii. Ch. xii. *Ariſtotle* (in *Diogenes Laertius* Lib. v. *Segm.* xxi.) being ask'd how we ought to behave ourſelves towards our Friends, anſwer'd, *As we wiſh they would behave themſelves towards us.* Lib. ii. Tit. ii. *D. quod quis juris in alterum,* &c. *Senec.* De Ira, Lib. iii. Ch. xii. *Let us ſuppoſe ourſelves in the ſame Circumſtances as the Perſon with whom we are angry: That which now puts us in a Paſſion, is only the wrong Opinion and Eſtimate of ourſelves: We are unwilling to SUFFER what we are willing to DO.* 'Tis a Saying of *Confucius* (in *Martinius*'s Hiſt. *Sin. Lib.* iv. *Ch.* xxv.) *Never do to another what you are unwilling to ſuffer from him.* The ſame Precept was made uſe of by *Ynca Manco Capace*, the Founder of the *Peruvian* Empire; in order to the reducing his Subjects to a Life of Civility. *De la Vega*, *Lib.* i. *Ch.* xxi. And indeed this is no other than that great Rule preſcrib'd by our Saviour himſelf, of *Doing to Men as we would be done by.* Matth. vii. 12.

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[a] *Idem Ch.* x. §. 1.

[b] Comp. *Rachel.* Prolegom. ad. Offic. *Ciceronis*, §. 38, &c.

[c] De *Cive*, *Ch.* iii. §. 26. & *Leviath. Ch.* xv.

[8] This Period was not in the firſt Edition of this Work; and not being exactly fitted to the Coherence of the Diſcourſe, I have changed the Reading in my Tranſlation, but without any Prejudice to the Author's Senſe.

[9] We find the ſame Maxim in *Sadder*, or the Collection of the Precepts of *Zoroaſter*, made by the *Perſian* Magi (*Porta.* lxxi.) in Mr. *Hyde*'s Book. See the Paſſage of *Hierocles* ſet down in my following Notes.

Dr. *Sharrock* is of Opinion [a] that this Rule is not univerſal, becauſe if ſo, a Judge muſt needs abſolve the Criminals left to his Sentence, in as much as he would certainly ſpare his own Life, were he in their Place: I muſt needs give a poor Petitioner what Sum ſoever he deſires, becauſe I ſhould wiſh to be thus dealt with, if I was in his Condition: Or I muſt clean my Servant's Shoes, becauſe I require him to clean mine. But the Rule will ſtill remain unſhaken, if we obſerve, that not [10] one Scale only, but both are to be conſider'd; or that I am not only to weigh and examine what is agreeable to me, but likewiſe what Obligation or Neceſſity lies [11] on the other Perſon, and what I can demand of him, without injuring either of our Duties. Yet we muſt confeſs, that this Precept cannot be eſteem'd a Fundamental Axiom of the Law of Nature; ſince it is only a Corollary of that Law which obliges us *to hold all Men equal with our ſelves*; and therefore may be demonſtrated *à priori*.

XIV. According to our Judgment, there ſeems no Way ſo directly leading to the Diſcovery of the Law of Nature, as is the accurate Contemplation of our [1] natural Condition and Propenſions. Altho' in this Conſideration regard muſt be had to ſome Things which are extrinſical to a Man, and chiefly to thoſe which are likely to promote his Intereſt, or to procure his Damage and Inconvenience. For whether this Law was impoſed on Man to advance his Happineſs, or to check his Wickedneſs (which might otherwiſe break out to his own Deſtruction) [2] we cannot proceed more clearly in gaining a Notion of it, than by examining in what Points and Reſpects he hath need of Aſſiſtance, and in what he hath Occaſion for Reſtraint and controul. In the firſt Place then, Man hath this in Common with all other Creatures endued with a Senſe of their own Being, that he loves himſelf as highly as is poſſible, that he endeavours by all Ways and Means to ſecure his own Preſervation, to obtain what appears conducible to his Good, and to repel what is in his Judgment Evil [b]. And this Self-love, regularly ſpeaking, is ſo very ſtrong, as to ſuperſede any Inclination which a Man may have for another. Sometimes indeed Men ſeem to affect others with a more tender Paſſion than themſelves, to be more delighted with their Happineſs, and more diſturb'd at their Misfortunes than at their own. Thus *Des Cartes* [c] obſerves, that the Love which a Good Parent bears towards his Children is ſo very pure, as to make him deſire neither the gaining of any thing by them, nor the poſſeſſing them in any other Manner than he doth at preſent, nor the being joined to them by any ſtricter Engagements than thoſe of the preſent Union. But conſidering them as his *other Self*, he ſeeks their Good equally with his own; or rather with greater Care, in as much as he reckons himſelf and his Children to make up but one entire Thing, of which not thinking himſelf the better Part, he frequently prefers their Advantage to his own, and is not afraid to ſecure their Safety by his own Deſtruction [d]. But now beſides that this Love is not always conſtant, there are other Reaſons why Parents are ſometimes willing to have the Misfortunes of their Children transferr'd on themſelves, namely, becauſe they think themſelves more able to ſuſtain them: or becauſe they cannot but confeſs, that Perſons of thoſe tender Years are more worthy of Life and of Safety. And a Reaſon why on the other hand Parents are ſo highly ſatisfy'd and pleas'd with the Succeſs and Proſperity of their Off-ſpring, may be, becauſe they are ſenſible a great Part of the Glory will redound to themſelves, for bringing ſuch excellent and worthy Perſons into the World [e]. *Qui tanti talem*

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[a] *De Officiis*, Ch. ii. Numb. 11. [b] *Cicero* de Fin. Lib. iii. Ch. v. *So ſoon as any Animal is born, it is endear'd, and, as it were, recommended to itſelf for its own Preſervation, and for the loving of its own Condition, and of every Thing that tends to the Preſervation of it: Being at the ſame time made averſe to Deſtruction, and to all things which ſeem pernicious. Valer. Flacc.* Lib v. V. 644.

Eſt amor & cunctis rerum tutela ſuarum.
By Nature all love and protect their own.

Add *Diog. Laert.* Lib. vii. In *Zen.* *Marcus Antoninus*, Lib. xi. §. 8. *Epictetus* Enchirid. Ch. xxxviii Numb. 2. *Cicero de Officiis*, Lib. i. Ch. iv. [c] *De Paſſionibus*, Art. 82. [d] See 2 *Sam.* xviii. 33. *Euripid. Alceſt.* v. 653. *uſque ad* 705. [e] See *Luke* xi. 27.

[10] *Hierocles* laying down the ſame Rule, adds this Reſtriction, *A Maſter*, ſays he, *ought to think how he would be treated if he were a Slave*; and this laſt, *if he were a Maſter, how he would be ſerved.* Κατὰ παντὸς μὲν γὰρ εἰπεῖν προσώπου ὑγιὴς ὁ λόγος, ὡς σαφής. Παντὶ οὖν χρήσῃ, ἔκ τε τοῦ σαυτὸν μὲν ἐκεῖνον, ἐκεῖνον δὲ σαυτὸν ὑποθέσθαι. Καὶ γὰρ οἰκέτῃ χρῷτ' ἄν τις καλῶς, ἐνθυμηθεὶς πῶς ἂν ἠξίωσεν ἐκεῖνον αὐτῷ προσφέρεσθαι, εἴπερ ἐκεῖνος μὲν ἦν δεσπότης, αὐτὸς δὲ δοῦλος. Apud Stob. Serm. 83.

[11] So that, altho' a Judge, if he were in the Place of a Criminal, would undoubtedly wiſh, as well as he, to eſcape the Puniſhment inflicted by the Law; nevertheleſs he ought to paſs Sentence, becauſe otherwiſe he can't diſcharge the Duty of his Office, and will bring on himſelf much Trouble by ſuch an Indulgence. We muſt relieve the Poor, but not to hurt ourſelves much by it, nor ſatisfy his inſatiable Avarice. It is juſt to uſe our Servants kindly, but we are not oblig'd to make clean their Shoes; this were to become a Servant inſtead of a Maſter. In a great Buſineſs, for Example, in a Diſeaſe, a Maſter may and ought, unleſs by another's Fault, to do ſuch Services for his Servants as they have a Right to require of him; but to go farther, is to reverſe the Order of Society, and accuſtom his Servants to Idleneſs, or rather to make them inſolent in the higheſt Degree.

§. XIV. [1] The very Name of natural Right ſhews us, That the Principles ought to be deduced from the Nature of Man, as many of the Antients have acknowledged. *Natura enim Juris*, ſays *Cicero*, *explicata eſt nobis, eaque ab hominibus repetenda Natura*, De Leg. Lib. i. Chap. v. Παρατήρει τί σου ἡ φύσις ἐπιζητεῖ, ὡς ὑπὸ Φύσεως μόνον διοικουμένου· εἶτα ποίει αὐτὸ, καὶ προσίεσο, εἰ μὴ χεῖρον μέλλει διατίθεσθαι σου ἡ ὡς ζώου φύσις· ἑξῆς δὲ παρατηρητέον, τί ἐπιζητεῖ σου ἡ ὡς ζώου φύσις, καὶ πᾶν τοῦτο παραληπτέον, εἰ μὴ χεῖρον μέλλει διατίθεσθαι ἡ ὡς ζώου λογικοῦ φύσις· ἐστὶ δὲ τὸ λογικὸν εὐθὺς καὶ πολιτικὸν, τούτοις δὲ κανόσι χρώμενος, μηδὲν περιεργάζου. Marc. Antonin. Lib. x. §. 2. i. e. *Conſider well what your Nature requires, as if you were governed by Nature only; and do this, if the Nature of the Creature be not any ways diſordered. Then conſider what the Nature of the Creature requires, and do not refuſe to do it, if it be not contrary to the Nature of a reaſonable Creature; for he that ſpeaks of a reaſonable Creature, ſpeaks of a Political one*; i. e. *one born for Society. If you obſerve theſe Rules, you need not be uneaſy for any thing.* Further, Our Author ſpeaks only of a natural obligatory Right; he thinks not in the leaſt of the natural Right by ſimple Permiſſion. See above, *Lib.* i. *Ch.* 6. §. 16. *Note* 1. and what is ſaid in the laſt Note of this Chapter.

[2] The laſt of theſe Periods was added in the ſecond Edition, and is not well placed.

genuere Parentes [a]? It is likewiſe evident, that many Perſons have contentedly ſuffer'd Death for other Perſons, whom they either lov'd with an entire Affection, or to whom they devoted themſelves with an abſolute Service. For theſe Men fanſied themſelves to be join'd to ſuch Friends or Maſters as leſſer Parts of the Whole, and therefore choſe to be themſelves deſtroy'd for the Preſervation of the greater Part [b]. *Procopius* [c] tells us, that amongſt the *Epthalite Hunns* the more wealthy Men pick out about Twenty, or perhaps more Perſons, for their ſpecial Friends; theſe are conſtant Gueſts at their Tables, and have the Uſe and Command of all their Riches and Poſſeſſions, being allow'd a kind of a Common Right over all Things: And when their Patron happens to die, Cuſtom obliges them to be put alive with him into his Grave. And that ſuch Ways of Mens devoting themſelves are ſtill practis'd in *Japan*, we are aſſur'd by the Authors who deſcribe that Country and People [d]. The Truth is, in the Opinion of ſuch Perſons, the Boaſts of Faith and of Affection with the Glory thence ariſing, are of more Value than all the Things in the World beſides, and are not over-purchas'd at the Expence of Life itſelf. Some too being depriv'd of a near Friend, or of a ſingular Benefactor, do caſt away their own Lives only out of Impatience and Deſpair, imagining it is impoſſible they ſhould be otherwiſe than very miſerable, having loſt him on whom alone all their Hopes and Fortunes depended. Certain it is, whatever a Man doth for others, he never forgets himſelf; and Satan in *Job* ii. 4. well expreſs'd the common Temper and Inclination of Mankind, when he ſaid, *Skin for Skin, and all that a Man hath, will he give for his Life.*

Beſides this Self-love, and this Deſire of preſerving himſelf by all Means and Methods, there is diſcoverable in Man a wonderful Impotency and natural Indigence; ſo that if we ſhould conceive any ſingle Perſon quite deſtitute of the Aſſiſtance of others, we ſhould conclude his Life was given him rather for a Puniſhment than for a Bleſſing. It is farther manifeſt, that, next to the Support and the Defence of Heaven, Men draw their chief Help and Comfort [3] from one another. For, as the Strength of particular Perſons is ſo unable to compaſs their Preſervation and their Maintenance, that to live happily and conveniently they have continual Occaſion for the Works and for the Supplies of their Neighbours, in as much as their own Time, as well as Power, would fail them to procure the moſt uſeful and the moſt neceſſary Things; ſo on the other Hand, particular Men have Convenience of furniſhing others with many Things, which they themſelves do not want; and which therefore would turn to no Uſe or Account, unleſs they were thus beſtow'd and diſpenſed [e]. And as Men appear thus to be ſo vaſt a Support and Help to each other, ſo may they likewiſe, in as eminent a manner, prove a mutual Plague and Miſchief; and they do often actually prove ſo, either upon the Inſtigation of their brutiſh Paſſions, or being compell'd by the Neceſſity of defending themſelves from the Injuries and the Aſſaults of others. The Truth of all which is clear to us from daily Experience, and hath been inſiſted on more largely by us in the firſt Chapter of this Book [f]. But we deſire it ſhould be well obſerved, that in ſeeking out the true Condition of Men, we have aſſign'd the firſt Place and Influence to Self-love, not as if each particular Man ought in every Reſpect to prefer himſelf to all others, or to meaſure all Things by his own private Advantage, eſtabliſhing his ſeparate Intereſt for his chief End and Deſign; but becauſe a Man is by Nature ſooner ſenſible of the Love he bears towards himſelf, than of that which he bears towards others, in as much as it is natural for him ſooner to perceive his own Exiſtence, than the Exiſtence of others. And farther, becauſe the Care of me and my Affairs belongs to no body ſo properly as to my ſelf: For altho' I propoſe the common Good for the Mark of Acting, yet ſince I likewiſe am a Part of Mankind, to the Preſervation of which ſome Care is due, this Care muſt needs lie more eſpecially and more forcibly on me my ſelf, than on any Perſon elſe in the World.

XV. Thus much being granted, it is an eaſy Matter to diſcover the Foundation of Natural Law. Man is an Animal extremely deſirous of his own Preſervation, of himſelf expos'd to many Wants, unable to ſecure his own Safety and Maintenance without the Aſſiſtance of his Fellows, and capable of returning the Kindneſs by the Furtherance of mutual Good: But then he is often malicious, inſolent, and eaſily provok'd, and [1] as powerful in effecting Miſchief, as he is ready in deſigning it. Now that ſuch a Creature may be preſerv'd and ſupported, and may enjoy the good Things attending his Condition of Life, it is neceſſary that he be *ſocial*, that is, that he unite himſelf to thoſe of his own Species, and in ſuch a Manner regulate his Behaviour towards them, as that they may have no fair Reaſon to do him Harm, but rather incline to promote his Intereſts, and to ſecure his Rights and Concerns [2]. This then will appear a fundamental Law of Nature, *Every Man ought, as far as in him lies, to promote and preſerve a peaceful Sociableneſs with others, agreeable to the main End and Diſpoſition of human Race in general* [3]. For by *Sociableneſs* we do not here mean a bare Readineſs or Propenſion to join in particular Societies, which may poſſibly be form'd on ill Deſigns, and in an ill Manner; as the Confederacies of Thieves and Robbers; as if it were ſufficient only to join ourſelves with others, let our Intentions be what they will. But by this Term of *Sociableneſs*, we would imply [4] ſuch a Diſpoſition of one Man towards all others, as ſhall ſuppoſe him united to them by Benevolence, by Peace, by Charity, and ſo, as it were, by a ſilent and a ſecret Obligation. It would therefore be a Charge moſt notoriouſly falſe, ſhould any inſinuate, that the Sociableneſs which we eſtabliſh is perfectly indifferent, and hath an equal Regard to good Society and to bad. We ſaid it was the Duty of every Man to promote and to practiſe Sociableneſs *as far as in him lies*; becauſe, for as much as it is not in our Power to oblige all other Men to behave themſelves towards us as they ought, we have done our Duty when we have omitted nothing which we were able to perform, in moving and engaging them to exerciſe the like Sociableneſs towards us. From all which it follows, that ſince he who obliges us to any *End*, cannot but at the ſame Time be ſuppos'd to oblige us to thoſe *Means* which are neceſſary to the Attainment of that *End*, *all Actions which neceſſarily conduce to this mutual Sociableneſs, are commanded by the Law of Nature, and all thoſe, on the contrary, are forbidden, which tend to its Diſturbance, or Diſſolution.*

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[a] *Æn.* i. 610. On the other Side, it was a gallant Saying of *Epaminondas*, that amongſt all the good and fortunate Accidents of his Life, none ſtruck him with ſo real a Pleaſure, as that he won the famous Victory at *Leuctra*, before he had loſt either of his Parents. *Plutarch*'s Apophthegm. p. 193. Ed. *Wech.* [b] Vid. *Cartes* de *Paſſion.* Art. 83. *Cæſar* de B. G. Lib. iii. Chap. xxii. concerning the *Soldurii.* [c] De Bello *Perſ.* Lib. i. Chap. iii. [d] Vid. *Franc. Carron*, in Deſcript. *Japan*, Chap. vii. Of the *Æthiopians*, ſee *Diod. Sic.* Lib. iii. Chap. vii. [e] *Senec.* de Irâ, *Lib.* i. *Chap.* 5. *Men are born to be Helps to each other.* *Marc. Antonin.* Lib. ii. Chap. i. *We are born for mutual Support and Aſſiſtance, and have each of us our proper Office to diſcharge for the General Benefit; as the Feet, the Hands, the Eye-lids, the Teeth,* or any Members of the Body. [f] Add. Dr. *Cumberland*, Chap. i. §. 15, 16.

[3] *Cicero* proves at large (*De Offic. Lib.* ii. *Chap.* iii, iv, v.) that there is nothing that a Man can receive more Good or Evil from, than from his Like. After which he thus concludes, *Cum igitur hic locus nihil habeat Dubitationis, quin homines plurimum hominibus & proſint & obſint, primum hoc ſtatuo eſſe virtutis, conciliare animos hominum, & ad uſus ſuos adjungere,* Chap. v. Juſt the ſame Conſequence as our Author draws in §. following.

§. xv. [1] Mr. *Titius* affirms, that the Conſequence is not good, but he is certainly miſtaken; for our Author deduces Sociableneſs from all theſe Characters put together, and not from any ſingle one. But in one Thing Mr. *Titius* ſeems to ſpeak with Reaſon, when he ſays, That our Author in ſettling Sociableneſs in that Manner, gives us Cauſe to believe, that every one's private Advantage is the Foundation of Natural Right; becauſe, according to him, if a Man becomes ſociable, 'tis becauſe he can't preſerve himſelf without it, nor enjoy ſuch Conveniences of Life, as are neceſſary in this World. I own, that our own Intereſts will engage us to be ſociable; but 'tis not therefore a Conſequent, that we muſt raiſe the Obligation of practiſing the Laws of Nature directly upon it; for there are Caſes in which we muſt ſacrifice our own Intereſt to others Advantage, and the Good of Society. I may add, that our Author himſelf, in his *Element. Juriſprud. Univerſ.* p. 431, &c. makes Self-love and Sociableneſs two diſtinct Principles of Duty; and I do not know for what Reaſon he ſhould change his Sentiments. See what is ſaid *Note* 5. of this Paragraph, and what the Author ſays in the Beginning of §. 16.

This [5] Method of Diſcovering the Law of

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[2] *Nihil eſt profecto præſtabilius, quàm planè intelligi nos ad juſtitiam eſſe natos, neque opinione, ſed naturâ conſtitutum eſſe jus. Id jam patebit, ſi hominum inter ipſos ſocietatem, conjunctionemq; perſpexeris.* Cicero De Leg. Lib. i. Ch. x. "You will "ſee clearly that Right doth not depend on Opinion, but on the Eſtabliſhment of Nature; if you conſider the "neceſſary Union and Alliance of Mankind." Σὺν ἀλλήλοις εἶναι ἀνθρώπους, καὶ ἀνομίᾳ διατᾶσθαι οὐχ οἷόν τε· μείζω γὰρ ἂν αὐτοῖς ζημίαν οὕτω γίνεσθαι ἐκείνης τῆς κατὰ ἕνα διαίτης· *Jamblich. Protrep. Chap.* xx. "That Men ſhould live together, and "yet without Law, is abſurd and impoſſible; for at this rate, Society would be more dangerous and prejudicial to them, than if they dwelt ſeparately and ſingly without any Communication."

[3] To explain this Rule more fully, I think this ought to be added: From whence it follows, that whoever is oblig'd to aim at a certain End, is oblig'd at the ſame time to make uſe of the Means, without which it can't be obtain'd. Whatever contributes neceſſarily to an univerſal Sociableneſs, ought to be looked upon as preſcrib'd by the Law of Nature; and, on the contrary, whatever diſturbs it, to be forbidden by the ſame Law.

[4] Whenever a Thing appears advantagious or noxious to Society in general, in what State ſoever Men are, in every Place, and at all Times, we muſt look upon it as either abſolutely commanded or forbidden by the Law of Nature. So altho' Theft or Adultery may in certain Circumſtances, and through the Corruption of Manners in certain Countries, have cauſed little or no Trouble in ſome particular Societies, as ſome affirm, that Experience hath proved in the Kingdoms of the *Maſſagetæ* and *Lacedemonians*, yet theſe two Crimes are not a whit the leſs contrary to the Law of Nature: For if they were allowed always and in all States, there would reſult from them, without doubt, monſtrous Inconveniences and terrible Diſorders; and, on the contrary, every Society whatſoever, muſt be more quiet and happy, where the Members of it religiouſly abſtain from Robbery and debauching their Neighbour's Wife, than where ſuch Attempts are frequently made. Our Author explains himſelf well enough upon this Subject in ſeveral Places of this Book, and in his other Works, *viz.* his *Spicilegium Controverſ. circa Jus Natur. Chap.* iii. §. 13. So that I am amazed that certain Men, who labour to confute him, and pretend to take a new Method in explaining the Law of Nature, make continual Alterations in a Thing ſo clear.

[5] Our Author (in the Beginning of the following §. of this Chapter, and in his *Specimen Controverſ. Chap.* v. §. 25. as alſo in his *Spicilegium Controverſ. &c. Chap.* i. §. 14.) declares, that he deſigns to explain here the Duties of Men only which properly refer one to another: For, according to him, our Duties toward GOD belong to natural Theology, and Religion is no other ways concern'd in a Treatiſe of natural Right, than as it is a more ſtrong Cement of human Society. As for the Duties of Man to himſelf, they are derived partly from Religion, and partly from Society. So that were Man independent on GOD's Authority, and no way concern'd in Society, we could not conceive how he could be ſubject to any Obligation from himſelf. If ſome had attended to this Syſtem of our Author, they would not have ſpent ſo much Paper in delivering Objections ſo ill grounded. Nevertheleſs I own, that he did well to prevent theſe Cavils by putting out a Treatiſe containing all the Duties of Man, of which we may know the Neceſſity by the Strength of Reaſon only, and which, if we rightly underſtand the Thing, are contained in the Idea of the Law of Nature, otherwiſe we muſt agree, that his Method to prove the Principle of Sociableneſs is ſubject to ſome Inconveniences, as we have obſerved above in *Note* 1. But all this may be rectified in ſome meaſure, by keeping cloſe to the Notions of the Author above quoted. We muſt conſider the Nature of Man, whoſe Conſtitution we have originally diſcover'd to be the Foundation of natural Right, either as it came out of the Hands of the Creator, or as framed afterward diverſly by ſome human Acts. I. From this Principle only, That Men are GOD's Workmanſhip, it evidently follows, that they ought to ſhew towards that ſupreme Being, all the Sentiments which are comprehended in the Notion of Religion, and of which we ſhall treat in *Ch.* iv. §. 3. *Note* 2. following. Moreover, GOD having conſulted the Preſervation and Happineſs of Mankind (as it appears plainly) both by the Faculties he has endowed him withal, and by that ſtrong Inclination which carries us irreſiſtibly to ſearch after Good, and avoid Evil: He alſo requires, doubtleſs, that every one ſhould not only preſerve and make himſelf happy, but alſo contribute his utmoſt Endeavours to the Preſervation and Happineſs of others. There are alſo two other Fundamentals of the natural Law in general, taken in its full Extent, and they are, 1. Love of ourſelves, in a true Senſe; and, 2. Sociableneſs. Inſomuch that as Religion contains all the Duties of a Man towards GOD, ſo Love of ourſelves (for ſo it may be beſt expreſſed to avoid all Equivocation) comprehends all that we are directly obliged to do in Relation to ourſelves; and Sociableneſs all that is due to others. See §. 24. *Note* 3. So that Sociableneſs is oppoſed to Self-love, and Self-love is no farther a Foundation of Sociableneſs, than as we are bound to others, becauſe we love ourſelves. But theſe are two diſtinct Principles, which though they have one great Relation, and equally concur in the Sight of the Creator, do yet differ in the Main, and ought wiſely to be managed, ſo that we muſt keep an equal Balance, as much as is poſſible, between them: I ſay, as much as is poſſible, for it ſometimes happens that we can't at the ſame time perform all the Duties which flow from theſe three great Principles of the natural Law; and in ſuch Caſes we ought to regulate ourſelves by theſe general Maxims: 1. That our Duties toward GOD ſhould always be preferred before all others. 2. That when there is a kind of Oppoſition between two Duties of Self-love, and two of Sociableneſs, we ought to prefer that which is attended with the greateſt Advantage, *i. e.* we muſt conſider whether the Good which ſhall be procured to ourſelves or to others in performing either of theſe Duties is more conſiderable, than the Good that ſhall redound to ourſelves or to others by the Omiſſion of that Duty, which we can't at preſent diſcharge without neglecting ſome other. 3. If, all Things elſe being equal, there is an Oppoſition between Self-love and the Duties

Nature, doth not only appear, upon Examination, to be the moſt plain and eaſy, but it is likewiſe own'd for the moſt proper and genuine Way, by full Conſent of the greateſt Part of Learned Men. There's no Need of heaping up Teſtimonies and Authorities, but we may let *Seneca* ſpeak for all the reſt. [6] *By what other Means*, ſays he, *are we preſerv'd, but by the mutual Aſſiſtance of good Turns? This Commerce and Intercourſe of Kindneſſes adds Strength and Power to Life; and, in Caſe of ſudden Aſſaults, puts it into a better Condition of Defence. Take us all aſunder, and what are we, but an eaſy and an unequal Prey to wild Beaſts? Man by Nature is weak on every Side: Society fortifies his Infirmity, and arms his Nakedneſs.* Thoſe two *Excellencies, of Reaſon and of Society, render him the moſt potent of all Creatures, who would otherwiſe be obnoxious to Injuries from every Thing about him. Thus, by the Help of Union, he commands the World, who, if divided, would ſcarce be a Match for any living Rival. And it is Society alone which gives him his ſovereign Sway over the inferior Creation. This was the Thing which firſt reſtrain'd the Violence of Diſeaſes, which lent Crutches and Supports to Old Age, and adminiſtred Conſolation to Grief. Take away this, and you cut aſunder the Band of Union, the vital String of Mankind* [a].

There are other leſs principal Cauſes, or rather Arguments of a ſociable Nature in Men. For Example, becauſe nothing is more ſad and diſagreeable than perpetual Solitude [b]: Becauſe otherwiſe we ſhould have no Uſe of our Tongue, that moſt noble Inſtrument, by the Help of which Mankind have this Advantage above all other living Things, that they are able to expreſs their inward Sentiments in articulate Sounds [c]: Becauſe every good and excellent Perſon is deſirous of ſhewing his worthy Deeds amongſt others. Amongſt theſe ſecondary Reaſons of Sociality, is that which *Tully* takes Notice of in his firſt Book of Offices, *Chap.* xliv. *There are ſome People*, ſays he [7], *that fanſy all Leagues and Aſſociations amongſt Men, to ariſe from the Need that one Man hath for another, toward the ſupplying of our natural and common Neceſſities: Becauſe* (ſay they) *if Providence had delivered us from this Care of looking after Food and Cloathing, by appointing ſome extraordinary Way for the Procurement of it; no Man of either Brains, or Virtue, would ever trouble his Head about Buſineſs, but wholly deliver himſelf up to the attaining of Wiſdom. But this is a Miſtake; for even in that Condition a Man would fly Solitude, and wiſh for a Companion in his very Studies: He would be willing to teach and to learn, to hear and to ſpeak.* He talks to the ſame Purpoſe in the Third Book of that Work, *Chap.* v. [8] *It is more according to Nature, for a Man to undergo all Sorts of Labours and Troubles for the Service and the Conſervation (if it were poſſible) of the whole World, after the Example of* Hercules, *whom the Gratitude of Men hath plac'd for his Virtue among the Gods; than to live in Solitude, and not only free from Cares, but even wallowing in Pleaſures and Plenty, with all the Advantages of Strength and Beauty over and above. This it is that makes all great and glorious Spirits prefer the former Kind of Life to the latter.* What the ſame Author obſerves in his *Lælius*, is rather applicable to particular Friendſhip, than to common Society: *Friendſhip firſt aroſe rather from Nature than from Weakneſs; rather from the Bent and Inclination of Mens Minds, than from the Conſideration of the Profit it would produce.*

We would have it obſerv'd, that the fundamental Law of Nature eſtabliſh'd by us, doth not diſagree [9] with that which Dr. *Cumberland* hath laid down in his Work on that Subject [d], concerning the Study and Endeavour after the com-

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of Society, whether it happens through the Fact of another, or not, then Self-love ought to prevail; but if there be an Inequality, then Preference ought to be given to that of the two Sorts of Duties, which is accompanied with the greateſt Profit. See what is ſaid upon *Chap.* v, and vi. of this *Book*. II. But it often happens, that Men, without leſſening the general Obligations, which reſult directly and immediately from their original Conſtitution, and the Appointment of the Creator, add thereto by their own Will, or by ſome Contract and poſitive Law, divers private Engagements, which are united with the Object of the Law of Nature, as it is a Rule of Action which requires ſuch Engagements. In ſhort, all Men ought throughly to conform their Actions to their original Conſtitution, but in a different Manner, according to the different Eſtate they are in, as all the Parts of a Clock concur to fulfil the Contrivance of the Artiſt, although every Wheel move in a Way agreeable to its particular Form. See §. 22, and 24. following.

[a] Ἀνὴρ τὸν ἄνδρα, &c. *Men are the Defence of Men, Cities of Cities; as the Hand rubs the Hand, and the Fingers waſh the Fingers. All Safety is Confederacy.* Plin. N. H. Lib. ix. Ch. xlvi. Add. *Marc. Antonin. Lib.* iv. §. 4. & *Lib.* v. §. 16, & 29. where he calls Society the *Good* or *Happineſs* of a rational Creature; as it is frequent with him to term Man *a Creature ſociable by Nature.* Vide & Lib. vii. §. 55. *Liban. Declam.* xix. p. 499. *Nature appointed Man to be a Companion, and an Aſſiſtant to Man.* [b] Cicero De Fin. Lib. iii. Ch. xx. *No Man would be willing to lead a Life of Solitude, though in an Infinity of Delights and Pleaſures. Whence 'tis eaſy to apprehend, that we are born for natural Conjunction and Community.* [c] Vid. *Quinctil. Inſtitut. Lib.* ii. *Ch.* xvi. [d] *Ch.* i. §. 4.

[6] *Ut ſcias per ſe expetendam eſſe grati animi adfectionem, per ſe fugienda res eſt ingratum eſſe, quoniam nihil æquè concordiam humani generis diſſociat & diſtrahit, quàm hoc vitium. Nam quo alio tuti ſumus, quam quod mutuis juvamur officiis? Hoc uno inſtructior vita, contraque incurſiones ſubitas munitior eſt, beneficiorum commercio. Fac nos ſingulos, quid ſumus? præda animalium & victimæ, & imbecilliſſimus & facillimus ſanguis. Quoniam cæteris animalibus in tutelam ſui ſatis virium eſt. Quæcunque vaga naſcuntur, & actura vitam ſegregem, armata ſunt: hominem imbellia cingit: non unguium vis, non dentium, terribilem cæteris fecit; nudum, & infirmum ſocietas munit. Duas res dedit, quæ illum obnoxium, validiſſimum facerent, rationem & ſocietatem. Itaque qui par eſſe nulli poſſet, ſi ſeduceretur, rerum potitur. Societas illi dominium omnium animalium dedit; ſocietas terris genitum, in alienæ naturæ tranſmiſit imperium, & dominari etiam in mari juſſit. Hæc morborum impetus arcuit, ſenectuti adminicula proſpexit, ſolatia contra dolores dedit: hæc fortes nos facit, quod licet contra fortunam advocare. Hanc tolle & unitatem generis humani, quâ vita ſuſtinetur, ſcindes.* De Benef. Lib. iv. Chap. xviii.

[7] *Nec verum eſt, quod dicitur à quibuſdam, propter neceſſitatem vitæ, quòd ea quæ natura deſideraret, conſequi ſine aliis, atque efficere non poſſemus, idcirco initam eſſe cum hominibus communitatem & ſocietatem; quod ſi omnia nobis, quæ ad victum cultumque pertinent, quaſi virgula divina, ut ajunt, ſuppeditarent, tum optimo quiſque ingenio, negotiis omnibus omiſſis, totum ſe in cognitione, & ſcientia collocaret. Non eſt ita, nam & ſolitudinem fugeret, & ſocium ſtudii quæreret, tum docere, tum diſcere vellet, tum audire, tum dicere.*

[8] *Magis eſt ſecundum naturam, pro omnibus gentibus, ſi fieri poſſit, conſervandis, aut juvandis maximos labores, moleſtiaſque ſuſcipere, imitantem Herculem illum, quem hominum fama beneficiorum memor, in concilium cæleſtium collocavit, quàm vivere in ſolitudine, non modo ſine ullis moleſtiis, ſed etiam in maximis voluptatibus, abundantem omnibus copiis, ut excellas etiam pulchritudine & viribus.*

[9] There are ſeveral other Authors whoſe Principles being well underſtood, may be reduced to this, though there appears ſome Difference in the Language and Method. See Mr. *Hertius*'s Diſcourſe *De Sociabilitate primo Jur. Nat. princip. Sect* II. §. 9, &c.

mon Good, and the demonſtrating all poſſible Benevolence towards all Men. For we, when we maintain that a Man ought to be ſociable, do at the ſame time intimate, that he ought not to make his own ſeparate Good the Mark of his Proceedings, but the Benefit of Mankind in common; that no Perſon ſhould purſue his private Advantage, by oppreſſing or by neglecting other Men; and that none hath Reaſon to hope for Happineſs and Succeſs, who either injures or deſpiſes his Neighbours.

From this ſocial Nature of Man, and from the Conſideration that every one is born not for himſelf alone, but for all human Kind, the Lord *Bacon*, in his Work of the *Advancement of Learning*, *Book* vii. *Ch.* i. deduces ſeveral excellent Corollaries; as, that an active Life is preferable to a contemplative one; that the Happineſs of Man is to be ſought for in Virtue [10], not in Pleaſure; that the Fear of ſudden and unexpected Accidents ought not to deter us either from managing publick Affairs, or from maintaining Society and Commerce with other Men: Laſtly, that we ought not to withdraw ourſelves from civil Buſineſs, out of a tender and ſcrupulous kind of Humour, or out of an Averſion to the uſual Methods of Complaiſance. In which place the ſame noble Author farther obſerves, that there never was any Philoſophy, Religion, Law, or Diſcipline found out in the World, which ſo far exalts the publick Good, and debaſes private Intereſt, as the Chriſtian Inſtitution appears to have done.

XVI. Let us conſider now whether or no the Doctrine aſſerted by *Hobbes*, in his Book *De Cive*, *Chap.* i. §. 2. claſhes with what we have been delivering on this Head. Certainly he hath been interpreted with very great Rigour, and with very little Reaſon by ſome learned Men, when they cenſure him for teaching, *that Nature did not inſtitute Society, but Diſcord, amongſt Men*, and, as they hence infer, *that all Kind of human Society is againſt the Deſign of Nature* [a]. Which is much the ſame Thing, as if I ſhould talk thus, *Speech is by Nature actually born with no Man; therefore all Speech which is afterwards learnt, runs againſt Nature's Intention.* Or thus, *All Men by Nature come into the World little; therefore it is againſt Nature that they ſhould grow up to larger Dimenſions.* Or, *Men are by Nature ſubject to Diſeaſes; therefore it is againſt Nature, to make uſe of Diet, or Phyſick to prevent or to cure them.* We muſt confeſs, that this Notion of *Hobbes*, looks at firſt View extremely paradoxical; eſpecially if a Man doth not conſider diligently the Ambiguity of the Word *Nature*. But for fear any one ſhould hereafter be cheated by the ſame doubtful Philoſophy, and led fatally into Error; let us firſt obſerve, that Self-love and Sociableneſs ought by no Means to be made Oppoſites; but thoſe different Inclinations are in ſuch a Manner to be temper'd, that the former do not overthrow or diſturb the latter [b]. When by the Enormity of wild Luſts this Temperament is broken, and ſo all take up a Reſolution of ſeeking each his own Advantage to the Injury of others; then ariſe thoſe Heats and Contentions which divide and confound Mankind. For the avoiding which, the bare Care of our private Safety commands the Obſervation of ſocial Laws, ſince we cannot enſure our own Perſons without their Aſſiſtance and Protection. As for *Hobbes*'s Demonſtration, in which he ingeniouſly enough deduces thoſe Laws which we call natural, from the Principle of Self-preſervation, the firſt Remark that we ſhall offer concerning it is this; that ſuch a Way of Proof doth indeed clearly enough make out, how conducive 'tis to the Safety of Men, that they act according to theſe Dictates of Reaſon: But it is not an immediate and direct Concluſion to ſay, a Man hath a Right of uſing thoſe Means for his Preſervation, therefore he is oblig'd, as it were by a Law, to obſerve and to purſue them: For to give thoſe Dictates of Reaſon the Force and Authority of Laws, there is need of proceeding on ſome other Principle, than what he lays down.

In the next Place, great Care is to be taken leſt any ſhould conclude from ſuch Arguments and Poſitions, that when he hath once enſur'd his own Safety, and ſet himſelf out of Danger, he need not trouble himſelf about the Security of other Men; or that he may inſult how he pleaſe, over ſuch a Perſon as doth not contribute to his Quiet and Hapineſs, or hath not Strength enough to diſturb it. For we therefore give Men the Name of ſocial Creatures, becauſe they, of all living Things, are the fitteſt and the moſt able to promote the Advantage of each other: Neither is any inferior Creature capable of receiving ſo great Benefit [1] from Man, as Man himſelf. Again, the Excellency and Perfection of any particular Perſon riſe the higher, the more he deſerves of the Community by his publick Benefactions; and Works of this Kind are reckon'd the moſt noble, being ſuppos'd to proceed from the greateſt Wiſdom: Whereas any worthleſs Wretch, or a meer Fool, may be able to trouble or to hurt his Fellows. Beſides, ſuppoſing every Man's private Advantage were eſtabliſh'd for the Mark of his Actions, if many Perſons ſhould happen to fix that private Advantage on the very ſame Thing [2], there will either be a Neceſſity of ſaying that theſe many Deſires, including a plain Contradiction, are conſiſtent with Reaſon, which is the higheſt Abſurdity: Or, ſince none can pretend that his Deſire would have the Preference of the reſt, we ſhall be forc'd to admit it for a Truth, that no Man ought ſo to make his own Profit the Aim of his Proceedings, as not to conſider and to regard the Good of others. Farther, whoever attempts to draw every Thing to himſelf and to his own Intereſt, without looking towards his Neighbour, will not only labour in vain (it being impoſſible that all Perſons and all Things ſhould be diſpos'd according to the contradictory Deſires and Wills of particular Men) but he will likewiſe invite others to plunder and to deſtroy him. Moreover, if that only can be ſaid to be *good* to a particular Perſon, which conduces to his ſeparate Intereſt, it follows, that in reſpect of all other Perſons it muſt be *evil*, inaſmuch as their Intereſt or Profit is not furthered by it: And ſo what one covets and purſues, all the reſt will oppoſe and keep off, which cannot but raiſe perpetual Claſhing and contending amongſt Men [a]. Laſtly, although another Perſon hath done me neither Good nor Hurt, and though he hath nothing in him to raiſe either my Fear or my Love, yet Nature obliges me to eſteem even ſuch a one as my Kinſman and my Equal; which Reaſon alone (had we no others) were ſufficient to enforce the Practice of a friendly Society and Correſpondence amongſt Men. And upon this Conſideration, ſuppoſing there was a Nation in the World maintaining Peace and Juſtice amongſt themſelves, and of ſuch mighty Strength as to be formidable to all others, and ſo not reſtrain'd from hurting them by the Fear of a like Return; yet ſhould this Nation or People aſſault, drive, kill, or drag into Slavery their weaker Neighbours, as often as they thought convenient, we ſhould pronounce them actually guilty of a Breach of the Law of Nature. And yet (as we ſuppoſe) theſe People might *preſerve* themſelves, whether they allow'd any Rights to others, or not [3]. In the ſame Manner, none will commend the Life and Profeſſion of Robbers, becauſe they exerciſe ſome little Juſtice towards thoſe of their Gang, becauſe their Captains divide the Prizes equally amongſt them, and becauſe he who either openly or ſecretly robs one of the Crew, is (even by Thieves) adjudg'd unworthy of farther Partnerſhip and Society with them [b]. This Rule of extending our Care beyond our own Perſons, is ſo much the more diligently to be attended to, the more evident it is, that a Man of more Strength and Power than ordinary, is likely to be tempted to the Violation of natural Law, by the Thoughts of his own Self-ſufficiency; that ſince his private Safety is abundantly provided for, he need not give himſelf the trouble of maintaining Peace and Friendſhip with his Neighbours.

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[a] *Compt. Conring.* in *Jure Civili, Ch.* xiv. *in fin.*

[b] *Arrian. Epictet. Lib.* i. *Ch.* xix. *God has diſpos'd the Nature and Conſtitution of rational Creatures after ſuch a Manner, that they can't advance their private, without contributing ſomething to the publick Intereſt. Community doth not exclude the Purſuit of private Advantage.*

[10] Virtue is the Cauſe of Happineſs, but it is not Happineſs itſelf. All Happineſs conſiſts eſſentially in Pleaſure, although, there being diverſe Sorts of Pleaſure, every one will not make a Man happy. This might be eaſily proved, if this were a proper Place. See a fine Paſſage of *Montagne*'s upon this Subject, *Eſſays, Lib.* ii. *Chap* xix. *Init.*

§. XVI. [1] Our Author muſt mean *Harm*, for to ſay *Benefit* would not be agreeable to right Reaſoning.

[2] Again, our Author is guilty of an Inadvertency, for inſtead of ſaying, *on the very ſame Thing*, he doubtleſs meant to ſay, *on Things very different from one another*; as appears from his Reaſoning afterwards, and from Dr. *Cumberland, Ch.* v. §. 16. whoſe Notions our Author follows: *If right Reaſon*, ſays that *Engliſh* Writer, *dictates to* Peter, *that all his Happineſs, and the End that he aims at, conſiſts in the Enjoyment of the full Right of the Lands which* John *and* James *poſſeſs, as alſo of their Perſons, and of the Goods of all others in general, right Reaſon cannot inſpire* James *and* John *to place their Happineſs in the Enjoyment of a full Right in the Lands and Perſon of* Peter, *and of all others, for that would imply a plain Contradiction*, &c.

But to conclude this Point, as the Care of our own particular Preſervation doth not exclude a Concern for Society, ſo neither doth a kind Regard for Society ſuppreſs our Affection to our Perſons, but they are both extremely agreeable and conſiſtent, as appears ſufficiently from the Rule propos'd by our Saviour, *Matth.* xxii. 39. when he commands us *to love our Neighbours as our ſelves* [4]. Indeed Reaſon plainly informs us, that whoſoever hath a hearty Deſire for his own Security muſt not, cannot neglect the Care of his Fellows. For, ſince our Safety and Happineſs depend for the moſt Part on the Benevolence and on the Aſſiſtance of others, and ſince the Nature of Men is ſuch, that for Benefits conferr'd they expect a Return of Kindneſs, and when no ſuch Return is made, refrain from farther Favours: No Perſon in his Wits can ſtick ſo cloſe to the Purſuit of his ſeparate Advantage, as to diveſt himſelf of all Regard to the reſt of the World: But rather the more rationally he loves *himſelf*, the more earneſt he will be in endeavouring by good Turns to procure the Love of other Men. For no one hath any Reaſon at all to hope, that Men will voluntarily contribute towards advancing *his* Happineſs, whom they know to be malicious, perfidious, ingrateful, and inhuman, and that theſe wicked Practices are the Requitals which he will make for their Bounty; on the contrary, it ſhould be expected, that they will all join together in ridding the Earth of ſuch a Monſter, or, at leaſt, in reſtraining him from doing farther Miſchief.

XVII. Neither is the following Argument which the *Hobbiſts* make uſe of at all concluſive; "Particular Men when they join Society or Company with certain others, have Regard to ſome peculiar Good or Benefit, which is likely to redound to themſelves: Therefore human Nature in general is not determin'd to Society, or, I am not oblig'd to behave my ſelf in a ſocial Manner towards him, from whom I do not expect ſome particular Advantage." For thus much indeed is evident, that the Reaſon why certain Men join in any certain Species of Society, is either becauſe they have a peculiar Reſemblance and Agreement in Diſpoſition of Mind, or in other Qualities; or elſe becauſe they think they ſhall better obtain ſome End which they drive at, amongſt theſe Perſons than amongſt others. But (beſides that, regularly ſpeaking, no Man hath the Property of belonging to no particular Society) even amongſt Men who are united only by the common Tie of Humanity, that general Sociableneſs and Peace are to be obſerv'd and cultivated; which implies little more than this, that they abſtain from hurting one another unjuſtly, and that as far as their ſtricter and particular Obligations leave Room, they mutually promote and communicate their Intereſts and their Goods.

XVIII. Hence it is clear what Anſwer ſhould be made to that Objection, *if one Man lov'd another naturally, that is, upon account of his being a* Man,

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[a] *Self-Intereſt is a poor Centre of a Man's Actions,* ſays my Lord *Bacon, Eſſ.* xxiii.

[b] Vide *Ciceron. Off.* ii. *Ch.* xi.

[3] *Nec magis vituperandus eſt proditor patriæ, quam communis utilitatis aut ſalutis deſertor, propter ſuam utilitatem, aut ſalutem. Cicero De Fin. Lib.* iii. *Ch.* xix. "A Betrayer of his Country is not more foully ſcandalous, than he who deſerts the common Benefit or Safety for the Procurement of his own."

[4] *Qui ſtadium currit, eniti & contendere debet, quàm maxime poſſit, ut vincat; ſupplantare eum, quicum certet, aut manu depellere, nullo modo debet. Sic in vita ſibi quemque petere, quod pertineat ad uſum, non iniquum eſt, alteri deripere jus non eſt.* Chryſippus apud Ciceron. De Offic. Lib. iii. Chap. x. *In running of a Courſe a Man may be allow'd, nay, he ought to ſtretch and contend his Utmoſt for the Victory: But he muſt not, on any Account, trip up his Antagoniſt's Heels, or thruſt him out of the Liſts by main Force. So in Life, it is very fair and allowable, for every Man to get, by honeſt Means, whatever makes for Uſe and Advantage; but 'tis by no Means lawful that he ſhould take it away from others.*

then there can be no Reaſon given, why every one ſhould not love every one equally, all being equally Men: Or why a Man ſhould chooſe to frequent their Company moſt, from whom he receives either greater Honour or greater Profit. In this Fallacy, common Society is confounded with particular and ſtricter Confederacies, common Love, with ſuch as ariſes from peculiar and ſingular Cauſes. For to deſerve that common Affection, no Property is requir'd but barely the being a Man. Nature having, for the Reaſons above aſſign'd, really conſtituted a general Friendſhip amongſt Men, from which no Perſon is excluded, unleſs he hath rendred himſelf unworthy of it by his monſtrous Villanies. Now, altho' by the good Diſpoſal of the All-wiſe Creator, our Natural Laws are ſo fitted to human Condition, that the Obſervation of them is join'd with the Intereſt and Advantage of the Obſervers; ſo that even this common Love is exceedingly profitable to Mankind: Yet in aſſigning the Cauſe and Reaſon of it, we are wont to have Recourſe, not to the Benefit proceeding from it, but to the general Nature in which it is founded. For Example, If we are to give a Reaſon why one Man ought not to hurt another, we do not uſually ſay, becauſe an abſtaining from mutual Violence is profitable (altho it is ſo indeed in the higheſt Degree) but, becauſe the Perſon being another *Man*, that is, another Animal related to us by Nature [1], it would be a Crime to offer him any Harm [a].

Yet beſides this common and univerſal Affection, ſome Circumſtances may make a Man love one Perſon in a higher Degree than another: Suppoſe, becauſe their Inclinations particularly agree, and their Heads lie the ſame Way; or, becauſe this Perſon is more able, or more willing to promote his Advantage; or, becauſe their Race, or Original, makes them allied to each other. As to that Obſervation about Mens being more willing to frequent ſuch Company, where they find themſelves preferr'd to others in Honour and in Profit; the Reaſon of the Thing is this, becauſe every one muſt naturally love his own Intereſt, if he have Wit enough to underſtand it. But this Love is by no Means repugnant to the ſociable Nature of Mankind, if it doth not riſe to ſuch a guilty Height, as to diſturb the Harmony and Agreement which is univerſally to be maintain'd amongſt Men. For Providence did not for this Reaſon give us a ſociable Nature, that we ſhould therefore [2] neglect ourſelves and our own Affairs. But rather we are ſtudious of Society on this very Account, that by a mutual Communication of Aſſiſtance and of Goods, our own Concerns may be manag'd with more Conveniency, and with more Succeſs. And altho' when a Man unites himſelf to any particular Society, he hath a prime Regard to his own Intereſt, and but a ſecondary one to the Intereſt of his Companions; not being able to carry on his own Matters without ſuch a Conjunction; yet this doth not hinder him from being oblig'd ſo to purſue his own private Ends and Advantage, as not to injure either the Corporation in general, or any ſingle Member of it, and ſometimes to poſtpone his ſeparate Good, for the Advancement of the common Benefit.

What is urged about the Original of great and laſting Societies, or *States* (it being ſaid that they are not deriv'd from mutual Benevolence, but from mutual *Fear*; by which Word they mean any Kind of Precaution and Foreſight) is entirely beſide the Purpoſe. For as the Queſtion doth not at preſent proceed about the Riſe of Civil Society in general; ſo farther, it is highly agreeable to our natural Condition, that whereas ſingle Perſons, or a few join'd in Confederacy, might lie perpetually expos'd to the Inſults of ſuch Wretches as purſue their private Ends, without Regard to their Neighbours; many ſhould unite in a Body, and ſo ſtrengthen their Guard againſt farther Aſſaults and Miſchiefs. Neither is it indeed abſolutely neceſſary, to the proving any Society agreeable to Nature, to ſay that it aroſe entirely from mutual Benevolence. And yet even this Principle muſt be allowed ſome little Share at leaſt, in the forming of States, ſince the Perſons who firſt begin them are commonly join'd on the Account of Kindneſs and Good-liking, though many others may afterwards engage in the ſame Union, by the Inducement of Fear. But as for this *Fear*, which is look'd on as the Cement of States, as likewiſe for that Diſpute, whether or no Man by Nature be ζῶον πολιτικὸν, we ſhall examine them more at large when we come to enquire into the Riſe and the Original of Commonwealths.

XIX. This Principle which we have eſtabliſh'd for deducing the Law of Nature, as it is the moſt genuine and the moſt clear, ſo we take it to be in ſuch a high Degree [1] adequate and ſufficient, that there is no natural Obligation bearing a Regard to other Men, the Reaſon of which is not terminated here, as in the chief Head and Fountain of Duty. Yet, as we ſhall hereafter ſhew, to give theſe Dictates of Reaſon the Force and Authority of Laws, there is a Neceſſity of ſuppoſing that there is a GOD, and that his wiſe Providence overſees and governs the whole World, and in a particular Manner the Lives and the Affairs of

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[a] *Lucian* in *Amoribus, Tom.* i. *p.* 893. Ed. *Amſt. We do not, like brute Creatures, affect ſolitary Meditations, but joining together in a friendly Society, we make our Joys to be the greater, and our Afflictions the leſs, by being mutually communicated: And our Pleaſures having many Sharers in them, fill us with the truer Satifaction and Delight.* Dio Chryſoſtom, *Orat.* xii. tells us, that the Reaſon why *Jupiter* hath often the Title of φίλιος and ἑταιρεῖος, *The Kind* and *The Friendly*, is, becauſe *he gathers, as it were, all Mankind into Unity and Society, and would have them prove Friends to each other, without the leaſt Mixture of Hatred or Oppoſition. In like manner,* ſays he, *he is call'd,* ξένιος, *or* hoſpitable, *becauſe we ought really to think no Man a Stranger to us.*

§. XVIII. [1] This is what the *Roman* Lawyers ſay, *Cum inter nos cognationem quandam natura conſtituit, conſequens eſt hominem homini inſidiari nefas eſſe.* Digeſt. Lib. i. Tit. i. De Juſtit. & Jure, Leg. iii.

[2] *Seneca* has very well obſerved this, and ſays, That the higheſt Point of Friendſhip is to look upon one's Friend as a Perſon who ought to be as dear to us, as we are to ourſelves; we ought to provide for the Intereſts one of another. *I will,* ſays he, *beſtow upon him that is in Want, but in ſuch a Meaſure as not to be reduced to Neceſſity my ſelf. I will ſtep in to the Aſſiſtance of him who is in Danger of periſhing, but not ſo as to periſh with him.* Quum ſumma amicitiæ ſit, amicum ſibi æquare, utrique ſimul conſulendum eſt. Dabo egenti, ſed ut ipſe non egeam, ſuccurram perituro, ſed ut ipſe non peream. *De Benef. Lib.* ii. *Chap.* iv.

§. XIX. [1] See *Note* 5. upon the 15th Paragraph.

Mankind. For we cannot by any Means ſubſcribe to the Conjecture which [2] *Grotius* ſtarts, in his *Prolegomena*, or Introduction, *N.* XI. *That the Laws of Nature would take Place, ſhould we* (*as we cannot without the moſt horrid Impiety*) *deny either the Being of* GOD, *or his Concern in human Buſineſs.* For, ſhould any Wretch be ſo horribly ſenſeleſs as to maintain that wicked and abſurd Hypotheſis in the rankeſt Way, and ſo hold Men to have deriv'd their Being wholly from themſelves; according to them, the Edicts of Reaſon could not riſe ſo high as to paſs into a Condition of Laws; in as much as all Law ſuppoſes a ſuperior Power. [3] 'Tis a good Obſervation of *Tully*, *De Naturâ Deorum*, *Lib.* ii. *Chap.* ii. *I know not*, ſays he, *but that upon taking away Religion, and Piety towards the Gods, all Faith and Society of human Kind, and even the moſt excellent Virtue of Juſtice, muſt be baniſh'd the World* [a]. Unleſs the Rules would be obſerv'd out of a bare Regard to Intereſt, as thoſe are which the Phyſicians preſcribe in the Regimen of Health. *Grotius* ſeems to have taken the Hint of that Notion from a Paſſage in *Marcus Antoninus* [b]; *If*, ſays the Emperor, *the Gods do not conſult about any of our Affairs, which the vileſt Impiety can ſcarce believe; why then 'tis fit that I ſhould conſult or deliberate about my own Concerns: And all my Deliberation muſt be concerning what is moſt profitable for me. Now that is moſt profitable to every one, which beſt agrees with his Nature and Conſtitution. And my Nature is to be rational, and to be a ſociable Member of ſome City or State. My City and Country, as I am* Antoninus, *is* Rome, *as I am a Man, is all the World: Thoſe Things therefore which are profitable to theſe Communities, are the only Things which are good and expedient for me.*

As to what a certain Learned Man objects, that particularly the Virtue of *Fortitude*, cannot be demonſtrated from our Principle, unleſs we farther ſuppoſe the Immortality of the Soul; ſince otherwiſe there would be no Reward to a Man who ſhould throw away his Life on a good Cauſe: This will require no great Pains to anſwer. For altho' really to deny, or ſo much as to call in Queſtion ſo certain a Truth be extremely impious; yet without bringing this high Point into the Argument, it is poſſible to demonſtrate, that a Soldier may fairly be commanded to fight to Death, in the Behalf of his Country. For, beſides that, there appears yet no clear Reaſon why we muſt ſacrifice, as it were, every good Action to ſome external Reward; thus much is univerſally agreed on, that 'tis in the Power of the Sovereign to arm the Subjects, and to lead them out againſt the Enemy, in Defence of the State; and farther, when they find it requiſite to forbid every one under Pain of capital Puniſhment, to quit his Station by Flight. Now of two Evils the leſſer is moſt certainly to be choſe. But it is a leſs Evil to fight with extraordinary Danger, and even to the laſt Breath, than to ſuffer unavoidable Death for running away. And therefore that Soldier muſt be the greateſt Fool, as well as the greateſt Coward, who would not chooſe rather to fall honourably by the Enemy's Hand, having firſt anticipated his own Revenge, than to deliver up himſelf to be ignominiouſly diſpatch'd by the Executioner [4]. It ſeems ſufficient that a Man fight with all his Force and Ability, let his Inducement to this Behaviour be what it will. Nor is it requiſite to the Preſervation of States, or of Society amongſt Men in general, that every particular Perſon ſhould be indu'd with ſuch a Firmneſs of Mind, as the Terrors of Death cannot ſhake or overcome; all Souls not being capable of this noble Pitch of Valour. Beſides, the Uſe of Fortitude doth not only diſcover itſelf in bearing Death undauntedly upon extreme Occaſion; but is chiefly employ'd in vigorouſly withſtanding, and in driving off the Danger of Death, as it preſſes on us. Many Difficulties are not otherwiſe to be avoided, than by undergoing others of almoſt equal Hazard [5]: And Fate ſooner overtakes the Coward, than it maſters the Valiant. It is farther obſervable, that ſetting aſide the Suppoſition of the [6] Soul's Immortality, it doth by no Means appear that the chief End and Happineſs of Man [7] conſiſts in Pleaſure. For beſides that in the Doctrine of natural Law, treated of in this Manner, the Immortality of the Soul is by no Means denied, but only abſtracted from; it's plain that the Pleaſure of the Body, in which *Epicurus* is vulgarly thought to have plac'd his *Summum Bonum*, is ſo far from promoting, that it rather contradicts and hinders the Preſervation, the Sociableneſs, the Peace, and the Tranquillity of Mankind. But the Genius and the Scope of Chriſtianity differs vaſtly from theſe meer natural Schemes; and the holy Apoſtle had good Reaſon to affirm [8], that *if in this Life only we had Hope in Chriſt, we ſhould be of all Men the moſt miſerable.* 1 Cor. xv. 19.

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[a] *Liban. Declam.* iii. *p.* 250. Ed. *Pariſ. Where there is no Honour of the Gods, there can be no Fidelity amongſt Men.*

[b] See *his moral Reflexions, B.* vi. §. 44.

[2] Mr. *De Courtin*, the Tranſlator of *Grotius*, explains theſe Words, but ſomething obſcurely, and ſeems alſo to miſtake him; telling us, that he maintains, That Man's natural Light, without any Star of God, would carry a Man in a moſt efficacious Manner to ſeek Good and avoid Evil, by all Means poſſible, in Obedience to that Law only which Reaſon preſcribes, and with the Execution of which Conſcience is charged. I ſuſpect that *Grotius* never deſigned to expreſs himſelf with ſo much philoſophical Exactneſs, and that there is little Rhetorick in that Paſſage, if the Senſe being rightly underſtood, has that Meaning; That the Maxims of the Law of Nature are founded upon the Conſtitution of Mankind, and neceſſarily contributing to the Advantage of every one, will not ceaſe to take Place, and be practiſed outwardly in ſome meaſure, although no Deity be acknowledged; but then they can't be looked upon as Duties, nor can be put in Practice, but upon the Account of ſome Intereſt or Vain-glory. Mr. *Bayle* goes much farther, and maintains, in his *Conſiderations upon a Comet, pag.* 554. That Reaſon, without any Knowledge of God, may ſometimes perſuade a Man, that a Thing is honeſt, and good, and commendable to be done, not for the Advantage coming by it, but becauſe it is ſuitable to Reaſon. The famous Chancellor *Bacon* (whoſe Authority, no more than *Grotius*'s, Mr. *Bayle* doth not take notice of) has delivered much the ſame Thing, in his *Serm. Fidel.* 117. where, making a Parallel between Superſtition and Atheiſm, he reaſons much after the ſame manner in his Conſideration on a Comet, though more largely. My Deſign is not to examine Things throughly, and therefore I ſhall only make ſome ſhort Reflexions. I own, that Religion is neither the only, nor principal Baſis of Society; but then, in my Opinion, we muſt allow, 1. That the Notions of Honeſty being ſtript of all Relation to the Will of God, the ſupreme Lawgiver, the Author of our Being, the Protector of Mankind, and of Society, are meer Chimera's, or meer barren Principles, pure Speculations, incapable of laying a Foundation for good Morality, or to produce ſolid Virtue. *If we look upon the Atheiſt* (ſays Mr. *Bayle* himſelf) *in the Diſpoſition of his Mind, we ſhall find that he, not being aw'd by any Fears of Puniſhment, nor encouraged with the Hopes of* God*'s Bleſſing, muſt reſign himſelf to the Government of his Paſſions.* 2. That, ſo far as we can judge by Conjecture, a Society of Atheiſts, all Things elſe being equal, would be more corrupt, and ſubject to more Diſorders, than any of thoſe who retain ſome Principles of Religion, although imperfect and incoherent. I ſay, All Things elſe being equal. For it would be ridiculous, to compare, for Example, a polite and well-inſtructed People with a ſavage Nation, who have not Senſe enough to do any Evil. We muſt beſides, if we will exactly diſtinguiſh the Effects proper to Atheiſm, and a good or bad Religion, ſuppoſe the Perſons ſo compared together, to be very near furniſhed with the ſame Notions, and to be in the ſame Situation, and under the ſame Circumſtances in general, otherwiſe we ſhall be in Danger of attributing to Religion, what really proceeds from Nature, Education, Cuſtom, or the like; which Religion is very little or nothing conducing to; or we may accuſe Religion of Impotency, by reaſon of ſome invincible Obſtacles in them, upon whom it would not fail to produce its Effect, were it not that they are ignorant of the moſt neceſſary Point. Upon this Foot I maintain, that Religion, tho' corrupted, would produce better Effects than Atheiſm, that it would diſturb Society leſs, and that the Good it would do, would be much greater than the Evil it would cauſe. I will not deny, but there may be amongſt theſe Atheiſts, Men of Senſe and Philoſophers, who, reflecting that it is better for Men to ſubject themſelves to certain Rules of Life, than for every Man to follow his Humours only, may obſerve them outwardly, ſo far as they are exempt from ſuch Circumſtances, as ſome great Intereſt preſent, or ſome violent Paſſion forces them upon, ſuch Counſels as are reaſonable, calm and aware of the Conſequences. But the common Sort of ignorant People, and Idiots, which make up the greateſt Part of Society, are not able to make ſuch Reflections. To curb in therefore the Violence of their Paſſions, and to outweigh Mens private Intereſts, which often claſh with the publick Good, ſome more obvious Principle, which all the World may be ſenſible of, and which may make the deepeſt Impreſſions upon them, muſt be found out, and that, in a Word, can be no other than the Fear of a Deity. Experience ſufficiently confirms this, that in all Times this Motive has had great Influences upon the Mind of Man; for who knows not, that in the darkeſt Times of Paganiſm, it was the Cauſe of Honeſty in many Nations? Mr. *Bayle* proves at large, That Men did not always act according to their Principles, and ſo it might well happen, that many Pagans did not perceive nor draw the Conſequences which followed from the falſe Notions which they had of the Deity. 'Tis certain, that not only the Philoſophers, but the Vulgar looked upon the Gods as the Revengers of the Violation of the Laws of Nature. See what is ſaid in the next *Chap.* §. 3. *Note* 4. Since then there are among Atheiſts the ſame Principles of Diſorder, as among Pagans, from which no Man can be reſtrained but by Religion, it ſeems plain that Vice muſt reign with much leſs Controul and Extent in the Society of Atheiſts, than in a religious one, altho' their Worſhip be falſe and erroneous. It may be, perhaps, pretended, that the want of this Reſtraint is made up by the Diſorders created in religious Societies, by Superſtition and falſe Zeal; and I own, that theſe Inconveniences, which ariſe from the Abuſe of Religion, are great; but the Disbelief of a Deity would produce much greater. As much as the Notions of Religion are perverted, and though they are made uſe of as an Occaſion or Pretence of confirming or engaging many Perſons in the Commiſſion of Crimes, yet they fail not to diſcourage and deter others, and thoſe of a much greater Number. The Notion of a God, and of an inviſible Judge, who will puniſh Vice and reward Virtue, are naturally ſo faſt linked together, that the moſt ſimple have a Senſe of it, notwithſtanding their other falſe ſuperſtitious Idea's, as appears from the Example of the Pagans. But, as much as Atheiſm pleaſes ſome Men, as the more pure State, nothing but pernicious Conſequences can be drawn from it, tending directly to the greateſt Looſeneſs and Debauchery; Conſequences which are clear to the Sight of all the World, and can't but bring Deſtruction to a Society, which is compoſed of Men endowed with ſuch irreligious Principles. If the Nations which are ſo barbarous as to have no Religion, be objected, beſides that the Hiſtories which give an Account of them are contradicted by more modern and faithful Relations, theſe People are either not formed into any Society, or are ſo illiterate and ſtupid, as there is little Difference between them and the Beaſts, as the ingenious Writer of the *Rights of the Chriſtian Church*, has very well obſerved in his *Preface*, §. 18. See alſo *Lib.* i. *Chap.* vi. §. 13. *Note* 7. *aforegoing*, and *Chap.* iv. §. 3. *Note* 4. of this Book following.

[3] *Tully*'s Words are theſe, *Atque haud ſcio, an Pietate adverſus Deos ſublatâ; fides etiam & ſocietatis humani generis, & una excellentiſſima virtus, juſtitia tollatur.* See alſo *Libanius*, *Declam.* iii. *p.* 250

XX. But to make theſe Dictates of Reaſon obtain the Power and the Dignity of Laws, it is neceſſary to call in a much higher Principle to our Aſſiſtance. For altho' the Uſefulneſs and Expediency of them be clearly apparent, yet this bare Conſideration could never bring ſo ſtrong a Tie on Mens Minds, but that they would recede from theſe Rules, whenever a Man was pleas'd either to neglect his own Advantage, or to purſue it by ſome different Means, which he judg'd more proper, and more likely to ſucceed. Neither can the Will of any Perſon be ſo ſtrongly bound by his own bare Reſolution, as to hinder him from acting quite contrary, whenever the Humour takes him. And altho' we ſhould ſuppoſe many Perſons ſtanding in a natural Liberty, and combining to keep theſe Precepts, yet the Force of them could then laſt no longer, than the Agreement from whence they deriv'd it. Nor would the Obligation then only ceaſe, when all the conſenting Parties ſhould pleaſe to alter their Minds (as is now the Manner of receding from mutual Covenants by common Conſent) but even during the general Agreement, the Power of obliging would be wanting to the Compact: Inaſmuch as we ſuppoſe, *that* Dictate of Reaſon which commands us to ſtand to our Bargains and Promiſes, not yet to have obtain'd the Authority of a Law; and therefore 'tis at every one's Pleaſure to renounce the Covenant, whether the other Perſons concern'd are willing, or not. Laſtly, the meer Force of human Command ſeems inſufficient to inveſt theſe Dictates with the Power of Obligation. For ſince no ſuch Command could take Place otherwiſe than by the Intervention of Covenants, and ſince Covenants owe all their Strength to ſome Law, it doth not appear how there could ariſe any human Sovereignty capable of Obligations, unleſs the Dictates of Reaſon were before-hand receiv'd for Laws. Or ſhould we grant the Fanſy of ſome, that human Government depends only on human Conſent, and then make theſe rational Duties be enjoin'd the Subjects like other Laws; yet even thus they would obtain no more Power than poſitive Conſtitutions, which depend on the Will of the Legiſlator, both as to their Original and their Duration [a]. It is therefore on all Accounts to be concluded and to be maintain'd, that the Obligation of natural Law proceeds from God himſelf, the great Creator and ſupreme Governor of Mankind; who by Virtue of his Sovereignty hath bound Men to the Obſervation of it. And thus much may be demonſtrated by the ſole Light of natural Reaſon. Here then we lay it down as a granted Truth, that God Almighty is the Creator and Governor of the World, ſince it hath been ſhewn with ſo much Evidence by wiſe and learned Men, and ſince no Perſon of Senſe and Underſtanding ever call'd it in Queſtion [1]. Now this ſupreme Being having ſo form'd and diſpos'd the Nature of Things and of Mankind, as to make a ſociable Life neceſſary to our Subſiſtence and Preſervation; and having on this Account indued us with a Mind capable of entertaining ſuch Notions as conduce to this End, and having inſinuated theſe Notions into our Underſtandings by the Movement of natural Things, deriv'd from him the firſt Mover; and likewiſe moſt clearly repreſented to us their neceſſary Connexion and their Truth: Hence it follows, that it is the Will of God, Man ſhould frame his Life according to that Diſpoſition and Method which he ſeems peculiarly to have aſſign'd him above the Life of Brutes. And ſince this cannot otherwiſe be atchiev'd and compaſs'd, than by the Obſervance of *natural Law*, it muſt be ſuppos'd that God hath laid an Obligation on Man to obey this *Law*, as a *Means* not ariſing from human Invention, or changeable at human Pleaſure, but expreſly ordain'd by God himſelf for the Accompliſhment of this Deſign. For when any Sovereign enjoins his Subject the Purſuit of ſuch an End, he is at the ſame Time ſuppos'd to oblige him to make uſe of thoſe Means, without which the End cannot be attain'd [a]. Nor is this the only Proof of Man's being oblig'd to a ſocial Life by the Command of God, that, as the Condition of Mankind ſtands at preſent, we could not ſupport and ſecure ourſelves, unleſs this Perſuaſion were firmly rooted in our Minds; and that by Order of the divine Providence it ſo falls out, that by a natural Conſequence our Happineſs flows from ſuch Actions as are agreeable to the Law of Nature, and our Miſery from ſuch as are repugnant to it: But it is farther confirm'd by this Conſideration, that in no other Animal there is diſcoverable any Senſe of Religion, or any Fear of a Deity [b] [2]. To which may be added, that tender Senſe of Conſcience inherent in the Minds of Men that are not corrupted and debauched with Vice; by which they are convinc'd, that to ſin againſt Nature's Law, is to offend him, who hath a ſovereign Power over Mens Souls, and who is to be fear'd, even when we do not apprehend any Danger from human Puniſhment [c].

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[a] *Comp. Selden De J. N. & G. Lib.* i. *Ch.* vii.

[4] Φόβῳ μειζόνων ὑπομένουσιν αὐτῶν οἱ ἀνδρεῖοι τὸν θάνατον, ὅταν ὑπομένωσι. *Jamblich.* in *Protrept.* "When the valianteſt Men "ſuſtain Death, they do it for Fear of greater Evils."

[5] Horat. Lib. iii. Od. ii. ver. 14, &c. *Mors & fugacem perſequitur virum;*
Nec parcit imbellis juventæ
Poplitibus, timidove tergo.

[6] All that the Author ſays here is true; but we muſt alſo declare, that the moſt effectual Motive to leſſen the Fears of Death, and make us out-face, as I may ſay, the Dangers, which the Defence of a good Cauſe engages us in, is the Hopes of another Life, and the Proſpect of the Reward which ſhall be given to good Men; the Courage produced by any other Principle is but a falſe Bravery, in Compariſon of the Undauntedneſs which naturally follows that Perſuaſion, when it is ſtrong, and the Idea of it is vigorouſly impreſſed on the Mind. See the *News of the Rep. of Letters.* July 1707. *p.* 79. and *Aug. p.* 178.

[7] See §. xv. *Note* 10. above.

[8] See what is ſaid at the End of §. xxi. with *Note* 6.

The Laws of Nature would have a full and perfect Power of binding Men, altho' God Almighty had never propos'd them anew in his reveal'd Word. For Man was under Obligation to obey his Creator, by what Means ſoever he was pleas'd to convey to him the Knowledge of his Will. Nor was there any abſolute Neceſſity of a particular Revelation to make a rational Creature ſenſible of his Subjection to the ſupreme Author and Governor of Things. No one will deny but that thoſe Perſons who were not acquainted with the holy Scriptures, did yet ſin againſt the Law of Nature: Which we could not affirm, did this Law derive its Force from the Promulgation made of it in the ſacred Writings. On this Account we can by no Means admit of that Notion ſtarted by *Hobbes* [d], *Since thoſe Laws*, ſays he, *which we call natural, are nothing elſe but certain Concluſions apprehended by Reaſon, concerning Things to be done and Things to be omitted; and ſince Law, in a proper Senſe, is only the Speech of him, who by Virtue of his Right commands Men to execute or to abſtain from ſome Performances; therefore they are not Laws as they proceed from Nature, but only as they are enacted by* God *in Scripture.* For we do not take it to be eſſential to a Law, that it be conveyed to the Subjects Notice in the Form and Manner of a Propoſition; but we reckon it ſufficient that the Will of the Sovereign be gather'd and underſtood any way, whether by internal Suggeſtion of the Mind, or from the Contemplation of our State and Condition, and of the Nature of thoſe Affairs and Tranſactions which are to engage our Life. And indeed he himſelf acknowledges as much, in another Part of the ſame Work [e], where he obſerves, that *the Laws of* God *are declar'd three ways; firſt by the tacit Dictates of right Reaſon*, &c. Beſides, the Laws of Nature, as they are deduc'd by Ratiocination, cannot be apprehended otherwiſe than in the Manner of Propoſitions, and therefore in this Reſpect they may be allow'd to bear that Name. But as in Civil Laws it matters not, whether they be promulgated in Writing, or

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[a] Vide *M. Antonin. Lib.* ix. § i.

[b] Vide *Protag. De Platon. p.* 224. Ed. *Wech. Ficin.*

[c] 'Tis remarkable what *Tacitus* ſays, *An.* vi. *Ch.* vi. of *Tiberius*. *His own Crimes and Villanies were by his Conſcience turn'd into the greateſt Puniſhments to him. And it was not without Reaſon, that the greateſt Maſter of Wiſdom us'd to affirm, That could we open the Hearts of Tyrants, we ſhould diſcover the Strokes and Wounds of Guilt: The Body not being more cut and tormented with Stripes, than the Mind is with Cruelty, Luſt, and ill Deſigns.* Cicero De Finib. Lib. i. Ch. xvi. *If there be any who think themſelves ſufficiently guarded and ſecur'd againſt the Diſcovery of Men, yet they dread the Majeſty of the Gods: And judge all thoſe Cares and Diſquiets, which Night and Day prey upon their Minds, to be ſent from Heaven, as a preſent Puniſhment for their Crimes.* Seneca *in* Lactant. Lib. vi. Ch. xxiv. *Vain Madman! what can it profit thee to have had no Witneſs of thy Villany, when thou always carrieſt a Conſcience about with thee?* Albricus De Deorum. Imagin. Ch. xxii. *A wicked Man is never Maſter of his own Countenance. Add.* Juvenal. Sat. xiii. 139. The Advantage of a *good Conſcience Martial* hath thus happily expreſs'd, *Lib. x. Ep.* xxiii.

> *Ampliat ætatis ſpatium ſibi vir bonus: hoc eſt*
> *Vivere bis, vita poſſe priore frui.*
>
> Good Men live twice: It doubleth every Hour
> To look with Joy on that which paſs'd before.

Add. *Philoſtrat. De Vit. Apollon. Lib.* vii. *Ch.* xvii.

[d] *De Cive, Ch.* iii. §. ult.

[e] *Ch.* iv. §. iii.

§. XX. [1] The ſtrongeſt and moſt natural Proofs of this fundamental Truth may be found in *Locke*'s *Eſſay of human Underſtand. B.* iv. *Ch.* x. §. 9, *&c.* See *Le Clerc*'s *Latin* Treatiſe of *Pneumatology, Part.* iii. *Ch.* i.

[2] Ἐπειδὴ ὁ ἄνθρωπος θείας μετέσχε μοίρας, πρῶτον μὲν διὰ τὴν τοῦ Θεοῦ συγγένειαν, ζώων μόνον θεοὺς ἐνόμισε, καὶ ἐπιχειρεῖ βωμούς τε ἱδρύεσθαι, καὶ ἀγάλματα θεῶν, *i. e.* "Man is the only one of all the Creatures, who by reaſon of the Relation which he has to the divine Being, thinks that there are Gods, and erecteth Altars and Images to them. *Plato* gathered this Notion from *Socrates* his Maſter, as it appears from what *Xenophon* relates, *Memoirs of* Socrates, *Lib.* i. *Chap.* iv. *Numb.* 13. See alſo *Cicero De Legib. Lib.* i. *Chap.* viii. and *Lactantius De Ira Dei, Ch.* xiv. *n.* 2.

viva voce [3], ſo the divine Law is of equal Obligation, whether it is diſcover'd to Men either by GOD himſelf in a viſible Shape, and with the Reſemblance of a human Voice, or by holy Men, peculiarly inſpir'd from Heaven; or whether, laſtly, it be work'd out by natural Reaſon, from the Contemplation of human Condition. For Reaſon, properly ſpeaking, is not the Law of Nature itſelf, but the Means, upon a right Application of which that Law is to be diſcover'd. Nor doth the Manner and the Method of promulgating a Law belong to its inward Eſſence and Conſtitution. Farther, altho' it ſeem a more clear and a more compendious Way of revealing one's Will to another, to force it upon his Senſes by expreſs Words and Speeches; yet that is likewiſe reckon'd to be ſufficiently reveal'd, which we muſt unavoidably diſcover, if we make uſe of the Occaſion offer'd, and keep the Way that we are put into. And thus Man, who, by the Bounty of his Creator, enjoys the Faculty of comprehending both his own and other Mens Actions, and of judging whether or no they are agreeable to human Nature, cannot but take Occaſion (ſuppoſing there are more Men in the World beſides himſelf) to obſerve and conſider how ſome of thoſe Actions do really thus agree to the Inclination and to the Condition of Mankind [a].

Although to render a Law obligatory there is a Neceſſity of making it known to the Subject; and altho' to deduce the Law of Nature from the Suggeſtions of Reaſon, and to apprehend its Foundation, and its neceſſary Connexion with the State of Humanity, be not the Gift of every Perſon; yet hence it can neither be pretended, that this Law doth not oblige all Men, or that it may not be ſaid to be known by the Light of Reaſon. For to give a Law a binding Force, a popular and ſimple Knowledge is ſufficient; nor is an artificial Demonſtration and Deduction abſolutely requiſite to this Purpoſe. And altho' 'tis [4] very probable that the chief Heads of natural Law were expreſly deliver'd by GOD Almighty to the firſt Mortals, and were from them communicated to others by Cuſtom and Inſtitution; yet the Knowledge of that Law may nevertheleſs be ſtil'd *natural*, inaſmuch as the neceſſary Truth and Certainty of it may be drawn from the Uſe of natural Reaſon. At the ſame Time, becauſe thoſe Propoſitions which repreſent to us the Law of Nature, are inſinuated into Mens Minds from the Contemplation of the Nature of Things; on that Account they are juſtly attributed and referr'd to GOD, the Author of Nature [b].

The wiſeſt of the old Heathens acknowledg'd the Authority of natural Law, and deriv'd it rightly from GOD. Thus *Plutarch* [c] Ταυτὸν ἐστι τὸ ἕπεσθαι θεῷ, καὶ τὸ πείθεσθαι λόγῳ· *To follow* GOD *and to obey Reaſon is the ſame Thing.* But *Tully* hath left the moſt noble Teſtimony for our Purpoſe, as it is cited out of his Books *De Republicâ* by *Lactantius* [d]: [5] *There is indeed*, ſays he, *a Law agreeable to Nature, and no other than right Reaſon, made known to all Men, conſtant and perpetual; which calls us to Duty by Commands, and deters us from Sin by Threats; and whoſe Commands and Threats are neither of them in vain to the Good, though they may ſeem of little Force to the Wicked. This Law we are neither allow'd to diſannul, nor to diminiſh; nor is it poſſible it ſhould be totally revers'd; the Senate or the People cannot free us from its Authority. Nor do we need any other Explainer or Interpreter of it beſides ourſelves. Nor will it be different at* Rome *and at* Athens, *now and hereafter; but will eternally and unchangeably affect all Perſons in all Places:* GOD *himſelf appearing the univerſal Maſter, the univerſal King. 'Tis he who is the Inventor, the Expounder, the Enacter of this Law; which whoſoever ſhall refuſe to obey, ſhall fly and loath his own Perſon, and renounce his Title to Humanity; and ſhall thus undergo the ſevereſt Penalties, though he eſcape every thing elſe which falls under our common Name and Notion of Puniſhment.* *Sophocles* ſpeaks very honourably on the ſame Subject in his firſt *Oedipus*, Act 3d, p. 187. Ed. *H. Steph.*

——— ——— νόμοι ὑψίποδες, &c.

——— The lofty Laws
Deriv'd from Heaven and high *Olympian Jove*,
And not the mean Device of mortal Men.

Mr. *Selden*, in his Diſcuſſion of this Point, hath ſhewn [e], that although the Gentiles did acknowledge the chief Heads of natural Law to be ſometimes violated through the corrupt Manners of Men, and to be (as it were) oppreſs'd and ſtifled by wicked Ordinances and Conſtitutions; yet they were at the ſame Time fully perſuaded that their τὸ αὐτοδίκαιον, or what was really juſt and fit to be done, did by Order of the Gods perpetually remain the ſame, and hold the ſame Force of Obligation. Whence aroſe that common Opinion amongſt them of the Puniſhment of wicked Men in another State; when they had been guilty of any monſtrous Offences againſt the Law of Nature. And ſince they thus believ'd the Gods to be the Avengers of its Violation, we may take it for granted, that they thought them too the Authors and Founders of its Authority. On the other Hand, ſuch of them as had any Senſe of any Virtue, did as fairly ſuppoſe, that good Men exerciſing Piety, never fail'd of the peculiar Countenance and Conſideration of Heaven. [7] Thus *Jamblichus* [a], *We muſt take this therefore for a certain Truth, that nothing properly evil ſhall happen to a good Man, either in this Life, or after it. Nor are the Affairs and Concerns of ſuch a Perſon neglected by the immortal Deities.* And *Euripides* [b] ſays, *Good Men do at laſt obtain what their Virtue hath deſerv'd: But evil Men ſhall never arrive at any tolerable Degree of Happineſs.* But Mr. *Selden* farther ſhews [c] it to have been a conſtant Opinion amongſt the Primitive Chriſtians, that in the Interval betwixt the Creation and the Publication of the Decalogue, thoſe natural and univerſal Laws were given to Mankind, which were afterwards inſerted in the Moſaical Conſtitutions. Hence was drawn that moſt excellent Obſervation of St. *Chryſoſtom* [d], that to the Commandments about the honouring of Parents, about Murder, about Adultery, and about Theft, God was therefore pleas'd to add no Reaſon, becauſe thoſe Duties were already well known and underſtood, as being main Points of the *natural Law*; whereas to the Ordinance concerning the Sabbath-day, a Reaſon of the Precept was deſignedly affix'd, upon account of its being *poſitive* and arbitrary [e]. To conclude, all Legiſlators have believ'd that their Laws, of what kind ſoever, would derive the greateſt Strength and Authority from the Succours of Religion: As appears from their ſolemn Cuſtom of uſhering in all their Conſtitutions with the Worſhip of the Gods [f].

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[a] Add. Dr. *Cumberland*, *Ch.* i. §. 11. & *Ch.* v. §. 1.

[b] Add. Dr. *Cumberland*, *Ch.* i. §. 10.

[c] *De Auditione.*

[d] *Lib.* vi. *Ch.* viii.

[e] *De J. N. & G. Lib.* i. *Ch.* viii.

[3] Theſe Words, which are found a little lower, *Nor doth the Manner* —— as far as, *Conſtitution*, may be more properly added here, as any Man may eaſily diſcern.

[4] See the Extract of an *Engliſh* Sermon of Dr. *Barrow*'s in *Tom.* iii. of the *Univerſal Library*, p. 322.

[5] *Cicero*'s Words are, *Eſt quidem vera lex, recta ratio, naturæ congruens, diffuſa in omnes, conſtans, ſempiterna, quæ vocet ad officium jubendo, vetando à fraude deterreat: quæ tamen neque probos fruſtra jubet, aut vetat; nec improbos jubendo aut vetando movet. Huic legi nec obrogari fas eſt; nec derogari ex hac aliquid licet; neque tota abrogari poteſt. Nec vero aut per ſenatum, aut per populum ſolvi hac lege poſſumus: neque eſt quærendus explanator, aut interpres ejus alius. Nec enim alia lex Romæ, alia Athenis, alia nunc, alia poſthac; ſed & omnes gentes, & omni tempore, una lex, & ſempiterna, & immutabilis continebit; unuſque erit communis quaſi magiſter & imperator omnium Deus, ille legis hujus inventor, diſceptator, lator: cui qui non parebit, ipſe ſe fugiet, ac naturam hominis aſpernabitur; atque hoc ipſo luet maximas pœnas, etiamſi cætera ſupplicia, quæ putantur, effugerit.*

XXI. It is well worth our while to treat more diſtinctly and more carefully concerning the *Sanction* of the Law of Nature. And to this Purpoſe, beſides what we have formerly deliver'd about the Sanction of Laws in general, we will firſt of all obſerve, that the Goods and Evils which happen to Man, may be both divided into three Ranks or Claſſes. And as for the Goods, ſome of them proceed, either from the free and liberal Donation of the Creator, or from the voluntary Benevolence of other Men, or from the Induſtry of the Acquirers, to which Induſtry they determin'd themſelves by their own free Choice. And it is plain, that this firſt Sort are not owing to the Obſervation of the Laws. Other Goods there are, which flow, by a natural Conſequence, from ſome Actions which the Laws command: The Creator having been pleas'd to aſſign to ſuch and ſuch Performances of the Laws ſuch perpetual and natural Effects, productive of the Good and Profit of Mankind. And theſe are thoſe which Dr. *Cumberland* calls *natural Rewards.* A third Kind of Goods proceed from ſome certain Actions, either by the Pleaſure of the Legiſlator, or by the Covenant and Agreement of Men; of which the former are call'd, κατ' ἐξοχὴν, *Rewards*, or arbitrary Returns, the latter more properly *Wages.* In the ſame Manner may Evils be divided. Some of them follow the very Nature and Condition of Men (if we abſtract the firſt Cauſe and Original of that Condition) or they happen without the particular Default of him who ſuffers them. Which we may, in a ſound Senſe, call *fatal Evils*, oppoſing the Word Fate, not to the divine Diſpoſal, but to the peculiar Faultineſs of the Perſon on whom theſe Evils light. Others do, by natural Conſequence and Connexion, proceed from Sins; which are by ſome Authors term'd *natural Puniſhments.* Laſtly, others there are which ariſe from Sins, by the peculiar Determination and Diſpoſal of the Legiſlator beyond the Manner of natural Effects: In which the Quality, the Manner, the Place and Time of the Evil depend on the Legiſlator's free Pleaſure. And theſe are what we would *properly* call *Puniſhments*, or (in a looſer Senſe of the Word) *arbitrary Puniſhments.*

Thus much being premiſ'd, we proceed to remark, that altho' the omnipotent Creator might by Virtue of his Sovereign Right have requir'd our Obedience, without making any good Fruit proceed thence to our own Advantage; yet it hath pleas'd his infinite Goodneſs, ſo to order and conſtitute the Nature of Things and of Mankind, that by a kind of natural Connexion ſome Goods ſhould attend the Obſervance, and ſome Evils the Tranſgreſſion of Nature's Laws. Thus a conſtant Obedience is follow'd by [r] Serenity and Security of Conſcience, join'd with a good and certain Aſſurance; by a good Frame and a ſettled Tranquillity of Mind [g]; by the Preſervation of the Body from many Evils, not *fatal:* Beſides an infinite Number of Advantages, which may be obtain'd by the mutual Benevolence and good Offices of other Men [a] [2]. On the other hand, from the Violation of the ſame Laws ariſe, by a natural Connexion, Diſquiet of Conſcience, Diſturbance and Degeneracy of Mind, Deſtruction of the Body, and numberleſs Evils, which may be occaſion'd by the withdrawing of other Mens Aſſiſtance, or by the Violence of their provok'd Revenge [3] [b].

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[a] *Protrep. Ch.* xiii. [b] *Euripid. Ion. v.* 1620, &c. [c] See *Book* vii. *Chap.* ix, x. [d] *Orat.* xii. *ad Pop. Antiochen.* [e] Add. *Selden*, ibid. *Chap.* ix. and *Lib.* vii. *Chap.* ix, x. [f] *See the Form which introduceth* Zaleuchus's *Laws in* Diodor. Sic. *Lib.* xii. *Ch.* xxi. [g] *See Archbiſhop* Tillotſon's *38th Sermon, Folio, pag* 451, &c. *See likewiſe* pag. 51 *and* 74, &c.

[7] *Jamblichus*'s *Greek* is, Ἕν τι οὖν τοῦτο διανοεῖσθαι δεῖ ἀληθές, ὅτι οὐκ ἔσται ἀνδρὶ ἀγαθῷ κακὸν οὐδὲν, οὔτε ζῶντι, οὔτε τελευτήσαντι, οὐδὲ ἀμελεῖται ὑπὸ θεῶν τὰ τούτου πράγματα. Theſe very Words *Plato* alſo makes *Socrates* to ſpeak, at the End of his *Apology, p.* 41. and *Cicero* has tranſlated them, *Tuſc. Quaſt. Lib.* i. *Chap.* xli. *Euripedes*'s Words alſo are,

——— Σέβοντα δαίμονας θαῤῥεῖν χρεὼν
Εἰς τέλος γὰρ οἱ μὲν ἐσθλοὶ τυγχάνουσιν ἀξίων
Οἱ κακοὶ δ', ὥσπερ πεφύκασ', οὔποτ' εὐπράξειαν ἄν.

§. XXI. [r] "It is certain (ſays *Montagne*) I know not how to expreſs the Satisfaction that we enjoy in ourſelves by well-doing, nor the generous Bravery that accompanies a good Conſcience. A Soul courageouſly vicious may provide for its Security at all Adventures, but it can't have the Pleaſure and Satisfaction. 'Tis none of the leaſt Comforts, that it finds itſelf free from the Infection of a corrupt Age, and can ſay in itſelf, If any Man could look into my Breaſt, he ſhould not find me guilty of troubling or ruining any Man, neither of Revenge, nor Envy, nor Breach of the publick Laws, nor of Diſſeiſin, nor Diſturbance, nor ill Language; and tho' the Licentiouſneſs of the Time allows and inſtructs, yet I have not put my Hands to the Goods or Purſe of any Man, nor eat of any Man's Bread but my own, either in War or Peace, nor made uſe of any Man's Labour without Wages. Theſe Teſtimonies of Conſcience are pleaſing, and 'tis our Benefit that this Comfort is natural, and the Reward which we can never want. To expect the Reward of virtuous Actions from the Commendation of Men, is an uncertain and troubleſome Foundation." *Eſſays, Lib.* iii. *Chap.* ii. *p.* 596.

Now altho' theſe Rewards, and theſe Puniſhments, are by ſome imagin'd not to proceed with Certainty enough from good and evil Actions; becauſe many Perſons in Return for Benefits receive only Hatred, Envy, or Injury; whilſt others on the contrary do ſecurely enjoy the Fruits of their Wickedneſs, without Moleſtation or Puniſhment; whence we cannot be infallibly aſſur'd before-hand that our good Deeds will be equally repaid by *other Men* (tho the Fruit which ariſes in *ourſelves* from ſuch honeſt Practices is not capable of Hindrance or of Interruption) yet thus much is beyond Diſpute, that more Advantages moſt ſurely and certainly follow from good and juſt Proceedings, than we can in Reaſon expect from the oppoſite Vices [c]. And altho' the whole Train of thoſe Goods do not attend on ſuch a conſcientious Behaviour, as in the Nature of Things they were diſpos'd to do [4], yet we have a fair Probability that many of them will not diſappoint us; at leaſt, that we ſhall obtain a greater Share than we could have hop'd for from a Courſe of Diſhoneſty and Wickedneſs. And ſo by this Means we provide much better for our own Security, and have much fairer Grounds to hope that others will, in their Turn, be alike ready to promote our Intereſts and Concerns, than if, laying aſide all Regard to our Neighbours, we directed every Thing towards our own private Advantage; and therefore infinitely better than if, by the Exerciſe of Violence or of Deceit, we endeavour'd to make our own Gains and Profits out of the Loſſes of other Men. By this way of reckoning therefore it appears, that the Value of that Reward which will follow upon a good Action, doth, all Things rightly conſider'd, exceed the Gain of the oppoſite illegal Practice.

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[a] Seneca De Irâ Lib. ii. Ch. xiii. *calls the unmov'd Tranquillity of a happy Mind,* A great Reward. Idem Ibid. *The Way to Happineſs is plain and eaſy. For what can be more comfortable to the Mind than Calmneſs? What more troubleſome than Paſſion? What more at reſt than Clemency? What ſo full of Buſineſs as Cruelty? Modeſty and Chaſtity enjoy a perfect Leiſure, whilſt Luſt is ever tir'd with laborious Purſuits. To conclude, the Poſſeſſion of every Virtue ſtands us in little Coſt or Trouble, but Vices are all chargeable to be kept. Add.* De Irâ, Lib. ii. Ch. xxx. & *ult. and* Lib. iii. Ch. v, xxvi. *See the Story of* Hercules, *at the two Ways, in* Xenoph. Apomnem. Lib ii. *Prov.* viii, 19. x. 9. xi. 3, 5, 10, 18, 19, 25. [b] Marcus Antonin. Lib. ix. §. 4. *He that acts unjuſtly really injures himſelf by his Wickedneſs.* 'Tis a Saying of *Tully, ad Attic. Lib.* ix. *Ep.* xii. on a profligate Wretch, *Ulciſcentur illum mores ſui, His own Practices will be reveng'd upon him.* See *Prov.* v. 9, 10, 11. vi. 33, 34, 35. xii. 13. xiv. 14, 32, 34. xvii. 13. xix. 29. xx. 1. xxii. 5. xxiii. 20, 28, &c. *Sirac.* xix. 3. xxxi. 22, &c. [c] See *Prov.* xi. 31. Vid. *Iſocrat. De Permutatione, p.* 576.

[2] *Seneca*'s Words are, ——— *Quos tantum præmium expectat fælicis animi immota tranquillitas* ——— *Nec, ut quibuſdam dictum eſt, arduum in virtutes & aſperum iter eſt; plano adeuntur. Non vana vobis auctor rei venio. Facilis eſt ad beatam vitam via, inite modo bonis auſpiciis, ipſiſque diis benè juvantibus. Multo difficilius eſt, facere iſta quæ facitis. Quid enim quiete otioſius eſt animi, quid irâ laborioſius? quid clementiâ remiſſius, quid crudelitate negotioſius? Vacat pudicitia, libido occupatiſſima eſt; omnium denique virtutum tutela facilior eſt, vitia magno coluntur.* We may add to this *Montagne*'s Meditation, *Eſſay, Lib.* i. *Chap.* xxv. "Virtue is not, as the Schools ſpeak, placed on the Top of a two-headed Mountain, rough, and not to be aſcended. They that purſue it may attain it. On the Reverſe, ſhe has her Abode in a fine fertile and pleaſant Plain, from whence ſhe beholds all Things below her; and if we labour to find her, our Way lies through ſhady and green Roads, ſweet, flouriſhing, and pleaſant; of an eaſy and ſmooth Aſcent, like that of the Celeſtial Vaults ——— The Price and Excellency of Virtue conſiſts in the Eaſe, Pleaſure, and Profit of the Practice. The Difficulty is ſo little, that an Infant may exerciſe it as well as a Man, and the Simple as well as the Wiſe. The Rule is its chief Inſtrument, and not Force. *Socrates* her firſt Favourite, willingly left his Buſineſs to glide along in Eaſe and Activity in her Paths. She is the nurſing Mother of all Pleaſures, ſhe makes them ſuitable, and renders them ſure and ſafe, and moderating them keeps us in Breath and Appetite. Abridging us of what ſhe refuſes, ſhe makes us more eager of what ſhe allows us, and ſhe allows us all Things that are ſuitable to our Nature plentifully, to Satiety, at leaſt, if not to Wearineſs, like an indulgent Mother, unleſs we will ſay that a Regimen of Sobriety and Temperance is an Enemy to Pleaſure. If a common Fortune befals it, ſhe can make her Eſcape, or paſs through it, and make another, not more fleeting and tranſitory. She knows how to be rich and powerful, and lie in Beds of Roſes. She loves Life, Beauty, Fame, and Health, but her peculiar Office is to teach us to uſe our Goods regularly, and to ſpend them freely; an Office more noble than ſevere, without which the whole Courſe of our Lives is churliſh, turbulent, and deformed, and can we do leſs than confine theſe Rocks, Thickets, and Monſters?" See alſo *Mar. Antonin. Lib.* v. §. 9.

"[3] That is not Vice, really Vice, which offends not, and in a true Judgment does not accuſe. For there is ſuch an apparent Deformity and Inconvenience in it, that they ſpeak with Reaſon who ſay, that it is principally produced by Beſtiality and Ignorance, ſo hard is it to know it, and not hate it. Malice ſucks up the greateſt Part of the Venom, and poiſons it. Vice leaves an Ulcer in the Fleſh, and Repentance in the Soul, which always tears and wounds itſelf; for tho' Reaſon extinguiſhes almoſt all other Griefs and Sorrows, yet it begets Repentance, which is ſo much the more grievous, becauſe it is bred within, as the Cold and Heat that affects the Sinews is always more ſharp than that which outwardly affects." *Montagne, Lib.* iii. *Chap.* ii. I could not forbear copying out theſe fine Thoughts, of which *Seneca* alſo hath one, *Epiſt.* lxxxi. *Quemadmodum Attalus noſter dicere ſolebat, Malitia ipſa maximam partem veneni ſui bibit.*

[4] A Paſſage of *Iſocrates* in *Orat. De Permutat.* is worth our Notice here, where he ſays, Θαυμάζω δ' εἴ τις οἴεται τοὺς τὴν εὐσέβειαν καὶ τὴν δικαιοσύνην ἀσκοῦντας, καὶ καρτερεῖν καὶ μένειν ἐν τούτοις ἐθέλοντας, ἔλαττον ἕξειν τῶν πονηρῶν· ἀλλ' οὐχ ἡγούμενος [for ſo it ſhould be read, and not ἡγουμένους] καὶ παρὰ θεοῖς, καὶ παρὰ ἀνθρώποις πλέον οἴσεσθαι τῶν ἄλλων. ἐγὼ μὲν γὰρ οἴομαι, τούτους μόνους, ὧν δεῖ πλεονεκτεῖν, τοὺς δὲ ἄλλους οὐδὲ γινώσκειν οὐδὲν ὧν βέλτιόν ἐστιν· ὁρῶ γὰρ τοὺς μὲν τὴν ἀδικίαν προτιμῶντας, καὶ τὸ λαβεῖν τι τῶν ἀλλοτρίων μέγιστον ἀγαθὸν νομίζοντας, ὅμοια πάσχοντας τοῖς δελεαζομένοις τῶν ζώων, καὶ κατ' ἀρχὰς μὲν ἀπολαύοντας ὧν ἂν λάβωσιν· ὀλίγῳ δ' ὕστερον ἐν τοῖς μεγίστοις κακοῖς ὄντας· τοὺς δὲ μετ' εὐσεβείας, καὶ δικαιοσύνης ζῶντας, ἔν τε τοῖς παροῦσι χρόνοις ἀσφαλῶς διάγοντας, καὶ περὶ τοῦ σύμπαντος αἰῶνος ἡδίους τὰς ἐλπίδας ἔχοντας, καὶ ταῦτ' εἰ μὴ κατὰ πάντων οὕτως εἴθισται συμβαίνειν, ἀλλὰ τό γ' ὡς ἐπὶ τὸ πολὺ τοῦτο γίγνεται τὸν τρόπον, χρὴ δὲ τοὺς εὖ φρονοῦντας, ἐπειδὴ τὸ μέλλον ἀεὶ συνοίσειν οὐ καθορῶμεν, τὸ πολλάκις ὠφελοῦν τοῦτο φαίνεσθαι προαιρουμένους. Πάντων δ' ἀλογώτατον πεπόνθασιν, ὅσοι κάλλιον μὲν ἐπιτήδευμα νομίζουσιν εἶναι, καὶ θεοφιλέστερον, τὴν δικαιοσύνην τῆς ἀδικίας· χεῖρον δ' οἴονται βιώσεσθαι τοὺς ταύτῃ χρωμένους, τῶν τὴν πονηρίαν προῃρημένων Which is thus Engliſhed, "I wonder that any one can be perſuaded, that they who apply themſelves conſtantly to Piety and Juſtice ſhould think themſelves more unhappy than Sinners, and don't promiſe themſelves more Advantages both from God and Man. As for me, I believe that only good Men enjoy moſt plentifully what is worth ſeeking, and Sinners, on the contrary, know not their own true Intereſts. For whoever prefers Injuſtice before Juſtice, and ſuppoſes his chief Happineſs to conſiſt in extorting other Mens Goods from them, is, in my Judgment, like the Beaſts that bite at an Hook, who are pleas'd at firſt with the Sweetneſs of the Bait, but ſoon after find themſelves embroiled in very great Troubles. But, on the other Hand, they that apply themſelves to Piety and Juſtice, are not only in Safety for the preſent, but meet with agreeable Hopes, that all their Life ſhall be happy. I own, this does not always happen, but Experience verifies it to be true for the moſt part. Now in all Things wherein we can't infallibly foreſee the Succeſs, a wiſe Man will chooſe that Side which commonly proves moſt advantagious. But nothing is more unreaſonable than their Opinion, who believe that Juſtice is ſomething fine and more agreeable to the Nature of the Gods than Injuſtice, and yet imagine, that they who apply themſelves to the firſt, ſhall be more unhappy than thoſe who give themſelves up to the latter."

We deſire it ſhould be well obſerv'd, that whilſt we are here treating about the natural Effects of good and of evil Actions, we do not by any Means reckon amongſt theſe Effects thoſe kind of Goods which we but now rank'd in the firſt Claſs, and which our own Prudence and Induſtry either cannot obtain, or cannot avoid. Such Things both may, and generally do happen alike to virtuous and to vicious Men. Thus a wicked Perſon may, by the Gift of Nature, poſſeſs a vigorous and a healthy Body, while perhaps a Man of Honeſty and Piety labours under a weak and crazy Conſtitution. And thus Death lays hold promiſcuouſly on the Juſt and on the Vile. But the only Goods we here allude to, are ſuch as it is in the Power of human Reaſon to provide for us; and which do therefore, in ſome meaſure, depend upon our own Act. Now altho' ſome Part of thoſe Goods which we intend by the Obſervance of the Law of Nature to obtain from other Men, has a Dependence on their Kindneſs and on their Probity, and ſo is not abſolutely in our own Power; yet, for as much as in all Probability, they have the ſame End and Deſign with our ſelves, we have at leaſt fair Reaſon to hope for and to expect ſuch good Uſage and Retribution from them, tho' we cannot give ourſelves an infallible Aſſurance of it, before it comes. Scarce any Man hath met with ſo many Enemies in the World, as not to own himſelf indebted to ſome Benefactors. And we ſee that the Evils which Men procure to one another, have never been able to prevail to the utter Ruin and Deſtruction of human Race: Which is a plain Evidence, that good Actions have oftner attain'd their juſt End and Reward, than they have fail'd and been diſappointed of it. On the other ſide, altho' a Perſon who neglects or diſobeys the Law of Nature, may ſometimes, by an unaccountable Concourſe of external Cauſes, receive a whole Flood of Goods and Benefits from other Men; yet becauſe in this Caſe thoſe Effects are, with regard to him, meerly contingent, and do very ſeldom fall out in ſuch a Manner, we may conclude, that Nature and Reaſon did not preſcribe, much leſs command the Means by which he attain'd, only caſually, to ſuch an End. Reaſon, on the contrary, moſt clearly ſhews us, that we take a much more probable Way to Happineſs, by acting on a ſettled Deſign, and by applying the beſt Means we can to the gaining of our Purpoſe, than if we ſhould throw aſide all Counſel and Forecaſt, and permit ourſelves to be driven at random by the blind Guidance of Chance. But this Point is indeed as clear as any Thing in Nature, and hath been made out to full Advantage by Dr. *Cumberland*.

There remains therefore this only Queſtion farther, whether or no beſides the natural Effects of evil Actions, and beſides thoſe which ariſe from the Sanction of Civil Laws, there are ſtill others in reſerve appointed by God's free Pleaſure, and to be [5] inflicted by Virtue of his Sovereign Prerogative; or whether God hath not added to the Sanction of the Laws of Nature ſome arbitrary Puniſhment: Eſpecially ſince it is apparent, that the natural Conſequences and Effects of evil Actions are frequently interrupted, and that the Wickedneſs of many Men ſeems to turn to their Gain and Advantage. Now what the Scripture hath declar'd in this Matter, is plain, and beyond all Diſpute. But waving that Authority, the affirmative Side of the Queſtion may be defended from ſeveral Conſiderations: As from that moſt antient and moſt univerſal Tradition, concerning a certain revenging Divinity [6], and the Pains after Death. Of which Opinion we have two fair Inſtances in the Caſes of *Jonas* and of St. *Paul* (*Jonas* i. 7. *Acts* xxviii. 1. *&c.*) for there being no natural Connexion and Conſequence, either between *Jonas*'s Crime and the Tempeſt, or between the Fact of Murther and the biting of the Viper, the People who were preſent at both Accidents, immediately ſuppos'd that God Almighty did thus extraordinarily interpoſe his Hand to puniſh ſome heinous Wickedneſs [a]. Moreover, it being moſt certain, that it is the divine Pleaſure thoſe Laws ſhould be obey'd, and not leſs manifeſt, that the natural Effects of them may be (partly at leaſt) eluded; it is highly probable, that God will find ſome other Way of puniſhing ſuch Offenders; eſpecially ſince the Gnawings of Conſcience, and the Want of Quiet and Security, which conſtantly attend evil Men, do not always riſe to ſuch an afflicting Degree, as to ſeem a ſufficient Plague and Penalty for their Crimes [b]. But becauſe whatever Arguments we can alledge *à priori*, will not amount to a Demonſtration, but only to a high Probability; and becauſe this arbitrary Puniſhment preſuppoſes ſome poſitive Determination of the divine Will, which we can hardly come to a Knowledge of without a particular Revelation; and ſince our Induction and our Experience are at preſent imperfect, we can ſcarce avoid confeſſing, that to thoſe who ſee only [7] by the Light of natural Reaſon, this Controverſy muſt ſtill appear in ſome meaſure dark and obſcure.

XXII. As

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[a] Add *Grot. De Veritate Rel. Chr.* Lib. i. §. 19, 20, 21, 22. Lib. ii. §. 9.

[b] Add Dr. *Cumberland*, Ch. v. §. 25.

[5] Our Author expreſſes himſelf thus; *Manu velut Regiâ exercendi*; in which he alludes to an Expreſſion of the *Roman* Lawyer *Pomponius*, ſpeaking of the firſt *Roman* Kings, who governed all Affairs as they thought fit, becauſe they had no written Law; *Et quidem initio civitatis noſtræ populus ſine lege certâ, ſine jure certo primum agere inſtituit, omniaque* MANU A REGIBUS GUBERNABANTUR. Digeſt. Lib. I. Tit. ii. *De Origine Juris*, &c. Leg. ii. §. 1. See *Tacitus*'s Annals, *Lib.* iii. *Chap.* xxvi.

[6] Which was call'd *Nemeſis* [or Δίκη] and was thought to have the Care of puniſhing the Crimes which were unpuniſh'd upon Earth; either thro' Negligence, or thro' want of Power; of this there is a fine Deſcription in *Ammian. Marcellin.* *B.* xiv. *Ch.* ii.

[7] This is true; but not to leſſen the Efficacy of the Laws of Nature, ſo far as they are known by the Light of Reaſon alone, let us add ſome Reflexions; and to this End, I think I can't do better, than to make uſe of the Words of a great Philoſopher of this Age, whom I have already quoted in ſeveral Places, who thus ſpeaks; "The Rewards and Puniſhments of another Life, "which God has eſtabliſhed to give greater Force to his Laws, are of Importance ſufficient to determine our Choice concern-"ing all the good or evil Things of this Life, when we conſider the Happineſs or Miſery to come as poſſible, of which none can "doubt. Whoever, I ſay, agrees that an excellent and infinite Felicity is a poſſible Conſequence of a good Life which he hath

XXII. As to the *Matter* of the Law of Nature, *Grotius* obſerves [a], that many Things are referr'd to this Law not *properly*, but *reductively*, forasmuch as the Law doth not oppoſe or forbid them. As thoſe Things are term'd Juſt, not only which are in ſtrict Juſtice due, but which Juſtice doth not contradict (tho' it would be better to call ſuch Things *permitted*, than plainly *juſt*.) But perhaps this Diſtinction of *Grotius* might be more conveniently applied to thoſe Conſtitutions which, according to the particular State of Men, the Deſire of Peace and Tranquillity hath at any time introduc'd; as likewiſe to the Actions undertaken in Conformity to ſuch Conſtitutions. For we ſhall often hear the Lawyers debating ſuch Caſes as theſe, whether the *Poſſeſſion of Things*, whether *Preſcription*, whether *the making Wills*, and whether *buying or ſelling*, do belong to the Law of Nature, or not. Which Doubts cannot eaſily be reſolv'd, unleſs we diſtinguiſh between thoſe Things which the Law of Nature determines, by commanding or forbidding them; and thoſe things which Men have been induc'd to ordain for the neceſſary Promotion of Society [1], the Liberty of doing which flows immediately from this human Ordinance and Inſtitution: and then we ſay of theſe laſt Things, that they belong to the Law of Nature by way of *Reduction*. Thus the Dominion or the Poſſeſſion of Things, doth not immediately ſpring from Nature, nor can we alledge any direct and expreſs Precept for its Introduction: yet it may be ſaid in ſome meaſure to be enjoin'd by natural Law, in as much as when Mankind began to multiply in the World, it was requiſite to their peaceable Condition, that the primitive Communion of Goods ſhould be laid aſide. Thus *Preſcription* is not plainly commanded by the Law of Nature; yet upon Suppoſition of Things being divided into diſtinct Proprieties, the Peace of Mankind ſeems to favour it; leſt otherwiſe the Titles to Things ſhould remain always in doubt. Thus, laſtly, Nature doth not poſitively enjoin us to make Wills, or to buy and ſell; yet Proprieties being ſuppos'd, as in the former Caſe, it naturally follows, that a Perſon at his Death ſhall have the Power of diſpoſing of his own Goods; and that Men, by the Intervention of Bargains and Contracts, ſhall be at Liberty to alienate ſuch Things as belong to themſelves, for the Procurement of thoſe which are in the Poſſeſſion of others.

Grotius farther obſerves on this Subject [2], that ſometimes by Abuſe thoſe Things are referr'd to the Law of Nature, which Reaſon indeed ſhews us to be honeſt, and better than their Oppoſites, tho' they are not properly matter of Debt and ſtrict Obligation. Of which kind are many high and uncommon Acts of Liberality, of Mercy and Clemency; as likewiſe whenever a Man recedes from any Part of his Right, not being compell'd by Neceſſity. Theſe Matters St. *Paul* illuſtrates in his firſt Epiſtle to the *Corinthians*, Ch. vi. ver. 12. Ch. vii. ver. 38. Ch. x. ver. 23. [b].

Socrates [c], when a raſcally Fellow had offer'd him an Injury, would not complain of it to the Judge, but reckon'd it (as he ſaid) no more than if an Aſſe had kick'd him. And *Cato*, as *Seneca* tells us, when he receiv'd a Blow in the Face, was ſo far from reſenting the Affront, and from deſiring Satisfaction, that he would not venture ſo far as to *forgive* it, but denied that any ſuch thing had been done: Thinking it better not to acknowledge the Fact, than to proſecute it.

XXIII. There is ſtill one Queſtion behind, which requires our Determination: Whether or no there be any ſuch thing as a particular and poſitive *Law of Nations*, contradiſtinct to the *Law of Nature?* Learned Men are not come to any good Agreement in this Point: Many aſſert the *Law of Nature and of Nations* to be the very ſame Thing, differing no otherwiſe than in external Denomination. Thus Mr. *Hobbes* [e] divides *natural Law, into the natural Law of Men, and the natural Law of States, commonly called the Law of Nations.* He obſerves, *That the Precepts of both are the ſame:*

“ lived here upon Earth, and an oppoſite State a poſſible Recompenſe of an irregular Life, ſuch a Man muſt neceſ-
“ ſarily own that he judges amiſs, if he concludes from thence, that a good Life, joined with a certain Aſſurance of
“ eternal Felicity which he may attain, is not preferable to a wicked Life, accompanied with the Fear of ſuch horri-
“ ble Miſery, into which it is poſſible the wicked Man ſhall one Day fall, and where nothing can be his Comfort but
“ the terrible and uncertain Hopes of being annihilated. All this is very evident, ſeeing good Men have nothing to
“ receive in this World but Evil, and Sinners are in a perpetual Felicity; which yet often happens otherwiſe, inſo-
“ much as Sinners have no great Reaſon to boaſt of their Eſtate, in relation to the good Things that they actually
“ enjoy; or rather, if we conſider all Things well, they have, I believe, the worſt Part, even in this Life; but when
“ we put infinite Happineſs into the Balance with infinite Miſery, if the worſt happen to a good Man, which is that
“ he is miſtaken, it is the greateſt Advantage that the Sinner can have; but if the contrary happen, what Man would
“ run the hazard, if he be a Perſon of any Thought? Who, I ſay, will be ſo much a Fool, as to expoſe himſelf to
“ the danger of being poſſibly infinitely miſerable, whereas he can get nothing by it but a pure Negative, if he eſcapes
“ the Danger? But, on the contrary, the good Man hazards a Negative only againſt an infinite Happineſs, which he
“ ſhall attain, if his Expectations ſucceed. If his Hope be well grounded, he is eternally happy; and if he be miſtaken
“ he is not unhappy, becauſe he'll be ſenſible of nothing. But on the other ſide, if the Sinner judges rightly, he is
“ not happy; but if he be miſtaken, he is eternally miſerable. Is not this one of the moſt viſible Irregularities of
“ Thought that any Man can fall into, not to ſee at the firſt Sight, which Side ought to be preferred in this Con-
“ troverſy? Mr. *Locke*'s *Philoſ. Eſſay upon Man's Underſtanding*, Lib. ii. Ch. xxi. §. 70. This is the Reſult of almoſt all Mr. *Paſcal*'s Reaſonings in his *Meditations*, *Ch.* vii. The Reader alſo would do well to read Mr. *Clerc*'s *Pneumatology*, Ch. ix. §. 2, 9. to the end of the Chapter; and Mr. *Bruyere*'s Characters, or *Manners of the Age*, in his Chapter of *Brave Spirits*, Page 560, &c. See alſo a Paſſage out of *Arnobius*, quoted above, *Lib.* i. *Ch.* iii. §. 7. *Note* 5.

[a] Lib. i. Ch. i. §. 10. Note 3.

[b] So *Ulpian* (Lib. iv. §. 1. D. *de alien. jud. mut. cauſ.*) *The Prætor doth not diſapprove of his Proceeding, who choſe rather to loſe his Right, than to engage in long Suits and Contentions. This Averſion to Strife doth by no means deſerve Reproof.*

[c] See *Plutarch* of the *Education of Children*, Page 10. C. Ed. *Wech.*

[d] *De Ira*, Lib. ii. Ch. xxxii, &c. *de Conſtant. Sapientis*, Ch. xiv.

[e] *De Cive*, Ch. xiv. 4, 5.

§. XXII. [1] There are two ſorts of Duties preſcribed by the Law of Nature, taken in its full Extent; the one flowing from the natural and primitive Conſtitution of Man immediately, and the other ſuppoſes human Eſtabliſhment. Theſe laſt are but the Conſequence of the former, or a ſuitable Application of the general Rules of the Law of Nature to the private Condition, and diverſe Circumſtances of every one. See §. 15. above, *Note* 5. and the laſt Paragraph of this Chapter. We may obſerve the ſame in all the Duties, of which this Author treats.

[2] See above, *Lib.* i. *Ch.* ii. §. 8. *Note* 5.

But that *foraſmuch as States, when they are once inſtituted, aſſume the perſonal Proprieties of Men, hence it comes to paſs, that what, ſpeaking of the Duty of particular Men, we call the Law of Nature, the ſame we term the Law of Nations, when we apply it to whole States, Nations, or People* [1]. This Opinion we, for our Part, readily ſubſcribe to: Nor do we conceive, that there is any other voluntary or poſitive Law of Nations, properly inveſted with a true and legal Force, and obliging as the Ordinance [a] of a ſuperior Power [2]. And thus we do not really differ in Judgment from thoſe who are more inclin'd to call that the Law of Nature, which conſiſts in a Conformity to rational Nature, and that the Law of Nations, which flows from the Conſideration of human Indigence, the Relief of which ſeems to be the main End and Deſign of Society. For we, as well as they, deny that there is any poſitive Law of Nations proceeding from a Superior. And whatever is deducible from Reflections on the Indigence of human Nature, we refer immediately to *natural Law*; only we were unwilling to define and explain this natural Law by a Conformity to rational Nature; becauſe by this means we ſhould eſtabliſh Reaſon for the Rule and Meaſure of itſelf; and ſo this way of demonſtrating Nature's Laws would run round in a Circle.

Moſt of thoſe Matters which by the *Civilians* and others are referr'd to the Law of Nations, as the Ways of acquiring things, the Buſineſs of Contracts, *&c.* do indeed belong either to the Law of Nature, or to the civil Laws of thoſe Countries where they are obſerv'd: Many People and States agreeing in ſuch Points, which otherwiſe do not depend on the univerſal Reaſon of Mankind. Now it is not proper or fair to conſtitute theſe as a peculiar and diſtinct Species of Law; inaſmuch as the Reaſon why ſuch Conſtitutions are common to many Nations doth not ariſe from any mutual Covenant or Obligation, but is wholly to be attributed to the particular Pleaſure of the ſeveral Legiſlators, who by Accident agreed in theſe Ordinances, without the leaſt Regard to one another. And therefore this kind of Cuſtoms and Decrees may be, and frequently are, alter'd by one People, or Kingdom, without adviſing with their Neighbours.

Nor is *Feldenius*'s Diſtinction to be deſpiſ'd, who in his Obſervations on *Grotius* [b] tells us, that the *Roman* Lawyers, by the *Law of Nations* [3], underſtood the Power and Liberty which Strangers and Foreigners were allow'd in tranſacting Matters in the *Roman* State; and by the *Civil Law*, that which was proper to the Citizens only, all Foreigners being excluded from its Benefit. That on this Account [4] *Wills* and *Marriages* were ſaid to be of the *Civil Law*, and *Contracts* or *Bargains*, of the

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[a] Add. *Boecler.* in *Grot.* Lib. i. Ch. i. §. 14. and in Lib. ii. Ch. iv. §. 9.

[b] Lib. ii. Ch. ii. §. 20. and Ch. viii. §. 1.

§. XXIII. [1] It is poſſibly from this Diſtinction of the Law of Nations from the natural Law, that we are accuſtomed to judge otherwiſe of the Actions of Princes, or Commonwealths, than of private Perſons, as Mr. *Bernard* has obſerved in relating Mr. *Buddeus*'s Words, as a good and ſmart Notion, in his *Elemen. Philoſoph. Pract.* Page 236. I ſhall give you them in the Extract made of them in the *News of the Republ. of Letters, March* 1704. " If one private Perſon offends another without Cauſe, we call that Action *Injuſtice*; but if one Prince encroaches upon another without Cauſe, " by invading his Dominions, by robbing his Subjects, and plundering his Towns and Provinces, it is called *War*, " and 'twere too much Boldneſs to call it *unjuſt*. To break Bargains made and agreed on, is a *Crime* between one " Man and another: but among Princes, to break the moſt ſolemn Alliance, is *Prudence, i. e.* the Art of Governing. " 'Tis true, they always alledge ſome plauſible Pretences, but they matter not whether they are believed juſt or " unjuſt. Be they called Cheats, Frauds, Lies, Double-dealings, Rapine, Theft, or the like Crimes, which are abhorred in the common Sort, all the World will commend, or at leaſt excuſe them, if a Prince or a whole Nation " commits them."

[2] There is neither a Superior nor Inferior. All People are naturally equal, and conſequently no one People can impoſe Laws upon another, much leſs can they altogether impoſe Laws upon themſelves. But if we ground this pretended Law of Nations upon the Conſent or Agreement of the People, we run from our Subject; for beſides that there is a Difference between an Agreement and a Law, this would not produce a particular Law diſtinct from the natural, but it muſt be referred to that general Law of Nature which obliges us to keep all Covenants. Further, neither all People, no nor the greateſt and more civilized Part, did ever yet agree together to obſerve thoſe ſort of Cuſtoms which are ſaid to belong to the Law of Nations; nay, there is not ſo much as One, in which they exactly agree in the Practice of it. How they become Obligatory, See Mr. *Titius*'s Obſervat. on *Puſendorf*, XCI. *Num.* 14. Mr. *Buddeus*'s Elemen. Phil. *pract.* Page 206, 207. as alſo a Diſcourſe *de Lytro*, §. 1, 2, *&c.* in Tom. I. of the Comment. & Opuſc. of Mr. *Hertius*. The ſecond of theſe Authors had Occaſion to obſerve, after he had treated of the Law of Nature, the Application that People might make of it one to another, ſo far at leaſt as the thing would permit and require him.

[3] 'Tis not exactly the Notion of the *Roman* Lawyers, for they underſtand by the *Law of Nations*, properly ſo called, that which the Light of natural Reaſon has eſtabliſhed among all Men, and ſo is common to all Nations, *i. e.* as the Definition ſuppoſes, to all thoſe that follow the Light of Reaſon. It chiefly conſiſts of ſuch Things as the Neceſſities and Buſineſs of Life oblige us to eſtabliſh, for we refer to it civil Government, Propriety of Goods, all Contracts almoſt, Slavery, and the Freedom of Slaves, the Rights of Wars, *&c.* *Quod verò naturalis ratio inter omnes homines conſtituit, id apud omnes populos peræquè cuſtoditur, vocaturque* Jus Gentium, *quaſi quo jure omnes gentes utantur*—— *Nam uſu exigente, & humanis neceſſitatibus, gentes humanæ jura quædam ſibi conſtituerunt. Bella etenim orta ſunt, & captivitates ſecutæ & ſervitutes.*—— *Et ex hoc jure gentium omnes penè contractus introducti ſunt.*—— Inſtit. Lib. i. Tit. 2. §. 1, 2. *Manumiſſiones quoque juris gentium ſunt*—— *Ex hoc Jure Gentium introducta bella: diſcretæ gentes: regna condita: dominia diſtincta: agris termini poſiti: ædificia collocata: commercium, emptiones, venditiones, locationes, conductiones, obligationes inſtitutæ; exceptis quibuſdam, quæ* [à] *jure civili introductæ ſunt.* Digeſt. Lib. i. Tit. 1. Leg. 4, 5. So that the Law of Nations is near a-kin to thoſe Laws of natural Right which our Author calls *Conditional*, §. 24. and the *Roman* Lawyers ſometimes confound it with the *Laws of Nature*, becauſe the Rules of both are founded on natural Reaſon. See *Grotius* upon that Paſſage of *Cicero*, where by the Law of Nature, *i. e.* the Law of Nations, one Man can't promote his own Intereſt at the Loſs of another: *Neque verò hoc ſolum Natura,* i. e. *Jure Gentium*—— *conſtitutum eſt, ut non liceat ſui commodi cauſa nocere alteri.* De Offic. Lib. iii. Ch. v. p. 296, *&c.* See alſo Mr. *Hertius*, *de Lytro*, §. 1, 7.

[4] The *Roman* Lawyers do not refer *Marriage* to the Civil Law, becauſe, according to them, it belongs not only to the Law of Nations, but Law of Nature; *Hinc* [ex Jure Naturali] *deſcendit maris atque fœminæ conjunctio, quam nos matrimonium appellamus.* Digeſt. Lib. i. Tit. 1. Leg. 1. §. 3. They only ſay, that to make a Marriage-contract valid, which is the Effect of the Civil Law, both the Perſons who are to be married muſt be Citizens of *Rome.* See *Ulpian*, Tit. 5. §. 3, 4. *Seneca, de Beneficiis*, Lib. iv. 35. *Boeth. in Top. Cicer.* Ch. iv. Likewiſe, altho' a *Will*, to make it valid, requires certain Formalities, and Strangers can neither make a valid *Will*, nor inherit by a *Will* (See *Cod. Lib.* vi. *Tit.* 24. and *Dion. Gothofred.* upon it) nevertheleſs, *Wills* were reputed to be from the Law of Nations, as appears from this, That a Soldier might make a Perſon condemned to Baniſhment, or condemned for all his Life to the Mines or Quarries, his Heir, becauſe they ſtill had a Right by the Law of Nations. *Ut ſunt in opus publicum perpetuo damnati, & in inſulam deportati, ut ea quidem, quæ juris civilis ſunt, non habeant, quæ vero juris gentium, habeant.* Digeſt. Lib. lxviii. Tit. 9. *De Pœnis*, Leg. 17. §. 1. See *Lib.* xxix. Tit. 1. *De Teſtamento Militis*, Leg. 13. §. 2. See alſo the Law of the Code quoted, *Lib.* iv. *Ch.* x. §. 4. *Note* 1.

Law of Nations, becauſe the former were reſtrain'd to the Citizens, whereas Strangers were admitted to a Share and Right in the latter.

Many Authors do farther rank under the Title of the *Law of Nations*, ſeveral Cuſtoms mutually obſerv'd by tacit Conſent, amongſt moſt People pretending to Civility; eſpecially in the Affairs and Tranſactions of War. For after that the moſt poliſh'd Parts of the World came to eſteem Martial Glory as the greateſt of human Honours, and to think that a Man had no ſuch fair way of ſhewing his Excellency beyond others, as by being able by his Boldneſs and his Sagacity to deſtroy many of his Fellows; upon which Account there perpetually aroſe either unneceſſary or unjuſt Contentions; for fear great Captains, if they us'd the full Liberty of a juſt War, ſhould bring too much Envy on their Power, and expoſe themſelves to general Hatred: Many Nations found it convenient to temper the vigorous Fierceneſs of hoſtile Proceedings, by a Shew of Clemency and of Magnanimity. Hence aroſe the Cuſtoms of exempting certain Things and Perſons from Martial Violence; the particular Manners of hurting Enemies to ſuch Degrees, of treating Captives, and the like. *Machiavel* in his *Prince*, *Chap.* xii. relates one Practice of this Nature, which I queſtion whether it were worthy of the Name and the Profeſſion of Soldiers; he ſays, it was firſt introduc'd by *Alberigo de Como* of *Romagna*, and kept up in the *Italian* Wars of the laſt Age, chiefly by the foreign and mercenary Troops; the oppoſite Generals endeavour'd with all poſſible Induſtry, to rid themſelves and their Soldiers of all Trouble and Fear: And their Way was, by killing no one in Fight; only taking one another Priſoners, whom they afterwards diſmiſs'd without Ranſom. When they were in Leaguer before a Town, they ſhot not rudely amongſt them in the Night; nor did the Beſieged diſturb their Camp with the like Incivilities. They made no Intrenchments for their Security whilſt encamped; and when Winter came on, never lay at all in the Field. And to behave themſelves in this manner was Part of their Diſcipline and Inſtitution. An Agreement ſomething like this *Strabo* tells us of, *Lib.* x. between the *Eretrians* and the *Chalcidians*, forbidding the Uſe of miſſive Weapons againſt each other. To which we may add the Cuſtom obſerv'd by the antient *Indians*, of letting the Husbandman remain ſafe from all Injury and Moleſtation, even in civil Wars [a].

But altho' theſe Cuſtoms ſeem to include ſome kind of Obligation ariſing from tacit Conſent; yet if one who is engag'd in a lawful War, ſhall neglect them, and profeſs that he will not be bound by ſuch Reſtraints; provided what is contrary to them may be rightly done according to the Law of Nature; he is guilty of no other Sin, but a ſort of Unſkilfulneſs, in not adjuſting his Proceedings to the nice Models of thoſe who reckon War in the Number of the liberal Studies. As a Gladiator is accus'd of Inexpertneſs, when he wounds his Antagoniſt otherwiſe than by the Rules of Art. Whoever therefore wages War in a juſt Cauſe, may ſlight theſe Formalities at Pleaſure, and govern himſelf purely by the Law of Nature: Unleſs he thinks it more for his Intereſt to obſerve them, as a Means to render the Enemies leſs ſevere towards himſelf and his Men. On the other hand, he who proſecutes an unjuſt Quarrel, if he punctually fulfils theſe Niceties, is ſo far in the Right, as to appear wicked with ſome kind of Temper and Moderation. However, theſe Reaſons not being general, cannot conſtitute any Law of an [6] univerſal Obligation. Eſpecially ſince as to any Reſtraints which depend on tacit Agreement, it ſeems reaſonable that either Party ſhould have the Liberty of abſolving themſelves from them, by making expreſs Declaration that they will be holden by them no longer, and that they do not expect or require the Obſervance of them from others. Hence we find many ſuch Practices to be worn out by Time, or overcome by the Prevalence of contrary Cuſtom. Neither have [7] thoſe Men any good Reaſon of Complaint, who cenſure this Doctrine as a Notion by which the Security, the Intereſt, and the Safety of Nations are robb'd of their ſureſt Guards and Defence. For the Enſurance of theſe Advantages and Bleſſings doth not conſiſt in the Practice of ſuch mutual Favours, but in the due Obſervance of the Law of Nature, a much more ſacred Support; and which whilſt they enjoy, they have little need of inferior Methods of Protection. And ſure it ſhews much more Excellency and Worth in any Cuſtom, to derive it from the Law of Nature, than to eſtabliſh it only on the Conſent of different People.

Amongſt the chief Heads of that *voluntary Law of Nations* which *Grotius* maintains, he reckons the Law [8] of Embaſſies. Now as to this Point it is our Opinion, that the Perſons of Embaſſadors are ſacred and inviolable, even amongſt Enemies, by the meer Law of Nature; provided they do not come purely as Spies, nor enter into any hoſtile Deſign againſt the Perſon to whom they are ſent; altho' in the ordinary Courſe of Buſineſs, and of Treaties, they prefer their Maſter's Intereſt to all others. For inaſmuch as ſuch Perſons are neceſſary for the procuring, the preſerving, or the ſtrengthening of Peace by Leagues and Covenants; and ſince the Law of Nature enjoins us to embrace Peace by all honeſt Ways, it muſt at the ſame time be ſuppos'd to have provided for the Security of thoſe Men, without whoſe Intervention this good End cannot be obtain'd [a]. To this Right of perſonal Safety, is join'd another of being exempted from the Juriſdiction of the Sovereign to whom they are ſent; at leaſt in all Matters relating to their Office. Since otherwiſe they would not have full Power and Liberty to promote their Maſter's Intereſt, with due Application and Vigour, were they oblig'd to give an Account of their Management to any Authority, beſides that which they repreſent. Other Privileges commonly attributed to Embaſſadors, eſpecially to thoſe who reſide in Courts, not for the ſettling or the ſecuring of Peace, but chiefly for the diving into the Secrets and Policies of a State, theſe depend abſolutely on the Indulgence of the Prince who entertains them; and therefore, if he ſees convenient, he may deprive them of theſe Favours without the Breach of any Law, provided he will ſuffer his own Miniſters abroad to be treated in the ſame Manner.

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[a] *Arrian.* in *Indicis*, Chap. xi.

[6] Cuſtom never obtains the Force of a Law in any State, but by the tacit Conſent of the Sovereign, which may eaſily be preſumed: But when one People treats with another, how muſt it be determined what repeated Acts, and what Space of Time ſhall render a Cuſtom obligatory? Moreover, great Revolutions often happen, inſomuch that not only the Sovereign, but alſo the Government itſelf is wholly changed; and in this Caſe, why ſhould a new State, or a new Prince, be obliged exactly to obſerve a Thing which they never conſented to? This is what Mr. *Hertius* has well obſerved. See his Diſcourſe, *De Lytro*, before quoted, §. 2.

[7] *Samuel Rachelius* is plainly meant here, as appears to me by what Mr. *Hertius* ſays in the ſame Diſcourſe, §. 11. where he mentions a Diſcourſe, *De Jure Gentium*, of that Lawyer, who was Profeſſor at *Kiel* in the Province of *Holſtein*.

[8] See what is ſaid *Note* 1. §. 12. *Ch.* 9. *Lib.* viii.

The [9] Right of Burial, which, according to *Grotius*, ſeems likewiſe to make a particular Head of the *Law of Nations*, may be well referr'd to the common Duties of Kindneſs and Humanity [b]. Nor are the other Inſtances which he offers of Conſequence enough to eſtabliſh a new Species of Law, ſince they may with Convenience enough be allow'd a Place in the Syſtem of the *Law of Nature*. As for thoſe Perſons who [10] rank under the *Law of Nations*, the particular Compacts of two or more States, concluded by Leagues and Treaties of Peace, to us their Notion appears very incongruous. For although the *Law of Nature*, in that Part of it concerning the *keeping of Faith*, doth oblige us to ſtand to ſuch Agreements; yet the Agreements themſelves cannot be call'd *Laws*, in any Propriety of Speech or of Senſe. Beſides, they are almoſt infinite in Number, and commonly are ſettled only for a Time. Nor do they any more conſtitute a Part of Law in general, than the Covenants and Bargains of particular Subjects with each other, do belong to the Body of the Civil Law of the Kingdom: But they are rather to be eſteem'd the Subject and the Concern of *Hiſtory* [c].

XXIV. Of all the Diviſions of *natural Law*, that ſeems to us moſt accurate and moſt convenient, which conſiders, in the firſt Place, a Man's *Behaviour towards himſelf*, and then *towards other Men*. [1] Thoſe Precepts of the *Law of Nature* which bear a Regard to other Men, may be again divided into *abſolute* and *hypothetical*, or conditional. The former are ſuch as *oblige* all Men in all States and Conditions, independent from any human Settlement or Inſtitution. The latter preſuppoſe ſome publick Forms and civil Methods of Living to have been already conſtituted and received in the World. Which Diſtinction *Grotius* hath thus expreſs'd in other Words; *The Law of Nature is concern'd, not only about ſuch Things as exiſt antecedent to human Will, but likewiſe about many Things which follow upon ſome Acts of that Will.* “ Whence altho' the *Dominion* or
“ the Propriety of Things, as it now ſtands, is eſta-
“ bliſh'd by the Pleaſure of Men; yet ſuch a Settle-
“ ment being once ſuppos'd, *natural Law* informs us
“ that 'tis a Sin to take the Goods of another Man,

[a] Add. *Marſelaer Legat. Lib.* ii. *Ch.* xiii.

[b] Add. *Ant. Matth. De Crimin. Proleg. Ch.* iii. §. 5.

[c] Add. *Selden De Mari Clauſo, Lib.* i. *Ch.* ii. Concerning *unwritten Laws*, or *Cuſtom*, beſides others, ſee *Bœcler.* ad *Grot. Lib.* ii. *Ch.* iv. §. 5.

[9] Altho' after Death whatever Treatment the Corpſe of the Dead meets with, is all one to it, the Right of Burial is not a whit the leſs founded on the Law of Humanity; inſomuch that it is a kind of Puniſhment to be deprived of Burial, as the Practice of Civil Judicatures ſhews, and the Uneaſineſs of ſuch as in their Life-time are troubled at the Thoughts that their Bodies, when dead, ſhall be caſt into the Highway. To this we may add, that, according to the Cuſtoms and ordinary Opinions of Men, Burial is a Mark of Honour. Now to deny a Man the Honour that he may lawfully claim, although but by an imperfect Right, is without Contradiction, a Breach of the Law of Nature. It is to no Purpoſe to object, that a dead Man is not ſenſible of what is done to his Carcaſe, yet he may be really wronged for all that, for 'tis not neceſſary that an injured Perſon ſhould know or feel the hurt done him, or be in a Condition to obtain his Right. (See *Lib.* i. *Chap.* i. §. 7. *Note* 4.) All the World agree, that an Infant in the Cradle may be wronged, and ſo may an Idiot, although the firſt knows not what it ſuffers, and the other does not underſtand the Hurt done him. Laſtly, the Relations and Friends of the Dead, do in ſome Manner repreſent his Perſon, and have a Right to require the Honour of Burial for him. But, by Burial we are to obſerve, that all the laſt Duties to be paid to the Dead are underſtood, whether it be by burning of the Body, or interring it; for this depends upon Cuſtom, which alone determines how the Memory of the Dead is to be honoured. Moreover, as we have intimated, a certain kind of Puniſhment is ſometimes inflicted upon the Bodies of ſuch as have committed enormous Crimes; and this is chiefly practiſed upon ſuch as have killed themſelves, and conſequently the Magiſtrate cannot puniſh them any other way, to affright others and diſcourage them from the like Attempts. But the Rights of War do not extend ſo far, as to deny Burial to ſlain Enemies; this Refuſal anſwers not to the lawful Ends of War, and can have no other Principle than barbarous Cruelty. I have taken this almoſt all out of *Buddeus's Element. Philoſoph. Pract.* We may add upon this laſt Article what *Plato* ſays, *viz.* That it is a great Piece of Cowardice to treat the Body of him with whom we are at War, as an Enemy; in ſo doing we act like Dogs, who bite the Stones caſt at them when they can't come at him that throws them. Καὶ γυναικείας, καὶ σμικρᾶς διανοίας ἐστιν, πολέμιον νομίζειν τὸ σῶμα τοῦ τεθνηκότος, ἀποπταμένου τοῦ ἐχθροῦ, λελοιπότος δὲ ᾧ ἐπολέμει, ἢ οἴει τι διάφορον δρᾶν τοὺς τοῦτο ποιοῦντας τῶν κυνῶν, αἳ τοῖς λίθοις, οἷς ἂν βληθῶσι χαλεπαίνουσι, τοῦ βάλλοντος οὐχ ἁπτόμεναι. *De Rep. Lib.* v. *Tom.* ii. Mr. *Thomaſius* nevertheleſs maintains, that there is no Evil in refuſing Burial to Enemies, and he affirms it a Thing altogether indifferent; but I leave it to others to examine whether what he ſays about it in his *Inſtitut. Juriſpr. Divin. Lib.* iii. *Chap.* x. deſtroys the Principles I have laid down. He alſo ſays, That ſuppoſing there be ſome Obligation to grant a Burial, the Refuſal of that Duty of Humanity is no juſt Cauſe of War. I own it, but it ought to be conſidered, that this Refuſal in ſome Caſes ſhews a bloody Diſpoſition, and may be more juſtly made a Cauſe of War, than many other Things that are.

[10] 'Tis the ſame Mr. *Rachelius*, beforementioned, in his Book *De Jure gentium*, in which he follows *Herman Conringius's* Diſcourſe, *De Jure*, as I underſtand from Mr. *Hertius*.

§. XXIV. [1] We muſt add, *towards* God. See what is ſaid above, §. 15. *Note* 5. and in the next Chapter, §. 3. *Note* 2. This Diviſion is very natural and antient. We find it in *Tuſc. Quæſt. Lib.* i. *Chap.* xxvi. *Hæc philoſophia nos primum ad illorum* [*Deorum*] *cultum, deinde ad jus hominum, quod ſitum eſt in generis humani ſocietate, tum ad modeſtiam, magnitudinemque animi erudivit, i. e.* “ Philoſophy teaches us firſt of all the Worſhip of a God, then the Duties of Men one to another, which are “ founded upon the Society of Mankind, and then on a Moderation and Greatneſs of Mind.” Every one knows that the Goſpel obliges us to reſpect God, our Neighbour, and ourſelves, as the three principal Objects, and greateſt Originals of our Duty. This Diviſion is clearly deduced from St. *Paul's* Words, *Tit.* ii. 12. *The Grace of* God, *which bringeth Salvation*—— *teacheth us to deny Ungodlineſs and worldly Luſts, and to live ſoberly, righteouſly, and godly in this preſent World.* We may alſo here take Notice of that Paſſage of the Philoſophick Emperor, Τρεῖς σχέσεις, ἡ μὲν πρὸς τὸ αἴτιον περικείμενον, ἡ πρὸς τὴν θεῖαν αἰτίαν, ἀφ᾽ ἧς συμβαίνει πᾶσι πάντα, ἡ δὲ πρὸς τοὺς συμβιοῦντας. *i. e.* “ We have three Obligations, the one to the Cauſe “ which is ſurrounding us, *i. e.* our Body; the other ties us to the ſupreme Cauſe from whom all Things come, which happen in this World, *i. e.* God, who is the univerſal Reaſon; the third and laſt obliges us to all Men, *i. e.* as joined in Society.” *M. Antonin. Lib.* viii. §. 27.

“ without the Owner's Conſent [a].” That is, there are many Things which as to the Exerciſe of the Act are arbitrary, or where it is left to the free Pleaſure of Men, whether they will perform ſuch an Act, or no: But the Act being once perform'd, there follows upon it, by Virtue of ſome Precept of the Law of Nature, a moral Neceſſity or Obligation; or elſe the Manner and Circumſtances of the Act are by the ſame Law adjuſted and determin'd. Thus, for Example, altho' the Law of Nature doth not command me to buy of another, yet ſuppoſing me to buy at my own Pleaſure, it commands me not to ſeek my own Gain to the Damage of the other Party, nor to cheat him in the Bargain. And many ſuch Precepts of the Law of Nature there are, which cannot take Place, or indeed be underſtood, unleſs upon Suppoſition of diſtinct Proprieties of Things, and of the Eſtabliſhment of civil Authority. Yet it cannot hence be prov'd, that even all poſitive Laws are Part of the Law of Nature, becauſe Nature obliges us to obey the Commands of the ſupreme Magiſtrate, tho' our own Conſent gave him his Sovereignty over us. Thus much indeed is certain, that the Violaters of civil Laws do, by breaking their intervening Covenant, mediately ſin againſt the Law of Nature. And yet there ſtill remains a prodigious Difference between theſe natural Laws which we call *hypothetical*, and the poſitive Laws of civil Governments; inaſmuch as the Reaſon of the former is drawn from the Condition of Mankind conſider'd in general; but the Reaſon of the latter is taken from the particular Intereſt of any Nation or State, or from the bare Pleaſure of the Legiſlator. Therefore our civil poſitive Laws are not ſo many Precepts of the natural *hypothetical* Law, but do only borrow their Force of obliging [3] in human Regard, from the Virtue of ſome ſuch hypothetical Precept of Nature. Now of thoſe human Inſtitutions which ſerve for Foundations of theſe hypothetical Precepts, the three chief are [4] *Speech*, the *Dominion* and the *Price* of Things, and [5] *human Sovereignty*, or Command. And by this Diviſion we ſhall hereafter guide our Proceedings, when we arrive at that Part of our Deſign.

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[a] Vid. *Leg*. i. §. 3. *D. De furtis*. *Leg*. xlii. *D. De verb. Signif.*

[2] See above, §. 22. *Note* 1.

[3] The laſt Editions ſay, *in foro humano*, and the *Engliſh* Tranſlator follows them, rendring it, *in human Regard*, whereas the firſt Editions expreſſed it, *in foro Divino*, as the Reaſoning of the Author plainly requires; and Mr. *Hertius*, in his Edition in 1706, hath ſuffered this Miſtake to paſs.

[4] See *Note* on §. 8. *Lib*. iii. *Chap*. ix.

[5] All that our Author ſays in this Chapter reſpects only the Obligations of the natural Law, which obliges us to act or not act indiſpenſibly, and which hath for its Object ſuch Actions as contain in them an Agreeableneſs or Diſagreeableneſs to the human Nature; but, as I have already ſaid above, *Lib*. i. *Ch*. vi. §. 16. *N*. 1. we muſt acknowledge a natural Law of ſimple Permiſſion, by Virtue of which we may do, or not do, according as we judge fit, every Thing which has not a neceſſary Agreeableneſs or Diſagreeableneſs with the Nature of Man, unleſs it be expreſly ordered or forbidden by ſome poſitive Law, either divine or human. 'Tis upon this natural Law of ſimple Permiſſion, that all Rights, as well natural as acceſſory and acquired, are founded, as Liberty, the Right of ſuffering no Evil from others, Empire or Authority over Perſons, and other ſuch like Things, which ordinarily receive divers Changes, according to the Will of Man. For Actions permitted by the Law of Nature may become obligatory, and afterwards return to their natural Indifference. Mr. *Selden* (as is before obſerved) acknowledgeth this Right of ſimple Permiſſion. See his Treatiſe *De Jure Nat. & Gent. ſecundum Hebræos*, *Lib*. i. *Chap*. viii. And if we examine what our Author ſays hereupon in the Beginning of §. 22. we ſhall find, that he can't forbear owning a Right of ſimple Permiſſion. See *Lib*. i. *Chap*. vi. §. 15. *Note* 2.

CHAP. IV.

Of the Duties and Performances of Man towards himſelf; as well in Regard to the Improvement of his Mind, as to the Care of his Body and of his Life.

The Contents.

i. *Every Man is to take Care of himſelf.*
ii. *In what that Care conſiſts.*
iii. *The Mind is to be inſtructed in Religion.*
iv. *And all corrupt Opinions to be rooted out of it.*
v. *The Knowledge of a Man's ſelf is neceſſary.*
vi. *A Man ſhould know his Soul and its Offices.*
vii. *And how great its Abilities are.*
viii. *Nothing above its Abilities may be attempted.*
ix. *How much we are to labour after Fame:*
x. *And how much after Riches:*
xi. *And about Pleaſures.*
xii. *Our Paſſions are to be governed by Reaſon.*
xiii. *Of our Study for Learning.*
xiv. *Of the Care of the Body.*
xv. *Of the Uſe of Life.*
xvi. *What Obligations we are under to preſerve Life.*
xvii. *How far our Life is to be imployed in the Service of others.*
xviii. *Whether it is to be endangered for them.*
xix. *Whether Self-Murder is lawful.*

ALtho' this be a Quality common to [1] Man, with other Animals, that he is concern'd for his own Preſervation, and is naturally glad to be in as good a Condition as poſſible; yet that

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Mr. Barb. *NOTES on Chap.* iv.

§. 1. [1] This Objection ought firſt to have been anſwered, before our Author had entred upon this Subject, *viz*. How a Man can be under any Obligation to himſelf? Our Author meddles not with it till he comes to §. 16. where ſee *Note* 2. This Neglect proceeded from hence, that the fifteen firſt Paragraphs were not in the firſt Edition, but being added in the ſecond, the Objection became ſo far poſtponed.

his [2] Care of himſelf ought to be of a much more refin'd, and of a much nobler Strain, than what we can ſuppoſe in brute Creatures, there is good Reaſon to conclude: Not only becauſe he hath receiv'd more Endowments than they, and ſuch as are more capable of fruitful Culture and of uſeful Improvement; but farther, becauſe he cannot perform the Duties to which he ſtands oblig'd, unleſs he brighten and quicken his Faculties by good Exerciſe, and make them more vigorous and more ready, in the Production of worthy Actions. Beſides, the Labour which a Man ſpends on his own Improvement, is not terminated in himſelf; but ſpreads abroad its Fruit to the Benefit of all Mankind; and the better any Perſon approves himſelf in the Management of his own Gifts and Abilities, he is juſtly eſteem'd the more excellent Citizen of the World, and the more generous Benefactor to his Fellows. Wherefore Man, in his Endeavours to fulfil the Laws of Society, to which he is by his Creator directed and deſigned, hath good Reaſon to imploy his firſt Pains and Study on himſelf; ſince he will be able to diſcharge his Duty towards others with ſo much more Eaſe and Succeſs, the more diligent he hath been in advancing his own Perfection. Whereas he who is unuſeful to himſelf, and idle in his proper Concerns, can give other Men but little Reaſon to expect Advantage from his Pains.

There is ſcarce more Neceſſity for our engaging in this Care, than there is Solicitude and Difficulty in the Proſecution of it. For, in the firſt Place, Men are born in an entire Ignorance of Things, and their Minds whilſt yet tender, may be eaſily ſo far defiled and tainted with vile Opinions, that it will afterwards be no eaſy Labour to waſh off the Stains. Beſides, we bring hereditary and inbred Corruptions with us into the World, which draw us all, more or leſs, out of the ſtraight Path of Reaſon; and unleſs we bridle and reſtrain them, pour out a Flood of foul and unworthy Actions, thro' the Courſe of our whole Lives. And it may, perhaps, quicken our Induſtry, to conſider that we have but one Time allow'd us to act our Part in, and cannot hope for a ſecond Entrance on the Stage, to amend the Faults of our firſt Performance. For that old Complaint in *Euripides* will ever be as vain and ineffectual as when it was firſt made [3]:

Me miſerable! that Men ſhould be deny'd
The Gift of ſpringing to a ſecond Youth,
A double Age! The Structures which we raiſe
If found defective, later Cares reform,
New modell'd: But our own unhappy Frame
Stands without Change, and falls without Repair!

O! might we turn our Steps, and tread again
The Path of Life, what Slips we once had made
We would correct, and every cheating Maze
Avoid, where Folly loſt our Way before.

Now ſince Man conſiſts of two Parts, a [4] *Soul* and a *Body*, whereof the former is the great Principle and Spring of human Actions, the latter ſupplying the Place of a ſubordinate Inſtrument, the Care and Improvement of the firſt and nobleſt Part, may juſtly challenge the Precedence in our Endeavours [5].

II. [1] The Culture of the Mind, which all Men are oblig'd to undertake, and which is abſolutely neceſſary for the Performance of human Duty, conſiſts chiefly in theſe Particulars; that we obtain true Opinions concerning all ſuch Things as our Duty bears any Reference to, that we ſet a right Judgment and Price on thoſe Objects which commonly excite our Appetites, and that we temper and regulate our Paſſions by the Direction of ſound Reaſon [2].

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[2] Our Author here puts the Care of preſerving a Man's ſelf, before that of perfecting himſelf, which is indeed the more natural Order; for beſides that the Idea of Preſervation is a Thing more ſingle than that of Perfection, our Being certainly pre-exiſts our Well-being; and in vain a Man thinks of perfecting himſelf, if he has not before taken all the Care he can of preſerving himſelf. But if the Author expreſſes himſelf well in this firſt Period, 'tis by meer Chance, for he forgets himſelf the next Moment, and takes a clear contrary Method in this Chapter; for all he ſays in this, and the thirteen following Paragraphs, concerns only, the Care of perfecting a Man's ſelf; and he begins not till the fifteenth to ſpeak of his Life and the Preſervation of it. Further, we muſt obſerve, that according to the Principles I have above laid down to rectify our Author's Notions (*Chap.* iii. §. 15. *Note* 5.) the Duties of Man to himſelf directly and immediately flow from Self-love, which obliges him both to preſerve himſelf, and put himſelf into as good a Condition as poſſible to attain all the Happineſs that he is capable of. *Montagne*'s Words may be pertinent here. "The principal Office (ſays he) which we have here, is for every one to govern himſelf. 'Tis the chief End of our Being here. He that forgets to live well and piouſly, and thinks to diſcharge his Duty by ordering and managing others, is a Fool. He that is careleſs of his own Health and chearful Converſation, to ſerve others, takes, in my Opinion, an ill and unnatural Courſe." *Eſſays, Lib.* iii. *Chap.* x. *p.* 748. But we muſt always ſuppoſe, that Self-love muſt be managed according to every one's Condition, and without any Prejudice to Religion or Society. See the general Rules which I have laid down in the Note above quoted.

[3] *Euripid.* Supplic. 1080. & *ſeqq.* Οἴ μοι. τί δὴ βροτοῖσιν οὐκ ἔστιν τόδε
Νέους δὶς εἶναι, καὶ γέροντας αὖ πάλιν;
Ἀλλ' ἐν δόμοις μὲν ἤν τι μὴ καλῶς ἔχῃ,
Γνώμαισιν ὑστέραισιν ἐξορθούμεθα.
Αἰῶνα δ' οὐκ ἔξεστιν, εἰ δ' ἦμεν νέοι
Δὶς καὶ γέροντες, εἴ τις ἐξαμάρτανεν,
Διπλοῦ βίου λαχόντες, ἐξορθούμεθ' ἄν.

See *Gataker* upon *Marcus Antoninus*, *Lib.* ii. §. 5. *p.* 60. Edit. *Londin.* 1652.

[4] So *Saluſt* ſpeaks, *Sed omnis noſtra vis in animo & corpore ſita eſt. Animi imperio, corpooris ſervitio magis utimur*; *alterum nobis cum Diis, alterum cum belluis commune eſt.* De Bel. Catilin. Chap. i.

[5] Thus *Plato* judiciouſly reflects to the ſame Senſe, Καὶ μὴν τοῦτο δὲ [ὡμολόγηται] ὅτι ψυχῆς ἐπιμελητέον, καὶ εἰς τοῦτο βλεπτέον —— Σωμάτων δὲ καὶ χρημάτων τὴν ἐπιμέλειαν ἑτέροις παραδοτέον, i. e. *We muſt all confeſs, that the Soul is to be chiefly taken Care of, and above all Things to be looked after. The Care of our Bodies and Eſtates we may commit to others.* In Alcib. i. *p.* 448. See alſo his Book *De Legib. Lib.* v. in the Beginning; and *Cicero De fin. Lib.* v. *Chap.* xii, xiii.

§. II. [1] This Paragraph and the following afford an Example of the Corrections and Additions which I have made of the Lemma's in the Margin, to fit them to the Subject treated on. The Author ſhews in what this Care conſiſts, as if he were ſpeaking in general of the Care a Man ought to take of himſelf, whereas this Paragrph treats only of the Care of the Soul in Oppoſition to that of the Body. In the following Paragraph he diſtinguiſhes, and explains more diſtinctly the different Duties, which make the Parts of the general Duty.

III. Amongſt the Opinions then which it highly concerns all Men to ſettle and to embrace, the Chief are thoſe which relate to Almighty GOD, as the great Creator and Governor of the Univerſe. That there is really exiſting a ſupreme Being, from whom all other Things derive their Original, and the Principle of their Motion; not as from a dull and ſenſeleſs Power (as the Weight, for Example, in a Clock) but as from a Cauſe endu'd with Underſtanding and with Freedom of Choice. That this eternal Being exerciſes a Sovereignty not only over the whole World, or over Mankind in general, but over every individual human Perſon: Whoſe Knowledge nothing can eſcape: Who, by Virtue of his imperial Right, hath enjoin'd Men ſuch certain Duties by *natural Law*, the Obſervance of which will meet with his Approbation, the Breach or the Neglect, with his Diſpleaſure: And that he will for this Purpoſe require an exact Account from every Man, of his Proceedings, without Corruption and without Partiality [1].

Now as the main Parts [2] of human Duty turn on this Belief, ſo is it the only Foundation of that ſweet Tranquillity and Acquieſcence of Mind, which Men inwardly enjoy, and [3] the very Fence and Bulwark of all that Probity which we are to exerciſe towards our Neighbours; without which no Man can ſeriouſly and heartily do a good Action himſelf, or give ſufficient Caution and Security of his honeſt Intentions to others [2]. And although it appears from the Ordinances of the Chriſtian Religion, that GOD is not ſo far pleas'd with every Kind of Worſhip which Men pay him, as to embrace them with peculiar Favour, and to give them a Title to eternal Life, which good Effects do follow only that Inſtitution and Way of Service which he hath reveal'd in a ſingular Manner to the World: Yet a ſerious Perſuaſion concerning the divine Exiſtence and Providence, under whatever particular Apprehenſions, or particular Worſhip, hath however thus much of Force and Efficacy, as to render Men more obſervant [4] of their Duty. To prove this Aſſertion we need only conſider, that there have been of old,

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[2] *Seneca* hath a fine Paſſage to this Purpoſe, which begins thus, *Epiſt.* lxvi. Edit. *Gronov. Animus intuens vera, peritus fugiendorum ac petendorum, non ex opinione, ſed ex natura pretia rebus imponens* —— —— *pulcherrimus, ordinatiſſimus, cum decore, cum viribus ſanus & ſiccus, imperturbatus, &c. i. e.* " The Mind looks into the Truth, is ſkilful in knowing what is to be a" voided and deſired; ſets a Price on Things, not according to the common Opinion, but according to its Nature—— " is moſt beautiful, orderly, graceful, and tho' of great Force, yet is ſound, uncorrupted, and undiſturb'd, *&c.*

§. III. [1] *Primus eſt Deorum cultus* (ſays *Seneca*) *Deos credere, deinde reddere illis majeſtatem ſuam, reddere bonitatem, ſine qua nulla majeſtas eſt. Scire illos eſſe, qui præſident mundo, qui univerſa vi ſuâ temperant, qui humani generis tutelam gerunt, interdum curioſi ſingulorum. Hi nec dant malum, nec habent; cæterum caſtigant quoſdam, & coercent, & irrogant pœnas, & aliquando ſpecie boni puniunt. Vis Deos propitiare? bonus eſto. Satis illos coluit, quiſquis imitatus eſt.* Epiſt. xcv. *i. e.* " The Worſhip of " God conſiſts, firſt of all in believing that they are, and then in acknowledging their Sovereignty and Goodneſs, without " which there can be no real Greatneſs. We muſt alſo be throughly perſuaded, that they govern the World, and by their " Power order and diſpoſe all Things, who take Care of Mankind in general, and ſometimes concern themſelves in pri" vate Affairs. They neither are evil, nor do any, yet they correct ſome Perſons to reſtrain their Malice, yea, and ſome" times puniſh them whom they ſeem to favour. Would you have them propitious and kind to you? Be good. They " honour them moſt, who imitate them." See *Cicero De Legibus, Lib.* ii. *Chap.* vii. and *Epictet. Enchirid. Chap.* xxxviii.

[2] Our Author, in his *Abridgment of the Duties of a Man and Citizen, Lib.* i. *Chap.* iv. hath given us a Syſtem of natural Religion; *i. e.* the Duties of Man to GOD; which, becauſe I have ſaid, *Chap.* iii. §. 15. *Note* 5. ought not to be excluded our Knowledge of the Law of Nature, I ſhall here give an Extract of what he there ſays, which is, Theſe Duties, ſo far as they can be diſcovered by the Light of Reaſon only, may be referred in general, to ſuch as concern, 1. The Knowledge, and, 2. The Worſhip of GOD. So that the Syſtem of natural Religion comprizes Propoſitions, 1. Speculative, and, 2. Practical. The ſpeculative Propoſitions are, I. That we muſt believe, 1. That there is a GOD. See §. 20. of the foregoing Chapter. 2. That this GOD created the World. See his *Abridgment of the Duties of a Man and Citizen, Lib.* i. *Chap.* 4. §. 3. 3. That he governs all Things by his wiſe Providence, which takes particular Care of all Mankind. And indeed it is the ſame in reſpect to Morality, to deny the Exiſtence of GOD, as his Providence, as the Pagans themſelves did acknowledge. See the Paſſages quoted *Chap.* vi. *Lib.* i. §. 11. *Note* 3. 4. That nothing can be attributed to GOD that implies the leaſt Imperfection. For, ſince he is the firſt Cauſe of all Things, he can't be ſuppoſed, without a manifeſt Abſurdity, to have any Imperfection, nor want any of thoſe Perfections, of which we, who are his Creatures, can form to ourſelves any Notion. See the *Abridgment* above mentioned, §. 5. and what is ſaid in the next Paragraph of this Chapter. The practical Propoſitions of natural Religion contain all the Parts of, II. Divine Worſhip; which is either outward or inward. The inward conſiſts in the *Honour* that is given to GOD. Now Honour being nothing elſe but the Opinion which we have of the Power or Goodneſs of any Thing, we honour GOD, when with regard to his infinite Power and Goodneſs, we conceive of him all the Sentiments of Reſpect and Reverence we are capable of. From whence it follows, that we muſt love him, as the Fountain and Author of all good Things, hope in him, as the Being upon whom all our Happineſs depends, both now and for ever; ſubmit entirely to his Will, having a Perſuaſion that he will do all Things for our Good, and that he knows better than ourſelves what is convenient for us; to fear him, as a Being of infinite Power, by which he is able to inflict the moſt terrible Evils upon thoſe that offend him; laſtly, to obey him in all Things with the moſt profound Submiſſion, as our Creator, and Lord, Almighty, and of all Goodneſs. Outward Worſhip conſiſts principally in the following Duties. 1. We muſt give GOD Thanks for all the good Things we receive from him. 2. We muſt, as far as in us lies, regulate our Actions according to his Will, *i. e.* actually obey him, ſo far as Ignorance and human Frailty will permit. 3. We muſt admire and celebrate his Greatneſs. 4. We muſt addreſs ourſelves to him by Prayer, to obtain all the Bleſſings we ſtand in need of, and to deliver us from all the Evils which threaten us. Indeed, Prayer is a Sign of our Hope and Confidence, and Hope implies a ſpecial, though tacit Dependence upon the Goodneſs and Power of him in whom we truſt. 5. When we are obliged to take an Oath, we ought to ſwear by the Name of GOD, and afterwards obſerve religiouſly what we have engaged ourſelves to, by taking GOD to Witneſs, as his infinite Knowledge and Power does require. 6. We ſhould never ſpeak of GOD, but with the greateſt Care and Circumſpection, for it is a Sign of Fear, and that is a tacit Regard to the Power of him whom we fear. From hence it follows, that we muſt not uſe the Name of GOD lightly and without Neceſſity in our common Diſcourſe, for this ſhews want of Circumſpection; that we ſhould never take an Oath, but upon Neceſſity; that we ſhould never curiouſly and nicely ſearch into the Nature of GOD, and the Acts of his Providence; for that were to confine the divine Nature within the narrow Bounds of our own feeble Reaſon. 7. Whatever we do in relation to GOD, ought to be moſt excellent in its Kind, and proper to ſhew our moſt profound Reſpect to him. 8. That we muſt honour him, and ſerve him, not only in private, but publick, and in the Sight of Men. For what a Man does only in private, looks as if he were aſhamed to do it. Whereas publick Worſhip is a Teſtimony, not only of our Zeal, but is alſo an Example to others, and often induces them to join in the ſame Actions. 9., And laſtly, We muſt apply ourſelves as cloſe as poſſible to the Practice of ſuch Duties as the natural Law preſcribes, both in reſpect to ourſelves and others; which ſome call an *indirect Worſhip*. Indeed, as the Contempt of GOD's Commands is the greateſt Affront we can offer to him, ſo, on the contrary, there is no Sacrifice ſo agreeable to him as Obedience to his Laws. Now the Law of Nature is a divine Law, as we have before proved. This is what our Author has delivered in ſhort. I might alledge ſeveral Paſſages of Heathen Authors to this Purpoſe, but this Note is already too long: Nevertheleſs we will add what Mr. *Thomaſius* (*Inſtit. Juriſp. Divin. Lib.* ii. *Chap.* i. §. 11, *&c.*) has ſaid, *viz.* That the Law of Nature indiſpenſibly requires a direct outward Worſhip, ſo far as is neceſſary to ſhew that we do not contemn the Deity, and not ſo far as it conſiſts in giving a poſitive Honour to the Deity, by ſome exterior Acts, the Omiſſion of which is no Sign of Contempt to him. This able Lawyer grounds this Aſſertion upon this, That GOD has no need of our Service, and that as he is the Searcher of Hearts, the inward Worſhip, without which all outward Acts of Piety are of no Worth, is ſufficient to diſcharge us of the Obligation we owe to the ſupreme Being, on whom we depend. As to what concerns other Men, Mr. *Thomaſius* ſays, That the Omiſſion of the outward Worſhip does not hurt either human Society in general, nor civil Society in particular, provided there be an inward Worſhip paid. But it does not from thence follow, in my Opinion, that there is no Neceſſity of worſhipping GOD outwardly, and that this Neceſſity is not ſufficiently known by the Light of Reaſon; for how can we conceive that there is a true Piety contain'd in the Heart, unleſs it ſhew itſelf by ſome outward Acts of Religion? Men are made in ſuch a Manner, that they do not think that they ſhew a ſufficient Reſpect one to another, if they do not give ſome

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Proofs of it by Word of Mouth, or ſome ſignificant Action, ſeeing they can no ways be aſſured of the Sincerity of each others Intention. But if the inward Worſhip of GOD is neceſſary for the Welfare of Society, as Mr. *Thomaſius* ſuppoſes it, I can't ſee how ſuch a purely ſpiritual Religion can be of any great Uſe; unleſs we will ſuppoſe that all Men are equally capable of knowing their Duty to GOD, and as careful to practiſe it, ſo that none need to be inſtructed or exhorted by others. Meer Talk is not ſufficient for the ignorant and common People, which are the greateſt Part of Mankind; there muſt be ſomething that will affect their Senſes, and rouze their Attention, without which they'll forget the Being of a GOD. So that though I might enlarge upon the Obligation to outward Worſhip, of which we ſhall ſpeak more afterward, *Chap.* vi. §. 2. we muſt grant, 'tis abſolutely neceſſary. And though Mr. *Thomaſius* declares that he was always of that Opinion, yet I ſee him owning, in his *Fundament. Jur. Nat. &c p.* 150. that outward Worſhip is neceſſary for the Regulation of Honeſty and good Order, which, as he explains theſe Terms in the general Reformation of his Syſtem, lay an Obligation, if not ſo binding, yet at leaſt as true and indiſpenſible, in my Judgment, as that he calls juſt.

[2] *Grotius in Lib. Sapientiæ*, Chap. xiii. ℣. 1. *How high ſoever ſome People talk about Honeſty's being deſirable meerly on its own Account; yet ſo great is the Force of theſe outward viſible Things upon our Mind, that without a full Perſuaſion of the divine Providence and Retribution, and without ſome Syſtem of Law to guide Men in the true Way of Acting, it is impoſſible but that they ſhould wander into moſt grievous and fatal Dangers. For, as human Reaſon is looſe and giddy, when the Paſſions have overcome the Judgment, and the Manners are ſuited to the Paſſions, it eaſily finds out a Colour and Diſguiſe for Sin, and ſo long obſtinately refuſeth to hear, till it grows quite deaf. Therefore the wiſe Man pronounceth thoſe to be miſerably vain, who are ſo far from having a careful Regard to the Knowledge of* GOD *and of his Providence, as to let thoſe great Points depend on every Man's Fancy and Choice: Than which nothing can be contriv'd more deſtructive, I do not ſay to good Manners, but to Government and Society.*

[3] *Boethius* de Conſolat. Philoſoph. in fin. *Magna vobis eſt, ſi diſſimulare non vultis, neceſſitas indicta probitatis, cum ante oculos agitis judicis cuncta cernentis, i. e.* "Your living under the Eyes of an All-ſeeing Judge, lays a kind of a Neceſſity "upon you to be good and virtuous."

[4] *Lucian De Imaginib.* Ὡς ὅσοι τὸ θεῖον μὴ ἐν παρέργῳ σέβουσιν, οὗτοι καὶ τὰ πρὸς ἀνθρώπους ἄριστοι ἂν εἶεν, *i. e.* "Thoſe who "are moſt ſtrict and conſcientious in their Duty to GOD, are the moſt honeſt and regular in their Dealings with Men." It is certain that religious Motives are of great Force to wean Men from Vice, and engage them to Virtue, however confuſed and imperfect Mens Notions of the Deity are. This may appear ſomething difficult to conceive in reſpect of the Heathens, but we have ſome Proofs of Fact. I don't ſpeak of Philoſophers, who had more clear Notions of Religion than the Vulgar, although they dared not deliver them openly. Mr. *Selden* (in his Treatiſe *De Jure Nat. & Gent. ſecundum Hebræos, Lib.* i. *Chap.* viii.) has collected ſeveral Authorities to make it evident, that moſt of them looked upon the Laws of Nature as derived from GOD, who will puniſh the Tranſgreſſion of them, and reward their Practice. And 'twould be no hard Thing to add to them many other Paſſages. Nay, the very People, notwithſtanding the prodigious Superſtition into which they were plunged, yet preſerved ſome Tincture of this important Principle, either by reaſon of that natural Relation there is between the Ideas of GOD and Sanctity, which hindered ſuch Men as had not wholly given themſelves up to Vice, from attending to the Conſequences of the received Opinions, or becauſe there remained ſome Footſteps of the antient Tradition of the only true GOD, the Creator of the World, and the Author and Protector of human Society. This ſeems plainly to ariſe from the common Opinion amongſt moſt of the Heathens concerning the Rewards and Puniſhments of another Life. (See what our Author has ſaid, *Chap.* iii. §. 20.) We may alſo find ſome expreſs Words relating to this Matter in the Poets, who, as every one knows, accommodated themſelves to the common Opinions. *Selden* has alledged many in the Place above quoted; we ſhall produce ſome others, *viz.* in the *Oedipus* of *Sophocles, Act.* iii. the Chorus ſaith,

Εἴ μοι ξυνείη φέροντι μοῖρα τὰν
Εὔσεπτον ἁγνείαν λόγων
Ἔργων τε πάντων, ὧν νόμοι πρόκεινται
Ὑψίποδες, οὐρανίαν δι' αἰθέρα
Τεκνωθέντες· ὧν Ὄλυμπος
Πατὴρ μόνος, οὐδέ νιν θνατὰ
Φύσις ἀνέρων ἔτικτεν, οὐδὲ
Μήν ποτε λάθα κατακοιμάσει.
Μέγας ἐν τούτοις Θεὸς,
Οὐδὲ γηράσκει.

Let th' Gods be ſo propitious to me
As I preſerve my ſelf in Sanctity
In Words, and Deeds, by th' Laws unto us given
Not by poor Mortals, but the GOD of Heaven.
Which Laws no Mortal can aboliſh quite
For GOD's in them, and by his Pow'r and Might
Will triumph over all that is not right,
For he can ne'er grow old———

See alſo the *Antigone* of the ſame Poet, ℣. 455. *Euripides* in his *Jon.* ℣. 440, &c. and a Paſſage in *Heſiod*, which our Author hath quoted in the foregoing Chapter, §. 2. *Note* 3. to which we may add ℣. 321, &c. in the Work of this laſt Poet. I will conclude with *Cicero*, who was not leſs ſuperſtitious (*De Legib. Lib.* ii. *Chap.* vii.) *Utiles autem eſſe opiniones has, quis neget, cum intelligat, quàm multa firmentur jurejurando, quantæ ſalutis ſint fœderum religiones? quàm multos divini ſupplicii metus à ſcelere revocarit? quamque ſancta ſit ſocietas civium inter ipſos, diis immortalibus interpoſitis tum judicibus, tum teſtibus? i. e.* "Who can deny the Uſefulneſs of theſe Opinions [*viz.* of the Gods and Providence] when he conſiders, how many "Things are confirmed by Oaths? How much the Security of Leagues and Alliances depend on Religion? How many the Fears of divine Vengeance keeps from Wickedneſs? And how careful Citizens are to diſcharge their Duties "to each other, becauſe they believe the immortal Gods are not only the Witneſſes, but will be Judges of their "Actions?" See what I have ſaid, *Lib.* i. *Chap.* vi. §. 12. *Note* 7. and *Lib.* ii. *Chap.* iii. §. 19. *Note* 2.

I ſpake in this laſt Note ſomething touching a Compariſon between a Society of Atheiſts, and another, of ſuch as have ſome Notion of a God, though imperfect and incoherent; but ſince that Note was compoſed and printed, Mr. *Bayle* hath put out (in 1704) a Continuation of diverſe Meditations upon Comets, where he ſpeaks ſomething that may ſerve to ſtrengthen and explain my Aſſertion; but I ſhall firſt begin with what Mr. *Le Clerc* has ſaid upon this Subject, in his *Biblioth. Choiſie, Tom.* v. *p.* 302, 303. in Anſwer to this Queſtion, Whether Atheiſm is to be preferr'd to Pagan Idolatry? To which he ſays, "We muſt, in my Opinion, diſtinguiſh firſt of the Societies, conſider their Opinions abſtractly, and then on the "one Side deſcribe Atheiſm, and on the other Idolatry. 'Tis poſſible we may find one ſort of Idolatry better than Atheiſm, "and another worſe; and ſo I can neither ſay Yea nor Nay to Mr. *Bayle*'s general Queſtion. In the ſecond Place, when we "come to conſider, not only the Opinions in general, but the Societies in themſelves, which profeſs the Pagan Idolatry or "Atheiſm, we muſt make alſo ſome curious Diſtinctions, and divide the Queſtion into ſeveral Propoſitions, according to old, and ſtill are, Men profeſſing Religions which we muſt own to be deſtructive to Salvation, as ſuppoſe *Mahometans*, or *Pagans*; who nevertheleſs by Virtue of their Perſuaſion of God's Providence, have ſhewn no inconſiderable Care and Concern for Honeſty and Juſtice; ſo as not to be outdone by many Chriſtians, at leaſt as to external Performances. Nay, there are not wanting Perſons, who from the Experience of long Travels, pretend to affirm, that Chriſtianity hath not been able to alter the common Diſpoſitions of ſome Nations towards particular Vices; and that 'tis not eaſy to diſcover the Truth of that holy Religion, from the Manners and the Practices of thoſe who profeſs it. Though I ſhould imagine the Reaſon of that Unhappineſs to be chiefly this, becauſe the Chriſtian

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the different Caſes which are put, and to which we muſt anſwer negatively or affirmatively, according to their Nature." Mr. *Le Clerc* gives us an Example in the ſame Volume, ſpeaking of the Hiſtory of the *Yncas*, written by *Garcilaſſo de la Vega, pag.* 380, 381. Theſe are his Words, "If what *Garcilaſſo de la Vega* ſays of the Opinions, Laws, and Manners of the Subjects of the *Yncas*, be true, there is no Idolatrous Nation in the World, not excepting the moſt polite and learned, where there are ſuch good Laws, or ſo well obſerved. Their Religion, which chiefly conſiſts in worſhipping the Sun, whom they believe to be the Father of the *Yncas*, not with human Sacrifices, as they do in the other Parts of *America*, but with Beaſts and other Things, is the leaſt corrupted of any among the Idolaters. Beſides the Sun, they hold there is another Deity, which they call *Pacha-camac*, a Word that ſignifies, in their Language, *The Soul of the World*. They ſpeak of this God as a Being inviſible, whoſe Nature is incomprehenſible, and who created the Sun and the Stars. They believe the Immortality of the Soul, and have ſome confuſed Notion of a Reſurrection. Suppoſing that all this that *Gar. de la Vega* ſays is true, we may ſay, that ſuch an idolatrous Society as this, is incomparably better than a Society of Atheiſts, and, in ſome Reſpects, may be preferred to ſome Societies, that otherwiſe have better Principles." Tho' this Queſtion in itſelf be not very important, becauſe a Society of meer Atheiſts is a Thing no where to be found, at leaſt, not in any Country; yet I doubt not, but many Perſons wiſhed that Mr. *Le Clerc* had deſcended to more Particulars.

I ſuppoſed in my Note, to which this is only a Supplement, that I did not intend to ſpeak of the Opinions of the Atheiſts or Idolaters, conſidered in themſelves and abſtractly, but only of the Effects they are able to produce in reſpect to Societies. I ſuppoſed alſo, that in the Parallel between a Society of Idolaters and Atheiſts, we might conceive an Idolatry which did not deſtroy the principal Fundamentals of Religion, *i. e.* the Eſſence and Providence of ſome Deity. For it is certain, that Faith in the Exiſtence of a God, without Faith in his Providence, is at the Bottom indirect Atheiſm, as to Morality. Upon which Foot I think, that all Things being otherwiſe equal, a Society of Atheiſts, *i. e.* a People compoſed of Men learned and unlearned, Perſons of all Orders and Conditions, bearing that Character; ſuch a Society, I ſay, will be more corrupt than another which preſerves the fundamental Principles of Religion, though mixt with Errors, and Things inconſiſtent with the Truth. And ſince in this Queſtion we have chiefly an Eye to the antient Heathens, let us ſuppoſe, for Example, that the Commonwealth of *Greece*, or ſome *Roman* Province, were on a ſudden turned Atheiſts, and no Man had any Senſe of Religion; I ſay, that after ſuch a Change, that Commonwealth or Province could not keep up any tolerable Order in Civil Society, but there would be among them many more Diſorders than were before. And my Reaſons are theſe, Among the Heathen, the People were not ignorant of the Agreement there is between Religion and the Laws of Nature. The Poets, who principally dealt with the People, have delivered many Things (as Mr. *Le Clerc*, in his *Bibliotheq. Choiſie, Tom.* iii. ſhews) that prove the true Notion of God was not quite blotted out of their Minds. For Example, the moſt antient of them, *Homer* and *Heſiod*, ſpeak thus of the Gods, That they are *Almighty, Immortal, Good, Omniſcient, Wiſe, Happy, Lovers of Virtue*, and *Enemies of Vice*, &c. Moreover, the Unity of the Godhead itſelf was not altogether unknown to the Poets, although Mr. *Bayle* ſeems to think that all the Heathens were ignorant of that Truth. Nothing can prove this better and more fully, than theſe Verſes of *Sophocles*, in a Tragedy now loſt, but preſerved to us in *Grotius*'s *Excerpta, pag.* 149.

Εἷς ταῖς ἀληθείαισιν, εἷς ἐστὶν θεὸς,	In Truth there is no more Gods but one,
Ὃς οὐρανόν τ' ἔτευξε, καὶ γαῖαν μακρὰν,	Who made the Heaven, far extended Earth,
Πόντου τε χάροπον οἶδμα, κἀνέμων βίας·	The blue ſwelling Sea, and fierce Winds.
Θνητοὶ δὲ πολλοὶ καρδίαν πλανώμενοι	Yet many Men being groſly deceived,
Ἱδρυσάμεσθα πημάτων παραψυχὰς,	Have erected, to comfort themſelves in Trouble,
Θεῶν ἀγάλματ' ἐκ λίθων, ἢ χαλκέων,	Images of the Gods, of Gold, and Stone, and Braſs;
Ἢ χρυσοτεύκτων, ἢ 'λεφαντίνων τύπους	And offer Sacrifices to them in their Aſſemblies,
Θυσίας τε τούτοις, καὶ καλὰς πανηγύρεις	And think that they are religious.
Τεύχοντες, οὕτως εὐσεβεῖν νομίζομεν.	

Several other Paſſages, beſides, what are alledged above, might be produced, to prove that the Practice of Virtue was well-pleaſing to the Gods; on the contrary, Vice odious, notwithſtanding the Crimes attributed to them in their Fables. Mr. *Bayle*, in the *Continuation of diverſe Meditations, pag.* 654.) ſays, "That ſingle Theft, for Example, and Lying, were not contrary to the Ordinances which their Gods had expreſly delivered, and ſo they believed that their Gods did not regard them." I own, that Prieſts ſpake very little of Morality to the People, but this hinders not but that the principal Duties of the Law of Nature were known among the People, who looked upon them as Laws to which the Gods required their Obſervation, although their Notions of them were very obſcure, and corrupted by ill Cuſtoms. This is what the Poets always ſuppoſed, who contributed more to their entertaining the Notions of Virtue and Vice, than the Prieſts, who, as wicked as they were, durſt not openly contradict them. We find in *Euripides* this fine Sentence, which he makes a Woman to ſpeak, and ſay, *That the Gods abhorred all Oppreſſion, Extortion, and every unjuſt Way of enriching ourſelves.* The ſame Poet alſo ſays, that every Crime is A GREAT IMPIETY, as well as a great Folly, in theſe Words,

Τὸ δ' αὖ κακουργεῖν ἀσέβεια μεγάλη,
Κακοφρόνων τ' ἀνδρῶν παράνοια. *Oreſt.* ℣. 821, 822. Ed. *Cant.*

See *Heſiod. Oper. & Dier.* ℣. 180, *&c.* 219, *&c.* and 238, 239. Ed. *Cler.* and Mr. Baron *Spanhemius*'s Comment on *Callimachus, Hymn. in Jovem.* ℣. 3. and in *Cerer.* ℣. 19. Many more ſuch Paſſages might be collected out of the Poets; but there is a remarkable Place in *Plato* that may not be paſſed over. That Philoſopher, treating of *Inceſt*, ſays, That it was looked upon with ſuch Horror, that Men of no Honeſty, yea, and the common People, would not entertain ſuch wicked Deſires, for a Siſter (for Example) though ſhe were never ſo fair. And that which extinguiſhed thoſe impure Thoughts was this, That Inceſt PASSED FOR AN UNLAWFUL AND ABOMINABLE ACT WITH THE DEITY. *No Body*, ſays he, *contradicts it, every one knows this from his Cradle, and all the World keeps to it in both jocular and ſerious Diſcourſes.* The Stage repreſents *Thyeſtes*'s, *Oedipus*'s and *Macareus*'s, who ſlew themſelves for the inceſtuous Commerce which they had with their Siſters. His Words are, Σμικρὸν ῥῆμα κατασβέννυσι πάσας τὰς τοιαύτας ἡδονάς — τὸ ταῦτα ΕΙΝΑΙ ΦΑΝΑΙ ΜΗΔΑΜΩΣ ΟΣΙΑ, ΘΕΟΜΙΣΗ ΔΕ, καὶ αἰσχρῶν αἴσχιστα. τὸ δ' αἴτιον ἆρ' οὐ τοῦτ' ἐστὶ, τὸ ΜΗΔΕΝΑ ΑΛΛΩΣ ΛΕΓΕΙΝ ΑΥΤΑ, ἀλλ' εὐθὺς γενόμενον ἡμῶν ἕκαστον, ἀκούειν τε λεγόντων ἀεὶ καὶ πανταχοῦ ταῦτα, ἐν γελοίοις τε ἅμα, ἐν πάσῃ τε σπουδῇ τραγικῇ λεγομένῃ πολλάκις, ὅταν ἢ Θυέστας, ἤ τινας Οἰδίποδας εἰσάγωσιν, ἢ Μακαρέας τινὰς ἀδελφαῖς μιχθέντας λαθραίως, ὀφθέντας δὲ, ἑτοίμως θάνατον ἑαυτοῖς ἐπιτιθέντας δίκην τῆς ἁμαρτίας. *De Legib. Lib.* viii. *p.* 838. Ed. *Steph.* So that it was a common Opinion, that even in this Life Crimes do not go unpuniſhed always, but whoever violates the Law of Nature, hath great Reaſon to fear the Effects of divine Vengeance. *Plautus* has a fine Paſſage to this Purpoſe, ſufficient to ſhew how great Impreſſion ſuch a Perſuaſion makes upon the Minds of the common People. *Arcturus*, one of the Conſtellations, is introduced, ſaying, That *Jupiter* the King of Gods and Men, had ſent him and other Conſtellations, *i. e.* inferior Deities which preſided

Chriſtian Doctrine and Worſhip, being received by moſt Men, not upon their own Choice and Judgment, but from the Cuſtom of the State in which they happen to be born, reſides rather in their Mouth than in their Heart; whence it comes to paſs, that ſo few are ſeriouſly inclin'd to reform

ſided over the Stars, he ſent them, I ſay, into all Parts; to be Witneſſes of the Actions, Manners, Piety and Fidelity of Men, and to ſee how every Man enriched himſelf. "We wrote down diſtinctly (ſays *Arcturus*) the Names of thoſe who "made uſe of falſe Witneſſes, to carry their unjuſt Cauſes, or who deny their Debts upon Oath before a Judge, and carried them to *Jupiter*, and by this he knows every Day who they are, that by their Crimes pull down his Judgments upon "their Heads. He knows them that are ready to take an Oath to get their Cauſe, and ſuch as get it unjuſtly by the Favour "of the Judges. He reviews their Cauſe, and judges it anew, condemning the Offender to ſo great a Puniſhment, that "the Gain they have made by it is inconſiderable. He hath the Names of good Men written in another Book. Theſe "wicked Men flatter themſelves, that they can appeaſe *Jupiter* with Offerings and Sacrifices, but they loſe both their Labour and Coſt, for he regards not any of the Prayers or Services of perjured Perſons. A good Man will be eaſily heard, "and obtain Favour of the Gods, but the Sinner cannot. This I advertiſe you of, O ye Virtuous, who live in Piety "and Integrity: Continue in them, that ye may receive the Benefit of your good Conduct." The Poet thus expreſſes himſelf,

Is nos per gentes alium alia diſparat,
Hominum qui facta, mores, pietatem & fidem
Noſcamus, ut quemque adjuvet opulentia:
Qui falſas lites falſis teſtimoniis
Petunt, quique in jure abjurant pecuniam:
Eorum referimus nomina exſcripta ad Jovem.
Cotidie ille ſcit, queis heic quærat malum,
Qui heic litem apiſci poſtulant perjurio,
Mali res falſas qui impetrant apud judicem:
Iterum ille eam rem judicatam judicat,
Majore mulctâ mulctat, quam litem auferunt.
Bonos in aliis tabulis exſcriptos habet.
Atque hoc ſceleſti in animum inducunt ſuum,
Jovem ſe placare poſſe donis, hoſtiis:
Et operam & ſumptum perduunt: ideo fit, quia
Nihil ei acceptum eſt à perjuris ſupplicii.
Facilius, ſi qui pius eſt, à dis ſupplicans,
Quam qui ſceleſtus eſt, inveniet veniam ſibi.
Iccirco moneo vos ego hæc, qui eſtis boni,
Quique ætatem agitis cum pietate & cum fide,
Retinete porro, poſt factum ut lætemini.
Rudent. Proleg. ℣. 10, &c.

I do not know what Mr. *Bayle* thought, when reciting exactly what the Conſtellation aſſerted upon the *Roman* Theatre, he added thereupon, (*Reſp. ad Provincial. Tom.* iv. *p.* 320.) "This was not to teach Men, but only in this, that they ſhould not "offend the Deity perſonally in abuſing Oaths, which they have taken to bear Witneſs with the greateſt Formality, which "if they do, they need not fear his Anger." But, on the contrary, it is very evident, that the Poet ſpeaks of Honeſty and good Manners in general, without which all outward Acts of Religion are no ways acceptable to God; and if he mentions other Crimes joined with Perjury, it is only to give an Example of the moſt enormous Wickedneſs, and ſuch Circumſtances as aggravate the Heinouſneſs of it. Nor is Mr. *Bayle* more happy in Criticiſm than he is in Reaſoning, "So that "(adds he) common Lies, evil Speaking, Lewdneſs, Drunkenneſs, and an hundred other Diſorders may promiſe them"ſelves Impunity in Reſpect of the Gods." Be it ſo, yet it will be always true, that Religion will be of Force to keep Heathens from Fraud, Cheating, Double-dealing, &c. in which it has much the Advantage of Atheiſm; and we know that many Heathens were faithful in their Dealings, for fear of bringing down Vengeance upon them in this World, and, on the contrary, to obtain Succeſs of the Gods in their Affairs. As to the Rewards and Puniſhments of another Life, we know that an antient Tradition, which is much inculcated in the Writings of the Poets, made the Opinion common almoſt every where. But can we think that thoſe Puniſhments were only deſigned for them who neglected the outward Worſhip of God, or directly offended his Majeſty? Read the Deſcription of Hell written by *Virgil*, and you'll ſee that not only the *Titans*, *Giants*, *Salmoneus*, *Tityus*, *Ixion*, and *Pirithous*, are puniſhed, but Brethren that are Enemies, and they who beat their Father; thoſe who deceive their Clients and Dependants, hoard up their Riches, and will neither impart them to their Fathers nor Friends; thoſe who have been ſlain in the Act of Adultery; who have engaged in unjuſt Wars; ſuch as make no Conſcience of breaking their Promiſes made to their Maſters. Another cries out, as loud as he can, "Learn by my Ex"ample, to do Juſtice, and not to ſlight the Gods." Another hath ſold his Country, and betrayed it to a Tyrant. Another for Money has made Laws and abrogated them. Another has committed Inceſt with his own Daughter. "If I had, "adds *Sibyll*, an hundred Tongues, and as many Mouths, with a Voice that would never fail, it were impoſſible for me "to reckon up all the different Sorts of Crimes which are puniſhed in that Place, or the Names of all the different Sorts "of Puniſhments which the Wicked ſuffer." Theſe are his Words,

Hic, quibus inviſi fratres, dum vita manebat,
Pulſatuſve parens, & fraus innexa Clienti;
Aut qui divitiis ſoli incubuere repertis,
Nec partem poſuere ſuis, quâ maxima turba eſt;
Quique ob adulterium cæſi, quiq; arma ſecuti
Impia, nec veriti dominorum fallere dextras;
Incluſi pœnam exſpectant——————
——— *magna teſtatur voce per umbras:*
Diſcite juſtitiam moniti, & non temnere divos.
Vendidit hic auro patriam, dominumque potentem
Impoſuit, fixit leges pretio atque refixit.
Hic thalamum invaſit natæ vetitoſque hymenæos.

. . . .

Non mihi ſi linguæ centum ſint, oraque centum,
Ferrea vox, omnes ſcelerum comprendere formas,
Omnia pœnarum percurrere nomina poſſim. Æneid. Lib. vi. ℣. 608.

He, on the contrary, repreſents good Men in a Place by themſelves, *viz.* in the *Elyſian Fields*, enjoying the Happineſs of another Life, and being, as it were, under the Conduct of a wiſe *Cato*:

Secretoſque pios, his dantem jura Catonem. Æneid viii. ℣. 670.

There are, I own, many ridiculous Fables mixed with theſe Deſcriptions of the Gods, and another Life, and the blockiſh Multitude did apparently depend more upon the Chimera's of the Poets than on the Truths which they had interſperſed in their Works. But is it credible, that among the People themſelves, which comprehends the illiterate Part of Mankind in general, there ſhould be many who have acknowledged, at leaſt, in part, the Abuſe, and gave great Attention to the true Principles of natural Religion, tho' mixed with many Falſities? Theſe Notions eaſily enter into the Mind of any Man that will make uſe of the Light of Nature; and Men without Study are ſometimes better diſpoſed to receive the Truth, and leſs prejudiced, than ſuch as profeſs themſelves learned (See *Parrhaſiana*, *Tom.* ii. *p* 103, &c.) The Poets might here alſo ſhew the People the Way, and give them Occaſion to think that they did not themſelves believe the Abſurdities which they attributed to the Gods, as *Hercules*'s Words in *Euripides* may prove:

'Εγὼ δὲ τοὺς Θεοὺς οὔτε λέκτρ', ἃ μὴ θέμις,
Στέργειν νομίζω, δέσμα τ' ἐξάπτειν χεροῖν·
Οὔτ' ἠξίωσα πώποτ', οὔτε πείσομαι,
Οὐδ' ἄλλον ἄλλου δεσπότην πεφυκέναι.
Δεῖται γὰρ ὁ Θεὸς, εἴπερ ἐστ' ὄντως θεὸς,
Οὐδενὸς· ἀοιδῶν οἵδε δύστηνοι λόγοι.

I don't believe the Gods love unlawful Beds,
Or that they put one another in Fetters and Chains:
Nor can I perſuade my ſelf to believe
That one of them is Maſter of the other.
God, who is really ſuch, can ſtand in need
Of nothing. Theſe are the falſe Accounts of the Poets.

See alſo Mr. Baron *Spanhemius* upon *Callimachus*'s *Hymn. in Jovem*, ℣. 60. & *in Iphigenia Taurica* the Chorus thus ſpeaks, ℣. 385, &c. Ed. *Cambr.*

——'Εγὼ

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reform their Mind by its Direction. For I doubt not, but that at leaſt the external Acts even of

national Vices, might be repreſt, would Men but apply themſelves in earneſt to the leading a Life

——— ——— Ἐγὼ μὲν ἂν
Τὰ Ταντάλου θεοῖσιν ἑστιάματα,
Ἄπιστα κρίνω, παιδὸς ἡσθῆναι βορᾷ.
Τοὺς δ᾽ ἐνθάδ᾽, αὐτοὺς ὄντας ἀνθρωποκτόνους,
Εἰς τὸν θεὸν τὸ φαῦλον ἀναφέρειν δοκῶ.
Οὐδένα γὰρ οἶμαι δαιμόνων εἶναι κακόν,

'Tis incredible to me that *Tantalus* ſhould feaſt the Gods,
And that they ſhould eat the Fleſh of Children.
I rather think, that the Inhabitants of that Country
Were accuſtomed to Homicide, and to juſtify their Crimes
They attributed them to the Gods; for I can't perſuade my ſelf
That any God can be guilty of ſuch a Wickedneſs.

Pindar had before ſaid much the ſame Thing, reflecting upon the ſame Fable,

Ἐμοὶ δ᾽ ἄπορα, γαστρίμαργον
Μακάρων τιν᾽ εἰπεῖν,
Ἀφίσταμαι, Ἀκέρδεια λέλογχεν
Θαμινὰ κακαγόρως. ———

To me it is abſurd to ſay, that God's a Glutton,
I muſt withhold Aſſent. They that thus abuſe
Thoſe happy Beings ſhall ſurely be puniſhed.
Olymp. I. 82.

The ſame Poet, as Mr. *Le Clerc* obſerves (*Biblioth. Choiſ. Tom.* vi. *p.* 269.) ſhews a little higher that he was ſenſible of the Falſhood of theſe Fables, ſaying, "Romantick Stories and Fables, ſet out with divers Fictions, do more eaſily gain "Entertainment in Mens Minds, than true Hiſtories. A flouriſhing Rhetorick which pleaſes Men, ſetting off a Thing "makes a Thing almoſt incredible to be believed. But Length of Time certainly diſcovers the Truth. Men ſhould "always ſpeak well of the Gods, for they run the leaſt Hazard."

Ἦ θαύματα πολλά,
Καί πού τι καὶ βροτῶν φρένας·
Ὑπὲρ τὸν ἀληθῆ λόγον
Δεδαιδαλμένοι ψεύδεσι ποικίλοις
Ἐξαπατῶντι μῦθοι,
Χάρις δ᾽ ἅπερ ἅπαντα τεύ-
χει τὰ μείλιχα θνατοῖς,
Ἐπιφέροισα τιμὰν,

Καὶ ἄπιστον ἐμήσατο πιστὸν
Ἔμμεναι τὸ πολλάκις,
Ἀμέραι δ᾽ ἐπίλοιποι,
Μάρτυρες σοφώτατοι,
Ἔστι δ᾽ ἀνδρὶ φάμεν
Ἐοικὸς ἀμφὶ δαιμόνων
Καλὰ, μείων γὰρ αἰτία.

Theſe Reflections may eaſily come into the Minds of the moſt ſimple Perſons, that will but make Uſe of their natural Senſe. For 'tis probable that the Poets did not hatch them in their own Brains, but here, as in other Things, followed the Dictates of Nature. We have always obſerved theſe Things to happen among Chriſtians, and doubtleſs the ſame Things happened among the Heathens. Among the Papiſts, in ſome Countries eſpecially, one Word from a Prieſt will raiſe the Mob againſt an Heretick, as they call them; but yet there are many honeſt Men, who abhor ſuch a diabolical Madneſs, and do not believe that any Man may be perſecuted for his Religion; though the Clergy inculcate that Doctrine with all the Earneſtneſs poſſible, to ſatisfy their Ambition, Pride, and Avarice, and to engage the People in their Intereſts, who ſuffer themſelves to be led blindly by their Harangues, eſpecially when they ſuggeſt Things agreeable to their brutiſh and irregular Inclinations. We may alſo ſay the ſame of diverſe Opinions, which are received by the ſeveral Parties of Chriſtians. The Doctrines of Tranſubſtantiation, Impanation, and the Ubiquity of Chriſt's Body, are ſuch groſs Contradictions, that none can belive them, and though ſome Men make a Profeſſion of that Faith, they no more believe them than ſuch as deny them. (See what I have ſaid in my *Preface* to *Tom.* III. of Archbiſhop *Tillotſon*'s Sermons.) But there are other ſpeculative Opinions and moral Maxims, either entirely or very unſound, which the Preachers deliver from the Pulpit, without convincing many Men, who by the Strength of meer natural Reaſon perceive the Abſurdity of theſe Doctrines and Maxims, or explain them in a clear different Senſe from the Preachers, as appears when they are queſtion'd about them in familiar Terms. The Pagan Fables were in like Manner abſurd, and why may we not alſo believe that many among the People looked upon them as falſe, and kept to the Fundamentals of natural Religion, though with ſome Mixtures of Error and Imperfection. Did not Men then make Uſe of their Reaſon? Or were thoſe Truths ſo obſcure that they could not be found out by long and profound Meditation? We may with much greater Reaſon ſuppoſe, that they, whoſe Education has been above the common Sort, in going to the Schools of the Philoſophers, and carefully reading their Books, ſhould be happily freed from the Superſtitions and groſs Notions of Heatheniſm. With what Liberty did the Philoſophers inſult the Religion of the Vulgar ſeveral Ways? "We may believe (ſays Mr. *Fontenelle*, in his Hiſtory *of Oracles, Diſſert.* i. "*Chap.* viii.) "that among the Pagans Religion was a ſort of Practice, whoſe Speculation was a Thing indifferent. Do "as others do, and you may believe as you pleaſe." This is a wild Notion, but the People, who ſaw not the Weakneſs of it, were contented with it, and the Philoſophers ſubmitted readily to it, becauſe they got by it. Mr. *Bayle* (alſo in his *Diverſe Meditations, p.* 367.) owns, That there were, among the Heathen, Men of Ingenuity and good Senſe, who, without Philoſophy, had ſometimes tolerable Notions of the Deity. It is true, that, according to him, they were not to be regarded, becauſe when they had heard the Reaſonings of the Philoſophers about the Nature of the Gods, as ſoon as they were gone, they did as others did. But it is no ways neceſſary in the Queſtion we are debating, to find ſuch Men among the Pagans as had the Courage to oppoſe the common Errors or Worſhip eſtabliſh'd by publick Authority. 'Tis ſufficient that ſeveral did acknowledge the more groſs Abuſes of Superſtition and Idolatry, and acquire ſuch Notions in Religion as were able to produce ſuch a Degree of Honeſty, as they could not have had, if they had been Atheiſts. The Deſcriptions of the Pagan Corruptions, made by Mr. *Bayle* (in his *Continuation of diverſe Meditations, p.* 702, &c.) do not prove the contrary. Theſe ſort of Deſcriptions ought not to be taken in a Metaphyſical Generality, 'tis ſufficient that, according to the Rules of good Criticiſm, they agree to the greateſt Number. Farther, the Men of whom I am now ſpeaking, not daring, for fear of incurring a general Odium, to openly oppoſe thoſe ſtrange Abuſes of the Vulgar, deſerve certainly to come under that Deſcription as well as the Philoſophers, as having ſuppreſſed the Truth which they knew, according to the Reproof given them by St. *Paul, Rom.* i. 18. But you'll ſay, we muſt not attribute the Honeſty of theſe Men to the religious Notions they had received: It was cauſed by a Principle of Honour, Fear of Laws, the croſſing of Paſſions, and ſeveral other Intereſts proceeding from Self-love. That this is all the Virtue which moſt Men have, as we ſee among Chriſtians, can't be deny'd, but doth it thence follow, that no Heathen was inclin'd to Virtue by a religious Motive, or with a Reſpect to the Puniſhments and Rewards which are diſtributed by the Deity, either in this Life or the next? "I can't deny, ſaith Mr. *Bayle* (in his *Diverſe Meditations, p.* 439, 440.) "but there have been "ſome Heathens, who making a good Uſe of their Knowledge of the Nature of GOD, have by that Motive ſub- "dued the ſudden Force of their Paſſions. But then (ſays he) 'tis moſt probable, that when this Motive was ſo "prevalent, their Paſſions were ſo moderate, that they might have been reduced by Reaſon, without that "Help." So we may as well believe, that among Chriſtians no Man is virtuous purely through his religious Principles, becauſe there are Laws and Diſgrace attending every Crime; nay, in a Word, all the other Motives which have Place in Heatheniſm. Moreover, what we may have ſaid of the Laws may ſuggeſt a Reflexion not to be ſlighted. Theſe wiſe Lawgivers of Antiquity ſo much eſteemed and reſpected by all the World, at the ſame time that they appointed that the Gods ſhould be worſhipped in their ſeveral Countries, forbad, under the moſt rigorous Puniſhments, moſt of thoſe Crimes which the Vulgar attributed to their Deities. And is it not natural to infer from thence, that they looked upon the Fables as abſurd Relations of the Poets, which the People pleaſed themſelves with? At leaſt, this is the Reaſoning of *Lucian*, in his *Necromancy, Tom.* i. *p.* 327. Ed. *Amſtel.* Οὔτε γὰρ τοὺς θεοὺς ἄν ποτε ἡγούμην μοιχεῦσαι, καὶ στασιάσαι πρὸς ἀλλήλους, εἰ μὴ ὡς περὶ καλῶν τούτων ἐγίνωσκον, οὔτ᾽ ἂν τοὺς νομοθέτας τἀναντία τούτοις παραινεῖν, εἰ μὴ λυσιτελεῖν ὑπελάμβανον i. e. "On the one Side I can't imagine that the Gods commit Adultery, or that there are among them Diviſions, Life ſuitable to their Profeſſion [5].

IV. As this Perſuaſion, and whatever elſe we are able to learn concerning the Worſhip of God, either from Reaſon or from Revelation, is firſt of all to be implanted in a rightly cultivated Mind. So are the Opinions contrary to theſe Truths moſt carefully to be barr'd off and excluded. And here we would not only be underſtood of Atheiſtical and Epicurean Principles, but of thoſe numerous Notions which appear to be deſtructive of true

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“ or at leaſt that they think theſe Things juſt and honeſt; and on the other ſide I ſee, that the Lawgivers have ordained the “ contrary, which they would not have done, had they thought them profitable.” But you'll ſay again, The very Notion of Honeſty, conſidered without any reſpect to Religion, might incline the Heathens, for Example, to render Men their Dues, tho' they might keep them without any Apprehenſions of Puniſhment from the Laws, or Diſgrace otherwiſe. But I'll leave it to any conſidering Man, if the Reaſonings which Mr. *Bayle* attributes to an *Atheiſt*, can come into any Man's Mind but ſome ſubtil Philoſophers, who are exerciſed in deep and abſtruſe metaphyſical Meditations. 'Tis not conceivable that any Philoſophers, whether Atheiſts, or not, ſhould be inclined to practiſe the Maxims of Virtue, by no other Motive, but its own Beauty, whether inward or outward.

It is very evident, that all that is ſaid about theſe Notions of Honeſty, is in the Mouth of moſt Men, eſpecially Atheiſts and *Epicureans*, meer empty Talk and pure Declamation, of which the Mind is not perſuaded. Nor are we more ſure, that all thoſe who ſay, *That Honeſty is natural to Virtue, and Diſhoneſty to Vice, that Virtue is worthy to be loved for itſelf, and is its own Reward* (Continuation, *&c.* 761.) have by that means excluded all Relation between Honeſty and the Will of God, as the Example alledged by Mr. *Bayle* out of *Cicero*, gives us Reaſon to believe. It is true, that he maintains, That unleſs we could eſcape the Eyes of God, as well as Men, we ſhould not ſuffer ourſelves to hearken to any Motions of Avarice, Injuſtice, Debauchery, or Intemperance. But does not the ſame Author declare poſitively elſewhere, that God is the Author of the Law of Nature (*Lib.* iii. *De Repub. apud Lanctantium, Lib.* vi. *Ch.* viii.) in theſe Words, *Unuſque erit communis quaſi magiſter, & imperator omnium Deus*; *ille* LEGIS *illius* [*viz.* RECTÆ RATIONIS, NATURÆ CONGRUENTIS] INVENTOR, DISCEPTATOR, LATOR, *&c.* See the whole Paſſage quoted above, *Ch.* iii. §. 20. *Note* 5. What do I ſay? In the ſame Book of Offices from whence this Paſſage is taken, which Mr. *Bayle* quotes, do we not find, that the Law of Nature is both an human and divine Law? *Atque hoc multo magis exigit ipſa naturæ ratio, quæ eſt lex divina & humana.* Lib. iii. Ch. v. Edit. *Græv.* And a little lower, *Ch.* vi. he explains himſelf better, *Qui autem civium rationem dicunt habendam, externorum negant, hi dirimunt communem humani generis ſocietatem: quâ ſublatâ, beneficentia, liberalitas, bonitas, juſtitia funditus tollitur: quæ qui tollunt, etiam adverſus Deos immortales impii judicandi ſunt*, i. e. “ They that hold, that the Rights eſtabliſhed among Citizens are to be regarded, yet will not allow them to “ Strangers, and theſe laſt deſtroy the general Society of all Mankind, with which Bounty, Liberality, Humanity, “ and Juſtice muſt fall. Now to attempt this is an Impiety againſt the Gods themſelves, ſince it is the Deſtruction “ of that Society they have eſtabliſhed among Men.” The ſame thing appears in many other Paſſages of that famous *Roman.* Whoever then will conſider what I have ſaid, will perhaps agree, that notwithſtanding the Pagan Blindneſs, Religion hath won from Vice and inclined to Virtue many Men, who without that had never been virtuous, eſpecially ſuch of the People as were not able to make or underſtand all the Reflections which the Proſpect of Intereſt, or Fame, and the Notion of Honeſty might ſuggeſt to the Philoſophers. As for others, they would not be leſs corrupted, ſuppoſing they were Atheiſts. Generally ſpeaking, we may ſay, in my Opinion, that the falſe Notions of Religion abate the Evil of an Action rather than produce any; they ſerve for an Excuſe or Pretence, but never invite into any Crimes of themſelves, even thoſe who are otherwiſe inclined to them. For the moſt part, thoſe whom we think to be ſeduced by Superſtition, or by falſe Conſequences drawn from the true Principles of Religion, act altogether by another Motive, which is, if not the only, the chief Cauſe at leaſt of their Conduct: Theſe are ordinarily the downright Hypocrites, Men without any Religion, and falſe Devoto's, who (as Mr. *de la Bruyere* ſpeaks, *p.* 478.) under a King that is an Athieſt will be Atheiſts, or who, if they have not quite extinguiſhed all Senſe of a Deity, and a Providence, yet at leaſt look upon theſe great Truths as ſome indifferent Problems. *Montagne* ſpeaking of a great Number of Chriſtians, ſays, That ſome falſly make the World believe, that they believe what they do not; others, and thoſe a great Number, cheat themſelves with a falſe Notion of Faith (*Eſſays, p.* 316. Edit. *Pariſ.*) And how much greater Reaſon have we to think, that Paganiſm affords Men that Character? I do not deny but there are ſome Men which engage themſelves in evil Actions out of a Principle of Religion; but if Idolatry and Superſtition ſeduceth them, in ſome Reſpects, 'tis becauſe what is otherwiſe good and true in Paganiſm had no Influence upon them to keep them from Vice, and incline them to certain Virtues; inſomuch, that the Evil that Religion produces on the one ſide, is compenſated by the Good it doth on the other; for we muſt not imagine, that the greateſt Bigots to Paganiſm did only draw, or obſerve all the Conſequences which naturally followed thoſe things, which they attributed to their Gods. What I have ſaid above proves to the contrary, and no Man but muſt as readily agree to it, as Mr. *Bayle*, who has taken great Pains to prove it, That Men do not reaſon and act always according to their Principles; and perhaps has much deviated from his Subject. A *Pagan* may, for Example, proſtitute his Daughter upon ſome Feſtival in Honour of the Gods, and for all that be honeſt in his Buſineſs, a religious Obſerver of his Promiſes, ſerviceable, charitable, *&c.* for Fear of the Gods. They are uſually ſome ſpecial Notions of Religion which make Impreſſions upon Men, and which determine to do Good or Evil; but the general Notion of a Deity, that he puniſhes Vice and rewards Virtue, works more effectually upon them; a Notion ſo affecting Mens Minds, that it often hinders the Effects that bad Principles would have upon ſuch as profeſs Religion. But I ſhall ſay little more in this Matter; yet tho' I have enlarged myſelf beyond the Bounds of a Note, I can't but add ſomething more about it; Mr. *Bayle* who has quoted that Paſſage of *Grotius*, upon which our Author criticizes, explains it thus (*Continuat. &c. p.* 768.) We ſhould be obliged to follow the Law of Nature, if we ſuppoſed that there were no God nor Providence; but his way of expreſſing himſelf, *viz. Hæc locum aliquem haberent, etiamſi daremus, &c.* ſhews, that he means no more than what's expreſſed in my Note. I know not what Mr. *Bayle* means by theſe Words, *Law* and *Obligation*; but in the Language of the Philoſophers, a *Law* ſuppoſes a Superior, and *Jus* comes from *Jubeo*, becauſe Right and Law proceed from the Authority of a Superior. Our Author, as I think, has very well proved in the foregoing *Chapter*, §. 20. and *Lib.* i. *Ch.* vi. §. 7, 8. That Man's Will cannot impoſe any Obligation, properly ſo called, upon itſelf, and that Maxims of Reaſon are not ſufficient of themſelves to determine the Will neceſſarily this Way or that Way. All that Mr. *Bayle* ſays, proves only, 1. That an Atheiſt knows that Thankfulneſs and Ingratitude are two different Things, as are alſo Faithfulneſs and Deceitfulneſs, a Circle and a Triangle. 2. He can percieve that the Maxims of Virtue are not purely arbitrary, but that they have a Foundation in the Nature of Things, and imply a certain Convenience. But can that alone make him certainly follow thoſe Maxims contrary to his private Intereſt, and the Bent of his Deſire? I can't think it can ever come into an Atheiſt's Mind, much leſs, that he ſhall have Courage to ſacrifice his earneſt Paſſions to thoſe fine Notions. He may think it becomes a reaſonable Creature to conform to Reaſon; but from the Moment that theſe Maxims of Reaſon are oppoſed by the Enjoyment of any Pleaſure, in which he promiſes himſelf more Satisfaction than he at preſent enjoys, he'll ſilence his Reaſon, and follow the Allurements of Senſe. Let us ſpeak the Truth, Suppoſing the Impiety of the Atheiſt, he does not act unreaſonably in following the Voice of Nature, thoſe Words, according to Mr. *Bayle*, are (*Continuat. &c. p.* 31.) “ We muſt “ eat and drink well, enjoy all the Pleaſures of Senſe, prefer our own Intereſt before another's, accommodate our- “ ſelves to every Thing that is agreeable, to do a Wrong rather than ſuffer any, to revenge ourſelves, *&c.*” See more againſt Mr. *Bayle* in Mr. *Bernard's Extract* of his *Continuation*, &c. in his *News from the Rep. of Letters, March* 1705. and in his Diſpute againſt Mr. *Bayle, April* 1707. *Art.* 3. *May, Art.* 4. *June, Art.* 3. *Auguſt, Art.* 3. and *September, Art.* 4.

[5] We may add to this, That tho' the Chriſtian Religion be not obſerved as it ought, inſomuch that there is little or no Difference between the Manners of *Chriſtians* and *Pagans*, yet Chriſtianity has divers great Advantages above Paganiſm, as Mr. *Le Clerc* has made it appear, in his Treatiſe of *Infidelity, Part* ii. *Ch.* v. *p.* 222. To the Examples that he has produc'd, to ſhew the good Effects of the Chriſtian Religion, we may add this very remarkable one, that by it the Cuſtom of expoſing Infants is utterly aboliſhed, which was ſo much uſed by the *Greeks* and *Romans*, as Mr. *Noodt* in his *Julius Paulus* ſhews.

Religion, of good Manners, and of human Society, which it is in an high manner the Intereſt of Mankind, to ſee abſolutely rooted up, and baniſh'd out of the World. Such is that Fanſy of the *Stoical* Fate, or the unchangeable Courſe and Wheel of Things and Actions; by which Men are made only the Tools or Engines of their own Operations, it not being in their Power to manage them with any Freedom of Choice, or with any Direction of Counſel. For admitting this Hypotheſis, it doth not appear, why the Actions of a Man ſhould be morally *imputed* to him, rather than the Motion of a Clock to the Wheels by which it is perform'd, or what would be the uſe of Religion, what the Equity of Laws and of Puniſhments. *Seneca Oedip. ver.* 1028.

Fati iſta culpa eſt; nemo fit fato nocens.
The Fault is Fate's; and Fate can fix no Guilt.

Vid. ibid. v. 980, *&c.* *Homer Il.* T. 86.

——Ἐγὼ δ' οὐκ αἴτιός εἰμι,
Ἀλλὰ Ζεὺς, καὶ μοῖρα, καὶ ἠεροφοῖτις
Ἐριννύς.

—The Fault's not mine, but *Jove*'s and Fate's,
And the Night-wandring Hag's.——

Zeno (in *Diog. Laert.* l. vii.) retorted this Objection very pleaſantly, tho' he did not refute it: As he was correcting his Slave who had been catch'd in a piece of Thievery, the Fellow in way of Excuſe told him, *Truly 'twas his Fate to ſteal: Yes,* ſays *Zeno, 'twas your Fate too to be beat for it. Marcus Antoninus* gives a more ſerious Judgment on the Point [2], *The Gods* (ſays he, *l.* ii. *c.* 11.) *have put it into every Man's Power and Choice, to avoid whatever is truly Evil.* There is an Opinion nearly allied to this, which ſuppoſes the Conſequences of Cauſes and of Effects, or the great Chain of Things eſtabliſh'd by the Creator, to ſtand by ſuch an immovable Decree, that GOD hath left himſelf no liberty of interpoſing in particular Caſes. Thus all Miracles, all extraordinary Aſſiſtances of Heaven, all Effects of Prayers, of Repentance, and of Amendment, ſeem to be entirely cut off at one Stroke. To this we may join that ancient and wildly receiv'd Perſuaſion, that the Poſitions of the Stars laid an indiſpenſable neceſſity on human Actions and Events; or that the Hour of Nativity determin'd the whole Proceedings of Life. Which *Manilius*, one of the Aſſertors of it, thus delivers, *l.* iv. *c.* 79, &c.

——*Furit alter amore,*
Et pontum tranare poteſt, & vertere Trojam.
Alterius ſors eſt ſcribendis legibus apta:
Ecce patrem nati perimunt, natoſque parentes,
Mutuaque armati coeunt in vulnera fratres:
Non noſtrum hoc bellum eſt: coguntur tanta movere,
Inque ſuas ferri pœnas, lacerandaque membra.
Hoc quoque fatale eſt, ſic ipſum expendere fatum.

One, mad in Love, to *Troy* will carry War,
Or ſwim the Flood, and view the Torch from far;
Another is determin'd to the Bar.
A Son his Father, Father kills the Son,
On mutual Wounds two headlong Brothers run.
Theſe Combats prove the force of ruling Powers:
For they are too unnatural to be ours.
Nay, this Opinion's ſettled by Debate,
'Tis *Fate*, that we ſhould thus diſpute of *Fate*.
Mr. *Creech.*

And this Superſtition ſtill bewitcheth a great part of the Eaſtern World, where no Buſineſs of Moment is undertaken without conſulting the Aſtrologers, *that they may read,* as the Phraſe is, *what is written in Heaven.* [3] To which purpoſe Father *Bernier* tells a pleaſant Story of a Gardiner of *Abas* King of *Perſia*, who rooting up ſome Trees which the King, by Direction of his Aſtrologer, had planted in a *fortunate Hour*, and being thereupon rebuked, turning to the Aſtrologer, *Sure,* ſays he, *you was out in your Calculation: For theſe Trees could never have the benefit of lucky Stars,* which were *ſet at Noon, and unfortunately pull'd up at Night.* Another Relation like this, he gives us of a certain Slave, a Run-away from *Goa*, who ſet up in the City *Dehli* for an expounder of the Stars, and foretold many ſtrange Events with good Confidence to the People: Every now and then looking upon his *Mariner's Compaſs* and his *Hour Book*, as the noble Inſtruments of his Art. When ſome who had formerly a Knowledge of him, declar'd their Wonder at his new Profeſſion and Equipment, his Reply was, *A tal Beſtias, tal Aſtrologuo, For ſuch Beaſts, ſuch an Aſtrologer.* But all this kind of Aſtrology is really nothing elſe, but a ſpecious way of cheating ignorant People of their Money, undertaken by ſome confident Knaves, who in their talk of future Occurrences are not ſo much ſupported by their own Arts, as by the Credulity of their Hearers: If Things fall out as they boldly gueſs'd, they preſently riſe in Honour and Credit with the Multitude; if Matters go otherwiſe, their Predictions are eaſily forgot, and ſo their Miſtakes make no noiſe. *Tacitus*, Hiſt. *l.* i. *c.* 22. calls the Pretenders to Aſtrology, *Gentes hominum potentibus infidum, ſperantibus fallax:* "A Pack of "Men unfaithful to the great, and diſappointing "to all of eager Hopes and Deſires. Add, *Hobbes de Homine,* c. 14. ſ. 12. *Agathias, l.* i. *c.* 1. *I cannot believe that the Cauſe of Evil is fix'd in the Courſe of the Stars, and in the fatal Appointment of unconceivable Neceſſity. For if the power of Fate every where prevails, all free election of Man's Will is deſtroy'd; and with it, all Precepts, all Arts, all Diſcipline muſt come to nothing; and thoſe who have led pious and virtuous Lives, will be depriv'd of their future Expectation. Nor do I think it allowable to aſcribe mutual Wounds and Slaughter to the Deities.* Vid. *Grot.* de Veritate Rel. Chriſtianæ, *l.* iv. *ſ.* 11. Now beſides the other numerous ill Conſequences of ſuch a Superſtition, this Miſchief follows of Courſe, that whilſt Men are continually gaping at the Stars, they have neither Leiſure nor Inclination to guide their Lives by the Rules of ſound Reaſon. *Helen* ſays wiſely in *Euripides, Hel. ver.* 763.

Γνώμη δ' ἀρίστη μάντις, ἥ τ' εὐβουλία.
Prudence and good Counſel are the beſt Prognoſticators.

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[2] The *Greek* is, Καὶ τοῖς μὲν κατ' ἀλήθειαν κακοῖς, ἵνα μὴ περιπίπτῃ ὁ ἄνθρωπος, ἐπ' αὐτῷ τὸ πᾶν ἔθεντο οἱ Θεοί.

[3] Our Author might have ſpared himſelf the Pains of reciting theſe two Stories.

Statius, Theb. iii. 562. [4].

——————Quid craſtina volveret ætas
Scire nefas homini. Nos pravum ac debile vulgus
Scrutamur penitus ſuperos: hinc pallor & iræ,
Hinc metus, inſidiæque, & nulla modeſtia voti.

——————What future Years ſhall bring to paſs
'Tis Sin to know. We a weak, puny Race,
Examine Heav'n, and ranſack *Jove*'s Decrees,
Wiſely to antedate our Miſeries.
Hence all our Miſchiefs ſpring, our *Rage*, our *Fears*,
Our treach'rous Wiles, and our immodeſt Prayers.

Moſt pernicious likewiſe is that Conceit, which makes God to allow a kind of Market of Sins, ſo as to let them be bought off with Money or other Preſents, or perhaps with ſome vain Ceremonies and ſet Forms of Speech, without Amendment of Life. No leſs abſurd is it to imagine, that God Almighty is delighted with ſuch Inventions of Men, ſuch Inſtitutions and Ways of Living, as are diſagreeable to human and civil Society, as it is temper'd by the Dictates of Reaſon and the Laws of Nature. Such may we reckon the greateſt part of the Monaſtical Orders, which we find in vaſt Numbers, not only in *Chriſtendom*, but amongſt the Turks and the Heathens. We ſhould alſo carefully avoid all ſuch unworthy aud ſuperſtitious Notions, as debaſe and diſhonour the Divine Nature or Worſhip. Every ſenſible Man ought to be as [5] *Antoninus* ſays his Father was, Θεοσεβὴς χωρὶς δεισιδαιμονίας [a], *Devout without Superſtition* [b].

'Tis another wicked Opinion, that the bare Exerciſe of Piety towards God is ſufficient, without any regard had to Honeſty, and to thoſe other Duties which are to be practis'd towards our Neighbours: As if the Externals of Divine Worſhip, when exactly perform'd, were able to make amends for a Courſe of Injuſtice toward other Men: Or, as if it were lawful to ſcrape up Money in our Life-time, by all Means and Methods, good or bad, provided at our Death we leave ſomewhat to be ſpent in *pious Uſes* [c]. Nor leſs unreaſonable is the Fanſy, that a ſingle Man ſhould be able not only to fulfil his own Duty to God, but to transfer ſome of his Merits on others; as if one Perſon's Negligence in his Duty was to be ſupplied by the *over* Righteouſneſs of another. Of the ſame Stamp is that vain Conjecture, that upon account of the Satisfaction and the Merit of Christ, we have a leſs Obligation lying on us to Probity and Sanctity of Manners; and that the Hope of thoſe Bleſſings furniſhes us with a Security of ſinning. He who believes that his own Offences ſhall be forgiven him for the ſake of another's Deſerts, can ſcarce be hinder'd from ſinking into the baſeſt Diſſoluteneſs, unleſs he be at the ſame time fully perſuaded, that there is ſtill an Obligation incumbent on him, to apply all his Endeavours to the Practice of a moſt holy Life.

Farther, It is no leſs a peſtilent than brutal Opinion, to pretend that the Wickedneſs of ſome Actions is excus'd with God, upon account of their Dexterity or Humour; and that ſome Sins paſs only for Jeſts in the Cognizance of Heaven. As the old Poets feign'd their Deities to take no notice of the Perjury of Lovers, and to forgive their Thefts and treacherous Intrigues [d]. Nay, their Madneſs proceeded ſo far, that they were not afraid to introduce their heavenly Powers as the Actors of deteſtable Villanies; aſſigning ſo many Tutelar Gods to have the Care, as it were, and the Guidance of ſo many particular kinds of Wickedneſs. Now the Argument which *Fulgentius* [e] draws hence is right and concluſive: *If there were any Deities* (ſays he, meaning *Mercury* and *Laverna*) *preſiding over Robberies, how could thoſe Actions be criminal before human Judges, which had Divine Authors and Patrons to defend them* [f]? *Euripides* diſputes as well on the ſame Point, *Ione*, ver. 449, &c.

——— Οὐκέτ' ἀνθρώπους κακῶς
Λέγειν δίκαιον, εἰ τὰ τῶν Θεῶν κακὰ
Μιμούμεθ', ἀλλὰ τοὺς διδάσκοντας τάδε.

If Human Vices are but Tranſcripts drawn
From Deeds Divine, and Copies ſet in Heaven,
Should Men be blam'd who act what they are taught,
Or thoſe immortal Guides who teach 'em wrong?

Nor was the poor *Indian* much out in his Inference, who when a *Spaniard* boaſted to him, that he was a Chriſtian, a Son of the great Creator of Heaven and Earth, whoſe Laws he came there to publiſh and proclaim, anſwer'd him to this effect: *If 'tis by Command of your God, that you thus invade other Mens Dominions, and there ſpoil, burn, kill, and commit all other Wickedneſs at pleaſure; you may reſt aſſur'd, that we will not on any account believe in ſuch a God, or receive his Ordinances amongſt us* [g].

It is wicked likewiſe to believe, that thoſe Prayers can pleaſe God, by which a Man deſires that others may ſuffer an undeſerv'd Evil, for the promoting or the occaſioning of an Advantage to himſelf. As ſuppoſe, if the Inhabitants of a Sea-coaſt ſhould pray, that many Shipwrecks might happen on their Shore. Nor do I take thoſe ſolemn Supplications to contain much more Holineſs, which are perform'd, either upon the engaging in an unjuſt War, or upon any Succeſs obtain'd in it. Thoſe Perſons too muſt needs lie under a great Miſtake, who fanſy the Breach of ſome Precept of Natural Law to be a part of Divine Worſhip. As they who are for treating in a hoſtile Manner, all ſuch as differ from them in Perſuaſion; who aſſert that Religion is to be propaged by the Sword; that no Faith is to be kept with Men of a contrary Profeſſion, no political Friendſhip (as they call it) and no Offices of Humanity to be exercis'd towards them, but that they are to be avoided even in common Converſation, as unholy and unclean; that Violence, Wickedneſs, Treaſon, Perfidiouſneſs, Sedition and Rebellion, are not only lawful, but commendable, if undertaken on a religious Account [7]. To conclude, the following Opinions are not of leſs fatal Effect, than thoſe which we have already mention'd: That it imports nothing to ſolid Felicity, whether a Man apply himſelf to a virtuous or to a vicious Life, and that good Men are [8] entitled to no better State or Condition than the Wicked. That the higheſt Pleaſure a Man can expect or obtain, is the preſent Gratification of his Senſes; and that the Soul periſhes with the Body. Laſtly, that all Law, even that which we call *natural*, is a meer human Device, not referable to God as the Author of it, nor deriving from him its Force and Sanctity. Theſe therefore, and ſuch like Notions, are entirely to be rooted up out of human Minds, in as much as they deſtroy our Duty to Almighty God, and prevent or intercept all Endeavours of conforming our Life and Manners to the Guidance of good Reaſon.

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[a] L. 6. ſ. 30. Add. *Bacon*, Eſſay 17.

[b] See *Plutarch*'s Treatiſe of Superſtition. Item, *Charron of Wiſdom*, lib. 2. c. 5. ſ. 10.

[c] Add. *Charron de la Sageſſe*, l. 2. c. 5. ſ. 25, &c.

[d] *Tibull*. l. 3. el. 7.

——————Perjuria ridet amantum
Jupiter, & ventos irrita ferre jubet.

Jove laughs to hear Love's harmleſs Perjury,
And bids the Winds go loſe it as they fly.

[e] *Mytholog*. l. 1. c. 18.

[f] *Senec. Hypolit*. ver. 195.

Deum eſſe Amorem, turpis & vitio favens
Finxit libido; quoque liberior foret
Titulum furori Numinis falſo addidit.

Love was firſt deify'd by Luſt and Vice:
When Men to gain a Patron to their Sin,
And free purſuit of Pleaſure, fix'd the Stamp
Of Heaven on Hell, a *Fury* made a *God.*

[g] *Benzo*. Hiſt. Nov. Orb. l. 2. c. 13.

[4] *Euripides*, in another Place, gives a Deſcription of all ſuch Perſons as pretend to Divination, in theſe Words:

——— Τίς δὲ μάντις ἐστ' ἀνήρ;
Ὃς ὀλίγ' ἀληθῆ, πολλὰ δὲ ψεύδη λέγει
Τυχὼν, ὅταν δὲ μὴ τύχῃ, διοίχεται.

What's an Aſtrologer? I thus reply,
A Man that ſpeaks few Truths, but many a Lye,
Which, when found out, he takes his Heels to fly.

Spoken by *Iphigen in Aulid*. v. 956. Edit. Cant.

[5] See what Mr. *Bayle* ſpeaks about this Matter in his Meditations upon a Comet.

V. When this principal Care is over, the main Concern behind is for a Man accurately to examine his own Nature, and to ſtudy to *know himſelf*. An Enquiry which Antiquity ſo much valued as the Forerunner of true Wiſdom, that Γνῶθι σεαυτὸν was thought an Inſcription worthy to be ſet in Letters of Gold, and conſecrated in the *Delphian* Temple. [2] On which *Tully* hath given us this Comment, *The Precept of* Apollo, ſays he, *in which he enjoins us to know our ſelves, doth not mean, that we ſhould be careful in knowing our Limbs, our Stature, or our Figure; for our Bodies indeed are not our ſelves. But when the Oracle ſays, Know your Self, it ſays in Effect, Know your own Mind and Soul. For the Body is no more than the Soul's Veſſel or Receptacle. And no Action is properly done by your ſelf, but what proceeds from your better and nobler Part* [a]. Now from this *Knowledge of himſelf* rightly purſu'd, a Man is brought to underſtand his Condition, and the Office he is to bear in the World: Whilſt he apprehends, that he did not exiſt of himſelf, but ow'd his Original and Being to a much Sublimer Principle; that he is endow'd with far more noble Faculties, than he ſees enjoy'd by the Beaſts about him; laſtly, that he was not born by himſelf, nor purely for his own Service, but that he is a part of human Kind, and is oblig'd to behave himſelf ſociably towards other Men. And from theſe Fountains may eaſily be drawn the compleat Knowledge of human Duty. Vid. *Marc. Antonin. l.* x. *ſ.* 6. [3] *Perſ. Sat.* iii. 71.

——————*Quem te Deus eſſe*
Juſſit, & humana qua parte locatus es in re
Diſce.

Study thy ſelf: Learn in what Rank and State,
The wiſe Creator hath ordain'd thy Fate.

It belongs likewiſe to our underſtanding our ſelves[4], to know our own Power, and how far it extends, either in exerting our Actions, or in forming our Deſigns [b]. And farther, what is the true Effect and Conſequence of every Practice; and what Reſpect and Uſe the Things without us have to our ſelves and to our Happineſs.

VI. From this Knowledge it follows, that a Man muſt apprehend his Subjection to Almighty God, and the Obligation which lies upon him, according to the Meaſure of the Gifts he hath receiv'd, both to celebrate the Divine Majeſty, and to ſhew himſelf a ſociable Creature in his Tranſactions with his Fellows. And in as much as God hath beſtow'd on him the Light of Underſtanding, he ought certainly to conclude, that he is not to do every thing at Random, and [1] without End or Deſign, but that whatever he undertakes, he ſhould firſt weigh the Matter in hand, and regulate his Method of proceeding about it [a]. And conſequently, that he propoſe an End [2] agreeable to his Nature, and rightly moderate and direct both his own Actions, and all other due Means towards the Attainment of that End. And this in ſuch a Manner, that he neither proceed in the Application of the Means, before the End is fix'd and determin'd; nor ſettle ſuch an End as he muſt afterwards want Means to arrive at. Another Inference cloſely ally'd to this is, that ſince Truth and Right are always uniform and without Alteration, ſo he ought always to form the ſame Judgments of the ſame Things, and when he hath once judg'd truly, to be always conſtant in his Mind and Reſolution. Farther, that his Will and his Appetite do not get the Start of [3] Good Judgment, but follow and obey it; never making Reſiſtance to its Decrees [4]. For he who obſerves this Courſe of Proceeding, will be ſure to act with Prudence, with Conſtancy, and with Moderation. He will make it his chief Aim and Rule, as *Lucan* deſcribes *Cato*, ii. 381.

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[a] Add. *Caſaubon* ad *Perſ. Sat.* 3. *v.* 67. and *Plato* in his *firſt Alcibiades p.* 448. Edit. *Francofurt. Ficin.* [b] *See* Socrates's *Explication of that noble Sentence in* Zenophon Apomnem. *l.* 4. Add. *Bacon Eſſ.* 36.

[7] See Mr. *Bayle*'s *Philoſophick Commentary* upon theſe Words, *Compel them to come in*, &c. *Part* 1. *Chap.* 4, &c.

[8] *Cicero* de Naturâ Deorum, l. 3. c. 35. *Ut enim nec Domus, nec Reſpublica ratione quadam, & diſciplina deſignata videatur, ſi in ea nec rectè factis præmia exſtent ulla, nec ſupplicia peccatis; ſic mundi divina in homines moderatio, profecto nulla eſt, ſi in diſcrimen nullum eſt bonorum & malorum.* i. e. *Heaven is certainly not at all concern'd in the Government of Men, if it doth not make a Diſtinction between the Good and the Wicked.*

§. V. [2] *Tully*'s Words are, *Nimirum hanc habet vim præceptum Apollinis, quò monet, ut ſe quiſque noſcat; non enim, credo, id præcipit, ut membra noſtra, aut ſtaturam, figuramve noſcamus; neque nos corpora ſumus*——*Cum igitur Noſce te, dicit, hoc dicit, noſce animum tuum. Nam corpus quidem quaſi vas eſt, aut aliquod animi receptaculum. Ab animo tuo quicquid agitur, id agitur à te.*

[3] *Perſius*'s preceding Words are elegant and pertinent:

Diſcite vos, miſeri, & cauſas cognoſcite rerum,
Quid ſumus, & quidnam victuri gignimur, ordo
Quis datus, aut metæ, quàm mollis flexus & undæ;
Quis modus argento, quid fas optare, quid aſper
Utile nummus habet, patriæ, chariſque propinquis
Quantum elargiri deceat, quem, &c.

Learn, wretched Men, and know the Cauſe of Things
What 'tis we are, and why we have our Beings;
What is the Order, and what Nature's Courſe,
What we may wiſh for, and what Money's Force,
What Profit it doth yield; what to beſtow
Upon our Country, and our Kindred too.
Study, &c.

[4] "This great Precept is often alledg'd in *Plato, Mind thy own Buſineſs, and know thy Self.* Each of theſe Sentences con-" tains in general our whole Duty, and ſeems to include the other. He that will do his own Buſineſs, muſt learn this Leſſon " firſt, to know himſelf, and he that knows himſelf, will not undertake any Buſineſs as his own, that he is not acquainted " with; for if he loves and takes care of himſelf, he'll refuſe needleſs Employments and unprofitable Thoughts and Propoſals." *Montagne*'s *Eſſays*, *l.* 1. *c.* 3.

——Servare modum, finemq; tenere,
Naturamq; ſequi, patriæq; impendere vitam:
Nec ſibi, ſed toti genitum ſe credere mundo.

To keep a *Mean*, to eye the chief Deſign;
To follow *Nature*, as a Guide Divine,
To pay his Country's Ranſom with his Blood,
And private Pleaſure quit for publick Good:
To raiſe his Soul to univerſal Cares,
And in his Pains give all the World their Shares.

He that acts otherwiſe, inſtead of keeping a decent Pace in the Journey of Life, ſeems to rowl and tumble through the World [5]: His Proceedings are perpetual Contradictions; and 'tis impoſſible for him to arrive at any comfortable Condition: Since, [6] as *Sophocles* obſerves, *Antig. ver.* 1348.

Πολλῷ τὸ φρονεῖν εὐδαιμονίας
Πρῶτον ὑπάρχει ————

True Wiſdom is the Spring of Happineſs.

VII. If a Man thus rightly apprehend and conſider his own Strength and Power, he will diſcover that it is of a *finite* Nature, having certain Limits, beyond which it can never extend itſelf; and therefore, that there are many Things in the World which we cannot manage or compaſs, as many that he cannot hinder or reſiſt. Other Matters there are which do not abſolutely exceed human Power, but which may be intercepted and prevented by the Oppoſition of other Cauſes. And a third Kind of Things we cannot compaſs by our bare Strength, nor aſſiſted by Dexterity and Addreſs. Applicable to theſe Reflections is the famous old Diſtinction of the *Stoicks*, dividing Things into τὰ ἐφ' ἡμῖν, and τὰ οὐκ ἐφ' ἡμῖν, thoſe *in our Power*, and thoſe *without* or *beyond it*. What ſeems to be moſt under our Command, is our own Will, and the Power of that Faculty in exerting Actions proper to our Species of Being. For although the Will hath ſome croſs and ſtubborn Principles adherent to it, which bend and ply it continually from its due *Æquilibrium*, yet hath a Man nothing in his whole Nature more nearly and cloſely tied to him, nothing which is leſs capable of being hindred by external Powers, and therefore nothing, the Motions of which do more properly belong to his Perſon, and may accordingly be *imputed*. Hence it follows, that every Man ought to make it his main Care and Concern, rightly to employ his Force and Abilities, in conformity to the Rules of Reaſon: At leaſt to ſettle a conſtant Reſolution of diſcharging, as far as in him lies, every thing which ſeems agreeable to his Duty, and to the Deſign of his Being. For this is the Teſt by which we are to rate the Worth of every Perſon, and to meaſure his intrinſical Goodneſs and Excellency. [1] *Arrian. Epictet. l.* i. *c.* 1. *What therefore, on the whole Matter, are we to do? To improve, and to put to the beſt uſe thoſe Things which are in our Power, and to deal with other Things as their Natures* [2] *require.*

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[a] Τάξον τινὰ ἤδη χαρακτῆρα σαυτῷ, ϗ τύπον ὃν φυλάξεις ἐπί τε σεαυτοῦ ὤν, ϗ ἀνθρώποις ἐντυγχάνων. *Epict. Ench. Chap.* 40.

§. VI. [1] *Seneca* has a fine Paſſage relating to this Subject, *Epiſt.* 71. *Ideò peccamus, quia de partibus vitæ omnes deliberamus, de totâ nemo deliberat. Scire debet, quid petat, ille, qui ſagittam vult mittere, & tunc dirigere, & moderari manu telum. Errant conſilia noſtra, quia non habent quo dirigantur. Ignoranti quem portum petat, nullus ſuus ventus eſt. Neceſſe eſt multum in vitâ noſtrâ caſus poſſit, quia vivimus caſu. i. e.* "The Original of our Errors is, that no Man contrives ſeriouſly to draw up a Scheme " of his whole Life, but contents himſelf to deliberate occaſionally upon ſome particular Actions. The Gunner ſhould know " his Mark, before he take his Aim to ſhoot. Our Counſels are diſappointed, becauſe we keep not the End in our Minds. The " Wind can never blow well for him, who don't know the Port he is ſailing to. Fortune muſt do much among us, who leave " ſo much to Chance in our Lives." See *Cicero*'s *Paradoxes, Chap.* 5. with *Græviu*s's *Notes*, and *M. Antoninus* with *Gataker*'s, *Lib.* 2. §. 16. and *l.* 11. §. 21. See alſo *Plato de Repub. l.* 7. *p.* 695. *Ed. Wech.* and *Montagne*'s *Eſſays, Lib.* 2. *Chap.* 1. at the End.

[2] All the World knows that famous Principle of Morality laid down by the *Stoicks*, who ſay, That *we muſt live agreeable to Nature.* See *Seneca, M. Antoninus, Epictetus,* &c. but chiefly *M. Antonin. Lib.* 5. *Chap.* 16.

[3] *Cicero* has very well obſerv'd, *Efficiendum autem eſt, ut Appetitus rationi obediant, eamque neque præcurrant, nec propter pigritiam, aut ignaviam deſerant; ſintque tranquilli, atque omni perturbatione animi careant. Ex quo elucebit omnis conſtantia, omniſque moderatio. i. e.* "We muſt bring all our Affections into Subjection to our Reaſon, and not ſuffer them either to outrun it, or thro' Sluggiſhneſs to deſert it. They muſt alſo be calm, and not diſturb our Minds. And then we ſhall be eminent for Conſtancy and Moderation." *Off. l.* 1. *c.* 29.

[4] *i. e.* Never to enquire into them, but after mature Deliberation, and never to act againſt our own Conſcience.

[5] Theſe Words are *Horace*'s, *Epiſt.* 1. *Lib.* 1. *v.* 99. *Et vitæ diſconvenit ordine toto.*

[6] *Lipſius*, in his *Politicks*, tranſlates the Words thus, *Lib.* 1. *Chap.* 7. *Longe Prudentia fælicitatis primas tenet, i. e.* "That " Prudence that makes a Man happy, is certainly the chiefeſt by much." But Wiſdom is incomparably much more advantagious and valuable than Happineſs or Proſperity: So that this Sentence makes nothing to our Author's Purpoſe, who is proving, That Wiſdom is the Means to arrive at Happineſs. Nevertheleſs I thought fit to obſerve, that this Paſſage of *Sophocles* is explained, as I have underſtood it, in the *Greek* Comment of *Triclinius*; for others follow an Explication which to me ſeems not true, and which they embraced, without being aware that πρῶτον has ſometimes a comparative Signification.

VIII. As to the other Matters which lie without us, we are ſo far to employ ourſelves about them, as they do not ſurpaſs our Strength, as they tend to a lawful End, and are worth the Labour which we ſpend in the Purſuit. For Things above us, a wiſe Man will not loſe his Hopes and his Pains upon them; he will reckon it folly to endeavour with vaſt Toil the Attainment of ſuch an End, which he knows his own Force, together with the Aſſiſtances he expects, unable to compaſs: Or unleſs he be at leaſt certain that the very Probability of obtaining the End is of more Conſequence than any other Effect, which he could without queſtion have produced at the ſame Time, and with the ſame Labour. [1] Other Things he will leave to the Direction of Providence, and will compoſe his Mind as well as he is able, [2] for a peaceful Acquieſcence in every Event. He will not [3] vainly diſquiet himſelf on the Account of Evils which either have already happen'd, or may hereafter fall out without his Fault: And ſo he will cut off the greateſt Part of human Troubles which are wont to be produced either by vain Hope driving us on ill Deſigns, or by the more violent Motions of Grief, Anger, or Fear[a].

From theſe Conſiderations this farther Conſequence may be drawn; that Man, as he is guided only by the Light of Reaſon, ought not to frame to himſelf, or to aſpire after any other Happineſs in this World, than ſuch as ariſes from the prudent Government of his Faculties, and from thoſe Aſſiſtances and Supports, which we are ſure the Divine Providence will afford us in the univerſal Adminiſtration of Things. From the ſame Principles we may infer, that as we are not to leave Things to meer Hazard and Chance, whilſt there is any room for human Caution and Foreſight; ſo when we have done all that lies in our Power, we cannot enſure an Event which doth not depend on our Direction, and of which [5] we have no certain Knowledge till it actually happen. As *Iphicrates* us'd to ſay, 'twas unworthy of a General to ſay, *I did not think it*; ſo 'tis below a wiſe Man to make the like ſorry Reflection. It was a good Wiſh of the Poet, *Ov. Ep.* ii. 85.

——————*Careat ſucceſſibus opto*
Quiſquis ab eventu facta notanda putat.

——————Ne'er may Succeſſes bleſs
The Man who meaſures Actions by Succeſs.

Yet this abſurd Opinion is ſo ſtrong and ſo univerſal among the *Mahometans*, that they take good Succeſs to be an infallible Argument of the Juſtice of a Cauſe, and an open Sign of the Approbation of Heaven. Whereas ſuch a Notion is indeed to be rank'd amongſt the ridiculous Follies of the loweſt and moſt ignorant Vulgar. For 'tis evident to any Perſon of common Senſe[6], that as *Juvenal* ſays, *Sat.* xiii. 103.

——————————————*Multi*
Committunt eadem diverſo crimina fato;
Ille crucem pretium ſceleris tulit, hic diadema.

That Sins *alike* unlike Rewards have found,
And whilſt *this* Villain's hang'd, the *other's crown'd*.

Hence likewiſe we learn, that as it is the Part of a wiſe Man[7], not to bound his Sight at the Things before him, but to extend his Conſideration and his View to Things to come, and to drive on his well-form'd Reſolution with his whole Strength, without ſuffering either the Threats of Fear, or the Flatteries of Pleaſure to turn him aſide: So is it as ſure a Mark of a Fool to drive directly againſt the Stream, and not rather to accommodate his Inclinations to the Events, when they will not conform themſelves to his Inclinations[a]. Laſtly, ſince human Foreſight is ſo weak in diſcovering future Things, and ſince they are very far from being under our Guidance, though they frequently fall out well beyond our Hopes and Expectations[b]; hence it is plain, that we ought neither too ſecurely to truſt our preſent Condition, nor to ſpend too much Care and Anxiety on what is to come. And for the ſame reaſon Inſolence in Proſperity, and Deſpair in Adverſity, are to be both avoided as equally dangerous and equally abſurd. 'Twould be eaſy to illuſtrate this Doctrine with endleſs Teſtimonies of Authors. Take the following for a Specimen. *Arrian. Epiſt. l.* ii. *c.* 1. *In Things which do not depend upon our Election, let us be bold and venturous, but in Things which are capable of Choice and Counſel, let us be timerous and cautious*[c]. Juvenal, Sat. x. 365.

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[a] Arrian. Epictet. l. 2. c. 7. *What can be better for us than that which hath the Approbation and the Appointment of GOD himſelf?*

§. VII. [1] *Arrian*'s Words are, Τί οὖν δεῖ; τὰ ἐφ' ἡμῖν, βέλτιστα κατασκευάζειν, τοῖς δὲ ἄλλοις χρῆσθαι, ὡς πέφυκε.

[2] *M. Antonin. l.* 6, 32. Τῇ δὲ διανοίᾳ ἀδιάφορα, ὅσα μὴ ἔστιν αὐτῆς ἐνεργήματα, ὅσα δέ γε αὐτῆς ἐστιν ἐνεργήματα, ταῦτα πάντα ἐπ' αὐτῇ ἐστιν, καὶ τούτων μέν τοι, ἃ περὶ μόνον τὸ παρὸν πραγματεύεται· τὰ γὰρ μέλλοντα, καὶ παρῳχηκότα ἐνεργήματα αὐτῆς, καὶ αὐτὰ ἤδη ἀδιάφορα. *i. e.* "All Things are indifferent to my Soul, except its own Operations. For all its Operations depend upon it. But only thoſe about which it is buſy at preſent are dear to it; ſuch as are paſt and to come are equally indifferent." See alſo §. 50. of the ſame Book.

§. VIII. [1] *Permittes ipſis expendere Numinibus, quid*
Conveniat nobis, rebuſque ſit utile noſtris.
Nam pro jucundis aptiſſima quæque dabunt Dî.
Carior is illis homo, quam ſibi -------
Juv. Sat. 10. *v.* 347, *&c.*

Let's leave it to the Gods to do what they
Think agreeable and profitable for us.
We ask what pleaſes us, they give what's fit and beſt.
They love Man better than himſelf.

[2] 'Twas a Maxim of the *Pythagoreans*, That wiſe Men are prepared for all Events which may happen to Man, and whoſe Management depends not on himſelf. Καὶ ἦν αὐτοῖς (ſays *Jamblichus*) παράγγελμα, ὡς οὐδὲν δεῖ, τῶν ἀνθρωπίνων συμπτωμάτων ἀπροσδόκητον εἶναι παρὰ τοῖς νοῦν ἔχουσιν, ἀλλὰ πάντα προσδοκᾷν, ὧν μὴ τυγχάνουσιν αὐτοὶ κύριοι ὄντες. *De Vitâ Pythag. Chap.* 31. *n.* 196. *Edit. Kuſter.* See alſo *numb.* 224.

[3] "Repreſent to yourſelves in your Minds all the Evils that can befal you, yea, the moſt intolerable, ſuppoſe yourſelves "certain to ſuffer them; and on the contrary is it not more eaſy and natural to baniſh ſuch Thoughts? They'll happen ne'er the "ſooner, nor continue e'er the longer. We may enlarge and prolong them by our Thoughts, yea, ſo incorporate them beforehand in ourſelves, and entertain them, tho' we have not truly any Senſe of them. They diſturb us enough whenever "they come (ſays one of the Leaders, not of the tendereſt, but hardeſt Sects) therefore favour thyſelf. Believe what thou "loveſt beſt. Recollect thyſelf, and uſe all Means to prevent thy ill Fortune. Don't loſe thy preſent Eaſe for fear of future "Evil, and be not now miſerable, becauſe thou ſhalt be ſo at ſuch a time." Theſe are the Words of Mr. *Montagne, Eſſays, Lib.* 3. *Chap.* 12. See alſo *Seneca, Epiſt.* 13, 24, 74, 98, *&c.*

[5] *Liban. Declam.* 21. Ὁ χρηστὸς καὶ σπουδαῖος ἀνὴρ τῇ γνώμῃ, καὶ οἷς προείληπται, κρίνεται· κἂν μὴ τὸ πέρας ἀκολουθήσῃ τῶν βεβουλευμένων ἄξιον, οὐδὲν ἧττον ἐστὶ σπουδαῖος, *i. e.* "A good and diligent Man proceeds according to his Judgment, and to the "Notions which he hath form'd of Things: And although the Event doth not anſwer the Worthineſs of his Deſign, he is no "leſs induſtrious for the future." See *Marc. Antonin. Lib.* VI. 50. VII. 38. VIII. 47.

[6] See Mr. *Montagne*'s *Eſſays* upon this Subject, That 'tis not reaſonable to judge of Actions by the Event, *Lib.* 1. *Chap.* 31. and *Lib.* 3. *Chap.* 8.

[7] So *Terence* ſpeaks, *Iſtuc eſt ſapere, non quod ante pedes modo eſt*
Videre, ſed etiam illa, quæ futura ſunt. Adelph. Act. 3. Scen. 4. Verſ. 23, 24.

Nullum numen abeſt, ſi ſit prudentia; ſed te
Nos facimus, Fortuna, Deam, cœloque locamus.

All Heav'n ſtands ready to aſſiſt the Wiſe, but we
Make Fortune a celeſtial Deity.

Horat. Carm. iii. 4. 65.

Vis conſilii expers mole ruit ſua:
Vim temperatam Dii quoque provehunt
In majus———

Force, without Wiſdom for its Guide
Sinks with its own unweildy Weight,
But with delib'rate Art apply'd
The Gods advance it to a nobler Height.

Lucret. l. iii. 1011.

——*Petere quod inane eſt nec datur unquam,*
Atque in eo ſemper durum perferre laborem;
Hoc eſt adverſo nixantem trudere monte
Saxum, quod tamen à ſummo jam vertice rurſum
Volvitur, & plani raptim petit æquora campi.

For, ſtill to ſeek, and ſtill in hopes devour,
And never to enjoy deſired Power,
What is it but to roll a weighty Stone
Againſt a Hill, which ſtrait will tumble down?
Almoſt at Top, it muſt return again,
And with ſwift Force roll thro' the humble Plain.

Mr. *Creech.*

Hor. Carm. ii. 3.

Æquam memento rebus in arduis
Servare mentem: non ſecus in bonis
Ab inſolenti temperatam
Lætitia.

Learn, Friend, to keep an even State,
Whatever Scene your Cares employs,
Amongſt the Smiles or Frowns of Fate.
Nor mean in Grief, nor inſolent in Joys.

Ibid. Od. 10. 21.

Rebus anguſtis animoſus atque
Fortis appare, ſapienter idem
Contrahes, vento nimium ſecundo,
Turgida vela.

The more you are oppreſs'd, bear up the more;
Weather the Tempeſt, till its Rage be o'er.
But if too proſp'rous and too ſtrong a Gale
Should rather ruffle than juſt fill your Sail,
Leſſen 't, and let it take but ſo much Wind
As is proportion'd to the Courſe deſign'd.

Dryd. Miſcel. 2. *p.* 422.

Lib. iii. Od. 29.

——*Ille potens ſui*
Lætuſque deget, cui licet in diem
Dixiſſe, Vixi; cras vel atra
Nube polum pater occupato,
Vel ſole puro.

He lives *in true Delight,*
And Maſter of himſelf appears,
Who ſtrange alike to Hopes and Fears,
Can boldly ſay each Night,
To Morrow let my Sun his Beams diſplay,
Or in Clouds hide them, I have liv'd to day.

Mr. *Cowley.*

Idem l. ii. Sat. 7.

Quiſnam igitur liber? Sapiens; ſibi qui imperioſus,
Quem neque pauperies, neque mors, neque vincula terrent.
Reſponſare cupidinibus, contemnere honores
Fortis, & in ſeipſo totus teres atque rotundus,
Externi ne quid valeat per læve morari.

He's *Free,* who wiſely can himſelf controul,
And challenge Fate and Death to ſhock his Soul.
Brave to reſiſt the Tide of wild Deſire,
And Proof againſt Ambition's cheating Fire.
All round and ſmooth, that no external Load,
May fix a Rub, to check him in his Road.

Juvenal. Sat. xiii. 20.

———*Dicimus autem,*
Hos quoque felices qui ferre incommoda vitæ,
Nec jactare jugum vita didicere magiſtra.

As *Happy* thoſe, tho' not ſo *Learn'd,* are thought,
Whom *Life* inſtructs, who by Experience taught
For *new* to come from *paſt* Misfortunes, look,
Nor ſhake the *Yoke,* which galls the more 'tis ſhook.

Mr. *Creech.*

Idem Sat. x. 347.

Permittes ipſis expendere Numinibus, quid
Conveniat nobis, rebuſque ſit utile noſtris.
Nam pro jucundis aptiſſima quæque dabunt Dî;
Carior eſt illis homo, quam ſibi.

Intruſt thy Fortune to the Powers above,
Leave them to manage for thee, and to grant

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[a] *Cedere majori virtutis fama ſecunda eſt.* Mart.
'Tis next to conqu'ring, wiſely to ſubmit.

[b] Ὀμίχλην ἄσκοπον ἐσσομένων, *the dark Miſt of Futurities.* Tryphiodor. [c] *Plutarch* de Superſtitione. Ἀρετῆς γὰρ ἐλπὶς ὁ θεός ἐστιν, οὐ δειλίας πρόφασις, i. e. *GOD is the Hope of Courage and Virtue, not the Plea and Excuſe of Weakneſs and Cowardice.* Indeed Self-love is the Cauſe that we are aſhamed to own that the Evil that befalls us happens through our own Fault, and ſo we charge Fortune, as Mr. *La Fontaine* ſpeaks ſuitably, *Fab.* 11. *Lib.* 5.

Nothing happens here below
But ſhe may us anſwer ſo,
We do make her rule our Fate,
She is the Author of our Adventures.
And are we Fools ſo to take our Meaſures?
This Excuſe we meditate
We accuſe our Luck, not to be long
Fortune always has the Wrong.

What their unerring Wiſdom ſees thee want;
In Goodneſs as in Greatneſs they excel:
Oh, that we lov'd ourſelves but half ſo well!

Mr. *Dryden.*

IX. Another neceſſary Part of human Improvement, is to be able to ſet a juſt Price on thoſe Things which are the chief in moving our Appetites. Becauſe from the exact Worth and Value of them we are to judge how far we may juſtly labour to be concern'd about them. Amongſt theſe, that which appears with moſt Figure and Splendor, and which is moſt capable of ſoliciting elevated and noble Souls, is the Opinion of Worth and Excellency, the Foundation of Glory and of Praiſe. Now as to this Concern, we are in ſuch a manner to form and diſpoſe our Mind, as to endeavour as far as poſſible the [1] procuring and the preſerving that kind of *Eſteem* which is [2] *ſimply* ſo call'd, being the bare good Opinion of good Men: Inaſmuch as this *regularly* flows from the Obſervance of the Law of Nature, and of our Duty: And becauſe the Want of it may lay open an Occaſion to a thouſand Miſchiefs and Inconveniences[a]. And if this good Reputation be aſſaulted by the Lies and Calumnies of wicked Men, we are to ſpare no Labour in reſtoring it to its Primitive Purity. But when it is not in our Power to overcome Slander, or to ſtifle the falſe Conceptions that the World may entertain about us, we are to comfort ourſelves [3] with the Teſtimony of a good Conſcience, and with the Aſſurance that our Integrity is ſtill known to God[b].

As for that *Eſteem*, which we uſually term *Intenſive*, as Honour and Glory, we are ſo far to purſue it, as it redounds from worthy Actions, agreeable to Reaſon, and promoting the Good of human Society; and as far as it opens a wider Field for ſuch generous Undertakings. But how large a Share ſoever we obtain of theſe Favours, and even by honeſt Means, good heed is to be taken that our Mind doth not ſwell with Arrogance and Vainglory[4]. Much more fooliſh and ridiculous is it to boaſt of, and to value ourſelves upon, what is empty and vain, and gives no ſolid Proof of our Worth. Therefore *Demonactes* in *Lucian*, when he ſaw a Fellow priding himſelf in the Wideneſs of his Purple, *Hark you, Friend* (ſays he) *a Sheep us'd to carry this fine Burthen before you, and yet was ſtill but a Sheep.* But when we want Occaſions and Opportunities of ſhewing our Worth, and are not able to procure them, we muſt bear this ill Fortune with Patience, ſince there is nothing in it that can be charg'd upon our Default[5]. On the other hand, it appears to be at the ſame time wicked and fooliſh, to affect and uſurp the external Enſigns of Honour, when the inward Foundations of it are wanting: As it is deteſtable Madneſs to aſpire to Fame and to Honours by evil Arts, and by Deeds repugnant to Reaſon; and to deſire the ſhining above others, only to be able to inſult over them, and to make them obnoxious to our Pleaſure. Laſtly, Since we are not always allow'd the Liberty of building our Fortune as we pleaſe, ſince it muſt ſometimes depend on external Cauſes; our Mind is to be put into ſuch a Temper, as when we have once done our beſt, to reſt ſatisfied with the Lot that falls to our Share; and to look on thoſe Things which we are not able to compaſs and to obtain, as Matters which do not concern us, and which therefore are not worthy our Grief or our Anger[6].

X. For

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[a] *See* 2 Cor. viii. 21. Vide *Eſſais de Morale par Mr.* Placete, *Vol.* 4. *Diſcourſ.* 6, & 7.

[b] Add. *Le Grand Philoſ.* Part VIII. *p.* 420.

§. IX. [1] *Negligere quid de ſe quiſque ſentiat, non ſolùm arrogantis eſt, ſed etiam omnino diſſoluti.* Cicero de Off. Lib. 1. Chap. 28. *To be careleſs what others think of us, is a Sign not only of great Pride and Preſumption, but alſo of entire Impudence.* See *Græviuſ*'s *Notes.*

[2] See the Explication of this Diviſion of Eſteem into ſimple and diſtinctive, *Lib.* 8. *Chap.* 4. §. 2. and what I have ſaid upon the laſt in my *Treatiſe of Games*, Lib. 1. Chap. 3. §. 6.

[3] *Seneca* has very well obſerved, That no Diſgrace ought to diſcourage us from doing good. *Si gratum eſſe non licebit, niſi ut videar ingratus, ſi reddere beneficium non aliter quàm per ſpeciem injuriæ potero, æquiſſimo animo ad honeſtum conſilium, per mediam infamiam tendam. Nemo mihi videtur pluris æſtimare virtutem, nemo illi magis eſſe devotus, quàm qui viri boni famam perdidit, ne conſcientiam perderet,* i. e. "When I can't ſhew my Gratitude unleſs I expoſe myſelf to the Diſgrace of being "thought ungrateful, and I can't be thought to do a Kindneſs, but it will be taken for an Injury; I will ſtill perſiſt ſincerely "in my honeſt Deſign to execute it, though I wade through Diſgrace. For no Man ſeems to have a greater Eſteem for "Virtue, or to be more devoted to it, than he, who to ſave his Conſcience, has loſt the Reputation of a good Man." *Seneca Epiſt.* 81. See *Marc. Antonin. Lib.* 5. §. 3.

[4] *Plin. Panegyr.* Chap. 71. *Nam cui nihil ad augendum faſtigium votum ſupereſt, hic uno modo creſcere poteſt, ſi ſe ipſe ſubmittat, ſecurus magnitudinis ſuæ, i. e.* "He who hath already arriv'd at the nobleſt Pitch of Eminence, hath this only Way left of im"proving his Height, by ſtooping to the Arts of Humility and Condeſcenſion, as ſecure of his own Greatneſs.

[5] Hor. Carm. III. 2. *Virtus repulſæ neſcia ſordidæ*
Intaminatis fulget honoribus,
Nec ſumit aut ponit ſecures,
Arbitrio popularis auræ.

On its own Worth true Majeſty is rear'd,
And Virtue only is her own Reward;
With ſolid Beams and native Glory bright,
She neither Darkneſs dreads, nor covets Light.
True to herſelf, and fix'd to in-born Laws,
Nor ſunk by Spite, nor lifted by Applauſe.

Mr. *Prior.*

Claudian. de Conſulat. Mall.
Ipſa quidem Virtus pretium ſibi; ſolaq; latè
Fortunæ ſecura nitet, nec facibus ullis
Erigitur plauſuve petit clareſcere vulgi;
Nil opis externæ cupiens, nil indiga laudis,
Divitiis animoſa ſuis, immotaque cunctis
Caſibus, ex alta mortalia deſpicit arce.

Virtue the Tribute ſcorns of vulgar Eyes,
And in herſelf her richeſt Portion lies.
With native Rays ſhe ſhines, nor owes a Beam
To glittering Honour, or to gloſſy Fame.
Unmov'd at earthly Storms, to Heaven ally'd,
From Heaven ſhe looks, and laughs at mortal Pride.

[6] Seneca Agamemn. *ver.* 102.
Modicis rebus longius ævum eſt.
Felix mediæ quiſquis turbæ
Sorte quietus,
Aura ſtringit littora tuta
Timiduſque mari credere cymbam,
Remo terras propiore legit.

Exceſs of Fortune kills, or cloys,
But *Temp'rance* is the *Health* of Joys.
Happy the Man whoſe middle State,
Fearing to tempt the Tide of Fate,
Securely guides with wary Oar
His humble Bark along the Shore.

Idem

X. For the better maintaining and preſerving himſelf in the World, a Man hath likewiſe need of external Goods and Poſſeſſions; as it is frequently a Part of our Duty to provide them for others. Concerning which, it is the Command of Reaſon and Nature, that we endeavour [1] the Procurement of them, ſo far as is conſiſtent with our Strength, our Opportunities, and our Honeſty. The *Ant* which *Virgil* [a] makes ſo *prudent a Provider for Old Age*, is even in the Divine Writings propos'd amongſt the Examples of harmleſs Induſtry[b] [2]. But becauſe our Wants are not infinite, but lie in a very little Compaſs, therefore we muſt moderate our Deſire and our Purſuit of theſe Things, according to the juſt Occaſions of Nature, and the Meaſure of Sobriety. *Socrates* in *Diogenes Laertius*, when he us'd to ſee the prodigious Quantity of Goods expos'd to Sale in the publick Places, would cry out, Πόσων ἐγὼ χρείαν οὐκ ἔχω; *What a number of Things are there here which I do not want!* Juv. Sat. v. 6.

Ventre nihil novi frugalius.——————
————The Belly is a frugal Gueſt.

Idem. Sat. xiv. 316.
————*Menſura tamen quæ*
Sufficiat cenſus, ſi quis me conſulat edam:
In quantum ſitis atque fames & frigora poſcunt.

If any aſk me what would ſatisfy
To make Life eaſy, thus would I reply:
As much as keeps out Hunger, Thirſt, and Cold.
Mr. *Dryden*, jun.

[3] *Apuleius* Apolog. *I would chooſe my Fortune as I would my Coat, rather neat and fit, than too long or too full. Inaſmuch as in all Things which we apply to the Service of Life, whatever exceeds Conveniency and Moderation, turns more to Burthen than to Uſe. Unweildy Poſſeſſions, like vaſt and monſtrous Rudders, will ſooner drown than guide us: They clog with Plenty, and ſurfeit with Exceſs.*

Lucan. iv. 377.
Diſcite quàm parvo liceat producere vitam,
Et quantum natura petat.——————
————*Satis eſt populo fluviuſque Cereſque.*

True Bliſs is frugal, every Brook and Field
A full Supply for Life and Nature yield.

Lucret. v. 1116.
Quod ſi quis vera vitam ratione gubernet,
Divitiæ grandes homini ſunt, vivere parcè
Æquo animo.

Would Men but once live up to Reaſon's Rules,
They would not ſcrape and cringe to wealthy Fools.
For *'tis the greateſt Wealth to live content*
With little————
Mr. *Creech*.

Claudian. *in* Rufin. 1.
Vivitur exiguo melius; Natura beatis
Omnibus eſſe dedit, ſi quis cognoverit uti.

Life runs the beſt on little: Nature's Store
Can make all happy that will uſe their Power.

Horat. Carm. III. 16.
Contracta meliùs parva cupidine
Vectigalia porrigam,
Quam ſi Mygdoniis regnum Halyattici
Campis continuem: multa petentibus
Deſunt multa, benè eſt cui Deus obtulit,
Parca quod ſatis eſt manu.

Thus paraphras'd by Mr. *Cowley*.
A Field of Corn, a Fountain, and a Wood,
Is all the Wealth by Nature underſtood.
The Monarch on whom fertile *Nile* beſtows
All which that grateful Earth can bear,
Deceives himſelf if he ſuppoſe,
That more than this falls to his ſhare.
Whatever an Eſtate doth beyond this afford,
Is not a Rent paid to the Lord;
But is a Tax illegal and unjuſt
Exacted from it by the Tyrant Luſt.
Much will always wanting be
To him who much deſires. Thrice happy he
To whom the wiſe Indulgency of Heaven
With ſparing Hand but juſt enough has given.

Idem Herc. OEtæ, *ver.* 691, *&c.*
Malè penſantur magna ruinis;
Felix alius, magnuſque volet;
Me nulla vocet turba potentem;
Stringat tenuis littora puppis.
Nec magna meos aura phaſelos
Jubeat medium & ſcindere pontum.
Tranſit tutos Fortuna ſinus,
Medioque rates quærit in alto,
Quarum feriunt ſuppara nubes.

Falls are the ſad Rewards of Height:
Let others burſt in ſwelling Great.
Give me no Title from the Crowd,
But let my gentle Bark be row'd
Cloſe to the Bank, whilſt fluttering Gales
Court me in vain to hoiſt my Sails.
When angry Vengeance puts to Sea
She leaves in Peace the ſilent Bay;
At the tall Maſts her Thunders fly,
Whoſe blazing Streamers ſtrike the Sky.

Add *OEdip. v.* 882, *&c.* See alſo *Val. Max. Lib.* 7. *Chap.* 2. §. 1. *exter.*

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[a] ————*Inopi metuens Formica ſenectæ.* Virg. Georg. l. 1. v. 186.

[b] *Prov.* vi. 6. xiii. 7.

§. X. [1] See my Treatiſe of Games, *Lib.* 1. *Chap.* 3. §. 7.

[2] *Eurip. Electr. v.* 80, 81.
Ἀργὸς γὰρ οὐδεὶς, θεοὺς ἔχων ἀνὰ στόμα,
Βίον δύναιτ' ἂν ξυλλέγειν ἄνευ πόνου.

————The Wretch that hopes
To help his idle Hands with idle Prayers,
And will not work to live, ſhould fairly ſtarve,
By Gods and Men unpity'd.————

[3] *Apuleius*'s Words are, *Fortunam, velut tunicam, magis concinnam, quàm longam probare, quippe etiam ea ſi non geſtetur, & trahatur, nihilominus quàm lacinia præpendens, impedit, & præcipitat. Etenim in omnibus ad vitæ munia utendis, quidquid aptam moderationem ſupergreditur, oneri potiùs, quàm uſui, exuberat. Igitur & immodicæ divitiæ, velut ingentia & enormia gubernacula, facilius mergunt quàm regunt: quod habent irritam copiam, anxiam nimietatem.* Our Author in this Paragraph heaps together a great Number of Quotations confuſedly.

Idem l. 1. Epiſt. 10. ver. 32.

——Licet ſub paupere tecto
Reges, & regum vita præcurrere amicos.

A Cottager may match in true Delights
Kings, and their more luxurious Favourites.

Idem l. 1. Ep. 12. ver. 4.

Pauper enim non eſt, cui rerum ſuppetit uſus.
He's never poor that holds enough for Uſe.

Quinctil. Declam. 13. *It is Wealth enough to deſire no more.* Turpilius *in* Priſcian. *The happieſt Livers are the contented Maſters of little Fortunes.*

We muſt not then on any account give too looſe Reins to our deſire of getting; much leſs muſt we invade the Wealth of others by Injuries and evil Deſigns [a]. And thoſe Things which we have fairly made our ſelves Maſters of, we are to account no otherwiſe, than as Helps to our Neceſſities, and Inſtruments to make us deſerve well of Mankind. But the Mind muſt by no means fix and enſlave itſelf, to poſſeſs and to preſerve them merely for their own Sake: or to be perpetually employ'd in the endleſs Labour of increaſing them. 'Tis downright Frenzy, as *Juvenal* ſays, *Syl.* xiv. 137.

Ut locuples moriaris, egenti vivere fato.

Living, to ſuffer a low ſtarving Fate,
In hopes of dying in a wealthy State.

On the other ſide, 'tis a very good part of the Character which *Statius* gives of a wiſe Man, *Syl.* ii. 2.

Non tibi ſepoſitas infelix ſtrangulat arca
Divitias, avidiq; animum diſpendia torquent
Fœnoris: expoſiti cenſus & docta fruendi
Temperies.

In ſtifling Cheſts your Wealth is not confin'd,
Nor, lent on greedy Uſe, torments your Mind;
But nobly ſpreads, on decent Ends employ'd,
By Moderation, and with *Art* enjoy'd [b].

We are farther to conſider, that Nature is not wanting in a plentiful Proviſion for the Neceſſities of her Sons [c]. That the Riches which we hoard up for future uſe, are expos'd in the mean time to a thouſand Dangers, and ſometimes give us more trouble in keeping them, than they gave us Labour in getting them [d]. Laſtly, that whatever we leave heap'd together, at our Death, muſt fall to an Heir, who may not only be unworthy of the Gift, but may deſpiſe and deride the Giver [e]. As therefore an honeſt Occaſion of acquiring Riches is not to be neglected, ſo the Mind ought to be put into ſo even a Temper, as not to loſe *it ſelf*, if it ſhould happen to loſe *them*. *Horace* hath taught us the beſt way of dealing with Fortune: *Od.* iii. 29.

Laudo manentem; ſi celeres quatit
Pennas, reſigno quæ dedit, & meâ
Virtute me involvo; probamq;
Pauperiem ſine dote quæro.

Which a great and noble Wit hath thus moſt happily paraphras'd:

Let her love whom ſhe pleaſe, I ſcorn to woo her;
Whilſt ſhe ſtays with me, I'll be civil to her;

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[a] Hor. Sat. 1. 1. 92. *Denique ſit finis quærendi, cumq; habeas plus,*
Pauperiem metuas minus; & finire laborem
Incipias, parto quod avebas.——

Stop then your ſwelling Riches as they grow;
And let baſe Want with its Retinue, ſhow,
At greater Diſtance, a leſs dreadful Foe.
Ceaſe your vain Care, let all your Labours ceaſe,
When your large Wiſh is crown'd with full Succeſs.

Eumen. Panegyr. *Thoſe who make not Reaſon the Bounds of their Deſires, are never ſatisfied with any Profuſeneſs of Fortune; and thus Happineſs ever ſlides by them, whilſt being full of Hopes, and void of real Enjoyments, they loſe the preſent in gaping after the future.* Add. *Charron de la Sageſſe, l.* 1. *c.* 21.

[b] Hippodamus de Felicitate: *The Poſſeſſion of good Things contributes nothing to Happineſs, without the Uſe.* Add. *Theocrit. Idyll.* 16.

Horat. Epod. 1. 32.

———Haud paravero
Quod aut, avarus ut Chremes, terra premam,
Diſcinctus aut perdam ut nepos.

I would not labour to abound
In what I might with no leſs Care,
Like a baſe Miſer or a Spendthrift Heir,
Squander *above*, or bury *under* Ground.

Idem Carm. IV. 9.
Non poſſidentem multa vocaveris
Recte beatum: rectius occupat
Non beati, qui deorum
Muneribus ſapienter uti
—Callet.——

The wide Poſſeſſor vainly claims
Amongſt his Titles and his Names,
The Term of *Happy*, which ſhould bleſs
The Man that wiſely lives on leſs.

Idem L. 1. Epiſt. 2.
Semper avarus eget; certum voto pete finem:
Quod ſatis eſt cui contingit nil amplius optat.

The Miſer's ever poor: Thy Wiſh ſhould fall
On ſome fix'd End: who has enough, has all.

Idem L. 2. Epiſt. 2.
Utar, & ex modico, quantum res poſcit, acervo
Tollam: nec metuam quid de me judicet hæres,
Quod non plura datis invenerit.——

I'll uſe my little Store, and freely take
Without Concern, what fair Occaſions lack.
And let my greedy diſappointed Heir
Rail when I'm gone, and curſe my want of Care.

Add. *Gell. l.* 10. *c.* 17.

[c] Arrian. Epictet. l. 3. c. 24. *No Man is properly an* Orphan; *we have a common Father, who is conſtantly buſied in providing for us.* [d] Horat. Carm. III. 16. *Creſcentem ſequitur cura pecuniam.*

Care in proportion ſwells with every Bag.

[e] Bion. Idyll. 5.

Ἐς πόσον ἁ δειλοὶ καμάτως κ' εἰς ἔργα πονεῦμες,
Ψυχὰν δ' ἄχρι τίνος ποτὶ κέρδεα καὶ ποτὶ τέχνας
Βάλλομες, ἱμείροντες ἀεὶ πολλὺ πλήονος ὄλβω;
Λαθόμεθ' ἦ ἄρα πάντες, ὅτι θνατοὶ γενόμεσθα.

How vainly wretched do we ſpend our Years
In uſeleſs Labour and in idle Cares?
The Chaſe of Wealth unwearied we purſue,
And loſe the preſent, for a future View.
But not one thinks how ſoon his mortal Line
Muſt ſadly break, and end his wild Deſign.

But if ſhe offers once to move her Wings,
I'll fling her back all her vain Gew-gaw Things,
And, arm'd with Virtue, will more glorious ſtand,
Than if the Bitch ſtill bow'd at my Command.
I'll *marry* Honeſty, though ne'er ſo poor,
Rather than follow ſuch a dull blind Whore [a].

As to Expences, we are to uſe ſuch a Moderation about them, as moſt willingly to undertake ſuch as our Duty requires of us, and yet not ſquander our Fortune at a venture, without Neceſſity and without Reaſon [b]. For 'tis equally fooliſh and abſurd, not to apply our Riches to the Ends for which they are given us, and vainly to throw them away on inferior Uſes and Deſigns. The former Vice including numerous Breaches of our Duty; the latter leading the direct way to Debt, Poverty, Rapine, Deceit, and a thouſand other Enormities and Miſchiefs [c].

XI. In Reference to Pleaſure and Pain, 'tis not only the Permiſſion, but the Advice of Reaſon, that we avoid as much as poſſible all unneceſſary Trouble and Diſquiet; and not only endeavour to keep ourſelves free from Grief and Diſguſt, but likewiſe to entertain our Senſes with ſuch Objects as are [1] agreeable and delightful to them [d]. But to a ſingular and exquiſite Gratification of Senſe, the Mind is by no means to be accuſtomed; in as much as this Kind of Epicuriſm either weakens and enervates a Man, equally oppreſſing the Vigor of Body and of Soul, and rendring them both unfit for any ſerious Buſineſs; or ſteals our Time from better and more neceſſary Employments; or waſtes and conſumes our Wealth, and our Conveniences of Life; or often, being join'd with ſome criminal Practice, draws after it no other Train, than Trouble, Danger, Damage, and Diſgrace. As therefore 'tis the next degree to Madneſs, to invite Uneaſineſs and Torment without uſe or occaſion: So it is very rational to allow ourſelves a moderate Taſte of lawful and innocent Pleaſures, without ſuffering them to overwhelm and to *drown* us. But this is to be fix'd as an inviolable Rule, That no Pleaſure muſt be purchas'd at ſo dear a rate, as the Neglect or the Tranſgreſſion of our Duty.

XII. The laſt Care which lies on us in the improving and well-ordering of our Mind, is with our utmoſt Diligence to maintain its Sovereignty over its own Motions and Affections; the greateſt part of which do not only impair the Health of the Body and the Vigor of the Soul, but caſt ſuch a Cloud on the Judgment and Underſtanding, as to wreſt them violently from the ways of Reaſon and of Duty. So that a *Coldneſs of the Paſſions* is, as it were, the natural Principle of Prudence and Probity amongſt Men [1]. It may not be amiſs to run with ſome light Remarks through the Particulars. *Joy* is in itſelf a Paſſion moſt agreeable to Nature. But ſtrict Care is to be taken, that it do not break out on improper Occaſions, as upon the Misfortunes of other Men: And likewiſe, that it do not drive us on any thing that is vain and trifling, or baſe and indecent. *Sorrow* [2] is a Canker that waſtes alike the Body and the Mind. This therefore is, as much as poſſible, to be remov'd and expell'd; unleſs ſo far as the Offices of Humanity oblige us to expreſs our Concern and Pity at the Misfortunes, or at the Deaths of others; and as it is requiſite to the great Buſineſs of Repentance. *Love* is a friendly Motion to Mankind; yet this is ſo wiſely to be manag'd and mo-

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[a] Add. *Charron de la Sagaſſe, l.* 1. *c.* 39. *n.* 2. *ſ.* 9.

[b] *Horat. l.* 2. *Epiſt.* 2. *ver.* 195.

Diſtat enim ſpargas tua prodigus, an neque ſumptum
Invitus facias, neque plura parare labores.

You may be gen'rous, and yet not profuſe;
Vain ſquandering differs wide from chearful Uſe,
Which neither fears to break the preſent Store
Nor labours in the needleſs Search of more.

[c] Lucan. l. 1. ver. 181.

Hinc Uſura vorax, avidumq; in tempore fœnus,
Et concuſſa fides, & multis utile bellum.

Hence greedy Uſury, hence Truſts betray'd,
And War, to Wickedneſs a gainful Trade.

Ovid. Epiſt. 15. 76. *Quaſq; male amiſit, nunc male quærit opes.*
What Vice has ſpent by Vice he would repair.

[d] Vide *Charron de la Sageſſe, l.* 2. *c.* 6. *n.* 1, 2.

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§. XI. [1] Mr. *Montagne* has ſome curious Thoughts on this Subject, which are worthy our Obſervation. "Nature, ſays he, "like an indulgent Mother, has enjoined us no Actions for our Neceſſities, but what it is a Pleaſure to perform; being invited to them, not by our Reaſon only, but by our Appetite, ſo that it is Injuſtice to corrupt thoſe Rules. When I ſee *Ceſar* "and *Alexander* in the midſt of their great Employments, enjoying human and bodily Pleaſures ſo fully, I can't think it was "for the Refreſhment of the Mind, but to ſtrain it, by introducing thoſe violent Actions and laborious Projects, through greatneſs of Courage, into an ordinary Courſe of Life. If they had been thought wiſe Men, what had been their ordinary Calling? This laſt. The Extraordinary——That the Soul aſſiſts and favours the Body, and does not abſolutely refuſe to "ſhare in its Pleaſures, but ſeems to be delighted with them, it is to preſerve a Moderation, as the wiſer Part, for fear through "Indiſcretion Men ſhould turn them into Trouble; for Intemperance is the Bane of Pleaſures, and Temperance is ſo far from "being any Abridgment of them, that 'tis a ſweetning of them. I direct my Soul to look upon both Grief and Pleaſure with "a View equally regular and firm, but on the one pleaſantly, and on the other ſowrely; and, according to its Ability, to be "as careful to ſhorten the one, as enlarge the other. The clear ſight of good Things is always attended with a diſtinct Knowledge of Evil, and Grief hath ſomething unavoidable at the beginning, as Pleaſure hath ſomething unavoidable in the end, "which may cut off all Exceſs. *Plato* (*De Legib. Lib.* 1. *Tom.* 2.) couples them together, and will have it the Duty of Courage to encounter Grief and the charming Delights of Pleaſure, with equal Bravery. Theſe are the two Fountains at which "whoever draws, where, when, and how he ought, whether he be Citizen, Man, or Beaſt, he is happy. The firſt he muſt "take as a Medicine, merely for Neceſſity, and ſparingly; the other to ſatisfy his Thirſt, but not to Drunkenneſs. Grief, "Pleaſure, Love, and Hatred, are the firſt Things an Infant feels. If Reaſon happens to guide them, they follow it, and "that is Virtue." *Eſſays, Lib.* 3. *Chap.* ult. There are many other curious Thoughts both before and after. See *Porphyr. de Vit. Pythag.* §. 39. and what I have ſaid in my Treatiſe of *Games, Lib.* 1. *Chap.* 4. §. 8.

§. XII. [1] Quinctilian Declam. 296. *Magni affectus Jura non ſpectant, i. e.* "Great Paſſions are above Laws." See *Lib.* 1. *Chap.* 4. §. 7.

[2] "I neither love nor value this Paſſion (ſaith *Montagne*) although the World ſet a peculiar Eſteem upon it, and gives it a "particular Honour. They call it Wiſdom, Virtue, and Conſcience. Fooliſh and vain Commendations! The *Italians* have "given it a much properer Name, calling it, a *corroding Humour*. It is a Quality always noxious, always fooliſh, and the "*Stoicks* maintain it to be baſe and cowardly, as their wiſe Men have ever eſteemed it." *Eſſays, Lib.* 1. *Chap.* 2. See alſo *Charron of Wiſdom, Lib.* 1. *Chap.* 33. and *Lib.* 3. *Chap.* 29.

derated by Reaſon, that it does not throw itſelf away on an ill Object; that it does not procure baſe and unworthy Fuel to its Flame; that it does not hinder the Exerciſe of other Duties, nor degenerate into Diſquiet and Diſeaſe: That if it ſettle on a Thing ſubject to Loſs, or to Corruption, it ſtick not ſo cloſely to it, as upon the Failure of it, to make the Soul unable to recollect and to recover its Force [3]. [4] *Hatred* is pernicious as well to the Perſon who employs it, as to him againſt whom it is employ'd. This therefore is to be diligently quench'd and ſtifled, leſt it betray us to Injuries and Breach of Duty againſt our Neighbours. And if ſome Perſons do really deſerve our Averſion, yet 'twould be ſtill Folly to create, on their account, Uneaſineſs and Diſquiet to our ſelves. *Envy* is a moſt deform'd Monſter, ſometimes producing ill Effects in others, but always in the envious Perſon; who like Iron, o'er-run with Ruſt, not only defiles, but deſtroys himſelf continually [5]. *Hope*, altho' a Paſſion more eaſy and mild than others, yet it is to be guided with ſuch a Temper, that it do not *make the heart ſick*; nor, by aiming at Things either vain and [6] uncertain, or beyond its Strength and Reach, tire itſelf to no purpoſe, and become as *Ariſtotle* terms it ἐγρηγορότος ἐνύπνιον, *a waking Dream*: And that we do not fall under *Lucretius*'s Cenſure and Character;

——*Dum abeſt quod avemus, id exſuperare videtur*
Cætera; poſt aliud, cum contigit illud, avemus;
Et ſitis æqua tenet vitai ſemper hianteis, &c. l. iii. 1095.

——*Abſent* Pleaſures ſeem the beſt;
With wing'd Deſire and Haſte we thoſe purſue;
But thoſe enjoy'd, we ſtraitway call for new.
Life, Life we wiſh, ſtill eager to live on, *&c.*
Mr. *Creech.*

Fear, as it is a dangerous Enemy to human Minds, ſo is it a Motion [8] altogether uſeleſs and unſerviceable. For that good Caution which ſome make to be the Product of it, may ariſe without its Aſſiſtance from a wary Circumſpection, and from a Prudence alike untouch'd with Anxiety, or with Conſternation. *Anger* is a moſt deſtructive as well as a moſt violent Paſſion; which is to be reſiſted with our utmoſt Strength and Endeavour. And whereas [9] ſome alledge in its Favour, that it excites our Valour, and confirms our Conſtancy in Dangers; its Effect is indeed directly contrary, for it binds a Man's Spirit and Courage, and drives him headlong to his Ruin [10], [11]. *Anger* [12], *is the moſt improvident Thing in the World: and ſeldom acts but what we afterwards repent of.* Nearly related to *Anger* is the [13] *Deſire of Revenge*, which when it exceeds a moderate Defence of ourſelves and of our Dependents or Concerns, and a juſt Aſſertion of our Rights againſt the Invaders of them, turns, beyond diſpute, into a *Vice* [a].

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[3] Sophocles Antigone, ver. 663.

Μὴ νῦν πότ', ὦ παῖ, τὰς φρενας ὑφ' ἡδονῆς:
Γυναικὸς οὕνεκ' ἐκβάλης. ——

Never let Woman rob thee of thy Wits.

Euripid. Hippol. Coron. ver. 258.

Χρῆν γὰρ μετρίας εἰς ἀλλήλους
Φιλίας θνητοὺς ἀνακίρνασθαι,
Καὶ μὴ πρὸς ἄκρον μυελὸν ψυχῆς
Εὔλυτα δ' εἶναι στέργηθρα φρενῶν,
Ἀπό τ' ὤσασθαι, καὶ ξυνθεῖναι.

Men ſhould be mod'rate when they fix their Love,
And ne'er give up their Freedom and their Soul.
The Bands of Paſſion ſhould be looſely ty'd,
Fit for a wider or a cloſer Knot.

Our Author here affirms, that the Maxim of *Euripides* agrees exactly to a Subject contrary to what he applies it to, I mean Hatred and Enmity, and that it ought rather to be looked upon as a Precept, not to make too great a Number of Friends. Whereas the Poet only condemns ſuch an Exceſs of Familiarity as cauſes us to carry our Kindneſs beyond the Bounds of Duty, and makes the Loſs of the Thing loved intolerable. This is evident from the Verſes following, which are an Explication of the foregoing:

Οὕτω τὸ λίαν γ' ἧσσον ἐπαινῶ
Τοῦ μηδὲν ἄγαν.
Καὶ ξυμφήσουσι σοφοί μοι.

[4] "Anger and Hatred (ſays *Montagne*) alſo, are above the Duty of Juſtice, and are Paſſions of Uſe only to them who can't "be kept to their Duty by plain Reaſon. *Utatur Motu animi, qui uti ratione non poteſt.*" Eſſays, Lib. 3. Chap. 1.

[5] Ovid. Metamorph. l. 2. 781.

——*Videt ingratos, intabeſcitque videndo*
Succeſſus hominum, carpitq; & carpitur una,
Suppliciumque ſuum eſt.

Pale Envy with pernicious Joys ſurveys
Others Succeſs; and in Reflection preys
Upon her ſelf; her Sin's her Puniſhment.

Add. *Bacon's Eſſ.* 10.

[6] Horat. Lib. 1. Epiſt. 2.

Invidia Siculi non invenere Tyranni
Majus tormentum,

Envy's a Torment that no Art can reach,
Of Cruelty improv'd————

[8] See *Montagne, Lib.* 1. *Chap.* 17.

[9] *Ariſtotle* ſays that Anger ſerves inſtead of Arms to Courage and Fortitude. This is very probable, but they that oppoſe (*Senec. de irâ, Lib.* 1. *Chap.* 16.) anſwer in Drollery: "'Tis a kind of Arms of a new Invention, for if we take away other "Arms, that will fail us, our Hands can't weild that, but that guides our Hands, that holds us, and we do not hold it." *Montagne's Eſſays, Lib.* 2. *Chap.* 31. in the End; read the whole Chapter, which is very fine and inſtructive.

[10] *Ira furor brevis eſt*, Anger is a ſhort Phrenzy. *Hor. Lib.* 1. *Ep.* 2. Add. *Liban. Progymn. Vituper. Iræ.*

[13] Statius, Theb. 10. 697.

————*Ne fræna animo permitte calenti,*
Da ſpatium tenuemq; moram: male cuncta miniſtrat
Impetus.

Give not the Reins to Paſſion in its Courſe,
Let Silence cool, and Leiſure break its Force:
Fury does all things ill————

[12] Horat. Lib. 1. Epiſt. 2.

————*Qui non moderabitur iræ*
Infectum volet eſſe, dolor quod ſuaſerit & mens,
Dum pœnas odio per vim feſtinat inulto.

The Man of Rage, whoſe Mind is not his own,
Muſt often grieve, and often wiſh undone
What paſs'd when Raſhneſs, deaf to wiſe Debate,
Prompted the ſpeedy Vengeance of his Hate.

[11] *Marcus Antoninus* ſays, Ἄριστος τρόπος τοῦ ἀμύνεσθαι, τὸ μὴ ἐξομοιοῦσθαι. "The beſt way of revenging ourſelves is, not "to reſemble him that has done us an Injury," See what is ſaid in the following Chapter. *Seneca* has a proper Paſſage for our Purpoſe, of which our Author quotes a part elſewhere: *Non enim ut in beneficiis honeſtum eſt, merita meritis repenſare, ita injurias injuriis; illic vinci turpe eſt, hic vincere. Inhumanum verbum eſt, & quidem pro juſto receptum, Ultio, & à contumelia non differt, niſi ordine. Qui dolorem regerit, tantum excuſatius peccat*——*Magni animi eſt, injurias deſpicere, ultionis contume-*

XIII. In ſuch Duties then, as we have already reckon'd up, doth that culture of the Mind chiefly conſiſt, which all are obliged to undertake, and in the implanting and inforcing which thoſe Perſons ought to employ eſpecial Care and Concern, who have the Information and Inſtitution of others committed to their Care. For the want of this Improvement, or the Diſpoſition directly contrary to it, are both repugnant to human Duty, and lay ſuch a Rub in our Way, as it is not eaſy to get over. And therefore whoever is found deſtitute of ſuch a neceſſary Perfection, juſtly falls under common Cenſure and Reproach.

There is ſtill behind [1] a more peculiar culture of the Mind, conſiſting in the various Knowledge of Things, and of Arts and Diſciplines. This cannot be abſolutely neceſſary to the Diſcharge of our Duty in general: And therefore every one is to moderate his Purſuit of them, according to his own Capacities and Occaſions, according to the Cauſes which drive him on ſuch Searches, and the Fruits which he may fairly hope to obtain from them. Now as for thoſe Arts which adminiſter to the Neceſſities and to the Conveniences of human Life, no Man can raiſe a Doubt about their Excellency and Uſe. But concerning the Study of Letters, many have been ſo bold as to maintain, that Learning is not only uſeleſs, but deſtructive to Mankind; and that for this Reaſon we find it to have been forbidden in ſo many Commonwealths, above the degree of reading, writing, and managing Accompts. Every one knows the common Reproaches that are caſt on Scholars: Of their unfitneſs for Buſineſs, their weakneſs of Courage, and of civil Prudence, their aukwardneſs in Geſture, and in Converſe; with a thouſand more Reflections of the ſame Nature, which ſome Men have thought themſelves very eloquent in ſetting out [b] [2].

Now to come at the Truth of this Queſtion, and to know how to ſet a juſt Value on ſuch Attainments, let us firſt lay this down for an undoubted Principle, that to the acquiring of Wiſdom and Prudence, bare Letters are by no means ſufficient, without a native Excellency of Soul. If this Happineſs be wanting, we can no more produce Wiſdom by ſcholaſtical Inſtitution, than we can procure a rich Harveſt of Corn by ploughing on the barren Sands. For 'tis one thing to be a great Reader, and another to be a prudent Man [c]. And *Quinctilian*'s Judgment is right, when he ob-

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lioſiſſimum genus eſt, non eſſe viſum dignum, ex quo peteretur ultio. Multi leves injurias altius ſibi demiſere, dum vindicant; ille magnus & nobilis eſt, qui, more magnæ feræ, latratus minutorum canum ſecurus exaudit. Minus, inquies, contemnemur, ſi vindicaverimus injuriam. Si tanquam ad remedium venimus, ſine ira veniamus, non quaſi dulce ſit vindicari, ſed quaſi utile. Sæpe autem ſatius fuit diſſimulare, quam ulciſci, i. e. "We muſt not behave ourſelves under Injuries as under Benefits. Theſe "'tis good to requite, but the other diſhoneſt; there 'tis a Shame to be overcome, here to overcome. Revenge is an inhuman "Word, though the Thing which it ſignifies is looked upon commonly as juſt and innocent. It differs nothing from an Injury, but in Time. The Aggreſſor does the firſt Injury, and he that revenges himſelf does another in his Turn; this laſt is "but little more excuſable than the former. A great and generous Soul contemns Injuries. The moſt injurious Revenge, "and moſt mortifying to the Aggreſſor, is to be judged unworthy of Revenge. Many Men in revenging a ſmall Injury, have "gained nothing but an Affront more ſmarting and hard to be forgotten. A Lion hears the Barkings of little Whelps without Regard. But you'll ſay, By revenging ourſelves we prevent others Contempt of us: Very well. But if you uſe Revenge as a Remedy, do it without Paſſion and Anger, and behave yourſelves, not as if you delighted in it, but as a thing "profitable. Nevertheleſs we muſt own that it is more advantageous often to diſſemble an Injury than to revenge it." *De Irâ, Lib. 2. Chap. 32.* See *Juſtus Lipſius*'s Notes on it.

[a] Add. *Le Grand. Philoſoph. p. 8. c. 12, &c.* [b] *Eraſmus* (*Epiſt. 12. l. 17.*) giving a Character of a learned Man, adds, *He was skill'd in common Prudence and Knowledge of Affairs, which is generally wanting to Scholars.* Procop. Hiſt. Goth. l. 1. *Learning and Virtue are different Things; and good Diſpoſitions are moſt commonly broken and cow'd by rigorous Inſtitution. Theodorick* us'd to ſay, *'Twas impoſſible that they who had been bred up in the fear of the Rod, ſhould ever arrive to ſuch a Degree of Courage, as to contemn Swords and Spears.* Plato de Repub. l. 7. *No free-born Subject ought to be inſtructed in a ſervile Manner.* Seneca Hippol.

Ingenia melius recta ſe in laudem ferunt;	Great Souls move ſtraighteſt in the Paths of Praiſe,
Si nobilem animum vegeta libertas alit.	When left to follow their free native Bent.

Plato Gorg. *When they* (the Philoſophers) *apply themſelves to the Management of publick or of private Buſineſs, they are moſt contemptibly ridiculous. Arrian. Epictet. l. 1. c. 11.* calls a meer Scholar, *an Animal that all the World laughs at.* Add. *Montagne l. 1. c. 24. Charron l. 1. c. 39. l. 3. c. 14. n. 19, &c.* [c] 'Tis the ſaying of an old Poet, Ὡς οὐδὲν ἡ μάθησις, ἂν μὴ νοῦς παρῇ, i. e. *Learning ſignifies nothing without a Mind*, or Genius.

§. XIII. [1] We may find ſeveral curious Remarks upon this Subject in Mr. *Buddeus*'s Diſcourſe, entitled, *De cultura Ingenii*, which is the fifth among his *Selecta Jur. Nat. & Gent.*

[2] Among the Paſſages here collected together by our Author, there are two nothing to the Purpoſe; *viz.* The firſt is of *Plato*, whom our Author makes to ſay, That a young Man of honeſt Condition ought not to apply himſelf to any Science in a ſervile Way. His Words are, *Nullam diſciplinam ingenuum ſerviliter oportet diſcere.* In which he ſeems to mean, That the Study of Philoſophy is only agreeable to Slaves. But this is not the Senſe of *Plato* in that Place: He only ſpeaks of the Manner of teaching Youth the Sciences: He will not have any Conſtraint or Force to be uſed with Children, or have them treated like Slaves, but to be inſtructed with pleaſure; becauſe, as he ſays, what is put into them by Force can't remain long; beſides he adds, by alluring them, their Diſpoſitions are better known. Ὅτι (ἦν δ' ἐγὼ) οὐδὲν μάθημα μετὰ δουλείας τὸν ἐλεύθερον χρὴ μανθάνειν, οἱ μὲν γὰρ τοῦ σώματος πόνοι, βίᾳ πονούμενοι, χεῖρον οὐδὲν τὸ σῶμα ἀπεργάζονται· ψυχῇ δὲ βίαιον οὐδὲν ἔμμενον μάθημα - - - Μὴ τοίνυν βίᾳ - - - - τοὺς παῖδας ἐν τοῖς μαθήμασιν, ἀλλὰ παίζοντας τρέφε, ἵνα καὶ μᾶλλον οἷός τ' ᾖς καθορᾶν, ἐφ' ὃ ἕκαστος πέφυκεν, *De Rep. Lib. 7. Tom. 2.* This is the very Notion which Mr. *Locke* has ſo well maintain'd in his Treatiſe, *Of Education of Children*; ſee chiefly §. 73, *&c.* and §. 131. of the laſt Edition at *Francfort* in 1708. *Plato* is ſo far from diſcouraging any from the ſtudy of the Sciences, that he tells us particularly in that Book, what thoſe are that Children ought to learn early, and ſays, with Reaſon, that they that cry down Philoſophy, as of no Uſe to the Vulgar, never underſtood it; and that moſt of thoſe that meddle with it are not well qualified for it. We will alſo rehearſe ſome Words of the ſame Philoſopher, and ſo the Heedleſneſs of this Author will give an Opportunity to produce ſome Quotations, which contain ſome remarkable Thoughts, *viz.* Τὸ γοῦν νῦν ἁμάρτημα (ἦν δ' ἐγὼ) καὶ ἡ ἀτιμία φιλοσοφίᾳ διὰ ταῦτα προσπέπτωκεν (ὃ καὶ πρότερον εἴπομεν) ὅτι οὐ κατ' ἀξίαν αὐτῆς ἅπτονται, οὐ γὰρ νόθους ἔδει ἅπτεσθαι, ἀλλὰ γνησίους. The other Paſſage unfitly applied is, *Seneca*'s *Hippol. v.* 459, 460. where we may plainly ſee that he is ſpeaking of a clear different Thing, than of a Mind not adorn'd with the Study of Philoſophy.

ſerves[a][3], that *Prudence can do more without Learning, than Learning without Prudence.* Therefore that Perſons naturally fooliſh and ſtupid are not turn'd into great Sages by the Application of liberal Studies, doth no more detract from the Excellency of ſolid Learning, than it doth from the Efficacy of Medicines, that they are not able to recover dead Men. *To him that hath ſhall be given*, Matth. xxv. 29[4]. And Learning, as *Horace* ſays, *Vim promovet inſitam*[5]; and where that *vis inſita*, that *natural Vigor* is wanting, the other Gift is vainly beſtow'd.

We may obſerve farther, that as Learning cannot alter native Folly, ſo neither can it reform a native Diſpoſition to Wickedneſs and to Impiety; which, on the contrary, grow more incurable by its Application, drawing thence a Supply of Arms for their open Defence. 'Tis a Remark of *Hobbes*[b], that *withont Learning it is impoſſible for any Man to become either excellently wiſe, or* (unleſs his Memory *be hurt by Diſeaſe, or ill Conſtitution of Organs*) *excellently fooliſh*[c].

But the whole Courſe of thoſe Purſuits which paſs under the Name of Learning, is not all of the ſame Nature, and therefore ſhould not be all rated at the ſame Price. We may divide Learning then into three Kinds, ſuch as is *Uſeful*, ſuch as is *Elegant* and *Curious*, and, laſtly, ſuch as is *Vain* and *Inſignificant*[6]. *Uſeful* Learning may be again divided into three Claſſes, *Morality*, *Phyſick*, and *Mathematicks*. For *Divinity* ſtands on its own Bottom; and maintains a ſeparate and a ſuperior Eſteem: Tho' if it condeſcends to enter the common Diviſion of Sciences, it muſt be placed under this firſt Head. [7] *Morality* is concern'd about the Improvement of Mens Minds, and the Advancement of a ſocial Life; *Phyſick* hath the Health of the Body under its peculiar Care; and *Mathematicks* are of apparent Uſe and Benefit in the Invention of ſo many Arts for the Profit and for the Conveniency of human Life. By that Learning which we term *Elegant* and *Curious*, we underſtand ſuch as is not indeed of ſo neceſſary Uſe, as to render the Life of Man leſs ſociable or leſs convenient upon the Want of it; and yet is worthy of the Enquiries of ingenious Perſons, becauſe it either leads us deeper into the Diſcovery of the ſecret Works of Nature, or ſhews the ſingular Excellency of human Wit and Cunning, or preſerves the Memory of Things and Actions, and the Records of Mankind. And ſuch may we reckon the Knowledge of various Tongues, natural Experiments and Speculations, the more fine and ſubtile Parts of Mathematicks, Hiſtory of all kinds, Criticiſm (as it preſerves Authors correct and entire) Poeſy, [8] Oratory, and the like. Which are all in themſelves excellent, and worthy of Praiſe, and ſerve for the Garniture and Ornament of human Improvement; according to which Meaſure both the Practice and [9] the Value of them are to be ſtated and determined.

Vain Learning we call, not only ſuch as is made up of falſe and erroneous Notions; but likewiſe all thoſe Inventions of crafty or of idle Men, ſet up to amaze our Minds, and to hinder us from the Purſuits of ſolid Knowledge. Amongſt which, as we muſt needs reckon many Opinions of the old Philoſophers, ſo very diſagreeable to the apparent Nature of Things; ſo we think it will not be over-ſevere to join to them the greateſt Part of that barbarous Cant, which went under the Name of *School Learning* in the Ages preceding the Reformation of Religion; and which is ſtill reſolutely maintain'd by ſome Men, either becauſe they know no better, or becauſe they are aſham'd to unlearn what they have made themſelves Maſters of with ſuch prodigious Labour, or becauſe 'tis the manifeſt Intereſt of the *Papal Monarchy* to keep Mens Wits employ'd on Trifles, for fear they ſhould make ſome very dangerous Diſcoveries[a]. Now the greater Proficiency any Perſon hath made in ſolid Knowledge, the more he deſpiſes theſe empty and unprofitable Enquiries.

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[a] *Quinctilian* Inſtit. l. 6. c. 6. *Plus ſine Doctrina Prudentiam, quàm ſine Prudentia facere Doctrinam, certum eſt.*

[b] *Leviath.* c. 4.

[c] Add *Bacon*, Eſſay 48.

[3] *Montagne*'s Words are, "The moſt learned are not the leſs fooliſh. I love and honour Knowledge as much as they that " have it, and if it be rightly uſed, it is the moſt noble and powerful Acquirement of Men. But as to thoſe (and there are a " vaſt Number of them) who place their chief Excellency and Worth in it, and refer their Underſtanding to their Memory, " *Sub aliena umbra Latentes* (as *Seneca* ſpeaks, *Epiſt.* 33.) and can do nothing without a Book; I hate them, if I may ſo ſpeak, " almoſt as much as a Blockhead. In my Country and Time Learning has done much Service to the Purſe, but little to the " Soul. If it meets with dull Men, it loads and choaks them, becoming a crude and undigeſted Maſs; if with airy Minds, it " purifies their Wills, and ſo ſubtilizes their Notions as to turn them into nothing. 'Tis a Thing of almoſt an indifferent Nature; a very uſeful Addition to a generous Mind, but pernicious and hurtful to any other: Or rather 'tis a Thing of a precious Uſe, which can't be attain'd at a cheap Rate. In one Man's Hand 'tis a Scepter, in another's a Fool's Bauble." *Eſſays, Lib.* 3. *Chap.* 8.

[4] This Maxim of the Goſpel, which our Author applies in the Stile of a Preacher, is meant in another Senſe.

[5] *Lib.* 4. *Od.* 4. *ver.* 33, 34.

[6] See *Seneca de Brevitate Vitæ, Chap.* 13. and his *Epiſtle* 88. where there are alſo many other fine Reflections on Study.

[7] I wonder our Author hath ſpoke nothing of Logick, which is abſolutely neceſſary, whatever Science we purſue, if we will do it with Benefit. See Mr. *Clerc*'s Preface to his *Latin Logick*, and *The Art of Thinking*; as alſo the ſecond Volume of *Parrhaſiana*, Art. 2.

[8] This Science though of no great Uſe, yet is often pernicious, becauſe 'tis very ſubject to be abuſed. Let us hear *Montagne* about this Matter: "An Orator of old ſaid, That it was his Work to make ſmall Matters appear great. He is a Cobbler " that makes great Shoes for a ſmall Foot. They were whipp'd in *Sparta* who profeſſed any Art of Cheating or Deluding. We " may believe that *Archidamus* King of *Sparta* could not hear without Aſtoniſhment the Anſwer of *Thucydides*, when he was " asked, Who was beſt at Wreſtling, *Pericles*, or He? He ſaid, *This is very hard to determine, for when I have thrown him to* " *the Ground, he'll perſuade them that ſaw it, that he did not fall, and ſo win the Prize.* They that mask and paint Women " do leſs Evil, becauſe 'tis no great Matter whether we ſee them in their pure natural Shapes, or no; but theſe make it their Buſineſs to deceive, not our Eyes, but our Judgments, and to baſtardize and corrupt the very Eſſence of Things. Thoſe Republicks who maintain'd a regular Order and Polity, as the *Cretans* and *Lacedemonians*, ſet no Value upon Orators. *Ariſtotle* " defined Rhetorick wiſely, calling it, *An Art to perſuade the People*, but *Socrates* and *Plato* called it *An Art of Soothing and* " *Deceiving*; and thoſe that deny this in the general Deſcription, verify it fully in their Rules. It is an Inſtrument invented " to manage and ſtir up the Multitude and diſorderly Societies, which is never made uſe of but as a Medicine. Where the " Vulgar or the Ignorant, or both, have the Power, as they had at *Athens*, *Rhodes*, and *Rome*, or Things were in mighty Confuſion, there Orators were plentiful." *Eſſays, Lib.* 1. *Chap.* 51. Where we may find many other fine Things about this Matter. To theſe we may add the Judgment of a modern Author, whoſe Authority is of great Weight. "In Diſcourſes by " which we ſeek rather to pleaſe and divert, than to inſtruct and compleat the Judgment, we can't blame ſuch ſort of Ornaments as are taken from Figures. But ——— except Order and Elegancy, the whole Art of Rhetorick, all its neat Applications and figurative Expreſſions according to the Rules of Eloquence, ſerve only to beget falſe Notions in the Mind, and " corrupt the Judgment; ſo that in effect they are nothing but perfect Cheats, and conſequently ought to be avoided in all " Diſcourſes which are deſigned to inſtruct; for they muſt be eſteemed great Defects, either in the Language or Perſon that " uſes them, ſo far as Truth is concerned. Hence it may appear how little Regard and Concern Men have for the Truth, ſince " theſe fallacious Arts have ſo great Eſteem and Reward given them. ——— But Eloquence, like the fair Sex, hath Charms " too powerful to admit of any Contradiction, and 'tis in vain to diſcover any Faults in theſe Arts of Deceiving, ſince Men take " pleaſure in being cheated." Mr. *Locke*'s *Phil. Eſſay, &c. p.* 642. See alſo what I have ſaid upon this Subject concerning the Pulpit, in my *Preface* upon *Tom.* II. of Archbiſhop *Tillotſon*'s Sermons. As to Poetry, there is an excellent Diſcourſe in *Art.* 1. of the *Parrhaſiana*, *Tom.* I. which 'twill be a pleaſure to read.

[9] We muſt obſerve here, that ſome of theſe Sciences are neceſſary, if not in themſelves, yet in reſpect to others, in which no Progreſs can be made but by their Help; ſuch, for example, is Hiſtory in reſpect of Politicks, and Criticiſm in reſpect of Hiſtory and Divinity. See Mr. *Clerc*'s *Ars Critica* in the *Preface*.

Another Thing to be conſider'd by thoſe who diſpute about the Uſefulneſs of Learning is this; that the Faults of bad Inſtitution and of hot-brain'd Pedants, are not to be charg'd on the Sciences themſelves[b]. Is it likely, that ſound Knowledge and Wiſdom ſhould be learnt in ſuch a School as *Agathias* deſcribes under the Philoſophaſter *Uranius? At their Meetings*, ſays he, *every one talks as he pleaſes about the ſublimeſt Matters, and Points of Divine Science; and tho' they are perpetually canvaſſing theſe Queſtions, yet they neither perſuade others, nor will ever lay aſide the Notion they themſelves have taken up, but whatever they be, defend them Tooth and Nail againſt all Oppoſers. When the Diſputations are over, they depart mutually incens'd, and vent their Rage againſt one another, like quarrelling Gameſters, in the moſt abuſive and fouleſt Ribaldry*[10]. *Thus the Contention ends, without the leaſt Profit given or receiv'd; and thoſe who went to the Engagement very good Friends, come away moſt violent and ſpiteful Enemies*[c].

But ſuppoſing Things rightly order'd, can any one doubt whether a Perſon endow'd with good natural Abilities, and inſtituted in ſolid Learning, will not diſcharge the greateſt Affairs with more Accuracy and with more Diſpatch, than if he depended on the bare Strength of Nature, and neglected other Aſſiſtances[d][11]? But then all thoſe who apply themſelves to Study, ſhould be exactly careful, firſt that they direct their Enquiries to a good End, the Service of Life, or the Improvement and Perfection of their Minds; and not make uſe of them for idle Amuſements, or pleaſant Methods of paſſing away Time. *Ariſtippus*[12] in *Diogenes Laertius*, being ask'd what Things ingenious Children ſhould be taught, anſwer'd, *Such as they may uſe when they come to be Men.* 'Twould not be only *ſhameful*, but *wicked*, if thoſe whoſe Heads are fill'd with brave Notions and Sentences ſhould do no more good than common Ideots[13][e]. The *Egyptians* call'd their Libraries *Phyſick Shops for their Souls*, intimating their Uſe as well as their Excellency[f]. And *Arrian*'s *Epictetus*[g] thought he could not give a worſe Character of Mens being falſly and inſignificantly learn'd, than to ſay that they were *Lions in their Schools, but meer Vermin out of them.*

They are likewiſe to take heed, that they do not reſolve all Science[14] into bare Authority[h], and Cuſtom of Speech, and an unintelligible Set of Terms; but that they ſearch into the ſolid Foundations of Things, and build their Schemes on evident Reaſon. As for thoſe Things which they cannot yet bring to clear Demonſtration, there muſt be no Stubbornneſs or Obſtinacy in maintaining them; but a former Opinion muſt be willingly quitted, upon a better and a more certain Information; becauſe 'tis very likely another

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[a] See *Hobbes*'s Leviath. c. 46, 47. *Plutarch* (in *Alexand.*) has left this Cenſure of *Ariſtotle*'s Metaphyſicks, that *they can afford no real Advantage to the Teacher or the Learner. Martial.* II. Epig. 86.

Turpe eſt difficiles habere nugas,	'Tis ſhameful Men ſhould needleſs Knots invent
Et ſtultus labor eſt ineptiarum.	To prove laborioſly impertinent.

[b] Vid. *Charron*, l. 3. c. 14. n. 21, &c. [c] The Maſter is deſcrib'd very agreeable to his Scholars, *Bearing above the reſt only by Impudence, and Volubility of Tongue*, he appear'd the firſt Fool of the Herd, and *conquer'd thoſe that knew nothing, by knowing juſt as much.* The like Form of Diſputation is ridicul'd by *Lucian*, in his *Accuſato*, and in *Charron*. [d] *Plutarch* de Educat. *The Life of Contemplation is of no Uſe, unleſs Action be added. And the Man of Action cannot but miſtake and miſcarry, without the Aſſiſtance of Study and Contemplation.* Saluſt. Jugurth. *The more reaſon have we to wonder at the Perverſeneſs of thoſe who ſuffer their Parts and Genius, the beſt and the nobleſt Advantage of a Mortal Nature, to ruſt in Idleneſs, and to grow dull and barren through want of Culture. Ælian.* V. H. l. 7. c. 15. *When the* Mitylenians *were Maſters of the Sea, they impos'd this Penalty on their revolted Allies, that they ſhould not teach Children Letters or Muſick: Thinking it the moſt grievous Puniſhment that could be inflicted, to live in utter Ignorance of the Liberal Arts.* Add, Cic. Off. I. where he ſpeaks of the Study and Search of Truth. [e] *I hate Men* (ſays old *Pacuvius*, in *Gell.* l. 53. c. 8.) *that are Philoſophers in Opinion, and Drones in Buſineſs. Iſocrates* Encom. Helen. *The Sophiſts ought to have inſtructed their Scholars in Things which are of uſe in common Life, and to have exercis'd them in the skilful Management of civil Affairs; taking this for a certain Truth, that a competent Knowledge of profitable Points is highly preferable to the moſt exquiſite Attainments in unneceſſary Speculations; and that it is much better to excel others a little in great and important Things, than to go far beyond them in ſmall Matters, eſpecially in ſuch as contribute nothing to the Aſſiſtance of Life.* Lucian *in* Conviv. *'Tis to no Purpoſe to be* wiſer, *unleſs we are* better. [f] *Diodor. Sic.* l. 1. c. 49. [g] *L.* 4. *c.* 5. [h] *Horat. l.* 1. *Epiſt.* 1. *ver.* 14. Nullius addictus jurare in verba Magiſtri. Vide *Ciceron. de Nat. Deorum, l.* 1. *c.* 5. *Seneca de Vita beata, c.* 1.

[10] See about the Abuſe of Diſputes, a fine Paſſage in *Montagne*'s *Eſſays, Lib.* 3. *Chap.* 8. which is copied out with ſome ſmall Alteration of Words, by the Author of the *Art of Thinking, Part* 3. *Chap.* 19. §. 7.

[11] *Plutarch*'s *Greek* is, Ὁ δὲ θεωρητικὸς [βίος] τοῦ πρακτικοῦ διαμαρτάνων, ἀνωφελής. Ὁ δὲ πρακτικὸς ἀμοιρήσας τῆς φιλοσοφίας, ἄμουσος καὶ πλημμελής. The Author alſo quotes here the Saying of an antient *Greek* Poet, Γράμματα μαθεῖν δεῖ, καὶ μαθόντα νοῦν ἔχειν, *He that affects Learning ſhould grow wiſe by it.*

[12] The *Greek* is, Ὁ δὲ οὖν Ἀρίστιππος ἐρωτηθεὶς, τίνα ἐστὶν ἃ δεῖ τοὺς καλοὺς παῖδας μανθάνειν; ἔφη, Οἷς ἄνδρες γενόμενοι χρήσονται.

[13] *Iſocrates*'s Words are, Οὓς [σοφιστὰς] ἐχρῆν ἀφεμένους ταύτης τῆς πραγματείας, τῆς ἐν μὲν τοῖς λόγοις ἐξελέγχειν προσποιουμένης, ἐν δὲ τοῖς ἔργοις πολὺν ἤδη χρόνον ἐξεληλεγμένης, τὴν ἀλήθειαν διώκειν, καὶ περὶ τὰς πράξεις, ἐν αἷς πολιτευόμεθα, τοὺς συνόντας παιδεύειν, καὶ περὶ τὴν ἐμπειρίαν τὴν τούτων γυμνάζειν, ἐνθυμουμένους ὅτι πολὺ κρεῖττόν ἐστι περὶ τῶν χρησίμων ἐπιεικῶς δοξάζειν, ἢ περὶ τῶν ἀχρήστων ἀκριβῶς ἐπίστασθαι, καὶ μικρὸν προέχειν ἐν τοῖς μεγάλοις, ἢ πολὺ διαφέρειν ἐν τοῖς μικροῖς, καὶ τοῖς μηδὲ πρὸς τὸν βίον ὠφελοῦσι·
Lucian's *Greek* is, Ὡς οὐδὲν ὄφελος ἦν ἄρα ἐπίστασθαι τὰ μαθήματα, εἰ μή τις ἄρα καὶ τὸν βίον ῥυθμίζει πρὸς τὸ βέλτιον.

[14] *Tully*'s *Latin* is, *Obeſt plerumque iis, qui diſcere volunt, authoritas eorum, qui docere profitentur, deſinunt enim ſuum judicium adhibere: id habent ratum, quod ab eo, quem probant, judicatum vident.*

Man may have more quick and more piercing Parts than ourſelves; and becauſe every new Day may correct ſome Miſtake in the former. And this teachable Diſpoſition is a moſt infallible Mark [15] of a generous Mind[a]. Laſtly, Care is to be us'd, that they do not in ſuch a Manner bury themſelves amongſt their Books, as to neglect other Duties, and render themſelves [16] unfit for the Genius of a civil and ſociable Life. For *Pedantry* of Mind is a [17] Vice not peculiar to Scholars, but runs in ſome Meaſure through the whole World, and infects Men of all Orders, Profeſſions, and Conditions.

XIV. But although the principal and the moſt laborious Part of human Improvement is concern'd about the Mind, we muſt not in the mean time [1] neglect the Body; ſince [2] the Mind makes uſe of its Supports, and can never riſe to any great Atchievement, if this Inferior be ill affected. We are oblig'd therefore, as much as in us lies, to ſecure [3] a *ſound Body* for our *ſound Mind* to lodge in[b]; and rather to harden our Limbs and Conſtitution by long Endurance of Labour, than to ſoften or break their Strength by Effeminacy and Idleneſs[c]. *Pyrrhus* is ſaid to have made this only Requeſt to the Gods in his daily Devotions, *ὑγιαίνειν*, *to be well in Health*, judging this Bleſſing to contain under it all Degrees of Happineſs. Care is likewiſe to be taken that our bodily Force and Vigor be not weaken'd by Intemperance in Meat or Drink, or by unſeaſonable and unneceſſary Labours, or any other way. Upon this Account *Gluttony*, *Drunkenneſs*[4], immoderate Uſe of *Women*, and the like Exceſſes are to be avoided. 'Tis a famous [5] Saying of *Democritus* in *Plutarch*[d], *If the Body ſhould bring an Action of Damage againſt the Soul, the Soul would be ſure to be caſt.* Though to this it might be replied, that the Miſtakes of the Mind in reference to Food, and Pleaſure, and other Things which concern the Preſervation of the Body, do all proceed from its yielding to the corporeal Appetites and Affections, contrary to the Admonitions of Reaſon: So that the Mind is never of itſelf the Cauſe of bringing the Body into a worſe Condition than ordinary. And therefore to *Democritus*'s Saying on one ſide, we will oppoſe the no leſs renown'd Sentence of [6] *Theophraſtus* on the other; *The Soul* (ſays he) *pays large Rent to the Body for its Dwelling.*

XV. Our Life is given us by our great Creator, as a kind of Courſe or Race, in which we might exerciſe our Strength and Abilities by the Direction of Reaſon: And therefore it is not to be meaſur'd by ſo many Times drawing Breath, but by a conſtant Succeſſion of good Actions. Every one is therefore to take care, that he be not ἐτώσιον ἄχθος ἀρούρης[e], *an uſeleſs Burden to the Earth*; unprofitable to himſelf, and troubleſome to others, [2] born only to increaſe the Number of Mankind, and to devour the Proviſions of Nature, [3] and that he do not only live for the ſake of his Palate[f] [4]. Farther, ſince human Induſtry commonly exerciſes itſelf one of theſe two Ways, either in procuring Things neceſſary for the Preſervation of Life, or in diſcharging the Offices of a ſocial and a civil Condition; which admit of great Variety, and do not all ſuit alike with all Mens Capacities and Abilities [a]; it is manifeſt that every Man ought with early Care to chooſe out and undertake ſuch a Courſe of Life as is honeſt, profitable, and comporting with his Parts and Strength. In which Choice [b] Men are uſually determin'd, either by Impulſe and Inclination of Genius and Fanſy, or by ſome peculiar Aptneſs of Body or Mind, or by Condition and Quality of Birth, or by the Goods of Fortune, or by the Authority of Parents, and ſometimes by the Command of the civil State; or laſtly, by the Invitations of Opportunity, or by the Compulſion of Neceſſity. [5] *Iſocrates* in *Areopagit.* gives us this Account of the old *Athenians*: *Under ſo great an Inequality of Fortunes, they could not preſcribe to all the ſame common Exerciſes; and therefore they put them in different Ways, according to their Circumſtances and Condition. The meaner Sort they engag'd in Agriculture and in Trading; well knowing, both that Idleneſs was the Cauſe of Poverty, and Poverty a Temptation to Injury and Miſchief. So that by removing this Fountain of Vice they thought they ſhould prevent the Evils which uſ'd to flow from it. As for the more wealthy, them they compell'd to apply their Minds to Horſemanſhip, Feats of Body, Hunting, and Philoſophy: Apprehending that ſuch Employments and Amuſements muſt needs have this good Effect, to make ſome excel in Virtue, and to keep others from being notorious in Vice.* It was an Ordinance amongſt the *Egyptians* and *Indians*, that every Man ſhould follow his Father's Trade. *Diodor. Sic. l.* i. *c.* 74. and *l.* xii. *c.* 41. [6] The Reaſon of which Inſtitution is given by *Iſocrates*, in *Laud. Buſir.* The like Cuſtom was receiv'd amongſt the *Peruvians*, under their antient *Yncas*; the Nobility alone being allow'd to improve themſelves by the Study of Letters. *De la Vega. l.* iv. *c.* 19. 'Tis a true Obſervation of *Xenophon*, *Cyropæd. l.* ii. *Thoſe Perſons arrive at the greateſt Height and Perfection in particular Attainments, who have given themſelves wholly to ſome ſingle Purſuit, avoiding Multiplicity of Buſineſs and of Enquiry.* As he ſays well in another Place, *Lib.* viii. *'Tis impoſſible that a Man who profeſſeth many Arts together ſhould excel in all.* Hence it appears, that not only thoſe Perſons do live in a State repugnant to ſound Reaſon, who maintain themſelves by Robbery or Villanies; but thoſe too, who withdraw themſelves unneceſſarily from the common Duties and Offices of Life; ſuch are many of the modern Hermits and Monks, as well as ſome of the antient Philoſophers. But thoſe who chiefly fall under this Cenſure, are the ſturdy and able *Vagrants*, who abuſe the Divine Name into a Trade of getting Money, and make God, as it were, their Tributary. The Wickedneſs of theſe Varlets is the greater, if they voluntarily maim or diſtort any of their Limbs, ſo as to render themſelves incapable of doing the World any Service, though they ſhould afterwards deſire it. 'Tis a Cuſtom very remarkable amongſt the *Chineſe*, that no Perſon of ſound Strength is permitted to beg, although he be *blind*; ſuch unfortunate Wretches being employ'd in turning Mills, from which Service they earn their Subſiſtence [c].

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[a] *Plin.* N, H. l. 3. Proem. *'Tis not to be look'd upon as a Wonder, that mortal Creatures ſhould be incapable of knowing all Things. Idem* l. 11. c. 3. *By my frequent Contemplations on Nature, I have been inſtructed never to call any Thing* incredible *that ſhe performs.* Diog. Laert. l. 10. *In natural Enquiries we are not to proceed according to ſtrict Method and Rules, but according as the various Appearances offer themſelves to our Obſervation, and incline our Judgment.* Cicero de Nat. Deor. l. 1. *The Authority of thoſe who pretend to teach, often proves a hindrance to thoſe who deſire to learn. For by this Means they neglect to apply their own Judgment, and to take every Thing for fix'd and certain, which they hear deliver'd by thoſe whom they admire.* Quinctil. Inſtit. l. 3. c. 1. *They love the Path which they firſt trod in, whatever it be. And you will find it a moſt difficult Task to make Perſons change ſuch Opinions as they imbib'd when they were Children; becauſe every one rather wiſhes to have his Trouble over, than to continue it; to have learn'd formerly, than to be a Learner now.* Idem. l. 7. c. ult. *No body is willing to ſee a Thing leſſen'd, in which he once appear'd great.* Yet, as *Plato* obſerves, *De Repub. l.* 5. *'Tis very unjuſt to be angry with the Truth. And all farther Study would be in vain, if it were unlawful to improve the Diſcoveries of thoſe that went before us.*

[b] To this End it may be uſeful to read that incomparable Book, *Medicina Mentis & Corporis*, by Mr. *Tchernhauſen.* [c] Vide *Diodor. Sic. l.* 1. *c.* 45. [d] *De Sanitate tuenda.* Add. *Bacon Eſſ.* 30. [e] *Homer. Il.* Σ. *ver.* 104.

[f] *Ovid. de Pont. l.* 1. *El.* 6. —— *Mors nobis tempus habetur iners.*
—— To be Idle's to be dead.
Sil. Ital. l. 3. —— *Quantum etenim diſtant à morte ſilentia vitæ?*
—— A ſilent Life is an untimely Grave.
Theocrit. Idyl. 14. —— Ποιεῖν τι δεῖ οἷς γόνυ χλωρόν.
—— Buſineſs ſhould be ply'd whilſt Age is green. Add *Gell. l.* 19. *c.* 10.

[15] *Sophocl. Antigone. ver.* 725. Ἀλλ' ἄνδρα κἄν τις ᾖ σοφὸς, τὸ μανθάνειν / Πόλλ' αἰσχρὸν οὐδὲν, καὶ τὸ μὴ τείνειν ἄγαν.
True Wiſdom is not ſtiff or poſitive,
Nor thinks it a Diſgrace to be inform'd.

[16] "A Learned Inſtitution leads aſide from right and plain Reaſon, thoſe who keep their Eyes and their Thoughts continually "fix'd upon their Books." *Lucian Conviv.*

[17] Here is a Fault in the Original that quite ſpoils the Senſe, *viz. Initium* for *Vitium*; and 'tis ſurpriſing that Mr. *Hertius* did not correct it in his Edition of 1706. Indeed all this is taken, Word for Word, out of the *Art of Thinking, Diſc.* 1. and the Author ought to have referred us to the Original where he had it.

§. XIV. [1] See *Plato* (in *Charmid. p.* 464. *Ed. Wech.*) *Seneca Epiſt.* 14. in the beginning, and *Hierocles* upon *Pythagoras*'s Golden Verſes, *p.* 153, 182. Edit. *Lond.*

[2] *Corpori vaco, cujus fulturis animus ſuſtinetur. Plin. Epiſt. Lib.* 1. *Epiſt.* 9. The Author alludes to this and the following Paſſage, though he does not quote them; nor are they diſtinguiſh'd by the *Italick* Letter,

[3] *Orandum eſt, ut ſit mens ſana, in corpore ſano,* i. e. *We muſt pray for a ſound Mind in a ſound Body.* Juv. Sat. 10. v. 356.

[4] Juvenal. Sat. 11. ver. 34. —— —— *Buccæ*
Noſcenda eſt menſura tuæ ——
Fools only make Attempts beyond their Skill;
A wiſe Man's Power's the Limit of his Will.

This Verſe does not reflect upon an Exceſs in Eating and Drinking, but upon ſuch exorbitant Expences as Men are at, not conſidering whether they are rich enough to bear them. For 'tis a Proverb ſignifying, That Men ought in all Things to examine themſelves, what they are capable of, and able to do. Our Author more fitly refers us to *Socrates* his Words about Intemperance, in his *Memoirs* collected by *Xenophon*, *Lib.* 1. *Chap.* 3.

[5] *Plutarch*'s *Greek* is, Ὡς εἰ τὸ σῶμα δικάσαιτο τῇ ψυχῇ, κακώσεως οὐκ ἂν αὐτὴν ἀποφυγεῖν. The Reflection which our Author makes upon theſe Words, is not altogether proper, for though Briskneſs of Spirits, and other Motions of the Body have great Influence upon the Soul, there are other Paſſions purely ſpiritual, as Covetouſneſs, *&c.* which are not leſs violent, and do much hurt to a good Conſtitution of Body. See my *Treatiſe of Games*, *Lib.* 3. *Chap.* 4. §. 6. and *Chap.* 5. §. 11, *&c.*

[6] His *Greek* is, Πολὺ τῷ σώματι τελεῖν ἐνοίκιον τὴν ψυχήν, in *Plut.*

§. XV. [2] *Nos numerus ſumus & fruges conſumere nati.* Hor. Lib. 1. Ep. 2. v. 27.

[3] *Juvenal* is referr'd to without Quotation, *Aut quibus in ſolo vivendi cauſa palato eſt.* Sat. 11. v. 11.

[4] *Ciceron. de Nat. Deor. l.* 2. *c.* 16. *Mihi enim, qui nihil agit, eſſe omnino non videtur, i. e.* "He that doth not ſhew himſelf in "Action, ſeems to me to have loſt his very Being." But this is nothing to our Author's Purpoſe. For by theſe Words one of the

Again, ſince Time runs on with ſuch ſwift Steps, ſince Death ſurprizes Men ſo often when they leaſt expect it, and is always beyond their Power to avoid; thence it follows, that 'tis our Duty to make an early [7] Uſe of Life, not to begin too long a Thread of Actions, not to lay

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Dialogiſts labours to prove a Providence againſt the *Epicureans* that denied it: for, ſays he before, *To maintain that there are no Gods, and to deprive them of all Care and Action, is much the ſame Thing; for he that doth not*, &c. So that this Paſſage could not be fitly applied to the Idleneſs of Man, but by a Preacher: He might much better have quoted *Saluſt*'s Words, who ſays, "That they only live truly, who are buſied in doing good; the idle Man's Life is Death." *Sed multi mortales dediti ventri, atque ſomno, indocti, incultique vitam, ſicuti peregrinantes, tranſiere, quibus profecto contra naturam corpus voluptati, anima oneri fuit: Eorum ego vitam, mortemque juxta exiſtimo, quoniam de utraque ſiletur. Verum enimvero is demum mihi vivere, atque frui anima videtur, qui aliquo negotio intentus, præclari facinoris, aut artis bonæ famam quærit.* De Bell. Catilin. c. 2. *Maximus Tyrius* alſo ſays, That Idleneſs belongs to none but a dead Man, τὸ δὲ ὅλον, ἀπραγμοσύνη τινὸς ἂν ἄλλου εἴη πλὴν νεκροῦ. *Diſſert.* 5. Mr. *Bruyere* alſo has a fine Paſſage, which may perhaps agree better than all theſe Quotations of old Authors. "There "are ſuch Creatures made by God as are called Men, who have a Soul, which is a Spirit, whoſe Life is wholly employed, and "all their Thoughts taken up in ſawing Marble: This is very ſilly, and a Thing of little Worth; and there are others that "wonder at it, but are nevertheleſs uſeleſs, and ſpend their Days in doing nothing; this is worſe than ſawing Marble." *Character of the Manners of this Age, Chapt. of Judgments, p.* 450, 451. See what I have ſaid in my *Treatiſe of Games, Lib.* 1. *Chap.* 1. §. 1. and *Lib.* 4. *Chap.* 6.

[a] Vide *Eſſais de Morale, Vol.* 3. *p.* 44, 202.
[b] Vide *Mr.* Oſtervald's *Cauſes of Corruption, Engl. Ed. p.* 227, &c.
[c] *Mart. Hiſt. Sin. l.* 1. *c.* 34.

[5] *Iſocrates*'s *Greek* is, Ἅπαντας μὲν οὖν ἐπὶ τὰς αὐτὰς ἄγειν διατριβὰς οὐχ οἷόν τ' ἦν, ἀνωμάλως τὰ περὶ τὸν βίον ἔχοντας· ὡς δὲ πρὸς τὴν οὐσίαν ἥρμοττεν, οὕτως ἑκάστοις προσέταττον. τοὺς μὲν γὰρ ὑποδεέστερον πράττοντας, ἐπὶ τὰς γεωργίας καὶ τὰς ἐμπορίας ἔτρεπον, εἰδότες, τὰς μὲν ἀπορίας, διὰ τὰς ἀργίας γιγνομένας· τὰς δὲ κακουργίας, διὰ τὰς ἀπορίας· ἀναιροῦντες οὖν τὴν ἀρχὴν τῶν κακῶν, ἀπαλλάξειν ᾤοντο, καὶ τῶν ἄλλων ἁμαρτημάτων τῶν μετ' ἐκείνων γιγνομένων. τοὺς δὲ βίον ἱκανὸν κεκτημένους, περί τε ἱππικὴν καὶ τὰ γυμνάσια, καὶ τὰ κυνηγέσια, καὶ τὴν φιλοσοφίαν, ἠνάγκασαν διατρίβειν· ὁρῶντες ἐκ τούτων, τοὺς μὲν διαφέροντας γιγνομένους, τοὺς δὲ τῶν πλείστων κακῶν ἀπεχομένους.

[6] *Iſocrates* only ſays, that *Buſiris* would have no Man have more than one Trade or Profeſſion, becauſe 'tis not poſſible to excel in ſeveral. Ἀεὶ τοῖς αὐτοῖς τὰς αὐτὰς πράξεις μεταχειρίζεσθαι προσέταξεν· εἰδὼς τοὺς μὲν μεταβαλλομένους τὰς ἐργασίας, πρὸς οὐδὲν τῶν ἔργων ἀκριβῶς ἔχοντας· τοὺς δ' ἐπὶ ταῖς αὐταῖς πράξεσι συνεχῶς ἐπιμένοντας, εἰς ὑπερβολὴν ἕκαστον ἀποτελοῦντας. So that he had better have joined this with what he quotes out of *Xenophon*'s *Cyropæd. Lib.* 2. *Chap.* 1. §. 8. and *Lib.* 8. *Chap.* 2. §. 4

[7] "The moſt glorious and principal Work of Man is to live well. All other Things, as to reign, get Eſtates, build, "are but Appendages and Helps for the more ——— They are mean Souls who are buried in Buſineſs, and do not know "how to diſentangle themſelves, nor to leave them, and reſume them." *Montagne*'s *Eſſays, Lib.* 3. *Chap. ult.*

too vaſt a Train of Deſigns[a]. We ought likewiſe to have the Accompts of our Life always drawn up in a Readineſs, and to harden our Minds betimes againſt the Terror of *Dying*; that without a trembling Reluctancy, without repining at our Creator's Pleaſure, we may reſign, when he demands it, what he lent us of his free Bounty, under no Terms of keeping[b].

XVI. How paſſionately every Man loves his own Life, and how heartily he ſtudies the Security and Preſervation of it, is evident beyond Diſpute. But it will admit of a Debate whether the bare natural Inſtinct, which he enjoys in common with Beaſts, inclines him to theſe Deſires? or whether he is not engag'd in them by ſome ſuperior Command of the Law of Nature? For, in as much as no one can, in a legal Senſe, ſtand *oblig'd* to himſelf, ſuch a Law ſeems to be of no Force or Significancy which is terminated in my ſelf, which I can diſpenſe with when I pleaſe, and by the Breach of which I do no one an Injury. Beſides, it looks like a needleſs thing to eſtabliſh a Law about this Point, ſince the anxious Tenderneſs of Self-love would beforehand drive us ſo forcibly on the Care of our own Safety, as to render it almoſt impoſſible for us to act otherwiſe[1]. If then [2] a Man were born only for himſelf, we confeſs it would be convenient that he ſhould be left entirely to his own Diſpoſal, and be allow'd to do whatever he pleas'd with himſelf. But ſince by the univerſal Conſent of all wiſe Men it is acknowledg'd that the Almighty Creator made Man to ſerve him, and to ſet forth his Glory in a more illuſtrious manner, by improving the good Things committed to his Truſt; and ſince *Society*, for which a Man is ſent into the World, cannot be well exercis'd and maintain'd, unleſs every one, as much as in him lies, takes care of his own Preſervation (the Safety of the whole Society of Mankind being a thing unintelligible, if the Safety of each particular Member were an indifferent Point) it manifeſtly appears, that a Man by throwing aſide all Care of his own Life, tho' he cannot properly be ſaid to *injure* himſelf, yet is highly injurious both to Almighty GOD, and to the general Body of Mankind[c].

It was not rightly inferr'd in the Argument we juſt now mention'd, that the Law of Nature did not concern itſelf with this Matter, becauſe Inſtinct did before drive us on the like good Reſolution. We ſhould rather imagine, that the Force of Inſtinct was ſuperadded (as an able Second) to the Dictate of Reaſon; as if this Help alone could ſcarce make a Tie ſtrong enough to keep Mankind together. For indeed, if we reflect on the Troubles and Miſeries that conſtantly wait on human Life, and do ſo far outweigh that little and mean Portion of Pleaſure [3], which through a perpetual Repetition grows every Day more flat and languid, ſo that we muſt needs loath it in every Enjoyment; and if we conſider farther, how many Men have their Days prolong'd only to make them capable of more Misfortunes and Evils; who is there, almoſt, who would not rid himſelf of the Burthen of Life, as ſoon as poſſible, if Inſtinct did not render it ſo light and ſo ſweet; or unleſs ſo much Bitterneſs or ſo much Terror were join'd to our Notion of Death? And yet who is there almoſt who would not break through the bare Oppoſition of Inſtinct, had not the Command of our Creator ſecur'd us with a much ſtronger Bar and Reſtraint [a]? "Nature, ſays *Quinctilian*, hath invented this chief Device for the "Preſervation of Mankind, *to make us die unwillingly*, thus enabling us to bear ſo vaſt a Load of "Misfortunes as falls to our Share, with ſome Patience and Quiet." And *Socrates* in *Xenophon* [b] declares it to be σοφȣ̃ δημιȣργȣ̃ τέχνημα, *the Artifice of a wiſe Workman, or Builder*, "to have implanted in Men a Deſire of producing Offſpring; "in Women a Deſire of nurſing and bringing "them up; and in all, when brought up, a vaſt "Deſire of Living, and as great a Fear of Death." And this laſt Motive is the main Security of every Man from the Violence of others. For how eaſy were it to *kill*, were it not ſo hard to *die?* Hence he preſently becomes [4] Maſter of other Mens Lives, who hath once arrived at the Contempt of his own. And the Regard that others have to their own Safety, is the beſt Defence of mine [c].

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[a] *Martial*, *l.* 1. Epigr. 16.

Non eſt, crede mihi, ſapientis dicere, Vivam:
Sera nimis vita eſt craſtina: vive hodie.

Ars longa vita brevis. Hippocrat.

The *Future* is the Tenſe of Fools. Delay
May make to Morrow late; be wiſe to Day.

Horat. l. 1. Epiſt. 4.

Inter ſpem curamque, timores inter & iras,
Omnem crede diem tibi diluxiſſe ſupremum;
Grata ſuperveniet, quæ non ſperabitur, hora.

Whilſt Hopes, Cares, Fears, and Frets to plague you join,
Think every Day your laſt that is to ſhine,
'Tis *not expecting* makes a Bleſſing dear:
An Hour's Reprieve is worth a vulgar Year.

Sil. Ital. Lib. 3. ver. 141.

——————*Brevitaſque vetat mutabilis horæ*
Prolatare diem.——————

Time, ever on the Poſt and on the Change,
Forbids us to delay.——————

Horat. Carm. i. 4.

Vitæ ſumma brevis ſpem nos vetat inchoare longam.
The ſhortneſs of our mortal Line
Forbids a longer Thread in our Deſign.

[b] *Sil. Ital.* ix. 376.

————*Virtus futile nomen,*
Ni decus adfuerit patiendo, ubi tempora lethi
Proxima ſint.————

——————Virtue's but an idle Sound,
Unleſs undaunted Honour keeps our Ground
Againſt the laſt Attack of Fate.————

Plin. N. H. l. 7. c. 40. *One Day paſſeth Judgment on another, and the laſt on all.* *Arrian Epictet.* l. 1. c. 1. Τῆς ὥρας ἐλθούσης, εἶτα τότε τεθνήξομαι· πῶς; ὡς προσήκει τὸν τὰ ἀλλότρια ἀποδιδόντα. *When my Time is come, I will be prepar'd immediately to leave the World. After what manner? Why, like a Perſon who is reſtoring what was lent him.* Add, *M. Antonin.* l. 12. ſ. 12. and *Bacon*, Eſſay 2. See alſo *Montagne*'s Eſſays, *Lib.* 1. *Chap.* 19.

[c] Compare *Ant. Matth.* de Crim. Prolegom. *c.* 3. *ſ.* 4.

§. XVI. [1] Senec. de Benef. Lib. 4. Chap. 17. *Supervacuum eſt enim, in quod imus, impelli: quemadmodum nemo in amorem ſui cohortandus eſt, quem adeo dum naſcitur trahit.* 'Tis needleſs to drive us, whither we are going of our own accord. No one wants an Exhortation to be perſuaded to love himſelf, ſince he drew in that Principle with his firſt Breath. See alſo *Xenophon*'s Memoirs of *Socrates*, *Lib.* 1. *p.* 423. *Ed. Steph.*

[2] The Obligation of preſerving and compleating a Man's ſelf, proceeds directly from Self-love plainly, which we have proved, §. 15. *Note* 1. of the foregoing Chapter, to be one of the principal Fundamentals of all our Duties. Indeed Inſtinct alone cannot always ſo forcibly conquer our own Idleneſs and Negligence, as to make us know ſufficiently, what is really profitable, or hurtful, to our own Self-preſervation, as Experience teaches. On the other ſide, 'tis ſometimes too fierce, and ſometimes too blind, to leave to its Direction entirely, a thing that requires ſo much Circumſpection, as the Care of ourſelves, and our true Intereſt does, which ought to be managed in ſuch a manner, as not to be prejudicial to Religion, the Rights of others, or the good of Society.

[3] Mr. *Bayle* has over and over prov'd in his *Hiſt.* and *Crit. Dictionary*, *that the Miſeries of Life are more and greater than its Comforts.* The places are marked in his Index. See alſo my Treatiſe of *Games*, Lib. 3. *Chap.* 1. §. 3.

XVII. 'Tis a Queſtion of more Difficulty, whether at all, or how far a Man hath Power over his own Life, either to expoſe it to extreme Danger, or to conſume it by ſlow Means and Degrees, or laſtly, to end it in a ſudden and violent manner [d]. Many of the Antients allow'd a Man an abſolute Right in theſe Points, and thought he might either voluntarily offer his Life as a Pledge for another's, or *devote* it freely, without any ſuch Deſign of preſerving the Life of his Friend; or whenever he grew weary of Living, might prevent the Tardineſs of Nature and Fate. *Pliny* [e] calls the Ability to kill one's ſelf, *the moſt excellent* Convenience, *in the midſt of ſo many Torments of Life*. Whom we can by no means excuſe from flat Impiety, for daring to think ſo abjectly [1] of the greateſt Gift of Heaven. It is our Buſineſs to examine what ſeems moſt agreeable, in this Caſe, to the *Law of Nature*. And here we may take it firſt of all to be true beyond Diſpute,

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[a] *Quinct.* Declam. 4. *What Satisfaction, O wretched Mortals, can it prove, to keep the Soul for ſo many Years, or, if Nature allow'd it, for infinite Ages, in the unpleaſant and weariſome reſtraint of the Body? If we diligently weigh and examine all our Joys, all the Pleaſures, which in this univerſal Scene of the World, either attract our Sight, or flatter our Senſes, we ſhall find the whole Life of a Man to be no more than a ſingle Day. They muſt be low and abject Minds which are not tired with this poor Circulation of Actions. So that he who by Application to honeſt Arts is able to underſtand what is the Perfection of Goodneſs and true Happineſs, will think no Death untimely: and thoſe who refer the Deſign of our Being chiefly to the Mind and Soul, muſt every Day be ſurfeited of Life. Ye expect I ſhould now give an account how many things there are in this ſhort Stage, which we ought to avoid and decline; that I ſhould ſet our Fears and our Calamities againſt our Joy and our Succeſs. Let us then weigh thoſe dear Comforts for which we weary the Gods with vain Petitions, and on the account of which we complain of the Shortneſs of Life: And what are they, but Vanity, Greedineſs, Luxury, and Luſt? And ſhall not we be aſhamed for the Sake of ſuch ſcandalous Privileges, to bear Weakneſs, Grief, and tedious Diſtempers; and even to court their ſtay, when we have an opportunity of throwing them off and eſcaping?* [b] *Xenophon* Apomn. l. 1. [c] Add. *Charron*, l. 2. c. 11. n. 8. [d] See *Montagne*'s Eſſays, *l.* 2. *c.* 3. [e] N. H. *l.* 2. *c.* 7.

[4] 'Tis the Expreſſion of *Seneca*, *Ita dico, quiſquis vitam ſuam contempſit, tuæ Dominus eſt.* Epiſt. 4. and Mr. *Corneille*, in his *Cinna*, makes *Æmilius* ſpeak thus of *Auguſtus*;

Whatever Care or Order thou doſt take,
He that deſpiſes his own Life, doth make
Himſelf maſter of thine. Act. 1. Scene 2.

This Verſe is alſo found in *Seneca*'s Tragedy, *Hercul. Oet. v.* 443.

Contempſit omnes ille, qui mortem prius.	He contemns all Men that contemns Death.

§. XVII. [1] Mr. *Montagne*'s Words are here remarkable: After he has alledged the Reaſons of ſuch as hold it lawful to kill themſelves, he goes on and ſays, "Several hold, that they may not leave this World without the expreſs Command of him that "ſent them into it; and that God hath placed us in it, not for ourſelves only, but for his own Glory, and the good of "others, and he is to releaſe us when he pleaſes, and not we ourſelves; that we are not born for ourſelves, but for our Country; and therefore the Laws call us to an account of Ourſelves, for their Intereſt, and have an Action of Murder againſt us. "Nay, we are in another World puniſhed as Deſerters of our Stations, as *Virgil* (in his *Æneids*, Lib. 6. v. 434, &c.) ſpeaks:

Proxima deinde tenent mœſti loca, qui ſibi lethum	Thoſe doleful Souls in the next Rooms of Hell,
Inſontes peperêre manu, lucemque peroſi	Who, without Guilt, did ſlay themſelves, do dwell.
Projecêre animas——	

"'Tis an Argument of much Bravery and Courage, rather to lug the Chain that clogs us, than break it. *Regulus*'s Conſtancy is "more commendable than *Cato*'s Deſpair. 'Tis Indiſcretion and Impatience that haſtens our Pace; Virtue will not turn its back "upon any Misfortunes, it rather ſeeks out Trouble and Affliction, as its Nouriſhment. The Threatnings of Tyrants, Fires, "and Executioners, rather invigorate and enliven it. (See *Horace*, *Lib.* 4. *Ode* 4. *v.* 55, &c.) And *Seneca*'s *Theb.* or *Phœniſſ.* Act. 1. ver. 190, &c.

Rebus in adverſis facile eſt contemnere vitam,
Fortiter ille facit, qui miſer eſſe poteſt, *Mart.* Lib. 11. Epigr. 57.

"It is a Sign of Cowardice, and not of Courage, to caſt a Man's ſelf into the Grave, under an heavy Tombſtone, to avoid "the Strokes of Fortune. Courage will not be beat out of its Way, or Courſe, by any Tempeſt that attends it.

Horat. Od. iii. 3. *Si fractus illabatur Orbis,*	If the World falls about his Ears,
Impavidum ferient ruinæ.	The Ruins will not raiſe his Fears.

"Moſt commonly, when we are flying from other Troubles we fall into this. By avoiding Death we ſometimes run headlong "to it.

Hic rogo, non furor eſt, ne moriare, mori? Mart. Lib. 2. Epigr. 80.

"As thoſe who, for fear of a Precipice, throw themſelves headlong from it. (See *Lucan*. Lib. 7. ver. 104, &c. and *Lucretius*, Lib. 3. v. 79, &c.) Contempt of Life is ridiculous, for our Being is our All. Things which have a more noble and excellent Being, may ſlight ours, but 'tis againſt Nature for us to deſpiſe it ourſelves, and bring ourſelves to neglect it. 'Tis a particular Diſeaſe, which no other Creature is troubled with, to hate and deſpiſe ourſelves. 'Tis a like Folly to deſire to be another Thing than we are. The Conſequence of ſuch a Wiſh does not concern us ſo much, as contradict and hinder itſelf. He "that deſires to be made an Angel, does nothing for himſelf, he deſires nothing better; for having no Exiſtence, how can he "be ſenſible of, or rejoice at that Amendment? The Security, Indolence, Impaſſibility, and Privation of the Evils of this "Life, which we purchaſe by dying, bring no Profit to us. In vain he avoids War, that can't enjoy Peace; and in vain he "flies from Pain, who has no way to get Eaſe. All Inconveniences are not ſo heavy, as to make us deſirous to die to avoid "them; for ſince there are ſo many ſudden Changes in human Affairs, it is hard to judge when we are come to the full end of "our Hopes. *All Things*, ſays an antient Proverb, *are full of Hope to a Man as long as he lives.* Eſſays, Lib. 2. Chap. 3. "Madam *Deſhoulieres* has ſome fine Verſes to this purpoſe:

In greatneſs of Courage Men do not know
When they are got to the Rank of the Hero's.
Thoſe Greeks *and* Romans *who themſelves ſlew,*
That they might make themſelves famous,
What great Thing have they done? They're departed this Life;
But Diſgrace follows them hard, as they deſerve.
By one Death they have eſcaped a thouſand.
How ſweet it is to troubled Hearts to ſigh!
It is more noble, more difficult
To bear a Misfortune, than to be delivered from it.

Diverſe Reflex. *Stanza* x. *Tom.* 1.

that ſince Men both can and ought to apply their Pains to the Help and Service of another; and ſince ſome certain kinds of Labour, and an over-ſtraining Earneſtneſs in any, may ſo affect the Strength and Vigor of a Man, as to make old Age and Death come on much ſooner, than if he had paſs'd his Days in Softneſs, and in eaſy Purſuits; and one may, without Fault, voluntarily contract his Life in ſome degree, upon account of obliging Mankind more ſignally, by ſome extraordinary Services and Benefits [2]. For ſince we do not only live to our ſelves, but to GOD, and to human Society; if either the Glory of our Creator, or the Safety and Good of the general Community require the ſpending of our Lives, we ought willingly to lay them out on ſuch excellent Uſes [a]. *Pompey the Great*, in a time of Famine at *Rome*, when the Officer who had the care of tranſporting the Corn, as well as all his other Friends, intreated him not to venture to Sea in ſo ſtormy a Seaſon, nobly anſwered them, *That I ſhould go 'tis neceſſary, but not that I ſhould live.* And *Achilles* in *Homer*, when his Fate was put to his Choice, preferr'd a haſty Death in the glorious Adventures of War, to the longeſt Period of Age, to be paſs'd idly and ingloriouſly at home.

XVII. Farther, in as much as it frequently happens, that the Lives of many Men cannot be preſerv'd, unleſs others expoſe themſelves, on their behalf, to a probable Danger of loſing their own; this makes it evident, that the lawful Governor may lay an Injunction on any Man in ſuch Caſes, not to decline the Danger, upon Pain of the ſevereſt Puniſhment. And on this Principle is founded the Obligation of Soldiers, which we ſhall enlarge upon in its proper place. 'Tis a noble Saying of *Socrates* in *Plato*'s Apology, [1] *In whatever Station a Man is fix'd, either by his own Choice, as judging it the beſt, or by the Command of his Superior; in that he ought reſolutely to continue, and to undergo any Danger that may aſſault him there; reckoning neither Death nor any other Evil ſo grievous as Cowardice and Infamy.*

Nor doth it ſeem at all repugnant either to *natural Reaſon*, or to the *Holy Scriptures* (which command us to *lay down our Lives for our Brethren*) that, without any ſuch rigid Injunction of a Superior, a Man ſhould voluntarily expoſe himſelf to a Probability of loſing his Life for others; provided he hath good hopes of thus procuring their Safety, and that they are worthy of ſo dear a Ranſom: for it would be ſilly and ſenſeleſs, that a Man ſhould venture his own Life for another whom 'tis impoſſible to preſerve; and [2] that a Perſon of Worth and Excellence ſhould ſacrifice himſelf for the Security of an inſignificant *paltry Fellow* [b]. We conceive it then to be lawful, that a Man may either give himſelf as a Surety for another, eſpecially for an innocent and worthy Perſon, or as a Hoſtage for the Safety of many, in the Caſe of Treaties; upon pain of ſuffering Death, if either the accus'd Perſon doth not appear, or the Treaty be not obſerv'd. Tho' the other Party, to whom he ſtands bound on either of theſe accounts, cannot fairly put him to Death upon ſuch Failure; as we ſhall elſewhere make out. But that thoſe vain Cuſtoms of Mens devoting themſelves out of Foolhardineſs and Oſtentation (ſuch as we obſerv'd to be in uſe amongſt the *Japoneſe*) are contrary to the *Law of Nature*, we do not in the leaſt doubt. For there can be no Virtue in an Action where there's no *Reaſon*. Nor do we pretend to maintain, that the *Law of Nature* obliges a Man to prefer the Lives of others to his own; eſpecially ſuppoſing the Caſes and Circumſtances to be equal. For beſides that the common Inclination of Mankind is an Argument to the contrary, we might alledge the Teſtimony of Witneſſes beyond all Exception, allowing a Man to be always *deareſt to himſelf*, and *Charity* ſtill to *begin at home* [c].

XIX. It remains that we examine, whether or no a Man, at his own free Pleaſure, either when he grows weary of Life, or on the account of avoiding ſome terrible impending Evil, or ſome ignominious and certain Death, may haſten his own Fate, as a Remedy to his preſent or to his future Misfortunes [d]. On this Point we have a famous Saying of [1] *Plato, in Phædo*, frequently mention'd with Honour and Commendation by

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[a] *Statius* Theb. X. 609.

Felix, qui tanta lucem mercede relinquet.
Happy, who at a Price ſo noble ſells
A fleeting Life!

Horat. Carm. III. 2.

Dulce & decorum eſt pro patria mori.
Mors & fugacem perſequitur virum,
Nec parcit imbellis juventæ
Poplitibus, timidoque tergo.

How ſweet, how glorious is the parting Breath
With which our injur'd Country's Peace we buy!
In vain the Coward flies: whilſt ſwifter Death
Hangs on his Back, nor ſpares the quivering Thigh.

[b] *Grotius* ad *Jonah*, C. 1. v. 12. *If one Man does well in offering to die for the Preſervation of many* (*as* Phocion *told* Demoſthenes) *how much more is he in Juſtice oblig'd to this, who apprehends himſelf to be the Cauſe of the common Danger?*

[c] See 2 *Corinth.* viii. 13, 14. l. 14. *Prin. D. præſcript. verb.* l. 6. C. *de ſervit.* l. 2. ſ. 9. D. *de aqua pluv. arc.* Nor can any Argument for the contrary be drawn from *L.* 5. ſ. 4. D. *Commodati*, L. 1. ſ. 28. D. *de Sancto Silan.* Add, *Tract. de Principiis Juſti & Decori*, p. 122, *&c.* [d] Vid. *Lipſii* Epiſt. Cent. 2. Ep. 22. Dr. *Donne*'s Βιαθάνατος, Eſſ. *de Morale*, Vol. 1. p. 50.

[2] In fine, We may obſerve with Mr. *Titius* (*Obſerv.* 115.) That the effect of theſe great Undertakings is not always ſo certain, that we need believe that they thereby infallibly ſhorten their Days. Moreover, the equal Poiſe between *Self-love* and *Sociableneſs*, doth not conſiſt in an indiviſible Point, but contains a conſiderable Extent. Laſtly, *Sociableneſs* ſometimes prevails more than *Self-love*. See what I have ſaid in the foregoing Chapter, §. 15. *Note* 5.

§. XVIII. [1] The Greek. Οὗ ἄν τις ἑαυτὸν τάξῃ, ἡγησάμενος βέλτιστον εἶναι, ἢ ὑπὸ ἄρχοντος ταχθῇ, ἐνταῦθα δεῖ, ὡς ἐμοὶ δοκεῖ, μένοντα κινδυνεύειν, μηδὲν ὑπολογιζόμενον, μήτε θάνατον, μήτε ἄλλο τι μηδὲν πρὸ τοῦ αἰσχροῦ.

[2] There would be not only Folly, but great Injuſtice in it; for the Law of Nature poſitively ordains, That all other Things being equal, every one ſhould love himſelf better than others, and prefer his own Intereſt before theirs, in a thing of that great Conſequence as Life is, which is the Foundation of all the good Things of this World. By a much ſtronger Reaſon, he that runs the hazard of his Life, can't endure that a Perſon of Merit and Worth to Society, ſhould ſacrifice himſelf to ſave his.

§. XIX. [1] *Plato* plainly treats here of the private Inſtructions which the *Pythagoreans* gave their Scholars, juſt admitted into their Schools, and in which they diſcover the Reaſons of the moſt abſtruſe and private Doctrines of their Philoſophy. Theſe ſecret Inſtructions they call'd their Ἀπόῤῥητα, about which ſee *Scheffer, De Not. & Conſtit. Phil. Ital. Chap.* 10. What *Plato* ſays before of *Philolaus*, a *Pythagorean* Philoſopher, will not allow us to doubt, that the Reaſon which he ſets down here, as very obſcure and hard to comprehend, is no other than what the *Pythagoreans* give, to prove that Self-murder is not allowable. And 'tis the ſame exactly which *Cicero* attributes to *Pythagoras*, *De Senec. Chap.* 20.

Chriſtian Writers: ὥς ἔν τινι φρουρᾷ ἐσμὲν οἱ ἄνθρωποι, καὶ οὐ δεῖ ἑαυτὸν ἐκ ταύτης λύειν, οὐδ᾽ ἀποδιδράσκειν. *We are plac'd, as it were,* upon the Guard, in Life; *and a Man muſt not rid himſelf of this Charge, or baſely deſert his Poſt.* Which *Lactantius* hath expreſs'd more fully in his *Divine Inſtitutions* [a]; *As,* ſays he, *we did not come into the World upon our own Pleaſure or Choice, ſo neither muſt we quit our Station otherwiſe than by the Command of him who gave it us; who put us into this Tenement of the Body, with Orders to dwell here, till he ſhould pleaſe to remove us.* It is worth while to hear how *Plato* [2] deſcribes the *Self-murderer,* whom he hath condemn'd to a diſgraceful Burial: *He that kills himſelf, preventing by Violence the Stroke of Fate, being forced to his End neither by the Sentence of the Judges, nor by any inevitable Chance, nor on the account of defending his Modeſty in extreme Danger; but thus unjuſtly condemning and executing himſelf, out of Cowardice and Unmanlineſs of Spirit.* *Ariſtotle* hath well ſeconded his Maſter: *To die,* ſays he [b], *either to get rid of Poverty or of Love, or of any other Trouble or Hardſhip, is ſo far from being an act of Courage, that it rather argues the meaneſt degree of Fear. For 'tis Weakneſs to fly and to avoid thoſe things which are hard and painful to be undergone* [c]. *Grotius* [d] hath obſerved, that Perſons guilty of Self-murther were excluded from decent Honours of Burial, both amongſt the *Gentiles* and the *Jews.* But amongſt the latter, one Caſe is commonly excepted, and allow'd as a juſt Reaſon for killing one's ſelf; and that is [3] when a Man finds he ſhall otherwiſe be made a Reproach to God, and to Religion. For acknowledging the Power over our Lives not to be in our own hands, but in God's, they took it for granted, that nothing but the Will of God, either *manifeſt* or *preſumptive,* could excuſe the Deſign of anticipating our Fate. As Inſtances of this excepted Caſe, they alledge the Examples of *Sampſon,* who choſe to die by his own Strength, when he [4] found the true Religion expos'd to Scorn in his Perſon and Misfortunes: And of *Saul,* who [5] fell on his own Sword, leſt he ſhould have been derided and inſulted over by God's and *his* Enemies; and leſt, if he ſhould have yielded himſelf Priſoner, the Slavery of his Country and Kingdom ſhould inevitably follow. For the *Jews* are of Opinion, that *Saul* recover'd his Wiſdom and Honour, as to the laſt Act of his Life; in as much as after the Ghoſt of *Samuel* had foretold his Death in the Battle, yet he refus'd not to engage for his Country and for the Law of his God; whence he merited eternal Praiſe, even by the Teſtimony of *David*; who likewiſe commended ſo highly the Piety of thoſe Men, who honour'd their Prince's Relicks with a decent Burial.

Some extend this Exception and Allowance to many other Caſes which bear a Reſemblance to the former. And the Foundation they build upon is this, that as no Man can be properly bound or *oblig'd* to himſelf, ſo no Man can do an Injury to himſelf, when he takes away his own Life. As for a Man's being engag'd by the *Law of Nature* to preſerve himſelf, they ſay the Reaſon of this is, becauſe he is conſtituted and appointed by God for the maintenance of *human Society,* which he muſt not by any means forſake, like an idle Soldier, who runs away from the Poſt aſſign'd him in Battle: And that therefore my Obligation to ſave my own Life, is not a *Debt* to myſelf, but to God, and to [6] the Community of Mankind. So that if that Reſpect to God and to Mankind be taken off and be remov'd, the Care of my Life is recommended to me only by *Senſitive Inſtinct,* which not riſing to the Force of a Law, an Action repugnant to it cannot be accounted ſinful. On theſe Conſiderations, they think the Caſe of thoſe

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[a] Div. Inſtit. *l.* 3. *c.* 18.

[c] Senec. *Phœniſſ.* ver. 190.

——Non eſt Virtus
Timere vitam; ſed malis ingentibus
Obſtare, nec ſe vertere ac retro dare.

Martial, L. 11. Epig. 57.

Rebus in anguſtis facile eſt contemnere vitam;
Fortiter ille facit qui miſer eſſe poteſt.

Virgil aſſigns a Place in Hell to Self-murtherers:

————————Qui ſibi lethum
Inſontes peperere manus, lucemque peroſi
Projecere animas.

[b] Ethic. *l.* 3. *c.* 2.

Valour is not, to be afraid of Life,
But bravely to reſiſt impending Woes,
And never to ſubmit or to retire.

Cowards in Miſery may court their Fate;
He's brave that dare perſiſt Unfortunate.

————————They
Who prodigally throw their Souls away;
Fools, who repining at their wretched State,
And loathing anxious Life, ſuborn'd their Fate.
Mr. *Dryden.*

Procop. Hiſt. *Goth.* l. 4. *To throw away our Life when there can be no Advantage, is precipitate Madneſs: And tho' ſuch a blind Fierceneſs hath ſome vain Shadow of Courage, yet it will always paſs for Folly, in the Judgment of wiſe Men.* Ammian. Marcellin. l. 25. c. 4. *If we conſider right, it is juſt the ſame Fearfulneſs and Cowardice, to deſire Death when we ought not, and to refuſe it on a proper Occaſion.* Add, *Roger de Bramin.* p. 2. c. 19. *Nicol. Trigau. de Regno Chinæ,* l. 1. c. 9. *Charron,* l. 2. c. 11. n. 18.

[d] L. 2. c. 19. ſ. 5.

[2] De LL. l. 9. Ὃς ἂν ἑαυτὸν κτείνῃ, τὴν τῆς εἱμαρμένης βίᾳ ἀποστερῶν μοῖραν, μήτε πόλεως ταξάσης δίκην, μήτε περιωδυνῷ, καὶ ἀφύκτῳ προσπεσούσῃ τύχῃ ἀναγκασθεὶς, μηδὲ αἰσχύνης τινὸς ἀπόρου, καὶ ἀβίου μεταλαχὼν, ἀργίας δὲ καὶ ἀνανδρίας δειλίᾳ ἑαυτῷ δίκην ἄδικον ἐπιθῇ —— τάφους δ᾽ εἶναι τοῖς οὕτω φθαρεῖσι, πρῶτον μὲν κατὰ μόνας, &c. See a Paſſage of Mr. *Montagne*'s quoted §. 17. *Note* 1. where you'll find an Abridgment, and a lively Repreſentation of the principal Reaſons which can be alledged againſt thoſe who believe that Self-murther is allowable, and ſome other Paſſages which our Author puts in the Margin here.

[3] This Reaſon does not excuſe Self-murder at all. Suppoſing that we do not any thing to diſhonour God on our part, 'tis not our Fault, if profane Perſons take an occaſion unjuſtly to ridicule their Creator; and this does not at all authorize us to violate the expreſs Prohibition both of the Natural Law and Revelation, in departing out of this Life without his Leave.

[4] 'Twas done rather out of Revenge againſt the *Philiſtines,* and God puniſhed him by hearing his Prayers. See Mr. *Le Clerc* on *Judges,* xvi. 28. 30.

[5] See Mr. *Le Clerc* upon 2 *Sam.* 1. 14.

[6] *Ariſtotle* obſerves (Ethic. l. 5. c. 15.) that thoſe who are guilty of their own Deaths, are more properly injurious to the Commonwealth than to themſelves; and that therefore they deſerve the Ignominy commonly inflicted on their Relicks.

Perſons deſerves a favourable Judgment, and at leaſt a kind Pity rather than a rigorous Cenſure, who lay violent Hands upon themſelves, when they ſee that they ſhall otherwiſe infallibly ſuffer a Death of Torture and Ignominy from their Enemies; ſince it cannot be for the Intereſt of the Publick, that they muſt needs die in ſo infamous a manner: Or elſe, when they ſee ſuch an Injury likely to be offer'd to them, as if they undergo, they ſhall be ever after ſcorn'd and derided by the reſt of Mankind. Of the former ſort are thoſe who ſeeing themſelves condemn'd to Death, either by cruel Enemies abroad, or bloody Tyrants at home, have wilfully prevented the Stroke; either to avoid the Tortures and the Shame of a publick Execution, or to procure ſome Benefit to their Friends or Families by this Expedient. Thus *Tacitus*, *Ann.* VI. 29. giving an Account of ſome of the *accus'd Perſons* under *Tiberius*, who made themſelves away, obſerves, that *the* [7] *Fear of the Executioner render'd theſe Acts very frequent. And* that *whereas ſuch as ſuffer'd Death in publick were denied the Privilege of Burial, and had their Goods confiſcated; thoſe who died by their own Hands were decently interr'd, and their Laſt Wills ſtood good with full Effect; theſe Indulgences ſerving as a Reward for their Haſte.* And here, by the way, we may remark, that *Martial*'s Cenſure doth not always hold good,

——*Furor eſt, ne moriare, mori*;

——'Tis mad to die for fear of Death;

For, as *Æſchines* [a] hath well diſtinguiſh'd, *To die is not ſo terrible, as to bear the Infamy that attends ſome kinds of Deaths.*

The other ſort of Perſons whoſe Death we obſerv'd to be ſo favourably interpreted by ſome Caſuiſts [9] are thoſe Women and beautiful Boys, who have kill'd themſelves to avoid the Violation of their Chaſtity [b]. And in their Behalf they urge this plauſible Excuſe, that being aſſaulted with ſuch a Danger as they could not otherwiſe, unleſs by a Miracle, eſcape, they might well conclude, that their Almighty Sovereign and General now gave them a Diſmiſſion, and that they might well preſume on the Conſent and Leave of Mankind, to whom they were already loſt: It being no one's Intereſt that they ſhould not anticipate their Death for ſo little a time, to avoid the feeling of ſuch Tortures and Abuſes as might, perhaps, tempt them to yield to a more grievous Sin: And inaſmuch as it ſeem'd unreaſonable to condemn generous Souls to ſuch a Neceſſity, as that they muſt wait for the Sword of Villains, who would enhance the Bitterneſs of Death, by their foul and ignominious Uſage [c].

But to leave this particular Point without venturing at a Determination; thus much we take to be evident, that thoſe who voluntarily put an end to their own Lives, either as tired out with the many Troubles which commonly attend our mortal Condition; or from an *Abhorrence* of Indignities and Evils, which yet would not render them diſgraceful Members of *human Society*; or through Fear of ſuch Pains and Torments as by reſolutely enduring, they might have become uſeful Examples to others; cannot be well clear'd of the Charge of *Sinning againſt the Law of Nature*. Sir *Thomas Moor* ſeems to be of another Opinion in his *Utopia*, but his Reaſons do not prevail with us to alter our Judgment.

But thoſe are, on all Accounts, to be exempted from the Crime of Self-murder, who lay violent Hands on themſelves, under any Diſeaſe robbing them of the Uſe of Reaſon. Many Perſons likewiſe who have run into voluntary Deſtruction, upon an exceeding Fright and Conſternation, have on that Account been excus'd by moderate and candid Judges [d].

It ought to be obſerv'd farther on this Head, that it makes no Difference whether a Man kill himſelf, or force others to diſpatch him. For he who at ſuch a Time, or on ſuch Occaſion, ought not to die, is by no means excus'd, if he makes uſe of another Man's Hands to procure his Death; ſince what a Man doth by another, he is ſuppos'd in Law to have done himſelf, and muſt therefore bear the Guilt or *Imputation* of the Fact. *David* was guilty of the Death of *Uriah*, tho' he got it effected by the Hands of the *Ammonites*. So

[a] Orat. de *falſ. Legat.*

[b] Vid. *Paul. Diac.* l. 15. & *Euſeb.* H. E. l. 8. c. 24, 27.

[c] *Cicero* Tuſc. Qu. I. 30. Cato *left the World rejoicing that he had met with an Opportunity of Dying. For that Divine Power which dwells in us, forbids us to depart without his Leave. But when Heaven preſents a fair Occaſion, as formerly to* Socrates, *now to* Cato, *and often to other Perſons, I dare engage, that a truly wiſe Man will quit with Joy this Vale of Darkneſs, to enter into Happineſs and Light. And yet ſuch an one will not violently break the Chains of his Priſon; for this the Laws forbid him; but he will go out quietly and fairly, when God is pleaſed to give him his Enlargement; as if his Releaſe from the Reſtraint were ſign'd by the proper Magiſtrate and Power.* Compare *L.* 3. ſ. 6. *D. de bonis eorum qui ante ſententiam.* L. 45. ſ. *D. de jure fiſci.* Add, *Quinctilian*, Declam. 4. *Ant. Matthæ:* de Crim. ad l. 48. tit. 5. c. 1. ſ. 9. *Grot.* ad Judic. c. 16. v. 30.

[d] *Q. Curtius*, L. 4. c. 16. *When Fear hath once got Poſſeſſion of the Mind, Men grow deſperate, and dread nothing but that firſt Object of Terror.* Lucan. L. 3. ver. 684.

Mille modos inter, lethi mors una timori eſt,
Qua cœpere mori ——— ——— ———

Amongſt a thouſand Ways of Death, they fear
That only which in part they feel ——— ———

Mors timore appetita, Death deſired thro' Fear, is a Phraſe with *Sueton.* Add, *L.* 14. ſ. 3. *D. quod metus cauſa*, and *Montaign's* Eſſay, *L.* 1. *c.* 17.

[7] *Tacitus*'s Words are: *Nam promptas ejuſmodi Mortes, metus carnificis faciebat; & quia damnati, publicatis bonis, ſepultura prohibebantur; eorum, qui de ſe ſtatuebant, humabantur corpora, manebant teſtamenta, pretium feſtinandi.*

[9] This is not a ſufficient Reaſon to juſtify Self-murder, for they ought to comfort themſelves with the Teſtimony of their own Conſcience, which can't blame them in that Reſpect, and bear patiently the unwarrantable Cenſures of Men, and the other Inconveniences which may redound from ſuch a Violence. True Chaſtity, as Mr. *Thomaſius*'s ſpeaks very well (*Inſtitut. Juriſpr. Divin. Lib.* 2. *Chap.* 2. §. 76.) is a Thing which no Man can take away by force, and 'tis without Reaſon that they are leſs eſteemed ſo, who have been obliged to yield to a greater Power.

were *Pilate* and the *Phariſees* guilty of that of our Saviour, tho' they did not themſelves faſten him to the Croſs, but order'd the Soldiers to do it. Altho' the Perſon who lends his Hands to ſuch a Service, may likewiſe bring himſelf in for a Share in the Fault. For this Reaſon we don't admire the Reflection which *Florus* [a] [10] makes on the Deaths of *Brutus* and *Caſſius*; *Who*, ſays he, *doth not wonder, that theſe wiſe and great Perſons did not employ their own Hands in their concluding Strokes? Perhaps it was part of their Perſuaſion, that they ought not to defile themſelves by ſuch Attempts, but that in delivering their moſt holy and moſt pious Souls from the Confinement of their Bodies, they ſhould make uſe of their own Judgment, in the Intention, and of other Mens Wickedneſs in the Execution.* For if it were unlawful for them at that time to end their Lives, it was indifferent whether they fell by their own, or by others Violence. But if it were lawful, how can any Wickedneſs or Guilt be imputed to the Servants who aſſiſted them? Tho' the Hiſtorian might, in ſome meaſure, be excus'd, if the ſame Cuſtom were practis'd in his Country, which *Æſchines* mentions amongſt the *Grecians*, that if a Perſon murther'd himſelf, the Hand that perform'd the Deed was buried apart from the reſt of the Body [b].

To conclude, ſince we deny that a Man hath abſolute Power over his own Life, it is plain that we cannot approve of thoſe Laws, which in ſome Countries either command or permit People to make themſelves away. Such a Law *Diodorus Siculus*, *L.* ii. *c.* 57. reports to have been in force amongſt the Inhabitants of the Iſland *Ceylan*, ordaining, “That the People ſhould live only to “ ſuch a Number of Years, which being run out, “ they eat a certain Herb that put them into “ their long Sleep, and diſpatch'd them without “ the leaſt Senſe of Pain.” *Add*, *L.* iii. *Ch.* 33. And thus too amongſt the *Ceans*, all Perſons above Sixty Years old, were obliged by the Laws to poiſon themſelves, to *ſupply Food for the reſt* [c]. Though *Ælian* gives this better Reaſon for the Practice; “That having arriv'd at ſuch an Age, “ they were conſcious to themſelves, that they “ were no longer able to promote their Coun- “ try's Intereſt by their Service; growing now “ towards Stupidity and Dotage [d].” *Procopius*, Hiſt. *Goth. L.* 2. relates a Cuſtom of the *Heruli*, by which thoſe who were weaken'd and diſabled, either by Diſeaſe or Age, voluntarily ſent themſelves out of the World: The Wives hanging themſelves at the Tombs of their Husbands, if they loſt them in this manner. *Ælian*, *L.* iv. *C.* 4. reports ſomewhat to the ſame purpoſe of the *Sardi*, and the *Bebrycei*; and *Strabo*, *Lib.* ii. and *Herodotus*, *Clio* in *fin.* of the *Maſſagetæ*, who may be conſulted at Leiſure.

[a] Lib. 4, 7.
[b] Orat. contra Cteſiphont.
[c] *Strabo*, L. 10. *Heraclia.* de Polit. Vide, H. Lib. 3. Chap. 37.
[d] Add, *Valer. Max.* Lib. 2. Chap. 6. ſ. 7, 8.

[10] Thus *Deianira* ſpeaks in *Seneca* (*Herc. Oet.* ver. 996.)

———— ———— *Dextera ſternar tua,*
Sed mente noſtra.

———— ———— *Yours* ſhall be the *Hand* of Fate;
And *mine* the *Will*.

CHAP. V.

Of SELF-DEFENCE.

The Contents of every Paragraph of the fifth Chapter.

I. *The Defence of a Man's Self is a lawful Violence.*
II. *And is ordain'd by the Law of Nature.*
III. *What ſort of Defence is allow'd in a natural State.*
IV. *And what ſort in Cities?*
V. *Whether it is lawful againſt one that miſtakes.*
VI. *The Time for ſuch Defence in a natural State.*
VII, VIII, IX. *And how to be ſettled in a Civil State.*
X. *Of maiming any Part of the Body.*
XI. *Of Chaſtity.*
XII. *Of a Box on the Ear.*
XIII. *Whether a Man is bound to fly.*
XIV. *Whether the Chriſtian Religion commands otherwiſe.*
XV. *Slaughter committed in Self-defence, is guiltleſs.*
XVI. *Of the Defence of our Goods.*
XVII, XVIII. *Of a Night-thief.*
XIX. *Of ſuch Defence as is made by him who has offered the Injury.*

TO *Self-preſervation*, which not only the tendereſt Paſſion, but the exacteſt Reaſon recommends to Mankind, belongs *Self-defence*, or [1] the warding off ſuch Evils or Miſchiefs as tend to our Hurt, when offer'd by other Men. This Defence of ourſelves may be undertaken two Ways, either without *hurting* him who deſigns the Miſchief againſt us[2], or elſe by *hurting* or *deſtroying* him. As to the former Expedient, no ſenſible Man can queſtion, but that it is altogether lawful and blameleſs. But concerning the latter, many have entertain'd a Scruple; inaſmuch as by putting it in Practice, we hurt or deſtroy a Man like ourſelves, with whom we are oblig'd to live in a *ſocial* manner, and whoſe Death ſeems to be as great a Loſs to Mankind as our own. And beſides, becauſe a forcible Repulſe of an Aggreſſor may cauſe more Diſturbances and Outrages in human Society, than if we ſhould either decline the Miſchief by flight, or patiently yield our Body to it, when an Eſcape is impoſſible. Yet that the Defence of ourſelves may not only be undertaken the firſt of theſe Ways, but [3] when that proves ineffectual, even with the Hurt of the Aſſailant, we are inform'd, as well by the Judgment of Reaſon, as by the concurring Teſtimony of the learned and unlearned World. 'Tis true, Man was created for the maintaining of Peace with his Fellows; and all the Laws of Nature, which bear a Regard to other Men, do primarily tend towards the Conſtitution and the Preſervation of this univerſal Safety and Quiet. Yet Nature is not backward in giving us an Indulgence to fly even to *Force*, when we cannot by other Means ſecure ourſelves from Injuries and Aſſaults. For the Obligation to the Exerciſe of the Laws of Nature and the Offices of Peace, is *mutual*, and binds all Men alike; neither hath Nature given any Perſon ſuch a diſtinct Privilege, as that he may break theſe Laws at his Pleaſure towards *others*, and the others be ſtill oblig'd to maintain the Peace towards *him*. But the Duty being *mutual*, the Peace ought to be *mutually* obſerv'd. And therefore when another, contrary to the Laws of Peace, attempts ſuch Things againſt me, as tend to my Deſtruction, it would be the higheſt Impudence in him to require me at the ſame time to hold his Perſon as ſacred and inviolate; that is, to forego my own Safety for the ſake of letting him practiſe his Malice with Impunity[4]. But ſince in his Behaviour towards me he ſhews himſelf *unſociable*, and ſo renders himſelf unfit to receive from me the Duties of Peace, all my Care and Concern ought to be how to effect my own Deliverance from his Hands; which if I cannot accompliſh without his *Hurt*, he may impute the Miſchief

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Mr. Barbeyrac's *NOTES on* Chap. V. § 1.

[1] This is well ſtated by the *Roman* Lawyers, for they lay it down as a Maxim of the Law of Nations (which we call *The Law of Nature*) *Ut vim atque injuriam propulſemus: Nam jure hoc evenit, ut quod quiſque ob tutelam corporis ſui fecerit, Jure feciſſe exiſtimetur*, Digeſt. Lib. 1. Tit. 1. De Juſtit. & Jure, Leg. 3. See alſo *Lib.* 9. *Tit.* 2. *Ad Leg. Aquil. Leg.* 4. *in princ.* Indeed, as Mr. *Titius* obſerves (*Obſerv.* CXX.) there may be ſome Oppoſition between Self-love, and the Duties of a Community, either in reſpect to the good Things which can't be poſſeſſed by two Perſons at the ſame time; and in this Caſe Self-love ought often to ſhew itſelf; or in reſpect of Evil, which equally threatens others and ourſelves. Our Author, in this and the next Chapter, treats of this laſt Oppoſition, which happens either by the Act of him towards whom we ought otherwiſe to obſerve the Laws of the Community, or without any Act on his part. He explains the firſt Caſe in this Chapter, and clears the other in the following; for the Fact of the other, which produces this Oppoſition, is either malicious, or not. He treats of the firſt in this Paragraph, and will ſpeak of the other in §. 5.

[2] We may add this Explication here, which our Author uſes in his Abridgment of the *Duties of a Man and Citizen*, Lib. 1. Chap. 5. §. 12. *i. e.* Taking good Heed that he ſhall not gain his Ends in inſulting us; or that he may have Reaſon to fear the ill Succeſs of his Attempt.

[3] We ought to obſerve this Limitation well; how unjuſt ſoever the Attempt of the Aggreſſor may be, the Community obliges us to ſpare him, if we can do it without Prejudice to ourſelves. By this juſt Temper we may, at the ſame time, preſerve the Rights of Self-love, and Duties of Community. The *Roman* Lawyers have owned this Truth, *Injuria autem* (ſay they) *occidere intelligitur, qui nullo jure occidit. Itaque qui latronem* [*Inſidiatorem*] *occiderit, non tenetur, utique* Si aliter Periculum effugere non potest, *Inſtitut. Lib.* 4. *Tit.* 3. *De Leg. Aquil.* §. 2. See Mr. *Noodt*'s excellent Treatiſe, *Ad Legem Aquiliam*, Chap. 4. p. 15, 16.

[4] *Herodian*, Lib. 4. c. 10. Ὁμοῦ καὶ εὔλογον, καὶ ἀναγκαῖον, τὸ μέλλοντα πείσεσθαι δεινὸν, ἀμύνασθαι μᾶλλον, ἢ ὑπομεῖναι, τῇ μὲν γὰρ συμφορᾷ τοῦ πεσόντος, καὶ ἀνανδρείας ψόγος παρακολουθεῖ. In extream Danger, not only Neceſſity, but Reputation obligeth us rather to avenge an Injury than ſuſtain it. Since ſhould we fall by ſuch a Miſchief, at the ſame time that we are pity'd as unfortunate, we ſhould be reproach'd as Cowards.

to his own Wickedneſs, which put me under this Neceſſity[a]. For otherwiſe, all the Goods which we enjoy either by the Gift of Nature, or by the Procurement of our own Induſtry, would have been granted us in vain, if it were unlawful for us to oppoſe thoſe in a *forcible* Manner, who unjuſtly invade them. And *honeſt* Men would be expos'd a ready Prey to *Villains*, if they were never allow'd to make uſe of Violence in reſiſting their Attacks. So that upon the Whole, to baniſh *Self-defence* though purſued by *Force*, would be ſo far from promoting the Peace, that it would rather contribute to the Ruin and Deſtruction of Mankind. Nor is it to be imagin'd that the *Law of Nature*, which was inſtituted for a Man's Security in the World, ſhould favour ſo abſurd a Peace, as muſt neceſſarily cauſe his preſent Deſtruction, and would in fine produce any Thing ſooner than a *ſociable* Life.

II. But now, whether a *violent Self-defence*, and ſuch as is join'd with the Hurt or the Slaughter of the Aſſailant be an obliging and a neceſſary Duty (as we have already ſhewn it to be a lawful and an allow'd Practice) is a Queſtion not ſo eaſy to be determin'd. In ſtating which Point we do not ſpeak of Soldiers, or of the Guards hired by Travellers, who whilſt they defend themſelves with the Slaughter of the Enemies or the Robbers, at the ſame time protect and deliver their Country, [1] or the Men who have put themſelves under their Care. But we confine ourſelves to the Caſe of thoſe who are excited to make ſuch Defence by their own [2] particular Danger[b]. Now there are ſome who will have this *Defence* to be ſo ſtrict a *Command*, that it cannot be taken off even by *Civil* Conſtitutions; and conſequently that he who ſuffers himſelf to be kill'd, when he might have violently reſiſted, ought to be look'd upon as guilty of *Self-murder*[c]. Which is ſomething like the Cuſtom in *Sparta*, where the *Ephori* puniſh'd a Man for having ſuffer'd many Perſons to injure him[d].

The Author of the Treatiſe, *De Principiis Juſti & Decori*, declares in favour of this Opinion; and the Argument he proceeds on is to this Purpoſe, *Pag.* 33. "That ſince amongſt other Things contributing to the Preſervation of Man, Nature "hath given us all a quick Senſe of Pain, a Deſire of Revenge, together with Hands for the "hurting others, or the defending ourſelves; we "may hence infer, that theſe Gifts not being beſtow'd on us in vain, it is the Pleaſure of God "that we ſhould employ them in procuring our "own Safety. And that therefore, not to uſe "my Hands againſt an Aſſailant, tho' to the Procurement of his Death[3], would be the ſame "Thing as voluntarily to cut them off. Tho' indeed he afterwards confeſſes, *Pag.* 118. that this "Law of Self-preſervation is not of ſo ſtrict Neceſſity, but that there may ſometimes happen "ſuch Caſes, as ſhall either diſpenſe with a Man's "Obedience to it, or leave him free to do as he "pleaſes."

For our Parts, we think it ought principally to be conſider'd, whether it much concern the Intereſt of many, that the Perſon invaded ſhould ſurvive, or whether he ſeem only to live for himſelf. In the former Caſe we conceive, that there lies an *Obligation* on a Man to ſecure his own Life by any poſſible Means. But in the latter Caſe we take it to be a Thing of *Permiſſion*, or Allowance only, not of Command, to defend one's ſelf by the Death of the Aggreſſor, eſpecially if his Life would have been of great Service and Profit to many People; and if we may probably conjecture, that by dying in ſuch an Attempt, he incurs the Danger of eternal Damnation. For tho' the Greatneſs of a ſurpriſing Terror will ſcarce ſuffer one exactly to weigh the Merits of Perſons; and tho' ſuch a Danger as a Man voluntarily throws himſelf into, and may at his Pleaſure get rid of, ought to find little Regard or Conſideration from others, eſpecially from him who is the Subject of his Fury, and at whoſe Coſt he is thus extravagant[e] [4]: Yet that an Act from which ſo great Evils would be brought upon another (as there would ſometimes from this violent Defence) ſhould be reckon'd a Matter of ſtrict Duty, and the Omiſſion of it a Sin, we ſee little Reaſon to allow. Eſpecially, ſince the old Maxim might be ſo well apply'd to this Caſe, *that any Man may renounce his own Privilege, provided he doth not thereby injure a third Perſon:* Which *Quinctilian* [5] hath thus expreſs'd and illuſtrated, *This*, ſays he, *is the Nature of all Benefits, that they do not impoſe a Neceſſity, but grant a Power. Whatever Expedient you invent to procure the Honour or Safety of another, loſes the Name of a Privilege, if you compel him to make uſe of it. Run over all the Inſtitutions and all the Rights of Mankind, and you ſhall never obſerve that the Law is ſo fondly ſolicitous for our Good, as to extort that from us, by which it intends only to do us a Favour.*

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[a] Hor. 2. Sat. 1. v. 44.

Nec quiſquam noceat cupido mihi pacis: at ille
Qui me commorit (melius non tangere, clamo)
Flebit. ———

Hurt not a peaceful Man; but if you try
My Patience far (*You'd beſt keep off*, I cry)
You may repent your Boldneſs. ———

[b] *Plutarch* in *Phocion*: Ὁ δὲ Φωκίων, ἐπὶ τὸ προέσθαι τὸν ἄνδρα [Νικάνορα] μὴ μὲν κατασχεῖν ἐγκαλούμενος, ἔφη πιστεύειν μὲν τῷ Νικάνορι, καὶ μηδὲν ἀπ' αὐτοῦ προσδοκᾶν δεινόν. εἰ δὲ μὴ μᾶλλον ἐθέλειν ἀδικούμενος, ἢ ἀδικῶν φανερὸς γενέσθαι. τοῦτο δὲ ὑπὲρ αὐτοῦ μὲν ἄν τινι σκοποῦντι δοκοίη καλοκαγαθικῶς λελέχθαι, καὶ γενναίως. ὁ δὲ εἰς πατρίδος ἀποκινδυνεύων σωτηρίαν, καὶ ταῦτα στρατηγὸς καὶ ἄρχων, οὐκ οἶδα μὴ μεῖζόν τι παραβαίνῃ, καὶ πρεσβύτερον τὸ πρὸς τοὺς πολίτας δίκαιον. When he was cenſur'd by ſome for letting *Nicanor*, the Ambaſſador of *Caſſander*, enjoy his Liberty, he anſwer'd, that he did not diſtruſt the Man, nor apprehend any Danger from him: But if Things ſhould happen otherwiſe, he would be glad to let the World ſee how much more willing he was to receive an Injury than to offer one. *This, if he look'd no farther than his own Perſon, was ſpoke with Honeſty, as well as with Bravery. But if a Man by ſuch an Act of Generoſity endangers the Safety of the State, eſpecially being himſelf in a publick Truſt, I queſtion if he does not violate that greater and more ſacred Law, his Obligation to his Country.*

[c] Vid. *Zeigler* ad *Grot.* Lib. 1. c. 3. ſ. 3.

[d] *Plutarch Lacon.* Inſtitut.

[e] *Iſocrates* adverſ. *Callimach.* *Is it not ridiculous and abſurd, that he ſhould petition you for Mercy in ſuch a Danger, as purely depended on his own Will; which he freely run into at firſt, and from which he has ſtill Means of being deliver'd?*

§. II. [1] Add *Grot.* Lib. 1. c. 2. & c. 3. ſ. 3. To whom we may apply that Saying of *Seneca* (Phœniſſ. 294.)

Vitam tibi ipſi ſi negas, multis negas.
By chooſing Death yourſelf you hazard the Lives of many.

[2] In general, no Man can releaſe his own Rights, or renounce his private Intereſts, when they are intermixed with another's, who will not allow us to do it. To this add the Example of *Phocion* alledged by our Author. See *Letter* [c].

[3] Mr. *Velthuyſen* does not ſay this, 'tis our Author's Comment.

[4] *Liban.* Declam. 23. Ἃ γὰρ οὐκ ἔπαθεν, οὐκ ἀδικῶν, ταῦτα αὐτὸν ἔδρασεν ἠδικηκώς. He who unleſs he had offer'd one Injury, had not ſuffer'd another, is equally the Cauſe of both.

III. But in order to more exact Judgment of *Self-defence*, and to know by what Rule it ſhould be moderated, and how far it may rightly proceed: Firſt of all we ſhould examine, whether the Defendant live in a *State of Nature*, or of *civil Society*; ſince the Bounds of this Practice are much narrower in the latter than in the former Condition. Which Difference not being obſerv'd by many Authors, hath been the Occaſion of their delivering ſuch Things in general concerning *unblameable Self-defence*, as will hold true only under one particular State. But now if we firſt diſtinctly explain what Right we have to ſuch a Practice in a *State of Nature*, it will appear with great Eaſe and Evidence, how far, and on what Grounds this Liberty is ſtinted, in Perſons living together under a civil Government.

It is then a good Rule of Prudence, that a wiſe Man ought to try all other Expedients, before he proceed to Arms or Violence [1]. For inaſmuch as all Combat and forcible Contention is of uncertain Iſſue, it would be adviſable firſt to make Experiment of ſafer Remedies and Redreſſes, e'er we enter the Liſts, and come to a formal Engagement [a]. Thus if I can cut off the Invader's Acceſs to me, I am a Fool if I unneceſſarily meet him hand to hand. And if I can defend myſelf with a Wall or a Gate, 'tis abſurd in me to expoſe my Breaſt [2] to my Foe. Farther, Wiſdom adviſes us to put up a ſmall Injury, if we can with convenience, and ſo rather to recede in ſome degree from our *Right*, than by an unſeaſonable Defence, to expoſe ourſelves to a greater Danger: Eſpecially if that Thing or Concern of ours, upon which the Attempt is made, may be eaſily made amends for, or repair'd [3]. Thus a Man who hath a Debt owing him from another, ſuppoſe to the Value of ten Pounds, would act more wiſely, in my Judgment, if he made up the Buſineſs by any kind of Compoſition, than if he engag'd in a troubleſome Suit, where the Lawyers Fees might exceed the main Sum which he endeavours to recover [b].

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[5] Declam. 7. *Omnium beneficiorum iſta natura eſt, ut non ſit neceſſitas, ſed poteſtas. Quicquid in honorem alicujus inventum eſt, deſinit privilegium vocari poſſe, ſi cogas. Coacta, ſi videtur, jura percurrite, nuſquam adeò pro nobis ſolicita lex eſt, ut quod præſtat, extorqueat.* See Mr. *Daumat*'s *Civil Laws*, *Tit.* 1. *Sect.* 4. But we ought here to obſerve, contrary to our Author's Hypotheſis, That Self-defence is not ſo inſeparable a Right, that we may uſe it or not, at all Times as we ſee fit. The Law of Nature does not allow us to defend ourſelves only, but it poſitively orders us thereby to love ourſelves, and do all we can for our Preſervation. See Mr. *Vander Muelen*'s Commentary on *Grotius*, *Lib.* 2. *Chap.* 1. §. 8, & 9. and Mr. *Titius*'s *Obſervat.* 121. If we were not under this Obligation, it would follow, that any Man might ſuffer himſelf to be kill'd as often as he was attack'd, and no Man need to be concern'd for his Preſervation. Now, who ſees not that this tends to the Deſtruction of a Community, and to deprive it of the moſt honeſt Men? Beſides, ſuch as ſurvive would have a fair Occaſion to leave the World. It is true, that the Creator hath provided by a natural Inſtinct, that every one ſhould defend himſelf, inſomuch that we are more apt to offend on the other ſide than this; but this ſhews, that Self-defence is not a Thing abſolutely indifferent in its own Nature, or barely permitted, ſo that it is always at our Liberty to ſuffer ourſelves to be ſlain. All that has been ſaid, tends only to this, that a Man may, yea, ought ſometimes to renounce his Right of defending himſelf, as we ſhall ſhew below. And that in theſe laſt Caſes, the Fear, into which the Greatneſs of Danger, and the Force of our Natural Inſtinct throws us, may excuſe or free them from Blame, who ſave their own Lives by the Loſs of theirs whom they ought rather to have ſpared with the Expence of their own. We may alſo believe on the other hand, that if one ſacrifices his Life through great Kindneſs, or ſome other weighty Conſideration which he has for the unjuſt Aggreſſor, who does not of himſelf deſerve ſuch a Sacrifice, he is excuſable, for yielding to a Motive of that Nature, as to be of Force enough to overcome Self-love and Fear of Death. See §. 5. *Note* 1. following.

§. III. [1] *Omnia prius experiri verbis, quàm armis, Sapientem decet.* Ter. Eunuch. Act. 4. S. 7. v. 19.

[2] Terent. Eunuch. Act. 4. Sc. 6. *Tu quod cavere poſſis, ſtultum admittere eſt, i. e.* "'Tis extreme Folly to meet a Danger that "you may avoid."

[3] *Plautus Amphitr.* Act. 2. Sc. 2. v. 71.

Bacchæ bacchanti ſi velis adverſarier,
Ex inſanâ inſaniorem facies, feriet ſæpius:
Si obſequare, una reſolvas plaga.

Oppoſe the raving Gypſy in her Fit,
She'll get more Fury, and you'll get more Blows.
Be gentle, and her conſecrated Wand
May then excuſe you with a ſingle Stroke.

See alſo *Trucul.* *Act.* 4. *Scen.* 2. *v.* 55.

Martial, Epig. 64. L. 6.

Sed miſerere tui, rabido nec perditus ore
Fumantem naſum vivi tentaveris urſi.

Have Pity on yourſelf, and, tho' you'r ſtout
As Maſtiff Breed, don't take a Bear by th' Snout.

[a] *Liban.* Declam. 1. Πρῶτον μὲν γὰρ τὰ δίκαια τῷ λόγῳ πειρᾶσθαι λαμβάνειν, ἀλλὰ μὴ τοῖς ὅπλοις ἐπιπηδᾷν, ἀνθρωπινώτερον δήπουθεν, *It is a more worthy and more manly Way of Proceeding, not to run preſently to Arms and Violence, but to try firſt if our Right may not be recover'd by fair Means.*

[b] Martial. l. 7. Epig. 64.

Ah miſer & demens! viginti litigat annis
Quiſquam, cui vinci, Gargiliane, licet?

Would any Wretch prolong his Suit, a Score
Of doubtful Terms, that might be *caſt* before?

Theocrit. Idyll. 22. v. 180.

Ὀλίγῳ τοι ἔοικε κακῷ μέγα νεῖκος ἀναιρεῖν.

——— ——— ——— 'Tis wiſe to cloſe
A great Contention with a little Loſs.

Pindar, Olymp. Od. 10. v. 47.

Νεῖκος δὲ κρεσσόνων ἀποθέσθ' ἄπορον.

'Tis hard to end a Quarrel with the Great.

And *Iſthm.* Od. 4. v. 52.

Ἔστιν ἀφάνεια τύχας καὶ μαρνα-
μένων, πρὶν τέλος ἄκρον ἱκέσθαι.

War is as blind as Chance: The doubtful Day
Oft cheats the Fighter, e'er it end the Fray.

It was very wiſe Conduct that which *Iſocrates* reports of himſelf (*de Permut.*) *Theſe*, ſays he, *were the Arts I made uſe of; never to offer any Damage or Treſpaſs: And, in caſe I receiv'd any Injury from others, not to make myſelf my own Redreſſer; but to refer the*

At the ſame time it may be obſerv'd, that the injur'd Party doth not owe this Patience and Moderation to the Perſon from whom he receiv'd the Damage; who, as far as lay in his Power, hath broke off all Duties of Humanity and Commerce with him; but to his own Security and Quiet. And therefore if a Man provok'd by Anger or Pain ſhould happen to exceed theſe Bounds, he does no Injury to the Provoker, but can only be ſaid to have [6] acted imprudently, or without ſufficient Temper and Diſcretion.

But when by the Application of theſe moderate Expedients, I cannot ſecure myſelf from the impending Danger, I am then to oppoſe Force with Force, and am compell'd to enter the Combat. During which, if the injurious Party continue to puſh on his malicious Deſigns againſt me, and do not declare his Sorrow and Repentance for his Fault, and his Willingneſs to renew the Peace, I am at liberty to kill him. And although he do not directly attack my Life, as ſuppoſe he only attempts to load me with a great Number of Blows, or to maim me by the Loſs of ſome Member not *vital*, or to rob me of my Goods; yet ſince he hath once broke the Peace with me, and ſince he gives me no Caution or Security, that he will not from theſe leſſer Injuries proceed to much greater, I may even in theſe Caſes make uſe of *Extremities* for my own Deliverance. For at the ſame Inſtant, as a Man profeſſes himſelf my Enemy (which he doth while he injures me without ſhew of Repentance) he gives me, as far as 'tis in his Power to give it, an [7] *infinite Liberty* of proceeding againſt him. Some indeed there are who do not approve of this Liberty of *reſiſting in infinitum*: *For* (ſay they) *there can be no natural Right of Defence and of Reſiſtance againſt Injuries, but ſuch as is conſiſtent with that Order, which is the chief End and Deſign of a ſocial Life. Therefore in reſiſting by natural Right, this Exception is always underſtood*, unleſs the ſocial Order be infring'd by my preſent reſiſting, *to which Order Nature hath the firſt and chiefeſt Regard. And if this Caution were not interpos'd, upon our failing to maintain that neceſſary and natural Order, we ſhould render Society itſelf unſociable*[a]. But we do by no means aſſert, that this *infinite Liberty* of *reſiſting* is to be actually made uſe of in all Caſes; becauſe ſeveral intervening Conſiderations may prevail with the injur'd Party not to proceed to Extremities: But only that the injurious Perſon cannot complain of hard Meaſure, though he be repell'd with the utmoſt Violence and Severity. The Life of Men would be then indeed moſt properly render'd *inſociable*, if, in a *natural State*, any Bounds were ſet to the Liberty of Reſiſtance. For what an Age of Torments ſhould I undergo, if another Man were allow'd perpetually to lay me on only with moderate Blows, whoſe Malice I could not otherwiſe ſtop or repel, than by compaſſing his Death? Or if a Neighbour were continually to infeſt me with Incurſions and Ravages upon my Lands and Poſſeſſions, whilſt I could not lawfully kill him, in my Attempts to beat him off? For ſince the chief Aim of human *Sociableneſs* is the Safety of every Perſon, we ought not to fanſy in it any ſuch Laws, as would make every good and modeſt Man of neceſſity miſerable, as often as any wicked Varlet ſhould pleaſe to violate the Law of Nature againſt him. And it would be highly abſurd to eſtabliſh Society amongſt Men on ſo deſtructive a Bottom as a Neceſſity of enduring Wrongs. Wherefore he is to be reckon'd a fooliſh and baſe Traytor to his own Safety, who whilſt an Enemy perſiſts in the Exerciſe of Hoſtility, vainly ſpares his Life, and chooſes rather to periſh than to deſtroy. For the Law of Nature obliges me thus far only to be mild and merciful towards my Enemy, as that if he ſhall expreſs a Sorrow for what is paſt, and an Inclination to deſiſt from farther Injury, ſhall make Retribution for my preſent Damage, and give Security for his not offending hereafter, I may entirely ſpare and pardon him, and, renewing the Peace, may perform all friendly Offices towards him, as he ſhall towards me[8]. For *meer Revenge*, which propoſes no Aim but the Grief or the Deſtruction of

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Controverſy to the Deciſion of Friends. Lucian. Eunuch. *This is highly ridiculous, that Men who pretend to Philoſophy, ſhould engage in Suits and Quarrels; whereas they ought to compoſe, in a Friendly Manner, their Differences of the greateſt Conſequence.* Add. l. 4. ſ. 1. *D. de alienat. jud. mut.* That which *Polybius* (in *Excerpt. Piereſc.*) applies to the *Achæans*, proves a Truth in many other Caſes, εἰ μὴ ταχέως ἀπολόμεθα ὐκ ἂν ἐσώθημεν: *Unleſs we had been quickly loſt, we had never been ſav'd.* *Seneca*, de Irâ l. 2. c. 14. *Reaſon often preſcribes Patience, when Anger calls for Revenge: And when we might have eſcap'd ſmaller Evils, we ſink ourſelves into greater. Some upon the Reſentment of one affronting Word have been caſt into Baniſhment: They have incurr'd the ſevereſt Troubles, by not being able to digeſt a ſlight Injury; and been made arrant Slaves, by their diſdaining a petty Encroachment on their Liberty.* See *Stobæus, Serm.* 19. To this may be apply'd, the * Interpretation of *Matth.* v. 25. offer'd by *Grotius, l.* 1. *c.* 1. *ſ.* 8. Though others will have that Saying to relate to Men who are under Oppreſſion, and who cannot obtain Juſtice. (Comp. *Lamentat.* iii. 28, 29, 30.) Whereas in a well-ordered Commonwealth every one is oblig'd to apply himſelf for Redreſs of Injuries to the Judge (*Levit.* v. 1.) not for the ſake of Revenge (*Levit.* xix. 17, 18.) but with a good Deſign of defending the Laws and Juſtice of his Country, and to hinder wicked Men from reaping any Gain, or any Pleaſure from their Crimes. *Lyſias*, Orat. contrà *Theomneſt. I take it to be a Sign of a moſt litigious and a moſt ungenerous Temper, to ſue a Man for an affronting Word.* It was a Law amongſt the *Cyrenians, that the* Ephori *ſhould bring the litigious Citizens before the Court of Juſtice, and impoſe a Fine on them, with the Addition of a Diſgrace.* Arrian, Epictet. l. 1. c. 28. *Suppoſe I ſtand as deaf as a Stone when I am abus'd; what Advantage can the Slanderer reap from his Calumny?* *Seneca* de Irâ. *To deſpiſe Injuries is a Mark of a great and generous Mind. 'Tis one of the moſt grating Ways of being reveng'd upon a Man, by ſeeming not to think him worthy our Revenge. He is truly brave and noble, who like ſome Princely Beaſt, can bear the puny Dogs barking about him with Scorn and Security.*

[a] Vid. *Bæcler.* ad *Grot. l.* 1. *c.* 4. *ſ.* 2.

* This Explication does not give us the true Meaning of CHRIST's Words, whoſe Senſe is certainly this, as Mr. *Le Clerc* expreſſes it: "JESUS CHRIST would not have us to go to Law for ſmall Matters, leſt having ſuffer'd one Injury, we bring "upon us another. Moderation much gains and ſweetens Mens Minds, and ſooner makes an end of Quarrels than the Penal"ties which the Magiſtrates inflict according to Law. The Revenge which is exerciſed by their Means, is often the Cauſe of "irreconcileable Animoſities between Families."

[6] Theſe are a confuſed Heap of Citations.

[7] *Antiphon.* Orat. 11. Οὐ γὰρ ταῦτα, ἀλλὰ μείζονα καὶ πλείονα δίκαιοι οἱ ἄρξαντες ἀντιπάσχειν εἰσί, *i. e.* "The firſt Ag"greſſors in an Injury not only deſerve to ſuffer the ſame, but much greater Evils."

[8] It is a Rule of *Heſiod's, Oper. & Dier. l.* 1. *v.* 710.

Ἡγῆτ' ἐς φιλότητα, δίκην δ' ἐθέλῃσι παρασχεῖν,
Δέξασθαι.

But if the injurious Friend the Wrong repair,
And beg a Re-admiſſion to thy Care,
Reject him not ——— ——— ———

him who hath hurt us, is deteſted and diſcarded by *Nature*, as falling under the Vice of *Cruelty*. Whence it follows, that the Remembrance of Enmities and Contentions ought as ſoon as poſſible to be defaced out of our Minds. On this Account, as we find the Story in *Tully*, the *Thebans* were accus'd in the General *Dyet* or *Council* of *Greece*, for ſetting up a *Brazen* Trophy of their Victory over the *Lacedemonians*; inaſmuch as *it did not become one* Grecian *State to fix an eternal Monument of their Quarrel with another*. For it ſeems, the Cuſtom was to raiſe their Trophies only of Wood, to prevent their long and reproachful Continuance[9].

But farther, Perſons in a *natural State* may not only repel a preſent Danger that threatens them, but having got rid of that Fear, may purſue their Succeſs againſt the Aſſailant, till ſuch time as, upon ſufficient *Caution* given, they ſhall think themſelves *ſecure* of him for the *future*. Concerning which *Caution* this is to be obſerv'd; if a Man having injur'd me, ſhall preſently after, repenting of what he had done, deſire my *Pardon*, and offer *Reparation* of the Damage, I am then oblig'd to be reconcil'd to him, and cannot fairly demand any farther Security than his *Faith* and Promiſe. For his voluntary Repentance, and Application to me for Pardon, [10] are a ſufficient Argument of his firm Reſolution to offer me no Wrong for the future. But he who muſt be brought to *Repentance* by main Force, and who then only thinks of *begging Pardon*, when his Strength fails him in proſecuting his Violences; ſuch an one is not ſafely to be truſted on his bare Promiſe: And therefore in order to our farther Security, we muſt either cut off from him all Power of doing miſchief, or we muſt lay ſome ſuch Bond or Confinement on him, as ſhall hinder him from appearing ever after formidable to us: Inaſmuch as his Malice having been once expreſs'd, and never rightly purg'd or amended, hath render'd him a juſt Object of our perpetual Suſpicion.

IV. But that which is a lawful Practice in Men living under a *natural Liberty*, who are to work out their Safety by their own Strength, and according to their own Judgment, can by no means be indulg'd in the Members of *Civil States*; and eſpecially in regard to their Dealings with their Fellow Subjects. For againſt theſe who live under the ſame Government and Laws (either perpetually, or only for the *time being*) they ought to be ſo moderate in the Uſe of this *violent Self-defence*, as then only to betake themſelves to it, when the Time and Place will not admit of any Application to the *Magiſtrate* for his Aſſiſtance in repreſſing ſuch an Injury, as puts either their Life, or ſomething as valuable as their Life, or [1] ſome Good which can never be repair'd, into preſent and maniſeſt Danger. And even in ſuch a Caſe we are, by our own Strength only, to rid ourſelves of the preſent Miſchief, leaving both the Puniſhment, and the Caution for future good Behaviour, entirely to the Magiſtrate's Determination. *Cicero* [2] tells us, that *nothing is ſo contrary to Rights and Laws, as the uſing Force in a well-order'd Commonwealth*: But then 'tis his own Obſervation in another Place, that *theſe Laws are ſilent, when Arms appear bent againſt us; and do not command us to wait for their Help and Protection, when we ſhould moſt certainly ſuffer an unjuſt Violence, before we could procure a juſt Redreſs.*

By theſe Rules and Foundations which we have laid, may be decided moſt of thoſe Diſputes, which are uſually bandied in Authors, concerning the Meaſure and the Moderation of *unblameable Self-defence*.

V. Some Men have rais'd a Doubt, whether, ſuppoſing a Perſon aſſaults me by miſtake, without any evil Deſign againſt me, and intending to employ his Force againſt another, I may in ſuch a Caſe kill him in my own Defence. For the clearing of which Point *Grotius* [a] lays down this Principle to proceed upon, That the Right of *Defence* doth *primarily* and *abſolutely* ariſe from that Favour of Nature, by which ſhe hath recommended every Man moſt ſtrongly to himſelf, whence no one can refuſe to apply all his Endeavours for the Procurement of his own Safety; and not from the Injuſtice or the Sin of the Aggreſſor. It will therefore be ſufficient to render my Defence innocent, if the Aſſailant have no Right to invade or to deſtroy me, [1] and I lie under no Obligation of taking Death at his Hands, without Reluctancy or Reſiſtance. Farther, ſince in the

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[a] *L. 2. c. 1. ſ. 3.* Add, *Gell. l. 4. c. 14. Quinctilian Declam. 13. 'Twas on this Account we receiv'd Laws and Magiſtrates from the Inſtitution of our Anceſtors; that no Man might be the Redreſſer of his own Grievances: And leſt, if private Revenge ſhould purſue every Crime, there ſhould be a conſtant Succeſſion of Injuries, and all Parties prove alike guilty.*

[9] *De Invent. l. 2.* See *Flor. l. 3. c. 2. in fin. Seneca Herc. Fur. v. 362, &c.*

Si æterna ſemper odia mortales agant,
Nec cœptus unquam cedat ex animo furor,
Sed arma felix teneat, infelix paret;
Nihil relinquent bella. ———

——— ——— Should Men maintain immortal Hate,
Nor quell the Fury riſing in their Breaſt;
But ſtill the Fortunate their dreaded Arms
Shake, and th' Unfortunate new Force prepare,
To try another Field; the General War
Would clear the World, and drive a common Spoil.

[10] See a Paſſage of *Arrian* quoted a little lower, at §. 19. *Note* 1.

§. IV. [1] *Some Good.*] In all the Editions of the Original, not excepting that of 1706, there is a groſs Fault, which ſpoils the Senſe, *i. e. Damnum* for *Bonum*; but it is corrected in his *Abridgment of the Duties of a Man and Citizen*, Lib. 1. *Chap.* 5. §. 16. where this Sentence is word for word.

[2] De LL. Lib. 3. c. 18. *Nihil eſt enim exitioſius civitatibus, nihil tam contrarium juri, & legibus, nihil minus civile, quàm compoſita Republica, quicquam agi per vim.* Pro Milone, c. 4. *Silent enim leges inter arma, nec ſe expectari jubent, cum ei, qui expectare velit, ante injuſta pœna luenda ſit, quàm juſta repetenda.* See Mr. *Noodt, ad Leg. Aquil. C.* 4.

§. V. [1] We ought to obſerve theſe two Conditions, for upon them depend ſome Caſes which our Author makes no mention of, as that of a Perſon being aſſaulted by his Prince. What we are to think of this, is this, in my Judgment: I ſuppoſe, that he that defends himſelf reſolves to free himſelf of the unjuſt Aggreſſor, by killing him, otherwiſe he had better ſuffer himſelf to be kill'd than come under the Hand of the Executioner, and ſuffer cruel Torments. This being premis'd, the Prince who would kill me, does it either maliciouſly, and with Deliberation, or elſe in a Paſſion, which he can't govern. In the firſt Caſe, I may as lawfully defend myſelf againſt him as againſt my Equal. See my *Comment* on the *Abridgment of the Duties of a Man and*

Caſe propos'd the Love of our own Perſons and Lives muſt needs gain an eaſy Conqueſt over all other Conſiderations, it is impoſſible but that a Man who finds himſelf expos'd to equal Danger with another, muſt, if he follow Nature, give his own Deliverance the Preference in his Regard: And ſince ſuch a Danger as we are ſpeaking of is brought on me without my deſerving it, my Fact is, for that Reaſon, the leſs odious, if I turn the Miſchief on the Author. All this being taken for granted, 'twill be very eaſy to decide all thoſe Particulars and Caſes which may happen about the Point in hand. As ſuppoſe a mad Man, or a Perſon walking in his Sleep and affrighted with ſome terrible Dream, ſhould make an Attempt upon my Life; inaſmuch as he hath no Right of aſſaulting me, and I have good Reaſon to prize myſelf above all Things, it doth by no means appear why I ſhould prefer his Safety to my own. But here it muſt neceſſarily be ſuppos'd, that I could not decline the threaten'd Danger any other way: Which is not ſo ſcrupulouſly to be obſerv'd, when a Man attacks me upon a Grudge, or upon a manifeſt ill Deſign. The ſame Deciſion will hold, in caſe a Soldier, fighting with good Intentions, aſſaults me, whom he miſtakes for one of his Enemies. For if even an Enemy had a Right of reſiſting him, there's no reaſon why I, who am in no ſuch State of Oppoſition, ſhould patiently run upon his Sword: But he ought to impute it to his own Folly and Heedleſneſs, that he thus drives a Friend on the Neceſſity of an hoſtile Act; ſince he ought to have known againſt whom his Force was to be employ'd. The ſame is to be ſaid, when a private Man, lying in wait for one with whom he hath a particular Quarrel, ſets upon me, inſtead of him, by miſtake. For why ſhould I, upon account of the Aggreſſor's Blunder, be brought under a harder Condition than that other Man, whom perhaps he had ſome Reaſon to hate? Such an Aſſailant is indeed by the [2] *Cornelian* Law of *Rome* guilty of Murder. For though there was an Error in the Perſon, yet there was no Error in the Deſign; but the Will and the Attempt of committing Murder were both manifeſtly declar'd[a].

VI. To render the Defence of ourſelves entirely innocent, it is commonly thought a neceſſary Condition, that, as to the Time, the Danger be juſt upon us, or, as it were, in the very Point of ſeizing us: And that no Suſpicion or Fear, whilſt yet uncertain, is ſufficient to juſtify our aſſaulting another. But this Aſſertion too will prove very unaccurate, unleſs we relieve it with our Diſtinction between a *Natural* and a *Civil State*. For as in neither Caſe the *Point* of Danger, which theſe Men ſpeak of, can be underſtood without ſome Latitude, ſo is it moſt certain, that Perſons plac'd under a *Natural Liberty* are allow'd a longer Space in making their Defence by Violence, than thoſe who live under the Protection and Aſſiſtance of a Government.

Inaſmuch as Nature obliges us to maintain Peace with others, it may and ought to be *preſum'd* that every one will fulfil this Obligation, unleſs he give manifeſt Evidence of contrary Deſigns, and unleſs it be apparent that he quits his Obedience to ſound Reaſon, which adviſ'd him to this Duty. But conſidering how prone the greateſt Part of Mankind are to violate this Precept of Reaſon, whoever hath a true Concern for his own Safety, will fortify himſelf betimes by all innocent Methods of Defence; as ſuppoſe by ſhutting up the Avenues againſt ſuch as are plotting any hoſtile Deſign; by providing Arms and all other [1] Neceſſaries for offenſive or defenſive Force; by entring into Confederacies and Alliances; by keeping a watchful Eye upon the Motions and Attempts of others, and the like. Thus we juſtly eſteem it Wiſdom in a Commonwealth, to think of War during the full Enjoyment of Peace. And altho' Innocency will always find a ſtrong Guard and Support in the Divine Providence, yet is it moſt ſenſeleſs Vanity for that Man to expect Miracles from Heaven for his Deliverance, who lies ſtill in a drowſy Idleneſs, and neglects all Care of his own Affairs. And even in Civil States, where our Goods are in ſome meaſure ſecur'd againſt Thieves and Ravagers, by the Severity of Penal Sanctions, he would be reckon'd a very ill Huſband, who ſhould forbear to ſecure his Doors in the Night, or to lock up his Cloſets and his Cheſts. To this purpoſe we are inform'd, that the old *Romans* us'd to ſeal their meaneſt Utenſils and Houſhold Goods with their Rings, to ſecure them from pilfering Slaves; over whom, at the ſame time, they had the free Power of Life and Death[b].

But now, though my providing thus far for my

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*Citizen, L.*1. *c*.5. §.20. In the latter Caſe, I ought to ſpare him, and rather ſacrifice my own Life than take away his, provided that he did not by his own Fault put himſelf into a Condition where he could not command himſelf; for if a Prince, knowing himſelf ſubject to ſuch violent Tranſports of Anger, and Lion-like Fury, gives himſelf up to his Temper, without any Reſtraint, and takes no Care to avoid Provocations, at leaſt in certain Circumſtances, and to keep himſelf from Drink, he deſerves to be had in no Regard, and we have as much Right to defend ourſelves againſt him, as if he acted in cold Blood. He had a Deſign to hurt us, if not formally, yet interpretatively, at leaſt, and the Intereſt of a Society is ſo far from requiring us to ſuffer ourſelves to be ſlain by ſuch a Sovereign, that it ought itſelf to fear him. After all, there is nothing more eaſy for Princes, ſince few of them are good Men, than to keep themſelves from ſuch Extravagances. If a Society loſes by a Change, it alſo gets ſometimes by it, and perhaps it would be better for it, if Men would not allow Princes ſo great a Liberty to ſatisfy their Paſſions, and if Succeſſors had before their Eyes ſome ſad Examples of an unhappy Fate, which their Predeceſſors had brought upon themſelves by thinking all Things lawful for them. What I have ſaid, will, by a much ſtronger Reaſon, have place in reſpect to the Miniſters of a Prince, and his inferior Magiſtrates, for whom, doubtleſs, there is much leſs Regard to be had than to the Perſon of the Sovereign himſelf. I ſhall ſpeak ſomething, §. 14. *Note ult.* of the Caſe, where the unjuſt Aggreſſor is a Father.

[a] Add. *L.* 18. *ſ.* 3. *D. de Injuriis, &c Grot. in Sparſ. Flor. ad l.* 14. *D. ad L. Cornel. de Sicar.*

[b] Vide *Tacit. An.* II. 1.

[2] The *Cornelian* Law, which is treated of in the *Digeſt. Lib.* 48. *Tit.* 8. puniſhed Murders committed deſignedly, and with full Deliberation, whereas the *Aquilian* Law puniſhed Murder committed thro' ſome Imprudence and Fault, tho' very ſmall, and without any Deſign. See Mr. *Noodt, ad Leg. Aquil. Chap.* 4, 5.

§. VI. [1] Such are principally in relation to States, Fortreſſes built on the Borders of Kingdoms. See Mr. *Thomaſius*'s Diſcourſe upon this Subject, entitled, *Non-Ens actionis Forenſis contra ædificantem ex æmulatione*, §. 18, *&c.*

Security can be injurious to none, yet before I can actually aſſault another under Colour of my own Defence, I muſt have Tokens and Arguments amounting to a moral Certainty, that he entertains a Grudge againſt me, and hath a full Deſign of doing me a Miſchief, ſo that, unleſs I prevent him, I ſhall immediately feel his Stroke. Amongſt theſe Signs and Tokens, giving me a Right to make a violent Aſſault on another Man, I muſt by no means reckon his bare Superiority to me in Strength and Power; eſpecially if that Happineſs deriv'd its Increaſe from harmleſs Induſtry, or from the Bounty of Providence, without the Oppreſſion of others. For 'twould be inhuman Malice, to envy another, and to endeavour to take from him a Bleſſing which he came ſo fairly by. 'Tis a very groſs Knack of philoſophizing which ſome Men have got, when they tell us, by way of Advice, *He that is able to hurt you, undoubtedly is willing; and therefore, without farther Warning, down with him, as you love your own Safety.* This kind of Doctrine is manifeſtly deſtructive of all ſociable Commerce amongſt Men; and the Authors commonly cited in Defence of it, either are ſuch whoſe Character prevents their Authority, or elſe in the Paſſages alledg'd from them, they ſpeak only of Precaution in our dealing with thoſe Wretches, who have given us ſufficient Tokens of their Reſolution to hurt us [a] [2]. And whereas ſome Men bring Examples inſtead of Arguments for ſo baſe a Practice, this is to make another's Sin the Rule and Standard of my acting[b]. Yet becauſe any Man may abuſe his Strength to ill Purpoſes, therefore, as we ſaid before, we ought to fence againſt Danger, by timely and by harmleſs Methods.

Nay, although ſuch a mighty Neighbour hath ſhewn himſelf to have the Will of hurting as well as the Power, he doth not yet give me directly a juſt Cauſe of ſetting upon him, becauſe he doth not yet expreſs this ill Will towards me in particular. For it is not ſufficient Proof that a Man deſigns to hurt me, becauſe he hath already hurt others; in as much as he might be provok'd to his Attempt on them by ſome particular Reaſons, which he doth not find againſt me. An Injury then done to another, gives me no Licenſe of falling on the Aggreſſor, whilſt I am tied to both Parties only by the common Band of Humanity. But I may happen to be united by a more peculiar Obligation to the injur'd Perſon; as if, upon his Deſire, I have promis'd and engag'd to aſſiſt him. For it is very agreeable to *Social Nature*, that a Man who hath himſelf receiv'd no Wrong, ſhould yet join Forces on Covenant with another, to help him to drive off an unjuſt Aſſault, as being allied to him by thoſe general Ties which hold together all Mankind. Becauſe, ſuppoſing the two Parties to be otherwiſe indifferent to me, yet it is a ſtanding Rule, that an Injury *receiv'd* ought to incline me to Favour, and an Injury *offer'd* [3], to Hatred and Averſion [c]. But farther, if on good and probable Grounds I ſuſpect that this *powerful* Aggreſſor, when he hath diſpatch'd his firſt Prey, will turn his Force upon me, and uſe his former Conqueſt for the Inſtrument of another; I may then more readily aſſiſt the diſtreſs'd Party, becauſe his Preſervation is likely to enſure my own Safety. As a wiſe Man will lend his beſt Help towards quenching a Fire in his Neighbour's Houſe, when his own is the next in Danger.

More than this, if it appear by clear Tokens that a Man is at preſent under a real Deſign of hurting us, though he doth not yet proceed to the open Execution of it, ſuppoſing us to live in a *natural State*, we may immediately enter on our own Defence by violent Methods, and prevent the Foe; provided that either upon a friendly Admonition he is not likely to be driven from his hoſtile Intentions, or that the giving ſuch an Admonition would prove of ill Conſequence to our Affairs. For no Man is oblig'd to expect patiently the Inſult of another, that he may thereby build the Juſtice of his Violence on the abſolute Neceſſity of his Defence. And therefore, in this Caſe, he is to be accounted the *Aggreſſor*, who made the firſt Motion towards hurting his Neighbour, or who conceiv'd the firſt Deſign of Miſchief, and was preparing to accompliſh it, though the other Party uſing greater Expedition, may have ſurpriz'd and oppreſs'd him before he could bring his Plot to Perfection. For it is not abſolutely neceſſary to the Notion and Buſineſs of Defence, that a Man receive the firſt Stroke, or that he only ward off or elude the Blows that are aim'd at him; but he too ſhall be interpreted to act by way of *Self-defence*, who, taking his Foe tardy, hath prevented the Miſchief that was hatching againſt him [4].

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[a] And as for that ſaying of *Cicero* (*Epiſt. Fam.* 11. *Ep.* 28.) *Even Slaves have been always allow'd this Liberty* to fear *according to their own Judgment, not another's*; we may oppoſe to it the ſharp Return of *Vibius Criſpus* (in *Quinctilian.* l. 8. c. 5.) *Who ever gave you Permiſſion* to fear *ſo unreaſonably?* Nay, *Cicero* himſelf hath ſufficiently overthrown this Opinion, *Who*, ſays he, *ever made ſuch an Ordinance as this, or to whom can this be granted, without the manifeſt Danger of the whole Community, that a Man may lawfully kill him, by whom he ſhall pretend to fear being hereafter kill'd? Orat. pro Tull*, in *Quinctil. l.* 5. *c.* 13.

[b] Add. *Alberic. Gentil. de Jure Belli, l.* 1. *c.* 14.

[c] *For that of* Exodus ii. 14. *only holds in a* Civil State.

[2] Our Author quotes theſe Words of *Cicero*, as favouring the Opinion which he confutes: *At hæc etiam ſervis ſemper libera fuerunt, timerent, gauderent, dolerent ſuo potius, quàm alterius arbitrio.* But if we conſider the following part of the Diſcourſe, we ſhall find that the Words will not bear the Senſe which he gives them. The *Latin* of the following paſſage in *Quinctilian* is, *Quis hoc ſtatuit unquam, aut cui concedi ſine ſummo omnium periculo poteſt, ut eum jure potuerit occidere, à quo metuiſſe ſe dicat, nè ipſe poſterius occideretur?*

[3] That the Laws of Nature, which tend to the Preſervation of Mankind, may be obſerv'd, without which they are uſeleſs, and that no Man may offer an Injury to his Neighbour, Nature has given every Man a Right to puniſh the Violation of its Laws, both in reſpect to all Mankind, and to private Perſons. The Laws of Nature, as well as all others, which are impoſed upon Men here below, would be altogether uſeleſs, if no Body in the free State of Nature had Power to execute them, by protecting and preſerving the Innocent, and reſtraining the Inſolent. For all Men being naturally equal, it follows, that if in that Eſtate every one have Right to puniſh the Breach of the Law of Nature, there is no Man but hath it in as large an Extent as another. Theſe are the Principles of the illuſtrious Mr. *Locke*, in *Part* I. of his excellent Treatiſe of *Civil Government, Lib.* 2. *Chap.* 2. We ſhall elſewhere obſerve the Conſequences which he draws from it in Relation to other Matters of Importance. *See Lib.* 8. *Chap.* 3. §. 4. *Note* 3. Hence it appears, that our Author is miſtaken, when he affirms, That unleſs we are under ſome particular Engagement to help a Perſon that is wronged by another, we are not obliged to oppoſe this latter, unleſs he inſults us directly. Much rather, we not only have a Right to eſpouſe the Quarrel of the Injured, but alſo, according to the Laws of Humanity, we are indiſpenſibly engaged to defend him, if we find our ſelves able to do it. This is the Conſequence of the Principle of Sociableneſs, as Mr. *Titius*, with much Reaſon maintains, *Obſerv.* 131. And I wonder our Author did not mind it, ſince, in *Lib.* 1. *Chap.* 5. §. 14. he approves of that fine Maxim of *Cicero*, *Qui non defendit, nec obſiſtit, ſi poteſt, injuriæ, tam eſt in vitio, quam ſi parentes, aut amicos, aut patriam deſerat, i. e.* "He that does not prevent or reſiſt an Injury, if he "be able, is as much to blame, as he that forſakes his Friends, Parents, or Country." *Menander* alſo has a fine Sentence relating to this Matter, ſaying, "If any one would be as much concern'd for the Injuries done to another, as if he receiv'd them "himſelf, and vigorouſly undertake the Defence of them that are oppreſs'd, there would not be ſo many Evil-doers, and thoſe "that are would not be ſo daring.

Εἴπερ τὸν ἀδικοῦνθ' ἀσμένως ἠμύνετο
Ἕκαστος ἡμῶν, καὶ συνηγωνίζετο
Ἴσως νομίζων ἴδιον εἶναι τὸ γεγονὸς
Ἀδίκημα, καὶ συνέπραττον ἀλλήλοις πικρῶς,
Οὐκ ἂν ἐπὶ πλεῖον τὸ κακὸν ἡμῖν ηὔξατο
Τὸ τῶν πονηρῶν, ἀλλὰ παρατηρούμενοι,
Καὶ τυγχάνοντες, ἧς ἔδει τιμωρίας
Ἤτοι σπάνιοι σφόδρ' ἂν ἦσαν, ἢ πεπαυμένοι.

In *Stobæus Tit.* 43. See Mr. *Le Clerc*'s Note on this Fragment, *p.* 3. *Ed. Amſt.* 1709.

VII. But we muſt by no means allow an equal Liberty to the Members of *Civil States*. For here, if the Adverſary be a Foreigner, we may reſiſt and repel him any way at the Inſtant when he comes violently upon us: But we cannot (without the Sovereign's Command) either aſſault him whilſt his Miſchief is only in Machination, or revenge our ſelves upon him after he hath perform'd the Injury againſt us [1], leſt we ſhould, by this raſh and unwarrantable Proceeding, involve our Country in an unneceſſary and unſeaſonable War. And a much greater degree of Caution muſt be us'd in our Dealings with our Fellow Subjects. For though I underſtand that ſuch an one is now coming to do me a Miſchief, or that he threatned me deſperately in Publick, this will on no Account bear me out in aſſaulting him; but I am to inform againſt him before the common Magiſtrate, who is to require Security for his good Behaviour. But if the Magiſtrate refuſe to interpoſe, I may then conſult [2] my own Safety by what Means I can, with the ſame Freedom as if I were plac'd under a *natural* State and Condition. Thoſe Moraliſts are widely miſtaken, who, as *Grotius* [a] ſays, maintain, "That I may lawfully "kill, not only the Man who offers me preſent "Violence, but him too whom I ſhall have diſco"ver'd to plot and conſpire againſt me; as by Poi"ſon, by falſe Accuſation, falſe Witneſs, the "Procurement of an unjuſt Sentence, or the "like." Nor is the Abſurdity at all leſſen'd by that Reſtriction which they add [3], *if either the Danger cannot otherwiſe be avoided, or if we are not ſufficiently aſſur'd that it cannot*. Becauſe ſuch a Delay of Time as is here ſuppos'd, how ſhort ſoever, may put us on many good Ways of Redreſs and Relief; beſides [4] the Variety of Accidents which may perhaps work our Deliverance. It is manifeſt, that theſe Authors ſuppoſe a *Civil State*, becauſe in that only we can conceive ſuch Things as unjuſt Judgments, Accuſations, Witneſſes, *&c.* For the Suppreſſion of which Injuries, if we permit the Subjects to inflict Death, what occaſion have we for Magiſtrates or for Laws? No Man is in Danger of being condemn'd, if he can prove the Accuſer guilty of Calumny and Forgery. Yet, if being unable to make this out, he aſſaults his Life, 'twill be hard to excuſe him from the Legal Cenſure and Penalty of Murther. But when a Man is already actually ſet upon, and reduc'd to ſuch Streights, that he hath not Power or Opportunity to implore the Aſſiſtance of the Magiſtrate, or his Neighbours, he may then make uſe of Extremities in repelling the Aſſailant: Yet the Reaſon and Ground of his proceeding to ſuch Violence muſt not be, that he may thus *revenge* himſelf for the Injury offer'd; but only becauſe he could not otherwiſe ſecure his Life from the imminent Danger. And therefore ſuppoſing that Danger to be more eaſily driven off, he cannot lawfully purſue the Aggreſſor, ſo as to ſtrike or harm him in his Flight [b].

VIII. It appears then from theſe Conſiderations, that under the Civil Governments the *Time* of making an *unblameable Self-defence*, is ſet within very narrow Bounds, and indeed reduc'd almoſt to a *Point* or Inſtant, yet ſuch as admits ſome ſmall Latitude, and in which a ſlight Exceſs will eſcape the Magiſtrate's Cenſure. And therefore altho' an underſtanding Judge will be beſt able to ſettle the Innocency of any Defence, from the Circumſtances of the particular Facts: Yet we think it may be aſſerted in general, that the exact Time when a Man may fairly deſtroy another in his own Defence, begins at the Inſtant, when the Aggreſſor ſhewing plainly his Deſign upon my Life, and being furniſh'd with Strength and Weapons for the Execution, is already got into a Place whence he may perform his Miſchief; Allowance being only made me for juſt ſo much *Space* as is neceſſarily requir'd for me to attack him in, before he attacks me. For Example, if a Man is making towards me with a naked Sword, and with full Signification of his Intention to ſtab me, and I at the ſame time have a Gun in my Hand, I may fairly diſcharge it at him whilſt he is at a Diſtance, and cannot yet reach me with his Weapon, becauſe, ſhould he get too near me, my Arms would be of no uſe. And the ſame holds more ſtrongly in relation to Bows, and Inſtruments of that nature, which ſignify nothing at all, unleſs we give them full Room and Space to exert their Force in. Again, ſuppoſe a Man approach me with full Deſign upon my Life, and is only arm'd with Piſtols, or the like, whilſt I am furniſh'd with a longer *Piece*, I am not oblig'd to wait till he comes within Piſtol-ſhot, but may prevent him with my Arms before he can uſe his own. For this is what the Laws call [1] *to meet a Danger in time, which is eſteem'd much better, than to revenge it after it hath taken Effect.* The continuance of this *Time* for *innocent Defence* is ſo long as till the Aggreſſor either is repuls'd, or hath retreated of his own accord, whether repenting of the miſchievous Deſign in the very Moment that he was performing it, or elſe becauſe he ſees he is like to loſe his Aim; as ſuppoſe his Sword is broke, or his Piece hath miſs'd fire, or ſhot beſide us; ſo that at preſent he can hurt us no farther, and we have an Opportunity of retiring into a Place of Safety. For the *Revenge* for paſt Injury, and the *Caution* for future Security, belong to the Care of the Magiſtrate, whom we are to addreſs on thoſe Accounts [a]. Whoever, enjoying the Protection of a Civil Government, ſhall kill another beyond theſe Bounds and Conditions, under the Notion of *Self-defence*, cannot be acquitted as entirely guiltleſs. Whence we may perceive how unreaſonable the Aſſertion of old *Baldus* is, when he declares, *If a Man chance to ſay to me, I'll kill you where ever I find you from hence forward, I may, without incurring any Penalty, take away his Life by way of Prevention, either in the midſt of his Threats, or whenever I can do it with moſt Convenience.* For though I be not oblig'd to wait till he performs his Threats, yet in a Commonwealth I ought to purſue other ways of Safety than by killing him: Even when it appears from the former Courſe of his Life that he is not backward in making good ſuch bold Reſolutions; which Condition is by ſome Authors added to mitigate *Baldus*'s Opinion.

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[a] *L.* 2. *c.* 1.

[b] Vide *l.* 3. *ſ.* 9. *D. de vi & vi armata.*

[4] *Demoſthenes, Philip.* 3. Ὁ γὰρ οἷς ἂν ἐγὼ ληφθείην, ταῦτα πράττων, καὶ κατασκευαζόμενος, οὗτος ἐμοὶ πολεμεῖ, κἂν μὴ πω βάλλῃ, μὴ δὲ τοξεύῃ, *i. e.* "He who is preparing and contriving Wiles for my Deſtruction, is moſt certainly engag'd in a "hoſtile State with me, though he has not yet attack'd me with his Darts or his Spears." *Thucydid. l.* 6. "We ought, not "only to chaſtiſe the open Actions of our Enemies, but to prevent, by due Puniſhments, their ſecret Counſels and Deſigns: "For they will be before-hand with us, if we neglect to be ſo with them." *Procop. de Bel. Perſic. l.* 2. *c.* 3. Λύουσι γὰρ τὴν εἰρήνην οὐχ οἱ ἐν ὅπλοις γένοιντο πρῶτοι, ἀλλ' οἱ ἂν ἐπιβουλεύοντες ἐν σπονδαῖς τοῖς πέλας ἁλοῖεν, τὸ γὰρ ἔγκλημα τοῦ ἐγκεχειρηκότι, κἂν ἀπῇ τὸ κατορθοῦν, πέπρακται, *i. e.* "Thoſe break the Peace, not who firſt take up Arms, but who are diſcover'd in any Plot "againſt their Neighbours and Friends. For whoever attempts and deſigns Miſchief, hath really committed the Crime, though "his Endeavours prove unſucceſsful." *Phil. Jud. de Leg. Special.* "We do not only reckon them our Enemies, who aſſault "us with Fleets or Armies, but them too who by Sea or Land make Preparations againſt us. See *Alberic. Gentil. advoc. Hiſpan. l.* 1. *c.* 9. *Leges Wiſogoth. l.* 6. *tit.* 4. *c.* 6.

§. VII. [1] See what this Author ſays, *Lib.* 8. *Chap.* 17. §. 8.

[2] We may add, *and that of ours*. So *Moſes* ſeeing one of his Brethren, an *Iſraelite*, ſuffer Wrong, he defended him; and in vindicating the Perſon injured, ſlew the *Egyptian*, *Exod.* ii. 11, 12. and *Acts* vii. 24. for, as Mr. *Le Clerc* ſays upon this laſt Paſſage, "*Moſes* knew very well that the *Iſraelites* could obtain no Juſtice of the *Egyptian* Judges. And when Power is arrived "at that height, that Juſtice can't be had, and the Foundations of Civil Society are deſtroy'd, we return again to the State of "Nature, in which 'tis lawful for every one to defend himſelf and his Friends, againſt all Force, without ſeeking Help, in "vain, from them who will not aſſiſt us. But this Right can't be made uſe of but in extreme Confuſion, as *Egypt* was, where "any Injuries might be done the *Iſraelites*, without any Fear from the *Egyptian* Judges."

[3] *Grotius* reads it thus, but careleſly. He maintains that all the Reaſons which he mentions there, are not ſufficient to prevent a Perſon who has ill Deſigns againſt us, and kill him, altho' he can find out ſome way to eſcape the Danger, or is not ſure that he can otherwiſe eſcape it; which Determination he founds upon the Remedies and Accidents which a little Space of Time may produce. But he adds, that there are ſome Divines and Lawyers, who extend this Favour farther, *i. e.* as any one may ſee, who grant to the Perſon againſt whom any thing is attempted, a greater Liberty, believing that he hath a Right to prevent his Enemy, although he could avoid the Danger ſome other way. So theſe Moraliſts do not perplex themſelves in any manner with the Reſtriction of which our Author ſpeaks. *Grotius* embraces the Exception in the Negative, and maintains it againſt them. Neverthele ſs I aſſert, That if you examine the Thing in itſelf, he doth not ſufficiently diſtinguiſh between the State of Nature and Civil State, as will appear by what our Author ſays afterwards.

[4] See *Aul. Gellius, Noct. Attic. Lib.* 13. *Chap.* 17. and *Eraſmus* upon the two Proverbs taken from thence,

IX. As to the common Determination, that this killing a Man in our own Defence is then only innocent, *when we cannot poſſibly eſcape the Danger by other Means*; this is not to be interpreted in too ſtrict a Senſe, but admits of a reaſonable Latitude, upon account of that Perturbation of Mind which ariſes from ſo ſurprizing and ſo imminent a Miſchief. For it is ſcarce poſſible that a Man under ſo terrible Apprehenſion ſhould be ſo exact in conſidering and diſcovering all Ways of Eſcape, as he who being ſet out of Danger can ſedately deliberate on the Caſe. Hence, as it is meer Raſhneſs for me to come out of a ſafe Hold to him who challenges me, ſo if another aſſault me in an open Place, I am not ſtrictly oblig'd to betake my ſelf to Flight, unleſs there be near at hand a Place of moſt ſecure Refuge; nor am I always bound to draw back from the Onſet. Becauſe I then turn my defenceleſs Parts to the Danger, and there is great Hazard of tripping or falling; and beſides, when I have once quitted my Poſture of Guard, 'tis not very eaſy to recover my ſelf. Neither doth it render my Defence blameable, if I choſe to run the Hazard of ſuch Accidents, rather than omit ſuch Buſineſs, which was either a part of my Duty, or which however I had a Liberty of acting: As ſuppoſe, whilſt I am going to any publick Place, about my Affairs, I kill a Man that ſets upon me in the Way, I am not the leſs innocent, becauſe if I had ſtaid at home the Thing had not happen'd. For the publick Security would be ill guarded, and our Liberty would ſtand us in little ſtead, if we might not make uſe of it in oppoſing thoſe ſudden Violences which others offer us, out of pure Malice and wicked Deſign.

There is no need of proving *Balſamon*'s Diſtinction [b] to be ridiculous; *A Man* (ſays he) *who kills another in his own Defence, is free from all Guilt, if the other Perſon had firſt given him a Mortal Wound, or the like Miſchief; but if the Hurt that was firſt offer'd him be ſlight and cureable, the Slaughter of the Aggreſſor is then unjuſt, and he muſt anſwer for the Fact.*

Much more pleaſant is their Nicety, who make it a Queſtion, *Whether an Equality of Weapons be neceſſary to the rendering a Defence innocent?* As if the Aggreſſors were ſo generous, as conſtantly to give Notice to the other Party of their Deſign, and of the Arms they purpos'd to make uſe of; that they might have Leiſure to furniſh themſelves in like manner for the Combat. Or if in theſe Rencounters we were to act on our Defence by the ſtrict Rules of the common Sword Plays, and Tryals of Skill, where the Champions and their Weapons are nicely match'd and meaſur'd for our better Diverſion.

But it muſt be obſerv'd on this Head, that the Plea of *Self-defence* ſhall not excuſe or indemnify him, who being challeng'd to meet in the way of *Duel*, doth by ſo appearing put himſelf into ſuch a Condition, that he muſt either kill or be kill'd.

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[a] Vide *l.* 45. *ſ.* 4. *D. ad L. Aquiliam.* * Mention'd by *Sichard ad C. Cod.* [b] Ad *Epiſt. Baſil.* ad *Amphiloch. Can.* 43.

[1] The Words of the *Code* are, *Melius enim eſt occurrere in tempore, quàm poſt exitum vindicare.* Cod. Lib. 3. Tit. 27. *Quando liceat unicuiq; ſine judice ſe vindicare,* &c. Leg. 1.

For in the Eſtimation of ſuch a Fact, the Danger will not be conſider'd, ſince the Laws forbad him to meet it; and therefore he will not only be guilty of *Manſlaughter*, but will ſtand obnoxious to thoſe other Penalties which are particularly ordain'd againſt the Cuſtom of Duelling.

X. There is one Enquiry commonly made farther on this Point, and that is, Whether it be lawful for a Man to kill another, who comes upon him, not with a Deſign to take away his Life, but only to *maim* him; provided the Danger cannot be otherwiſe avoided? And here, as to a *Natural State*, we may ſafely hold the affirmative Side of the Queſtion. For Nature hath inſpir'd us with ſo tender a Care to preſerve our Bodies whole and entire, that we cannot but make uſe of all Ways and Methods for that purpoſe; and the Loſs of one Member, eſpecially if it be of the moſt noble Kind, is reckon'd almoſt equal to the Loſs of Life itſelf. Beſides, Death is frequently the Conſequence of ſuch barbarous Treatment; and I have no Security but that the Villian will proceed to greater Miſchief. Laſtly, as we have heretofore hinted, ſuch an Attempt declares a Man my open Enemy, and conſequently gives me a Licenſe *in infinitum* of acting againſt him.

Nor do the Laws, even in Civil Governments, ſeem to engage the Subjects to ſuch hard Conditions, as that they muſt rather ſuffer themſelves to be *maim'd*, than uſe Extremities in repelling the Aſſailant: For ſince ſuch a degree of Patience ſurpaſſes the ordinary Strength and Conſtancy of Mankind, 'twould look very rigid to require it, only in favour of a malicious Rogue. But when ſuch an Injury is once actually receiv'd, the Proſecution of the Malefactor is to be left entirely to the Magiſtrate.

XI. The Defence of *Chaſtity* is in almoſt all Nations eſteem'd equal to the Defence of Life, and doth in the ſame manner excuſe the Slaughter of thoſe who attempt it. The Reaſon of this Favour is grounded on the natural Conſideration, that the *Honour* of Women is their chief Treaſure and Ornament; together with the Reſpect had to the Weakneſs of the Fair Sex, which 'twas convenient ſhould be guarded by all poſſible means from [1] Violence and Abuſe[a]. Even in Civil States, as the Legiſlators might very reaſonably appoint Capital Puniſhments for Offences of this kind, ſo they might farther give a Liberty to all honeſt Women, to uſe *Extremities* in their own Defence, upon danger of loſing what 'tis impoſſible for them to recover, and for which no Reparation can be made them. Amongſt the *Jews*, as Mr. *Selden* [b] tells us, a Man was allow'd to kill another, not only in his own Defence, but in the Defence of a third Perſon, if unjuſtly aſſaulted, whether with regard to Life, or to Chaſtity of either kind [c]. And thus the Sentence of *C. Marius* was highly applauded amongſt the *Romans*, when he not only abſolv'd, but crown'd the Soldier who had kill'd his Nephew, a *Tribune*, or Colonel in the Army, for ſoliciting him to an unnatural Debauch[d]. St. *Auguſtine* [e] hath a Saying, that *the Holineſs or Purity of the Body is never loſt, whilſt the Purity of the Mind remains, tho' the Body ſuffer Violence*[f]. But it follows no more from hence, that forcible Raviſhers are not to be repell'd with Extremities, than that becauſe a good Man is tranſlated to eternal Happineſs by *Death*, therefore he ought not to defend himſelf with Violence againſt a Villain who attempts his Life. 'Tis [2] obſervable what *Lyſias* [g] reports, that the *Attick* Laws decreed a ſeverer Puniſhment againſt him who *perſuaded* a Woman to an unchaſt Compliance, than againſt him who compell'd her by mere Force. The Reaſon we find ſubjoin'd, *Becauſe* (ſays he) *a Man who commits a violent Rape is ſuppos'd to be hated by whom he abuſes. Whereas thoſe who by Flattery and Inſinuations tempt Women to their Deſires, do by this Means gain a greater Intereſt and Authority with them than their own Husbands, and conſequently have the whole Family in their Power and Diſpoſal: beſides the Inconvenience of confounding the Childrens Birth, and hindring all Diſtinction between thoſe who came lawfully, and thoſe who came unlawfully into the World*[h].

XII. 'Tis another famous Queſtion, Whether the Danger of receiving *a Box on the Ear*, or ſome ſuch ignominious, though ſlight Injury, will excuſe the killing of a Man in our own Defence. And *Grotius*'s Deciſion [i] makes it *not to be repugnant to expletive Juſtice*. The Senſe of which Expreſſion is this, that ſince expletive Juſtice is equally violated by denying one that which he had a *perfect Right* to poſſeſs, or by bringing ſomewhat on him which he had likewiſe a *perfect Right* not to ſuffer; when a Perſon is kill'd for offering an Injury of this Nature, there can be no Complaint made that a Breach of *expletive Juſtice* hath been committed upon him. For he who firſt makes an Attempt of any Miſchief againſt another, retains no Right why the other ſhould not proceed to Extremities in returning it; or (what comes to the ſame thing) gives the other an *infinite Right* of oppoſing him; though other Conſiderations may frequently hinder the injur'd Party from a full and rigorous Uſe of this Right. Nor will it ſignify any thing to object, that in ſuch Returns that *equality* is neglected which Juſtice commonly requires. For that *Equality* is chiefly concern'd with the Exchanges of Things, and the Diſtribution of common Goods. But Evils, which by way of War are mutually offer'd, cannot be exactly reduc'd to any ſuch Meaſure, nor is it neceſſary they ſhould. [1] As for *Grotius*'s Remark, that *the degree of hurting in War ſhould be ſtated according to the Manner of Reſtitution and Reparation in Civil Damages*; there is good Reaſon for this Limitation to it, *as nearly as we can:* And then that Moderation doth not ariſe from any Right inherent in the Enemy, but from the Generoſity and Courage of the Victor. *Grotius* adds, that *Charity doth not of it ſelf require our patiently ſuffering ſuch an Affront, in favour of the Perſon who offer'd it; tho' the Doctrine of the Goſpel doth indeed forbid the Repulſe of ſuch Attempts by violent Means.*

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[a] *Quinctil. Declam.* 349. *You have drawn a Virgin into as great an Injury, as War it ſelf could have offer'd.* [b] *L.* 4. *c.* 3. [c] *Lex Wiſogoth, l.* 3. *tit.* 3. *c.* 6. *Conſtitut. Sicul. l.* 1. *tit.* 22. [d] *Plutarch* in *Mario. Plato de LL. l.* 9. *He that hath debauch'd a* young *Perſon of either Sex, ſhall be lawfully kill'd, not only by the abuſed Party, but by the Father, Brothers, or Children.* [e] *De Civitate Dei*, l. 1. c. 18. [f] Add. *Gratian. Cauſ.* 32. *qu.* 5. *c.* 1, 2, 3, 4. *Plautus Amphitr.* Act. 5. Sc. 2. Haut promeruit quamobrem vitio verteres; mea vi ſubacta eſt facere: *You can't lay to her Charge, what ſhe did upon my Compulſion.* Senec. Hippolit. v. 727.

Mens impudicam facere, non caſus, ſolet ——Not on Chance, but on the Will
Unchaſtity depends. ————

[g] *Orat.* 1. [h] *Liban. Declam.* 2. *It is a much greater Wickedneſs to tempt and entice a Maid to be conſenting to her own Abuſe, than to injure her by mere Force.* [i] *L.* 2. *c.* 1. *ſ.* 10.

§. XI. [1] The Affront is ſo much the greater, becauſe a Woman of Honour may be reduced to that hard Neceſſity, to raiſe up, from her own Blood, a Child to an Enemy, *Duties of a Man and Citizen, Lib.* 1. *Chap.* 5. §. 22. See what I have ſaid upon that Place of this Author's *Abridgment*, and Mr. *Thomaſius*'s *Juriſprud. Divin. Lib.* 2. §. 114. Mr. *Bayle*, in his *Anſwer to the Queſtion of a Provincial, Tom.* 4. *Chap.* 28. *p.* 412. affirms, That if that Law of the Decalogue, *Thou ſhalt do no Murder*, doth not oblige a Woman, who breaks it to ſave her Life or Chaſtity, it follows, that the other Laws of the Decalogue include the ſame Condition in obſerving them, provided it be no Damage to my Life or Honour; and ſo often as the Obſervation of any of theſe Articles of the Decalogue expoſe us to any certain Danger of loſing our Life or Honour, we may excuſe our ſelves from it, as well as from the Obſervation of this Precept, *Thou ſhalt not Kill.* To me the very Recital of ſuch an Argument is its own Confutation. And I ſhould wonder that Mr. *Bayle* ſhould ſuffer himſelf to be blinded with ſuch weak Reaſons, if I did not plainly ſee, that he has eſpouſed the falſe Notions of ſuch as pervert the Moral Doctrines of the Goſpel, by ſuch Explications as are contrary to the Rules of good Senſe and Criticiſm.

[2] See *Digeſt. Lib.* 11. *Tit.* 3. §. 3. where is the like Deciſion in the Caſe of Slaves. See alſo what is ſaid *Lib.* 6. *Chap.* 1. §. 21. *Note* 2.

For our Parts, we have already ſhewn, that in a *natural State* a Man cannot be requir'd to bear even a ſlight Injury (eſpecially if it be continued) without endeavouring, even by the utmoſt Violence, to keep it off. And we read, that the moſt holy King *David*, for an Affront put upon his Ambaſſadors, rais'd a War, to almoſt the utter Ruin of a Nation [a].

But 'tis very doubtful, whether in Members of a *Civil State* the ſame violent Procedure is excuſable. It is indeed in common Judgment a moſt high Affront to receive a *Box on the Ear*, and the Reaſon of this Opinion amongſt many of us *Europeans* ſeems to be, becauſe we treat our Servants in this Manner, and other Inferiors plac'd under our Diſcipline. And hence 'tis a Cuſtom in ſome places, when Perſons are firſt allow'd the Uſe of Arms, or come out of their Apprenticeſhip, and the like, to give them a *Box on the Ear*, in formal Manner, to put them in mind of their former Condition, and to let them underſtand, that they are above ſuch Treatment for the future. Therefore to offer ſuch an Affront highly diſgraces the Sufferer, and ſuppoſes him to be unworthy of bearing Arms, or of being reckon'd amongſt free and grown Men. But here we muſt obſerve, that ſuch a Blow never appears ignominious and diſgraceful, but when it is given before the other Party prepares for Reſiſtance: For thus Slaves and Children are beaten without the Liberty of Oppoſition. Therefore thoſe who fall by mutual Conſent to Fiſty-Cuffs, and deal freely with each others Face and Head, can on neither ſide complain of an Injury of this affronting Nature. Nor is it eaſy to conceive how a Man that bears Arms, and is preparing to uſe them for his Defence, can be capable of receiving a Blow under the ſame Notion and Aggravation of Contempt. Beſide, 'tis a great Miſtake to fanſy that a Man's Honour is really impair'd by ſuch a Trifle; for [2] Honour would be a moſt fragile and a moſt precarious Good, if 'twere in the Power of every ſaucy Fellow to diminiſh and to infringe it. And as for the Contempt which is ſhewn in ſuch an Action, this may be either quite taken off, or however eaſily repair'd by the Magiſtrate, by ſetting a heavy Fine on the Offender, and by enjoining him farther to perform in publick ſome Marks of Honour and Reſpect to the Perſons whom he hath injur'd. Nor is the Vulgar Notion of any Weight, which fancies the Courage of Men, and eſpecially of Soldiers, to be indamag'd in its Character, by the receiving theſe kinds of Affronts, and that therefore their Credit muſt be vindicated by Sword and Duel. For that Man ſhews ſufficient Teſtimonies of his Courage, who bravely maintains and diſcharges the Office aſſign'd him by the State. And there are much more noble and more ſhining Occaſions of exerciſing Valour, than, contrary to the Laws of Reaſon and of our Country, to purſue an immoderate Paſſion, or to engage in the Hazard of an unneceſſary and unprofitable Combat. Yet if, as it commonly falls out, upon the offering of ſuch an Injury, Swords are immediately drawn, and the Man who thus began the Fray happens to be kill'd, or deſperately wounded, 'tis reaſonable that the other *Party* ſhould have his Penalty mitigated, upon account of the high Provocation. But 'tis an intolerable Paradox which ſome maintain, that a Man may fairly kill another, not only to avoid an Affront of this kind, but for the Recovery of his Honour, after the Affront has been actually given, and the Party who offer'd it is fled.

We may add to theſe Obſervations, that though the Rate and Eſtimation of Things is not to be determin'd by the Multitude, but by the Judgment of wiſe Men, yet if in any State the Receipt of ſome particular Injury is attended with extraordinary Scandal and Diſgrace, there ought to be a moſt ſevere Puniſhment ordain'd againſt Delinquents in this Point; in as much as all Men have not Philoſophy enough to put up thoſe provoking Indignities; and becauſe it would be inconſiſtent with the Characters and Stations which ſome Men are to maintain in the Commonwealth, ſhould they be expos'd to the Contempt and Deriſion of the meaneſt Subjects. The Magiſtrate then hath little Reaſon to be angry, if he neglecting or refuſing to give Redreſs in Complaints on this Score, a Man aſſerts his own Honour by what Means he can, though only in Regard to the Opinion of the Vulgar, ſince the ſame Opinion

[a] 2 *Sam.* x. 4, *&c.*

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[1] Theſe Words of *Grotius*, as our Author expreſſes himſelf, ought to have been found in the ſame place with the foregoing and following, but I can't find them either in thoſe Places, or in the Third Book, where *Grotius* treats expreſly of the Diſpoſition which Men ought to obſerve in War.

[2] See *Lib.* 8. *Chap.* 4. §. 8. following.

would otherwiſe load him with ſo much Reproach. Therefore thoſe Governors who would effectually ſuppreſs all Duels and private Combats, ought to enact the moſt grievous Penalties againſt thoſe who ſhall offer ſuch a Blow or other Affront as is reckon'd ignominious in the Opinion of the particular Country For the Courſe and Manner of Civil Life will not bear that refin'd Philoſophy of *Grotius*; *ſince Honour is no more than an Opinion of Excellence, and the Sufferer of ſuch an Injury ſhews himſelf excellently patient, his Honour is rather increas'd than impair'd*[a].

XIII. From what hath been ſaid it may likewiſe be underſtood, whether in Caſes of Aſſault, a Man is oblig'd, if he can conveniently, *to betake himſelf to Flight*, ſo as that the Slaughter of the Aſſailant is never juſtifiable under a Poſſibility of running from him? Now here 'tis plain, that in a State of Nature the Aggreſſor hath no *Right*, by which the other Party is bound to decline his Violence in this Matter, rather than oppoſe it. And the Reaſon why a Man (under this Natural Condition) ſometimes chooſes rather to fly than fight, is not out of any Favour to him who ſets upon him, but becauſe he thinks it moſt convenient for his own Affairs[1]. Diſtinct Nations and Kingdoms are ſet, we know, in this natural State towards each other: And who will ever maintain, that when one King unjuſtly invades the Realm of another, the injur'd Prince is oblig'd to ſave himſelf, if poſſible, by flying; for fear he ſhould kill ſome of his Enemies by making Reſiſtance?

But under Civil Governments, we are to fly, if we can with Convenience, rather than take away the Aſſailant's Life. Nor can ſuch a Flight be at all baſe or unworthy of a Man at Arms; in as much as it is not undertaken out of Cowardice or Neglect of Duty; and becauſe Reaſon can never think this a fit Occaſion of exerting my Valour, when I only kill a Fellow Subject without any Neceſſity, from whom the Magiſtrate could have ſufficiently ſecur'd me. We added this Reſtriction, *if we can with Convenience*, becauſe (as hath been already hinted in part) we are not always oblig'd to retreat and to turn our Backs, ſince we thus expoſe ourſelves to a greater Danger of Wounds and Miſchief, as well as to the additional one of falling; and ſince a Man who hath once betaken himſelf to his Heels, if he meet with a Stop, or if the Aggreſſor happen to overtake him, cannot eaſily recover himſelf into a Poſture of Defence. Therefore in caſe there be not a Place of ſafe Refuge near at hand, he doth not tranſgreſs the Bounds of *innocent Self-defence*, who oppoſes an Aſſailant Breaſt to Breaſt, rather than he will lay himſelf open to his Violence, by running off on a Diſadvantage.

Laſtly, *Grotius* hath done well to cenſure thoſe Authors, who allow that *we may lawfully kill a Man who hath ſaid any ſuch Thing of us, as we think will injure our Repute and Character with good Men*. For, if the Man hath ſpoken falſe, have we not many more convenient ways of wiping off the Calumny? And if he hath ſaid nothing but Truth, muſt we ſtudy the Concealment of one Sin by the Commiſſion of another? How much better is *Plato*'s Law[2], *If a Man kill a Slave who hath not injur'd him, only out of Fear he ſhould diſcover ſome baſe Action, or on the like account; he ſhall undergo the ſame Penalty as if he had murther'd a free Subject or Citizen?*

XIV. All this ſeems plainly enough deducible from Reaſon. But many raiſe a Scruple about theſe Doctrines, in regard to the peculiar Temper and Genius of Chriſtianity, aſſerting that although it be indeed lawful to kill a Man who unjuſtly attempts our Life, yet 'tis an Action[1] more praiſe-worthy to loſe our own Life in ſuch a Caſe, than to take his. Becauſe he thus dying in the Commiſſion of a Mortal Sin, incurrs the Danger of Damnation: And that it is not conſiſtent with Juſtice to rid our ſelves of a leſs Evil, by bringing a greater on another Man. Now, tho' the Solution of this Difficulty doth not properly fall under our Buſineſs; yet we think the Maintainers of this high Notion would do well to conſider, that in the Conſternation of Danger, and in the Heat of Fighting, a Man hath little Leiſure for a nice Reflection on ſuch Reaſons; in as much as all his Thoughts and Faculties are taken up with conſulting how to ſave himſelf from preſent Death. Again, the Perſon who is thus aſſaulted, is not always ſo well prepar'd, as not to need ſome farther Time for compoſing his Mind and Conſcience, and for *making up his Bundles*, before he takes his long Journey, as *Varro*[2] ſpeaks. Beſides, it doth not appear very probable, that I ought in this Caſe to be more ſolicitous for the Soul of the other Man, than he himſelf is. And therefore if he, neglecting this great Concern, invade my Life, ought I to pay ſo precious and irrecoverable a Ranſom, for reſcuing him from the Danger of incurring ſo ſad a State[3]? For it is very doubtful whether, if I ſhould now ſpare him, to my own Ruin, he will not, for all my Charity, ſtill deſerve, and ſtill meet with the ſame terrible Sentence. 'Tis a Maxim vulgarly known, that no Regard is to be had to ſuch a

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[a] Vide *Acts* xvi. 37.

§. XIII. [1] ———— Πόδες ὅπλα λαγῶων, ſays *Oppian*, *Cyneget. Lib.* 4. *v.* 35. *Hares have their Armour in their Feet.* A needleſs Quotation.

[2] *De Legib. Lib.* 9. Ἐὰν δὲ τις δοῦλον κτείνῃ μηδὲν ἀδικοῦντα, φόβῳ δὲ μὴ μηνυτὴς αἰσχρῶν ἔργων καὶ κακῶν αὐτοῦ γίγνηται, ἤ τινος ἕνεκα ἄλλου τοιούτου, καθάπερ ἂν εἰ πολίτην κτείνας ὑπεῖχε φόνου δίκας, ὡσαύτως καὶ τοῦ τοιούτου δούλου κατὰ τὰ αὐτὰ ἀποθανόντος, οὕτως ὑπεχέτω.

§. XIV. [1] Mr. *Fortſchius* Profeſſor of Divinity at *Tubing*, undertakes to defend St. *Ambroſe*, and ſome other Fathers, who maintained, that Chriſtian Charity would not allow a Man to ſlay an unjuſt Aggreſſor, and that he ought to ſuffer himſelf to be ſlain. But if we examine the Words of this Divine, *Diſſert.* 1. *in Offic. Ambroſii*, we ſhall find, that after he has diſcourſed long, he does not touch upon the Reaſons of our Author. I find only one thing reaſonable, which I have obſerved above, §. 2. *Note* 5. *viz.* That in following the Principles of Mr. *Puſendorf*, he aſſerts, That he that ſlays his unjuſt Aggreſſor, ought to have more than a ſimple Permiſſion.

[2] *De Re Ruſticâ. Lib.* 1. *Chap.* 1. *Annus enim Octogeſimus admonet me, ut ſarcinas colligam, antequam proficiſcar è vitâ.*

[3] *Plin. l.* 2. *Epiſt.* 10. *Parum eſt providum ſperare ex aliis, quod tibi ipſe non præſtes, i. e.* "You are very improvident, if "you expect that from others, which you will not do your ſelf. This Paſſage does not make the leaſt to our Author's Purpoſe.

Danger as a Man throws himſelf into by his own Default, and from which he may deliver himſelf if he pleaſes. Now in the Caſe before us, provided he draw off or forbear to treat me in this injurious Manner, the Danger to which he expoſes his Soul, ceaſes as to the preſent Matter. And doth not this Opinion allow greater Favour and Indulgence to Wickedneſs, than to Goodneſs, whilſt it makes the former, as it were, ſacred and inviolable? For according to ſuch Rules, the moſt holy and virtuous Men would be always oblig'd to yield their Throats to Villains and Murderers, leſt, by reſiſting, they ſhould ſend them immediately on their Road to Hell [a]. That ſaying of our Saviour, in which he commands us *to love our Neighbour as our ſelves*, Matt. xxii. 39. ſeems not ſo fitly to be interpreted of the *degree* of Love, as of the *Truth* and *Sincerity*; in as much as no Man diſſembles or counterfeits a Paſſion towards himſelf. And that Phraſe, *As thy ſelf*, looks like a proverbial Speech, importing a ſincere and hearty Kindneſs [b]. But ſhould we take the Expreſſion in the higheſt Senſe [4], it would ſcarce follow, that ſuppoſing the Love of our ſelves and of our Neighbour not capable (in ſome Inſtance) of being anſwer'd both together, the former ought to yield to the latter [5]. Nor are the Proofs which we find ſometimes alledg'd from *Exodus* xxiii. 4, 5. and *Deuteronomy* xxii. 4. ſufficient to evince, that the Love of our Neighbour ought to take place before our own real Advantage: For it cannot thence be gather'd, that we are firſt to help our Neighbour's Beaſt out of the Ditch, if our own be in the ſame Condition; or that we are oblig'd to give ſuch an Aſſiſtance, when the Buſineſs we muſt neglect for that good Office is of more Conſequence, than the Thing we thus endeavour to ſave or reſcue for another. And beſides all this, it may very fairly be queſtion'd, whether a Perſon who aſſaults us in a violent manner, ought to keep the Title of a *Neighbour*, as the Word ſeems to be meant in our Saviour's Command [c].

Lactantius [d] hath cenſur'd *Tully* [6] for deſcribing a *Good Man* to be one *that doth good to as many as poſſible, and that hurts no Body, unleſs provok'd. O what a moſt excellent and moſt true Sentence* (ſays [7] the Father) *hath he ſpoil'd by the Addition of two Words! For what occaſion had he to ſay,* unleſs provok'd? *If a good Man may thus hurt another when provok'd, the very offering that Hurt will make him loſe his Character and Name: It not being leſs Evil to return an Injury, than at firſt to give it. For whence ariſe all the Contentions and the Combats which we behold amongſt Men, unleſs from this Miſcarriage, that Impatience oppoſing Wickedneſs, occaſions ſo many Tempeſts in the World? Whereas, if in oppoſing the ſame Wickedneſs we ſhould make uſe of Patience, than which there is no truer Virtue, and none more worthy of human Nature, we ſhould as effectually extinguiſh the ill Deſign, as if we were pouring Water upon Fire.* But indeed, as the Impatiency of the injur'd Party is frequently the occaſion of unneceſſary Combats, which might with Convenience have been avoided; ſo, on the other hand, Patience is not always infallible in the Cure of Malice and Villany. Nor doth the Virtue which, under that Name, is ſo highly recommended to Chriſtians, equally oblige us to the putting up [8] all Injuries promiſcuouſly, without Difference and Diſtinction. He that defends himſelf in a lawful manner, doth not act directly for the Hurt of another, but for his own Preſervation: And he who repels a Wrong is not injurious, but he who offers it. 'Tis one thing to exerciſe an unblameable Defence, and another thing to proſecute an unmerciful Revenge. The latter may be as great a Sin as the firſt offer of an Injury, but the former can never fall under ſo hard a Cenſure.

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[a] Comp. *Grotius*, L. 1. c. 2. ſ. 8. & c. 3. ſ. 3.

[b] Vid. 1 *Sam.* xviii. 1, 3.

[c] See *Luke* x. 29, *&c.* where, by the Term of *Neighbour*, we are to underſtand every Man who hath need of our Help, and whom we have opportunity of benefiting.

[d] Inſtitut. L. 6. c. 18.

[4] If as often as a Man finds himſelf in the ſame Danger as another, he ought indiſpenſibly to reſolve to periſh to ſave him, he is obliged to love his Neighbour better than himſelf. Moreover, this Command of CHRIST is a general Maxim, which can't be of uſe to determine a particular Caſe, and inveſted with the Circumſtances of all Particulars, ſuch as this, when a Man finds he can't at the ſame time ſatisfy the Love of himſelf and Neighbour; for, all things elſe being equal, the Love of a Man's Self ought to be preferred, as appears by St. *Paul*'s Words, 2 *Cor.* viii. 13. The Determination of that Caſe, in which there is an Oppoſition between the Love of a Man's Self and Sociableneſs, depends upon other Principles, from which it may be inferred, That as there are ſome Caſes in which the Love of a Man's Self is to be preferred before every other Thing, ſo there are other Caſes, when the Preſervation of another may be preferred before his own. This is taken out of the Apology of our Author, which is in the *Eris Scandica*, §. 32.

[5] *Præclarum illud eſt, & ſi quæris, rectum quoque, & verum, ut eos, qui nobis cariſſimi eſſe debeant, æquè ac noſmet ipſos amemus; at verò plus fieri nullo pacto poteſt; nè optandum quidem eſt in amicitia, ut me ille plus quàm ſe, ego illum plus quàm me. Perturbatio vitæ, ſi ita ſit, atque officiorum omnium, conſequatur, i. e.* "Thus much indeed is brave, and right, and true, that "we ſhould love thoſe who ought to be moſt dear to us, as well as our ſelves. But to love them better, is abſurd and impoſſible. "'Twould be ridiculous for me to wiſh, that my Friend and I ſhould each of us prefer the other's Perſon and Intereſt to his "own; becauſe ſuch a change of Hearts could not but be follow'd with a Confuſion of all Offices of Life." *Cicero Tuſc. Quæſt. l.* 3. *c.* 29.

[6] *Tully*'s Words are, *Eum virum bonum eſſe, qui proſit quibus poſſit, noceat nemini, niſi laceſſitus injuriâ.* Our Author might here have oppoſed to this Cenſure of *Lactantius* other Words of *Cicero*, which will ſhew, that that Orator believed, that a good Man ought to ſpare his greateſt Enemies, when he can do it without Danger to his own Life. *Jugulare civem, nè jure quidem quiſquam bonus vult. Mavult enim commemorare ſe, cum poſſet perdere, peperciſſe, quam cum parcere potuerit, perdidiſſe. Hæc in homines alieniſſimos, denique inimiciſſimos, viri boni faciunt, & hominum exiſtimationis & communis humanitatis cauſa: ut cum ipſi nihil alteri ſcientes incommodarint, nihil ipſis jure incommodi cadere poſſit,* Orat. pro Quintio, *c.* 16.

[7] *Lactantius*'s Words are, *O quàm ſimplicem, veramque ſententiam duorum verborum adjectione corrupit! Quid enim opus fuerat adjungere, Niſi laceſſitus injuriâ?——Nociturum eſſe dixit bonum virum, ſi fuerit laceſſitus; jam ex hoc ipſo viri boni nomen amittat, neceſſe eſt, ſi nocebit. Non minus enim mali eſt, referre injuriam, quam inferre. Nam unde certamina inter homines, unde pugnæ, contentioneſque naſcuntur, niſi quod improbitati oppoſita impatientia, magnas ſæpe concitat tempeſtates? Quod ſi patientiam, quâ virtute nihil verius nihil homine dignius inveniri poteſt, improbitati oppoſueris, extinguetur protinus, tanquam igni aquam ſuperfuderis.*

[8] This may be inferred from the Words of CHRIST, *Matth.* v. 39, 40. in which Patience is moſt earneſtly recommended. For that divine Teacher ſays not, *If any one will ſlay, wound, or ſmite you mortally, bear it patiently*, but, *If any one ſmite you on the right Cheek, turn to him the other alſo*, for a Blow on the Cheek is a ſmall Injury in it ſelf, and eaſy to be born. Moreover, in theſe Words there is a Proverbial Expreſſion, which imports thus much, That rather than revenge our ſelves of them that have done us any perſonal Wrong, we ſhould ſuffer our ſelves to receive ſome new Injuries. Nor doth JESUS CHRIST ſay, *If any Man will take away all your Goods, or the greateſt part of them, do not reſiſt the Spoiler, nor oppoſe his Injuſtice, neither by your own Act and Deed, nor by ſeeking Protection from the Magiſtrate*; but, *If any Man ſue you at the Law, and take away thy Coat, let him take thy Cloak alſo*, i. e. rather than engage thy ſelf in a Law-ſuit for ſo ſmall a Matter, be ready to undergo a freſh Loſs. See *Grotius*, and Mr. *Le Clerc* on this Place. The Heathens alſo acknowledge, that we ought ſometimes, though not always, to depart from ſomething of our Right. See *Cicero De Offic. Lib.* 2. *Chap.* 18.

But farther, thoſe who maintain that in Caſes of this Nature it is more commendable *to be kill'd* than *to kill*, add this Exception, *Unleſs the Party aſſailed be a more uſeful Perſon than the Aſſailant.* As if it were always poſſible for me, under the Apprehenſion of ſo imminent Danger, to weigh my Abilities nicely with thoſe of the other Man, and to determine, whether the World would have more occaſion for his Service than for mine! This is beyond Diſpute, that he on whom the Safety of many depends, and whoſe Office or Duty it is to keep off Violence from others, ought not to reſign his own Life for the ſparing an unjuſt Invader; tho' he ſhould be of ſo mild a Diſpoſition as with *Piſo* in *Tacitus*[9], *to think it as great a Miſery to kill another, as to die himſelf.* And the Reaſon is evident, becauſe by throwing himſelf away, he betray'd the Safety of ſo many other Perſons. This is the Caſe of thoſe who accompany Travellers by way of Guards; as likewiſe of Princes, of Generals, and other Commanders, whoſe Deaths are uſually attended with ſo wide a Ruin, and to whom we may apply that Saying of *Lucan*, v. 685.

Cum tot in hac anima populorum vita ſaluſque
Pendeat, & tantus caput hoc ſibi fecerit orbis,
Sævitia eſt voluiſſe mori.———

Since one dear Life enſures and guards us all,
And with the World's great Head, the World
 muſt fall,
'Twere Cruelty to court your Fate[a].

But it cannot be hence inferr'd, that ſuppoſing a Man to have the Lives of none, or of very few depending on him, ſuch an one may not fairly kill an Aſſailant, who is perhaps of more Service to the Publick, or in whoſe Life the Intereſt of more Perſons are concern'd. For at this rate, a Man who is either unmarried, or without Children, muſt in no Caſe kill an Invadet, who hath a Family, for fear his Wife and Children ſhould be left Deſolate and in Want. But if the Affection and Concern for theſe Relations could not hinder the injurious Party from attempting his Villany, what Reaſon hath the other Perſon to give his own Life for the Prevention of their Misfortune and Trouble?

Plato[10] in his Syſtem of Laws hath been very nice and exact on this Point: *If the Life of a Son*, ſays he, *be attempted by his Parents, did ever any Law allow him in ſuch a Caſe to kill thoſe who gave him Being, although in his own Defence? So far from this, that he is obliged and commanded to ſuffer all Extremities, rather than to engage in ſo unnatural a Deed. But if upon account of Tumult, or Sedition, or the like occaſion, a Brother kills his Brother, to preſerve himſelf from his Violence and Aſſault, he ſhall be equally guiltleſs as if he had ſlaughter'd an Enemy.* As for the Additional Clauſe, *If a Slave in his own Defence kill a free Man, he ſhall be obnoxious to the ſame Penalties as a Parricide*, this was not the Fault of the Lawgiver, but of the Age.

XV. From what hath been obſerv'd on this Head, it appears, that a Slaughter committed within the juſt Bounds of Self-defence, doth not taint the Author with any real Blemiſh or Guilt, and conſequently doth not render him obnoxious to any Puniſhment: and that it is not to be rank'd amongſt thoſe Actions, which, tho' they are in themſelves ſinful, yet human Laws favour with Impunity, upon account of the violent and almoſt unavoidable Tranſports of Paſſion: As when they allow the Husband to kill the Adulterer[1]. If therefore in any Places ſome Penalty or Expiation hath been enjoin'd the Actors of juſt Slaughter, it either belong'd not to the Caſe of *innocent Defence*, or it was introduc'd without any true Ground or Reaſon; or, laſtly, it might be apply'd for the making Men underſtand how heinous a Crime it was to kill unjuſtly, [2] when the killing even upon a juſt Account, ſtood in need of ſome Satisfaction. [3] *Philo* the *Jew*, in his Life of *Moſes*, *Lib*. i. tells us, *He commanded the Prieſt to perform a ſolemn Purgation, on thoſe who return'd freſh from the Slaughter of their Enemies; becauſe tho' the Laws did by no means forbid ſuch Attempts, yet he who kills a Man, tho' by Compulſion, and in repelling an Injury, ſeems to contract ſome Stain, upon account of the near Relation which Mankind bear to one another, being all deriv'd originally from the ſame Head. And this therefore was the reaſon of the Ceremony to take off the very Appearance and Shadow of Guilt.* As for the Benefit of the *Aſylums* or Places of Refuge and Sanctuary, a Man who preſerv'd his own Life by the Death of an Aſſailant, ſeems to have had no occaſion for theſe Reliefs; but only he who had been the Author of another's Death by an involuntary Stroke, yet ſuch as upon exact Care and Diligence he might have forborn and avoided. That Place in the Firſt of the *Chronicles*, Chap. xxix. ver. 3. doth not belong to the Caſe of *Self-defence*; and * the Building of a Temple ſeems to have been forbidden *David*, not ſo much becauſe he had gather'd any Pollution by his Slaughters in War, as becauſe he who had acquir'd ſufficient Honour to himſelf by martial Atchievements, ought not to have robb'd his Son of ſuch an Occaſion of growing glorious by the Works of Peace. The Scholiaſt on the *Oreſtes* of *Euripides* informs us, that 'twas an antient Cuſtom amongſt the *Grecians*, for thoſe who kill'd any one upon a juſt Reaſon, immediately to ſhew their Weapons to the *Sun* for a Token of their Innocence; as deſiring him to be Witneſs of the Fact, who, in their Opinion, *overlook'd and overheard all things*. And beſides this Formality, they apply'd ſome Means of Expiation, and were oblig'd to undergo one Year's Baniſhment: Which Baniſhment is likewiſe mention'd by *Plato de LL. l.* ix. Vid. *l.* xvi. *ſ.* 8. D. *de Pœnis*, & *Grot. in flor. Sparſ. ad loc.* And we learn farther from *Demoſthenes*, and from the Scholiaſt on *Ariſtophanes*, that at *Athens* when a Man had kill'd another, and pleaded to have done it juſtly, the Cauſe was try'd in a peculiar Court, call'd the *Delphinian*, with Alluſion to the Oracle of *Apollo* at *Delphi*. Amongſt the *Ethiopians*, whoever had ſlain a Man involuntarily, quitted his Country till ſuch time as the *Gymnoſophiſts* had purg'd him by their Ceremonies[a]. And we find *Æneas* in *Virgil* declaring in reference to the holy Reliques,

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[a] And that of *Alexander*'s Friends in *Quintus Curtius*, L. 9. c. 6. *What God can ſecure to us a long Enjoyment of this Light, this Bulwark of* Macedon; *when you ſo often, with a kind of Greedineſs, expoſe your Perſon to certain Danger; not reflecting how many Thouſands of Lives you hazard in one?*

[9] *Tacitus*'s Words are, *Si nobis aut perire hodiè neceſſe eſt, aut quod æquè apud bonos miſerum eſt, occidere.* Hiſt. Lib. I. Chap. 29.

[10] *De LL. Lib.* 6. Οὐδ᾽ ἀμυνομένῳ θάνατον, μέλλοντι ὑπὸ τῶν γονέων τελευτήσειν, παρέξει νόμος οὐδεὶς κτεῖναι τὸν πατέρα, ἢ μητέρα, τοὺς εἰς φῶς τὴν ἐκείνου φύσιν ἀγαγόντας, ἀλλ᾽ ὑπομείναντα τὰ πάντα πάσχειν, πρίν τι δρᾷν τοιοῦτον. Ἀδελφὸς δὲ ἂν ἀδελφὸν κτείνῃ, ἐν στάσεσι μάχης γενομένης, ἤ τινι τρόπῳ τοιούτῳ ἀμυνόμενος ἄρχοντα χειρῶν πρότερον, καθάπερ πολέμιον ἀποκτείνας, ἔστω καθαρός. Ἐὰν δὲ αὖ δοῦλος ἐλεύθερον ἀμυνόμενος ἀποκτείνῃ καθάπερ ὁ κτείνας πατέρα, τοῖς αὐτοῖς ἔνοχος ἔστω νόμοις.

To treat of this Queſtion more exactly, I obſerve, That in Truth the Laws may by reaſon of ſome Inconveniences, puniſh all Children, who ſhall ſlay their Father or Mother, though in Defence of their own Perſons; becauſe we may ſuppoſe the Caſe ſo very rare, that it would be to no Purpoſe to make ſuch an Exception, which might be an Occaſion of ſuffering a real Parricide to go unpuniſhed. But if the Thing be conſidered as it is in itſelf, without any relation to Civil Tribunals, we muſt, in my Judgment, thus think of it: 1. If a Father be hurried by his Paſſions, which he can't maſter, to kill his Son, and knows not what he is doing, as I have ſpoken, in the Caſe of one attacked by his Sovereign, *Note* 1. of §. 5. ſo I ſay here, that he ought to ſuffer himſelf to be ſlain, rather than imbrue his Hands in his Father's Blood. 2. But if we have reaſon to fear, that a Father is inclined with ſome Knowledge and Deliberation to put us in Danger of our Life, we ought to avoid the leaſt Occaſions to provoke him, and abſtain from doing many of thoſe Things which we have Right to do, if we were concerned with any other. 3. But if, after we have done all on our Part, we ſee ourſelves infallibly in danger to loſe our Life by the Hand of him, who, above all Men, is bound to preſerve it, though in this Caſe we may, if we will, ſuffer our ſelves to be ſlain, out of Exceſs of Love and Kindneſs, and in Regard to him from whom we have derived our Being, yet I do not believe him guilty of Murder and Parricide, if, in defending himſelf, he ſlays the Aggreſſor. The Right of defending our ſelves is prior to any Obligation we have to another; and a Father, if he ſo far forgets himſelf, as to fall into ſuch an extravagant Paſſion againſt his own Son, deſerves not to be looked upon as a Father.

§. XV. [1] Of which ſee *Lib.* 20, 22, 24. 32. D. ad *L. Jul. de Adulter.* and *Lyſias Orat.* 1. *pro cæde Eratoſthen.* where he ſhews, that by the *Attick* Conſtitutions it was allowable to kill, if catch'd in the Fact, the Abuſer, not only of a Wife, but of a Concubine; and as *Demoſthenes* extends it, of a Mother, a Siſter, or a Daughter. And the Reaſon he gives is this; *Becauſe whatſoever Perſons we fight for againſt our Enemies, to reſcue them from Injury or Affront, for the ſake of the ſame Perſons the Law permits*

Me bello è tanto digreſſum & cæde recenti
Attrectare nefas; donec me flumine vivo
Abluero.

In me 'tis impious holy Things to bear,
Red as I am with Slaughter, new from War:
Till in ſome living Stream I cleanſe the Guilt.
Mr. *Dryden.*

In the 18th Canon of the Council of *Nantes*, held under Pope *Formoſus*, we have this nice Injunction; *If a Man by accident, and unwillingly, hath been Author of another's Death, let him repent forty Days with Bread and Water; when this Courſe is over, let him for two Years be ſeparated from the Congregation of the Faithful, and let him neither communicate nor offer. After the ſpace of two Years, let him offer with the Congregation, but not communicate. At the end of the five Years let him be receiv'd to full Communion, but let his Abſtinence from Meats continue at the Diſcretion of the Prieſt.* Yet neither doth this Canon touch the Caſe of Defence, nor can it well be vindicated from too much Rigor. Thus too what we meet with in the Laws of the *Lombards*[b], ſeems not capable of being extended to the Buſineſs in hand, or if it be, may deſervedly fall under the Cenſure of unreaſonable Severity. *De Mornay*[c] tells us, that 'tis religiouſly obſerv'd by the Judges in *France*, ſcarce ever to abſolve Perſons in Cauſes of this Nature, without enjoining them at the ſame time to beſtow peculiar Largeſſes upon the Poor, and *ſometimes to be at the Charge of Chriſtian Sacrifices, or Propitiations for the Soul of the Party kill'd.* And tho' the latter Part of this Cuſtom ſmells too much of Superſtition; yet every good Man hath reaſon to be deeply afflicted and concern'd, when he is put under the Neceſſity of depriving another of Life, by any ſuch unfortunate Means.

XVI. Indeed, the Defence of Life, of Limbs, and of Chaſtity, as of irreparable Goods, admits ſo large a Degree of Favour, as to ſtand exempted from one of the poſitive Divine Laws, and to be conſtrued as no Breach of the Sabbath. *Vide* 1 *Maccab*. i. 32, *&c. Joſeph*. Antiq. *L*. xii. *c*. 8. [1] For thoſe who maintain'd the contrary Opinion, are not without Reaſon ſcouted by *Plutarch* and

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mits us to kill even Friends, if they offer them any unjuſt Violence. For ſince Enemies and Friends are to be judg'd and diſtinguiſh'd by their Actions, thoſe that practiſe Hoſtility, we may proſecute in an hoſtile manner. Amongſt the *Perſians*, he that kills the Adulterer and the Adultereſs at the ſame time, is preſented with a new Garment as a Reward of his Service to the State. Add, *Olear. Itin. Perſic.* L. 5. c. 22. *Val. Max.* L. 9. c. 1. ſ. 13. *Ant. Matthæ.* de *Crimin.* ad L. 48. D. tit. 3. c. 3. ſ. 13, &c.

[a] Vid. *Philoſt.* de Vit. *Apolon.* l. 6.

[b] L. 1. tit. 9. l. 19. & capit. *Carol.* l. 4. tit. 27. & lib. 7. tit. 295.

[c] Ad. Leg. 3. *D. de Juſt. & Jure*, in which there appears but little Superſtition.

[2] *Porphyry*, as Mr. *Hertius* obſerves, ſpeaks very well, That the Reaſon why Lawgivers command, that Murthers committed without any Deſign, and upon Neceſſity, ſhould not be wholly exempted from Puniſhment, is, for fear it ſhould be a Pretence to any to attempt it on ſet Purpoſe. Ἔτι καὶ τὸν ἀκούσιον φόνον οὐκ ἔξω πάσης ζημίας κατέστησαν οἱ νομοθέται, ὅπως μηδεμίαν ἐνδῶσι πρόφασιν τοῖς ἑκουσίως τὰ τῶν ἀκουσίως δρώντων ἔργα μιμεῖσθαι προαιρουμένοις. De Abſtinent. *Lib.* 1.

[3] The Hiſtorical Remarks made here by the Author had better have been placed under a Note. See *Numb.* xxxv. 10, *&c. Deut.* xix. 1, *&c.*

* See Mr. *Le Clerc* upon that Place, who gives another Reaſon more apparent.

§. XVI. [1] I may add, That as Mr. *Le Clerc* obſerves, Jeſus Chriſt alludes to this Opinion of the *Jews*, when he ſays to them who were offended becauſe he did Cures upon the Sabbath-Day, *Is it lawful to do good on the Sabbath-Day, or to do evil, to ſave Life or to deſtroy it?* Mark iii. 4.

Agatharchides, as *Joſephus* obſerves in his *Antiquities*[a]. And therefore 'tis ſtrange that the ſame Author, in his firſt Book againſt *Appion*, ſhould celebrate, as worthy of all Commendation, that Act of the *Jews* which we read of in the Hiſtory of the *Maccabees*, whilſt refuſing to make Reſiſtance on the Sabbath-Day, they preferr'd this Command of GOD to their own Lives, and to the Liberty of their Country: Unleſs he is to be underſtood as rather praiſing the good Intention than the Deed itſelf.

But in reference to the Defence of Things or Goods, which as they may be reſtor'd or compenſated, ſo they ſeem not all of them abſolutely neceſſary to Man's Happineſs, it will bear a Diſpute whether *theſe* may be preſerv'd and ſecur'd by the Uſe of Extremities. Eſpecially ſince many are very ready to approve of what *Taxilles* ſaid to *Alexander* in *Plutarch*, *What occaſion is there*, Alexander, *that you and I muſt needs quarrel and fight; ſince you neither came to rob us of our Water nor of our Food, which are the only two Things that Men in their Wits think worth contending for?*

Euripid. Supplic. ver. 775.

Τοῦτο γὰρ μόνον βροτοῖς, &c.
For, Life alone's th' irreparable Loſs;
Breaches of Fortune have an eaſy Cure.

The Judgment and the Cuſtom of all Nations is manifeſt in this Point, whilſt they allow Men to fight for their Goods and Poſſeſſions, even to the Slaughter of thoſe who wrongfully invade them. It is plain likewiſe, that moſt War is engag'd in, not for the ſake of deſtroying Mens Lives, but of winning their Lands or their Wealth. And it would be reckon'd a very pleaſant Humour in an Enemy, if to hinder himſelf from being oppos'd by violent Means, he ſhould make Proteſtation that he came not to kill but to rob. Thus much therefore is certain, that he who is kill'd in the Attempt of plundering or of waſting another Man's Goods, hath no Injury done him: Tho', in other reſpects, thoſe Goods do not bear an equal Proportion to the Life of a Man. For in a *natural State*, he who offers any kind of Injury with a malicious Intent, immediately becomes an Enemy; and then he can have no Right inherent in himſelf to forbid the Uſe of the utmoſt Extremities againſt him. And ſince another hath no more Right to invade my Poſſeſſions than to aſſault my Life, I have certainly an equal Licenſe and Power to defend them both. Beſides, ſince Life cannot be preſerv'd without a Competency of Goods, he that goes about to rob me of *theſe*, doth, by conſequence, endeavour to deprive me of *that*. And indeed, it is clearly evident, that the Security and Peace of Society, and of Mankind, could very hardly ſubſiſt, if a Liberty were not granted to repel by the moſt violent Courſe, thoſe who come to pillage our Goods, for which Men have commonly a very hearty Love and Concern.

Thoſe who have tormented themſelves in maintaining the more rigid Side of the Queſtion, build chiefly on two Suppoſitions; firſt, That a juſt Puniſhment ought always to be ſo equal to the Crime, that the guilty Perſon be not depriv'd of a greater Good than what he attempted to hurt or to deſtroy in another[2]. The Falſeneſs of which we ſhall elſewhere make out. Secondly, That the Hurts which we offer to an unjuſt Invader, in defence of ourſelves and our Poſſeſſions, are *Puniſhments* in a proper Senſe, and conſequently ought to be ſtated by the Rules of vindicative Juſtice. But this Hypotheſis is no truer than the former. For all Puniſhment proceeds from a Superior againſt a Subject, by virtue of his Sovereign Right; and the Degree of it is meaſur'd with reſpect to the publick Good. But Defence is a Thing of more antient Date than any civil Command, and chiefly takes place amongſt thoſe, neither of whom are ſubject to the other; and is moderated with regard to our own Safety, and to the Neceſſity of Self-preſervation. Indeed amongſt thoſe who live under the ſame civil Government, the Liberty of *natural* Defence is very much reſtrain'd. Becauſe the inward Tranquillity of a State could not ſubſiſt, if the Subjects were to return Hoſtilities to each other for every Injury or Affront. The Members then of a Community may ſo far only make uſe of violent Defence, as it is not taken off or forbidden by the Genius of civil Society, or by the Laws of the State. And the Laws of moſt Places, tho' they allow one Subject to repel another who invades him, by offering a greater Evil, than the Invader deſign'd againſt him[3]; yet according to the regular Courſe of Proceeding, they would not have private Perſons apply Extremities, in oppoſing ſuch Injuries as are levell'd only againſt Things that may be reſtor'd or repair'd. Inaſmuch as ſuch Reparation or Reſtitution may eaſily be procur'd by the help of Government; whereas when there is no Government to interpoſe, Men cannot be forc'd to make Requitals, but by War. There is no need then of being ſo ſolicitous with *Grotius* [b]*to make up the Inequality between the Thing invaded and the Life of the Invader, by our Favour to the Defendant, and our Hatred and Rigor againſt the guilty Party.* Unleſs we join with *Bœcler* in his Explanation of the Place, and ſay no more than this, that ſince in a Cauſe or Action of this kind it is generally very difficult to determine what was done within, and what beyond the due Bounds, it is not repugnant to Nature that we turn our Favour on the ſide of the Perſon who ſuffer'd, or was likely to ſuffer the Damage, and our Hatred upon the Plunderer or Thief; that is, when the Caſe is doubtful, we may fairly pardon in the former the Death of the latter. In civil States therefore it is ſufficient, that a Man do not exceed the Limits of Defence appointed by the Laws of his Country. And yet if he ſhould tranſgreſs theſe Meaſures he doth no Injury to the Invader, but only is guilty of a Breach of *Civil Law*. But it may be aſk'd farther, whether it is not at leaſt a Sin againſt Charity to kill one who comes to plunder us of a repairable Good? In anſwer to which, it is our Judgment, that Charity towards one who profeſſes Hoſtility againſt us, takes place only ſo long as we have probable Hopes of bringing him, by this means, to Repentance and to Peace. But when theſe Hopes appear fruitleſs, he that ſpares his Enemy betrays himſelf. Or if at any time my Reaſon perſuades me, that a Thing of little and deſpicable Value is not to be defended with the ſame Eagerneſs and Violence, I forbear, in this Caſe, not for the ſake of the Robber or Invader, but partly becauſe I would not give myſelf ſo much Trouble about a Matter of ſo ſlight Concern, and partly becauſe I would not ſeem narrow-ſpirited and covetous, by reſenting to ſo deſperate a height ſo inconſiderable a Damage.

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[a] L. 12. c. 1. Add. *Grot.* ad 1 *Maccab.* ii. 37.

[b] L. 2. c. 1. ſ. 11.

[2] See *Lib.* 8. *Chap.* 3. §. 23, 24.

[3] Such was the *Athenian* Law mention'd by *Demoſthenes* (adverſ. *Ariſtocrat.*) ordaining, *That he who kill'd another in defence of Goods, which this other Perſon was taking or carrying off by Violence, ſhould not be chargeable with any Guilt.* The *Greek* is, Καὶ ἐὰν φέροντα, ἢ ἄγοντα βίᾳ ἀδίκως, εὐθὺς ἀμυνόμενος κτείνῃ, νηποινεὶ τεθνάναι κελεύει.

XVII. It may be proper for us, on the preſent Occaſion, to reflect on that moſt noble Law giving Licenſe to kill a Night Robber, but not one that comes in the Day-time[1]; which we read in *Exod.* xxii. 2. and which hath been ſo often imitated in the *Grecian* and the *Roman* Conſtitution. Thus the Law of *Solon* recited by *Demoſthenes* (contra *Timocrat.*) [2] *If any one, in the Day-time, ſteal above fifty* Drachmæ, *all Perſons are impower'd to bring him before the Court of the* Eleven. *But if he ſteal in the Night, whatever the Value be, it ſhall be allowable either to bring him before the Judges, or to purſue, and wound, or kill him.* For which *Ulpian* the Rhetorician gives this Reaſon, [*] *In the Day we may call for Aſſiſtance, which in the Night cannot ſo well be had.* So *Plato* de LL. l. ix. *He that kills a Thief entring his Houſe in the Night ſhall be blameleſs.* The ſame we find in the *Roman* Twelve Tables. Tho' as to this, *Caius* (L. iv. ſ. 1. D. ad L. Aquil.) affirms, *That the* Roman *Law doth indeed permit a Man to kill the Night Thief; but then it obligeth him to give notice of it by crying out.* The latter Part of which Aſſertion, *Jac. Gothofredus* (ad LL. vi. Tali) obſerves to be a Specimen of *Tribonian*'s mild Diſpoſition, inaſmuch as that there was no Clauſe originally in the Twelve Tables, appears from *Cicero* Orat. pro *Milon. The Twelve Tables,* ſays *Cicero, allow the killing of the Night Thief by any means poſſible; but the Day Thief only if he defend himſelf with his Weapon. M. Senec.* l. x. Controv. ult. *The Law which permits the killing of the Night Thief any way poſſible, doth not ſpeak of him as condemn'd, but as ſurpriz'd in the Fact. A. Gell.* l. xi. c. *ult.* when he reports that *Draco* made Theft capital, and *Solon* only double Reſtitution; adds, that the *Roman* Decemviri *took the middle way between the Severity of the former, and the Mildneſs of the latter; then only permitting a Thief, taken in the Act, to be kill'd, if either the Thing happen'd in the Night, or if being in the Day-time, he defended himſelf with his Arms againſt the Diſcoverer.* As for the Sign of *Crying out,* the Twelve Tables requir'd it only in the Caſe of the Day Thief when he fought in his own Defence. *Si luci furtum faxint, ſi ſe telo defenſint, quiritato, endoque plorato: Poſt deinde ſi cæſi eſint, ſe fraude eſto.* Comp. l. iii. S. D. ad L. *Aquil.* where the Term *Æque* is mollified by *Tribonian.* Yet it is not improbable, that in courſe of Time, and upon the Authority of wiſe Men, that antient Law was plainly mitigated, as *Cujacius* allows, *L.* xiv. *Obſerv.* 15. This appears from *Ulpian, L.* v. *ad Edict.* whoſe Words are fully recited in the *compariſon of the* Jewiſh *and* Roman *Laws,* firſt publiſh'd by *Peter Pithæus.* Which are maim'd, as we have them in *L.* v. *D. ad L. Aquil.* (Add. *L.* ix. *D. ad L. Cornel. de Sicar.*) The reaſon of which Alteration perhaps might be, that it was a Practice ſometimes with Villains to ruſh out of their Houſes and murder Perſons, and then pretend that they found them in the Act of Thievery: As likewiſe, becauſe Houſes which are ſtrongly built, and ſtand thick together, cannot eaſily be robb'd without the Maſter's Negligence; or at leaſt cannot afford Rogues ſo frequent Opportunities. Compare *Juſtin, L.* ii. *c.* 2. *ſ.* 9. Whence *Cujacius* conjectures, that the ſaid Law as by *L.* i. *C. quando hic unicuique,* was abrogated in Towns and Cities, and only allow'd to hold good in the Country. Tho' indeed this Order which he cites, doth not ſpeak of Thieves who make their Attempts in Privacy and Silence, but of violent Robbers and open Aſſailants; as appears from the Reaſon ſubjoin'd, *That they may meet the Death which they threaten'd, and incur that which they deſign'd againſt others. Sextus Cæcilius* in *Gell. L.* xx. *c.* 1. explains this Law of the Twelve Tables falſly, when he makes it relate to the *inſidious Violence of nightly Murtherers*[3]. Now the Reaſon of ſuch Diſtinction we take to be this, that in the Day we may eaſily ſeize the Thief and recover our Goods; whereas in the Night he may ſlip from the Houſe undiſcover'd; it being difficult to know him in the dark; or if one Perſon ſhould chance to have a Knowledge of him, yet this would not convict him, unleſs, which cannot be done without great Trouble, more Witneſſes are call'd out of their Beds. But in this Opinion there is one Thing which ſtartles moſt Men, and puts them to ſome Loſs and Difficulty; for they are apt to argue thus: Since the Laws which make this Allowance do not decree a capital Puniſhment againſt Robbers, it looks like an Abſurdity, that private Perſons ſhould be indulg'd with a Licenſe of proceeding farther in theſe Caſes, than the Sovereign Power thinks proper for itſelf to do. In anſwer to which it may be obſerv'd, that all thoſe Laws concerning the Puniſhment of Thieves, do ſuppoſe the Things ſtolen to be reſtor'd or compenſated, upon the Apprehenſion of the Felon. And in order to this they judg'd the giving of two-fold, or ſometimes of four-fold to be ſufficient; according to the different Cuſtom of particular Commonwealths. But it doth not hence follow, that therefore the ſame Laws, in Caſes where Reparation was not to be had, could not furniſh the Subject with ſome larger Power taken out of the Stock of natural Liberty. For the Lawgivers of Kingdoms and Republicks have not always thought it neceſſary, in ordaining Penalties for Offences, to take their Standard from what in a State of Nature the Right of War allow'd to be done. Thus there are ſome States in the World where Adultery is not a capital Crime; and yet the Husbands are indemnified if they kill the Adulterers upon ſurpriſing them in the Act. Now ſuppoſing Men to be plac'd in a *natural Liberty*, the Performance, or the very Offer of an Injury to their Bed, is plainly a ſufficient Cauſe of War, and how far the Licenſe of War extends every one is ſenſible. And yet theſe Laws would not ſtretch the Puniſhment of Adultery when once actually committed, to ſuch Violence as might be allowable in a War undertaken upon that Score. But for their Indulgence to private Perſons of farther and ſeverer Methods, we may borrow this very good Reaſon from Dr. *Cumberland*[a]; that inaſmuch as Offences of this kind eſcaping the Cognizance of the Civil Magiſtrate, do frequently paſs unpuniſh'd, therefore whenſoever their Circumſtances make them capable of receiving Puniſhment, it hath been thought proper to allow the moſt rigorous and extreme; that the Boldneſs of wicked Men, as much as it increaſes by common Impunity, ſo much it may be leſſen'd and kept under by the Fear of meeting ſometimes with ſo grievous and ſo terrible a return. That Clauſe in the *Roman* Law giving Authority to kill a Day Thief, *Si telo ſe defenderit, If he defends himſelf*[4] *with his Weapon*, plainly intimates, that I am hereby permitted to kill him, tho' barely for the Preſervation of my Goods, and not then only when he firſt aſſaults me with his Weapon, but when upon my endeavouring to recover my Things from him, he employs it againſt me for his own Security.

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[1] The Words are, *If a Thief be found breaking up* [an Houſe] *and be ſmitten that he die, there ſhall no Blood be ſhed for him. But if the Sun be riſen upon him, there ſhall be Blood ſhed for him, for he ſhould make full Reſtitution; if he hath nothing, then he ſhall be ſold for his Theft,* [to make Satisfaction.]

[2] The *Greek* of *Demoſthenes* is, Εἰ δέ τις νύκτωρ ὁτιοῦν κλέπτοι, τοῦτον ἐξεῖναι, ϗ ἀποκτεῖναι, ϗ τρῶσαι διώκοντα.

[*] *Ulpian*'s *Greek* is, Ἐν νυκτὶ μείζονα τὴν τιμωρίαν ἔδειξεν· ἐπειδήπερ μεῖζόν ἐστι τὸ ἔγκλημα τῆς νυκτὸς, ἐν γὰρ ἡμέρᾳ δύναταί τις ϗ βοηθοὺς καλέσαι ἑαυτῷ, ἐν δὲ νυκτὶ, οὐκέτι.

Plato's Words are, Νύκτωρ φῶρα εἰς οἰκίαν εἰσιόντα ἐπὶ κλοπῇ χρημάτων, ἐὰν ἑλὼν κτείνῃ τις, καθαρὸς ἔστω.

[3] Mr. *Noodt* has ſhew'd in §. 1. of *Law* IV. *ad Leg. Aquil.* that there was no Addition of *Tribonian*'s, nor any thing contrary to the Law of the Twelve Tables. He treats there of *Reſtitution,* not *Puniſhment.* The *Cornelian* Law, as well as that of the Twelve Tables, allows an abſolute Impunity to them who ſlew a Thief in the Night, whether they cry'd out or no, whether they might have avoided killing of him or no; but the *Aquilian* Law did not exempt them from paying Damages and Fines, unleſs when there was an abſolute Neceſſity of ſlaying the Aggreſſor to ſave their own Lives. *Obſervat. Lib.* 1. *Chap.* 15 and his *Probabil. Juris Lib.* 1. *Chap.* 9. as alſo *ad Leg. Aquil. Chap.* 5.

XVIII. And therefore it is clear, that they are in the wrong who make the Reaſon of the foreſaid Law to be only this, *Leſt if the Robber eſcap'd in the Night the Crime ſhould paſs unpuniſh'd*. As to *Grotius*'s [b] Diſcuſſion of this Point, there are many Things in it to which we cannot ſubſcribe. He makes the Laws we have been ſpeaking of to be founded on this Bottom, that the *Legiſlators hereby intimated, that no Man ought to be kill'd directly for the ſake of our Goods*. Which is more than we can diſcover in thoſe Laws which treat of ſuch Thieves as creep into Houſes with deſign to carry Things privily away. 'Tis true in the Caſe of the nightly Thief, it may happen that whilſt I endeavour to ſave my *Goods*, my *Life* too may be in danger: And then the Slaughter of the Thief is permitted me upon a double Account. Nor here will it be an Objection againſt my Innocence, that I ſeem to throw myſelf into this Danger, by attempting to retain or to recover my Matters. For I am then engag'd in a lawful and almoſt a neceſſary Act; from which no Effect that ariſes without my Fault, can be *imputed* to me. But were it not lawful to kill another purely on the Account of Goods, how can we utterly clear him from all Guilt, who for the Preſervation of thoſe Concerns caſts himſelf deliberately into ſuch a Condition as makes it neceſſary for him either to kill, or to be kill'd? As we do not allow him the Plea of *Self-defence*, who kills a Man in a Duel voluntarily undertaken.

The other Reaſon which *Grotius* aſſigns for the *Hebrew* Law ſeems not of ſufficient Strength and Solidity. *Inaſmuch* (ſays he) *as by Night Witneſſes of the Fact are difficult to be procur'd, therefore*[1] *more eaſy Credit is given to him who ſhall affirm*[*] *that he kill'd the Thief in defence of his own Life*; *as having found him with an Inſtrument that might have done hurt*. For granting that the *Hebrew* Word in the Text cited by him ſignifies an [2] *Inſtrument of Digging* or *Stabbing*, yet if the Intent of the Law had been as he makes it, 'twould have been much plainer to have ſaid, *If he be found with a Weapon*. Nor indeed is it, after all, a good Conſequence to ſay, that becauſe the Thief was found arm'd with a Weapon, therefore he came certainly to aſſault the Life of the Perſon who kill'd him. No more doth it follow, that becauſe by the Law of the Twelve Tables the Day-thief could not be kill'd, unleſs he defended himſelf with his Weapon, therefore there lies a fair Preſumption againſt the nightly Thief that he actually made uſe of his Weapon in the ſame manner. For that Law gave Commiſſion to kill the nightly Thief [3] without Conditions, and by any Means poſſible. In after Ages indeed, [4] this farther Clauſe was added to it, *Si parcere ei ſine periculo ſuo non potuit, dum rem ſervare conatur* [a]: *If whilſt he endeavours to ſave his Goods he cannot ſpare the Robber's Life without manifeſt Danger*. But before this Addition it cannot be prov'd, that a Perſon ſtood guilty of Homicide, who had kill'd a nightly Thief, tho' there were Witneſſes to prove that the Party ſlain never brought him into danger of his Life. The Example of a Maid raviſh'd in the Field, which *Grotius* here alledges, is nothing at all to his Purpoſe: For in that Caſe, the Law expreſly commands us to *preſume* that Violence was offer'd her. But in the Matter we are now concern'd about, we cannot diſcover that any *Preſumption* of mortal Danger is made or ſuppos'd by the Laws. As indeed it is not the Buſineſs of theſe purloining Raſcals to fight, but to run. Yet after all, we are ready to confeſs, that a Man who in defence of his Goods only lays hold on the Night-robber (if he can with Safety and Convenience) and carries him before the Magiſtrate, acts much more generouſly than if he had unneceſſarily depriv'd him of Life [b].

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[a] L. 5. ſ. 26.

[b] L. 2. c. 1. ſ. 12.

[*] If the Affirmation or Word of every Particular ſtood for a legal Evidence in this Caſe, this great Inconvenience would follow, that any malicious Perſon (tho' his Credit be no better than his Temper) might, with Impunity, deſtroy his Neighbour, if he would but give his Word his Neighbour firſt aſſaulted him.

[4] See the Authorities alledged in the firſt Note of this §. and chiefly *Cicero*'s *Orat. pro Milone*, Chap. 4. and the Commentators on it.

§. XVIII. [1] Then (ſays *Gronovius* the Father in his Notes upon *Grotius*) here is only a bare Fiction of Law, as in the Caſe of Preſcription and *Poſtliminium*. But can ſuch a weak Foundation be of Force ſufficient to give one Right to ſlay a Man whoſe Life he ought to have preſerved? We ought rather to hold, that he ought to call for the Aſſiſtance of his Fellow Citizens againſt the Attempts of an unjuſt Aggreſſor, and more, that the Laws grant us an extraordinary Protection and ſpecial Privileges. Among the antient *Scythians*, as *Juſtin* relates, *Lib.* 2. *Cap.* 2. Robbery was a Crime puniſh'd with the greateſt Severity and greateſt Reaſon, becauſe if that had been permitted, what could they have enjoy'd whoſe Goods conſiſted in Herds of Cattle, which could never be ſhut up? For this Reaſon the driving away of Cattle (*Abigeatus*) is puniſh'd more ſeverely even by the Law of God, than Theft, *Exod.* xxii. 1. altho' the Thing ſtole be of much greater Value than the Beaſt. (See Mr. *Le Clerc*'s Notes upon that Text.) So that in the Night, while Men ſleep, the Law's awake, as we may ſay, and when the Proprietors of Goods are leſs able to take care of themſelves and defend their Goods, it deters Thieves by making them apprehenſive of a greater Puniſhment than if they rob in the Day-time. Moreover, There is a great Preſumption that a Night Thief comes arm'd, and Lawgivers ſuppoſe it as a Thing undoubted; for all Things being commonly made faſt in the Night, can a Thief be ſuppoſed with his Hands only to break thro' a Wall, force open Gates, Cheſts, and Cupboards? Wherefore for this Reaſon, becauſe all Things are ſhut faſt, we can't believe that a Thief will come in the Night without Arms and Engines to enter by force a Place which he ought to look upon as a Thing ſacred. See *Cicero*'s *Orat. pro Domo.* Chap. 41.

[2] Our Author hath reaſon to doubt, whether במחתרת *Bammahhtereth*, ſignifies, *with an Inſtrument to break thro'*, 'tis more probable it means, *in breaking thro'*, as the LXX and Vulgar tranſlate it. But Mr. *Le Clerc* has very well obſerv'd, that it comes much to the ſame, ſince none can break thro' a Wall but with an Inſtrument. We may add with the ſame Commentator, that this Expreſſion is founded upon the Eaſineſs of breaking thro' Walls; for it appears, that heretofore, as well as at this day, that moſt of the Houſes in the *Eaſt*, as well in the Country as Cities, were built with Clay, ſtruck upon Laths placed acroſs, and whited over with Lime. Hence *Job*, Chap. iv. 19. alludes to it, when he ſays, *That Men dwell in Houſes of Clay*.

XIX. The laſt Point uſually diſputed on this Subject is, whether the Party who firſt gave and begun an Injury, may fairly reſiſt the other Man when he endeavours to return or to revenge it? Many here take the affirmative ſide, upon this Reaſon, that whilſt Men undertake to right themſelves by their own Pleaſure and their own Force, they are ſeldom very exact in proportioning the Puniſhment to the Crime. But we conceive the Queſtion ought to be determin'd with more Caution and with more Diſtinction. The Law of Nature then commands, that he who has injur'd another ſhould offer him Satisfaction: And at the ſame time it obliges the other Party to pardon the Offender, when he intreats him with Signs [1] of Penitence, offering Reparation for paſt Damages, and Security for his future good Behaviour [c]. He therefore that refuſes to make Satisfaction, and hereupon *reſiſts* the Perſon demanding it, manifeſtly heaps one Injury upon another. But when a Man refuſes to accept fair Satisfaction, when offer'd him, and reſolves to proſecute his Revenge by open Arms, in this Caſe he practiſes *unjuſt Force*, and conſequently it can be no Fault to make Reſiſtance againſt him [d] [2].

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[a] *In l. 9. D. ad L. Cornel. de Sicar.*

[b] Add. *Groenewegen de Leg. abrogatis*, ad L. *Aquil.* where he obſerves, that the *Dutch* Laws do not require the Sign of *Crying out* in the diſpatching of a Night-thief. Comp. *Leg. Wiſogoth.* l. 7. tit. 2. cap. 16. *Leg. Burgundion.* addit. 1. tit. 16. c. 1, 2. *Leg. Friſiorum*, Tit. 5. *Conſtitut. Sicul.* Tit. 13. Capital. *Carol. & Ludovic.* L. 6. c. 19.

[c] *Quinctilian* Declam. 5. *There's nothing more honourable than the Concluſion of a Quarrel. But whilſt the Parties are hot with ſecret Deſires of Miſchief, 'tis in vain to pretend an outward Reconciliation.* M. Antoninus, L. 1. ſ. 7. *rejoiceth in this Happineſs of his own Temper, that he was eaſily placable, and willing to be reconciled to thoſe who had given him any Cauſe of Offence, ſo ſoon as they deſired it.* Add. & L. 9. ſ. 8. & Senec. de Irâ, L. 2. c. 34. L. 3. c. 26, 27, 42. *Amongſt the* Chineſe, *who prefer moral Philoſophy to all other Parts of Knowledge, there is ſcarce any one ſo cruel as to deſire to revenge an Injury with the Death of him that offer'd it: And they reckon it a true Mark of a brave, and wiſe, and worthy Man, to put up the Hurts and Affronts he receives, without any Inclination to harm the Author.* Neuhoſ. Deſcript. Chin. c. 1.

[d] Comp. *Liv.* L. 9. & *Grot.* L. 2. c. 1. ſ. 18. & *Bœcler* ad loc. See the Story of the private Combat in *Davila*, l. 15. p. 1027.

[3] *Duodecim Tabulæ nocturnum furem, quoquomodo; diurnum autem, ſi ſe telo defenderit, interfici impunè voluerunt.* Cicero pro Milone, cap. 3.

[4] *Furem nocturnum ſi quis occiderit, ita demum impune feret, ſi parcere ei ſine periculo ſuo non potuit.* Digeſt. Lib. 48. tit. 8. ad Leg. Cornel. de Sicar. Leg. 9. But Mr. *Noodt* hath ſhewed very well, that that Law is ill placed, and that *Tribonian* had taken no more Care than *Ulpian*, from whom 'tis taken. *Lib.* 37. *ad Edictum*, where he ſpeaks of the Reparation of the Damage to which the *Aquilian* Law condemned him, and not of the Puniſhment ordered by the *Cornelian*. See his *Probabil. Jur. Lib.* 1. *c.* 9. §. 6.

§. XIX. [1] The Philoſopher *Arrian* ſays, That the only way to attone for a Crime, is, in his Opinion, to confeſs it, and ſhew Repentance; for, adds he, the Fault appears not ſo great to him that has received it, when the Offender acknowledgeth that he hath done ill, and he hath reaſon to hope that he will do ſo no more, becauſe he ſeems ſo much troubled for what he has done. Μόνην γὰρ ἔμοιγε δοκεῖ ἴασις ἁμαρτίας, ὁμολογεῖν τι ἁμαρτόντα, καὶ δῆλον εἶναι ἐπ' αὐτῷ μεταγινώσκοντα, ὡς τοῖς παθοῦσιν πάχαρι οὐ πάντη χαλεπὰ τὰ παθήματα φαινόμενα, εἰ ὁ δράσας αὐτὰ ξυγχωροίη, ὅτι οὐ καλὰ ἔδρασεν, αὐτῷ τέ τινι ἐς τὸ μέλλον ταύτην ἐλπίδα ἀγαθὴν ὑπολειπομένην, μή ποτε ἂν παραπλήσιόν τι ἁμαρτεῖν, εἰ τοῖς πρόσθεν πλημμεληθεῖσιν ἀχθόμενος φαίνοιτο, De Expedit. Alexand. *Lib.* 7. *cap.* 29.

[2] This hath place chiefly in the Quarrels that happen between two Sovereigns, or two States, only we muſt obſerve; that they will not take a ſlender Reparation for a ſufficient Satisfaction, or ſome Signs of Repentance for Recompence. But as to thoſe Damages which Fellow-citizens do one to another, and for which the Laws preſcribe a Satisfaction, it is more eaſy to determine which of the Contenders ſhall paſs for the Aggreſſor. *Titius Obſerv. on Puſendorf*, CXL. But before I end this Chapter, we ſhall ſupply a conſiderable Omiſſion of our Author, which neither he nor *Grotius* have taken notice of, and that is, the Right which every one hath to defend his Liberty. Mr. *Locke* hath proved the Juſtice and Extent of that Right which all have to defend themſelves; *Whoever*, ſays he, *endeavours to uſurp an abſolute Power over any one, puts himſelf into a ſtate of War with him; ſo that this laſt can't look upon the Proceedings of the former but as a plain Attempt againſt his Life.* Indeed, from the Moment that a Man labours to bring me into Subjection to him againſt my Will, I may preſume, that if I fall into his Hands, he will treat me as he pleaſes, and make no ſcruple to ſlay me in his Humour. Liberty, if I may ſo ſay, is the Bulwark of my Preſervation, and the Foundation of all Things that belong to me; ſo that he that will make me his Slave, authorizes me to repel him all manner of ways, that I may ſecure my Perſon and Goods. But here we muſt carefully diſtinguiſh the State of Nature from the Civil State; for 'tis upon this that the extent of our Right, that we have to defend ourſelves againſt them who would bring us into Subjection to them, depends. Man's natural Liberty conſiſts in acknowledging no ſuperior Authority upon Earth, and following the Laws of Nature, without any Dependance upon any other Man. Liberty, in a Civil Society, in not ſubmitting to any Legiſlative Power but that which is eſtabliſhed by the general Conſent of the whole Body, nor to any other Government than what they acknowledge, nor to any other Laws than thoſe which the ſame Legiſlative Power may make according to the extent of the Right which it hath received. But of this I ſhall ſpeak more largely elſewhere. See that *Engliſh* Author's Treatiſe of *Civil Government*, whoſe Notions I have mentioned *Lib.* 2. *Chap.* 3, & 4. §. 17 & 22.

CHAP. VI.

Of the Right and Privilege of Neceſſity.

The Contents of every Paragraph of the ſixth Chapter.

I. *How many kinds of* Neceſſity *there are.*
II. *Wherein the Right and Privilege of* Neceſſity *conſiſts.*
III. *What Right it gives every one over himſelf, and directly over others.*
IV. *And what indirectly.*
V, VI, VII. *What Right it confers over other Mens Goods.*
VIII. *What we may do to others Goods to preſerve our own.*

THE *Caſe of Neceſſity* is a thing in every Body's Mouth, and the force of it generally acknowledg'd in the World: Hence we commonly ſay, that it *hath no Law*, that 'tis a *ſuppos'd* or *preſumptive* Exception to all human Ordinances and Conſtitutions; and that therefore it gives a Right of doing many things otherwiſe forbidden [a]. Now whence this Force or Power ariſes, and how far it extends, we ought with the more Accuracy to examine; becauſe ſome Caſuiſts ſeem to allow it none, or very little Efficacy, as to the Morality of human Actions. But before we proceed to this Enquiry, we may obſerve in general, that [1] *Tully* in his ſecond Book of *Invention, c.* 57, 58. makes a twofold *Neceſſity*, the one *ſimple* and *abſolute*, which can by no poſſible means be reſiſted, alter'd, or abated; and the other *conditional* or *reſpective*. This again he divides into three kinds, with regard either to *Honeſty* [b], to *Safety*, or to *Convenience*. Of which, he ſays the firſt is by many degrees the higheſt, the ſecond of next Moment and Conſideration, and the third very much inferior, and not able to ſtand in Competition with the reſt. He proceeds to give it for a Rule, that altho' *Honeſty* be better than *Safety*, yet in ſome Caſes we may give the Preference to the latter; when what we take from Honeſty in the conſulting our preſent Safety may be recover'd and made up by our future Virtue and Integrity: When this cannot be done, Honeſty is abſolutely to be prefer'd and embrac'd. Others chooſe to ſay, that when the *Neceſſity of Safety* is prefer'd to the *Neceſſity of Honeſty*, ſuch a Fact cannot be defended in a direct way, and by any Preſcription of Right, but leans wholly on the Excuſe which we allow to human Infirmity, and on the Indulgence of our Mercy and Pity. But that *Neceſſity of Convenience* is ſtill much weaker, and weighs very little either in the defence or the excuſe of Actions; unleſs when the Cauſe comes before ſuch a Judge, as hath more regard to his own partial Inclination, than to the Suggeſtions of Wiſdom and to the Demands of Right.

Now our Buſineſs on this Subject lies chiefly in examining and ſtating the *Neceſſity of Safety*, and in conſidering what force it hath to exempt any Action from the Obligation of common Laws: that is, whether we may not ſometimes do things forbidden, and omit things commanded by the Laws, when we are (not by our own Fault) caſt into ſuch Streights, that we cannot otherwiſe ſecure our own Preſervation [2]? And here it is apparent, that the *Favour*, the *Right*, the *Leave*, or whatever it is that in ſuch Caſes we attribute to *Neceſſity*, doth ſpring from this ſingle Principle, that it is impoſſible for a Man not to apply his utmoſt Endeavour towards preſerving himſelf; and that therefore we cannot eaſily conceive or ſuppoſe, ſuch an Obligation upon him, as ought to outweigh the Deſire of his own Safety.

II. No good and pious Man can queſtion, but that GOD Almighty, who is the abſolute Maſter of our Lives, and whoſe free Bounty gave us the precarious Enjoyment of them, may impoſe on us ſo ſevere a Law, that we ought rather to die, than to recede the leaſt degree from it. Of which kind the *Jews* took their Law againſt eating Swine's Fleſh to be; as we find in the Hiſtory of

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[a] *M. Senec.* L. 4. Controv. 27. *Neceſſity is the great Patronage and Shelter of human Infelicity. Callimach.* Hymn. in *Del. Neceſſity's a mighty Goddeſs.* ——— Add. Orat. *Lentul.* in *Liv.* L. 9. c. 4.

[b] To which belongs the ſaying of *Pliny*, L. 1. Epiſt. 12. *The beſt and higheſt Reaſon paſſeth for Neceſſity with wiſe Men.*

Mr. Barbeyrac's *NOTES on* Chap. VI.

§. I. [1] *Tully*'s Words are; *Atque etiam hoc mihi videor dicere, eſſe quaſdam cum adjunctione neceſſitudines, quaſdam ſimplices & abſolutas.——Puto igitur eſſe hanc neceſſitudinem, cui nullâ vi reſiſti poteſt; quæ neque mutari, neque leniri poteſt.——Quod adjungitur——omni tempore, id pertinebit——aut ad honeſtatem——aut ad incolumitatem——aut ad commoditatem.——Ac ſumma quidem neceſſitudo videtur eſſe honeſtatis; huic proxima, incolumitatis; tertia, ac leviſſima, commoditatis: quæ cum his nunquàm poterit duabus contendere. Haſce autem inter ſe ſæpe neceſſe eſt comparari, ut quamquam præſtet honeſtas incolumitati, tamen utri potiſſimùm conſulendum ſit, deliberetur.——Quâ in re fieri poterit, ut cum incolumitati conſuluerimus, quod ſit in præſentiâ de honeſtate delibatum, virtute aliquando & induſtriâ recuperetur, incolumitatis ratio videbitur habenda: cùm autem id non poterit, honeſtatis.* Farther, we muſt obſerve, that Neceſſity which we muſt ſuppoſe always happens without his Fault who is reduced to it, begets a Conteſt not only between Self-love and Sociableneſs, but alſo between Self-love and Religion; as alſo between the divers Duties of Self-love. The Conteſt between Self-love and Sociableneſs happens, when the Perſons with whom we ought to have dealt otherwiſe, have no part in the Neceſſity to which we are reduced: For our Author hath ſpoken in the foregoing Chapter of the Conteſt produced by the Reaſon of another's Fact, whether malicious, or not. See the Notes on the following Paragraph.

[2] Either in our Perſons or Goods, as it appears from the following part of this Chapter.

the *Maccabees*. And their Judgment was then indeed right; becauſe as the Caſe ſtood with them, to eat that ſort of Fleſh was look'd on as an open Denial of the true Religion. Whereas, were they under no ſuch hard Circumſtances, it was no Sin for a Man to keep himſelf from ſtarving by feeding on this forbidden Meat, when no other could be procur'd. Sometimes too by the Authority of a Civil Sovereign, Men may receive ſo ſtrict and rigorous Commands, that they muſt rather part with their Lives, than omit the Duty enjoin'd them. But the Obligation of *Poſitive Laws* is not always preſum'd to be ſo harſh and ſevere. For in as much as the Authors of theſe, or of any other Rules and Conſtitutions in the World, chiefly deſign'd by them to promote the Safety or Convenience of Mankind, we may ſuppoſe them, generally ſpeaking, to have had before their Eyes the weak Condition of human Nature; and to have reflected on the Impoſſibility which every Man lies under, not to avoid, and to drive off, all things that aim at his Deſtruction. Upon this account then, [1] moſt Laws, eſpecially thoſe which we call *Poſitive*, are judg'd to except the *Caſes of Neceſſity*; that is, not to *oblige*, when the Obſervance of them muſt be attended with ſome Evil, deſtructive of our Nature, or exceeding the ordinary Patience and Conſtancy of human Minds: Unleſs when this very *Caſe* is included plainly in the Injunction, either by expreſs mention, or becauſe the Nature of the Buſineſs cuts off all Exception and Reſerve. Hence it is clear, that no ſuch Power ought to be attributed to *Neceſſity*, as that it ſhould give us the Privilege of directly violating a Law, or of committing a Sin; but we only preſume from the favourable Intention of Legiſlators, and from the Conſideration of the Nature of Man, that the *Caſe of Neceſſity* is not comprehended under the general Terms of a Law. An Inſtance of this our Saviour himſelf hath been pleas'd to give us, in *David*'s eating the *Shew-bread* [a], intimating, that the Matter and the Reaſon of the Law which forbad that Action in general, could not be ſuppos'd to have any ſuch rigorous Deſign, as that a Man ought rather to die with Hunger, than to touch the conſecrated Food [2].

It is plain then, that as to *poſitive Laws* this Privilege of *Neceſſity* is admitted and allow'd: But 'tis a Point much more difficult to determine, whether the ſame Favour can take place in [3] the Laws of Nature; that is, whether in *neceſſary Caſes* we may fairly omit what is *naturally* commanded, or perform what is *naturally* forbidden? As for the firſt Queſtion, it appears from the Nature of *affirmative* Precepts, that whenever they oblige a Man to the actual exerting of ſuch a Performance as is enjoin'd, they at the ſame time ſuppoſe him to have Opportunity, Subject, and Power of acting: But now we may fairly judge theſe Conditions to be wanting, when I cannot do a thing without the Loſs of my Life. Since to throw off the Love and Care of ourſelves, is juſtly rank'd amongſt impoſſible Attempts; or however amongſt ſuch as ſurpaſs the common Strength of Mens Souls. Therefore, unleſs it either be expreſly and particularly provided by the Law, or deducible from the Quality of the Buſineſs to be undertaken, that I muſt rather lay down my Life than omit the Duty, all affirmative Edicts of Nature may be underſtood to except the Caſe of extreme Neceſſity: Eſpecially when a Man hath not fallen under ſuch Neceſſity through his own Neglect and Default. Thus I am not bound to furniſh an hungry Perſon with Bread, when I want it for my own Suſtenance [a] [4]; or to help a Man that is drowning, when I cannot ſave him without loſing myſelf. *Seneca*'s Reſolution is good in both Caſes, *I will give* (ſays he) [b] *to thoſe that are in need; but ſo as not to put my ſelf in the ſame needy Condition: I will ſuccour thoſe who are ready to periſh; but ſo as not to expoſe my ſelf to certain Ruin.*

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[a] See *Matt.* xii. 4. Add. *Caſaubon* Exercitat. ad *Baron.* 1. n. 9.

§. II. [1] Otherwiſe, as Mr. *Thomaſius* obſerves, the publick Good redounds from the Good of private Perſons; and for the moſt part, the Preſervation of a private Perſon is more advantageous to the State, than the Obſervation of any human Law. *Inſtit. Juriſpr. Div. Lib.* 2. *Chap.* 2. §. 131.

[2] We muſt ſay the ſame thing of Injunctions to keep Days of Feſtival, to which our Author's Words refer, *Neceſſitas feriis caret*, out of *Pallad. de Re Ruſtic. Lib.* 1. *Chap.* 6. Neceſſity makes no Holidays.

[3] Theſe Principles are moſt exact, and proper to decide all Queſtions which can be propoſed in this Matter; they are borrowed from *Titius*'s Obſerv. CXLI. and partly from *Thomaſius*'s *Inſtit. Juriſpr. Divin. Lib.* 2. *Chap.* 2. §. 130, *&c.* For we muſt diſtinguiſh between the Laws which concern God, and thoſe that relate to Men. As to the firſt of theſe, we may lay down theſe two Rules; 1. That always when in doing or not doing a certain Action, we ſhew directly, or indirectly, ſome Contempt of the Divine Majeſty; the Law which forbids, or orders this Action otherwiſe, admits of no Exception in Caſes of Neceſſity; for in this laſt Caſe, the Nature of the Thing itſelf makes it evident, that no Man ought to preſerve his own Life by any thing whereby God is diſhonoured. 2. But if in doing, or not doing a certain Action, we do not directly, or indirectly, ſhew any Contempt of the divine Majeſty, the Law which forbids, or orders that Action otherwiſe, does not indiſpenſibly oblige, in a Caſe of extreme Neceſſity; for then the Glory of God not ſuffering any Affront, his infinite Goodneſs will not allow us to preſume, that he will not oblige us to expoſe our Lives needleſly, or our Goods. So that when we cannot commit any Action poſitively by the Law of Nature, without ſhewing at leaſt indirectly ſome Contempt of the Supreme Legiſlator, theſe ſort of negative Laws admit of no Exception in the Caſe of Neceſſity; and ſo much the more, if we do not find ourſelves reduced to this Dilemma, either to die, or break ſome negative Maxim of the natural Law, which thro' the Violence of him that propoſes it, either formally, or by Interpretation, may make us contemn the Authority of the Supreme Legiſlator. Wherefore we muſt reſolve rather to die, than lie (for Example) with our Mother, or ſlay a Perſon whom we know to be innocent. See what we have ſaid upon *Lib.* 1. *Chap.* 5. §. 9. *Note* 2. But we may, to avoid a great Evil, with which we are threatned by an unjuſt Aggreſſor, promiſe ſomething, even with an Oath, without Intention of ſwearing, or contracting by ſuch a forced Act, any valid Obligation; for in that Caſe 'tis neither a true Oath nor Promiſe; and he that forces us unjuſtly, does it only becauſe he thinks we have a greater Reſpect to the Deity, otherwiſe he would not value it; ſo far is he from engaging us to violate our Duty, that he would be much troubled that we ſhould. See what is ſaid *Lib.* 4. *Ch.* 2. §. 8. As for ſuch Actions as are forbidden by ſome poſitive divine Law, as they are otherwiſe indifferent in themſelves, the Exception of the Caſe of Neceſſity hath place, or not, in that reſpect, according as in doing of them we ſhew, or not, ſome Contempt of the divine Majeſty, which muſt be judged of by Circumſtances. The firſt is ſeen in the Example of *David*, and the other in the ſeven Brethren ſpoken of in the Hiſtory of the *Maccabees*, upon which our Author reaſons well. As to the natural affirmative Laws, which concern the Divinity, Mr. *Titius* believes with Mr. *Thomaſius*, that they do not indiſpenſibly oblige to an outward poſitive Worſhip, whoſe Omiſſion may be a ſign of ſuch a Contempt. See what is ſaid upon *Chap.* IV. of this *Book*, §. 3. *Note* 2. But altho' ſome Acts of outward Worſhip are expreſly commanded by ſome poſitive Law, we are not obliged to practiſe them in the Caſe of extreme Neceſſity, unleſs the Omiſſion paſſes for an open, or tacit Abjuration of the Religion which we eſteem true, as in the Caſe of *Daniel*, *Chap.* vi. *ver.* 10. or when it ſhews a Contempt of the Divinity directly or indirectly, which does not commonly happen. I ſhall ſpeak in *Note* 5. of the Privileges of Neceſſity, with relation to the Duties which concern Men themſelves.

As for the *negative* Precepts, or the Prohibitions of natural Laws, this in the firſt place is moſt certain, that no *Neceſſity* can make it allowable for us to undertake an Action directly diſhonouring Almighty GOD, as ſuppoſe to blaſpheme or to deny him, and renounce his Worſhip and Service, tho' for the avoiding of preſent Death. For in as much as GOD is able to inflict on a Man a much more grievous Evil than *natural Death* can be imagin'd to be, our Reaſon doth with good Probability aſſure us, that he will requite us with a much more noble Happineſs, when we part with our Lives for his Sake: On the other hand, it would be abſurd, as well as impious, to ſin againſt the Divine Honour for the eſcaping of a leſſer Evil, than what he incurs by ſuch an Offence [c]. Yet the unhappy Caſe of thoſe who yield to the Force and Violence of Tortures, is not altogether unworthy of our Pity.

Concerning thoſe Laws which contain the mutual Duties [5] of Men, it may be firſt obſerv'd, that ſome of theſe natural Precepts do preſuppoſe ſome Human Deed or Inſtitution; which, as may be gather'd from its End and Purport, not extending to the Caſe of extreme Neceſſity, the ſame Exception may be fairly underſtood in the Law. And then we may remark farther, that a Man cannot be ſaid by his own Act *immediately* to have violated a Law, unleſs the Act can be rightly *imputed* to him. Now an Act may proceed from a Man two ways, either as he is the *Principal*, or as he is the *Inſtrumental Cauſe of it*. And this *Inſtrumental Cauſe* is again of two kinds, either as it exerciſes no Motion but what is impreſs'd on it by the *principal Cauſe*, and againſt its own natural Inclination, if it have any; or, as it applies itſelf upon its own proper and internal Impulſe to ſuch a Performance, tho' the Influence and the Direction of the firſt Cauſe do likewiſe aſſiſt in the Operation. If then a Man be, according to this latter way, *Inſtrumental* in an Act, the Act may not only be *imputed* to the *principal* Cauſe, but alſo to him, as his true and proper Work. But if he be *inſtrumental* or concurrent only in the former manner, the Act ſhall not be *imputed* to him, but only to the *principal* Agent. What farther Conditions are requiſite to this Caſe ſhall hereafter be [6] more largely explain'd.

III. Thus much being premiſed, we may go on to diſcuſs the particular Caſes and Queſtions uſually diſputed on this Head. In reference then to a Man's ſelf, tho' otherwiſe he hath no ſuch Right and Power over his Members, as to deſtroy, to diſtort, or to maim them at his Pleaſure; yet it ſhall be lawful for him to cut off a Limb, that is either poſſeſs'd by an incurable Gangrene, or that is rendred uſeleſs by a Wound; in the former Caſe [1], to keep the whole Body from periſhing, or the ſound Parts from being infected, and in the latter, that the uſe of the other Members be not hindred by the Clog of an unſerviceable and cumberſome Appendage. Whether the extremeſt Neceſſity doth farther give a Man any Right over his own Life, that is, whether for the eſcaping a

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[a] See 2 Corinth. viii. 13.

[b] *De Benef.* L. 2. c. 15.

[c] *Carpyllid.* in Antholog.

—— ——Ἦ ῥα δικαίοις
Ἀνδράσιν εὐσεβίης ἀπόλωλε χάρις.

Good Men, whatever Scenes of Fate they ſee,
Shall ne'er be Loſers by their Piety.

[4] This Paſſage is quoted *Chap.* III. §. 18. *Note* 2. of this Book.

[5] Firſt, as often as in doing any Action otherwiſe forbidden, with relation to another, or ourſelves, we find a ſure way to avoid ſome great Danger, without falling into ſome greater Evil, or equal to that from which we keep ourſelves, the Law permits an Exception of the Caſe of Neceſſity. 2. But if the Performance of the like Action is no ſurer way of eſcaping the Danger, and the Evil which may redound from it, appears greater, or equal, the Law does not allow the Exception of a Caſe of Neceſſity. By *ſure means* we underſtand thoſe which have a natural and neceſſary Power to remove the Danger wherewith we are threatned, and not a pure arbitrary Force, which depends upon the Fanſy of him who has brought himſelf into that Neceſſity; for in the firſt Caſe 'tis divine Providence which affords Means to deliver out of Danger, whereas in the other 'tis the Malice of Man, and ſuch a Malice as intends either directly, or indirectly, to oblige us to diſobey the Magiſtrate. We may add, that the Certainty of the Means of which we are ſpeaking, is not an abſolute and infallible Certainty, and ſuch as ought to be underſtood in a negative Senſe, rather than a poſitive, *i. e.* in ſuch ſort, that without ſuch a Means we are loſt, and are not ſure we ſhall eſcape if we put them in practice. A Man, for Example, who is purſued, may be at length convicted, but to make his Eſcape, runs in haſte upon a Cripple who ſtands in his Way, this is no hindrance but that he might make his Way, altho' he did ſome great Damage to him who was not able to retire, for Nature allows every one to maintain his Ground as long as he can. As for the great Injury which may ariſe from that to which Neceſſity leads us, it ought alſo to be meaſured phyſically, for we neither can, nor ought to compare the moral Evil which may be on the one ſide, or the other, becauſe that's the Thing in queſtion. Provided therefore that there be no Fault in him who is in danger, which muſt always be ſuppoſed here, the Circumſtances obſerved are ſufficient to enable us to make a probable Conjecture of the Will of GOD; for the Law of Nature without Contradiction tends to the Happineſs of Mankind, and when we can be probably delivered from a great Evil by expoſing ourſelves to a leſſer, we have Reaſon to chooſe the latter. But if the Evil which we embrace, is equal to that from which we fly, and we cannot otherwiſe promiſe ourſelves any Certainty of avoiding the Danger by that means, in this Caſe nothing can diſpenſe with our Obedience. See Mr. *Titius*'s *Obſerv.* CXLI. As to the Affirmative Precepts of the Law of Nature, which refer to another, our Author has treated of them well enough.

[6] See *Lib.* VIII. *Chap.* 1. §. 6. and what I ſhall ſay upon it contrary to our Author's Notions.

§. III. [1] We may in this place apply the Principles laid down in *Note* 4. of the precedent §. Indeed the loſs of a Member is without Contradiction a leſſer Evil than the Loſs of Life, and is alſo a ſure Means to keep ourſelves from Danger. The ſame Thing hath place, as any one may ſee, in the Caſes where to ſave a more noble and neceſſary Member, we are contented to be deprived of one leſs conſiderable and uſeful. But we ought to obſerve, 1. That it is ſufficient here to ſuppoſe a bare Permiſſion, there being but few Men who have Courage ſufficient to bear ſuch a painful Operation as the cutting off a Member dangerouſly affected is, and therefore had rather die of their Wounds in eaſe. 2. That Neceſſity to which we were reduced ought not to be underſtood in its utmoſt rigor. So that when we have in ſome manner contributed by our own Fault to put ourſelves into ſuch an Extremity, we may not lawfully, to retrieve our Affairs, reſolve upon a thing otherwiſe unlawful. See Mr. *Titius*'s *Obſerv.* CXLII.

Death of Ignominy or of Torture, he may lay hold on more gentle Means of leaving the World, we have enquir'd and ſtated in the preceding Chapter. We may proceed therefore to examine what Right *neceſſity* can give us over others. To feed on Man's Fleſh in the deſperate Extremity of Famine, when no other Suſtenance can be procur'd, is a lamentable, indeed, but not a ſinful Expedient. But as for thoſe Inſtances, when in diſtreſs and want of all Proviſions, Men have been kill'd to preſerve their Fellows, either by Compulſion and againſt their Conſent, or elſe by the Determination of Lot, the Deciſion of them is a Point of ſome Difficulty and Uncertainty. Inaſmuch as whatever the Law againſt Murther ſuggeſts on one ſide, the ſharpneſs of Hunger pleads as loud on the other, and the Belly, that Advocate without Ears: Eſpecially, conſidering that unleſs this *unhappy* Means was made uſe of, the whole Company muſt have inevitably periſh'd. This is one of thoſe Caſes in which a Man ought to die rather than commit the Fact, it being directly contrary to the Laws both of God and Nature[a][2]. To this purpoſe we have a Story of ſeven *Engliſhmen*, who being toſs'd in the main Ocean without Meat or Drink, kill'd one of their Number, on whom the Lot fell, and who had the Courage not to be diſſatisfied, aſſuaging, in ſome meaſure with his Body, their intolerable and almoſt famiſh'd Condition: Whom when they at laſt came to ſhore, the Judges abſolv'd of the Crime of Murther. *Ziegler* upon *Grotius*[b], giving this Relation, is of opinion, That *the Men were all guilty of a great Sin, for conſpiring againſt the Life of one in the Company, and (if it ſhould ſo happen) every one againſt his own; thus regarding bodily Peril more than the Danger of their Souls: That no one ought to have ſet ſo little a Value on his Life, as to loſe it for ſatisfying the Hunger of the reſt: And that the reſt ought not to have been ſo cruel to their Fellow, in compliment to their own Stomachs.* But to this it might be anſwer'd, that 'tis too harſh and rigorous a Cenſure, to ſay that thoſe Men *conſpire againſt the Life of another*, who agree to take the Chance of dying one of them, for preſerving the Lives of all the reſt[c]. And conſequently they could put their Souls into no danger by this unfortunate Reſolution. Nor is the Charge of *undervaluing their Lives* any better grounded; ſince he only can fall under this Imputation, who throws himſelf away without Neceſſity. Nor, in the third place, doth there lie any Objection of Cruelty, when the Perſon dying for the Safety of his Companions, receives the Inſtrument of Death with leſs Grief and Reluctancy than the others apply it. There is another Caſe worth examining, [3] ſuppoſe in a Shipwreck more Men leap into the little Boat than it is able to carry, and the Boat belongs to no one by a more peculiar Right than to the reſt; whether they may not fairly draw Lots who ſhall be caſt over-board; and whether if any one refuſe thus to take his Chance, he may not be thrown out without farther Deliberation, as one that ſeeks the Deſtruction of the whole Company? But theſe Caſes being ſuch as very rarely fall out, [4] we chooſe at preſent to ſuſpend our poſitive Judgment concerning them.

IV. This may more frequently happen, that two Perſons being under imminent Danger of their Lives, both muſt unavoidably periſh, unleſs one of them, for his own Deliverance, haſtens, by ſome Act, the Fate of the other, which would however have ſoon arriv'd: Or, that upon neceſſity we may bring on another, indirectly, the danger of Death, or of ſome grievous Hurt; not deſigning to harm him, but only to exerciſe ſuch an Act as may probably prove miſchievous to him; at the ſame time deſiring any other way to get rid of our Neceſſity and Streights, and endeavouring, as far as lies in our Power, to make the Damage fall light on the Suffering Party. Now this kind of hurt, as we judge it not to cauſe any Sin in the Giver, ſo we think the Receiver ought to look on it as purely an accidental Evil, upon account of which he has no reaſon to be angry at the Author. Let us conſider an Inſtance or two of both Caſes. If I, being a skilful Swimmer, fall into deep Waters with another utterly ignorant of that Art, and he, as the uſual way is, clings faſt about me, who am not able to drag out both Burthens; who will blame me for uſing all my Strength to get rid of him, and ſo to prevent my own Death, tho' perhaps I could, with hard ſhift, have held him ſome few Minutes above Water? So in a Wreck[1], if I have taken Poſſeſſion of a Plank which will not hold two, and another ſwimming towards me, ſhall endeavour to throw himſelf upon it, to the Deſtruction of us both; there ſeems to be no Reaſon why I ſhould not apply the utmoſt Violence in keeping him off. And thus likewiſe if two Men are purſued hard by an Enemy, bringing Death in his Hand, if both cannot be ſaved, one of them may, for his own Security, either by breaking down a Bridge, or ſhutting a Gate after him, leave the other in imminent Danger of being kill'd. This kind of Neceſſity often happens in War; where 'tis a Rule, that at any time ſome few are to be left in diſtreſs for ſecuring the main Body. *Arrian* de Expedit. *Alex. Lib.* vi. *c.* 25. *It was neceſſary to ſet aſide the Care of ſingle Perſons, in proſecution of the Common Safety. Virgil* Æn. ix. v. 722, &c.

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[a] *Homer* Odyſſ. vii. 216. Οὐ γὰρ τι ϛυγερῇ, &c.

The Belly, like a bold Petitioner,
Breaks rudely in, and forceth you to hear.

[b] Ad *Grot. L.* 2. *c.* 1. from *Nich. Tulpius Obſervat. Medicin. L.* 1. *c.* 43.

[c] See *Jonah, c.* 1. *ver.* 7, *&c.*

[2] Mr. *Titius*, Obſerv. CXLIV. thinks it neither unlawful, nor of an indiſpenſible Obligation, but he ſays, " That they who " are reduced to this Extremity, ought not nevertheleſs to reſolve upon a Thing ſo ſad and inhuman; for altho' commonly " the Affections of Men one to another, eſpecially ſuch as are neither Parents nor Friends, are very cool, yet when they are " involved in any common Danger, the Senſe of that naturally awakens our Thoughts of Humanity and Compaſſion, which " make us chooſe rather to die ourſelves, or wait the unforeſeen Events of Divine Providence, than have recourſe to ſuch an " irkſome and barbarous Expedient, by which we are not yet ſure that we ſhall ſave our Lives.

[3] In truth, the Maſter of the Shallop doth not ſeem to be obliged to draw Lots with the others, which he permitted lovingly to come into it, and conſequently he might make them caſt Lots to ſave himſelf.

[4] Our Author determines it by ſaying, *It ſeems ſo to me*, in his *Abridgment of the Duties of a Man and Citizen*, Lib. 1. *Chap.* 5. §. 22.

§. IV. [1] But if that other being ſtronger than I, drive me from my Plank, the Neceſſity of ſaving his Life will not excuſe him, becauſe he brings upon me as great an Evil directly, as that he ſaves himſelf from. Moreover, I am here the firſt in time, the Plank belonged to me by the Right of the firſt Occupant, and ſo he could not drive me from it without Injuſtice. We muſt ſay the ſame Thing of a Man, who, when an Army is routed, will ſeize upon an Horſe which belongs to a wounded Perſon, and leaves him infallibly expos'd to the Fury of the Enemy, to ſave his own Life the more certainly. Theſe are the two Caſes mention'd by *Lactantius*, in the Place above quoted, *Chap.* 3. §. 11. *Note* 2.

> *PANDARUS, ut fuſo germanum corpore cernit,*
> *Et quo ſit fortuna loco, qui caſus agat res;*
> *Portam vi multa converſo cardine torquet,*
> *Obnixus latis humeris: multoſque ſuorum,*
> *Mœnibus excluſos, duro in certamine linquit.*

When *Pandarus* beheld his Brother kill'd,
The Town with Fear and wild Confuſion fill'd:
He turns the Hinges of the heavy Gate, (Weight.
With both his Hands, and adds his Shoulders to the
Some happier Friends within the Walls inclos'd;
The reſt ſhut out to certain Death expos'd.
Mr. *Dryden.*

And again, *Lib.* xi. *ver.* 884, *&c.* after the Defeat of the *Latin* Horſe,

> ——— *Pars claudere portas,*
> *Nec ſociis aperire viam, nec mœnibus audent*
> *Accipere orantes.*

Then in a Fright the Folding Gates they cloſe,
But leave their Friends excluded with their Foes.
Mr. *Dryden.*

Compare *Livy, Lib.* xxvi. 15. Where the *Thurini* made a wicked and treacherous Uſe of this Pretence. *Florus* (*Lib.* ii. *c.* 18.) ſays of the *Numantines, At length they enter'd into a Reſolution of Flight: But this their Wives prevented, by cutting in pieces the Harneſs of their Horſes; committing a baſe Cruelty thro' an Extremity of Love. Tacitus* (Ann. xiv. c. 32, 33.) cenſures it as the Effect of ill Conduct, or of Treachery, that when the *Romans* were beſieg'd in *Camolodunum, Non motis ſenibus & fœminis juventus ſola reſtiterit*; the young and able Men did not throw out the Women, and Perſons uſeleſs through Age, and ſo clearing the Place make it more capable of Defence. (Add. *Livy, Lib.* v. *c.* 40.) On the contrary, he tells us in the ſame Story, that Suetonius *reſolv'd to hazard the Loſs of one Town for the Security of the whole Province; and therefore he would not be mov'd by the Cries and Intreaties of thoſe who begg'd him to ſtay and protect them: But giving the Sign for marching, he receiv'd all into his Troops that were willing and able to follow him; and as for thoſe whom either the Weakneſs of their Sex, or the Burthen of their Age hinder'd from ſtirring, they were left to the Mercy of the Barbarians.* Yet *Darius* in *Quintus Curtius, Lib.* iv. *c.* 16. when Things were not brought to deſperate Extremity, bravely refus'd to break down the Bridge of the River *Lycus*, which he had paſs'd with ſome part of an Army in a Retreat; making this generous Declaration, *That he had rather give a Paſſage to thoſe that purſu'd, than take it from thoſe that fled.*

An Inſtance [3] of the other Caſe which we mention'd in general, may be this: Suppoſe a Perſon of more Strength than myſelf follows me cloſe with Intention to kill me, and I meet one in a narrow Paſſage, thro' which I muſt take my Flight; if upon my Requeſt he will not get out of the way, or if he has not Time or Room to ſtand off, I may throw him down and run over him, tho' the Fall, in all probability, will be very grievous and hurtful to him: Unleſs he be ſuch an one as, by virtue of ſome peculiar *Obligation*, I am bound at any time to ſerve voluntarily with my own Danger. And if the Perſon who thus ſtops my Flight be not able to look to himſelf upon my calling to him, as ſuppoſe a lame Man or a Child, I ſhall certainly deſerve excuſe, if I attempt to leap over him (either being on Horſeback or a foot) rather than to fall into my Enemy's Hands by my Delay. As for that other Example, which ſome give, it plainly appears not to be without Fault: The Caſe is this, [4] *A Captain flying from a Battle, and being cloſely follow'd by the Enemy, one of his Men happening to be got juſt before him in the Crowd, he runs him thro' to get off with the more Expedition.* Now here the Captain was ſtrong enough to have made his way only by puſhing down the Fellow that ſtopp'd him, and therefore ought not to have us'd ſo violent Means. Yet if in getting by him he had undeſignedly hurt him with his Arms, the Miſchance would have been very pardonable. But in caſe a Man either out of a frolickſome, or a cruel and barbarous Humour, ſtops me on purpoſe, and refuſes to make room for me to eſcape, I may preſently uſe him as an Enemy, and thruſt him down by any means I can, how much ſoever he is like to ſuffer by the Bruiſe[a]. To conclude this Point, as the declining Death any way admits of much Favour and Excuſe, ſo if the Danger offer'd be no more than a Maiming, or a grievous Wound, and we fly from it with the Hurt of thoſe that chance to ſtop us, the Fact will bear much the ſame Apology or Defence. For he who offers ſuch a Violence may be reſiſted, as much as if he directly attempted to murther us; and when we are compell'd to conſult our Safety by Flight, the Conſternation we muſt needs lie under vindicates our Innocence, as to any ſudden and unfortunate Accident that we chance to treſpaſs in.

V. Let us enquire in the next place, whether the Neceſſity of preſerving our Life can give us any Right over other Mens Goods; ſo as to make it allowable for us to ſeize on them for our Relief, either ſecretly, or by open Force, againſt the Owner's Conſent. For the more clear and ſolid Determination of which Point, we think it neceſſary to hint in ſhort on the Cauſes upon which diſtinct *Proprieties* were firſt introduc'd in the World; deſigning to examine them more at large in their proper Place[a]. Now the main Reaſons on which *Proprieties* are founded, we take to be theſe two, that the Feuds and Quarrels might be appeas'd which aroſe in the *Primitive Communion* of Things, and that Men might be put under a kind of Neceſſity of being induſtrious, every one being to get his Maintenance by his own Application and Labour. This Diviſion therefore of Goods was not made, that every Perſon ſhould ſit idly[1] brooding over the ſhare of Wealth he had got, without aſſiſting or ſerving his Fellows; but that any one might diſpoſe of his Things how he pleas'd, and if he thought fit to communicate them to others, he might at leaſt be thus furniſh'd with an Opportunity of laying Obligations on the reſt of Mankind. Hence when *Proprieties* were once eſtabliſh'd, Men obtain'd a Power not only of exerciſing Commerce to their mutual Advantage and Gain, but likewiſe of diſpenſing more largely in the Works of Humanity and Beneficence; whence their Diligence had procur'd them a greater Share of Goods than others: Whereas before, when all Things lay in common, Men could lend one another no Aſſiſtance but what was ſupply'd by their corporal Ability, and could be charitable of nothing but of their *Strength*[b]. Farther, ſuch is the Force of *Propriety*, that the *Proprietor* hath a Right of delivering his Goods with his own Hands; even ſuch as he is oblig'd to give to others. Whence it follows, that when one Man has any thing owing from another, he is not preſently to ſeize on it at a venture, but ought to apply himſelf to the Owner, deſiring to receive it from his Diſpoſal. Yet in caſe the other Party refuſe thus to make good his Obligation, the Power and Privilege of *Propriety* doth not reach ſo far as that the Things may not be taken away without the Owner's Conſent, either by the Authority of the Magiſtrate in *Civil Communities*, or in a *State of Nature* by Violence and hoſtile Force. And tho' in regard to bare *Natural Right*, for a Man to relieve another in Extremity with his Goods, for which he himſelf hath not ſo much occaſion, be a Duty obliging only *imperfectly*, and not in the manner of a *Debt*, ſince it ariſes wholly from the Virtue of *Humanity*; yet there ſeems to be no reaſon why by the additional Force of a Civil Ordinance, it may not be turn'd into a ſtrict and perfect Obligation. And this *Selden* obſerves to have been done among the *Jews*: Who, upon a Man's refuſing to give ſuch Alms as was proper for him, could force him to it by an Action at Law. 'Tis no wonder therefore, that they ſhould forbid their Poor on any account to ſeize on the Goods of others, enjoining them to take only what private Perſons, or the publick Officers, or Stewards of Alms ſhould give them on their Petition. Whence the ſtealing of what was another's, tho' upon extreme Neceſſity, paſs'd in that State for Theft or Rapine. But now ſuppoſing under another Government the like good Proviſion is not made for Perſons in want, ſuppoſing likewiſe that the covetous Temper of Men of Subſtance cannot be prevail'd on to give relief, and that the needy Creature is not able, either by his Work or Service, or by making Sale of any thing that he poſſeſſes, to aſſiſt his preſent Neceſſity, muſt he therefore periſh with Famine? Or can any human Inſtitution bind me with ſuch a force, that in caſe another Man neglects his Duty towards me, I muſt rather die, than recede a little from the ordinary and the regular way of acting? We conceive therefore, that ſuch a Perſon doth not contract the Guilt of Theft, who happening, not through his own Fault, to be in extreme Want, either of neceſſary Food, or of Cloaths to preſerve him from the Violence of Weather[2], and cannot obtain them from the voluntary Gift of the Rich, either by urgent Intreaties, or by offering ſomewhat equivalent in Price, or by engaging to *work it out*, ſhall either forcibly or privily relieve himſelf out of their Abundance; eſpecially if he do it with full Intention to pay the Value of them, whenever his better Fortune gives him Ability. Some Men deny that ſuch a Caſe of *Neceſſity*, as we ſpeak of, can poſſibly happen. But what if a Man ſhould wander in a Foreign Land, unknown, friendleſs, and in want, ſpoil'd of all he had by Shipwreck, or by Robbers, or having loſt by ſome Caſualty whatever he was worth in his own Country; ſhould none be found willing either to relieve his Diſtreſs, or to hire his Service, and ſhould they rather (as it commonly happens) ſeeing him in a good Garb, ſuſpect him to beg without Reaſon, muſt the poor Creature ſtarve[3] in this miſerable Condition? It may be objected indeed, that in *Proverbs* vi. 30, 31. he is call'd a Thief, and pronounced obnoxious to the Penalty of Theft, who ſteals only to ſatisfy his Hunger. But whoever cloſely views and conſiders that Text, will find that the Thief there cenſur'd is neither in ſuch extreme *Neceſſity*, as we are now ſuppoſing, nor ſeems to have fallen into his needy Condition meerly by ill Fortune, without his own Idleneſs or Default: For the Context implies, that he had a Houſe and

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[a] Comp. *Lactant.* Inſtitut. *l.* 5. *c.* 17. *which ſome have vainly oppos'd to the Opinion here deliver'd.*

[3] Theſe ſort of Caſes have no Difficulty in them, for he treats of the Affirmative Precepts of the Law of Nature, which oblige not when there is no occaſion of practiſing them, and much more in a Caſe of Neceſſity, in which we can't practiſe them, but at the Expence of our own Preſervation. See Mr. *Titius, Obſerv.* CXLV.

[4] It is eaſy to ſee, that the Action here alledged is not innocent. This Officer might have made way for himſelf forcibly, by thruſting the Soldier aſide, but if he had hurt him with his Arms undeſignedly, he was excuſed.

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[a] Lib. 4. c. 4. [b] See *Epheſ.* iv. 28.

§. V. [1] *Aut qui divitiis ſoli incubuere repertis,*
Nec partem poſuere ſuis, &c. Virg. Æn. VI. 610, 611.

[2] If in a Caſe of Neceſſity a Man may innocently do ſome Wrong to another in his Perſon, ſo far as to put him in danger of his Life to ſave his own, by a much ſtronger Reaſon will he be permitted, in like Caſes, to take away or deſtroy the Goods of another, which are of much leſs Value than Life and Members. *Thomaſ. Inſtit. Juriſprud. Div. Lib.* 2. *Chap.* 2. §. 168. *Note* 1. and *Titius*'s Obſerv. CXLVII.

[3] Mr. *Hertius* has alledged an Example here, which is this; when the Magiſtrate, in a great Scarcity of Proviſions, conſpires with thoſe that will not open their Granaries, that they may ſell their Corn the dearer, or at leaſt he neglects to hinder Monopolies, and puniſh the barbarous Cruelty of thoſe, who to enrich themſelves, care not how many Men they bring to Beggary.

Goods ſufficient to make [4] ſevenfold Reſtitution; which he might have either ſold or pawn'd; a Chapman or Creditor being eaſily to be met with in Times of Plenty and Peace. For we have no Grounds to think, that the Fact there mention'd is ſuppos'd to be committed, either in the Time of War, or upon account of the extraordinary Price of Proviſions. Beſides, this Thief was faulty on another Account: For if he had not wherewithal to maintain himſelf, the Laws oblig'd him to ſell himſelf for a Slave [a].

VI. *Grotius* [b] propoſes another way of ſolving the Difficulty under our preſent Debate: He ſays, that the firſt Introducers of diſtinct *Proprieties* muſt be underſtood to have done it with this Exception and Limitation, that the Right of this Propriety excluding others from the Uſe of every Man's proper Goods ought then to expire and to give place, when another cannot poſſibly without making uſe of them, be ſuſtain'd or preſerv'd: And conſequently, that in ſuch a Caſe of *Neceſſity* a Thing poſſeſs'd in *peculiar*, when another Man's Life cannot be ſav'd without it, is turn'd again into *common*. Or, what amounts to the ſame Purpoſe, that when Men originally inſtituted ſeparate Proprieties, they agreed by mutual Covenant, to forbear uſing the particular Goods of each other, any farther than the Owner ſhould give leave: Yet ſo as to make it allowable in extreme Neceſſity, for a Man to ſeize on any Thing abſolutely requiſite for his Preſervation, as if it ſtill lay in its primitive Indifference and Community. For ſince in *written Laws*, that Interpretation is to be follow'd which recedes the leaſt from natural Equity, he preſumes this will hold more ſtrongly in regard to Cuſtoms, which obtain only by tacit Agreement. And ſurely it muſt be in the higheſt Degree equitable, that a Man be permitted to ſave his Life, by uſing any thing at hand, when all other Means fail him.

But this Expoſition lies open to ſeveral Exceptions and Difficulties: For if *Neceſſity* gives a Man a Right of ſeizing on the Goods of others, as if they lay in common, what hinders but that, if he have ſufficient Strength, [1] he may take them from the Owners, when they themſelves are at the ſame time pinch'd with the like *Neceſſity?* Yet this *Grotius* doth by no means allow. Again, *Grotius* requires *Reſtitution* to be made in theſe Caſes: But I am oblig'd to no ſuch Duty, when I take a Thing by virtue of my Right. Beſides, he forgot to mention how different the Caſe is, when a Man falls under ſuch Neceſſity by his own Sloth or Negligence, and when it comes on him without his Fault. Which Diſtinction being omitted, a Right ſeems to be given to idle Knaves, whoſe Vices have brought them into want, to ſeize forcibly for their own Uſe the Fruits of other Mens honeſt Labours; and ſo continuing their Poverty and their Lazineſs together, to put a Neceſſity on induſtrious Perſons of feeding ſuch uſeleſs Bellies for nothing. But all wiſe Men, as they allow ſuch as are innocently miſerable to deſerve Aſſiſtance and Relief; ſo they adviſe us to pack off mendicant Drones and Lubbards, with the old Anſwer that the Ant gave the Graſhopper in the Fable [c]. Since then it is lawful for every Proprietor to diſtinguiſh between ſuch as are indigent out of Misfortune, and ſuch as are reduc'd to the ſame Condition by their own Demerit and Neglect; 'tis plain, that he has ſuch a Right over his own Goods, as ſhall in ſome meaſure prevail even againſt a Perſon in extreme Neceſſity: So far at leaſt as that he ſhall have the Privilege of judging, whether the Man be an Object worthy of his Relief, or not; that it may be in his Power to oblige and win a neceſſitous Perſon by his ſeaſonable Succours: For nothing raiſes the Value of a Kindneſs ſo much as its being done for the Removal of an extreme Diſtreſs. But all this Merit and Obligation is cut off, when we give another only what he might otherwiſe, as his own Right and Due, violently take from us.

We think therefore, that this Point of Diſpute will be more clearly determin'd by the Principles and the Method which we have laid down; that is, by ſaying, in ſhort, that the wealthy Perſon is bound to relieve him who innocently wants, by an imperfect Obligation; to the performing of which though regularly no Man ought to be compell'd by Violence, yet the Force of *extreme Neceſſity* is ſo great, as to make theſe Things recoverable by the ſame Means as thoſe which are truly and rightfully due: That is, by making complaint [2] to the Magiſtrate, or when the

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[a] See *Levit.* xxv. 39. *Selden* L. 6. c. 7. Nothing can be drawn to the contrary from *Prov.* xxx. 9. Other Authors give this Example of extreme Neceſſity: *A Man being in an unknown Country, is attack'd by an unjuſt Aſſailant, and cannot otherwiſe ſave himſelf than by ſpeedy Flight. He finds ready at hand a Horſe belonging to ſome Perſon of the Country, but which he ſees no means of reſtoring, as well becauſe he is ignorant of the Owner, as becauſe he may be oblig'd to ride far to eſcape the Danger.*

[b] L. 2. c. 2. ſ. 6.

[c] And thus in *Plutarch* (Apophthegm.) when a Captain of Coaſting-robbers made an Inroad into the Territories of *Lacedemon*, and being taken, urg'd in his own Defence, *That he was neither able of himſelf to pay his Companions, nor could prevail with thoſe that had Money to ſupply him; and therefore he ventur'd to take it by Force. Cleomenes* call'd this Proceeding, σύντομος ἡ πονηρία, *A very compendious Wickedneſs.* Add. *Pandulf.* Collenut. rer. *Neapolit.* *l.* 5. *p.* 373.

[4] *Grotius* in his Notes upon this Text affirms that it ought to be render'd, *If he be taken in the Fact, he ſhall reſtore ſevenfold. i.e.* He ſhall not be oblig'd to any Thing but Reſtitution, according to the Law preſcribed, which ſuppoſes always, that the Thief hath ſomething, ſince he muſt reſtore out of it what he has taken. See *Exod.* xxii.

§. VI. [1] I do not perceive how this can follow from *Grotius*'s Hypotheſis. It is certain, that when a Proprietor can't ſpare the Bread, for Example, or Corn, which he hath for his preſent Uſe himſelf, 'tis not permitted to any other, tho' he be in ever ſo great Neceſſity, to take them away from him by Force. But yet the Maxim is no leſs true, which ſuppoſes, that in theſe laſt Caſes all Things become common, as they were at firſt; for Community does not at all hinder, but that all which every one is poſſeſſed of for his own Uſe, ſhould not belong to him only who is in actual Poſſeſſion of it, altho' the Property is his, and we can't take any thing from him but when he hath an Overplus, and we can't otherwiſe find any Means to ſupply our Wants. See what is ſaid *Lib.* 4. *Chap.* 4. *Note* 2. So that our Author has done well to depend upon other Reaſons, which he alledges afterward, and which are ſufficient for his Purpoſe.

[2] This is the only Refuge that they have, who believe that the greateſt Neceſſity cannot authorize any Man to take another Man's Goods of himſelf; but as Mr. *Thomaſius* has obſerv'd, *Inſtit. Juriſp. Div. Lib.* 2. *Chap.* 2. §. 171. they acknowledge tacitly, that he that is reduced to that troubleſome Neceſſity, has a full Right to require what he wants; for only thoſe Things which are due by virtue of a compleat Obligation, can be the Subject of the Magiſtrate's Deciſion.

Urgency of the Diſtreſs cannot allow time for ſuch an Expedient, than by ſeizing what is ready at hand, either in a ſecret or in an open manner. Now the chief reaſon why we affirm thoſe things which proceed purely from the Virtue of *Humanity*, to be owing only by an imperfect Right, is that Men may be allow'd both an occaſion of ſhewing their voluntary Propenſion to the Diſcharge of their Duty, and likewiſe of endearing others to them by their voluntary Benefits. But now if a Man ſhould deſpiſe theſe Conſiderations, muſt a poor neceſſitous Creature be famiſh'd becauſe he cannot prevail on the unmerciful Miſer? Certainly ſuch an inflexible Churl ought rather to be depriv'd of his Gift and of his Merit together; ſince he had not Heart enough to venture on an Act of common Humanity.

From what has been hitherto offer'd, it is eaſy to gather the Reaſonableneſs of thoſe Exceptions which *Grotius* ſubjoins to his and our main Aſſertion. For ſince nothing but inevitable Neceſſity can juſtify the taking by force what is owing only upon an *imperfect Obligation*, in the firſt place it is clear, that all fairer Courſes are firſt to be tried, as complaining to the Magiſtrate, begging and intreating, promiſing Reſtitution, if we are ever able, or offering to diſcharge the Debt by equivalent Labour and Service. *Secondly*, This Licenſe can by no means take place, when the Owner of the Thing which we want, lies under as great a Neceſſity as we ourſelves: On the contrary, we ſuppoſe the Owner to *abound*. This Caution or Exception may be extended farther, and we may ſay, that a diſtreſs'd Perſon cannot fairly take a thing from the Owner without his Conſent, if it be only manifeſt, that upon the Loſs of that thing the Owner will hereafter fall into the like indigent Condition. For in theſe Caſes 'tis fit *Charity ſhould begin at home*. That Rule of the *Civil Law* which *Grotius* applies to the preſent Buſineſs, that *when the Conſiderations on both ſides are equal, the Caſe of the preſent Occupant* [3] *is to be preferr'd:* doth not ſeem ſo exactly to hit the Purpoſe. For that Maxim only imports, that Judgment ought to be given for the *Poſſeſſor*, whilſt the *Claimant*'s Title and his are alike diſputable. But in the Matter before us, the Poſſeſſor's Right and Title are granted, and the only Queſtion is, whether I am oblig'd by the bare Law of Humanity, to periſh myſelf for the ſake of preſerving another? which is a Paradox that no Man will pretend to maintain. The other Sentence which *Grotius* applies out of *Curtius* [a], is much more proper and more agreeable to the Point; *Melior eſt cauſa ſuum non tradentis, quàm poſcentis alienum. He who refuſes to deliver what is his own, has a fairer Cauſe than he who demands what is another Man's.*

Thirdly, We lay it down as an indiſpenſible Condition, that Reſtitution is to be made if poſſible; eſpecially if the Thing taken were of great Value, and ſuch as the Owner could not well part with without ſome Conſideration. But if the Thing were ſmall and inconſiderable, and the Loſs ſo light, that the Owner's Fortune could not feel it, 'twill be ſufficient, when opportunity ſerves, to ſhew that we ſhould not have been wanting in Gratitude, if his Greedineſs would have given us leave to be obliged to him. As for *Grotius*'s requiring [4]Reſtitution, it ſeems not to ſuit with his Hypotheſis. For if upon a Caſe of Neceſſity the Right of *Primitive Communion* returns, ſo as to give a Man a juſt Title to the Goods of others, then Reſtitution can on no account be deſir'd or demanded. But ſince this is neceſſarily to be made, it appears that the Right of the Owner doth not expire thro' the Neceſſity of the Petitioner; but that he ought voluntarily to have given Relief, either *gratis*, or upon receipt of the Price of the Thing, or any other Compenſation. Which Duty when he neglects to perform, then indeed the Neceſſity of the diſtreſs'd Perſon gives him a Right of taking the Thing by Force, but ſtill with the ſame *Burden*, or under the ſame Condition which the Owner might have impos'd on him; that is, either to refund the Value hereafter, or at leaſt to make a grateful Acknowledgment of the Benefit.

VII. If we look on other Authors, we ſhall find them much divided about this difficult Point. The fourth Chapter of the fifth Book of the *Decretals* [b], enjoining *Penance* to *Thieves who ſteal out of Neceſſity*, is by the *Gloſs* expounded of *little and indifferent Neceſſity*, not of ſuch as is extreme and inſupportable. *Covarruvias* [c] delivers his Opinion almoſt to the ſame purpoſe as *Grotius*: *The Reaſon* (ſays he) *why a Man in extreme Neceſſity may, without incurring the Guilt of Theft or Rapine, forcibly take the Goods of others for his preſent Relief, is, becauſe this Condition renders all things common. For it is the Ordinance and Inſtitution of Nature itſelf, that inferior things ſhould be deſign'd and directed to ſerve the Neceſſities of Men. Wherefore the Diviſion of Goods afterwards introduc'd into the World, doth not derogate from that Precept of natural Reaſon, which*

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[a] L. 7. c. 1.

[b] *Cap. Si quis*, Lib. 5. tit. 18. *De furtis.*

[c] P. 2. ſ. 1. n. 3.

[3] But this is only an Accommodation which *Grotius* makes of a Maxim of the *Roman* Law, *In pari cauſâ poſſeſſor potior haberi debet.* Digeſt. Lib. 50. Tit. 17. *De diverſis Regulis Juris*, Leg. 128.

[4] Mr. *Van der Muelen* (in his Commentary, *Tom. 2. p.* 88.) affirms, that *Grotius* pretends to ſpeak of the *Right of Uſage*, and not of the *Right of Property*, which, according to him, are two diſtinct things; ſo that a Man may have a Right to uſe a Thing, which for all that may properly belong to another. But this doth not take off the Difficulty; for the Queſtion is to know upon what the *Right of Uſage* is founded? *Grotius* delivers himſelf fully (*num.* 2.) "That the antient and original "Right which every Man hath to the uſe of all Things, revives in the Caſe of extreme Neceſſity, as if they remained in com"mon; for ſo long as a Community of Goods continued, no Man was obliged to reſtore what he had taken for his Uſe, be"cauſe nothing belonged to one more than to another, and every Man had an equal Right to uſe every thing; inſomuch, "that if a Man were ſeized of a greater quantity of Things than he had an abſolute need of, by himſelf, every other Man had "a full Right to take from him by force whatever was ſuperfluous, and neceſſary for his Support in extreme want." On the contrary, *Grotius* alſo openly rejects the Opinion of them who eſtabliſh the Right of taking the Goods of another in the like Caſe, upon this Foundation, "That every Proprietor is obliged, by the Rules of Charity, to impart to ſuch as are in Neceſſity." (*num.* 4.) So that I ſee not how the Hypotheſis of that great Man can be made good, and preſerve itſelf from falling in with the Principles of our Author, who has produced a Solution more natural and coherent.

ſuggeſts, that the extreme Wants of Mankind may be in any manner remov'd by the uſe of temporal Poſſeſſions. There is alledg'd a Paſſage of St. *Ambroſe* from *Gratian*, Decret. c. *Sicut*. ii. §. 4. diſt. 47. *It is the Bread of the Hungry which you detain: It is the Raiment of the Naked which you lock up. Pereſius*[a], arguing on the ſame ſide alledges, that in this Caſe a Man is compell'd to the Action by a Force which he can't reſiſt; and then, that the Owner's Conſent may be preſum'd on, becauſe Humanity obliges him to ſuccour thoſe who are in Diſtreſs. Beſides, he obſerves, that the neceſſitous Perſon doth not properly take the Goods which were another Man's, but which lay in common: And yet he is bound, when he has obtain'd deliverance from his Want, to make fair Reſtitution. *Anton. Matthæus*[b] is of Opinion that a Diſtinction ſhould be made in this Caſe between the *Crime* and the *Puniſhment*; the Crime of the Theft, he ſays, is not taken off even by extreme Penury, but he would have the Puniſhment either wholly remitted, or conſiderably mitigated and abated. Now that the Crime of Theft is committed even under theſe Circumſtances, he endeavours to prove from the Definition of *Theft* in the Civil Law, which he makes to reach this Action: *Theft*, the Emperor *Juſtinian* tells us, *is a fraudulent ſeizing on the Goods of others, for the ſake of making a Gain of them.* But we may fairly plead (in Oppoſition to *Matthæus*) that neither of theſe Imputations can fall on the Fact which we defend. For how can this be term'd a *fraudulent ſeizing on another Man's Goods*, when both the Owner lay under an imperfect Obligation of giving the Thing deſir'd, and the other Perſon had a Right, by Virtue of his preſent Condition, to poſſeſs himſelf of it by the moſt convenient means he could? Nor can he well be ſaid to take a thing of another Man's for the ſake of making a Gain of it, who deſigns it purely for the Relief of his extreme Diſtreſs, with full Wiſhes and Reſolutions to reſtore, or to repay it as ſoon as poſſible. That part of his Argument is meer Bravado, where he tells us, that no Violence can compel a wiſe and a good Man to defile himſelf wilfully with any uncomely Action: And that in theſe Caſes every one ſhould, as *Tully*[c] [1] adviſes, *rather patiently endure his own Inconvenience, than treſpaſs on the Conveniences of others.* Now beſides that 'tis an eaſy matter to talk Philoſophically, whilſt we do not ourſelves feel the *Hardſhip* any farther than in Speculation[d]; the Fact under Debate can, according to our way of determining it, include no other Turpitude or Indecency, than ſuch as Perſons of Breeding and Quality are guilty of, when the ſeverity of Famine compels them to feed on the baſeſt and moſt filthy Meats. And then the Rule about Conveniences and Inconveniences is beſide the Queſtion, which only ſuppoſes ſome little Matter to be taken from a wealthy Perſon, who doth not feel the Loſs, to keep another from periſhing by the Extremities of Hunger or of Weather. The ſame Author obſerves, on [2] the *Lex Rhodia de jactu*, that tho' for the publick Benefit, in a time of Scarcity, every Man is oblig'd to bring what Corn he has by him into the common Market, yet People are not hereupon impower'd to carry off what they pleaſe, becauſe they are in want, and others abound; but the whole Buſineſs is to be left to the Care and to the Direction of the Magiſtrate. But muſt the Poor therefore be content to ſtarve, when the Magiſtrates neglect to make due Proviſion for their Suſtenance?

As to what ſome urge, that there doth not appear any *Diſpenſation of the Law in this Matter*, 'tis an Objection that may be eaſily ſpar'd. For ſufficient Reaſons have been given why we may well preſume, that the Law which forbids Theft is not to be extended to the preſent Caſe.

VIII. *Laſtly*, The Danger and Neceſſity of our own Goods ſeems to allow us the Privilege of deſtroying or of invading thoſe which belong to other Men: Yet with theſe Proviſo's, that the Danger did not happen thro' our Fault; that we cannot find a more convenient way of [1] removing it; that we do not ruin a more valuable Thing of our Neighbour's, for ſaving one of our own, inferior in Price and Conſideration; that, in caſe the other Thing had not been loſt but for our ſake, we pay the Price of it; and laſtly, that if what belong'd to our Neighbour muſt have otherwiſe been deſtroy'd, together with ours, if we had not preſerv'd [2] the latter by making away with the former, that then we conſent to bear a part in the Damage. On this Foundation is grounded the Equity of the *Rhodian* Law *de jactu*, by [3] which it was provided, that *if for the lightening of a Ship the Men were compell'd to throw any Goods overboard, the Loſs ſhould be made up by general Contribution, ſince it happen'd upon account of the general Safety*[e]. Thus too if my Veſſel be driven upon the Cables, or the Nets belonging to another, I have Liberty to [4] cut them in Pieces, if I cannot otherwiſe get clear. And if my own Neglect did not bring me into that Trouble, I am to anſwer but for half the Coſt. Thus in a Fire, I may pull down my Neighbour's Houſe for the Security of mine, if I am willing to make good all that he ſuffers by the Miſchief. For tho' in [5] one of the *Roman* Conſtitutions[a], it is determin'd, that in caſe the Fire had actually reach'd to the Houſe that was pull'd down, the Perſon who procur'd it ſhall not be reſponſible; yet the common Opinion inclines more to Equity[b], which aſſerts, that upon ſuch Demoliſhment of one Houſe for the Security of many, the Damage ſhall be repair'd by thoſe neighbouring Inhabitants who thus eſcap'd the Danger; though the Houſe which they in this manner ruin hath not been touch'd by the Flames. For it would be indeed unreaſonably hard, that when [6] I have ſav'd my own Concerns by deſtroying thoſe of another Man, the whole Loſs ſhould be thrown upon him, whilſt the whole Advantage lights on me. From the ſame Rules and Principles the *Roman* Lawyers deduce moſt of their Doctrine concerning that kind of *Damage* which they call *Damnum Infectum*[c] [7]. Thus, for Example, if my next Neighbour has a ruinous Houſe, very likely to tumble to the Prejudice of my Effects, he ſhall be oblig'd to give me Security for anſwering all Damages that I ſuſtain; and if he refuſe this Condition, upon applying myſelf to the *Prætor*, I obtain [8] an Edict, impowering me to enter the ruinous Place. On the ſame Account they aſſert, that [9] in caſe a Man has a Field ſurrounded in ſuch a manner on all ſides, by the Lands of others, that he cannot get to it without ſeemingly committing a Treſpaſs, the Borderers ſhall be compell'd by the Judge to grant him Paſſage, at leaſt upon the offering of a reaſonable Conſideration.

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[a] Ad. *Tit. Cod. De furtis*, ſ. 3. [b] Ad. l. 47. D. tit. 1. ſ. 7. [c] Offic. l. 3. c. 5. [d] Vid. *Oppian* Halieut. l. 3. v. 197. [e] Vid. *Tot. titul.* together with the Commentators on that and on the Naval Laws.

§. VII. [1] *Tully*'s Words are; *Suum cuique incommodum ferendum eſt potius, quam de alterius commodis detrahendum.*

[2] The Digeſts have alſo another Law, commanding, that if Proviſions fail at Sea, every one ſhould bring out their Store and leave it in common, *Eò magis quòd, ſi quando ea* [cibaria] *defecerint in navigatione, quod quiſque haberet, in commune conferret.* Lib. 14. Tit. 2. *De Lege Rhodiâ de Jactu.* Leg. 2. §. 2.

§. VIII. [1] We muſt take care that the Way appear ſure. *Titius*'s Obſerv. 148.

[2] We may add, That the Proprietor not foreſeeing, or before he foreſaw that Neceſſity, did not conſent to the Loſs of his Goods.

[3] The Words of the Digeſts are, *Lege Rhodiâ cavetur, Ut ſi levandæ navis gratiâ jactus mercium factus eſt, omnium contributione ſarciatur, quod pro omnibus datum eſt*, Lib. 14. Tit. 2. *De Lege Rhodia de jactu*, Leg. 1. See the Treatiſes of divers Authors, *De Legibus Nauticis*, as alſo Mr. *Daumat*'s Civil Laws in their natural Order, *Part* 1. *Lib.* 2. *Tit.* 9. *Sect.* 2. §. 6, &c.

[4] *Item Labeo ſcribit* (ſay the Digeſts) *ſi cum vi ventorum navis impulſa eſſet in funes Anchorarum alterius, & nautæ funes præcidiſſent, ſi nullo alio modo, niſi præciſis funibus explicare ſe potuit, nullam actionem dandam. Idemque Labeo & Proculus, & circa Retia Piſcatorum, in quæ navis inciderat, æſtimarunt. Planè ſi culpâ nautarum id factum eſſet, Lege Aquilia agendum.* Lib. 9. Tit. 2. *Ad Leg. Aquil.* L. 29. §. 3. See Mr. *Noodt*'s excellent Treatiſe, *Ad Leg. Aquil.* Chap. 18. *in fin.* and Chap. 29.

Grotius [d] makes this farther Deduction from the Doctrines we have been now laying down, that it is lawful for him who wages a *juſt* War to poſſeſs himſelf of a Place ſeated in a Country that is at Peace with him; if there be certain (and not only imaginary) Danger, that the Enemy will otherwiſe ſurprize it, and from thence annoy him with irreparable Miſchief: Provided he take nothing but what is neceſſary to his own Security, as the bare *Cuſtody* of the Place, leaving both the Juriſdiction and the Profits to the right Owner; and fully purpoſing to reſtore the *Cuſtody* too, ſo ſoon as the Neceſſity that brought him thither ſhall ceaſe. To theſe Conditions it ſhould be added, that the Lord of the Place is firſt to have frequent Notice given him, and to be deſir'd that he would himſelf ſecure and defend the Place, upon a Promiſe from the other Prince to defray the Charges; or that he would demoliſh and render it untenable, if he thinks that the moſt proper Method. And another equitable Caution is, that in caſe the new Poſſeſſor has expended any Sum in raiſing Works and Fortifications, the proper Lord is not oblig'd to refund, unleſs he intended to have built the ſame Defences himſelf; inaſmuch as the other did not make it his Aim purely to improve the Place, but chiefly to ſecure his own Territories. *Bœcler*, in his *Notes* on this Paſſage of *Grotius*, well obſerves, that it is apparent from the Uſage of all Ages and of all Nations, that no one thinks himſelf oblig'd to allow another thus to ſeize on any Fort or Place of his[10], if he be able to hinder his Attempt. And that therefore if the other do actually take Poſſeſſion, the Fact is ſuch as may admit of eaſy Pardon, but not ſuch as can be fairly and ſtrictly defended on the Grounds of *Natural Law*. To which Purpoſe we may conſider farther, that 'tis very probable the Enemy may hence entertain a Suſpicion, that the Lord of the Place is in ſecret Confederacy againſt him; and ſo the whole Burthen of the War may be eaſily devolv'd on the third Party. And tho' the Enemy be well ſatisfied that the Place was ſeiz'd without the Leave or Concurrence of the Lord, yet if he reſolve and endeavour to diſpoſſeſs thoſe who hold it, the innocent Prince cannot but feel ſome Part of the Calamities of Arms; which if he keeps off by any Means, he cannot juſtly fall under Reprehenſion. And thus too in a leſſer Caſe, it can never be adviſable for a Man to admit more Strangers into his Houſe, than he can conveniently get rid of when he pleaſes: Since otherwiſe he is under a Neceſſity of being at their Diſpoſal; and muſt perhaps be content to walk out of Doors, and to leave all to his new Maſters[11].

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[a] L. 7. ſ. 4. *D. quod vi aut clam.*

[b] Add. L. 49. ſ. 1. *D. ad L. Aquil.*

[c] *De Damno Infecto*. vid. *Digeſt.* XXXIX. tit. 11.

[d] L. 2. c. 2. ſ. 10.

[5] The Words of the *Digeſts* are, *Si perveniſſet* [*ignis, eo uſque*] *abſolvi eum oportere* ——— *quoniam nullam injuriam aut damnum dare videtur, æquè perituris ædibus.* Lib. 43. Tit. 24. *Quod vi aut clam*, Leg. 7. §. 4. See *Lib.* 9. *Tit.* 2. *Ad Leg. Aquil.* Leg. 49. §. 1. and what Mr. *Titius* ſays in his Obſervations *in Compend. Jur. Lauterbach.* Obſerv. 420. as alſo Mr. *Noodt ad Leg. Aquil.* Chap. 19.

[6] Mr. *Titius* hath reaſon to ſay, that theſe Rules are good in Speculation, but the Application is very hard, and almoſt impracticable in Civil Societies. Indeed, we can't for the moſt part be aſſured, that he who hath beat down his Neighbour's Houſe, had reaſon to think that he could ſave his own that way, and that he was obliged to it by Neceſſity; for without this how can we determine, whether he ought to make good the Damage? Moreover, Burnings almoſt always happen by ſome Fault, or at leaſt by Imprudence and Negligence, and very often we know not whom to charge them on, or how they began; and if the Author be ſometimes diſcover'd, 'tis found uſually that he is unable to make up the Damages of ſuch as have ſuffer'd. Laſtly, When the Fire is come by meer Chance, we can't exactly tell how the neighbouring Houſes can be preſerved from the Fire by the demoliſhing of one already beat down, and ſo 'tis impoſſible to ſtate exactly who are bound to make good the Damage, and how much each ſhall contribute. Experience alſo proves, that upon theſe ſad Occaſions, they who received the Damage are conſtrained to bear it themſelves, unleſs the way of Reparation be fixed beforehand by ſome Agreement, or Order of State, or the Bounty of others affords them a voluntary Relief. The Order therefore eſtabliſh'd in ſome Places, that the Damages that come by ſuch Accidents ſhould be ſatisfied by the Publick, and ſo every one is obliged to contribute to the Relief of the Miſerable, is highly commendable, *Obſerv. on Puſendorf* CL. and on *Lauterbach* CCCCXX. It is alſo a wiſe Eſtabliſhment, and will be of excellent Uſe, if it be well managed, which has been lately made in *Pruſſia*, where all ſuch as have Houſes are obliged to pay ſome ſmall Annual Rent to the Directors of the Fire-Cheſt, where there is a Bank made up of ſuch Contributions, which are deſign'd to make good the Damages of ſuch Owners of Houſes as are burnt, according to the Valuation made of them, and according to which they pay their Rent.

[7] See Mr. *Daumat*'s Civil Laws in their Natural Order, *Part* I. *Lib.* 2. *Tit.* 8. *Sect.* 3.

[8] So the Digeſts ſay, *Si intra diem à Prætore conſtituendum non caveatur, in poſſeſſionem ejus rei mittendus eſt. De Damno Infecto, &c.* Leg. 4. §. 1. See *Titius*'s Obſervat. on *Lauterbach.* 989.

[9] They build upon this Law, to which I have elſewhere referred, *Lib.* 3. *Chap.* 3. §. 7. *Si quis ſepulchrum habeat, viam autem ad ſepulchrum non habeat, & à vicino ire prohibeatur* ——— *Præſes* ——— *compellere debet, juſto pretio ei iter præſtare.* Digeſt. Lib. 11. Tit. 7. *De Religioſis, &c.* Leg. 12. *init.*

[10] This has place no leſs, when the Owner of the Place has no Power to defend himſelf; for if he can, and doth not, 'tis the ſame as if he gave Paſſage to his Neighbour's Enemy; ſo that this laſt may look upon him himſelf as a new Enemy.

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[11] There is not the leaſt Difficulty in the Example alledged by *Grotius*, in the ſame Place, concerning them who having need of a Veſſel to ſave themſelves, or defend themſelves, take the firſt they meet, and uſe it upon the Conditions required. See *Xenophon de Expedit. Cyri, Lib.* 5. *Chap.* 1. and Mr. *Hertius*'s Diſcourſe *de Colliſione Legum*, *Sect.* II. §. 14. in *Tome* I. of his *Opuſc.* and *Comment.*

OF THE
LAW of NATURE
AND
NATIONS.

BOOK III.

CHAP. I.

That no Man be hurt; and if a DAMAGE *be done to any Man, that* REPARATION *be made.*

The CONTENTS of every Paragraph of the firſt Chapter.

- I. *That no Man ought to do any Damage to another, or his Concerns.*
- II. *That if any be done, it ought to be repaired.*
- III. *What a Damage or Hurt is.*
- IV. *Who are they that do an Hurt.*
- V. *How ſuch as hurt others are obliged.*
- VI. *How many ways a Damage may be done.*
- VII. *An Example of Reparation in a Murderer.*
- VIII. *In one that has maimed another.*
- IX. *In an Adulterer.*
- X. *In a Raviſher.*
- XI. *In a Thief.*

WHAT Duties the Law of Nature injoyns a Man to exerciſe towards himſelf; and what Indulgence, what Licenſe, or Favour it allows him in the Preſervation of his own Perſon or Goods, we have hitherto endeavour'd to explain (*). We may now paſs on to thoſe other Natural Precepts which contain the Duties we are to practiſe towards other Men. Theſe we have formerly divided into *Abſolute*, and *Hypothetical* or *Conditional*. In the Series of *abſolute* Duties, or ſuch as oblige all Men antecedently to any human [1] Inſtitution, this ſeems with Juſtice to challenge the firſt and nobleſt Place, *that no Man hurt another*[2]; *and that in caſe of any hurt or damage done by him, he fail not to make Reparation* [3]. For this Duty is not only the wideſt of all in its Extent, comprehending *all Men*, on the bare account of their being *Men*; but it is at the ſame time the moſt eaſy of all to be perform'd, conſiſting for the moſt part purely in a negative Abſtinence from acting; except that its Aſſiſtance

(*) *B.* II. *C.* 3.

Mr. BARBEYRAC'*s* *NOTES on* Chap. I. §. 1.

§. [1]. Not that they are always independent upon every human Act or Eſtabliſhment. Our Author intimates the contrary clearly at the end of this Paragraph, in numbring up the Things to which this Maxim extends. No Man can be ignorant that we ought not to neglect ſuch Duties of Humanity, as concern Bargaining, as for Example, to refuſe to ſell any Man what he ſtands in need of. But the Reaſon why he calls thoſe Duties, which he treats of in this and the following Chapter, abſolute, is becauſe they are the natural Conſequence of the univerſal and original Conſtitution of Mankind, and ought to be paid to all Men, though they have no other Relation to us, but a bare Similitude of Nature. Whereas conditional Duties always ſuppoſe ſome human Act, Agreement, or other Accident, and oblige only under certain Circumſtances, and with relation to certain Perſons.

[2] *Nefas eſt nocère Patriæ*, &c. It is a Crime to injure one's Country, and conſequently a Citizen, who is a Member of it. Then we muſt injure no Man, becauſe every one is our Fellow-citizen of the great City of the World. Do the Hands endeavour to hurt the Feet, or Eyes the Hands? As therefore the Members of the Body keep a fair Correſpondence with one another for the Preſervation of the whole: So Men ought to deal friendly one with another, becauſe they are born for Society, which can't be preſerved, unleſs all the Parts, of which it is compounded, love one another, and endeavour mutually their own Preſervation. *Sen. de Irâ*, l. 2. c. 31. Beſides this Paſſage, which our Author refers to a little lower, pleaſe to read, *Epiſt.* 95. *p.* 464, &c. *Edit. Lugd. Bat.* 1672. and *Epiſt.* 103.

[3] All Duties which relate to Society may be compriz'd under theſe three generals: 1. To do Evil to no Man. 2. To hinder others from doing the Miſchief which they threaten to do. 3. To do all the good we can ſincerely. Theſe three Principles yield an infinite Number of particular Conſequences, according to the difference of Subjects. Our Author ſpeaks here of the firſt, and of the other two together in Chap. III. of this Book. *Titius Obſ.* 151.

is ſometimes neceſſary in reſtraining the Luſts and Paſſions, when they fight and ſtruggle againſt Reaſon; amongſt which rebellious Deſires, that boundleſs Regard which we ſometimes ſhew to our own private Advantage, ſeems to be the Principal, and the Ringleader. Beſides, it is the moſt neceſſary of human Duties, inaſmuch as a Life of Society cannot poſſibly be maintain'd without it. For ſuppoſe a Man to do me no good, and not ſo much as to tranſact with me in the common Offices of Life, yet provided he do me no harm, I can live with him under ſome tolerable Comfort and Quiet. And indeed this is all we deſire from the greateſt Part of Mankind; a mutual Intercourſe of good Turns lying only between a few. But what Poſſibility is there of my living at Peace with him who hurts and injures me; ſince Nature has implanted in every Man's Breaſt ſo tender a Concern for himſelf, and for what he poſſeſſes, that he cannot but apply all Means to reſiſt and repel him, who in either reſpect attempts to wrong him[a]? Now as the Strength of this Precept is a Guard and a Fence to thoſe Things which we receive from the immediate Hand of Nature, as our Life, our Bodies, our Members, our Chaſtity, our Reputation, and our Liberty; engaging Men to keep them ſacred and inviolable: So muſt it be ſuppoſed to ſpread itſelf thro' all thoſe Compacts or Inſtitutions, by which the Propriety of any Thing is made over to us; ſince without it they could obtain no Force or Effect. Whatever therefore we can on any good Title call our own, Men are by this Precept forbidden to take away, to endamage, or to impair, or any way to withdraw it from our Uſe, in whole or in part. The ſame Duty is virtually contain'd in many affirmative Commands, which enjoining ſome one poſitive Practice, remove and reſtrain the contrary Enormities. How plainly the Neceſſity of this Law inſinuates itſelf into the Minds of all Men, let *Seneca*'s Obſervation inform us. *Ask a common Rogue* (ſays he) *whether he had not rather obtain by honeſt Means, what he now gets by Theft and Villany? He who makes it his Gain to aſſault and pillage all he meets, would be more willing to find the Money by Chance, than to take it by Violence. There is no one who would not be better pleas'd to enjoy the Fruits of his Wickedneſs without the Practice of it*[4][b]. *Tully* ſays excellently to the ſame purpoſe, that *for a Man to rob and injure another to promote his own Advantage, is more againſt Nature than Death, or Poverty, or Pain*[c].

II. Farther, it follows from this Precept, that *in caſe a Man be hurt or injur'd by another, in any reſpect, the Perſon who ſtands juſtly charg'd as Author of the Wrong, ought, as far as it lies in his Power, to make Reparation*[1]. For otherwiſe it would have been a vain Command not to harm another, if the Party who actually ſuffers ſuch a Harm, muſt be content to put it up without farther Notice, and leave the Offender to enjoy in Peace the Fruit of his Injury, never obliging him to refund, or to reſtore. Furthermore, were not Reſtitution made a neceſſary Duty, neither would wicked Men ever abſtain from wronging others; nor would thoſe who have been injured, find it an eaſy Task to compoſe their Mind in ſuch a manner, as to maintain Peace with the other Party, ſo long as they have obtain'd no Recompence or Conſideration for their Sufferings.

III. The Word *Damage*[1] which ſeems properly to refer only to Goods and Poſſeſſions, we here uſe in an extended Senſe, ſo as to make it take in likewiſe all manner of Harm that may be offer'd to a Man's Body, his Chaſtity, or his good Name. In this Latitude then, it implies all Hurt, Spoil, or Diminution of whatſoever is already actually our own; all Interception of what by a perfect and abſolute Right we ought to receive, whether ſuch Right be the original Gift of Nature, or whether it be allow'd us by human Inſtitution and Law. And laſtly, all Omiſſion or Denial of any Duty, or Performance, which others by a perfect Obligation ſtand bound to pay us[2]. We ſay by a *perfect Obligation*; becauſe if the *Obligation* in the other Party be only *imperfect*, and we conſequently have only an *imperfect Right*, the with-holding of any ſuch Due cannot really be eſteem'd a Damage.

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[a] *Seneca* of Anger, *B.* II. *C.* 31. It is a Sin to injure one's Country; and therefore to injure a Fellow Subject, inaſmuch as he is a Member of our Country. The Parts ought to be held ſacred, if the whole deſerve our Veneration. And hence likewiſe the Perſon of every Man ought to be inviolable, becauſe every Man is our Fellow Citizen in the great and univerſal Society. What a Diſtraction would ariſe, ſhould the Hand practiſe Miſchief againſt the Feet, or the Eyes prove treacherous to the Hands? As all the Members conſpire in an exact Union and Agreement, becauſe the Safety of each in particular is the Intereſt of the whole Body; ſo particular Men ought to ſpare each other, becauſe we are all born for Society. And no Society can remain ſecure, without a firm Love and Concord amongſt the Members of which it is compoſed.

[4] Nay, *Cicero* further ſays, That there is no Man, who had not rather ſatisfy his Deſires without incurring any Guilt, though he were ſure to go unpuniſhed. For, ſays he, *Lib.* 3. *de fin. c.* 11. who is there, or ever was of that covetous Temper, or extravagant Deſires, who had not much rather obtain that which he is reſolved to get by ſome wicked Means, without making uſe of them, though he were aſſured of Impunity?

[b] *Sen. de Beneſ.* l. 4. c. 17.

[c] *De Offic.* l. 3. c. 5.

Mr. Barbeyrac's *NOTES on* §. II.

[1] That a Man be obliged to make Satisfaction for any Wrong done to another, it is neceſſary, 1. That the Injury done be forbidden by ſome Law, either Natural or Poſitive. 2. That it was done through our Fault, and that the Will did either directly or indirectly concur in that Action, by which the Injury is done. 3. Laſtly, That he who has ſuffered the Damage, is no way conſenting to it. For if he give his Conſent, either directly or indirectly, though with ſome Reſtrictions, the Prohibition of the Law ceaſes, and conſequently ſo does the Obligation to Reſtitution. Our Author ought to have taken notice of theſe Three Conditions diſtinctly, becauſe they are the Foundation and Key of all the Chapter.

Mr. Barbeyrac's *NOTES on* §. II.

[1] In the *Roman* Law the ordinary Signification of *Damage* is this, ſome Hurt done to our Goods or Poſſeſſions, produced immediately by the Perſon, who is the Author of it. This Suppoſition is founded entirely upon the *Aquilian* Law, and ſerves only to diſtinguiſh the different Sorts of Actions, which are brought to Juſtice by their ſeveral Circumſtances. *Titius Obſ.* 155. *Juſtin. Inſt. & Digeſt.* l. 39. tit. 2. leg. 3.

[2] From hence it appears by this firſt Law of Natural Right, *viz.* That we ought to do evil to no Man, that all ſorts of Actions in general are forbidden, by which any Wrong or Injury is done to our Neighbour in reſpect to all Things to which he has an undoubted Right, *viz.* Murder, Wounds, Blows, evil Words, Affronts, Calumnies, Rapine, Extortion, Theft, Pillaging. Fraud, and Force, either direct or indirect, mediate, or immediate, *&c.* as this Author expreſſes himſelf in his Abridgment of the Duties of a Man and Citizen, *l.* 1. c. 6. §. 3. It ought alſo further to be obſerved, that a Damage or Hurt may be done to the Soul by neglecting to inform the Mind, or regulate the Paſſions of ſuch as we are obliged to inſtruct or reform, and much more by leading them on purpoſe into any Error or Vice, from which we ought to reſtrain them.

proceed

For ſince all Performances of this kind ought to proceed from the voluntary Motion of ſome virtuous Principle in the Giver, and ſince I have no Power or Licence to exact the Payment of them by force, it would by no means be convenient that I ſhould think my ſelf damaged, in not receiving ſuch things as I could not otherwiſe expect, than in the way of free Gift and Benefit. And as I cannot reckon thoſe things amongſt my own, which I have only a *Fitneſs* or *Capacity* to poſſeſs; ſo I have no reaſon to complain of injurious Practice, if they happen to be kept from me. *Ariſtotle* ſays elegantly to this Purpoſe, *he who out of a narrowneſs of Spirit refuſes to aſſiſt another with his Wealth, doth not hereby increaſe it*, Eth.v.4. and ſince *he* has not *more*, the Perſon whom he thus ſends away unreliev'd has not *leſs*. On the ſame Principle is founded the Argument which *Cicero* makes uſe of in his Defence of *Plancius*, that altho' the other Gentleman *Lateranenſis* might perhaps be the more worthy Competitor, yet it was in the Power of the People to paſs him by, and to chooſe *Plancius* into the Office of *Ædile*, in as much as neither of the Candidates had a *perfect Right* to that Honour. *It is a Privilege*, ſays he, *belonging to the very Condition and Conſtitution of free States, that they be able by their Votes, to give to a Perſon, or to take from him what they will.* Yet in the ſame Place the Orator diſtinguiſheth between what People *could* do, and what they *ought* to do; the Term *ought* implying that *leſs perfect Obligation*, by which we ſtand engaged to the Exerciſe of every Virtue. But here * *Grotius* well adviſes us to take heed of confounding Points which belong not to the ſame Head. For the People in a Commonwealth, who are obliged to confer Honours on the moſt deſerving, only by the Rules of State-prudence, yet in caſe they intruſt any perſon with this their Power of chooſing Officers, if we prefer thoſe who are leſs worthy, the others who are paſt by, cannot bring an Action of Injury or Damage againſt the Elector[3]. Yet the *People*, by whoſe Deputation he acted, have a Right of calling him to an account for his Proceedings, and may require *Reparation* for any Damage which the Commonwealth hath ſuſtain'd by his unworthy Choice[4]. And thus to a *Citizen* endued with Arts and Abilities ſufficient for the diſcharge of an Office, tho' in reference to obtaining it, he has no Right which will hold good againſt the State; yet he has an equal Right with others to ſue for it: in which Right if any Perſon by Force or Fraud ſhall prejudice or obſtruct him, he may demand Satisfaction; tho' not the full Value of the Office deſired, yet to the value of his uncertain Expectation[5]. And now we are ſettling the Notion of *Damage*, we are farther to remark, that it affects not only the thing itſelf, which being either our Poſſeſſion or our Due, is hurt, deſtroy'd, or intercepted; but likewiſe the Fruits or Profits accruing from the thing, whether they have been already received (though then indeed they may be valued as particular Goods or Things) or whether they are yet only in Hope and Proſpect, if the Owner had a Right of receiving them[a]; provided ſtill a Deduction be made of the Expences he would have been put to in ſecuring and gathering in ſuch Fruits[6], leſt he enrich himſelf at the Charge of the other Party. Now the *value* of Fruits in Expectation riſes and falls according as the time of receiving them is more or leſs diſtant, and conſequently the Iſſue more or leſs uncertain. Thus the loſing a Field of Corn in the *Blade* will not be rated ſo high, as if it had been deſtroy'd in the *Ear*. Some Conſideration too is allow'd for what we call *Civil Fruits*. Thus he who ſets on fire another Man's Houſe[b], is not only bound to rebuild it, but likewiſe to make good the Rent, which it would in the mean time have brought to the Owner. *Philo Judæus*[c] informs us, that in his Nation, when a Man had any way *damaged* his Neighbour, and done Penance for the Fact, he was obliged, beſides paying to the full value, to add one fifth part more, as a Comfort to the Perſon who had ſuſtain'd the Wrong.

* *Lib.* II. *c.* 17. §. 3.

Laſtly, it is a clear Point, that all Evils or Miſchiefs following by a natural Conſequence from any *Damage* given, ought to be adjudg'd Parts of it[d][7]. *Strabo*[e] relates of King *Ariarathes* of *Cappadocia*, that having ſtopt up the little Paſſages, by which the River *Melas* emptied itſelf into the *Euphrates*, that ſo covering the greateſt part of the neighbouring Plain, he might divert himſelf with the childiſh Play of making little *Iſlands*; at length the Damms all giving way on a ſudden, the Flood pour'd it ſelf ſo violently upon *Euphrates*, as not only to make it carry off part of the *Cappadocian* Country, and ſome of their Houſes, but to cauſe great Waſte and Miſchief in the Lands of their Neighbours, the *Galatians*: Whereupon the matter being refer'd to the Arbitration of the *Romans*, they condemn'd the King in Damages of thirty Talents[f][8].

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[3] That is to ſay, as *Grotius* expounds it, he doth nothing contrary to Juſtice, properly ſo called. See l. 1. c. 7. §. 11, 12. above.

[4] See *Juſtinian*'s Novels, 128. c. 16. *in fine*, & 124. of *Julian*'s Abridgment, c. 556. which is quoted and corrected in *Gronovius*'s Notes upon *Grotius*.

[5] *Grotius* maintains (§. 3.) that the ſame thing takes place when any one hinders another from giving a Legacy, either by Violence or Fraud; for it being a kind of Right to be capable of a Legacy, it is a real Injury to deprive a Teſtator of the Liberty or Will which he hath to give any Perſon a Legacy, which he is in Expectation of.

[6] *Grotius* adds, or for the Improvement of the Thing. See for the Diſtinction of Fruits, what is ſaid, l. 4. c. 7. §. 3.

[7] So *Libanius Progymn.* ſays, he that gives the Occaſion, muſt be anſwerable for all the Conſequences. See *Exod.* 22. 6. *Digeſt.* l. 9. t. 2. *ad leg. Aquil.* leg. 7. §. 7. leg. 27. §. 8. leg. 30. §. 3.

[8] The Lawyers here diſtinguiſh between *damnum emergens* and *lucrum ceſſans*, (i. e.) an *emergent Damage*, and a *ceaſing Profit*. The firſt is the Loſs which one ſuffers by the diminiſhing his Goods at preſent. The other is the Damage one receives by the Loſs of that Gain which he might make. But we ought alſo to obſerve, that there are ſome Events which are the direct and immediate Conſequents of the Action, from which the Damage proceeded, in ſo much that it may be ſaid, it was the cauſe of it, others there are that have a particular Cauſe independent on that Action, that was the Occaſion of it, or at leaſt had no relation to it, but by ſome mere Accident. See concerning this the Civil Laws drawn up in their natural Order by *Daumatius* part 1. *lib.* 3. *tit.* 5. where you'll alſo find in the Prefaces to thoſe Titles, ſome Obſervations very important about the difference there is between the Damage that ariſes from ſtoppage of Payment, and other ſorts of Damages and Intereſts.

[a] *Vid.* l. 6. t. 1. *D. de rei vindic.* [b] *Vid.* l. 3. *C. de rei vindic. Add.* l. 22. ſ. 1. l. 23. *princ. D. ad L. Aquiliam.* [c] *De Victimis.* [d] See *Exod.* XXII. 6. l. 27. ſ. 8. l. 30. ſ. 3. *D. ad L. Aquil. M. Seneca*, l. 5. *Excerpt. Controverſ.* 5. [e] *L.* 22. [f] *Liban. Progym.* Τὸ παρέχον τὴν ἀφορμὴν καὶ τῶν ἀκολουθέντων κομίζεται τὸν λόγον. That which gave the Occaſion, is eſteem'd the Cauſe of all Accidents that follow. *Add.* l. 7. *D. ad L. Aquil. Lex Wiſigothorum*, l. 7. *Tit.* 2. c. 1, 2, 3. & *tit.* 3. c. 3.

IV. In ſtating who are to be eſteem'd Authors of *Damage*, it will be neceſſary to recollect from our firſt Book, *Chap.* 5. how many ways the Act of one Man may be imputed to another. A Perſon then may damnify his Neighbour, not only immediately by himſelf, but likewiſe by the Miniſtry of others. And farther, a Damage immediately done by one Man, may be chargeable upon another (who is conſequently obliged to make Reparation) inaſmuch as he contributed ſomewhat to the Action, either by doing what he ought not, or by omitting what he ought to have done [a] [1]. He may ſtand guilty of this Charge in three Ways and Degrees; for he may either be the principal Cauſe, or he may be equally concern'd with the Actor; or laſtly, he may be only an Acceſſary, and an inferior Cauſe. Of all which Caſes this may in general be obſerv'd, that the Perſons thus chargeable are bound to *Reſtitution*, according as they were either the real Cauſe of the Damages, or contributed to it in whole, or in part. For it often happens, that Perſons may concur leſs principally to the Fact of another Man, by ſome Omiſſion or Commiſſion, and yet that he would moſt certainly have done the ſame Damage, whether they had thus concurr'd or no; ſo as to render their Concurrence altogether ſuperfluous. Now here tho' they are juſtly puniſhable for the Will and the Endeavour, yet ſince no Part of the preſent *Damage* flow'd from them, they cannot be required to make *Reſtitution*. Some indeed are for bringing off all Acceſſaries at a venture; becauſe ſay they, if theſe had not lent their Counſel or Aſſiſtance, there would not have been wanting others to help forward with the Miſchief, and conſequently the Damage had been done without their Means. But this Argument is of no Weight, 'tis ſufficient to make them guilty, if their Aid had any real Efficacy in producing the Treſpaſs; and had thoſe other Perſons join'd their Hands to the Buſineſs, they too would have been proportionably reſponſible. This Rule then may be fix'd as an univerſal Standard, to know who are bound to make Reparation, and who are not; that when any one did not give real Aſſiſtance in the Act of Damage, nor by any antecedent Motion or Default, caus'd it to be undertaken, nor came in for any Part of the Advantage, ſuch a Perſon tho' by giving any the leaſt Occaſion to an ill Action he contracts a Sin, yet ſhall not be obliged to Reſtitution [2]. And hence 'tis eaſy to conclude on the other ſide who ſhall be oblig'd. Thoſe who inſult over their afflicted Neighbours, and rejoice in their Calamities brought on them by wicked and injurious Men, are ſinful no doubt in an heinous manner [b]; and yet it would be abſurd to affirm, that they are bound to repair ſuch Damages as they delight to ſee. The ſame muſt be ſaid of thoſe who defend, excuſe, or praiſe a Treſpaſs already committed, provided they do not hereby hinder the Duty of Reſtitution; as likewiſe of thoſe who either wiſh Succeſs to ſuch a Fact before it is committed, or entertain a ſilent Joy and Satisfaction during the Performance. There is no ground to build a contrary Opinion on the Paſſage of *Cicero*[c], which ſome would make uſe of to that Purpoſe [3]. *What Difference is there*, ſays he, *between him who perſuades a Man to an ill Action, and him who afterwards approves of it? Or what ſignifies it whether I would have a Thing done, or whether I rejoice when it is done?* For the Orator employs this Sentence, not to expreſs his Mind ſeriouſly [4], but to refute an impertinent Objection. And had it been ſpoken never ſo gravely, it could not be ſtrain'd ſo high, as to aſſert the Neceſſity of Reparation in theſe Caſes. And therefore *Ammianus Marcellinus* [d] ſeems not very properly to apply this Saying of *Tully* to the Buſineſs of *Probus*, *Præfectus Prætorii* to the Emperor *Valentinian*, *who*, as he relates, *did indeed never command any of his Clients or Servants to undertake an unlawful Action; yet if he found them to have committed any Crime, he protected and defended them in ſpite of Juſtice itſelf, without ever enquiring into the Fact, and without the leaſt regard to Honeſty or Truth.* For here the Dependence on ſo great a Patron added Strength and Boldneſs

Mr. BARBEYRAC's *NOTES* on §. IV.

[1] This ſeems to be contrary to what our Author proves in other Places, *viz.* lib. 4. c. 13. §. 6. For though one does not what he ought to do, he does not do any ſuch real Damage, as to be obliged to Reſtitution. It is ſufficient that a Man have a Right to do a Thing to ſecure him from a juſt Imputation of any ill Conſequences that may reſult from it to another. The *Roman* Lawyers maintain the Truth of this Maxim, that no Man does wrong to another, unleſs it be he that does that which he has no Right to do, *Digeſt.* l. 50. Tit. 17. *De diverſis reg. Jur.* Leg. 151. If in theſe Caſes any one receives a Damage through our Means, 'tis his Misfortune; but ſince 'tis none of our Fault, it can't be reaſonably expected that we ſhould make any amends.

[2] By the *Roman* Law the Approvers and Authors of any Miſchief are liable to the ſame Puniſhment. *Imo & ſi erat ſervus, &c.* If a Servant be about to run from his Maſter, or rob him, and another commends his Deſign, he is guilty, for he ought not to encourage his Wickedneſs by Commendation. *Digeſt.* l. 11. Tit. 3. *De ſervo corrupto*, leg. 1. §. 4. Mr. *Bayle* in his Diſcourſe about Defamatory Libels, and *Grotius* before him, approve of this Law, which they ſay is built upon this ſure Maxim, That they who approve an Action, 'tis very likely, would do it if they could, *i. e.* if ſome reaſon of Self-love did not hinder them from engaging in it. The firſt alſo approves of the Law of *Valentinian* and *Valens*, which make thoſe Men liable to a Capital Puniſhment, who accidentally meeting with a Libel, diſperſe it, whereas they ought to have torn it, or burnt it. *Vide Cod.* l. ix. Tit. XXXVI. *De famoſis libellis.* For (he adds) I can't conceive, but he who in the like Caſe diſperſes a Libel, has as great a Deſire to injure, as he that compoſed it, and conſequently deſerves as great a Puniſhment as the Author. For certainly in this laſt Caſe there is ſomething more than a meer Approbation. To diſperſe a Libel, which might and ought to have been ſuppreſſed, either altogether or in part, is to do an Injury directly to the Party defamed, and join with the Author of the Libel. As to the Law of *Ulpian*, if a Slave is fully reſolved to rob his Maſter, or get away from him, the Approbation given to theſe Actions, which he is about to do, ſince it neither encourages nor confirms him in this unlawful Action, does not ſeem ſufficient to oblige to any Satisfaction, as Mr. *Bayle* infers. For though a Man would do a Thing with Pleaſure, were it not againſt his Intereſt, yet in my Judgment he is not puniſhable, unleſs he do it, by any human Laws (of which he is ſpeaking) eſpecially if he never deſired to do it, and his Approbation did not determine, nor encourage the Actor.

[3] The *Latin* is, *Quid intereſt inter ſuaſorem facti, & probatorem? aut quid refert, utrum voluerim fieri, aut gaudeam factum?* Cic. Philip. ii. *c.* 12.

[4] *Cicero* does not ſeem to ſpeak any otherwiſe than he does, who ſpeaks his Thoughts ſeriouſly. 'Twere better to anſwer, as this Author does afterwards, that he ſpeaks not of a Reparation of Damages, but only of the Vitiouſneſs of the Intention of ſuch as approve others Crimes.

[a] *Nemo damnum facit* (ſay the *Roman* Lawyers) *niſi qui id fecit, quod facere jus non habet,* Digeſt. *Lib.* 50. *Tit.* 17.

[b] See *Pſalm* cxxxvii. *v.* 7.

[c] *Philip.* II. *c.* 12.

[d] L. 27.

to their Enormities; and his Protection interpoſing, hindred them from making good the Damages they had been guilty of [5]. As to the Point of counſelling or adviſing, this is moſt certain, that he who ſuggeſts to another the way and manner of committing a Treſpaſs, is bound to Reparation. Whereas the ſame Obligation doth not ſeem to lie on thoſe who either perſuade a Man in general Terms to apply himſelf to an ill Courſe, as to Theft or Robbery, for inſtance, or join their Approbation and Conſent [6] to his Reſolution, when already fixt and ſettled; as is often the Caſe with timorous Counſellers, or baſe Flatterers of Princes [a]. Laſtly, concerning thoſe who concur to an injurious Action, by omitting ſomewhat which they ought to have perform'd, this may be obſerv'd, that their Omiſſion doth then only bind them to repair the Damage, when it is of a Duty, to which they ſtood engag'd by a *perfect Obligation*; not if the thing was only a Matter of Charity and Humanity. For, ſince what is owing to me in this imperfect Manner, I cannot yet account my own, neither if it be intercepted, can I go about to recover it [7], whatever *Ziegler* in his Obſervations on *Grotius* [b] alledges to the contrary.

V. Where therefore many Perſons have concurr'd to one Act of Damage, in making Reparation this Order ſhall be obſerv'd; thoſe ſhall be in the firſt place chargeable, who ſet forwards the Miſchief [1], either by their Commands, or by ſome other powerful Means, amounting almoſt to a neceſſary Influence. And the immediate Actor of the Crime, or he who was thus forced to lend his Hands for its Performance, ſhall, in theſe Caſes, be eſteem'd only as the *Inſtrument*. Where any one appears to have engag'd himſelf in the Enterprize, without being driven on it by Neceſſity, he ſhall be firſt obnoxious, and then the reſt who contributed their Aſſiſtance; yet ſo, that if the former of theſe Parties concern'd ſhall have made good the Damage, the others ſhall be then clear, as to Reparation, tho' not as to Puniſhment. But what if an Act proceeds from many Perſons, who are all Authors or Cauſes of it in the very ſame degree; ſhall each Party be reſponſible for the whole, or only for an equal Share of the Damage? *Grotius* [c] pronounces in this Caſe, that each *Perſon is to anſwer for all, if the whole Fact proceed from each, tho' not from each alone*. Which Rule is ſomewhat obſcure, unleſs we illuſtrate it by an Inſtance. Here are three Men then, who at the ſame time, tho' perhaps in different Parts, all ſet fire to an Houſe. This Fact of burning the Houſe ſeems to have proceeded from each Man entire, and in whole, although not from each alone; in as much as the ſame Miſchief would have follow'd, had *one only* applied the Fire. But ſuppoſe ſeveral Perſons join in beating or cudgelling a Man, one of whom perhaps gives him a Wound in the Head, another breaks his Arm, and a third ſtrikes out his Eye; here each Perſon ſhall not anſwer for the whole Hurt, but only for that part of it, which he himſelf effected. Though in Caſe one of them eſcape, it is uſual to condemn the reſt who are taken in the whole, eſpecially when it appears, that they combined together to execute the Miſchief. We may ſtill ſet this Matter in a clearer Light, by diſtinguiſhing between *diviſible* and *indiviſible Acts*. The latter which we are concern'd with, are ſuch in which many Perſons concur, but in ſuch a manner that the whole Act would have follow'd from the Endeavours of one only; and therefore cannot conveniently be divided into Shares amongſt them all; of this kind are the firing of Houſes, the breaking down of Banks and Damms, or the like. For the ſame Damage would have enſued, had one only of the many Parties ſet his Hand to the Exploit; ſo that it is impoſſible to define and ſettle what part of the Fire, or of the Flood, proceeded from each in particular. When many join in an Act of this Nature, each Perſon ſhall be thus far reſponſible for the whole, that in caſe they are all apprehended, they ſhall contribute equally to the Reparation; but if upon the Eſcape of the reſt, one only be taken, he ſhall then be charg'd with the entire Sum. After the ſame manner, if ſome of the Perſons apprehended prove inſolvent, the whole Burthen ſhall be laid on thoſe who have more Subſtance and Ability. In this too the *Reparation of Damage* differs from the *Exaction of Puniſhment*, that in the former, if full Payment or Reſtitution be made by one of the Parties concern'd, the reſt are cleared and excus'd; ſince it is not conſiſtent with Equity, that the ſame Damage ſhould be twice made good (though by way of Puniſhment, this is frequently practis'd) but on the other hand, in penal Caſes, nothing is more uſual, than that every particular Accomplice in a Crime be made to ſuffer all that the Law inflicts [d].

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[5] The *French* Tranſlator here adds, *So that there was ſomething elſe beſides a mere Approbation, or Defence of the Wrongs done to others*, which ſeems to make our Author's Reaſoning more clear.

[6] That this Reſtriction ought to be added, eſpecially if by the fundamental Laws of a Kingdom, the Miniſters are obliged to deny their Conſent to their Prince, as it is in *England*. See the Paſſage cited out of Dr. *Bates*'s *Elench. Mot. Nup. Angl.* Part I. compar'd with our Author, l. 1. c. 5. §. 14.

[7] Certainly of the Perſon himſelf, who has refuſed to do any of theſe Duties; but if he was hindred by ſome other Perſon, he has a Right to require Damages of this latter, if not before humane Tribunals, which often ſuffer many Wrongs, yet by the immutable Rules of Juſtice and Equity. See §. 3. above, Note 8.

Mr. BARBEYRAC'*s NOTES on* §.V.

[1] For the Rule of the Law is this: He does the Wrong, who commands it to be done, but he is in no Fault, who is under a Neceſſity to obey. *Digeſt.* Lib. L. Tit. XVII. *De diverſis Reg. Jur. Leg.* CLXIX.

[a] Compare *Ant. Matthæus de Crimin. Proleg.* c. 1. ſ. 7, 8, 9. [b] L. 2. c. 17. ſ. 9. [c] *Ibid.* ſ. 11. [d] Such a Caſe we have in *Quintilian Inſtitut.* l. 7. c. 6. Two Thieves had ſtolen together Ten Thouſand *Seſterces*, they were ſued in Court, and Forty Thouſand demanded of each Man, according to the *Law* enacting, that every Thief ſhall pay *Four-fold*. They petition that each may pay no more than Twenty Thouſand. Here the Judgment ought to go againſt the Thieves, in as much as by the *Roman* Laws, theſe *Actions* of *Reſtitution* are reckon'd under the Head of *Puniſhments*, ſ. *ult. de Oblig. quæ ex delict. naſc.* l. 7. ſ. 5. l. 8. *D. de Juriſdictione*, l. 6. *prin. D. arborum furtim cæſarum*: l. 34. *D. de injuriis. Add.* l. 11. ſ. 2, 4. *D. ad L. Aquil.* l. 5. 1. ſ. 2. *ibid.* l. 15. ſ. 2. *D. quod vi aut clam.* l. 2. ſ. 9. *D. de furtis, Hotoman. illuſt, Quæſt.* 33.

VI. Now whenever we hurt or endamage another, we do it either out of full Purpoſe and premeditated Guilt, or by a Fault of Negligence only, and not of Deſign (and this Negligence, as it is more or leſs groſs and ſupine, is more or leſs culpable) or laſtly, we may do it by *meer Chance*, ſo that the Injury cannot rightly be *imputed* to us[a]. Among ſome People, thoſe *Damages* are not only *imputed* to a Man, which are committed with his Aſſiſtance or Concurrence, but thoſe likewiſe which are cauſed by his Servants or Cattle, without his poſitive Influence. It is beyond doubt, that he who offers Damage to another out of an *evil Deſign*, is bound to make Reparation, and that to the full Value of the Wrong, and of all the Conſequences flowing from it. But thoſe likewiſe ſtand reſponſible, who commit an Act of Treſpaſs, tho' not deſignedly, yet by ſuch a Piece of Neglect as they might eaſily have avoided[1]. For it is no inconſiderable Part of ſocial Duty to manage our Converſation with ſuch Caution and Prudence, that it do not become terrible or pernicious to others; and Men under ſome Circumſtances and Relations are obliged to more exact and watchful Diligence[b][2]. Indeed the ſlighteſt Default in this Point is ſufficient to impoſe a Neceſſity of *Reparation*, unleſs under one of theſe Exceptions, either that the Nature of the Buſineſs was ſuch as diſdain'd a Care more nice and ſcrupulous, or that the Party who receives the Wrong is no leſs in fault than he who gives it; or laſtly, that ſome Perturbation of Mind in the Perſon, or ſome extraordinary Circumſtances in the Affair, leaves no room for accurate and conſiderate Circumſpection; as ſuppoſe a Soldier in the Heat of an Engagement ſhould hurt his next Man with his Arms, whilſt he brandiſhes and employs them againſt the Enemy. To this purpoſe the Story in *Ælian*[c] is remarkable; "A young Man travelling towards *Delphi*, as he "defended his Companion from the Robbers, hap"pen'd to kill him by an unlucky Turn of his "Weapon; and upon Application to the Oracle "receiv'd his Pardon in this comfortable Anſwer:

Ἔκτεινας τὸν ἑταῖρον, ἀμύνων, οὐ σ' ἐμίανεν
Αἷμα· πέλεις δὲ χέρας καθαρώτερος ἢ πάρος ἦσθα.

Striving to ſave your Friend, you have him ſlain;
His Blood will cleanſe your Hands, it ne'er can ſtain[d].

But in Caſes of pure Chance, where the hurtful Action is not mix'd with any Fault of ours[3], it is evident we are not oblig'd to Reparation. For when I have done nothing that can be fairly laid to my Charge, there ſeems to be no Reaſon why the Misfortune, and the Damage of a Harm which I unwillingly cauſ'd, ſhould rather fall on me than on the Perſon who receiv'd it[e]. Yet if a Perſon of Wealth hurt a poor Man, though meerly by Chance, it will become him by ſome Act of Liberality to ſupport and comfort the Sufferer. As for thoſe *Actions* which lie againſt us for any Treſpaſs or Hurt committed by our Cattle or Slaves, and the like, * *Grotius* is of opinion, that they owe their Riſe to Civil and Poſitive Laws; inaſmuch as the Maſter or Owner being innocent of the Fact, is not by any natural Obligation made reſponſible for it. Yet others hold that *Actions* of this kind are moſt agreeable to natural Equity, although they are not preciſely ſuggeſted by the Law of Nature. It is one of *Plato*'s[f] Conſtitutions, "If a Man or Woman "being a Servant, ſhall injure the Goods of ano"ther Perſon, either by an unſkilful, or by an im"moderate Uſe of them, the Perſon who receives "the Wrong, not being himſelf the Cauſe of it; "the Maſter ſhall either make him Satisfaction for "the Damage ſuſtain'd, or ſhall deliver the offend"ing Servant into his Power and Pleaſure." And the ſame way of proceeding is obſervable in the old *Roman* Story of *Evander*, delivering up his Servant *Cacus* to *Hercules*, who had convicted him of ſtealing his Cattle[4]. But why the Owner of a Beaſt ſhould rather ſuffer Damage than he who upon provoking a Creature[5] not violent by Nature, has without the Owner's Fault receiv'd a Hurt, the Reaſon ſeems

* *Lib.* ii. *c.*17. §. 12.

Mr. Barbeyrac's *NOTES on* §. VI.

[1] See the Civil Laws drawn up in their Natural Order, by Mr. *Daumat*. Part I. l. 2. *Tit.* 8. where you will find a great Number of theſe ſorts of Caſes decided, wherein it appears, that there is nothing but the indirect and interpretative Will of him that cauſes the Damage.

[2] Among the Laws of *Moſes*.

[3] This Reſtriction ought carefully to be obſerved. For when the accidental Caſe is an Effect of ſome Fault, which produced it, we are indiſpenſibly required to make good the Damage, the Obligation to repair being the Effect of the Fault, and not of the Chance. See Mr. *Daumat*, Civil Laws, *Part* I. *Lib.* 2. *Tit.* 9. We ought to remember that we may be engaged by ſome Agreement to anſwer for ſome accidental Caſes, and then, as any one may ſee, the Obligation to make good a Damage is an Act of our Will, and the Accident gave us only an Opportunity to fulfil our Promiſes. See l. 5. c. 9. following. Mr. *Thomaſius* goes farther, and maintains, that a Man is bound to make good any Damage, of which he is only the Phyſical Cauſe, altho' he does not do any wilful Injury; but the Welfare of human Society does not ſeem to require, that our Obligation to ſatisfy a Damage ſhould extend ſo far. Human Society will be happy enough, if every Man carefully abſtains from endamaging others, not only out of a formal Deſign, but thro' the leaſt Negligence.

[4] The Author in his laſt Edition, which this Tranſlation follows not, places the next Paragraph, and that moſt properly, here, but then it muſt be render'd, *it is clear*, inſtead of, *much more is it clear*.

[5] This Reſtriction is made by the Civil Law only, for according to Natural Right, it imports not, whether a Beaſt follows the Diſpoſition of thoſe of its own Kind, or not, provided that it carries itſelf in the uſual Way when it does the Hurt. Neverthelеſs, ſince it often happens through Man's Default, that a Beaſt does miſchief, though it follows its own Natural Inclination, and thoſe Damages which happen by its extraordinary Motions, could not elſe ſo eaſily happen, the Diſtinction muſt not be neglected. *Tit. Obſ.* 261. To this we may add alſo the Damages that are cauſed by an Infant, a mad Man, or one ſeized with a Fit of a Frenzy. Mr. *Thomaſius* maintains, with Reaſon, that the Damage ought to be repaired out of the Infant's or mad Man's Goods: For though neither of them are capable to do a Wrong knowingly, it is ſufficient that they are the Phyſical Cauſe of a Damage, which they have no Right to do: For the Obligation to Reſtitution ariſes from the Thing itſelf, and Natural Equity, and not from any Agreement or Crime. For if we may oppoſe a mad Man, when he does us any Wrong, why may we not expect Satisfaction out of his Goods, when he has done it? We muſt ſuppoſe ſuch a Reſtriction here. This Satisfaction is the more juſt, becauſe it is commonly the Fault of ſuch as are to take care of ſuch Child or mad Perſon.

[a] *Lyſias* Orat. xxx. Οὐδενὶ οὐδὲν ἑκούσιον δυστύχημα γίγνεται.
No Misfortune happens to any Man by his good Will.
See *Exod.* xxi. 28, &c. 33, &c. & *Grot. ibid.*

[b] *Vid.* l. 6. ſ. 7. l. 14. *D. de Offic. Præſidis.* l. 27. ſ. 9. *in fin.* ſ. 29, 34, 35. l. 27, 29. ſ. 2, 3, 4. *ad L. Aquil. Deuteron.* xxii. 8.

[c] *Var. Hiſt.* l. 3. c. 44.

[d] *Add. Epictet. Enchir.* c. 39. & *Simplic. in eum circa fin.* 8. *L.* 44. l. 52. ſ. 4. *D. ad L. Aquil.* & *ibi Interp.*

[e] *Add.* l. 5. ſ. 2. l. 7. ſ. 3. *ad L. Aquil.*

[f] *De Leg.* l. 11.

to be this, that the Settlement of *Proprieties* does not impair or prejudice this antecedent natural Precept of Reparation. And therefore, ſince ſuppoſing Things to lie in their primitive Community, in caſe I had been hurt by a Beaſt, I had the Power of requiting, or ſatisfying myſelf upon the Beaſt, by any means I thought fit; this Power or Liberty of proceeding is not ſuppoſ'd to be taken from me by the Introduction of diſtinct Proprieties. And inaſmuch as the Owner of ſuch a Beaſt makes a *Gain* of him, and I ſuffer'd *Loſs* by him, the Reparation of Damage taking place in Equity and common Favour before the Procurement of Profit, it hence appears, that I can rightly demand of the Owner, either to make good the Loſs ſuſtain'd; or in caſe ſuch a Charge would riſe higher than the Value of the Beaſt, then to deliver him up as a Criminal, to be deſtroy'd[6]. The ſame Rule holds much ſtronger in the Caſe of a *Slave*, ſince he is by Nature made liable to anſwer for any Damage he ſhall give. But now, ſince he has no Goods of his own to repay or requite the Loſs, and ſince his very Body is his Maſter's, it follows in Equity, that the Maſter either repair the Wrong, or give him up to the Sufferer. Eſpecially ſince without this Proviſion, a Slave would be impower'd to act what Hurt and Miſchief he pleas'd; whilſt neither he (who is Poſſeſſor of nothing, nor indeed of himſelf) nor his Maſter, could be oblig'd to Reſtitution. Nor ſhould the Maſter by the ſevereſt Courſe of Blows, or of Impriſonment, puniſh the Offender, would this be any real Satisfaction to the injured Party[a].

Much more then is it clear beyond the leaſt Doubt or Diſpute, that the Owner ſtands reſponſible for thoſe Damages which his Beaſts commit, either by his own Fault or Inſtigation, or by their natural and accuſtom'd Violence, and the common Force of their peculiar Inſtinct. For the Owner ought either not to keep ſuch Creatures, or carefully to reſtrain them from doing Miſchief[7].

Of Reparation in general, we have this farther to obſerve, that when the Hurt or Wrong is done by an evil and criminal Act, there to make good the Damage is not ſufficient to take off the Puniſhment[b]. Though the voluntary Offer of Requital, as a Sign of Penitence and Sorrow, frequently leſſens the Severity of farther Proſecution[8][c].

It is time now to illuſtrate this Doctrine by ſuch Inſtances and Examples as *Grotius* chiefly will ſupply us with.

VII. An *unjuſt Slayer* is obliged to defray the Charge of Phyſicians and Chirurgeons, and give to thoſe Perſons whom the Deceas'd was by full and perfect Duty bound to maintain, as Parents, Wife and Children (not to any whom he kept out of Charity and Pity) ſo much as the Hope of their Maintenance ſhall be fairly valued at; Regard being had to the Age[d], both of the Deceas'd[1], and of themſelves[e][2]. As to *Ziegler*'s Opinion on this Place of *Grotius*, that ſome Conſideration is to be allow'd for the Gain which the Deceas'd might have acquired, had he lived longer, which conſequently would have made their Portions the larger, we think it will ſcarce hold good, inaſmuch as all Advantage of this kind being yet uncertain, cannot be reckon'd amongſt our Poſſeſſions; and ſince future Time lies equally open to loſs as to gain; and laſtly, ſince it cannot clearly be made

[6] Beſides this, we may obſerve with Mr. *Hertius*, that it may be commonly preſumed, that the Maſter of ſuch a vitious Beaſt knows its Fault, and if when it has done a Miſchief, he will neither reſign it, nor pay the Damage, he may be thought to approve it.

[7] If a Slave or Beaſt be put on by any other Perſon than the Maſter of it, 'tis plain that ſuch a Perſon is obliged to make good the Damage. But we muſt then ſuppoſe, that the Perſon hurt has not through his own Fault occaſion'd the Damage done him by the Slave or Beaſt; for in this Caſe he can blame none but himſelf, and the Slave did nothing but what he might do in his own Defence. In a word, no Proprietor is obliged to ſatisfy a Damage, where he is guilty of no Fault, unleſs his Slave or Beaſt have done a Miſchief of their own Accord. *Vid.* The Civil Laws in their Natural Order, by Mr. *Daumat*. Part I. l. 2. *Tit.* 8. §. 2.

[8] But there can be no true Repentance without Reſtitution.

Mr. BARBEYRAC'*s* *NOTES on* §. VII.

[1] But it may be objected, How can it be known how long the Perſon ſlain might have lived? Mr. *Placette* in his Treatiſe of Reſtitution, *l.* 3. *c.* 4. thus anſwers, That the Length of no Man's Life can certainly be known, but it may be probably gueſſed at two ways: As, 1. By what the Law has determined about it, which fixes it to 60 Years, and ſo if the Perſon ſlain was 40 Years old, the Perſons intereſted muſt be ſatisfied for the Gains of 20 Years, but then he muſt not be much above, and all Deductions muſt be conſidered. 2. But the beſt way ſeems to be to refer the Matter to the equitable Judgment of one or more Arbitrators, who are wiſe and prudent Men, who conſidering the Conſtitution, Health, and Frugality of the dead Perſon, may determine beſt what is moſt reaſonable to allow.

[2] The manner of computing the Value of their Maintenance is ſet down in *Digeſt*. l. 35. *Tit.* 2. *ad Legem Falcidiam, Leg.* 68. But *Titius* upon this Author obſerves, that no exact Eſtimation can be made of a Damage by this and the following Examples, and therefore in this Caſe we ought to ſubmit to an Accommodation. I may add, that every one ought to conſult his own Conſcience well, and conſider, that it is better always to make ſuch a Reparation as may ſeem ſomething more than the Damage done, than expoſe himſelf to be thought not to have done enough, for the Cauſe of the Perſon damag'd is always more favoured, than of him that did it.

[a] *Vid. Interp. Jur. Roman. ad Tit. Si quadrupes pauperiem, & ad L. Aquiliam, & De damno infecto.*

[b] *Vid.* l. 48. *D. de furtis.*

[c] The *French* Tranſlation puts the following Citation into the Text after [c], and 'tis ſo in the Original. See *Luc.* xix. *v.*8. 'Tis remarkable, what *Glycas* tells us, in his *Annals* of *Michael* the *Paphlagonian*. But the Emperor *Michael*, ſays he, "Did "not forbear all his Life-time to lament his Villany towards *Romanus* III. and endeavour'd by building Monaſteries, by Charity "to the Poor, and other good Works to appeaſe the Anger of God. And this Method might have prov'd beneficial to him, "had he laid down the Empire (for the ſake of which the Fact had been committed) and throwing off the Adultreſs, the Em"preſs, for the Love to whom he had done that Wickedneſs, bewail'd his Sin in a private Condition. But he neglecting "ſuch Means of Repentance, and ſtill uſing *Zoa* as his Wife, ſtill holding faſt the Imperial Dignity, and only making a ſhew "of doing good at the publick Charge, thinking thus to obtain his Pardon, betray'd an impious Opinion of God Almighty, "as if he would ſuffer us to buy our own Forgiveneſs at the Loſs of other Men. *Valer. Max.* l. 2. c. 8. ſ. 4." So much Difference there is, whether you really add any Thing to another, or whether you only reſtore what you had taken from him, as there is between the Beginning of a Benefit, and the End of an Injury.

[d] See Mr. *Placette*'s Treatiſe of Reſtitution, *l.* 3. *c.* 4.

[e] The way of reckoning the Maintenance we learn from *L.* 68. *D. ad L. Falcidiam.*

out, how much the deceas'd would have ſpent of any ſuch Gain, had he been ſuffer'd to live and to procure it [3].

Now he is an *unjuſt Slayer* that kills a Man, who had a Right not to be kill'd by him, and who therefore by the Act that caus'd his Death was truly injur'd. And this Right appears to belong to every individual Perſon, ſince Nature by a general Command binds all Men to live like ſociable Creatures, and to abſtain from mutual Hurt. Which Right a Man may, as far as in him lies, renounce; at leaſt ſo as to make it fair and juſt for him to be hurt by ſuch or ſuch particular Perſons; and this may be done either *tacitly* or *expreſly*. He *tacitly* diſclaims this Right, who in a violent manner ſets upon another without juſt Cauſe. For ſince the other has a Right of repelling the Violence by any Means he can, the Aſſailant is to accuſe himſelf only for any harm he ſuffers in the Repulſe of his own unlawful Force. The ſame Right is *expreſly* renounced by him who enters into *War* with another upon mutual Appointment and Conſent. For 'tis a Law of War, that every one have fair Liberty to uſe his full Endeavours for the Defeat and Suppreſſion of his Enemy [a]. And though in ſuch War the prevailing Perſon may perhaps ſin againſt Charity, yet the Violation of Charity only will not oblige to repair the Loſs he has thus occaſion'd.

The Life of a Freeman does not admit of any Rate or Valuation; and had it any, there is no Perſon to whom the Debt ſhould be paid. For his Life does not properly belong to his near Relations, it is only their Intereſt that he ſhould live; and therefore the Value of that Intereſt or Advantage being paid to them, they can demand no ſuch farther Recompence as the full Worth of his Life. The Caſe is otherwiſe with a Slave or Vaſſal, who being entirely the Propriety of his Maſter, and falling under Exchange and Commerce, in the manner of other Goods, has really a Price ſet upon him, which, if he be wrongfully kill'd, the Maſter has a Right to demand. If it ſeem hard and ſomewhat like Inhumanity to rate our Slave thus, in the ſame manner as we would our Beaſt, it may be anſwer'd, that we do not make this *Valuation* of his Perſon, but only of the Work and Service which he would have done us.

Thoſe in like manner ſtand bound to *Reparation*, who kill another in their Sports or Recreations, which is eſteem'd equal to deliberate Miſchief [b]. And thoſe alſo who commit the ſame mortal Violence, through their own Unwarineſs and Neglect. Examples of which Caſe we find ſet down in the *Inſtitutions* [c] [4]. As if a Soldier practiſing with his Arms in another place, than what is ſet apart for thoſe Exerciſes, ſhould ſlay a Man who was caſually paſſing by; or if one who is not a Soldier ſhall happen to do the ſame; though in the place ordain'd for the publick training of Military Men. But if a Soldier in the ſame place of common Duty ſhall undeſignedly take away a Man's Life, he ſhall ſtand excuſed; for he was performing his proper Buſineſs, and the other Party was in the fault for throwing himſelf into the Danger [d]. If a Feller of Wood ſhall with the Limb of a Tree which he is cutting down, kill a Servant paſſing by in the high Road, or in a Way near a Town; without having firſt cried out to give Warning. But in Caſe he did thus cry out, and the Servant neglected to ſave himſelf upon timely Notice, the Feller ſhall not be charged with his Death. No more ſhall he if the ſame Misfortune happen'd at a diſtance from the Highway, or in the middle of a Field, although he did not give the uſual ſign of crying out; becauſe there the Stranger had no Right of paſſing, and conſequently ventured at his own Peril [e].

If a Phyſician deſtroy his Patient, either by plain Neglect and Deſertion, or by adminiſtring through Ignorance, improper, and dangerous Medicines [f].

If a Muletier, through Weakneſs or Unſkilfulneſs, ſhall have ſuffer'd his Mules to run over any Perſon; provided he undertook this Buſineſs of driving at his own Choice, or made it his Profeſſion; not if he was preſs'd and compell'd to the Service, proteſting at the ſame time his want of Art or of Strength [g].

In the *Alcoran* [h], he who ſhall ignorantly kill a Muſulman, is enjoin'd to make good to his Relations the damage they ſuſtain'd by his Death; and to redeem one Perſon of his own Religion from Slavery.

It ſeems probable that thoſe likewiſe were oblig'd to ſome ſuch Method of Reparation, who by the Favour of the *Jewiſh* Law enjoy'd the Privilege and Protection of the *Aſylums*, or Cities of Refuge [i]. Since in the Caſe there ſpecified, of a Man's killing his Neighbour by the fall of the *Head* of his Ax from the *Helve*, the Man is not entirely blameleſs, in as much as he ought to have ſtrengthned his Inſtrument better, for the Prevention of ſuch a ſad Miſchance [5]. But how it came to be allow'd, that the [6] *Revenger of Blood* ſhould diſpatch ſuch an *innocent Slayer*, if taken without the Bounds of his Sanctuary, which ſeems not altogether conſiſtent with a regular State of Government, we have this only Reaſon to aſſign, that God was pleas'd to grant ſome little Inſtances of Indulgence to the cruel and implacable *Genius* of that People [a] [7].

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[3] Mr. *Van Muelen*, in his Commentary upon *Grotius*, l. 2. c. 17. §. 16. believes that the Nature and Certainty of the Gain which the dead Perſon might have made, ought to be examined. If his Gain were altogether uncertain, ſo that it depended more upon Chance than the Induſtry of the dead Perſon, no Satisfaction ought to be made; but if his Gain were morally certain, and wou'd have in all appearanee been produced by the Labour and Induſtry of the dead Perſon, as the Gain of ſome Traders, Merchants, and Artificers is, then he ought to ſatiſfy the Perſons concerned for the Gain loſt, according to the equitable Eſtimation of an Arbitrator, who ſhall make as exact Deductions for all Expences which the dead would have been at, as poſſible, and conſider the Circumſtances our Author mentions.

[4] See that excellent Treatiſe upon this Subject, compoſed by Mr. *Noodt, Ad Legem Aquiliam.*

[5] Our Author obſerves a little higher, that the *Alcoran* in the Chapter of Women, appoints, that if a Perſon againſt his Will, kills a *Muſulman*, he muſt not only make Satisfaction to the Parents of the Perſon ſlain, but alſo redeem a captive *Muſulman* at his own Charge.

[a] To this purpoſe we have a Story in *Plutarch's Laconian Apophthegms*; that two Boys, one of them with a Sickle, gave the other a mortal Wound; when the Companions of the wounded Boy, who had haſten'd to part the Fray, promis'd him to revenge his Death on his Murderer; By no means, ſays he, this would be to act unjuſtly: For what he hath done to me is no more than I had done to him, had I been ſtrong enough to have prevented him. *Add.* l. 4, 5, 7. ſ. 4. l. 52. ſ. 1. *D. ad L. Aquil.*

[b] *Vid.* l. 4. ſ. 1. *D. ad L. Cornel. de Sicar. & ib. Gothofred.* l. 10. *D. ad L. Aquil. Digeſt.* l. 48. Tit. 8. [c] *De L. Aquil.* ſ. 5. &c. [d] *Add.* l. 9. ſ. 4. *D. ad* l. *Aquil. & Antiphon. Orat.* VII. [e] *L.* 31. *D. ad L. Aquil. Add. Leg. Burgundion,* Tit. 46.

[f] Vid. *Plin.* l. 29. c. 1. *Leg. Wiſigothor.* l. XI. *Tit.* 1. c. 6. [g] *Add.* l. 5. ſ. 3. l. 7. ſ. 2. 5, 6, 8. l. 8. l. 9. *princip.* l. 31. l. 52. ſ. 2. *D. ad L. Aquil. & confer cum* c. 8, 9. *Se.* X. *de Homicid.* [h] In the Chapter *of Wives*. [i] *Num.* XXXV. *& Deuteron.* XIX.

VIII. He that has maimed a Man, ſhall be obliged to pay the Charges of the Cure, and to make up what he now gains leſs than before, by his Labour or Calling [b]. On this Head the *Jewiſh* Conſtitutions are very worthy of Remark, as we find them deliver'd in *Conſtantine l'Empereur* [c]. He that hurts his Neighbour is reſponſible on five Accounts; for the *Damage*, for the *Pain*, for the *Cure*, for the *Ceſſation of Work*, and for the *Affront* or Diſgrace. The *Damage* they compute in this Method: If, for example, he has beat out the other's Eye, or cut off his Hand, or broke his Leg, they then conſider the ſuffering Party as if he were a Slave to be ſold in the Market, and ſo reckon how much he would have yielded in Sale before the Hurt, and how far his Price is now fallen. For they judged there would be no certain Way of ſettling theſe Rates and Accounts, ſhould they in this Caſe diſtinguiſh between the different Qualities and Conditions of Men; ſince the Profeſſions of Life, and the States of Perſons admitting ſo endleſs a Variety, the Sufferer would be always throwing in ſome new Reaſon to enhance the Damage, and aggravate the Hurt, and conſequently to enlarge his Demands of Compenſation. They thought it convenient therefore to ſet all Men, with regard to this Buſineſs, in the one general Condition of Slaves, the juſt Value of whom was diſcoverable beyond diſpute. So that if the maim'd Perſon, ſuppoſed to be a Slave, would before the Hurt have brought fifty *Shekels*, and could be ſold afterwards for no more than thirty, the Maimer was enjoin'd to pay him twenty *Shekels*.

As to the Point of *Pain*, if a Man, for inſtance, had *burnt* another, although in the Nails, where no Bliſter follows, they conſider'd how much a Perſon of that State and Fortune would have taken to ſuffer voluntarily ſuch a Pain. For one may find a wealthy or a nice and delicate Perſon, who would not be hired at any rate to endure a ſlight and moderate Smart; and at the ſame time one may light on a poor and hardy Labourer, who would be content to undergo ſome ſharp Degree of Torture for the earning of a Penny. Farther, in rating the Pain, they proceeded thus; they ſuppoſed, for inſtance, that a Perſon of that Condition was condemn'd to have his Hand cut off, and then they conſider'd how much he would give to loſe his Hand, rather by ſome eaſy conſuming Application, than by the violent Stroke of a Sword; and ſo much the Party, from whom the Hurt was receiv'd, was bound to give him on Account of the *Pain* [d].

Concerning the *Cure*, they obſerv'd theſe Rules: If after the Cure perform'd, any Sores or Tumours aroſe, in caſe it appear'd that the former Wound was the real Occaſion of them, the Perſon who gave it ſtood farther bound to pay for his ſecond Cure; if they proceeded from any other Cauſe, he was not reſponſible. As often as the Wound being imperfectly heal'd broke out again, he was ſtill charged with the Expences, but not after it had been once brought to a perfect Cure. It might be added, that his Obligation continued only in caſe the Wound thus broke out *of itſelf*; not if the Thing happen'd thro' the Fault of the Patient, or thro' the Unskilfulneſs of the Chirurgeon.

In rating the Allowance to be made the Sufferer for the *Ceſſation of his Work*, they conſider'd him as a *Keeper of Cucumbers*. The *Jewiſh* Doctors thus enlarge on the Point; they ſuppoſe him already to have receiv'd Satisfaction for the Defect or Damage ſuſtain'd in his Body, and likewiſe for the Pain he has endured. And therefore ſuppoſing him (for inſtance) to have loſt the Uſe of a Hand, or a Foot, they do not now conſider what Gain he would have made, had thoſe Limbs remain'd entire; but becauſe he hath been already paid for the diſabled Part, they only compute what Damage he ſuffers during his Sickneſs in reſpect of ſuch Work, as he could have perform'd, though maim'd in Body, if well in Health. And they think he may fairly demand ſo much for every Day of his Sickneſs, as his daily Wages had been for watching a Cucumer Garden. But becauſe it is a different Thing, whether a Man loſes a Hand, or a Foot; whether only lying ſome time ſick of his Wound, he afterwards recovers without prejudice, or whether he is actually depriv'd of a Limb, *Maimonides* propoſes a nicer and more exact Way of rating the *Ceſſation of Work*, according to particular Caſes. If the Sufferer ſhall not be maim'd, but only caſt into a Sickneſs, and confined to his Bed, or if the affected Limb only ſwell for a time, and afterwards regain its Soundneſs and Uſe, the other Party ſhall allow him daily for the Loſs of his Work, according to the uſual Wages or Hire receiv'd by Men of the ſame Calling. But if he is maim'd in a Limb, or has loſt a Hand, Satisfaction being already made him for that Loſs, or what they call *Damage*, being before diſcharged, as to the bare *Ceſſation of his Work*, they then conſider him as a Keeper of Cucumers, and computing the Pay generally allowed for this Work, order him ſo much for every Day of his Illneſs. In like manner, if he has loſt a Leg, they conſider him as a Centinel or Watchman at a City Gate; if an Eye, they ſuppoſe him to work at turning a Mill; and ſo agreeably of all other Hurts and Miſchiefs.

Laſtly, In rating the Affront, or *Diſgrace*, they conſider the Condition and Degree of both Parties. Since an Affront is much more provoking from a mean and vile Perſon, than from one of Quality or Power; and ſince the ſame Piece of Diſreſpect may be light and inconſiderable to one of vulgar Condition, and yet be heinous and intolerable, if offer'd to a Man of Honour. And here we may by the bye obſerve the Diſtinction added, concerning the *Place* or the Scene of the Action, which ſometimes very much varies this Point. Thus if a Man ſliding down from the Roof of a Houſe, ſhall *hurt* one that paſſes by, and at the ſame time *affront* him, for inſtance, by making the Dirt fall on him, he ſhall be reſponſible for the *Damage* or *Miſchief*, not for the *Ignominy*. Thus much we have gather'd from the *Jewiſh* Laws; and on the ſame Head the Reader may conſult the *Roman*; particularly, *l. ult. D. De his qui effuderint vel dejec. & l.* 3. *D. Si quadrupes*. Where we muſt take notice, that when 'tis ſaid *Scars* and *Deformity* are not capable of being prized or rated, the Rule[1] will hold good only in the Caſe of Freemen. For ſince the debauch'd Manners of that Nation ſet a higher Price than ordinary on handſome Slaves, they might conſequently claim a pecuniary Satisfaction from thoſe who ſhould rob a Slave of this Advantage, by a Wound in the Face, or any Injury of that kind. So the disfiguring the Face of a Virgin or unmarried Woman, whoſe Beauty ſometimes is the beſt part of their Fortune, may be reckon'd amongſt Hurts requiring Compenſation. And indeed Deformity, if very remarkable, is in general a ſad Unhappineſs, rendring us diſagreeable to others, and expoſing us to the Contempt and Deriſion of proud and of ſatyrical Men. Yet Scars receiv'd in War paſs for Marks of Honour and Valour by the common Vote of Mankind[a].

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[6] The Revenger of Blood was evidently the next Heir, or neareſt Relation of the dead Perſon. See Mr. *Le Clerc's* Notes. The Author quotes *Hom. Odyſſ.* l. 15. l. 272. & *Tacit. German.* c. 21. See alſo Mr. *Hertius's* Diſſertation, entituled, *De Hærede Occiſi Vindice, in Tom.* III. of his Comments, and ſmall Tracts, &c.

[7] Certainly ſuch a Permiſſion can't be allowed under the Goſpel. See the Interpreters of *Matth.* v. 38, &c.

[a] Compare *Tacitus German.* c. 21. *Homer. Odyſſes,* O. *v.* 272.

[b] *Confer.* l. 13. *prin. D. ad* l. *Aquil.* l. 7. *D. de his qui dejec. vel effud.*

[c] In *Babakama,* c. 8. ſ. 1.

[d] *Conf.* l. 5. *princ.* & ſ. 1. *D. De injuriis.* Where ſince there is this Difference made between *Verberatio* and *Pulſatio,* that the former is *with,* and the latter *without Pain,* it ſeems to follow that even *Pain* may fall under Valuation.

As to the Compenſation after an Act of *Maiming*, this is farther obſervable, that in ſuch Caſes the Limb itſelf is not properly rated or valued, it being a Thing really incapable of a pecuniary Price; but the Deſign of theſe Proceedings is only to repair the Damage ſuſtain'd by the Loſs, or by the Diſuſe of ſuch a Part, with regard to the Difference of Times, of Perſons, and of Abilities; and whilſt the Judge is ſettling theſe Points, 'tis neceſſary he ſhould ſpeak of the Members themſelves[b].

IX. The next Inſtance produced by *Grotius*[1] of the Adulterer and the Adultereſs, who he ſays are bound not only to ſave the Husband harmleſs, as to the Maintenance of the ſpurious Iſſue; but likewiſe to make good to the Legitimate Children any Damage which they ſhall ſuſtain, in caſe ſo falſe a Sharer ſhould be admitted with them into the Inheritance, falls under that *kind* of *Damage*, which Men are ſaid to cauſe only *indirectly*, and *by Conſequence*. For as to the *direct* Crime of Adultery, *that* does by no means belong to *pecuniary Damage*. On this Point *Ziegler* obſerves that *Grotius* is indeed in the right, when he aſſerts, that the Husband ought to be ſecured from the Burthen of keeping the adulterous Offspring: But that it will bear a Diſpute, whether Reſtitution ſhould be made to the Legitimate Children for what they ſuffer by ſuch a Partner in the Inheritance. For he ſays the Queſtion here is concern'd only about the Mother's Eſtate, to which the adulterous Children cannot be admitted, but by the Ordinance and Preſcription of Law. And therefore when the Law of any Nation does thus actually allow them to ſhare in the maternal Inheritance with the Legitimate, the Damage here given proceeds from the Law itſelf, and not from the Adulterers. To which might be added, that the Adulterers are not obliged to ſuch Reparation for this farther Reaſon, That Children have not a *perfect Right* to the Goods of their living Parents; and no Neceſſity of Reparation can ariſe but from the Breach of a *perfect Right*. Thus a Parent cannot be ſaid properly to *injure* the Children by paſſing to a ſecond Marriage, though their Hopes of Inheritance may ſink conſiderably by ſuch a Proceeding. But the Truth is, the Inſtance alledged by *Grotius* abſtracts both from the Proviſions made by Civil Laws, about the Succeſſion of adulterous Children to the Goods of their Parents, and alſo from the Penalties decreed againſt the Adulterers, if convicted; and 'tis but reaſon to affirm with him, that the Adulterers, tho' unconvicted or undiſcover'd, do really owe ſuch Reparation both to the Husband and to the Legitimate Children[2]. For by the End and Deſign of the matrimonial Covenant, the Children had a perfect Right, that no one ſhould thruſt new Coheirs amongſt them, beſides the lawful Husband of their Mother. And by the ſame Covenant the Husband had a Right of refuſing to maintain, not only out of his own proper and ſeparate Goods, but likewiſe out of his Wife's Dowry, the baſe Progeny of his polluted Bed.

Mr. Barbeyrac's *NOTES on* §. VIII.

[1] And the Reaſon, which the *Roman* Lawyers give, is, becauſe *Liberum corpus nullam recipit æſtimationem*, i. e. the Body of a Freeman is not capable of any Valuation, as the Body of a Slave is; but Mr. *Titius* as well as this Author diſapproves of this Reaſon, and ſays, that though Freemen are not commonly bought and ſold as Slaves are; it is not a good Inference, that a Freeman that is hurt may not reaſonably require a Reparation by a certain Price of the Scars and Deformities, which are the neceſſary Conſequents of the Wounds he has received. His Reputation, for example, is as little capable of a Valuation as his Scars; yet we allow, that a Man that is injured by Calumnies may demand, that the Offender be obliged to make a pecuniary Satisfaction for his impaired Honour. Some Men indeed through a Greatneſs of Soul, either real or affected, think it below them to take Money in Compenſation of the Blows and Hurts they have received, but this hinders not, but that they have right to require ſuch a Satisfaction, if they pleaſe, and that it may be made by Money; for as *Grotius* ſays, *Lib.* 2. *Chap.* 17. §. 22, Money is the common Meaſure of all Things, which are profitable to Man.

Mr. Barbeyrac's *NOTES on* §. IX.

[1] See upon this Head concerning the Satisfaction for the Damage done by Adultery, Mr. *Placette*'s Treatiſe concerning Reſtitution, l. 3. c. 12, 13.

[2] Mr. *Thomaſius* in his *Inſtit. Juriſpr. Div.* l. 2. c. 5. §. 50. ſays, that the Reaſon produced here by our Author, taken from the Contract of Marriage, is far fetched, and agrees not with the Nature of Contracts in general; for (as he adds) all Contracts of Marriage are made between the Man and Woman only, and no ways include the Children (*ſunt extra pacta*) but our Author affirms not that Children are not comprehended in the Engagement of Marriage from whence they proceed, and which were made before they were brought forth into the World, but ſays only, that by virtue of the End of Marriage-Contracts the Children have a Right to believe that no Perſon may diſappoint them of their Hopes. Now it is certain, that if the Father or Mother had not committed Adultery, the Portion of the Legitimate Children out of the Goods already gotten, had been much greater; ſo that all the Difficulty which remains is about the Goods which the Father or Mother may get after the Birth of an Illegitimate Child. But however uncertain the Gains are, the leſſening of the Inheritance of the lawful Children is not leſs real, nor a leſs neceſſary Conſequent of Adultery, ſeeing they are already gotten; for the Reparation of the Damage muſt be made firſt. And it imports, that the Damage proceeded immediately from the Will of the Father (which is another Reaſon of *Thomaſius*'s) for the Father's Will could not have acted without an Objection propounded to it.

[a] See the Example of *M. Servilius* in *Livy*, l. 45. c. 39. *Add. Senec. de Benefic.* l. 5. c. 24. l. 13. *Princ. D. ad L. Aquil.*

[b] *Bœcler. ad Grot.* l. 2. c. 1. ſ. 6.

X. If a Man has either by Force or Fraud defiled a Virgin, he is oblig'd to pay her ſo much as ſhe appears to be damnified in her hopes of Marriage, by the Loſs of her Honour. For pure Virginity is a very valuable Poſſeſſion, and as it were the common Portion which Nature gives her Daughters[a]. And therefore he who robs a Maid againſt her Will of this Treaſure, ought ſo largely to refund to her, that the Improvement of her Fortune may hide the Blemiſh of her Body. Though indeed the true Way of proceeding is, that he marry her himſelf; unleſs hinder'd by the Diſparity of their Conditions, or ſome other extraordinary Circumſtances[b]. But ſhe who by a luſtful Compliance, voluntarily parts with her Chaſtity, is to thank herſelf for the Loſs. Yet commonly ſpeaking, the Man in theſe Caſes is preſum'd to be more faulty than the Woman. He who ſhall entice a Virgin to proſtitute herſelf on the Promiſe of Marriage, ſhould be bound to make good that Engagement. Nor will the Objection hold here, that Covenants about baſe or diſhoneſt Things are invalid. For ſince the Law of Nature requires no Interval betwixt the Covenant and the Completion of Matrimony[c] (all ſuch Diſtance being introduc'd by Civil Cuſtoms and Conſtitutions)[d] with regard to that Law, we can ſcarce call this a *baſe Condition*, "You ſhall be my Wife[1], provided you "conſent, that I ſhall immediately uſe you as ſuch." Or if there be any Thing which ſeems foul in ſo over-haſty a Match, it is not judg'd ſufficient to invalidate the Contract; becauſe Marriage is, in this Caſe, the more *favourable* Side.

XI. A Thief or Robber is bound to reſtore the Thing taken away, with its natural Increaſe or Improvement[e]; and to make good, not only the Damage[1] actually enſuing to the Owner, but likewiſe the ſurceaſing of his Gains; and this, although he be compell'd to ſuffer the juſt *Puniſhment* of his Crime. For 'tis the injur'd Party who demands Reparation, and it is the Commonwealth which requires Puniſhment for the publick Good; and the Judge can by no means reckon this as a Satiſfaction to the private Perſon, ſo as to make him loſe his Goods, without Remedy and Reſtitution. Therefore 'tis an abſurd way of proceeding in ſome States, where[2] the Magiſtrate claims the Goods found on the Robber, and commands the true Owner of them to content himſelf with ſeeing the Villain brought to publick Juſtice[f]. Nor is it more agreeable to the Law of Nature, that the Charges of puniſhing the Thief ſhould be laid on the Perſon he has robb'd, ſince the inflicting due Penalties belongs entirely to the Government; to effect which, if more Expences are requir'd, than the Eſtate of the Criminal amounts to, the Remainder is to be made up by the Publick; eſpecially ſince at other Times the Treaſury gains ſo conſiderably by Forfeits and Confiſcations. For inſtanee, if a State engage in a War, upon account of ſome private Members who have been injured, all are obliged to contribute to the Charges, as well as thoſe whoſe Defence is particularly undertaken. The Caſe is otherwiſe, if the Judge puts it to the injured Party's Choice, whether he had rather recover his Goods, or ſee the Thief executed; for here if he prefer the latter Condition, he can lay no Claim to farther Satisfaction. Though the Judge cannot fairly propoſe ſuch Terms, ſince the Puniſhment of Malefactors ought not to depend on the Pleaſure or Humour of private Men, but on the publick Advantage of the State.

If the Thing ſtolen be ſpent and embezzel'd, *Grotius* will have it to be paid for according to a middle Valuation; not to the full Worth, nor yet conſiderably leſs. Which Direction *Ziegler* does not without reaſon diſlike. For what Title has the Thief in this caſe to favour? If I can demand the full and higheſt Price, when, to oblige a Perſon, I ſell a Thing otherwiſe not *vendible*, why ſhould I here make any Abatement to the Thief, who ſeizes my Goods againſt my Will, and is my Chapman only upon Compulſion[g][3]? And in this Caſe too Reparation is due from the Thief, or from his Heirs[4], yet not beyond the Value of the Inheritance, although he has ſuffer'd the corporal Penalty of his Crime. For it does by no means look

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Mr. BARBEYRAC's *NOTES on* §. X.

[1] From henceforth the Marriage is made and conſummated, in a State of Nature, ſays *Thomaſius, ubi ſupra*, §. 51.

Mr. BARBEYRAC's *NOTES on* §. XI.

[1] See §. 3. Note 11. above.

[2] See *lib*. 4. *c*. 13. §. 4. following near the end, and what Mr. *Hertius* ſays upon it there, and his Diſcourſe *De Superioritate territoriali*, §. 56. Nevertheleſs Mr. *Thomaſius* in his Treatiſe *De Stat. Imper. poteſt. Legiſlat.* §. 41. maintains, that ſuch a Claim, Seizure, or Confiſcation, although it is eſteemed by ſome People to be contrary to all natural Right, may be juſtified by very good Reaſons, if long Cuſtom, and expreſs Law has ſettled it in that Country. As for example, The Intention of the People, or Legiſlator may be to make the Proprietors more watchful to preſerve their Goods, or they may appoint ſuch ſtolen Goods as they have recovered to bear the neceſſary Charges of the Officers of Juſtice, who are to puniſh Thieves, which otherwiſe muſt be born by the Publick. We will not enquire how far theſe Reaſons may avail in Conſcience, but ſhall only obſerve that it hath nothing contrary to natural Equity, among ſuch People as have conſented to ſubmit to ſuch a Law or Cuſtom, which equally affects all. Yet when the ſtolen Goods fall into the Hands of a Stranger, the Maxims of pure Natural Right ought to take place, and then ſuch an Uſage can be no ways authorized. Mr. *Thomaſius* pretends here to make uſe of the Opinion of ſuch as are of a contrary Judgment, who acknowledge that ſtolen Goods may be confiſcated, and given to ſuch Subjects of the State to whom they are of uſe, for he ſays, in the Opinion of all our Doctors, the Right of Repriſals is not contrary to Law or Nature: Hereupon he alledges the Example of Theft and Adultery. But it is here much the ſame to put a Man to Death, or ſeize his Effects by way of Repriſal, which otherwiſe would be contrary to the Law of Nature, we do but defend ourſelves againſt one kind of Enmity.

[3] The *Roman* Law on the contrary will have that which is ſtole or loſt to be valued at the higheſt Rate, for ſo it ſpeaks. *Placet tamen id tempus ſpectandum, quo res unquam plurimi fuit, Digeſt*. l. 13. Tit. 1. *De condict. ex cauſa furti, Leg*. viii. § 1. but *lib*. 9. *Tit*. 2. *ad Leg. Aquil. Leg*. ii. adds, *quanti id in eo anno plurimi fuit*, and *lib*. 12. *Tit*. 3. *De in litem Jurando, Leg*. 9.

[4] See *lib*. 4. *ch*. 11. §. 19. following.

[a] *Apuleius* in *Apolog*. A beautiful Maid, though in the Condition of Poverty, hath a ſufficient Portion, ſhe brings her Huſband Sweetneſs of Spirit and Diſpoſition, fair Charms and honeſt Purity. And indeed Virginity alone is commonly, and ought to be eſteemed by the other Sex, a full and juſt Recommendation.

[b] See *Exod*. xxii. 16, 17. *Deuteron*. xxii. 28, 29.

[c] See *Tobit* vii. 10, 18.

[d] *Vid. Gratian. Cauſ*. 27. *Quæſt*. 2. *cap*. 39.

[e] *Vid*. l. 4. c. 7. ſ. 3.

[f] *Vid. Caroli V. Ord. Crim. Art*. 218. *Add*. l. 3. ſ. 12. *D. De Peculio*. l. 56. ſ. 1. *D. De furtis* l. 7. *princ. D. De incendio, ruina*.

[g] *Add*. l. 9. *D. de in litem jurando*, l. 2. *princ. D. ad L. Aquil. verb. quanti id in eo anno plurimi fuit*, l. 8. ſ. 1. l. *ult. D. de Condict. furtiv*.

like Injuſtice or Cruelty, that the Offender after he thus ſatisfied the Law, either by Death, or other bodily *Pain*, ſhould likewiſe recompenſe the Perſon he has endamaged. The trite Objection of *Mors omnia ſolvit* [a], *Death pays all*, has no manner of Force in the preſent Buſineſs. Death indeed diſcharges perſonal Performances, but not proper *Debts*, which cleave as it were to the Goods and Poſſeſſions, and follow them to any new Maſter. And ſuch is this Debt for Damage given.

The other Species of *Hurt* are more eaſy to be ſettled and decided; and ſome of them will hereafter be particularly inſiſted upon in their proper Places [b] [6].

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[6] Our Author has collected ſeveral Examples more particularly in his Elements of the Civil Law, *p.* 453, *&c.* but before we end this Chapter, let us in a few Words after the Example of *Buddeus*, make an Application of theſe Maxims, which we are about to eſtabliſh for the Right of Nations, taken in the Senſe our Author intends it, *l.* 1. *c.* 3. §. 23. People then may do ill to, or offend each other in reſpect either of the Body, or the Eſtate, which anſwers to the Life of Man, or of the Government, or of his Reputation, or perfect Rights; or laſtly, ſome of the Members, or Citizens, who may be damaged either in their Perſons, or their Goods, or Reputation, or their Rights. Moreover, one People may offend another, either directly, when by the Order of their Sovereign, who reigns in Chief, they cauſe a Damage to be done to another in any manner; or indirectly, when a Sovereign does not puniſh the Miſchiefs done by his Subjects to another People, or if he could hinder them, doth not; as for example, If he does not uſe the beſt Means he can and ought to prevent or reſtrain Robberies and Pyracies; if inſtead of paying his Troops, he reduces his Soldiers to a Neceſſity of pillaging both Friends and Enemies; if he affords a Reception to thoſe who have wronged and injured the State. (See *Grotius*, l. 2. c. 17. §. 20.) In all theſe Caſes he is obliged to Reſtitution. And the other State has not only Reaſon to take Arms, if the Thing be troubleſome, but to continue a War, till it can gain itſelf a Security for the future, which is not allowed to one Citizen againſt another. But of this we ſhall treat more largely, when we come to ſpeak of the Rights of War.

[a] *Ex. Novell.* 22. c. 20.

[b] As for the Treſpaſſes done by Beaſts, which the *Roman* Lawyers term *Pauperies*, conſult their Obſervations, *ad Tit. D. Si quadrupes.*

CHAP. II.

That all Men are to be accounted by Nature equal.

The CONTENTS of every Paragraph of the ſecond Chapter.

I. *Every Man is to account another his equal.*
II. *What is a Natural Equality.*
III. *The popular Reaſons for it.*
IV. *The Opinion of ſuch an Equality makes Men helpful to one another.*
V. *How Things are to be divided by it among many.*
VI. *Men offend againſt it by Pride.*
VII. *And by Affronts offered to others.*
VIII. *Whether any be Servants by Nature.*
IX. *Whence has proceeded that Inequality that is found among Men.*

BESIDES that Affection which every Man maintains for his own Life, and Body, and Poſſeſſions, by which he cannot but reſiſt and repel whatever threatens Deſtruction to thoſe dear Concerns; we may diſcover likewiſe deeply rooted in his Mind, a moſt tender *Eſteem* and *Value* for himſelf; which if any one endeavour to impair, he is ſeldom leſs (and ſometimes much more) incens'd, than if a Miſchief had been offer'd to his Perſon, or to his Eſtate. This Paſſion, though it may be heighten'd and improv'd by various external Cauſes, yet ſeems to lay its firſt Foundations in the very Conſtitution of human Nature. The word MAN is thought to carry ſomewhat of *Dignity* in its Sound; and we commonly make uſe of this, as the laſt and the moſt prevailing Argument againſt a rude Inſulter, *I am not a Beaſt, a Dog, but I am a Man as well as yourſelf* [a]. Since then human Nature agrees equally to all Perſons, and ſince no one can live a ſociable Life with another, who does not own and reſpect him as a *Man*; it follows as a Command of the Law of Nature, *that every Man ſhould eſteem and treat another as one who is naturally his Equal, or who is a Man as well as he* [1].

Mr. BARBEYRAC's *NOTES on Chap.* II. §. I.

[1] This is a Conſequence of the Maxim which was to be explained in the preceding Chapter; for every one having a perfect Right to expect that he be regarded and treated as a Man, he that doth otherwiſe with another does him a real Damage. This Duty being founded on an immoveable Condition, *viz.* That Men ſhould be uſed preciſely as Men, is not only general, but of perpetual Obligation; inſomuch, that notwithſtanding all the Inequality by the Changes and Diverſity of additional Titles and Degrees, the Rights of Natural Equality always remain unmoveable, and agree to every one in relation to another, whatever Condtion he is in. There are nevertheleſs ſome Superiors ſo inſolent that they plainly violate this Duty, treating their Inferiors after an inhuman Manner, by exacting of them exceſſive Labours, ſlaying them, or expoſing their Lives to danger without neceſſity, as if they were Beaſts; for though it be common for Men to contemn each other, yet we ought to look upon ſuch contemptible Perſons, as of the ſame Nature with ourſelves. We ordinarily content ourſelves to account others as fooliſh and inconſiderable Perſons, in a word, as Perſons of no Merit or Accompliſhments, in compariſon of ourſelves. *Titius Obſ.* 172.

[a] Statius, *Thebaid.* 12. ver. 565.

——— *Hominum inclyte Theſeu,*
Sanguis erant omnes, eademque in Sydera, eoſdem
Sortitus animarum, alimentaque veſtra creati.

Brave *Theſeus*, they were *Men* like all before,
And human Souls in human Frames they bore,
With *You* to take their Parts in earthly Feaſts,
With you to climb to Heaven, and ſit immortal Gueſts.

II. For the better underſtanding this *Equality* amongſt Men, we may obſerve, that Mr. *Hobbes* [a] reſtrains it to a Parity of Strength, and of other human Abilities which attend a ripe and perfect Age; and would from hence infer, that all Men have good cauſe naturally to fear each other [1]. For he indeed can ſtrike no Terror into me, whoſe power reaches not far enough to hurt me. But now amongſt Men, he who is inferior to another in bodily Strength, may either by treacherous Contrivance, or by Art and Dexterity, take away the Life of the ſtouteſt Mortal [b]. Since therefore the greateſt of natural Evils which can proceed from human Power, is Death, which any grown Perſon is able to bring upon another; ſince thoſe may be term'd *Equal*, who can do equal Miſchief to each other, and ſince to kill is equally (becauſe in the higheſt degree) to miſchieve, it follows hence that Men are by nature equal [c]. When he ſubjoins that *the preſent Inequality has been introduc'd by Civil Law*, he ſeems to me very much to have forgotten himſelf. For he had been ſpeaking before of the natural Equality of Mens Strength, to which it is a great Impropriety to oppoſe the Unequalneſs ariſing from politick Inſtitutions, which does not affect or regard the Strength of Men, but their State and Condition; does not make one Man ſtouter than another, but greater in Quality and Honour. Nor has the ſame Author much better Succeſs, when he pretends [d] to diſcover *in the Faculties of the Mind a greater Equality than that of Strength*. He ſays indeed, that *all Prudence is but Experience, which Nature in equal time equally beſtows on all Men, in thoſe things they equally apply their Minds unto*. But do not we ſee one Man piercing more deeply than another into the Conſequences of things [e], applying more dextrouſly what he obſerves, and diſtinguiſhing with more Perſpicacity the likeneſs or unlikeneſs of Caſes and Circumſtances? And hence it frequently comes to paſs, that of two Men who have been employ'd an equal Time in the ſame Buſineſs one ſhall grow eminent for Management and Addreſs, whilſt the other's natural Heavineſs ſhall be little amended by ſo long a Courſe and Experience of Affairs. Nor does the great Diſparity of Mans Prudence ariſe only *from their own falſe and overweening Conceit of their particular Worth; every one thinking himſelf to have a higher degree of Wiſdom than the Vulgar; that is, than all, except a few, whom by Fame, or for concurring with himſelf, he is wont to approve and admire*. For this Diſparity appears not only when a Man compares himſelf with others, but when he compares others amongſt themſelves, and is not concern'd as to his own Intereſt, which ſide carries the Advantage. Nor do we always favour and commend him, who conſpires with our own Thoughts and Deſigns; but whom the fair Contrivance and the good Succeſs of his Project, entitles to our Approbation. And although ſuch is the natural Temper of Man, ſo greedy is he of Eſteem and Applauſe, that every one diſdains to be upbraided with Folly or [2] Imprudence, and is exceedingly incens'd againſt thoſe who boaſt of much larger Talents, much higher Attainments than his Neighbours; yet it does not follow hence, that no one allows another to be wiſer than himſelf. For what if we fanſy two Men falling together into the ſame danger, one of whom by his dexterous Management comes cleanly off, whilſt the other is baſely hamper'd, and eſcapes not without conſiderable Hurt or Prejudice; will not the latter here acknowledge his Fellow to have had a better Head-piece than himſelf? This is indeed a part of that Freedom which Men equally enjoy, that a wiſer Perſon ſhall have no Right to challenge the Government of one more ſimple, unleſs with his Conſent; eſpecially if the latter profeſs himſelf to be contented with his own little Sagacity, and not deſirous of the Controul and the Direction of others.

But although the Conſideration of *equal* Strength is thus far ſerviceable to our preſent Purpoſe, that it may reſtrain one Man from raſhly inſulting over another, in as much as all Contention with an Equal is of dubious Iſſue; and becauſe it is extreme Folly to deſire the hurting another by undergoing our ſelves the ſame Proportion of Miſchief: Yet the [3] Equality which we are now treating of is of a different Species, and the inviolable Obſervation of it is in the higheſt degree conducible to the common Benefit and Intereſt of Mankind. And here, as in all other things, may we juſtly admire the wiſe Contrivance of Nature, that whilſt ſhe diſtributes amongſt Men the Goods of the Body and of the Mind, by unequal Parcels and Meaſures, ſhe introduces this general *Equality*, to form an agreeable Harmony amongſt all the other Varieties and Diſproportions. For as in well order'd Commonwealths, one Subject may exceed another in Riches or in Honour, but all are equal Sharers in the common *Liberty*; ſo under this Regulation of Nature, how much ſoever a Man may ſurpaſs his Neighbours, as to bodily or intellectual Endowments, he

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Mr. BARBEYRAC's *NOTES* on §. 2.

[1] In the Original this Paragraph is full of Miſtakes, Omiſſions, and Superfluities, which ſometimes render the Diſcourſe very intricate; I have endeavoured to unfold it, and rectify it, as well as I can, by following the Notions both of the Author, and Mr. *Hobbes*, whoſe Principles he recites with all Exactneſs.

[2] The *Latin*, even in the laſt Edition in 1706 hath, *impudentiam*, but doubtleſs it is a Fault in the Print, for *imprudentiam* ſeems to be the true Reading.

[3] Mr. *Titius* makes our Author ſay that the natural Equality of Men, or the natural Equality which they have one to another, ſhews it ſelf in three Things: 1. Their Equality of Strength. 2. Inequality of the Goods of Nature, and Fortune. 3. The ſame natural Obligations; but he miſtakes our Author's Senſe, for after he has rejected the Opinion of Mr. *Hobbes*, who inſiſts upon an Equality purely phyſical, *viz.* of Strength and natural Faculties, he confines himſelf to the Conſideration of our moral Equality, which he calls an Equality of Right, and he ſuppoſes to ariſe from our Conformity of Nature; which is made clear by theſe Words of our Author: "Although Nature has beſtowed ſome excellent Qualities of Body and "Mind upon ſome, which ſhe denies to others, yet all are obliged to obſerve the Maxims of the natural Law one to another."

[a] *De Cive*, c. 1. ſ. 3.

[b] *Seneca de Ira*, l. 1. c. 4. There is no Man ſo contemptibly weak, who may not hope ſome way or other to wreck his Revenge on the braveſt Perſon breathing. We are all ſtrong enough to do Miſchief. [c] It is the Argument of *Pallas* in *Virgil*'s Æn. 10. ver. 376.

——*Totidem nobis animæq; manuſq;* Our Hands are equal, and our Lives the ſame.

[d] *Leviathan*, c. 13. [e] See the Earl of *Clarendon*'s Survey of the *Leviathan*. *Lowde* on the Nature of Man, *cap.* 5.

is ſtill obliged to pay all natural Duties, as readily and as fully as he expects to receive them; nor do thoſe Advantages give him the leaſt Power or Privilege to oppreſs his Fellows. Nor on the other ſide, does the bare unkindneſs of Nature, or of Fortune, ſet a Man in a worſe Condition than others, as to the Enjoyment of common Rights. But whatever one Man requires or expects from others, the ſame may others (all Circumſtances being alike) demand from him; and the ſame Judgment one decrees againſt another, he is obliged in like Caſe to ſubmit to *himſelf* [a] [4]. On this Account we can by no Means admit of *Cicero*'s Rule, which he lays down in his third Book of *Offices*; *Lex ipſa naturæ*, &c. *The Law of Nature it ſelf, which preſerves and holds together the common Profit of Mankind, does decree, That things neceſſary for Life and Suſtenance may be transferr'd from an idle and uſeleſs Perſon, to a Man of Wiſdom, Goodneſs, and Valour, who, ſhould he be ſuffer'd to periſh, would exceedingly prejudice the Publick by his Death* [5]. Much more unworthy of Approbation is that Saying of the *American*, recorded by *Montaign* [b], who coming to *Roan* in the Reign of *Charles* IX. and being ask'd what he obſerv'd that was ſingular in *France*, anſwer'd that amongſt other things, he could not but wonder to ſee ſome Perſons abounding in all manner of Plenty, and others oppreſs'd with the moſt grievous Want, begging at their Doors, and not rather chooſing to invade and pillage them for their own Support. For as thoſe who excel in the Goods of the Mind, of the Body, or of Fortune, ought not to treat Men of lower Condition with Haughtineſs and Inſolence; ſo neither ought theſe to envy or to rifle their Superiors.

And this *Equality* we may call an *Equality of Right*; the Principle from which it ſprings is this, that the Obligation to a ſocial Life *equally* binds all Men, in as much as it is the inſeparable Companion of human Nature, conſider'd ſimply as *ſuch*. Where we may obſerve farther, that between Obligations enjoy'd by a Superior, and thoſe which ariſe from mutual Compact, there ſeems to be this Difference, that the latter immediately ceaſe to a Man, when the other Party hath broken the Agreement; whereas the former may ſtill engage us to ſome Performances towards a Perſon who is wanting in a natural return of Duty. And the Reaſon of this is, becauſe the Author and Impoſer of the Obligation is able to make up to us ſome other way what we loſe by being more juſt than our Neighbours. But our Obligation to the Practice of natural Duty and Right, although impoſed by the ſupreme Lawgiver, does thus far agree with Obligations of common Bargains and Covenants, that ſo ſoon as one Perſon recedes from it [6], he can no longer require the ſame Offices from another; and beſides, the other Party does hence acquire a Right of compelling him by Force to make Satisfaction. Though the *Genius* of Civil Society makes it neceſſary to abridge and allay this Liberty adhering to a State of Nature, for the ſupport and maintenance of Government and Peace.

III. Other Reaſons there are popular and plauſible, which might give us no little Aſſiſtance in diſcovering, and in illuſtrating this Equality. Amongſt which this is not the leaſt conſiderable, that we all derive our being from one Stock, from the ſame common Father of human Race. On this Conſideration *Boetius* checks the Pride of inſulting Nobility: *l.* iii. *metr.* 6.

Quid genus & proavos ſtrepitis?
Si primordia veſtra,
Autoremq; Deum ſpectas,
Nullus degener extat,
Ni vitiis pejora fovens,
Proprium deſerat ortum.

Fondly our high Deſcent we boaſt;
If whence at firſt our Breath we drew,
The common Springs of Life we view,
The airy Notion ſoon is loſt.

Th' Almighty made us equal all:
But he that ſlaviſhly complies
To do the Drudgery of Vice,
Diſowns his high Original.

Mr. *Itchiner*.

Farther, that our Bodies are all compoſed of the ſame Matter, frail and brittle, liable to be deſtroy'd by a thouſand Accidents of Miſchief. We all owe our Exiſtence to the ſame Method of Propagation, we are all by the ſame Degrees faſhion'd and compacted in the Womb of our Mother; and the Nobleſt Mortal, in his Entrance on the Stage of Life, is not diſtinguiſh'd by any difference of Pomp or of

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[4] Here we may apply the Determination of the *Roman* Lawyers. *Quod quiſq; Juris*, &c. The ſame Law which we uſe againſt others, we ſhould ſubmit to our ſelves, *Digeſt. Lib.* II. *Tit.* II. for the chief part of Equity is Equality, *Sen. Ep.* XXX. as alſo *de Ira*, lib. 1. c. 14. *Phædr.* l. 1. Fab. 26. *Diod. Sic.* l. 13. c. 30. *Eurip. Phœniſſ. v.* 538. *Quinct. Declam.* 3. *Cumberland de leg. Natur.* c. 2. §. 7.

[5] Our Author ſeems not ſufficiently to have attended to the Connexion of *Cicero*'s Diſcourſe, if he imagines that the Orator lays it down for a general Maxim, That we may always take the Goods of Fortune from them who are not ſo worthy to enjoy them as we are, as if a Perſon of great Merit had a ſufficient Title and Right to ſtrip a Proprietor of the Goods he is lawfully poſſeſſed of; whereas *Cicero* ſpeaks only of an extraordinary Caſe, *viz.* in extreme Neceſſity, and then, as rigid as he ſeems to be, builds his Determination not upon that Right which every one has to preſerve himſelf, but upon the good of Society, whoſe Intereſt it is to preſerve ſuch a Perſon; for he ſays, that out of ſuch a Caſe, the moſt honeſt Man in the World, tho' he be almoſt famiſhed, may not take a Morſel of Bread from any Man, which may be of uſe to others. In a word, *Cicero* had taken ſuch great Care to prevent any ſuch looſe Interpretation of his Words, that it is aſtoniſhing, how our Author could ſo ſtrangely pervert his Meaning.

[6] See Book II. c. 5. §. 1. above.

[a] As *Phædrus* ſays, l 1. *Fab.* 26. *Sua quiſque exempla debet æquo animo pati.* Every one ought to bear it patiently, when his Example is turn'd upon himſelf. *Diod. Sic.* l. 13. c. 30. 'Tis but juſt that a Man ſhould himſelf ſubmit to that Law which he hath preſcribed to others. *Quinctilian Declam.* 3. We muſt needs think that every one when he paſſeth Judgment on Matters, approves of that which he himſelf wou'd have done in the like Caſe. *Add. Cumberland de Leg. Nat.* c. 2. ſ. 7. *Senec.* Epiſt. 30. Equality is the firſt part of Juſtice. *Euripides Phœniſſ.*

'Tis beſt my Son to keep *Equality*;
The mighty Band which Friends unites to Friends,
And States to States, and links confederate Wars.

[b] B. 1. C. 30.

Paſſage, from the loweſt of Mankind [a]. Our Growth and Nouriſhment is perform'd alike, and the groſs Remainders of our Food are carried into the ſame *Common Shore*. Laſtly, our Life haſtens to the ſame general Mark; Death obſerves no Ceremony, but knocks as loud at the Barriers of the Court, as at the Door of the Cottage [b]; and after Death, our Bodies are reſolv'd into the ſame Duſt and Corruption [c]. Beſides, wiſe Men are ever preſſing it upon our Conſideration, that we are alike obnoxious to the Sports of Fortune, to the endleſs variety of Dangers or Miſchances; or rather, that the divine Diſpoſer of all Things *enſures* no Man in his preſent State, or in the Poſſeſſion of unſhaken Felicity: But according to the ſecret Counſels of his Providence, expoſes divers Men to various Changes and Troubles, as if he pleaſed himſelf in raiſing the Poor out of the Duſt, and caſting the High down to the Ground. (See (*) at the bottom of the *Page*.) Our Chriſtian Profeſſion ſuggeſts many Motives to the ſame Purpoſe; as that God does not eſteem Men according to their Nobility, their Power, or their Wealth, but according to their ſincere Piety and Goodneſs. And that at the laſt Day of Judgment, of the Diſtribution of Rewards and Puniſhments in another Life, no regard will be had to thoſe who ſwell in Port and Figure, beyond their Neighbours of this World.

IV. This *Equality* being admitted, there flow from it ſeveral Precepts, the Obſervation of which bears a very great Force in the maintaining of Peace and Friendſhip amongſt Men. And this in the firſt place is moſt manifeſt, that he who would uſe the Aſſiſtance of others in promoting his own Advantage, ought as freely to be at their Service, when they want his help on the like Occaſions. *One good Turn requires another*, is the common Proverb. For *he* muſt certainly eſteem others *unequal* to himſelf, who conſtantly demands their Aid, and as conſtantly denies his own. And whoever is of this inſolent Temper, cannot but highly diſpleaſe and provoke thoſe about him, and ſoon give occaſion to a Breach of the common Peace [1]. It was a manly and gallant Reproof which *Caractacus* gave the *Romans*, *Num, ſi vos omnibus imperitare vultis, ſequitur ut omnes ſervitutem accipiant? Becauſe you deſire to be Maſters of all Men, does it follow that all Men muſt deſire to be your Slaves* [2]? And indeed, it as much implies a Contradiction to determine differently in my own Caſe, and another's, when they are exactly parallel, as to make contrary Judgments on things really the ſame. Since then every Man is well acquainted with his own Nature, and as well, at leaſt as to general Inclinations, with the Nature of other Men, it follows that he who concludes one way as to his own Right, and another way as to the ſame Right of his Neighbour, is guilty of a Contradiction in the plaineſt Matter; an Argument of a Mind unſound in no ordinary degree. For no good Reaſon can be given, why what I eſteem juſt for my ſelf, I ſhould reckon unjuſt for another in the ſame Circumſtances. Thoſe therefore are moſt properly ſociable Creatures, who grant the ſame Privilege to others, which they deſire ſhould be allow'd themſelves [d]; and thoſe who on the other hand, are moſt unfit for Society; who imagining themſelves a degree above vulgar Mortals, would have a particular Commiſſion to do whatever they pleaſe; they give themſelves a free Pardon for all

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Mr. BARBEYRAC's *NOTES* on §. 4.

[1] The *French* Tranſlator in this place goes on thus: "For according to the Remarks of a judicious ancient Chriſtian Doctor, (*viz. Lactantius Inſt. Div.* l. 3. c. 23.) *Nihil ſapienter fit*, &c. Nothing is conformable to the Rules of Wiſdom, which being practiſed by every one, becomes hurtful and evil.

[2] The Author here ſets down a Speech of *Caractacus*, a great Commander of the *Britains*, the ancient Inhabitants of *England*, which he ſpoke with much Courage to the *Romans*. *Num ſi vos*, &c. but this Paſſage were better placed elſewhere, ſince he doth not here treat at all of the Right of commanding others, but only of requiring a Duty.

[a] See *Wiſdom* VII. 5. [b] *Horat. Od.* i. iv. 13. ——— *Mors æquo pulſat pauperum tabernas* ——— *Regumque turres.*
Θανάτῳ πάντες ὀφειλόμεθα. The World owes us all to Death.

[c] *Claudian. in Rufin.* l. 2. ver. 473.

Huc poſt emeritam mortalia ſecula vitam,
Deveniunt, ubi nulla manent diſcrimina fati,
Nullus honos, vaniq; exutum nomine regem
Proturbat plebeius egens. ———

Hither as to the grand retiring Room,
From Earth's wide Stage, the mortal Actors come,
And here partake an undiſtinguiſh'd Doom.
Aſide their Honours with their Robes they throw;
The Herald and his Trade are loſt below.
The King depos'd, forgets the Duſt he made;
And the rude Peaſant crouds the *Royal Shade*.

Phocylides, Πάντες ἴσοι νέκυες, the Dead are all upon a Level. Ἰσοτιμία γὰρ ἐν ᾅδου καὶ ὅμοιοι ἅπαντες, the Grave admits no difference in Title or Degree. *Cicero de Leg.* l. 2. c. 23. It is moſt agreeable to Nature, that Death ſhould take off all Diſtinction of Fortune. *Statius Theb.* X. 712. —— *Titulique in morte latentes.*
——Titles hid in Duſt. *Add. Sirach.* X. 9, *&c.*

[d] *Qui ne tuberibus propriis offendat amicum*
Poſtulat, ignoſcat verrucis illius: æquum eſt
Peccatis veniam poſcentem reddere rurſus.
Hor. 1. Sat. 3.

He that would have his *Botches* not offend,
Muſt wink at *puny Pimples* in his Friend.
Indulgence ſhould be mutual; they that *want*
The largeſt Pardon, ſhould the largeſt *grant*.

(*) ——— *Valet ima ſummis Mutare, & inſignem attenuat Deus. Obſcura promens*, Hor. l. 1. *Od.* 34. GOD can quite change the Conditions of Affairs, and the Stations of Men. *Idem* l. 2. *Od.* 13. *Quod quiſque vitet nunquam homini ſatis cautum eſt in horas.* No Man is provided againſt the Accidents of the next Hour. *Manil.* lib. 3. ver. 521.

———*Tanta eſt rerum diſcordia in ævo,*
Et ſubtenta malis bona ſunt, lacrymæq; ſequuntur
Vota, nec in cunctis ſervat fortuna tenorem,
Uſque adeo permixta fluit, nec permanet unquam,
Amiſitq; fidem variando cuncta per omnes.

———Hence there ſprings
That various Diſcord which is ſeen in Things:
In one continued Stream no Fortune flows,
Joy mixes Grief, and Pleaſure's urg'd by Woes:
Inconſtancy in every Part appears,
Which Wiſdom never truſts, but Folly fears.
Mr. *Creech.*

A moſt noble Strain we have to the ſame Purpoſe in *Seneca*'s Thyeſtes, ver. 597. *Ille qui donat diadema fronti*, &c.

Arrian (*in Epict.*) tells a Story of a poor Shooemaker, whom his Maſter *Epaphroditus* ſold off as a Slave of little uſe. In ſome time the Man got the Honour of working at his Trade for the Emperor; and then 'twas pleaſant to ſee how *Epaphroditus* made his Court to him.

things, and vouchſafe not to others the leaſt Indulgence; they demand the principal Share of common Honours, and of common Goods; though their Right and Title is not diſtinguiſh'd by any peculiar Excellence or Advantage. For as in raiſing an Edifice, a Stone which by reaſon of its rough and angular Figure, robs others of more room than it fills it ſelf, and upon account of its exceeding Hardneſs, cannot conveniently be cut into Regularity, and ſo hinders the whole Frame of Building from cloſing together, is thrown aſide by the Workman, as unfit for all Uſe and Service; ſo thoſe πλεονέκται, thoſe greedy Churls, whoſe rough and ſavage Temper inclines them to heap Superfluities on themſelves, and to deprive others of mere Neceſſaries, and whoſe violence of Paſſion makes them uncapable of being reclaim'd, are indeed the great Impediments of Society, and the Plagues of Mankind. Hence it is a Command of Nature's Law, that *no Man who has not obtain'd a particular and eſpecial Right, ſhall arrogate to himſelf a larger ſhare than his Fellows; but ſhall admit others to an Enjoyment of equal Privileges with himſelf* [a]. Therefore the Commiſſioner in *Livy*[b], who came to treat with the common People in Sedition, was guilty of Inſolence, when he told them, *Satis ſuperq; humilis eſt, qui æquo jure in civitate vivit, nec inferendo injuriam, nec patiendo. He is humble enough, and indeed too humble in a State, who is content to live upon equal Terms and Rights, neither doing an Injury, nor taking one.* As if it were a hard Caſe, that the Privilege of Nobility ſhould not be ſtrong enough to diſpenſe with that fundamental Law of Equity, *Do as thou wouldſt be done by*[c]! On this Principle is built that gallant Compliment of * *Pliny* to the Emperor *Trajan*, *Unum ille ſe ex nobis, & hoc magis excellit atque eminet, quod unum ex nobis ſe putat: nec minus hominem ſe quam hominibus præeſſe meminit. He thinks himſelf one of us, and 'tis this makes him more our Superior, that he paſſes in his own Judgment for our Equal, and remembers himſelf to be no leſs a Man than the meaneſt Subject whom he governs.* For that excellent Prince, when he accepted the ſupreme Command, had promiſed that private Men ſhould find him ſuch an Emperor, as he himſelf deſired to find, whilſt a private Man [3]. *Galba* in *Tacitus* [d], gives *Piſo* an admirable piece of Advice to the ſame Purpoſe. *Utiliſſimus idem ac breviſſimus bonarum malarumq; rerum delectus eſt cogitare, quid aut volueris ſub alio principe, aut nolueris. The beſt and the ſhorteſt Rule to obtain the true Art of good Government, is to conſider what you would your ſelf approve, and what you would condemn in another Prince; and accordingly to practiſe the former, and to avoid the latter.* And *Seneca* [e] joins in the ſame wiſe Direction; *This* (ſays he) *is the Sum of my Advice, ſhew ſuch Behaviour towards an Inferior, as you would have a Superior ſhew towards you* [f].

V. The ſame *Equality* teaches a Man how to carry himſelf, in caſe he be appointed Arbitrator of any Right betwixt others, namely, *that he treat them as Equals, and give no Favour or Indulgence to one above the reſt, except ſuch as can claim by virtue of ſome peculiar Right.* For he that by a partial Preference of one Perſon to another, violates the Rule of natural Equality, is at the ſame time guilty of an Injury, and of an Affront, by denying a Man what is his juſt Due, and by detracting from that Worthineſs, which Nature gives him in common with his Fellow [1]. It follows as a Corollary from this Doctrine, that if the thing which is to be diſtributed amongſt many, admit not of a Diviſion, the Perſons who have an equal Right to it, uſe it in common, and without ſtint, if the Quantity of the thing will allow it; if not that they then uſe it in a certain and limited manner, and with proportion to their Number. For it is not poſſible to find out any other way of obſerving an Equality in theſe Caſes. But if the thing can neither be divided, nor poſſeſs'd in common, then the uſe of it ſhall either be taken by turns [2] [g], or if this Courſe too fail of Succeſs, and if likewiſe one of the Contenders cannot give the others an Equivalent to ſecure to himſelf the whole Enjoyment of the thing deſired, then one ſhall carry it from the reſt, by the fair Deciſion of a *Lot*; which is the moſt proper Remedy that can be applied to all Differences of this kind, in as much as it takes away the Notion of Contempt, by ſetting all the Parties on a Level; and if it does not favour a Man, yet does it not in the leaſt diſgrace him [h].

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[3] The excellent Saying of *Seneca* to this Purpoſe is very remarkable, *Sic cum inferiore vivas, quemadmodum tecum velles ſuperiorem vivere,* Deal ſo with your Inferiors, as you would have your Superiors deal with you. *Epiſt.* 47. *& de ira*, l. 2. c. 28.

Mr. Barbeyrac's *NOTES* on §. 5.

[1] For as an antient Author (*viz. Livy*, l. 34. c. 4.) ſpeaks, *Quod ut alii liceat, tibi non licere, aliquid naturalis aut pudoris aut indignationis habet.* That what is lawful for another, ſhould not be lawful for you, creates a natural Shame, or a natural Indignation.

[2] When Things are enjoyed by turns, the Lot muſt decide who ſhall have the firſt Turn. *Hobbes*, c. 3. §. 17.

[a] Thus the *Tribune* of the *Commons* ſpeaks in *Dionyſius Halicarnaſſæus*, *Antiq. Rom.* lib. 7. c. 41. "With regard to the "underwritten Laws of Nature, O ye Senators, we demand that the People may thus far enjoy the ſame Rights with you. We "grant that thoſe of your Number who excel in Virtue and in Fortune, ought to poſſeſs the chief Offices and Honours of the "State: But this Privilege we preſume may be fairly challeng'd by every Member of a Commonwealth, to be ſecured from In"juries, and to obtain Juſtice againſt thoſe who offer them. *Lactant. Div. Inſtit.* l. 3. c. 22. He that would bring Men to an Equality, muſt take off all the vain Humour of Arrogance and Pride; and ſhew thoſe who ſwell with Power and Grandeur, that they are indeed on the Level with their moſt needy Vaſſals. *Add.* Sen. *de* Ira, l. 2. c. 28. [b] Book III. Chap. 53.

[c] See the arrogant Manner of the Satisfaction given by the Duke of *Joinville* to *Mareſcote* in *Gramond. Hiſt. Gal.* l. 8.

[d] *Hiſt.* 1. 16. [e] *Epiſt.* 47. [f] Hence appears the intolerable Inſolence of that Saying in *Lucan*. l. 5. v. 340.

——Nunquam ſic cura Deorum
Se premit, ut veſtræ morti veſtræq; ſaluti,
Fata vacent; procerum motus hæc cuncta ſequuntur,
Humanum paucis vivit genus.

——Heaven thinks not on the vulgar Herd,
Their Deaths to haſten, or their Lives to guard;
Fortune diſdains to court ſo mean a Care,
Nor leſs than *Ceſar* is a Mark for her.
The Fate of Subjects on their Lords muſt turn,
And *little* Mortals for the *great* are born.

This my Lord *Bacon* calls a *Gygantean* Temper of Mind, poſſeſſing thoſe great Diſturbers of the World, who ſeem to aim at nothing leſs than to render all Men happy or miſerable, according as they appear their Friends or Foes; and as it were to make all Nature bear their own Image; which is properly fighting againſt Heaven. *De Augment. Scient.* l. 7. c. 2.

[g] *Curtius*, l. 7. c. 6. In this hot Contention between the two Parties of Horſe and Foot, for the Honour of carrying their Prince, *Alexander* finding it would be difficult for him to make the Choice, and that he could not ſatisfy one Order without diſguſting the other, commanded they ſhould bear his Litter by turns. [h] *Proverb.* XVIII. 18.

* Plin. Panegyr. *c.* 2. *n.* 4.

Hobbes [a] has divided *Lots* into two ſorts, *arbitrary* and *natural.* The former is ſuch as the Competitors agree upon, engaging to ſtand to the Event, whilſt they cannot by any Art govern or foreſee it; and therefore this kind of Lot, with regard to Men, depends entirely on meer Chance and Fortune. *Natural Lot*, he ſays, is either *firſt Seizure*, by which a Thing, which can neither be enjoy'd in common nor divided, paſſes to him who ſhall firſt lay Hands on it with a deſign to keep it; or *Primogeniture*, by virtue of ſuch paternal Goods as can neither be divided nor poſſeſs'd in common by many Children, and are adjudg'd to the Firſt-born. Yet if we accurately conſider Things, there will appear to *be* no proper *Lot* but what we may call *arbitrary*. For 'tis not eaſy to aſſign a Reaſon why ſuch an Event as a Man cannot procure by his own Induſtry, ſhould give him a Right which ſhould hold good againſt his Equals, unleſs this *Right* was aſſign'd or adjudg'd to this particular *Event*, by the *arbitrary* Appointment and Agreement of Men. Thus a Thing which no one has a particular Right to claim, belongs [3] by Compact to the firſt Seizer; becauſe when diſtinct Proprieties were introduced, there ſeems to have paſs'd this tacit Agreement amongſt Men, that thoſe Things which were not peculiarly aſſign'd to any Owner, and yet could not without a Prejudice to Mankind be always left in common, ſhould be the Right of the firſt Poſſeſſor. And thus too the Right of *Primogeniture* owes its Original to human Conſtitution and Compact. For otherwiſe, why ſhould the younger Brothers, born of the ſame Parents, be placed in a worſe Condition than the eldeſt, barely upon account of an Accident or Circumſtance, which it was not in their Power to hinder [b]? Now the Reaſon why theſe two Claims by *Primogeniture*, and *firſt Seizure*, are ſometimes, tho' improperly call'd *Lots*, is this, becauſe they cannot be foreſeen or directed by any Power of human Induſtry, and becauſe it reflects no real Diſgrace on a Man to loſe the Preference, for want of theſe Advantages [4].

VI. This Rule of *Equality* is likewiſe tranſgreſs'd by [1] *Pride*, when a Man [2] for no Reaſon, or without ſufficient Reaſon, prefers himſelf to others, bearing a lofty Carriage towards them, as baſe Underlings, unworthy of his Conſideration or Regard. How vaſtly diſtant this Temper is from the Virtue of Generoſity and true Greatneſs of Mind, *Des Cartes* has moſt elegantly ſhewn in his Treatiſe *of the Paſſions*. He lays it down as a Principle, “that it is one of the chief Parts of Wiſdom to know how and on what Accounts every one ought to eſteem or diſeſteem himſelf; *and then he makes out, that* the only juſt Cauſe of eſteeming ourſelves, ariſes from the lawful Uſe of our Power of *free Choice*, and from the Command and Authority which we exerciſe over our Wills; ſince beſides the Actions which depend on that Faculty, there is nothing in us that can properly merit Praiſe or Diſpraiſe. *Hence he concludes*, the true Notion of Generoſity, which prompts a Man to value himſelf as highly as in reaſon he ought, to conſiſt in this, that he acknowledge nothing to be truly *his own*, but this free Diſpoſition of his Will; that he be ſenſible he cannot purchaſe Blame or Commendation, otherwiſe than by the ill or the good Uſe of this Power; and that at the ſame time he feel within himſelf a full Purpoſe and Reſolution of uſing it well. *He proceeds to obſerve*, that thoſe who have ſuch a true Senſe of themſelves are eaſily inclin'd to think, that every Man judges of his own Worth in the ſame manner, ſince there is nothing in this Notion which hath any Dependence on external Things or Perſons. *That* for this Reaſon they never deſpiſe others, but are ready to excuſe their Faults, as proceeding rather from Miſtake than Deſign. *That* as they think themſelves not much inferior to thoſe who exceed them in Wealth, Honour, Beauty, Wit, or Learning, knowing that theſe Advantages ought not to come into the Account; ſo when they find themſelves poſſeſs'd of the like Goods, they do not fanſy they are much ſuperior to thoſe who want them. Hence, *he ſays*, there is diſcoverable in the moſt generous Spirits an honeſt Humility; a Virtue conſiſting in the Reflection which we make on the Infirmity of our Nature, and upon the Miſcarriages which we either have formerly been guilty of, or may be hereafter, theſe being no leſs than we ſee committed by others; whence it comes to paſs, that we prefer not ourſelves to any Perſon living, wiſely conſidering that all Men have the ſame Faculty of Free-will, and may all employ it to as good Uſe. *He remarks farther, that* thoſe who entertain a good Opinion of themſelves for any other Cauſe, are not endued with real Generoſity, but puffed up with empty Pride, which as it is always vitious, ſo it is aggravated the more, the more unjuſt the Cauſe is on which the Self-conceit is founded. And the moſt unjuſt Cauſe of Pride is the being proud without Cauſe; that is, when a Man being conſcious to himſelf, that he has no real Merit which ſhould entitle him to Eſteem, imagines Glory to belong to

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[3] We ſhall make it appear in its proper Place, that this is a falſe Suppoſition. See *Lib.* 4. *c.* 4. *paragr.* 4 *Note* 2.

[4] This Point is more largely diſcourſed of, *Lib.* 4. *c.* 11. §. 8. & *Lib.* 5. *c.* 9. §. 2. & *Lib.* 7. *c.* 7. §. 11.

Mr. BARBEYRAC's *NOTES on* §. VI.

[1] Pride taken in its moſt extenſive Meaning does not always directly oppoſe the natural Equality of Men, as may appear from §. 1. *Note* 1. All that our Author ſays here refers only to Mens Reputation in general. For Pride in general ſignifies nothing elſe than a very high Opinion of a Man's ſelf. See *Titius*, *Obſerv.* 179, &c. and *Thomaſius*'s *Inſtit. Juriſpr. Div.* l. 2. c. 4.

[2] When any one has lawfully gotten a Right which gives him a Preheminence above others, he ought to value and maintain it, provided that he avoid all vain Oſtentation, and all Contempt of his Inferiors. And on the other ſide Inferiors ought not in this Caſe to refuſe them a Preference, but pay them the Honours which they may lawfully require, as our Author ſays in his Treatiſe of the Duties of Men and Citizens, *Lib.* 1. *c.* 7. §. 5. Our Author cites at the bottom of this Paragraph a Paſſage out of *Euripides*, ſhewing us, that if any one is arrived at a Degree of Diſtinction, he ought not to be proud, but on the contrary have the greater Affection for his Friends, by how much he ſees himſelf in a better Condition to do them Service. *Iphig. in Aulid.* v. 343. He alſo recites a Paſſage out of *Lucian*, *Tom.* II. *p.* 14. *Ed. Amſt.* Of Images. Οὐδεὶς γὰρ ἂν φθονήσειε, &c. No Man will envy Perſons in Authority, if they uſe their Power with Moderation. 'Tis the Abuſe of Power that begets Envy. Mr. *Ablancourt* delivers the ſame. What goes before, and what follows after, deſerves Reading.

[a] *De Cive* c. 3. ſ. 18, &c. *Leviath.* Engl. *p.* 78.

[b] Therefore *Ariſtotle* ſays, Brothers are equal, except they differ in Age, *Ethic.* 8. *c.* 12.

" every one that pleaſes to uſurp it, and that the " greater ſhare a Man claims of it, the greater he " really enjoys[3]. A Vice ſo extremely abſurd, that " 'tis ſcarce credible any ſhould proſtitute them- " ſelves to ſuch a Baſeneſs, were there not a Pack " of idle Flatterers in the World, who, by their " falſe Praiſes, ſwell Men of heavy Parts into this " moſt ſtupid Degree of Folly, which the Poet [a] " calls a kind of Madneſs.

Nor does a Man's Advancement to Honour, or Power, give him any juſt Reaſon to be proud; on which Point *Menelaus* in *Euripides* [b], thus admirably expoſtulates with *Agamemnon:*

Οἶσθ' ὅτ' ἐσπούδαζες ἄρχειν Δαναΐδαις, &c.

You know when with ambitious Aim you ſtrove,
To lead the Greeks *to* Troy, *and rule the War,*
How meek you look'd, how low you ſtoop'd to reach
The meaneſt Hand; your hoſpitable Gate,
Free of Acceſs, let in the vulgar Tide;
You, as in order thro' the Ranks you paſt,
With courteous Arts of popular Addreſs,
Saluted, Man by Man, the gaping Crowd,
And forc'd your Honours on unwilling Clowns:
That low Compliance might advance your Pride,
And in the common Market purchaſe Praiſe.
But Maſter of your Wiſh, and voted Chief
Of our united Force, lofty you grew
In Manners, as in Place; your Doors were barr'd,
Four Friends (once Friends, but now intruding Slaves)
Drove back with Scorn; yourſelf, like ſome rich Gem,
Deeply encas'd, and veil'd from vulgar View.
But a good Man, if Wealth or Dignity
Exalt his State, ſhould keep his Soul unmov'd
From Virtue's Centre, and elude the Charms
Of ſwelling Inſolence; ſhould freely ſmile
On Friends beneath, and ſerve them with more Will,
When his improv'd Condition gives more Power.

Lucian [c] has left an excellent Obſervation to the ſame purpoſe; *No Man*, ſays he, *will envy one advanced to Eminence and Grandeur, if he ſee him bear his Fortune with Moderation.*

VII. A much heavier Breach of this *Equality* is it, for a Man to ſhew his Contempt of others by outward and open Signs, whether by Actions or Words, by a Look or a Laugh, or any ſuch Affront; one kind of which is often expreſs'd by troubling another with a ridiculous or a diſagreeable Preſent [d]. Which Sin is to be reputed ſo much the more heinous, as it gives the higheſt Provocation imaginable, and inflames the Sufferer with the greateſt Violence of Anger and Revenge. For we find many Perſons who will expoſe their own Life to preſent Danger, and much more break the Peace with others, rather than put up ſuch a grating Indignity: Inaſmuch as every Act of this Nature is a Wound to a Man's Glory or Reputation, of which Goods we are more proud, and more tenderly ſenſible, than of any Thing elſe we poſſeſs; and in the ſafe and flouriſhing State of which, almoſt the whole Pleaſure of our Mind conſiſts [1].

VIII. From what has been offer'd on this Head, it is eaſy to diſcover the Abſurdity of that Opinion, derived from the antient *Greeks*, *of ſome Mens being Slaves by Nature*. Which if taken in the ſame Crudeneſs of Senſe, as it bears in the Expreſſion, is directly repugnant to that *natural Equality*, which we have been endeavouring to eſtabliſh [e]. Thus much indeed is moſt evident, that ſome Men are endued with ſuch a Happineſs of Wit and Parts, as enables them not only to provide for themſelves and their own Affairs, but to direct and govern others. And that ſome again are ſo extremely ſtupid and heavy, as to be unfit to govern themſelves, ſo that they either do miſchief, or do nothing, unleſs others guide and compel them. And farther, that theſe laſt being commonly furniſh'd by Nature with ſtrong and hardy Bodies, are capable of bringing many notable Advantages to others by their Labour and Service. Now when theſe have the Fortune to live in Subjection to a wiſe Director, they are without doubt fix'd in ſuch a State, as is moſt agreeable to their *Genius* and Capacity. If therefore theſe two Parties of Men voluntarily conſent to the Eſtabliſhing of ſome common Government amongſt them, it is conſonant to Nature, that the former be inveſted with the Power of *Commanding*, and the latter with the Neceſſity of *Obeying*, by which Method the Intereſts of both will be beſt promoted and ſecured. And in this Senſe we may without Danger admit of *Ariſtotle*'s Aphoriſm, laid down in his firſt Book of *Politicks*, c. 2. Τὸ μὲν δυνάμενον τῇ διανοίᾳ προορᾷν, &c. which according to [2] *Heinſius* his Paraphraſe runs to this purpoſe; *Nothing is more ſuitable to Nature, than that thoſe who excel in Underſtanding and Prudence, and are able to judge of Things at a Diſtance, ſhould rule and controul thoſe who are leſs happy in theſe Advantages; on the other hand, thoſe whoſe bodily Strength and Vigor enables them to put the Commands of wiſer Men in Execution, are by Nature framed and deſigned for Subjection and Obedience. From this Conſtitution of Things the So-*

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[3] This Vice is not only ridiculous in itſelf, and with relation to him that is guilty of it, being ſo fooliſh as to value himſelf without any Ground, but is very injurious to others; ſince he muſt at leaſt imagine, that the reſt of Mankind are ſuch Sots and Fools, as to pay their Reſpects to Perſons of no manner of Merit.

Mr. BARBEYRAC's *NOTES* on §. VII.

[1] There is a Paſſage in Mr. *De la Bruyere*'s Characters in the Chapter, *Of Man*, worthy of our reading, becauſe it confirms and illuſtrates the Notion of our Author. 'Tis this: They who take away our Goods by Force or Injuſtice, and rob us of our Honour by Calumny, ſhew their Hatred to us ſufficiently; but yet they do not equally prove that they have no Eſteem for us. On the contrary, Mockery is an Injury, which leaſt of all deſerves Pardon; it is the Language of Contempt, and ſuch an one as is eaſilieſt underſtood; it attacks a Man in his laſt Entrenchments, *i. e.* the Opinion of himſelf; it renders a Man ridiculous in his own Eyes, and convinces him that he has the worſt Diſpoſition to him poſſible, and ſo renders him irreconcileable.

Mr. BARBEYRAC's *NOTES* on §. VIII.

[2] There is a Letter of *Dan. Heinſius*'s in the various Readings of *Janus Rutgerſius*, l. 4. c. 3. wherein he ſhews, that *Ariſtotle* did not ſpeak of the natural Condition of ſuch as are naturally diſpoſed to be Slaves, but of their natural Servitude. And he endeavours to reconcile the Maxims of Philoſophy with the Civil Lawyers, who ſay, that Slavery is contrary to Nature. See *Note* 6. following, and *Lib.* 6. *c.* 3. §. 2.

[a] *Pindar. Olymp.* 9. Τὸ καυχᾶσθαι παρὰ καιρὸν μανίαισιν ὑποκρέκει. To boaſt unſeaſonably is the Character of Madmen.

[b] *Iphigen. in Aul.* [c] *De Imaginibus.* [d] *Add.* l. 5. ſ. 1. *D. qui ſatiſdare cogantur*, Matt. v. 22.

[e] And therefore *Strabo*, l. 1. ſpeaking of thoſe who adviſed *Alexander* to treat all *Grecians* as Friends, and all *Barbarians* as Enemies, wiſely obſerves, that the Diſtinction ought rather to have been founded in the Goodneſs or Badneſs of the Perſons, many *Grecians* being wicked and cruel, many *Barbarians* virtuous and obliging.

vereign and the Slave receive equal Advantage, the Benefits and the Conveniencies are alike on both Sides[a]. Yet it would be the greateſt Abſurdity imaginable to believe, that Nature actually inveſts the Wiſe with the Sovereignty over the Weak and Imprudent, or with a Right of forcing them to ſubmit and obey againſt their Wills. For no Sovereignty can be actually eſtabliſh'd, unleſs ſome human Deed or Covenant precede. Nor does a natural Fitneſs for Government preſently make a Man Governor over another, who is as naturally adapted for Subjection; nor, ſuppoſing a Thing to be profitable for another, is it therefore lawful for me to force it upon him againſt his Inclination. For all Men enjoy a *natural Liberty* in the ſame Meaſure and Degree, which before they ſuffer to be impair'd or diminiſh'd, there muſt intervene either their own *Conſent*, Expreſs, Tacit, or Interpretative, or ſome Fact of theirs, by which others may obtain a Right of abridging them of their Liberty by Force, in caſe they will not part with it by a voluntary Submiſſion. 'Twas therefore well urged by *Quinctilian*'s Declaimer[b]: *What hath Nature produced amongſt all her Works which ſhe hath not ſet in a State of Freedom? I forbear to ſpeak of Slaves, whom the hard Chance of War hath deliver'd up as a Prey to the Conquerors, though they were born by the ſame Laws, by the ſame Neceſſity, by the ſame Accidents contributing to their Original. They draw Breath out of the ſame free and common Air; and 'twas not the Decree of Nature which gave them Maſters, but the Unkindneſs of Fortune.* 'Tis a Maxim of *Ulpian*, that *all Men by a natural Right are born free*[c]; which Freedom *Grotius* interprets, "To be ſuch as is only a *Privation* of Servitude, not a *Contradiction* to it; that is, it provides that a Man ſhall not be by Nature a Slave; but it gives him no Right that he ſhall not become a Slave afterwards; for no Man is in ſuch a Senſe *free*, *as that* it ſhall be impoſſible for him to loſe his Liberty." The ſame Truth may be thus explain'd in other Words; ſince Nature hath produc'd all Men *equal*, and ſince *Servitude* cannot be conceiv'd without Inequality (for *Servitude* neceſſarily brings in a Diſtinction of Superior and Inferior; whereas in the Notion of *Liberty*, it is not requiſite that we ſhould have an Inferior; but 'tis ſufficient that we are ſubject to no Superior) it follows that all Men naturally, and antecedently to any human *Deed*, are conceiv'd to be *free*. But *natural Ability*, or the Poſſeſſion of ſuch Qualities as are requiſite for any State, do not immediately ſet a Man in that State. Every one who hath Capacity enough to rule a People, or to command an Army, is not without more ado a King or a General. Nor can ſuch an accompliſh'd Man as *Horace*'s *Lollius* preſently challenge to himſelf the *Conſular Faſces*; tho' he fully anſwer that fine Character,

——Eſt animus tibi
Rerumque prudens, & ſecundis
Temporibus dubiiſque rectus,
Vindex avaræ fraudis, & abſtinens
Ducentis ad ſe cuncta pecuniæ;
Conſulque non unius anni, &c. Lib. iv. Od. ix.

A Soul with ſage Experience fraught,
Whoſe generous Worth and ſtedfaſt Thought,
Nor Frowns of adverſe Fate could grieve,
Nor ſmiling Happineſs deceive.
A mortal Enemy to Knaves,
And Gold that makes them: Gold enſlaves
The wicked World, but owns its Charms
A Match too weak for *Virtue*'s Arms.
Not Conſul of a ſingle Year, &c.

And what *Plutarch* reports of *Pelopidas*, that he held the Supreme Command longer than the Laws allow'd of, leſt his Succeſſors, thro' Idleneſs or Miſmanagement, ſhould prejudice the Affairs of the State, muſt be look'd on as an Inſtance, not of any ſtanding Right, but of an extraordinary Indulgence[d].

And here too we have an Opportunity of interpreting that Saying of *Albutius* in *Seneca*[e], which is commonly cited on this Subject. *By Nature a Man is neither Bond nor Free; 'twas Fortune that afterwards introduc'd theſe Names:* That is, ſo long as all Men were *equal*, they could not be diſtinguiſh'd in our Mind by ſuch a State as is oppoſite to their natural State of Equality. But afterwards, when thoſe who loſt or quitted that natural State, got the Appellation of *Bondmen*, in like manner thoſe who retain'd it did now entirely engroſs the Title of *Free*. The Thing may be explain'd by this familiar Inſtance in a like Caſe; ſo long as there are no military Men in a State, the Subjects all keep the ſame common Name and Condition; but when part of the Subjects are liſted into armed Troops, the Diſtinction of the *Soldiery* and the *Country* immediately ariſes. And according to this Explication may we admit of that Notion, which *Ariſtotle*[f] cites and rejects, that *Bondage and Freedom owe their Original to Law*. For were not *Servitude* introduced by human Compacts and Conſtitutions, ſuch a Difference would be unintelligible, all Men being placed by Nature in the ſame equal State; as the Emperor ſpeaks in the Inſtitutions[g], *Whereas before all Men enjoy'd the ſame general Name, the Law of Nations brought in three kinds of Men*, Liberti, Servi, *and* Libertini; *Men that are born Free, Men that are Slaves, Men that being at firſt Slaves have obtained their Freedom.* Or it may be enough to juſtify that Saying, which *Ariſtotle* diſlikes, to give it this Senſe, *the Rights of Liberty and Servitude, as they are conſider'd in Men living under ſettled Governments, are defined by Civil Laws.*

Many other Conſiderations there are of ſufficient Strength, to overthrow that vain and groſs Opinion of *Slaves by Nature*. For there is ſcarce any Man ſo dull and ſtupid, but he fanſies it will be more proper and convenient for him to live according to his own Inclinations, than to ſubmit himſelf to the Command, and to the Pleaſure of another. This natural Deſire appears more evidently in whole Nations, none of which are ever ſo low-ſpirited, as to prefer a Foreign Governor to a Prince of their own Country and Race. Laſtly, Since Nature does not actually conſtitute any Superiority or Government, and ſince thoſe *natural Slaves*, whom *Ariſtotle* ſpeaks ſo much of, are commonly Men of ſtrong

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[a] *Apuleius* in *Philoſoph.* delivers the ſame Opinion. It is moſt agreeable, ſays he, that a Man who is neither by Nature nor Induſtry prepared for a right way of living, ſhould not govern, but be govern'd; ſhould be a Servant, not a Maſter; ſhould upon account of his own Weakneſs and Incapacity be under the Controul of others; ſhould ſuſtain the Part of Obeying, not of Commanding.

[b] *Declam.* 13.

[c] *Utpote cum jure naturali omnes liberi naſcerentur*, &c. *Digeſt.* l. 1. *De Juſtitia & Jure.*

[d] Add. *Cornel. Nep.* in *Epaminond.* c. 7. & *Liv.* l. 26. c. 2.

[e] III. *Controverſ.* 21.

[f] *Polit.* l. 1. c. 3.

[g] Lib. 1. tit. 5. ſ. 1.

Hands and able Bodies, there would be a hard Scuffle betwixt them and their wiſer Neighbours for the Maſtery; in which Contention the latter Party with all their Sagacity could not promiſe themſelves any infallible Succeſs. *Ariſtotle*'s Argument borrow'd from the Poets, deſerves likewiſe to be thrown out as moſt arrogant and unreaſonable. *Therefore*, ſays he[a], *the Poets tell us, 'tis juſt* [3] *the* Greeks *ſhould rule the* Barbarians; *as if to be a* Barbarian, *and to be a Slave were naturally the ſame Thing*[b]. For according to this Doctrine, if we had a mind to deſtroy any Nation differing from us in Cuſtoms and Manners, it were only to brand them with the reproachful Name of *Barbarians*, and then to invade them without farther Colour or Excuſe. It is manifeſt, that this abſurd Notion of the *Grecians* aroſe chiefly from hence, that they were wholly inclin'd to a Democratical Government: Whereas their mighty Neighbours the *Perſians* were conſtant Maintainers of a Monarchy, whom for this and other Reaſons they mortally hated beyond all Bounds of Juſtice or Humanity. On this account *Iſocrates*[c] calls the *Perſians* φύσει πολεμίȣς, *Enemies by Nature* to the *Greeks*, " and ſays, that in the general Councils or Aſſem-" blies, before any Buſineſs was tranſacted, a ſolemn " Curſe was denounced againſt thoſe who ſhould " deſire Peace or Friendſhip with the *Perſians*; " and that at the great Feaſt of the *Myſteries*, the " publick *Heralds* forbad all of that Nation, as " Murderers, to be preſent at the holy Ceremony.

As for *Ariſtotle*'s whole Diſcourſe on this Subject, we ſhall put a more reſpectful and a more favourable Conſtruction on his Words, if we ſay that by making two kinds of Servitude, natural and legal, he means the former to be when a Man of more Strength than Wit, ſerves another, whoſe Parts and *Genius* diſpoſe him for Command; in which Caſe both enjoy a Condition moſt agreeable to their Nature and their Neceſſities. And that the legal Servitude which he ſpeaks of, is when a Perſon of good Endowments and Abilities of Mind, is, thro' the Meanneſs of his Birth, or the Hardneſs of his Fortune, compell'd either by his own Fear, or by publick Conſtitutions, to ſerve a Maſter inferior to himſelf in thoſe Accompliſhments of Mind; and whenever this happens, 'tis ſcarce poſſible but that the Vaſſal ſhould hate his Lord; whereas on the other hand, theſe Relations produce a firm Love and a kind of Friendſhip, when each Party bears that Character which is moſt ſuitable to his Diſpoſition and to his Power. But ſtill this muſt be fix'd as a moſt undoubted Principle, that the bare Force of ſuch a *natural Aptitude* does neither give the one a Right of impoſing a Condition of Servitude, nor oblige the other to receive it.

IX. It will be proper to add ſomewhat in ſhort, concerning the other kind of *Equality*, which differs from the former, in that it is rather a Conſequent, than an Ingredient of the State of Nature; we may call it an *Equality of Power*, or of *Liberty*, by which all Men are reckon'd *naturally equal* in this reſpect, that antecedently to any Deed or Compact amongſt them, no one hath Power over another, but each is Maſter of his own Actions and Abilities. This *Equality* is taken away, when Men enter into a *Civil State*, where whilſt one or more are inveſted with the Power of Commanding, and all the reſt enjoin'd the Duty of Obeying, there ariſes the greateſt Inequality imaginable between the Sovereign and the Subject. But ſince there ſtill appears ſome Inequality, even between the Fellow Subjects, not only with regard to Honour and Eſteem[d], but likewiſe as to the Power which one obtains over another; we may obſerve that Part of this Inequality proceeds from the *State of Fathers of Families*; who being the chief Rulers before the Inſtitution of publick Governments, brought into ſuch Governments the Power which they before held over their Wives, their Children, and their Servants[e]. So that this Inequality being more antient than the Erection of *Civil States*, can by no means owe its Original to them; nor do they *give* this Power to the *Fathers of Families*, but leave it in their Hands as they found it; though in ſome Places it is thought convenient very much to abridge, and to reſtrain it. If any further Inequality, as to Power, be diſcoverable amongſt Fellow Subjects, it is plain the Fountain and the Occaſion of it muſt be the ſupreme Civil Authority. For thoſe whom we ſuppoſe to have paſs'd into a publick *State*, did at their Entrance on it, make over to their common *Sovereign*, ſo much of the Power which they before poſſeſs'd, as was neceſſary to ſupport this new Conſtitution. And therefore in caſe any Perſon had before this Change transferr'd to another, any Right over himſelf, that Right would either ceaſe and be extinct in the preſent Regulation, or it muſt ſubmit to the Pleaſure and Diſpoſal of the ſuperior Authority. But after a Man hath once join'd himſelf as a Member to any Civil Community, he cannot on any Account give another ſuch Power over himſelf, as ſhall hold valid againſt the Right acquired by the chief Ruler; ſince this would be to admit two independent Maſters, whom 'tis impoſſible to ſerve both at once. Whatever Inequality therefore amongſt Fellow Subjects commences, after the Settlement of the Civil State, muſt take its Riſe, either from the publick Adminiſtration, on account of which the Sovereign conveys by Delegacy, to ſome of the Subjects, a command over others; or from ſome certain Privilege granted by the ſame ſupreme governing Power. But diſparity of Riches does not of it ſelf cauſe any Inequality amongſt Fellow Subjects; only as great Wealth affords Men matter of actual Hurt or Benefit to others, on which Score the poorer ſort are wont to ſeek the Favour of the rich, by the moſt ſubmiſſive Methods of Addreſs, either to obtain Advantage, or to ſecure themſelves from Injury[a]. But there is nothing in this *Civil Inequality* any ways repugnant to thoſe Precepts, which we have before deduced from a *natural Equality*[1].

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[3] This Notion proceeded partly (as our Author obſerves) from hence, that the *Greeks* were paſſionately in love with the Liberty of a Democracy, whereas the *Perſians* were devoted to Monarchy; partly from the exceſſive and inhuman Hatred which the *Greeks* had to the *Perſians*. Hence it is that *Iſocrates* ſays in his *Panathen.* that the *Greeks* are by Nature Enemies to the *Perſians*. We may alſo obſerve, that the *Greeks* in their publick Aſſemblies, before they made any Decrees, pronounced an Anathema or Curſe againſt all thoſe Citizens who ſhould ſeek to make Peace, or have any Friendſhip with the *Perſians*; and in the Celebration of their Myſteries, the *Eumolpides* and publick Heralds excluded from that Ceremony, in hatred to the *Perſians*, all other *Barbarians* as Murderers, *Panegyr.* In fine, the illuſtrious *Algernoon Sidney* ſays, that the natural Liberty of Man is a Principle received by *Greeks, Romans, Spaniards, French, Germans, Britains*, and in a word, by all Nations, who profeſs'd any Generoſity, long before the Nativity of our Saviour; inſomuch that the *Aſians* and *Africans*, a lazy and effeminate People, becauſe they never attempted to preſerve their Liberty, nor were able to govern themſelves, deſerved the Name of Slaves by Nature, a Name given them by *Ariſtotle*, and the Philoſophers of his Time, who made a very little Difference between them and Beaſts. See §. 1. in the Notes. Nevertheleſs, 'tis hard to excuſe *Ariſtotle* altogether for thoſe falſe Notions which he had about the manner how thoſe Nations ought to reſpect and treat one another. See the Place cited in my *Preface* out of *Plutarch, Strabo*, and *Ariſtotle* himſelf at the Letters (*kkk*) and (*lll.*)

[a] *Polit.* 1. c. 2.

[b] *Euripid. Iphig.* in *Aulid.* ver. 1400. Βαρβάρων δ' Ἕλληνες, &c.

'Tis fit *Barbarians* own the *Grecian* Sway,
And not that *Greece* ſhould ſerve a barbarous Lord.
Wiſe Nature made the Law; 'twas Nature form'd
Them to obey, and us to be obey'd.

[c] *Panegyr. & Panathenaic.*

[d] Of which ſee *Book* VIII. *Chap.* 4.

[e] See the firſt Chapter of the Author's Introduction to the Hiſtory of *Europe.*

Mr. BARBEYRAC'*s NOTES on* §. 9.

[1] People are obliged the more to reſpect one another as Equals, becauſe they are always in an eſtate of natural Liberty, and conſequently in a perfect Equality of Right one towards another; whereas if we come to Particulars, there are divers civil Inequalities, which ſet Bounds to our natural Liberty and Equality. Nevertheleſs, we may obſerve ſome Inequality among People in reſpect to their Reputation, either ſimple, or with diſtinction. Simple Reputation is leſſened, or entirely loſt, when any People violate the Maxims of Civil Right with a wilful Deſign, and thereby render themſelves worthy to be treated as the Enemies of Mankind. For a People that deals in ſuch a manner muſt be looked upon only as a Body of Thieves and Pirates. *See* Lib. 8. c. 4. §. 5. As to our Reputation with diſtinction, ſee what is ſaid in the ſame place at §. 15, &c.

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[a] Compare *Luc. Antiſt. Conſtans, De jure Eccleſiaſt.* tit. 3.

CHAP. III.

Of the Common Duties of HUMANITY.

The CONTENTS of every Paragraph of the third Chapter.

I. *Every Man ought to promote the Intereſts of others.*
II. *And that either indefinitely,*
III. *Or definitely by common Humanity.*
IV. *A leſſer ſort of Example,* viz.
V. *Of allowing a way through another's Land,*
VI. *And for Carriage of Goods.*
VII. *Whether Toll may be required for ſuch a Paſſage.*
VIII. *Of our touching upon a ſtrange Shore.*
IX. *Of entertaining Strangers.*
X. *Of allowing a Settlement to Foreigners.*
XI. *Of granting a Market.*
XII. *Whether a Man be bound to buy a Stranger's Goods.*
XIII. *Of permitting Marriages.*
XIV. *Whether any ſingle Perſon may be denied what is common to all.*
XV. *Of Beneficence.*
XVI. *Of a grateful,*
XVII. *And ungrateful Mind.*

IT is but a poor thing not to have hurt another, or not to have robb'd him of his juſt Eſteem[a]: This negative Kindneſs to a Man will barely hinder him from having any fair Reaſon to hate, but can give him little Encouragement to love us. To knit Mens Minds more ſtrongly together, it is neceſſary to add to this Forbearance of mutual Evil, the real Practice of mutual Good. The Debt which I owe upon account of my being a ſociable Creature I have not yet diſcharg'd, whilſt I have not eſtrang'd a Man's Affection from me by any miſchievous or diſtaſtful Deed; but I ought farther to promote his actual Profit and Benefit, that I may ſhew it is a Pleaſure to me to ſee others Partners of my Nature, and Sharers with me in the Goods which we poſſeſs. The near Relation which Men naturally bear to one another, is loſt, unleſs it be cheriſh'd and kept up by a conſtant Commerce of kind Offices betwixt them[b]. It was a noble Saying of *Plato*[c]. Ἕκαστος ἡμῶν οὐχ αὑτῷ μόνον γέγονεν, ἀλλὰ τῆς γενέσεως ἡμῶν τὸ μέν τι ἡ πατρὶς μερίζεται, τὸ δέ τι οἱ γεννήσαντες, τὸ δὲ οἱ λοιποὶ φίλοι. Which Paſſage *Tully* has thus borrow'd and enlarg'd upon in his *Offices*: *Non nobis ſolum nati ſumus*, &c. *We are not born for our ſelves alone; our Country, our Parents, and our Friends have all a Share and an Intereſt in our Being. 'Tis a Maxim with the* Stoicks, *that as the Earth and all the Productions of it were created for the Uſe of Men, ſo Men themſelves were, for the ſake of Men, brought into the World, that they might aſſiſt and benefit each other. In this we ought to follow the Guidance of Nature, to bring common Goods together, and freely lay them in common, and by an Intercourſe of giving and receiving kind Offices, by Art, Induſtry, and by all our Faculties, to cement the Society of Mankind*[d].

Now

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[a] *Quantulum eſt ei non nocere, cui debeas prodeſſe? Seneca,* Epiſt. 95. [b] *Seneca, ut ſupra.* What a poor thing is it not to hurt him whom you ought to benefit? [c] Epiſt. 9. *ad Archyt.* [d] Off. i. 7. & iii. 5. *Magis eſt ſecundum naturam,* &c. It is more agreeable to Nature, for a Man to undertake all ſorts of Labour and Trouble, for the Service and Conſervation (if it were poſſible) of the whole World, than to live in Solitude, not only free from Cares, but in the midſt of the greateſt Pleaſures. *Add. Lact. Inſtit.* l. 6. c. 10, 11. *Phil. Jud. Quod Deus eſt immutab.* Thoſe Wretches are worthy of the utmoſt Deteſtation, who regard only their private Intereſt, and neglect the common good of Mankind; as if they were born for themſelves alone, and not for an innumerable Society, for their Parents, their Wife, their Children, and in general for all the World. *Heliodorus* Æthiop. ii. 6. acquaints us that it was one of the *Maxims* amongſt the *Gymnoſophiſts*, never to neglect a Soul, when once entred into a human Body, ſhould it fall into danger of Diſtreſs. *Liban. Declam.* 19. When I do but ſpeak the Word Man, I imply Mercy, Courteſy, and Kindneſs. *Add. Philoſt. de Vit. Apol.* l. 5. c. 1. *Marc. Anton.* l. 3. ſ. 4. The good Perſon conſiders, that whatever partakes of Reaſon is of Kin unto him; and that to care for all Men generally is agreeable to the Nature of a Man. *Idem* l. 4. ſ. 3. Men are born for the ſake of each other. *Add. id.* l. 4. ſ. 4. *Seneca* Epiſt. 95. We are all Members of a great Body. Nature produced us under a mutual Relation, from the ſame Principles, and for the ſame Deſigns. This inſpired us with a Love one for another. She taught us the Leſſons of Equity and Juſtice; it is upon account of her Conſtitutions, that

we

Now if the Law of Nature engages us to concern our ſelves with ſo much earneſtneſs for the good of our Fellow-creatures, it muſt on the contrary condemn it, as a thing vile and unworthy of a Man, to rejoyce in the Afflictions and Calamities of others, eſpecially of innocent Perſons; or on the other ſide to grieve and repine at the Proſperity of his Neighbours.

II. Now we may promote the good of other Men, either *indefinitely*, or *definitely*, and this either ſo as to part with ſomewhat of our own, or not. A Man *indefinitely* advances the common Benefit, when he ſo poliſhes and prepares his Mind or his Body, as to render them uſeful to the publick; particularly by Sagacity of Parts and Judgment, he diſcovers ſuch *Inventions*, as may ſerve the Neceſſities or the Conveniencies of human Life. *Columella*[a] obſerves with great Wiſdom, "That it "would be a thing of the higheſt Value and "Advantage in the World, if every one were "ſenſible of his own Ignorance, and always de"ſirous to learn what he knew himſelf at preſent "to be defective in.

Hence it appears, that thoſe Perſons are guilty of a Sin againſt Nature's Law, who neglect to exerciſe themſelves in ſome honeſt Art or Employment, by living unprofitable to themſelves, and troubleſome to others, uſe their Soul only for Salt, to keep their Body from ſtinking.

——*Numerus tantum, & fruges conſumere nati*; *Born* only to increaſe the Number of Mankind, *and to help to rid and devour the ſuperfluous Fruits of Nature.* For the rooting ſuch uſeleſs Animals out of their State, the *Egyptians* had a Decree, obliging all Men to give in their Names to the Magiſtrates, and withal to intimate by what Calling or Profeſſion every one got his Livelihood. He that brought in a falſe Account, or practis'd an unlawful way of Gain, was puniſh'd with Death[b][1]. In the ſame Rank we may juſtly place thoſe, who having a ſufficient Fortune left them by their Anceſtors, think their own Induſtry would be an unneceſſary Trouble, ſince they have gain'd ſo fair a Subſiſtence by the Induſtry of others; and accordingly ſacrifice their Time and Thoughts to Sottiſhneſs and Sloth. Nor does *Virgil* without good Reaſon aſſign a Station in Hell, to thoſe uſeleſs and unmerciful Wretches,

——*Qui divitiis ſoli incubuere paratis,*
Nec partem poſuere ſuis[c].

——Who to *Lucre ſold*,
Sit brooding on unprofitable Gold;
And dare not *give*, and ev'n refuſe to *lend*
To their poor Kindred, or a wanting Friend.
Mr. *Dryden*.

It was a Law amongſt the *Mileſians*, that he who had ſpent his Father's Eſtate, ſhould be denied the Benefit of his Father's Sepulchre[d]. Such an extravagant *Spendthrift Manilius* deſcribes:

Ille patri, natiſq; reus, quas ceperit ipſe,
Non legabit opes, cenſumq; immerget in ipſo.
Tanta fames animumq; cibi tam dira cupido
Corripit, ut capiat ſemet, nec compleat unquam,
Inque epulas funus revocet, pretiumq; Sepulchri[e].

——Who minds himſelf alone,
He wrongs his Father, and he cheats his Son:
His Race in vain with Expectation wait,
For in himſelf he buries his Eſtate.
So vaſt his Gluttony, his Luſt ſo wild,
That he devours himſelf, yet is not fill'd;
And whilſt his Appetite proceeds to crave,
He eats his Funeral, and he ſpends his Grave.
Mr. *Creech*.

The *Apoſtle* amongſt the Reaſons obliging a Man to Labour, ſets down this as no inconſiderable one, Ἵνα ἔχῃ μεταδιδόναι τῷ χρείαν ἔχοντι, *that he may have to give to him that needeth*[f]. And *Horace* could ask the covetous Man,

Cur eget indignus quiſquam, te divite?

Why ſhould any one undeſervedly reduced to Poverty, continue to want, whilſt you abound? Such great Churls are like Swine, good for nothing till they are dead. The old *Greek Epigram* rallies them very pleaſantly, and repreſents them very juſtly:

[2] Πλουτεῖν φασί σε πάντες, ἐγὼ δέ σε φημὶ πένεσθαι,
Χρῆσις γὰρ πλούτου μάρτυς, Ἀπολλόφανες.
Ἂν μετέχῃς αὐτῶν σὺ, σὰ γίγνεται· ἂν δὲ φυλάττῃς
Κληρονόμοις, ἀπὸ νῦν γίγνεται ἀλλότρια.

The World may think you rich, I'll ſay you'r poor;
None e'er was rich, but he who us'd his Store.
Uſe it, and 'tis your own; but if you ſpare
Till Death, you're only Steward for your Heir.

In my Opinion we ought not to judge more favourably of thoſe uſeleſs Burthens to the Earth, who under the Pretence of Religion ſtudy only the Improvement of a fat Carcaſe, and in a lubberly Lazineſs conſume the Fruits of other Mens honeſt Labour. *Zozimus* the Hiſtorian, though in other things as Profane as *Paganiſm* could make him, yet has paſs'd a Cenſure juſt enough on ſome of theſe *Monaſtick Brethren*; they abſtain (ſays he)

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we ought to eſteem it a greater unhappineſs to do Hurt than to receive it: It is by her Orders that our Hands move ſo readily to the Aſſiſtance of our injur'd Neighbour. Let that good old Verſe be ever in your Mind and in your Mouth:

Homo ſum, humani nihil à me alienum puto.

I am a Man, and I eſteem nothing a Stranger to me, which is of kin to Humanity. Let us lay our natural Powers in common. Human Society is built like an Arch of Stones, which is by this means only ſupported and upheld from Ruin, that each part hinders the fall of the other. Add. *Bacon*'s Eſſ. 13.

Mr. Barbeyrac's *NOTES on Chap.* 3. §. 2.

[1] The People of *Sardis* had a Law to the ſame effect, as *Ælian* relates in his *Var. Hiſt.* l. 4. c. 1. where ſee alſo *Perizon.* To this we may add, that the Senate of the *Areopagus* was obliged by *Solon* to enquire how every Man got his Livelihood, and puniſh them who had no Buſineſs. The ſame Lawgiver alſo made a Law, that no Son ſhould be obliged to maintain his Father, who had not in his Youth took care to bring him up to ſome Trade. See the Life of *Solon* in *Plutarch*.

[2] Theſe Verſes have no known Author, but they are found in the *Anthologia*.

[a] *De re ruſtic.* l. 11. c. 1. [b] *Diodor. Sic.* l. 1. c. 77. *Ælian.* Var. Hiſt. l. 4. c. 1. mentions ſuch a Law amongſt the *Sardians*.

[c] *Æn.* vi. 610. [d] *Diog. Laert. in Democrit.* [e] *Lib.* 4. *ver.* 535. [f] *Epheſ.* IV. 28.

from lawful Wedlock [a], *and fill City and Country with numerous ſwarms of Men, uſeful neither for War, nor for any other Service of the Commonwealth. Yet they have purſued their Deſigns with ſo much Succeſs, from thoſe times to the preſent Age, that they have engroſs'd to themſelves the greateſt part of the Lands and Eſtates, and under Colour of communicating all things with the Poor, have almoſt reduc'd all others to Poverty.* To theſe we may add ſuch begging Strolers, as they tell us are found amongſt the *Chineſe*, who fight with their Heads like *Rams*, till you part them with ſome piece of Bounty; or ſuch as threaten to lay violent Hands on themſelves, unleſs you give them what their Lazineſs craves [b]. *Valerius Maximus* juſtly commends the Cuſtom of the old *Maſſilians*, who as he reports the Matter, "uſed to ſhut "up their Gates againſt all ſuch who made the "Plea of Religion a Cloak, and Shelter for Idle-"neſs; thinking it highly worth their Care to re-"move by all the Methods of Diſcouragement, "ſuch a falſe and drone-like Superſtition. (*Lib.* II. *Ch.* VI. §. 7.) [3].

On the other hand, thoſe worthy Perſons have been ever celebrated with the higheſt Praiſes, whoſe happy Parts and Study have invented new Arts, and Advantages of living; and then have not kept the Benefit of them to themſelves, but communicated them feeely to all Mankind. For as *Horace* obſerves,

Paulum ſepultæ diſtat inertiæ
Celata virtus, *L.* iv. *Od.* 9.

Conceal'd Virtue, or Worth, has little Advantage above the dulleſt Idleneſs.

Virgil has wiſely placed in his *Elyſian* Paradiſe,

Inventas——qui vitam excoluere per artes,
Quiq; ſui memores alios fecere merendo [c].
Æn. vi. 663.

Thoſe who by Arts invented, Life improv'd,
Or by deſerving made themſelves remember'd.
Sir *William Temple* [4].

Thus *Antiquity* advanced many [5] to divine Honours, who had rendered human Life more commodious, by being the Authors of uſeful Diſcoveries, or of wiſe and wholeſome Inſtitutions [d] [6]. Hence the *Retirement* of great Men, whilſt they are capable of ſerving their Country in publick Employments, is an Humility not altogether commendable. And therefore it was too high a Strain of Philoſophy in *Similis*, chief Miniſter to the Emperor *Adrian*, when quitting all his Honours and Offices, and ſpending his laſt ſeven Years in the Country, he left this Sentence for his *Epitaph: Here lies* Similis, *whoſe Life was* ſo many *Years long, but he lived only Seven.* Xiphilin.

By theſe and the like Methods then may we promote the good of others indefinitely, and in general; or without propoſing to ſerve particularly ſuch or ſuch a Perſon; but by laying, as it were, our Benefits in common, and offering them to the publick Uſe [7]. But ſome on this Point will have the Curioſity to enquire, whether, ſuppoſing a Man to find ſuch a famous ſecret, as what they call the *Philoſopher*'s *Stone*, the Art of changing, with little Trouble, the meaneſt Materials into the richeſt Metals; whether I ſay, he ought to communicate ſo rich a Diſcovery? And if any one ask ſo nice a Queſtion, we may venture to reſolve it in the negative, ſince were it poſſible to bring this grand Invention into ordinary Practice, Trade would be ruin'd, Inheritances and all kind of Riches would loſe the good Force and Authority which they now bear in the World; and the whole Method and decent Orders of Life would be changed into endleſs Tumults and Confuſion [8].

III. We may be ſaid to ſerve or benefit others, more *definitely* and expreſly, when we confer on particular Perſons any thing that may be uſeful and profitable to them. And this we may often perform, not only without our own Loſs and Prejudice, but likewiſe without giving our ſelves any Labour or Trouble. To deny, or to grudge another a Kindneſs of this eaſy Nature, is juſtly cenſured as moſt deteſtable Malice and Inhumanity. For ſuch a *Power*, by which we may oblige others, and not injure our ſelves, unleſs it be on due Occaſion, put into Action and Effect, appears to be *Vain*, and only turns to the Reproach of him that has it. Hence it is uſual to compare ſuch unreaſonable Churls to the Dog in the Fable, who refuſed that Provender to the Oxe's Hunger, which was ſo improper to ſatisfy his own. Therefore when we diſpenſe this kind of Benefits, we regard only *Man* in general, or the common *Nature* which we all enjoy. Thus *Ariſtotle*, when ſome reproved him for beſtowing an Alms on a vicious Perſon, wiſely anſwer'd, ȣ̓ τ͂ τρόπον ἀλλὰ τὸν ἄνθρωπον ἠλέησα [a]. *I did not relieve the Manners, but the Man*; or as ſome report it, οὐκ ἀνθρώπῳ, ἀλλὰ τῷ ἀνθρωπίνῳ. *Not the Man, but Humanity.*

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[3] See alſo *Eraſmus*'s Letter to *Servatius*, inſerted in his Life, which is alſo at the beginning of his Letters. *Edit. Lond.* 1642.

[4] So *Cicero* ſpeaks, *Impellimur autem natura*, &c. We are vehemently inclined by Nature to endeavour the Profit of many, chiefly by teaching them, and laying before them the Rules of Prudence, and Reaſons of Things. *De fin. bon. & mal.* l. 3. c.8.

[5] See what *Diodorus Siculus* alledges at the Reaſons why the *Egyptians* worſhipped *Iſis* and *Oſiris* as Gods. *Lib.* I. c. 13, 14. 15, as alſo c. 43.

[6] Here the *French* Tranſlator confirms our Author's Judgment from *Cicero* and *Seneca*. Of which the former ſays, Nature herſelf ſtirs us up to do all the Service to Mankind which we are able; and above all, to teach Men ſome new thing, and inſtruct them in the manner how they ought to govern themſelves. *De Nat. Deor.* l. 1. c.14. To which the latter adds, The moſt curious and profitable Knowledge would be no Pleaſure to me, if I ſhould keep it to my ſelf. If any one would communicate to me any thing, be it Wiſdom it ſelf, upon Condition that I muſt keep it ſecret and impart it to no Man, I would refuſe it without farther thought. The Poſſeſſion of nothing is pleaſing, which we muſt enjoy alone. *Epiſt.* 6. See *Sophocles Oedip. Tyran.* p. 164. *Ed. H. Steph.* as alſo *Salmaſius* upon *Spartian in Adrian.* c. 9.

[7] On the other ſide, when any one labours to make himſelf a general Benefactor to Mankind, others ought, as much as in them lies, to encourage ſuch a noble Attempt, or at leaſt not hinder his Succeſs by putting a Bar in his way thro' Envy. And if Men can't make any other better Acknowledgement, they ſhould not forget to publiſh their Commendations, and make their Memory immortal, which is indeed the principal Reward of ſuch as devote themſelves to the Service of the Publick, and for which others are encouraged to imitate their Example, as our Author ſpeaks in his Duties of a Man and Citizen, l.1. c.8. §.3.

[8] See the Diſcourſe of Mr. *Buddeus*, intitled, *Whether Chymiſts may be ſuffer'd in a Kingdom*, §. 26, &c. where you'll find beſides many curious and diverting Things. 'Tis compoſed in the Form of a Dialogue, and was printed at *Hall* in *Saxony*. *A.D.* 1702.

[a] *L.* 6. 5. [b] Of whom ſee *Neuhof. in Leg.* p. 267. [c] Thoſe who inſtructed, and adorned Life by the Invention of Arts. He means thoſe Philoſophers that advanced any uſeful Improvement in the World. *Servius in loc. Lucret. Lib.* 5. *in init.*
[d] Vid. *Diodor. Sic.* l. 1. c. 13, 14, 15, &c. 43.

But ſuppoſing me to be unwilling to keep a thing any longer; either becauſe I am overſtock'd, or becauſe the Poſſeſſion of it is ſome way troubleſome, how barbarous would it look in me, not rather to leave it ſafe and entire, that it might prove ſerviceable to others, than to embezle and deſtroy it? The caſe indeed is otherwiſe in War, where we ruin what we cannot keep, leaſt the Enemy ſhould employ it to our Prejudice.

In like manner we are to allow freely to others, thoſe things which they call *res innoxiæ utilitatis*, things of *innocent Profit*, or of *harmleſs Uſe*. Let us hear *Tully* ſettling this Point: *As to thoſe things*, ſays he, *which Men ought to hold in common, we may apply to many Caſes the Inſtructions which* Ennius *gives us in one Inſtance:*

Ut Homo qui erranti comiter monſtrat viam,
Quaſi lumen de ſuo lumine accendat, facit:
Nihilominus ipſi luceat, cum illi accenderit.

To ſet a wandring Traveller in his way,
Is but to light one Candle with another:
Yet put not out your own; let that no leſs
Shine clear, and not be loſer by its Bounty.

From this one Example we may ſufficiently apprehend, that whatſoever we can part with to another, without any Damage to our ſelves, this it is our Duty to give, though to a Stranger. Of which kind are theſe cheap and common Benefits, to afford Water from a River, Fire from Fire, good Counſel [1] *to a Man that is in Doubt or Diſtreſs. All theſe things are profitable to the Receiver, without any Loſs or Trouble to the Giver. Wherefore we ought both to uſe them our ſelves, and likewiſe to exhibit them to the common Good. But in regard, that particular Perſons have not much to give, whereas the number of thoſe that want it is almoſt infinite, in exerciſing this Duty of common Bounty we muſt have a reſpect to* Ennius's *wiſe Caution,* NIHILOMINUS IPSI LUCEAT; *that is, we muſt keep enough to have the Means of being liberal to our own Relations and Dependents* [b].

Of theſe Favours then none is to be debar'd, unleſs ſuch an one, as by his abominable Villany has rendred himſelf deteſtable to Mankind, and unworthy the common Privileges of his Nature. Thus *Plutarch* [c] reports of thoſe falſe Accuſers, who took away *Socrates* his Life, "That the *Athenians* thinking them the vileſt Men that lived, expreſs'd ſo "high a degree of Hatred and Averſion to them, "that they would neither lend them Fire, nor ſo "much as anſwer them when they ſpoke, nor bathe "themſelves in the ſame Water which they had "uſed; but would order their Servant to pour it "away as polluted and defiled, till impatient of a "State of conſtant Reproach, the Wretches be"came their own Executioners." In the ſame City, when Men were condemn'd for ſome heinous Crimes, it was held unlawful to let them *light Fire*, to be in their Company at an Entertainment, or at any part of religious Worſhip [d].

When *Seneca* ſays, *Who will call it a Courteſy or Benefit, to give a piece of broken Bread, an Alms of ſmall Money, not worth keeping, or the favour of lighting a Fire?* he does by no means deny the Obligation that lies on all Men, freely to diſpenſe their Kindneſſes; he only ſhews how impudent and how baſe it would be for a Man to value himſelf on ſuch petit Bounty, and to expect a Return like ſome mighty Benefactor. For although theſe inconſiderable Offices prove ſometimes of great Value and Conſequence to the Receiver, yet the Cheapneſs of them in reſpect of the Giver, be they never ſo luckily timed, hinders them from being *placed to Account* [2].

IV. For the farther Illuſtration of theſe Offices of Humanity, *Plutarch* will do us good Service, whilſt he diſcourſes ſo admirably on thoſe old *Roman* Cuſtoms of leaving ſomething always upon the Table, and of never putting out their Lamps. *Theſe Practices* (ſays he) [e] *ſerv'd as Leſſons of Humanity. For neither is it lawful for us, when we have ſatisfied our own Hunger, to throw away the reſidue of our Proviſion, nor to ſtop up, or any way to conceal a Spring, when we have drank enough of the Water our ſelves; nor to remove the Marks and Directions of ſailing and journeying, after they have ſerv'd our own Occaſions. But all theſe things are to be left behind us, that they may afterwards prove uſeful to other Men. In like manner, it is a very unbecoming Niggardlineſs to put out a Candle, when we have made what uſe of it we intended; but we ought to leave it, that thoſe who come after us may have the Benefit of its Light. Nay, were it poſſible to be effected, we ought to lend others our Sight and our Hearing, and even our Wiſdom and Courage, to employ for*

Mr. Barbeyrac's *NOTES on* §. III.

[1] *Plato* ſays truly, that Counſel is a ſacred thing, λέγεταί γε συμβουλὴ ἱερὸν χρῆμα εἶναι. *In Theagen.* Tom. I. The *Pythagoreans* alſo held the ſame Maxim, and obliged thoſe of their Sect to give their beſt Advice they could to ſuch as deſired it. See *Jamblich. de Vit. Pythag.* c. 18. §. 85.

[2] For according to the Maxim of * *Terence*, 'tis by no means the part of an ingenuous Man to expect our Acknowledgements without his Merit. Nor ought we to think that we lay a great Obligation upon others by ſuch a Preſent as the Latin Poet † *Horace* ingeniouſly banters. The *Calabrians* when they preſent their Fruits to ſuch as come to viſit them, ſay, *Eat, ſpare not.* If their Friends anſwer, We have eat enough, they ſay, Take them, put them into your Pockets, they'll be an acceptable Preſent to your Children. If they reply, We are as much obliged to you as if we carried them all away. They again ſay, If you will not take them, we'll give them the Hogs. Who ſees not that they can't tell what to do with what they ſo prodigally give? Such Prodigality has and does make many Perſons ungrateful.

(*) *Ego, Charine, neutiquam officium liberi eſſe hominis puto,*
Cum is nihil promereat, poſtulare id gratiæ apponi ſibi.
Ter. Andr. Act. II. Scene I.

(†) *Non quo more pyris veſci Calaber jubet hoſpes,*
Tu me feciſti locupletem; veſcere ſodes.
Jam ſatis eſt. At tu quantumvis tolle. Benigne
Non inviſa feres pueris munuſcula parvis.
Tam teneor dono, quam ſi dimittar onuſtus.
Ut libet; hæc porcis hodie comedenda relinques.
Prodigus & ſtultus donat, quæ ſpernit, & odit,
Hæc ſeges ingratos tulit, & feret omnibus annis.
Horat. Lib. 1. Epiſt. 7. v. 14, &c.

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[a] *Diog. Laert.* l. 5. [b] *Offic.* i. 16. & l. 3. Amongſt the *Athenians*, a publick Curſe was denounc'd againſt him who ſhould refuſe to ſet a Man in the right way. [c] *De Invid. & Odio.* [d] *Vid. Orat. Dinarch. contra Ariſtogit. Add. Sophocl. Oedip. Tyran.* v. 244, &c. *Euripid. Oreſt.* v. 46, & 513. [e] *Quæſt. Sympoſ.* L. VII. Q. 4.

their Service, whilſt going to our Repoſe, we for ſome time loſe the Uſe of them ourſelves[a].

Prometheus, in *Lucian*, chargeth the Gods with Envy, and Narrowneſs of Spirit, that they ſhould reſent ſo highly his Action of communicating Fire to Mankind: "Since this could not be the leſs for "being made publick, nor be itſelf extinguiſh'd "by lending its Light to others.

To the ſame Head belongs *the Uſe of running Water*, for the ordinary Occaſions of Life. For tho' Rivers may be the *Property* of whole States, or of private Perſons, yet Humanity enjoins us to allow the Privilege of drinking, or of drawing for other Uſes to any one, not actually engag'd in Hoſtility againſt us. We think the Point is ſettled with more Clearneſs this way, than if we ſhould ſay with *Grotius*, that *the River*[1], *as a River*, *is the peculiar Right of ſuch a People*, *but as running Water*[2] *it remains in common.* For it ſeems leſs agreeable to call the ſame Thing in different Reſpects, *Proper* and *Common*, than to affirm that the *Uſe* of a Thing ought by the Laws of Humanity to lie freely open to all, tho' the Thing itſelf may be really a *Propriety* or *Peculiar*[3]. Now to impute this as a *Loan*, which would otherwiſe be loſt, and will be immediately repair'd by the Springs, would look moſt ridiculouſly ſordid[b]. Thus *Latona* argues with the *Lycian* Clowns in *Ovid. Metam.* VI. 349.

Quid prohibetis aquas? uſus communis aquarum eſt,
Nec ſolem proprium natura, nec aera fecit;
Nec tenues undas: ad publica munera veni.

What Rudeneſs *Water* for my uſe denies,
Whoſe endleſs ſtore the common World ſupplies?
Nor *Light*, nor *Air* did Heaven create for one;
Nor gentle Streams: I crave a *publick* Boon.

For tho' the *Uſe of* Water is *common*, yet the *Poſſeſſion* of them may no doubt be turn'd into a Propriety. On this Account we find the *Iſraelites* offering to pay for what Water they or their Cattle ſhould drink, in paſſing through the Country of *Edom*[c]. However, if the Waters are in great Plenty, what the Current throws out at random, we ought freely to afford to all; ſo far as our Indulgence brings no Trouble or Inconvenience on ourſelves[4].

We ſee then that Duties of this kind do originally belong to the Law of Nature; yet 'tis not unuſual to have many of them farther confirm'd and enjoin'd by Civil Conſtitutions. It may not be improper to ſet down an *Inſtance* or two. *Solon*'s Law about Wells we find thus recorded by *Plutarch*: *Becauſe the Country hath but few Rivers, Lakes, or large Springs, and moſt uſe Wells, which have been dug, he made a Law, that where there was a publick Well within four Furlongs, all ſhould draw at that; but when it was farther off they ſhould ſearch after a private Well. And if upon digging ten Fathom deep they could find no Water, that then they ſhould fetch from their Neighbours to the quantity of about ten Gallons every day. For he thought it prudent to make Proviſion againſt Want, yet not to encourage Idleneſs.* "The ſame Author tells us, that *Plato* in his "Laws, permits none to borrow Water from their "Neighbours, but ſuch as having firſt dug in their "own Ground as deep as the *Clay*, could find no "Spring." *For he would have thoſe only come in for a ſhare with others, who could not provide for themſelves.* And the *Spartan* Legiſlator *Lycurgus*, allows a Perſon in neceſſity to make uſe of the Servant, the Beaſt, and even the Food of another Man[d].

Mr. Barbeyrac's *NOTES on* §. IV.

[1] *i. e.* Conſidering in general the whole Extent of the Shore, which is contained in the Lands of any Perſon.

[2] Which changes every Moment, and properly belongs to none but him who takes it up to drink.

[3] The *French* Tranſlator places the following Period from the word *Now* to *Boon*, becauſe he thinks it improperly placed here, at the End of this Paragraph, and adds, This Chapter is one of thoſe which wants divers Amendments, as may be diſcern'd by comparing his Tranſlation with the Original. See *Lib.* 4. *c.* 5. §. 2.

[4] The Laws of divers Nations preſcribe alſo ſometimes the ſame Offices. By the Law of *Moſes* the Proprietor, *Lev.* xix. 9, 10. xxiii. 22. *Deut.* xxiv. 19, 21. was obliged to leave the Corners of his Field unreaped, and not to glean up the Ears ſcattered by the Reapers. He was to leave them for the Poor and Strangers. The ſame Thing he was to do with the Grapes that remain'd after the Vintage upon the Tree, or were fallen upon the Ground; as alſo the Olives that did not fall from the Tree when it was ſhaken. It was alſo allow'd to Travellers to pick a bunch of Grapes in the Vineyard, or an Ear of Corn in the Field, provided they eat only to ſatisfy themſelves, and carried nothing away. *Selden. de Jur. Nat. & Gent.* l. 6. c. 6. *Joſ. Arch. Jud. Lib.* 4. *c.* 8. So alſo in the *Roman* Law it is forbid Fiſhers to kindle a Fire upon the Shore in the Night, for fear that ſuch as are ſailing on the Sea ſhould take it for a Signal of a ſafe Port, and ſo run the hazard of being caſt away. *Digeſt.* l. 47. *De incendio, ruina,* &c. *Tit.* 9. *Leg.* 10.

[a] *Idem Quæſt. Rom.* Or doth this Cuſtom teach us, that we ought not to loſe any of thoſe Things which we have in plenty, as Fire, Water, or other Neceſſaries; but when we have ſerv'd our own Occaſions, to leave them for the Uſe of others?
Theocrit. Idyl. 26. *Mercury* of all the Gods reſents it moſt, When we deny a Stranger what is juſt. Mr. *Creech.*
It is one of *Pythagoras*'s Aphoriſms in *Diog. Laert.* Not to cut down nor to hurt a Tree capable of bearing Fruit. See *Menage*'s Notes upon it.

[b] *Plautus Trucul.* ii. 7. *De fluvio qui aquam derivat ſibi, Niſi derivetur, tamen omnis ea aqua abeat, in mare.*
Ovid. *A. A.* iii. 1. 93. *Quis vetet adpoſito lumen de lumine ſumi; Atque cavo vaſtas in mare ſervet aquas?*

[c] *Numb.* xx. 19. compared with 2 *Chron.* xxxii. 3. See likewiſe *Gen.* xxvi. 20, 21, 22.

[d] *Xenophon de Rep. Lac.* A Stranger travelling alone, or with one Companion only, ought to have the Liberty to taſte the Fruit which he meets with in his way, by the common Law of Hoſpitality. *Add. Lex Burgund. Tit.* 28. ſ. 1. *It. Selden.* l. 6. c. 6. *Phocylides*, Ἄστεγον εἰς οἶκον δέξαι, &c.

Receive the Baniſh'd, and conduct the Blind;
And let the ſhipwreck'd Sailor move thy Mind,
For Sailing is uncertain; kindly run
To lift the Weak; ſupport a Wretch undone;
Pity thy Foe, and ſave his ſinking Beaſt;
Direct the Stranger, ſuccour the Diſtreſs'd, *&c.*

Add. l. 10. *D. De incendio ruina. Quinctil. Declam.* 5. GOD hath made us for mutual Support and Succour; and that each Man ſhould endeavour to defend others from what he fears himſelf. This is not properly Love, or any perſonal Eſteem and Reverence; but a provident Fear of the like Accidents, and a religious Apprehenſion of common Dangers. When we relieve a famiſh'd Wretch *, we do but as it were pity ourſelves. Hence in a Siege we lay our Proviſion in common. Hence in a Diſtreſs at Sea the Food of one Paſſenger hath ſupported the whole Company. And hence too ariſeth that Affection which puts us on covering with Earth † the dead Body of a Stranger; and how haſty ſoever our Journey be, we never fail ſtopping to perform, in ſome ſort or other, this pious Office.

* This is well expreſſed in the antient Verſe of *Publius Syrus*: *Homo, qui in homine calamitoſo eſt miſericors, meminit ſui.*

† See the Notes above on *Chap.* 3. *Lib.* 2. §. 23. Note 9.

V. Amongſt the ſame *Duties of Humanity*, *Grotius*, L.ii. c.2. "reckons the granting *free Paſſage* thro' any Lands, Rivers, or Parts of the "Sea, which have fallen under our Propriety, if "any have juſt Occaſion to deſire it; as ſuppoſe "when any People expell'd out of their own Country, are going to find a new Seat; or when they "deſire to trade and correſpond with a Nation "which we divide from them; or when they are "marching to recover what is their own in a juſt "War; or when, being at a diſtance from home, "they are haſtening to the Defence of their Country, at preſent under ſome extraordinary Danger "or Diſtreſs." But we ought to allow this Point a fuller Diſcuſſion. Thus much then is clear beyond all doubt, that in caſe the Requeſt be made by a ſmall Number of Men unarm'd, and willing to live at their own Charge, Paſſage is to be granted them, provided they ask it upon an honeſt and neceſſary Account. But the Caſe of great Armies is not ſo eaſily to be decided; ſince the admitting of them may create juſt Fears and Suſpicions in us, not only on their own Account, but in reſpect of the *People* whither they are bound. *Grotius* maintains, that notwithſtanding any ſuch Fear, their Petition is to be complied with for this Reaſon; "Becauſe in that grand Diviſion of Things, "by which the Primitive Community was aboliſh'd, and diſtinct Proprieties introduced, all may "be ſuppos'd to have reſerv'd to themſelves ſo far "the uſe of each other's Poſſeſſions, as ſhould be "ſerviceable to their Wants, and not injurious to "the Owner; and that therefore when any ſtand "in need of ſuch a *Uſe*, they have a *Right* to de-"mand it." If any diſlike this Argument, a plainer Reaſon may be thus offer'd, that the Law of Humanity obliges every Man to allow another the *harmleſs uſe* of his Goods or Poſſeſſions; which upon urgent Neceſſity may be challeng'd in a forcible manner, inaſmuch as the Denial of it is preſum'd to ſpring, either from groundleſs Diffidence, or from wicked Perverſeneſs of Mind. Yet in ſuch Caſes, Leave is firſt to be ask'd fairly and peaceably, and Violence muſt not force a Paſſage, whilſt it is yet uncertain, whether the Lord of the Place grounds his Refuſal on any juſt Reaſon, or acts only out of a barbarous and inhoſpitable Temper. When *Cimon* the *Athenian* General going to aſſiſt the *Lacedemonians*, with his Troops, broke thro' the Territories of the *Corinthians*, without giving notice to the State, *Lachartes* the *Corinthian* gave him that handſome Reproof, Καὶ γὰρ θύραν κόψαντας ἀλλοτρίαν, οὐκ εἰσιέναι πρότερον ἢ τὸν κύριον κελεῦσαι[a], *That when a Man knock'd at another's Door, he forbore* in Civility *to enter, till the Maſter bad him* come in[b][1].

Thoſe who take the ſame Side of the Queſtion with *Grotius*, add, that a Fear upon account of the Numbers of thoſe who would enter, doth not ſeem a ſufficient Reaſon to deny Paſſage; ſince a Multitude as well as a few Perſons may inoffenſively uſe this Privilege, and not treſpaſs againſt the Law of Nature. However, the ſame Law empowers us to take Security of the Men whom we admit, to engage them to do no Damage, or to repair what they do. For the common Proverb tells us, that *Opportunity makes the Thief*; and he is a very unwiſe Maſter of a Houſe, who lets in ſo many Strangers, as to be turn'd out himſelf. Nor are there wanting Inſtances of ſeveral Cities, which have loſt their Liberty, by unwarily receiving too great a Number of armed Gueſts. And what ſhould make us more cautious is, that few Generals deſerve the *Encomium*, which *Tully*[c] on this ſcore hath given of *Pompey the Great*, *that he march'd his Legions thro'* Aſia, *in ſuch a manner, as to keep not only the Hands, but even the Feet of ſo vaſt an Army, from committing the leaſt Treſpaſs on any peaceful and friendly Perſon.* When the *Helvetians*, or *Swiſs* in the *Gallick* War, ſent Deputies to *Ceſar*, to beg a Paſſage thro' the *Roman Province*, we find *Ceſar* rejecting their Petition on this very good Account, "He remember'd how the ſame People had formerly defeated and kill'd *L. Caſſius* the *Roman* "Conſul, and forced his Soldiers to paſs ignominiouſly *under the Yoke*; and he imagined it ſcarce poſ-"ſible, that Men who were Enemies in their Hearts "ſhould purſue their Way fairly, and without "launching out into ſome Injury or Diſorder[d]."

Many ways of taking *Caution* or *Security* in this Caſe are propos'd; as firſt, that they ſhall paſs thro' without their Arms; but 'tis very hard to get this Condition accepted of by military Men; ask them *to part with their Weapons*, and they take it as if you deſired Leave *to cut off their Hands*[2]. It may be a more proper Expedient, that the Forces make their Paſſage in ſmall and ſeparate Bodies, or that Hoſtages be given for their peaceable Behaviour. For what ſome propoſe, that thoſe who grant the Paſſage, ſhall hire ſufficient Guards at the Charges of thoſe who deſire it, would take up too much Money as well as too much Time.

It is farther ſaid on the ſame ſide, that it will not juſtify us in denying this Favour, to alledge, that Paſſage may be had elſewhere, upon taking a larger Circuit; becauſe ſhould this pretence always be uſed, the Requeſt would never be granted, tho' in the moſt reaſonable Caſe, and ſo the *Right* would utterly ceaſe and come to nothing. It is ſufficient therefore, in their Opinion, if without any fraudulent Deſign, Paſſage be there deſired, where it lies moſt ready and convenient.

Some there are who maintain the Right of *free Paſſage*, on this Argument[3], that *Highways* are common to all Mankind, and do not come under

Mr. Barbeyrac's *NOTES* on §. V.

[1] The *Carthaginians*, to ſhew that they had a Right to a Country which *Maſſiniſſa* King of *Numidia* conteſted about with them, alledged among other Reaſons, that *Maſſiniſſa* himſelf had granted it; becauſe when he purſued *Ciphires*, who had eſcaped out of his Kingdom, and took his Rout round *Cyrene* with a Party of *Numidians*, he begged leave of the *Carthaginians* to paſs thro' that very Country, as then depending upon *Carthage* without Contradiction. See farther about this Right of Paſſage, as about a Right of Trading where we pleaſe, *Selden*'s Tract, entituled, *Mare Clauſum*, Chap. 20.

[2] As *Florus*, l. 2. c. 18. ſays, That the People of *Numantia* are ſaid to have looked upon ſuch a Propoſal, when it was offered them, as a Condition of Peace. See *Freinſhemius*'s and *Grævius*'s Notes upon the Place.

[3] Mr. *Hertius* cites here a Treatiſe of *Adrian Beier* upon this Subject, *An & quatenus tranſitus pro exercitu per territorium alterius poſtulari & denegari poſſit*, i.e. How far Paſſage for an Army thro' another Prince's Territories may be deſired, or denied.

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[a] *Plutarch in Cim.*

[b] And thus *Telephus* in *Dictys Cretenſis* rightly accuſeth the *Greeks*, that profeſſing to come as Friends, they ſhould give no notice of their Viſit. *Lib.* 2. *c.* 5.

[c] *Pro Lege* Manil. *c.* 13.

[d] *Cæſar Comment. de B. G.* l. 1. c. 7, 8.

the Propriety of thoſe, in whoſe Territories they lie. As if at the firſt Creation of the World, the Roads had been chalk'd out immediately by the divine hand, and left as univerſal Benefits. A Notion too ridiculous to deſerve a ſerious Refutation.

On the other ſide there have been good Arguments offer'd, to evince that this[4] *Liberty of Paſſage* for an Army of Strangers is not owing to a mere natural Right, without any Compact or Conceſſion intervening; eſpecially when the Caſe is, that an Enemy to ſome of our neighbouring States deſires leave to carry his Troops againſt them, thro' our Territories. For it ſeems to be part of the Duty, which we owe to our Neighbours, eſpecially ſuch as have been kind and friendly, not to ſuffer any hoſtile Power to march along our Country to their Prejudice, provided we can hinder the Deſign with no great Inconvenience to our ſelves[a]. And it is indeed one expreſs Article in moſt Leagues, that neither Party ſhall grant Paſſage to the Foes of the other[b]. Nor will it ſolve the Difficulty, to ſay that we ought to allow *Paſſage*, if the War which is undertaken be *juſt*; not, if it be *unjuſt*. For there is commonly much Time and much Thought requir'd to make ſuch a Judgment; and beſides it is look'd upon as a piece of Raſhneſs, to thruſt in our Arbitration between two armed Parties, without their deſiring it, and to conſtitute our ſelves Judges of ſo great a Cauſe. But farther, ſuppoſing we grant the Requeſt, it is very poſſible, we may by this Means fix the Seat of the War in our own Country. For what if the other Party ſhould meet and[5] ſtop his Adverſary, whilſt yet in our Borders? And I do not ſee how we could blame him for this Proceeding, ſince he is by no means oblig'd to receive the Foe into his own Dominions, on purpoſe to rid us of the Burthen and of the Trouble. It ſeems therefore the ſafeſt way of acting in this Caſe, if we can without any conſiderable Prejudice to our own Affairs, to deny the Enemy Paſſage, and actually to oppoſe him, if he endeavour to force it without our Conſent. But if we are either too weak to hinder his Progreſs, or muſt on this Score engage in a dangerous War; the Plea of Neceſſity will fairly juſtify us to our Neighbour[c].

Ziegler in his Obſervations on *Grotius* aſſerts, that in this Caſe no one can naturally have a Right of paſſing through the Lands of another, but all ſuch Right muſt be obtain'd by Compact; juſt as no Man has the Liberty of going through the Fields of a private Perſon, unleſs ſuch a *Service* is impoſed on the Fields by Virtue of their particular *Tenure*. He ſays this will eſpecially hold good, when we have juſt reaſon to apprehend Danger from ſuch a Conceſſion[6]. And this Point too he illuſtrates by a parallel Caſe between private Perſons. You may have a Right of making a Thoroughfare of *Titius*'s Yard; but if you appear there often with Fire and Torches, ſo as to endanger the Buildings, *Titius*'s Fear cannot indeed in this Caſe abſolutely take away your Right; but he may hinder you from going in ſo dangerous a manner, and conſequently may abridge your Privilege, though he cannot annul it. But as to this way of arguing we muſt obſerve, that in the Queſtion now before us, we do not by the Liberty of Paſſage underſtand any ſettled and conſtant *Service*; but only an occaſional, and as it were a momentary uſe of another's Territories or Poſſeſſions, to which we are driven, either by Neceſſity, or by the Proſpect of ſome extraordinary Advantage, when it would be Inhumanity in the other Party, not to comply with our Wants, and with our Requeſt.

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[4] In this Caſe the Benefit deſired is not a Service without hurt; for there is a preſent Damage, and a great hazard of a future. For if an Army in its march cauſes ſometimes Waſte and Diſorder in an Allies Country, and among their own Countrymen themſelves, what will it do in a ſtrange Nation? Hiſtory, both antient and modern, and preſent Tranſactions furniſh us with many Examples. See *Tacitus*'s Hiſt. l. 2. c. 12. §. 87. *Plin. Panegyr.* c. 20. numb. 4. *Phil. de Comines* l. 6. c. 2. Farther, a great number of Men, which paſs through a Country, muſt of neceſſity make Proviſions dearer; by which means the greateſt part of the Natives ſuffer; but the Conſequences, which may be apprehended, are far more burdenſome, which we ſhall hereafter diſcourſe of, when we come to ſupply the Defects of the Author, according to the Senſe of *Gronovius* in a large Note upon *Grotius*, l. 2. c. 2. §. 13. numb. 1.

[5] This is not the only Danger. For he to whom Paſſage is granted, may be overcome, and put to the worſt; and if ſo, let the Cauſe of making War be juſt or not, he will certainly revenge himſelf upon thoſe who did not keep his Enemy from invading him. But ſuppoſing there be nothing to fear from the ſtrange Troops which are ſuffered to paſs, the Abettors of the contrary Opinion agree, that many Precautions ought to be obſerved. The Men that are always in Arms are eaſily tempted to abuſe them, and commit great Outrages. Moreover, if they are very numerous, and find an Opportunity to ſeize on a conſiderable Prey, how often have we ſeen Armies of Strangers ravaging or ſeizing to their own Uſe the Eſtates of a People who have called them to their Succour? nor have their ſolemn Oaths and Treaties been able to deter them from this foul Perfidiouſneſs. See *Juſt.* l. 4. c. 4. n. 5. & l. 8. c. 3. *Tit. Liv.* Lib. VII. chap. 38. and what *Wittikind* ſays concerning the *Saxons*, l. 1. *Annal.* What then may we expect from ſuch as are under no ſuch ſtrict Engagements, but only barely promiſe to do us no Injury? Furthermore, as in the Bodies of living Creatures the moſt tender Parts, and ſubject to be dangerouſly affected, are the inwards called the Vitals; ſo all States almoſt have this in common, that the farther Men advance into the heart of a Country, they find it more weak and unarmed. The *Carthaginians*, otherwiſe invincible, were conquered near *Carthage* by *Agathocles* and *Scipio*. *Hannibal* ſaid he could never beat the *Romans* but in *Italy*. It is then a very dangerous thing, conſidering the Covetouſneſs of Men, which are never ſatisfied, to lay open theſe Secrets to Strangers, who having Arms at hand, may make an Advantage of our Weakneſs, and puniſh our Imprudence. To this we may add, that in all States there never want Men turbulent and diſaffected, who are ready to ſtir up Strangers either againſt their Fellow-citizens, Sovereign, or Neighbours, as we are told by *Francis Beaucaire* in his Commentaries on the *French* Affairs; and *Phil. de Comines*, l. 7. c. 7. ſpeaking of the Inhabitants of *Piſa*, to whom King *Charles* VIII. gave Liberty, when he paſſed through the Kingdom of *Naples*, to conquer it; and by *Tacitus* about the People of *Lyons*, Hiſt. l. 1. c. 65. Theſe Precautions are always neceſſary to be obſerved, unleſs where ſuch a Paſſage can't be prevented, for we may be often deceived, tho' we uſe all imaginable Circumſpection. And whoever allows a Stranger to enter his Country, he gets either a Maſter or an Equal. But if we have no Reaſon to fear any thing either from him that would paſs, or from him againſt whom he marches; yet he certainly deprives his Subjects of the Advantage of the Commerce, which his Subjects might have with that Neighbour, upon whom they let in an Enemy. See what is farther ſpoken according to *Gronovius*, Note 9.

[6] If a Prince may forbid the Inhabitants of his own Country to go armed in all Parts of his Dominions, with much more Reaſon may he hinder Strangers. See *Cicero*, Lib. V. *in Verrem*, c. 3. Moreover, a private Perſon has a Right to keep any from coming upon his Ground to hunt ſo much as Birds, *Inſtitut.* l. 2. Tit. 1. *de Rerum Diviſ.* §. 12. And ſhall not a Sovereign have Power to deny Paſſage to an Army of Strangers? See *Juſt.* Lib. 9. c. 2. *Tit. Liv.* l. 37. c. 7. *Cæſar de Bell. Gall.* l. 1. c. 8. *Jo. Fred. Gronov.* As alſo the Diſcourſe of Mr. *Bynkerſhoek*, *De Dominio Maris*, c. 4. publiſh'd *A. D.* 1703.

[a] And therefore 'twas unreaſonable for the *Romans* in *Livy*, B. 21. c. 20. to deſire the *Gauls*, that they would not grant the *Carthaginians* a free Paſſage into *Italy*, becauſe they would thereby turn the War upon themſelves, and expoſe their own Country to be waſted for the Security of another, to which they had no Obligation. We have not (ſay they) received any Advantage from the *Romans*, nor Damage from the *Carthaginians*, which may oblige us to take up Arms for the one, or againſt the other. [b] See the League of the *Romans* with the *Carthaginians* in *Livy*, B. 38. c. 38. and with the *Etolians*, *Polyb. Excerpt. Legat.* 28. [c] 'Tis remarkable what *Plutarch* reports in his Life of *Lyſander*, that when the City of *Athens* was oppreſs'd by the Thirty Tyrants, the *Thebans* paſs'd a Law, that whoever ſhould carry Arms through *Bæotia* againſt the *Athenian* Tyrants, ſhould be free from the Notice of the *Theban* Eyes or Ears.

Examples, which are of ſo great Weight in determining other Queſtions, have little Force as to the Deciſion of this. For generally as People have been ſtronger or weaker, they have required *Paſſage* with Modeſty, or with Confidence, and have in like manner granted, or refuſed it to others [7]. "*Ageſilaus* in *Plutarch*, when the *Trallians* [a] demanded an hundred Talents, and as many Women for the Price of his Paſſage through their Country, ask'd them pleaſantly, *Why the Commiſſioners were not there ready at hand to receive them?* and without farther Delay march'd forward, encounter'd, and routed them. He ſent to the King of *Macedon*, to deſire the ſame Favour, who anſwering, that he would take time to conſider of it; Let him conſider of it, ſays *Ageſilaus*, and in the mean while we will go forward. The *Macedonian* admiring, and fearing ſuch Spirit and Reſolution, humbly requeſted him to paſs at his Pleaſure."

But the chief Example produced on this Point, is that of the *Iſraelites*, when deſiring to paſs thro' the *Edomites* Country, they voluntarily offer'd the following Conditions: "That they would march along the King's Highway, without turning into the private Fields or Vineyards, and would immediately tender Money for every thing of theirs which they ſhould have occaſion to uſe." The *Edomites* rejecting theſe Terms, and endeavouring in a hoſtile Manner to hinder their Paſſage, they did not think it juſtifiable to obtain it by Force, but took a large Compaſs round about their Borders; and when at length they were oblig'd juſt to touch on [8] ſome part of their Coaſts, they did not take occaſion from the former moſt inhuman Treatment, to commit any Violence or Treſpaſs in their march [b]. As to the ſame People, when *Sihon* King of the *Amorites*, not only refuſed them the like Privilege, but came out arm'd to oppoſe them, probably before they had reach'd his Coaſts, and therefore ſet upon them without any Reaſon or Provocation, we find he was overthrown in the Combat; but he ſeems to have ſuffer'd this Fate, not ſo much for denying them Paſſage, as for raſhly encountring them upon ſo little Colour or Pretence. For otherwiſe it would have ſeem'd too hard to puniſh the Neglect of a piece of Humanity with the ruin of a whole Nation; ſince it appears that theſe *Amorites* were ſeated without the Borders of the [9] *Land of Promiſe*, the Inhabitants of which God Almighty had by a ſpecial Decree adjudg'd to utter Extirpation and Deſtruction. "Nor will it alter the Caſe to ſay with ſome that the *Amorites* here, to make their Fear juſtifiable, ought not to have rejected ſo fair Conditions, but ſhould have immediately treated about accepting and regulating them; but that now by refuſing all peaceable Conference and Commerce, they had rendred themſelves liable to be dealt with as the moſt unjuſt and moſt unfaithful of Men:" For by the common Right and Privilege of Mankind, a Breach [10] of the Law of *Humanity* does not deſerve the utmoſt Rigor and Extremity of Proceeding.

VI. Amongſt theſe Matters of *harmleſs Profit*, which Nature engages us to allow freely to all Men, *Grotius* reckons the permitting Goods and Merchandiſe to be carried through our Dominions. *Ziegler* accuſes *Grotius* of a Contradiction on this Point, whilſt in one place he ſays, That *no one can have a Right of hindering any Nation from maintaining Traffick and Commerce with any other* [1] *Nation that is remote from them*; and yet in another place of the ſame Chapter he grants, That *it is lawful for one Nation to contract with another for all the Goods of one kind not to be found elſewhere; ſo that no other People ſhall have the Liberty of buying them.* But

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[7] To theſe Examples, which rather prove what was done, than what ought to be done, we may oppoſe ſome Examples more remarkable, *viz.* of ſome People who have been badly rewarded for their Eaſineſs in granting Strangers Troops to paſs their Country. So it was that *Phœbidas* got poſſeſſion of the Caſtle *Cadmæa*, *Diod. Sic.* Lib. 45. c. 20. And the City of *Meſſina* was taken by the Captains of *Agathocles*'s Army, *Polyb. Hiſt.* Lib. I. as *Gronovius* obſerves. See the Diſcourſe of *Buddeus* about theſe Expeditions among his *Selecta Jur. Nat. & Gen.* § 30.

[8] They never entred into *Idumea*, but marched upon the Borders of it, and bought their Proviſions of the *Idumeans*. See Mr. *Le Clerc* upon *Deut.* 2. 9.

[9] It is a wonder that our Author, contrary to ſeveral expreſs Paſſages in Scripture, ſhould exclude the *Amorites* from the Number of the Seven Nations which God had ordered to be deſtroy'd, *viz.* *Deut.* 7. 1. and 20. 17. Nevertheleſs, it is true, that thoſe whom he here ſpeaks of were not in the *Land of Promiſe* properly ſo called, which contained all the Country between *Jordan* and the Mediterranean Sea; and conſequently if King *Sihon* had granted the *Iſraelites* a quiet Paſſage, they had not executed the Sentence which God had pronounced upon that part of the *Amorites*. See Mr. *Le Clerc* upon *Gen.* 10. 16. and *Numb.* 21. 22.

[10] See Mr. *Thomaſius*'s *Inſtitut. Juriſpr. Div.* Lib. 2. c. 6. §. 16. *in fine*. Mr. *Buddeus* in his Elements, *Phil. Pract.* Part II. c. 4. ſ. 8. §. 3, *&c.* maintains, that ſuppoſing the War which that Prince, who deſires a Paſſage through our Country, makes, is juſt and neceſſary; and on the other ſide we have no reaſon to fear any thing either from him that is to paſs, or him againſt whom he marches, we are under an indiſpenſible Obligation to allow him a Paſſage; and his Reaſon is, becauſe the Law of Nature obliges every one to aſſiſt thoſe who are unjuſtly oppreſſed; and with much greater Reaſon ought we to be no hindrance to ſuch as undertake their own Defence. See Lib. 2. c. 5. §. 6. Note 3. above.

Mr. Barbeyrac's *NOTES on* §. 6.

[1] *Grotius* ſeems to underſtand, either *mediately or immediately*. This appears from the Reſtraints that he puts upon the Traffick which he ſuppoſes to be allowed between the two Eſtates, of which the one engages to ſell the other a certain ſort of Wares which grow no where elſe; it being meant, as he adds, that the People who have obtained the Privilege of buying theſe Wares only, are ready to ſell them again to others at reaſonable Rates. For granting that we have Neceſſaries of Life ſufficient to ſatisfy Nature, it matters not of whom we have them. So that our Author's Diſtinction might have been ſpared.

[a] Or the *Troädes*, as we find them called in the *Lacon. Apophthegm.* of the ſame Author.

[b] See *Deut.* ii. 6, 34. *Numb.* xx, xxi.

now by this Contract of Engroſſment it is plain other Nations are thus far hinder'd from trading in the ſame Country. Yet it is eaſy to bring off *Grotius*, by ſaying, that in the former Paſſage by *hindering* he underſtands, not hindering them by virtue of ſome precedent Bargain or Covenant, but *hindering* them by open Methods of Violence. Yet on the Whole it muſt be confeſs'd, that he has not brought the preſent Queſtion to a full and clear Deciſion. For truly ſpeaking, the Law of Humanity does not ſeem to oblige us to grant Paſſage to any other Goods, except ſuch as are abſolutely neceſſary for the Support of their Life to whom they are thus convey'd. But as for thoſe who import ſuch Commodities as improve and encourage Luxury, or from which thoſe who deal in them do not ſeek any Supply of real Wants, but rather an exceſſive Gain, and an Indulgence to covetous Deſires, I do not ſee what Right they have to demand Paſſage thro' our Coaſts for this kind of Traffick, or on what Pretenſions they can claim ſuch a Privilege as their *Due*. I confeſs, there ſcarce appears any probable Colour on which we ſhould deny unarmed Veſſels the Liberty of an open Sea, which we are Maſters of, whilſt they are bound to a third People, with whom we are at Peace. And to this Point, chiefly relate all thoſe Authorities and Teſtimonies of Authors uſually produced in the main Diſpute. But thus much we may reaſonably do, we may ſtop the Veſſel in ſuch a Caſe, and force them to leave their *Cargo* in our Territories, that we may have the Benefit of the firſt Purchaſe. For beſides that the frequent Paſſage of Strangers may ſome time create Danger, or at leaſt may give Suſpicions to our State, what ſhould hinder us from deriving that Profit on our own People, which would otherwiſe be made by Foreigners? ſince in Matters of Favour we ought conſtantly to prefer the former to the latter. And tho' in Strictneſs it be indeed no *Damage* to us, if we permit the free Tranſportation of theſe Commodities, and tho' the third Party who receives them, does not properly *injure* us by making a Gain, which 'twas in our Power to have ſecured before him; yet ſince he has no Right of excluding us from ſuch a Gain, why ought we not to love ourſelves beſt, and to be before-hand with him in the Advantage? Which we ſhall be, if whilſt we lie thus in the midſt between two People, we take care not to let ſuch Goods paſs from one to the other, without going firſt thro' our own Hands[2]. And unleſs this be admitted for fair and equitable Dealing, I ſee not on what Grounds we can defend thoſe [3] *Staples*, and other Rights which we find in ſome Countries, by virtue of which Foreign Commodities are ſtopp'd, and carried to the publick Place of Sale; and Strangers are permitted to traffick, not immediately betwixt themſelves, but at ſecond-hand with the natural Subjects.

VII. From what has been ſaid, there may well ariſe this farther *Queſtion*, Whether the Law of Humanity will permit us to require *Toll*, or *Cuſtom* for Goods tranſported thro' any Land, River, or narrow Sea, ſubject to our Dominion? For at firſt Sight it ſeems inhuman, not to grant ſuch a Privilege without *Price*, which the Law before-mention'd allows freely to all Mankind.

Now why *Cuſtom* ſhould be impoſed on Goods carried over *Land*, there is this manifeſt Reaſon, becauſe ſuch heavy Conveyance ſometimes treſpaſſes on the Fields adjoining to the common Roads; and becauſe the Sovereign of the Country is put to charge, both in repairing the Ways, and in ſecuring the Paſſengers[1]. And farther, if it be neceſſary to erect Bridges for this Purpoſe, it is plain in Equity that the Sovereign may ſet up a Toll to reimburſe himſelf for thoſe Expences; and at the ſame time, he who does require ſuch Toll, is oblig'd not only to let the Bridges ſtand, but likewiſe to keep them in conſtant Repair. *Grotius* on the 1 *Kings* x. 19. obſerves, that a great Toll was paid to *Solomon* for the Horſes brought thro' *Judea* from *Egypt*, to the *Syrians*, or to the *Hittites*; and thus too no *Frankincenſe* was tranſported without *Cuſtom*. The like *Impoſitions* are reaſonable in thoſe Places, where by the Induſtry of the Natives, the Roads are render'd more ſhort or more eaſy; as by the filling up of Pits and Ditches, or by other uſeful Labours, for the Convenience of Paſſengers and of Goods. Thus of old, had any one cut thro' the *Iſthmus*, and join'd the *Ionian* and *Egean* Seas, he might fairly have required ſome moderate Toll of the Merchants and Sailors; which they would

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[2] As the Duties of Humanity are reciprocal, and he that has received a Benefit ought to make ſome Acknowledgment of it, Strangers have no juſt Reaſon to complain that they are obliged to put their Goods to Sale in the Country, provided they'll buy them at a reaſonable Price, becauſe by that means they will get by them, tho' perhaps not ſo much as they would have done, if they had carried their Merchandizes farther. But if the Merchandizes or Wares be ſuch as we are well ſtored with, or trade with ourſelves, we may poſitively refuſe them coming in; becauſe 'tis evident, that ſo much Profit as theſe Traders make in paſſing thro' our Country, 'tis ſo much Loſs to ourſelves. But if in refuſing a Paſſage, we deprive the Strangers that demand it of that Profit they might make, without any Advantage to ourſelves, 'tis inhuman to envy others the Benefit which we can't obtain ourſelves; and ſo much the more, if the other People to whom they would carry theſe Merchandizes, can't have them any where elſe, but at an exorbitant Price. See Mr. *Buddeus*, as above, §. 4, 5. Mr. *Hertius* in his Note upon this Place of our Author agrees, that nothing hinders but the Right of *Staple* may take place among Citizens of the ſame State, either with relation to Strangers, who come to ſell their Merchandizes and Wares in their Country, *i. e.* they may not allow them to ſet them to Sale but in a certain Place; but he does not ſee why ſuch Perſons as bring Foreign Commodities, whether of their own Growth or Manufacture, to carry them into a third Country, ſhould be obliged to put them to Sale; eſpecially if the People thro' whoſe Country they are carried, have no great need of them. For my part, there ſeems to me to be no Injuſtice in it, provided we are willing to furniſh theſe Strangers with ſuch Things as they are ſeeking elſewhere, when they have paſſed our Country, whether of our own Growth or Manufacture, at a reaſonable Rate. For why ſhould they go far for what they may have near at hand? And why ſhould they not accommodate themſelves among us, who are nearer than others? So long as they may make a tolerable Gain, tho' not ſo great as if they were ſuffered to go farther. So that in this Caſe it is at our Liberty either to allow Paſſage, or not, for Foreign Commodities; all that we are to beware of is, that in denying we do not prejudice the Commerce of the Inhabitants of our own Country, or bring ſome other Inconvenience on them; but this is a matter of Prudence only.

[3] *Stapula*, this word comes from the *German*, *Stapelen*, which ſignifies, to put into an Heap or Pile. See Mr. *Menage's* *Etymolog. Diction.* & *Marquard. de Jur. Mercat.* Lib. 2. c. 6.

Mr. BARBEYRAC's *NOTES on* §. VII.

[1] In ſome Countries, they who received theſe Tolls were obliged to make the Roads ſafe. So that if a Man was robbed in the Day-time, they were bound to make good what he had loſt. Some ſay, that this Cuſtom is uſed at this Day in ſome Places of *England* and *Italy*. See *Furetiere's* *Diction.* in the word *Peage*, and the *Saxon* Laws, *Lib.* 2. *Art.* 27.

not have been unwilling to give, the Voyage being now perform'd with more Expedition and more Security. And tho' this Project was never ſet on foot, *Strabo* informs us, "That the Merchants of *Aſia* and *Italy*, rather than paſs out of "one of theſe Seas into the other, by the tedious "and dangerous Coaſt of *Malea*, were extremely "well ſatisfied to put in at *Corinth*, and ſo carry "their Effects over Land; notwithſtanding the "Duties to be paid there for all imported or exported Goods." Another Reaſon which ſome bring to aſſert the Equity of Impoſitions on Land-Carriage, is this, that by ſo perpetual Confluence of Strangers the Price of Proviſions is exceedingly rais'd. To which we may add in Concluſion, that a Sovereign, on this account, requires ſome Acknowledgment from the Goods of *Foreigners*, becauſe he ſuffers them by paſſing thro' his Territories, to receive ſuch Goods *immediately* from a third People; whereas ſhould he erect a *Staple*, the Gain and Benefit would be fairly intercepted by his own Subjects.

As to the *River* Tolls, this amongſt other Arguments may be offer'd to juſtify them, that ſince the Water by continually preying on the adjoining Lands, and ſometimes by overflowing them, is the Cauſe of no inconſiderable Damage, for the prevention of which it is often neceſſary to ſecure them with Banks and other *Works* of great Charge and Labour; it ſeems by no means unreaſonable, that towards the making up of theſe Loſſes, ſome moderate Conſideration ſhould be allowed by thoſe who gain Advantage by the River, without being concern'd in its ordinary Miſchiefs. It is true in the Capitularies of *Charles the Great* [a], one Order forbids to take Toll in thoſe Rivers, *Ubi nullum adjutorium præſtatur itinerantibus, Where no Aſſiſtance is given to the Paſſengers* [2]; but this Conſtitution ſeems to have been made in favour of the natural Subjects, and there is no Neceſſity of extending it to Foreigners [*].

It is a more difficult Point, to ſtate the Equity of Tolls demanded in *Seas*. This indeed is beyond diſpute, that the Sovereign of a Sea may impoſe Duties anſwerable to the Charge which he beſtows about it; as for the ſetting up of Marks near Rocks and Quickſands, for the keeping of Fires to direct Veſſels in the Night, or for ſcowring the Coaſts of Pirates. But whatever is demanded farther than upon theſe Accounts, will not admit of ſo good Defence; inaſmuch as the Paſſage of *unarmed Ships* is plainly one of thoſe harmleſs Benefits which *Humanity* lays in common. Yet where ſuch Pretenſions are made, the Pleas which ſupport them do not ſeem altogether abſurd; as that no one ought to be blamed for making the beſt of his Dominions, or for raiſing ſuch Profits from his Waters as others do from their Land. That, ſince he who enters the Territories of another, is for that time his *Subject*, we may compel the Ships of Foreigners, whilſt they paſs thro' our Sea, to let our Subjects have the firſt Purchaſe of their Goods; and that if we give up this Claim, we may require ſome reaſonable Conſideration in lieu of it. That altho' we cannot perhaps ſet up a *Staple* in ſuch a Sea, becauſe the third Nation whither thoſe Ships are bound, may not have the Uſe of Sailing, and therefore cannot fetch the Goods from us, neither have we, it may be, the Liberty of carrying them thither; yet it ought not to be thought hard, if we put in for ſome little ſhare in the Gain; ſince we permit Strangers to ſail thro' our Water, with ſo much Expedition and Convenience. But upon the whole, it muſt be confeſs'd, that ſince this Toll by *Sea* is, for I know not what Reaſon, accounted more odious than what is demanded by *Land*, it ought to be exerciſed with great Prudence and Moderation, and without the leaſt Appearance of Extortion or Avarice. And after all there may, 'tis very likely [3], be a Sovereign or two, who ſhall claim an Exemption from the common Duty, and build his Pretenſions on good Reaſon; as that his Dominions bordering on the ſame Sea [4], incloſe it ſo at both Ends, as to give him a fair Title to its Uſe; or that on ſuch a Uſe of it, his Commerce with Foreign Nations, and conſequently the Good and Safety of his own People almoſt entirely [5] depends. For in theſe Caſes it would be unreaſonable, that to obtain the Liberty of a harmleſs Paſſage by Sea, he ſhould be reduc'd to a kind of [6] tributary Condition; nor will any one be much inclin'd to cenſure him, if upon ſo odious a Provocation he endeavour by any poſſible Means to free himſelf from ſuch Exaction and Oppreſſion. Nor will it render his Reſentments leſs juſtifiable, to alledge on the other ſide, that other Nations have agreed to pay the Impoſition: becauſe their Support and Safety is not ſo immediately concern'd in the uſe of ſuch a Sea, and therefore they may afford to allow the Sovereign of the Sea a ſhare in their Gains, without grudging or repining. As the Caſe is very different [7], whether a Man deſires Way through my Grounds, becauſe without this Privilege, he would be as it were excluded from the World, and confined to Solitude, or becauſe he could not otherwiſe carry off the Fruit of his own Land; and whether he makes the ſame Demand, purely to ſhorten his Paſſage, and impoſes a Burthen on my Eſtate, not to relieve his own Neceſſity, but to promote his Convenience and Eaſe.

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[2] Either in taking care that the Commodities be not endamaged, or for the Safety of their Perſons.

[3] Our Author has a principal Reſpect here to the Streight of the *Sound*, for he was at that time Profeſſor at *Lunden* in the Province of *Schonen*, belonging to the *Swedes* ſince the Peace of *Rotſchild*.

[4] This Reaſon proves nothing. The Subjects of this Prince trade together by Land, but if they will tranſport their Merchandizes by an Arm of the Sea, why ſhould they refuſe more than other People to pay an Impoſt to the Maſter of the Streight, either as a Satisfaction for the Charge he is at to ſecure them a commodious Navigation, or as a ſmall Acknowledgment of the Profit they reap themſelves from an open Paſſage, which ſhortens their Courſe, and makes their Trade more flouriſhing? And tho' there be no other Communication between the Countries of that Prince, which are above and below the Streights, this does not at all leſſen the Right of him that has the Poſſeſſion of it. Otherwiſe it would follow, that he that hath a Country ſurrounded with another's States, ſuch, for example, as are *Avignon* and *Orange* in the Kingdom of *France*, hath a Right to aſſert, that the Lord of that Country which incloſes his muſt ſuffer all Merchandizes and Goods to paſs backward and forward without paying any Tax or Impoſition, which our Author will never grant. And I can't ſee what Privilege Navigation can pretend to more, ſince the Gulphs and Streights of the Sea, according to our Author's own Principle, *Lib.* 4. *c.* 5. §. 8. belong no more to any Prince, whoſe Country they border on, than the Highways taken out of his Lands. See Mr. *Bynkerſhoek*'s Diſcourſe, *De Dominio Maris*. c. 4. p. 28.

[5] Suppoſe that the People be ſo poor, that a moderate Tax laid upon their Goods and Merchandizes which they tranſport, would diſable them from trading, and providing themſelves the Neceſſaries of Life. In this Caſe the Maſter of the Streight will be obliged to ſuffer the Veſſels of that People to paſs without exacting any Cuſtoms of them. But yet he may take them of Foreign Merchants for their Paſſage; becauſe, tho' it ſeems to be a leſſening their Profits, yet they know how to indemnify themſelves in ſelling their Merchandizes, without which their Fellow Citizens, to whom they ſell them, muſt either want ſome of the Neceſſaries of Life, or buy them at an exorbitant Price. And tho' perhaps, if the Maſter of the Streight ſhould altogether refuſe them a Paſſage, they would be in great Want of ſeveral Things, yet it does not follow, that they muſt therefore be exempted from ſuch Cuſtoms, becauſe that open Paſſage procures a flouriſhing Trade, and a great Abundance of all Things they have need of, and much more.

[6] That Prince is no more tributary to the Maſter of a Streight for paying a Cuſtom, than a Traveller in a ſtrange Country, paying the Toll of a Bridge or River is tributary to the Lord of the Country who receives it. It is not (as an *Engliſh* Author, *viz.* Mr. *Moleſworth* in his *Memoirs* affirms) a ſervile Acknowledgment of the Sovereignty of that Prince over the Seas, of which the Streight is a Key. We may as well ſay, that by paying the Toll over a Bridge or River, which are on the Border of a Prince's Country, we attribute to him the Sovereignty over all the Country.

[a] Lib. 3. c. 12.

[*] *V. Lex Longobard.* lib. 3. Tit. 1. Leg. 21.

They tell us, that the King of *Abyſſinia*, or *Ethiopia*, pretended of old to a certain Tribute from *Egypt*; upon account that the River *Nile*, to which that Country owes its Fruitfulneſs, took its Riſe in his Dominions; and that afterwards when the *Turks* had ſeiz'd on *Egypt*, and uſed great Severities towards the *Chriſtians*, the *Abyſſinian* Prince made an Attempt to have turn'd the Channel of the *Nile* into the Red Sea, but without Effect. Theſe Pretenſions and theſe Proceedings, which bear ſome Relation to the Caſe before us, we cannot but look upon as unjuſt [8].

Some would determine this whole Buſineſs by the means of Compact and Covenant, which Method we think not to be altogether accurate and deciſive. For it remains ſtill in Queſtion, what was the original Reaſon of theſe Covenants; and whether the Maſter of the Sea may deny Paſſage to others, until ſuch time as they ſhall enter into the ſame Articles of Agreement. Though indeed when ſuch a Covenant has once paſs'd without any natural Flaw or Weakneſs, which might render it invalid, both Parts are obliged ſtrictly to obſerve it; ſo that the People who uſe the *Paſſage* deſired, ought on no account to deny the ſettled *Impoſition*, and the Maſter of the Sea ſhall not raiſe the Duty higher than what has been thus eſtabliſh'd by joint Conſent [a]. *Nicephorus Gregoras* [b] reports, that the *Caliph* of *Egypt* obtain'd by Covenant of the Emperor of *Conſtantinople*, Licenſe for the Merchants of his Country to paſs through the *Thracian Boſphorus*. Which Privilege was therefore ſo eaſily granted at firſt, becauſe it ſeem'd a Matter of little Importance. But when in courſe of time it appear'd to be a Point of very conſiderable Conſequence, it was found impoſſible to revoke the *Grant*, after it had been by long Cuſtom enforced and eſtabliſh'd [9].

But in Caſe the oppoſite Shore is poſſeſs'd by another People, ſo that the Sea is either held in common by both, or elſe as a middle Point divides the Confines of the two Dominions, though here perhaps one of the States only may by Compact or Conceſſion require Toll of Paſſengers, yet the Subjects of the other State ſhall by no means ſtand liable to the ſame Impoſition, ſince they ſail in their own Water [10].

VIII. Under the ſame Head of common and innocent Privileges *Grotius* [c] likewiſe reckons the liberty of Sailors, to touch and to reſt a little on any Shore, for the ſake of Health, or of freſh Water, or on any other juſt Account. Thus the *Trojans* complain in *Virgil* [d]:

> *Quod genus hoc hominum? quæve hunc tam barbara morem*
> *Permittit patria? hoſpitio prohibemur arenæ,*
> *Bella cient, primâq; vetant conſiſtere terrâ.*
> *Si genus humanam & mortalia temnitis arma,*
> *At ſperate Deos memores fandi atque nefandi.*

> What Men, what Monſters, what inhuman Race;
> What Laws, what barbarous Cuſtoms of the Place,
> Shut up a deſert Shore to drowning Men,
> And drive us to the cruel Seas again?
> If our hard Fortune no Compaſſion draws,
> Nor hoſpitable Rights, nor human Laws;
> The Gods are juſt, and will revenge our Cauſe.
> Mr. *Dryden*.

But 'tis obſervable that they profeſs'd before,

> *Non nos aut ferro Libycos populare Penates*
> *Venimus, aut raptas ad littora vertere prædas;*
> *Non ea vis animo*, &c.

> We come not with deſign of waſteful Prey,
> To drive the Country, force the Swains away:
> Nor ſuch our Strength, nor ſuch is our Deſire.
> Mr. *Dryden*.

Whence we are taught that the Party who deſires this Favour, ought to appear on ſuch Coaſts with moſt innocent Intention, ſo as neither to create any Danger to the Inhabitants, nor any probable Grounds of Fear. And therefore *Dido*'s Anſwer to this Speech is exceedingly wiſe and proper:

> *Res dura, & regni novitas, me talia cogunt*
> *Moliri, & late fines cuſtode tueri:*

> ———My cruel Fate,
> And Doubts attending an unſettled State,
> Force me to guard my Coaſts.———
> Mr. *Dryden*.

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[7] But our Author himſelf, reciting the ſame Example above, l. 2. c. 6. §. 8. ſays, according to the Senſe of the Interpreters of the *Roman* Law, that he is obliged to grant a Paſſage, eſpecially if he make ſome Acknowledgment. See *Digeſt*. l. 11. Tit. 7. *de Relig. & Sumpt. fun. &c.* Leg. 12. Let any Man then conſider, whether the Conſequences which our Author draws from the Circumſtances he ſuppoſes in favour of his Prince, be well grounded; and if this Prince has any way to oblige the Maſter of the Streight to let him carry his Merchandiſes free of all Toll, ſince other People pay it willingly.

[8] This Inſtance, tho' our Author paſſes a true Judgment as to the Pretenſions of the *Abyſſine* Prince, yet has little or no relation to the Cuſtom or Toll which a Maſter of a Streight exacts of the Merchandiſes which paſs through it.

[9] What does this prove?

[10] But our Author elſewhere acknowledges, *viz.* Lib. 4. c. 5. §. 8. that whoever has ſettled himſelf firſt upon one of the Coaſts of the Streight, and has taken poſſeſſion of the whole Streight, he that comes afterward to inhabit on the other ſide is Maſter only of his own Ports and Shore. So that in this Caſe the firſt Occupant has a Right to require Cuſtoms of the Veſſels of the other, as if he had both ſides of the Streight, unleſs he be diſpenſed with by any Agreement.

[a] *Add. Bœcler. ad Grot. L. 2. c. 2. ſ. 14.* [b] Lib. 4. [c] L. 2. c. 2. ſ. 15. [d] *Æneid.* 1. ver. 542.

For before we grant any thing of this kind, we ought to be well aſſured whether the Perſons approaching come as Friends, or as Enemies, what Appearance the Fleet makes, what Force and Figure the Men bear who are to land; and farther, whether they are free from all contagious Diſtempers [a]. When there ariſes no Obſtacle on either of theſe Accounts, as it would be then moſt barbarous Inhumanity, to deny the Liberty of harmleſs Acceſs to Shore, ſo that Favour being once granted, calls for one more, altogether as reaſonable, the Privilege of erecting little *momentary* Huts for preſent Shelter, which is neither any prejudice to the Shore, nor any Abridgment of our Right and Property. Indeed Reaſon forbids that any one ſhould raiſe a *laſting* Structure or Edifice on the Strand, without expreſs Allowance from the Sovereign [1], eſpecially if it could not be done but by endamaging others [b].

Altho' ſome Nations have by formed Compact ſettled the Point of Acceſs to Shores and Ports [2], yet this does not hinder the like Kindneſs from being due by natural Right; ſince many Duties ariſing from thoſe Virtues which impoſe only an *Imperfect* Obligation, are frequently ſtrengthen'd and confirm'd by civil Covenants and Laws [3]. Beſides, our preſent Aſſertion regards chiefly this extraordinary Caſe, when Perſons contrary to their Intentions, are driven by ſome Violence on a foreign Coaſt; whereas theſe Covenants which ſometimes paſs betwixt Nations, uſually have for their Subject the Point of conſtant and continual Acceſs on common Occaſions. Therefore for this latter Indulgence, it is on no account abſurd to require ſome moderate Conſideration. But in the former Caſe it would be extreamly baſe and ſordid, to charge as a Debt ſo ſmall a Relief of Perſons in Diſtreſs, and as it were to ſet a Price upon our Charity.

IX. Another Duty of *Humanity* is the Admiſſion of Strangers, and the kind Reception and Entertainment of *Travellers*. Some of the Antients carried this Point to the heighth of Ambition and Oſtentation, conceiving the Right of Hoſpitality to found the ſtricteſt Relation, and the moſt ſacred Friendſhip [c]. But to give a natural Right to theſe Favours, it is requiſite that the Stranger be abſent from his own Houſe on an honeſt, or on a neceſſary Account; as alſo that we have no Objection againſt his Integrity, or Character, which might render our Admiſſion of him, either dangerous or diſgraceful; and farther, that he cannot at preſent hire Lodgings for his Money. And therefore in antient Times, when publick Inns either were not in uſe, or elſe accounted ſcandalous, and unworthy to receive a good and virtuous Gueſt, the Neceſſity of this Duty was greater and more ſtrictly binding, than it is now in moſt parts of *Europe*; where we meet with ſo many of theſe Houſes exactly fitted and furniſh'd, not only for all Uſe and Convenience, but even for Ornament and Splendor.

Now although *Inhoſpitality* be commonly, and for the moſt part juſtly cenſured, as the true Mark of a ſavage and inhuman Temper, yet the Point will now and then bear a diſpute, eſpecially as to the Caſe of thoſe who wander into foreign Countries purely on account of Curioſity; whether or no ſuch Perſons may claim free Admiſſion by any natural Right [1]. The *Spartans* to juſtify themſelves in driving all Strangers from their Coaſts, thought this one Reaſon ſufficient, Leſt the Converſe of Strangers ſhould introduce a Corruption, or a Contempt of their receiv'd Manners and Cuſtoms [d]. In anſwer to which it is well urged by ſome, that what we practiſe at home is not always the beſt, nor what others do abroad the worſt; if then a *foreign* Cuſtom be really *better*, it is abſurd to deſpiſe, and to reject it on the Score of its being *foreign*. That this is the Temper and Property of Curs to fawn on *domeſtick* Slaves, and to bark at the moſt noble and excellent of *Strangers*. That thoſe Men uſually contract a Roughneſs and Clowniſhneſs of Behaviour, who never breathe out of their native Air, and ſee no more of the World than what paſſes under their Noſe [e]. As to the Que-

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Mr. Barbeyrac's *NOTES on* §. VIII.

[1] See Mr. *Noodt*'s Book called, *Probabilia Juris*, (i. e.) *The Probabilities of the Law*, Lib. 4. c. 1.

[2] Sometimes, on the contrary, as our Author obſerves a little below, one People agree with another that they will not come into the Ports, nor on the Coaſts one of another, as appears from two Treaties made long ago between the *Romans* and *Carthaginians*, That the *Romans* and their Allies ſhall not ſail beyond the *fair Promontory*, unleſs they are driven farther by a Tempeſt, or by the Purſuit of their Enemies; and if thro' theſe Means they paſſed their Bounds, they ſhould buy nothing, nor meddle with any thing but what was either neceſſary for Sacrifice, or to repair their Veſſels, and ſet ſail again to return within five Days. *Polyb.* l. 3. This was their firſt Treaty. The ſecond was, that no *Roman* ſhould trade into *Sardinia* or *Africk*; that they ſhould not build any City there, nor land, unleſs to get Proviſions, or repair their Veſſels; and if they were driven aſhore by a Tempeſt, they ſhould depart within five Days. *Ibid.*

[3] See §. 4. above, and Lib. 2. c. 6. §. 5. where you'll find Examples of theſe imperfect Obligations, which have been made perfect by the Determination of the Legiſlator, who has made them effectual by Law: As alſo, ſee Lib. 4. c. 2. below.

Mr. Barbeyrac's *NOTES on* §. IX.

[1] For the ſame Reaſons *Lycurgus* forbad the *Lacedemonians* to travel out of their own Country, leſt they ſhould learn the bad Cuſtoms and coarſe Manners of Strangers. *Plut. Inſt. Lac.* See *Potter's Archæol. Græc.* l. 4. c. 21.

[a] Add. *Plin. N. H.* l. 26. c. 1. [b] Vid. l. 50. *D. de acq; rer. dom.* [c] *Ariſtot. Mag. Moral.* l. 2. 11. Of all kinds of Friendſhips that ſeems to be the firmeſt which is expreſs'd in the courteous Entertainment of Strangers; becauſe the Perſons here having not the ſame Ends and Intereſts to propoſe, cannot ſo eaſily fall into Contention, as thoſe who are Members of the ſame State. *Homer* ſays, the Poor and Stranger are the Care of *Jove*; and again, the ſuppliant Stranger craves a Brother's Love. In *Lucian* (*de Dea Syria*) amongſt the Crimes which brought *Deucalion*'s Flood upon the World, we find theſe which follow. They practiſed all kinds of Injuſtice; for they neither kept their Oaths, nor receiv'd Strangers, nor gave a patient Hearing to the Requeſt of the Miſerable. Of the Humanity which the *Indians* ſhew to Strangers, ſee *Diod. Sic.* l. 2. c. 42. *Add. Plato de L. L.* l. 12. *Ælian* (*V. H.* l. 4. c. 1.) recites this Law of the *Lucanians*, If at Sun-ſet a Stranger arrives, and deſires Reception in a Houſe, in caſe the Maſter refuſe to admit him, let him be puniſh'd as an Offender againſt the Laws of Hoſpitality. *Add. Lex Burgund.* Tit. 30. ſ. 1. *Helmoldus* (*in Chron. Sclav.* l. 1. c. 82.) reports of the antient *Sclavi*, If a Man be diſcover'd to have denied Lodging to a Stranger (a Rudeneſs which ſeldom happens amongſt them) the People join in a Body to pull down his Houſe, and to ruin his Eſtate; which way of proceeding is permitted by the Laws. *Philo Jud.* in his Life of *Moſes*, ſays, that Strangers have the ſame Rights as Suppliants.

[d] The *Chineſe* have much the ſame Conſtitutions in reference to Strangers. *Vid. Nieuhof. Gen. Deſcript. Chin.* c. 1.

[e] (In *Livy* l. 41. c. 24.) The Decree of the *Achæans*, by which they forbad the *Macedonians* to enter their Territories, is call'd, *exſecrabilis velut deſertio Juris Humani*, as it were a deteſtable Deſertion of the Law of human Nature. 'Tis a Saying of *Periander* in *Plutarch* (*Sympoſ.*) I commend thoſe States and thoſe Magiſtrates which firſt give Audience to Strangers, and then to their own Subjects.

ſtion before us then, thus much is certain, that if our People are kindly receiv'd by any Nation abroad, we ought to entertain the Men of that Nation with an equal return of Civility. As on the other hand, thoſe who drive us from their Coaſts, cannot without the moſt ſtupid Impudence petition us for a more courteous Treatment. But ſuppoſing that any one Nation, contented with what it finds at home, utterly refrains from all foreign Travel, it does not appear what Obligation ſuch a State can have to admit thoſe who would viſit it, without a neceſſary or weighty Cauſe. The Caſe is ſomewhat like that of a private Man, who in his Houſe or Gardens, poſſeſſes ſome rare Curioſity, or other valuable Sight; ſuch an one does not apprehend himſelf tied freely to let in all Spectators; but whoever is thus gratified either rewards, or at leaſt acknowledges, it as an extraordinary Favour. And this ſeems the more reaſonable, becauſe the Grounds of prudent Caution and Suſpicion are ſo numerous, that we may eaſily make uſe of one or other of them, to juſtify us in keeping ſuch Perſons at a diſtance, as would too curiouſly examine and pry into our Affairs.

Therefore the *Spaniſh Caſuiſt* [a] has not made many Converts by the Reaſons he lays down to juſtify his Countrymen in their Proceedings againſt the *Indians*. The firſt Right on which he founds their Title, is that of natural Society and Communication, which he draws up into this Aſſertion, *The* Spaniards *had a Right of travelling and of living in thoſe Countries, provided they did the Natives no harm, and from this Previlige none could reſtrain them.* In reply to which it is well urged, that this *natural Communication* does not hinder a juſt Proprietor from communicating his Goods by ſuch Methods, and upon ſuch Conſiderations as he finds neceſſary. And farther, that it ſeems very groſs and abſurd, to allow others an indefinite or unlimited Right of travelling and living amongſt us, without reflecting either on their Number, or on the Deſign of their coming; whether ſuppoſing them to paſs harmleſly, they intend only to take a ſhort view of our Country, or whether they claim a Right of fixing themſelves with us for ever. And that he who will ſtretch the Duty of Hoſpitality to this extravagant Extent, ought to be rejected as a moſt unreaſonable, and moſt improper Judge of the Caſe. The ſecond Principle he lays down is, *That it was lawful for the* Spaniards *to traffick with thoſe People, and the Sovereigns on either ſide could not hinder their Subjects from ſuch Intercourſe.* But here Men of more ſober and moderate Judgments confeſs themſelves unable to find out any ſuch Liberty of trading, as Princes may not abridge their Subjects of, for the good of the Commonwealth; much leſs ſuch as ſhall force and obtrude Strangers upon us, whether we will or no. His third Reaſon is this, *If the* Indians *had amongſt them any Rights and Privileges allow'd in common to Natives and Foreigners, in theſe they ought not to hinder the* Spaniards *from their Share: For Example, If other Strangers were permitted to dig Gold, the* Spaniards *might fairly claim the ſame Liberty.*

On which Point ſome have judged it worth conſidering, firſt, whether thoſe Privileges were granted to others, by way of *Debt*, or by way of free Gift and Favour. For of thoſe things which Men cannot claim from me as *ſtrictly* their *Due*, I may be more liberal to one than to another. And in the next place, whether theſe new Comers will behave themſelves with the ſame Juſtice and Modeſty as the former, who made uſe of our Goods without our Prejudice or Inconvenience; and whether theſe late Gueſts propoſe no other End of their Viſit. Suppoſe I give one or two of my Neighbours leave to come into my Garden, as often as they pleaſe, and to gratify themſelves with taſting my Fruit; it may be, there breaks in afterwards a rude Hector, who is for tearing up my Trees, and would kick me out, to plant his own Body in my proper Land; my Caſe is bad if I may not be allow'd to ſhut the Gate againſt ſuch an intruding Villain [b]. But let others ſettle this Controverſy. As to our main Queſtion, it is look'd on by moſt as the ſafeſt way of reſolving it, to ſay, That it is left in the power of all States, to take ſuch Meaſures about the Admiſſion of Strangers, as they think convenient; thoſe being ever excepted, who are driven on the Coaſts by Neceſſity, or by any Cauſe that deſerves Pity and Compaſſion. Not but that it is barbarous to treat in the ſame cruel manner, thoſe who viſit us as Friends, and thoſe who aſſault us as Enemies [c], The free Admiſſion of Ambaſſadors is deduced from another Head [d] [2].

But having once admitted Strangers and foreign Gueſts, to turn them out again, unleſs by *good Reaſon*, is uſually cenſured as ſome Degree at leaſt of Inhumanity [e]. From the number of theſe *good Reaſons*, St. *Ambroſe* and with him *Grotius* [f] excludes the Caſe of grievous Scarcity and Dearth afflicting a People. To whoſe Judgment we ſubſcribe with this Suppoſition, That there are ſtill Means left, though perhaps very hard and preſſing, to ſave both Natives and Strangers, and if the latter have been formerly, or may be hereafter uſeful and ſerviceable to us, and of ſuch only St. *Ambroſe* ſpeaks. But in caſe we are not *obliged* to the Foreigners amongſt us, and there be no Neceſſity of their periſhing, ſhould we ſend them off, there ſeems to be no Reaſon why the Subject on their Account ſhould be content to ſtruggle with a Famine [g].

X. In the ſame Claſs of Duties *Grotius* [h] places the allowing of a perpetual Habitation to Strangers, who being driven by Violence out of their own Country, are forced to ſeek out a new Seat; provided ſtill, that they ſubmit to the eſtabliſh'd Government, and behave themſelves with ſuch Prudence and Decency, as to adminiſter no Occaſion to Factions and Seditions [i].

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[2] See what is ſaid above, L. 2. c. 3. §. 23. and below, Lib. 8. c. 9. §. 12. Note 1.

[a] *Franciſcus a Victoria Relect.* 5. ſ. 3. [b] Add the Anſwer given by ſome of the *Americans* to the *Spaniards*, in *Montaigne's* Eſſays, l. 3. c. 6. [c] Vid. *Diod. Sic.* l. 1. c. 67. [d] Add *Ziegler ad Grot.* l. 2. c. 2. ſ. 23. [e] Vid. *Liv.* l. 2. c. 37, 38. [f] *De Offic.* l. 3. c. 7. *Grot.* l. 2. c. 2. ſ. 19. [g] Vid. *Sueton. Auguſt.* c. 42. & *Bœcler. ad Grot. d. l.* [h] Lib. 2. c. 2. ſ. 16, 17. [i] *Euripides* Medea. Χρὴ δὲ ξένον, &c. ver. 222.

——————A Stranger ſhould conform
In Manners to the State that entertains him.

So among the Articles of Peace propoſed by *Æneas* in *Virgil*, *Æn.* xii. 192. we find this for one:

——————*Socer arma Latinus habeto,*
Imperium ſolenne ſocer; mihi mœnia Teucri
Conſtituent, urbiq; dabit Lavinia nomen.

Latinus ſhall the Regal Scepter bear,
Latinus firſt in Peace, and chief in War.

Humanity, it is true, engages us to receive a ſmall number of Men expell'd their Home, not for their own Demerit and Crime; eſpecially if they are eminent for Wealth or Induſtry, and not likely to diſturb our Religion, or our Conſtitution. And thus we ſee [1] many States to have riſen to a great and flouriſhing Height, chiefly by granting Licence to Foreigners to come and ſettle amongſt them; whereas others have been reduced to a low Condition, by refuſing this Method of Improvement.

But no one will be fond of aſſerting, that we ought in the ſame manner to receive and incorporate a great Multitude, eſpecially if now in Arms, or naturally addicted to War; ſince it is ſcarce poſſible, but that their Admiſſion ſhould highly endanger the Natives. Therefore every State may be more free or more cautious in granting theſe Indulgences, as it ſhall judge proper for its Intereſt and Safety. In order to which Judgment, it will be prudent to conſider, whether a great increaſe in the Number of Inhabitants will turn to Advantage; whether the Country be fertile enough to feed ſo many Mouths; whether upon Admiſſion of this new Body, we ſhall be ſtraitned for room; whether the Men are induſtrious, or idle; whether they may be ſo conveniently placed and diſpoſed, as to render them incapable of giving any Jealouſy to the Government. If on the whole, it appears that the Perſons deſerve our Favour and Pity, and that no Reſtraint lies on us from good Reaſons of State, it will be an Act of Humanity to confer ſuch a Benefit on them, as we ſhall neither feel very Burthenſome at preſent, nor are likely to repent of hereafter. If the Caſe be otherwiſe, we ought ſo to temper our Pity with Prudence, as not to put our ſelves in the ready way of becoming Objects of Pity unto others. Farther, ſince whatever we beſtow on ſuch Petitioners, we may juſtly reckon as a Matter of free Bounty in us, hence it follows, that they are not preſently to lay hands on what they pleaſe, nor to fix themſelves as it were by ſome Right, in any Spot of Waſte-ground they find among us; but that they ought to reſt ſatisfied with the Station and Privileges we aſſign them [a].

XI. The next Office of Humanity mention'd by *Grotius*, is that we allow every Man the Privilege of procuring for himſelf, by Money, Work, exchange of Goods, or any other lawful Contract, ſuch things as contribute to the convenience of Life, and that we do not abridge him of this Liberty, ei-

Mr. Barbeyrac's *NOTES on* §. X.

[1] See *Parrhaſiana*, Tome 1. p. 265, *&c.* and a Diſcourſe *De conſcribendo Milite*, §. 18. among the Select Diſcourſes, *Jur. Nat. & Gen.* of Mr. *Buddeus*.

[a] What hath been ſaid may be illuſtrated by theſe hiſtorical Examples. *Latinus*, in *Virgil Æn.* 11. ver. 316. offers the *Trojans* this Condition:

Eſt antiquus ager Tuſco mihi proximus amni,
Aurunci Rutuliq; ſerunt, & vomere duros
Exercent colles, atque horum aſperrima paſcunt.
Hæc omnis regio & celſi plaga pinea montis
Cedat amicitiæ Teucrorum, & fœderis æquas
Dicamus leges; ſociosq; in regna vocemus.

A Tract of Lands the *Latines* have poſſeſs'd,
Along the *Tiber*, ſtretching to the Weſt,
Which now *Rutulians* and *Auruncans* till,
And their mix'd Cattle graze the fruitful Hill;
Thoſe Mountains fill'd with Firrs, that lower Land,
If you conſent the *Trojans* ſhall command,
Call'd into part of what is ours; and there
On Terms agreed the common Country ſhare.

Mr. *Dryden.*

Servius on this Paſſage obſerves, from *Cato*'s *Origines*, that the Land here mention'd contain'd 100 Acres. He tells us likewiſe, for fear we ſhould think that the King was liberal of what did not belong to him, that to thoſe Words *Aurunci Rutuliq; ſerunt*, we muſt join *mihi* in the preceding Verſe; the *Auruncans* and *Rutilians* having that Country allow'd them in a way of free Stipend, or elſe being placed there by the King as his Husbandmen, to manage the Crown Lands. The Story is told more at large by *Dionyſ. Halicarnaſſ.* L. 1.

The *Cimbrians* in *Florus* (l. 3. c. 3.) petition the *Roman* Senate, that ſo brave and warlike a People would give them a little Portion of Land as a kind of Pay, promiſing in return, that their Hands and their Weapons ſhould be ever employ'd in the Cauſe of *Rome*. But (as the Hiſtorian there reflects) what Land could the *Romans* give them without quarrelling amongſt themſelves, on the Point of ſuch arbitrary Diſtributions? And how could the Senate without manifeſt Injuſtice diſpoſe of the Property of private Men? Beſides, poſſeſſing ſo many things as were likely to raiſe the Appetite of needy Strangers, they judg'd it unſafe to admit ſo ſtrong and ſo fierce a Nation into their Limits.

In *Cæſar* (*de B. G.* l. 4.) the *Tencteri* and *Uſipetes* petition'd in this boaſting manner: That they did not voluntarily leave their own Country to ſeek a foreign Seat; that if the *Romans* would accept of their Service, they were able to ſhew themſelves no unprofitable Friends; only they deſire ſome Lands to be aſſign'd them, or to have the Privilege of keeping what they had already gotten by their Arms. The Anſwer which *Cæſar* ſent them was to this purpoſe; That 'twas unreaſonable in thoſe Men to invade another Country, who could not defend their own. That there were no vacant Lands in *Gallia*; eſpecially not to hold ſo vaſt a Multitude, without Prejudice or Danger. Though indeed he had ſtill another more ſecret Reaſon, why he would not have thoſe new Neighbours.

In *Tacitus* (*A.* xiii. c. 55.) the *Antibarii* being at a Loſs for a Dwelling, having therefore ſeated themſelves in ſome Lands beyond the *Rhine*, belonging to the *Romans*; excuſed themſelves, not altogether unreaſonably, in theſe Words: That the main part of the Land was uſeleſs; being only employ'd now and then by Chance in feeding Beaſts for the Army. That the *Romans* ought to reſign a Place which was fill'd only with Beaſts, when they might relieve the Diſtreſs of Men; and prefer Friends and Subjects to Deſerts and Solitudes. That as Heaven was poſſeſs'd by the Gods, ſo the Earth was given to Mankind; and what Parts were void of Inhabitants, lay in common to all the World. (Which Principle Sir *Thomas Moore* eſtabliſheth amongſt his *Utopians*, l. 2.) This Meſſage deſerv'd a more favourable Anſwer than thoſe moſt haughty Words of *Avitus*, That they ought to ſubmit to the Pleaſure of their Betters. That the Gods, whoſe Aſſiſtance they now implore, had choſen the *Romans* to be Commanders of the World, and to diſpoſe of it as they ſhould think convenient, without ſuffering any other Judges but themſelves.

The Emperor *Probus* ſettled an hundred Thouſand of *Baſtarnæ* in the *Roman* Territories; who all proved fruitful and quiet. But he uſing the ſame liberty of Tranſplanting vaſt Numbers from other Nations, as from the *Gepidi*, the *Gautumni*, the *Vandals*, &c. all theſe broke their Promiſe, and whilſt the Emperor was engaged in the War againſt the * *Tyrants*, wandered by Sea and Land almoſt through the whole World, aud ſpread no ſmall Cloud on the Glory of *Rome*. *Flav. Vopiſc.*

* *Theſe Tyrants were ſuch as revolted from the Emperor then reigning, and cauſed themſelves to be proclaimed Emperors by the Soldiers. See* Salmaſius *upon the Thirty Tyrants of* Trebellius Pollio.

So likewiſe in *Ammianus Marcellinus*, the *Goths* deſerting their Seat for fear of the *Huns*, begg'd leave of *Valens* to fix themſelves in *Thrace*, promiſing to live quietly, and to lend him their Service when he ſhould have occaſion. Soon after other barbarous People put up the ſame Requeſt, to whom *Valens* granted the like Favour, hoping that from theſe Numbers he might draw Men for his Troops, without any great Charge. Yet this Indulgence proved afterwards his Ruin; as the Hiſtorian demonſtrates at large. *Add. Socrat. Hiſt. Eccleſ.* l. 4. c. 28.

ther by any civil Ordinance, or by any unlawful Combination, or Monopoly. For that as Trade and Commerce highly promote the Intereſt of all Nations, by ſupplying the unkindneſs of the Soil, which is not every where alike fertile, and by making thoſe Fruits ſeem to be born in all Places of the World, which are to be found in any one [a]: So it cannot be leſs than Inhumanity to deny any *Son of the Earth* the uſe of thoſe good Things, which our common Mother affords for our Support; provided our peculiar Right and Propriety be not injured by ſuch a Favour. And therefore the *Megarenſians* (in *Plutarch*) when the *Athenians* had forbidden them entrance to all their Ports and Mart-Towns, complain'd that this was done παρὰ τὰ κοινὰ δίκαια, *contrary to the Law of Nations.*

But this Aſſertion will admit of many Reſtrictions. For we do not ſeem in Duty obliged to communicate to others ſuch Goods, as belong not to the Neceſſities, but to the Pleaſure and the Superfluity of Life. And then, if Scarcity lies upon us, we may juſtly keep what we have to our ſelves. Could *Joſeph* have diſcover'd that the Corn of *Egypt* was not ſufficient to ſupport the Natives, under the ſeven Years Famine, he might with good Reaſon have forbid the Exportation of it to Foreigners [b]. So the *Athenians* once decreed it to be *capital* for any Subject of that State, to carry Corn for Sale any where but to *Athens* [c]. Beſides, we may fairly exclude others from trafficking with us for things not abſolutely needful for the Support of Life, when by ſuch a Permiſſion our own Country would loſe a conſiderable Advantage, or ſuſtain (though by indirect Conſequence) ſome notable Evil. For Example, one Kingdom, ſuppoſe, produces admirable Horſes; what ſhould hinder the Government there from paſſing an Act to prohibit the carrying into foreign Parts, any that are fit for breed? For ſhould the fine Strain grow common, the Country would loſe its greateſt Profit, and its greateſt Ornament. And this beautiful Race is affected abroad, not for neceſſary Uſe, but for Pomp and Pride, for Elegance and Eaſe [d]. In one of the old *Roman* Conſtitutions it is made capital to carry Wine, Oil, or Arms to the barbarous Nations. They thought the Prohibition about the Wine and Oil no leſs neceſſary, than the other about the Weapons, fearing leſt the *Barbarians* by taſting ſuch generous Productions of the Empire, ſhould endeavour to make themſelves Maſters of ſo rich a Soil. And we find in *Livy* [e], that when *Aruns* of *Cluſium* invited the *Gauls* into *Italy*, he made them a Preſent of *Italian* Wines, as the Encouragement and the Reward of their Expedition [f].

Laſtly, there lies no Reſtraint on a State, why, in reference to the Exportation of Goods, it ſhould not favour its own Subjects more than Strangers; as by demanding leſs *Cuſtom* of the former, than of the latter, or by giving them the Right of *firſt Purchaſe*.

XII. Though, as has been ſhewn, we are *oblig'd* in many Caſes to ſell, yet as *Grotius* [g] obſerves, no Law ties us to a neceſſity of *buying*. In as much as every Man is naturally free to accept, or to refuſe what Purchaſe he pleaſes; and no one has juſt Reaſon to complain, becauſe another is content to want ſomewhat which he could ſupply him with. And therefore we find it forbidden in many Places, as well antient as modern, to import ſome particular Commodities: either leſt any Damage ſhould by this Means ariſe to the State; or to excite the Induſtry of our own Subjects; or to hinder our Money from paſſing into foreign Hands.

Therefore the *Spaniſh* Caſuiſt, lately mention'd, is widely miſtaken, when he aſſerts, that by the *Law of Nations, every one has a Right of trading into foreign Parts, of importing what the People there want, and of exporting Gold, Silver, and other Goods in which they abound.* For ſuppoſing I declare my ſelf well ſatisfied with what I poſſeſs of my own, with what Face can another force his Things upon me, whether I will, or no?

When the contrary is enacted, for Example, when in ſome Places, every Houſholder is obliged to buy yearly ſuch a Quantity of Salt, this ariſes from the Power of Princes over their Subjects, and that Neceſſity of buying is a kind of Tax or Tribute. Thus too a Ruler may enjoin his People, that if they want ſuch a particular Commodity, they ſhall buy it only of ſuch a Perſon. Which kind of Laws are very juſt, when they promote the Intereſt of the Commonwealth. In the ſame manner we find it often commanded by Authority, that the Subject do immediately buy up Corn and other Neceſſaries, even in remote Parts, when there is danger of a Scarcity (eſpecially upon Apprehenſion of a Siege) or to bring down Proviſions to a more reaſonable Price amongſt us. But that I ſhould go about to compel a Man, over whom I have no Power, to the purchaſe of my Commodities, this is what no Reaſon will juſtify, or excuſe [1]. For upon what Pretence can I aſſume ſuch Authority over the Purſe of another, who is not my Subject, as to preſcribe the Matter, and the Meaſure of his Expences, and to teach him how he ſhould provide for his Neceſſities, or for his Pleaſures? And though my Gain be in the mean time hinder'd, or leſſen'd, yet this Conſideration can by no means abridge the other Party of his natural Liberty. Or, if I would have him thus contribute to my Advantage, I ought to encourage him by mutual good Offices, and render my ſelf worthy of the Favour. But if a Man being ſtock'd with ſuch particular Commodities, offers to vend his *Abundance*, where-ever he can find Chapmen, it would, in this Caſe, be moſt inhuman, and unjuſt to hinder him from thus furniſhing himſelf with other things, which he *wants* for the neceſſary Occaſions of Life [a].

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[1] See the Diſcourſe of Mr. *Thomaſius*, entitl'd, *De pretio affectionis in res fungibiles non cadente*, c. 2. §. 1, 2, 5.

[a] *Liban. Orat.* 3. God hath not enriched every Place with all his Bleſſings; but hath divided his Gifts according to the difference of Countries, that he might incline Men to Society, by the want of mutual Aſſiſtance; and he diſcover'd to Men the way of Trading, that what was the Product of any particular Soil, might by this Means be enjoy'd in common by the whole World.

[b] *Quintil. Declam.* 12. Whilſt we were ſelling to the neighbouring Nations, and urged on by the hopes of ready Gain, we neglected a due Regard to the publick Safety; and having emptied our Stores abroad, brought a Famine upon our ſelves at home.

[c] *Lycurg. Orat. contra Leocrat.* [d] In *Livy* (l. 43. c. 5.) Upon the Requeſt of the *Gallick* Ambaſſadors, it was order'd, that they ſhould have the liberty of buying Ten Horſes, and of carrying them out of *Italy*. [e] L. 5. c. 33. [f] Add. *Numb.* 13. 24. *Judith* 10. 20. [g] L. 2. c. 2. §. 20. *Plato* de *L. L.* 8. Let no Man import Frankincenſe, nor other foreign Things uſed in Sacrifices, nor Purple, nor any Colours which are produced at home; nor in ſhort, any Commodity, but ſuch as is abſolutely neceſſary; and on the other ſide, let no Man export what is of neceſſary uſe in our own Country. *Cæſar de B. G.* l. 2. reports of the *Nervii*, that they allow no Entrance to Merchants, ſuffer no Wine or any other Incitement to Luxury to be imported; imagining that the uſe of theſe Delicacies muſt needs weaken Mens Minds, and unbend the ſtiffneſs of their Courage. The ſame Author tells us of the *Suevi*, that if Beaſts be brought from other Parts for their Aſſiſtance, they refuſe to make uſe of them; and as for Wines they abſolutely forbid the Importation of them, being of Opinion, that thoſe Liquors ſoften and effeminate the Spirits of Men, and render them unfit for laborious Employments.

XIII. Another Duty of the ſame Rank, is the giving Licence to Men of other Nations, eſpecially if ſeated in our Neighbourhood, to ſolicite, and contract Matrimony with our Subjects, when they are at a Loſs for Women amongſt themſelves [1]. As for Inſtance, if a People compos'd only of *Men*, either being expell'd their own Country, or upon ſome other neceſſary Account, are fix'd near us, and deſign to form a new State. For to live without the Aſſiſtance of the other Sex, is what the Frame and Temper of few Men can bear. Celibacy in a healthy Conſtitution is the Gift only of excellent Souls; and to ſeek other Satisfactions in this Caſe, than Nature adviſes or allows, would be foul and brutal. Beſides, as *Florus* obſerves, *Res tantum unius ætatis eſt populus virorum* [2], A State made up of one Sex, *viz.* Men, can laſt but one Age. Upon this Principle many are willing to defend, or at leaſt to excuſe, the famous Exploit of *Romulus*, the *Rape* of the *Sabine* Women. Authors indeed are divided about the Reaſon and the Manner of this Proceeding. *Dionyſius Halicarnaſſeus* reports, that the main deſign of *Romulus* was to obtain the Friendſhip, and Alliance of the neighbouring Nations, by joining with them in Marriage; and that, though he began this Project in an injurious Way, yet he imagin'd that in time this ill Beginning would produce a good Concluſion, and that a fair Correſpondence and Familiarity would be eſtabliſh'd, ſo ſoon as they ſhould have clear'd themſelves to the new Brides, by the Plea of Love, and to the Fathers and Relations by urging that the *Stratagem* was ſet on Foot, not out of Affront and Abuſe, but as a neceſſary Relief to a deſperate Condition. Yet it muſt be confeſs'd, this ſeems a very prepoſterous way of gaining Friendſhip. See *Tacit.* An. l. I. c. 55. What he reports of *Segeſtes*, that when *Arminius* had ſtolen his Daughter againſt his Conſent, *Gener inviſus*, &c. The Names of Son-in-Law, and Father-in-Law, which when there is a mutual Conſent of Parties uſed to be a Band of Love and Endearment, prove now the Seed of Hatred, and the Incitement to mortal Diſcord.

Others pretend, that *Romulus* by this Attempt only ſought an Occaſion of quarreling with his Neighbours, which ſeems very improbable. The common Defence of the Fact is to alledge the want of Women, and ſo to have Recourſe to Neceſſity; but then Authors take care to tell us, that Commiſſioners were firſt ſent about to treat with the People on the Affair, and to beg that they would not think it hard to let Men like themſelves mix with them in Race and Blood; and that when theſe Agents were diſmiſs'd after a reproachful manner, it was then at laſt thought proper to gain Relief, by the joint Application of Cunning and of Force. And what makes the thing ſtill carry a better Force is, That this way of *catching Wives* was in thoſe Times, not only a common, but a laudable Practice; *Dionyſius* calls it, *An Antient and a* Grecian *Cuſtom, and the moſt renowned Method of obtaining Maids in Marriage.* L. 2. c. 30. Add *Judges* XXI. 22. It is true, Violence can ſeldom be neceſſary in this Caſe, ſince it's never difficult to find Women enough, who ſhall be ready, of their own accords to accept of any Husbands that are not abominably vile and ſcandalous.

To reject thoſe who ſeek our Alliance by ſuch Propoſals, would be very hard Dealing. And tho' the denying of a Woman for a Wife be not, *in it ſelf*, a juſt Cauſe of commencing a War, yet is it, if the Refuſal were accompanied with Reproach. As the Inhabitants of *Rhegium*, when *Dionyſius* of *Sicily* ſent to deſire a Wife amongſt them, returned in anſwer, That they would grant him none but the Daughter of their common Executioner. See *Diodor. Sic.* l. xiv. c. 108. & *Strab.* l. vi. a like Inſtance is to be met with in *Paulus Venetus*, l. I. c. 52. On the other hand, ſhould a Prince, by Virtue of his ſovereign Authority, compel the Women of his Country to accept of ſuch Husbands as have nothing in them to deſerve Affection, this would look like Inhumanity; eſpecially in Caſe the Fortunes and Conditions of the Parties were unequal. The Speech of *Canuleius* in *Livy*, where in the Name of the Populacy [3], he intreats the Senate, that they would allow them the Privilege of Marriage, a Favour granted to Foreigners, and to Neighbour Nations; and that they would not exclude them from the Number of Mankind, does not belong to the Queſtion before us, although produced as an Inſtance by *Grotius*. For the *Plebeians* did not then feel a Scarcity of Women, but the Aim and Deſign of this Petition was to raiſe themſelves to an equal Pitch with the *Nobility*, by Means of marrying into *Patrician* Families. Otherwiſe, when Women are plenty, there is no occaſion of winning a Bride by main Force of Arms: *Invenies aliam, ſi te hæc faſtidit.* As for thoſe civil Laws which forbid Marriage with Foreigners, or between Subjects of different Ranks, they always preſuppoſe, that every one is able to find out a Match ſuitable to his Condition; and they are generally founded on ſuch Reaſons as theſe; that the Splendor of great Families may be preſerv'd; that our Women may more eaſily get Husbands at home, whilſt our Men are not allow'd to get Wives abroad; or that the [4] Riches and the Affections of our People, may not by the Means of Inter-Marriages be eſtrang'd from us, and ſettled on a foreign State.

Mr. Barbeyrac's *NOTES* on §. XIII.

[1] See Mr. *Buddeus*'s Diſcourſe, entitl'd, *Juriſpr. Hiſtoricæ Specimen*, §. 9. among his *Selecta Juris Naturæ & Gentium.*

[2] *Res erat unius ætatis, populus virorum.* Flor. 1. c. 1. numb. 10.

[3] *Canuleius*'s Words are, *Connubium petimus, quod finitimis, externiſque dari ſolet* —— *ut hominum* —— *numero ſimus.* Liv. Dec. 1. Lib. 4. c. 3.

[4] This Clauſe in Mr. *Hertius*'s Edition, with his Notes, is thus rendered, *Ne opes aut effectus noſtrorum in alias Civitates per Connubia transferantur*; whereas other Editions have it, as it ought to be, *affectus*. This renders it credible, that 'tis not a Fault in the Impreſſion, but as *Hertius* remarks, by way of Supplement, a thing contained in the Author's Expreſſion. For fear (ſays he) a Citizen in reſpect to the Alliance and Riches of ſome powerful Stranger, ſhould exalt himſelf above others, or on the contrary, for fear a powerful Stranger ſhould make uſe of his Alliance to a Citizen to become a Maſter of the State. For ſo *Ariſtotle* obſerved, that *Dionyſius* the younger, having married a Woman of *Locris*, found a way by means of that Alliance to poſſeſs himſelf of the Government of that Republick, *Polit.* l. 5. c. 7. But all this is not comprehended in the Word *affectus*, of which Mr. *Puſendorf* ſpeaks.

[a] *Add.* Bœcler. *in loc. citat.* Grot.

XIV. Laſtly, *Grotius* adds, that any Right common to all, and conſequently an Obligation to a Duty to be perform'd towards all, ariſes from this *Suppoſition*, that we grant ſuch an Indulgence promiſcuouſly to every Stranger; becauſe then, if any one be excluded from the Privilege, he is manifeſtly *injur'd*. For it is an Affront and Reproach to debar a Man, without particular Reaſon, from a *common* Advantage; this being to make him unequal and inferior to others. Hence *Grotius* concludes, that if it be in any Place permitted to Strangers, to hunt, to fiſh, to hawk, to gather Pearls, to receive Legacies, to ſell Goods, to contract Marriages (even without being compell'd to it by ſcarcity of Women) no Nation can be deny'd the ſame Liberties, except they have forfeited them by their own Default. But this Aſſertion will ſcarce hold. For the Conceſſions here ſpoken of muſt be made either *expreſly*, or *tacitly*. When we grant a Thing *expreſly* to another, we do it either *precariouſly*, or in the manner of a *Pact*, or *perfect Promiſe*. Now that any one ſhould give a *perfect* Right over a Thing of his (not due by the Law of Nature) to all Nations, known and unknown, without Limit or Reſtraint, is a Caſe which I believe never did, and never will happen. For every one is deſirous to know at leaſt, on whom he beſtows his Benefit, and in what Meaſure. But when a Man either by *Pact*, or *free Favour*, has granted ſuch a particular Privilege to all that come under his Friendſhip or Acquaintance, for a meer Stranger to pretend a Right to the ſame Indulgence, would be very impudent and very wicked. As for thoſe Things which we permit *tacitly*, or as it were overlook, they are reckon'd of Courſe to be of the ſame Nature with precarious Favours; and ſuch may be fairly revoked, either upon the Change of our Affairs and Circumſtances, or becauſe the Perſons who enjoy'd them did not make ſo prudent and modeſt a Uſe of them, as they ought. *Bœcler. ad Grot.*

XV. What we have hitherto touch'd on, are but vulgar Degrees of *Humanity*, the Omiſſion of which implies a moſt baſe and abject Temper of Mind. A much higher, and more illuſtrious Strain of the ſame Duty, is when a Man out of pure Benevolence and Inclination, ariſing either from a native Generouſneſs of Soul, or from Pity and Compaſſion to a Perſon in diſtreſs, is at ſome Pains or Charge in beſtowing freely on another, what may relieve his Neceſſity, or procure his Advantage. Kindneſſes of this noble Rank are by way of Eminence ſtiled *Benefits*; the Manner and Meaſure of diſpenſing which are commonly to be adjuſted with regard to the Condition of the *Giver*, and of the *Receiver*. And theſe are the Things which open to Mankind the largeſt Field of doing good, and of acquiring Glory, if they are temper'd and regulated by true Prudence and Greatneſs of Mind. For to throw about Favours without Reaſon and Judgment, ought, as *Pliny*[1] obſerves, to be call'd Ambition or Oſtentation, or any thing rather than Liberality. Wiſe Men have made it their chief Buſineſs to preſcribe Rules for the guiding and perfecting of theſe Obligations: And the antient Books of Morality are not on any Subject more copious, or more clear. [2]*Tull.* Off. l. c. 14. *Beneficentia, qua nihil eſt naturæ humanæ accommodatius, multas habet cautiones*, &c. The Duties of Liberality or Bounty, than which there is nothing more agreeable to the Nature of Man, fall under many Limitations[3]. For in the firſt place it ſhould be our Care to ſee that our Bounty prove not a Prejudice, either to the Perſon we would oblige, or to any other Body; and then that we do not give above our own Ability, nor above the Merit of the Receiver. As to this laſt Point, we are principally to regard thoſe, to whom we ourſelves already ſtand obliged, and then others, as they have more or leſs need of our Aſſiſtance. We are likewiſe to conſider the ſeveral Degrees, by which we ſtand related in the World. Of theſe the firſt and moſt extenſive, is the univerſal Society of Mankind. Nearer than this is the Alliance between Perſons of the ſame Nation, of the ſame Province, of the ſame Language, of the ſame City. There is yet a nearer Tye of Kindred. And here the firſt Society is in Wedlock, the next in Children; the Relation of Brothers comes afterwards, and then of Brothers and Siſters, Children and Men, the Matches and Alliances between different Families But the moſt excellent and ſtrongeſt of all Alliances is, when good and virtuous Men join in familiarity upon account of the Agreement of their Manners.

Idem de Finib. l. v. c. 23. *In omni honeſto*, &c. *In all the Compaſs of Honeſty there is nothing ſo illuſtrious, or of ſo great a Latitude, as the Conjunction and Society of Men with Men, including a mutual Communication of Conveniences, and general Love for Mankind. This Dearneſs begins immediately upon one's Birth, when the Child is moſt affectionately beloved by the Parent; from the Family, it by degrees ſteals abroad into Affinities, Friendſhips, Neighbourhoods; then amongſt Members of the ſame State, and amongſt States themſelves, united in Intereſts and Confederacies; and at length ſtretcheth itſelf to the whole Extent of human Race. In the Exerciſe of all theſe Duties, we are farther to obſerve what every Man hath moſt need of, and what with our Help he muy, what without our Help he cannot attain; ſo that in ſome Caſes the Tye of Relation muſt yield to the Point of Time; and ſome Offices there are which we would rather pay to one Relation than to another. Thus you ought ſooner to help a Neighbour in with his Harveſt, than either Brother, or a familiar Acquaintance; but on the other ſide, in a Suit at Law, you ought to defend your Brother, or your Friend, before your Neighbour.* See *Seneca*'s Treatiſe *of Benefits*, which it would be tedious here to abridge. *Plutarch* (in *Sympoſ.*) tells us 'twas a Rule amongſt the *Pythagoreans*, not to take a Burthen from their

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Mr. BARBEYRAC's *NOTES* on §. XV.

[1] *Ambitio enim, & jactantia, & effuſio, & quidvis potius, quam liberalitas exiſtimanda eſt, cui ratio non conſtat.* Plin. Paneg. *chap.* 38. *numb.* 4.

[2] See the Commentators upon theſe and ſeveral other Paſſages, where *Tully* treats of *Beneficence*. See *Marc. Antonin.* Lib. 5. c. 6. with *Gataker*'s Notes, and *Pliny* the younger, *Lib.* 9. *c.* 30. But above all, I muſt commend to your reading a little Book, wherein Mr. *Le Clerc* gives a fine Deſcription of Liberality, and wherein he ſhews excellently well the falſe Notions which Men ordinarily have of that Virtue. 'Tis the 12th Chapter of his Book, which he entitles, *Reflections upon our good or ill Luck, as we commonly call it, in the Buſineſs of Lotteries.* A Work printed at *Amſterdam* in 1696.

[3] Under the Notion of Beneficence we may comprehend all the Services we do to others in averting the Dangers they are threaten'd withal. 'Twas a Precept of the antient Gymnoſophiſts, as appears from a Saying of *Charicles* in *Heliodorus*, which our Author cites above, Οὐδὲ γὰρ ἦν μοι θεμιτὸν ἐν κινδύνῳ ψυχὴν ἅπαξ ἐνανθρωπήσασαν παριδεῖν, ἓν γὰρ καὶ τοῦτο παράγγελμα τῶν γυμνῶν παρ' ἡμῖν σοφῶν. We muſt not leave any Soul that is enter'd into an human Body in danger, as the Gymnoſophiſts inſtruct us, *Lib.* 2. *c.* 6.

Fellow, but to help him to bear it; and this they did to exclude all Idleneſs and Eaſe. Tho' S. *Paul* could have taught them a better Reaſon, 2 *Cor.* viii. 13. *Not that other Men be eaſed, and you burthen'd, but by an Equality, &c.*

Add *Ambroſ.* Offic. *l.* i. *c.* 30. and from him *Gratian* Diſt. lxxvi. *c.* 14, &c. *&* Cauſ. i. Queſt. 2. *Chap.* 6, 7. *Socrates* in *Xenophon* (Ἀπομν.) lays down this as a Rule in our Aſſiſtances, to our Friends or to Strangers, and in almoſt all the Concerns of Life, *To do according to our Ability*[4].

XVI. The Virtue anſwering to *Beneficence* in the Giver, is *Gratitude* in the Receiver, by which he demonſtrates, that the Kindneſs was acceptable to him, and upon this ſcore entertains a hearty Reſpect for the Author of it, ſeeking all Occaſions of making a Requital, as far as his [1] Abilities will give him leave. For it is by no means abſolutely neceſſary, that our Return ſhould be preciſely as much in Value, as the Courteſy amounts to; but good Will and earneſt Endeavour are frequently allow'd to ſatisfy an Obligation. Ovid. *de Ponto* l. iv. El. 8. ver. 37.

Sed qui, quam potuit, dat maxima, gratus abunde eſt;
Et finem pietas contigit illa ſuum.

He that repays to his Extent of Power,
Were not more grateful with the nobleſt Store.

The Reaſon of this Duty ceaſes, when ever we have a juſt Exception againſt the Donor, and are fully aſſur'd, that his Bounty was more in Pretence than in good Will[2]. But here wiſe Men give us an excellent Caution, that we ſhould not be too curious in enquiring upon what Grounds and Motives a Man has been our Benefactor; becauſe this Niceneſs of Examination will ever afford a Plea, and a Colour to *Ingratitude*.

The more apt in their own Nature Benefits are to unite and to engage the Minds of Men, the more ſtrictly does Reaſon enjoin us to apply ourſelves with Vigor and Induſtry to a juſt Requital. When a Man has expreſs'd ſo much Dependence upon me, as to confer the *prior* Obligation, I am bound at leaſt not to ſuffer him to be the worſe for his Kindneſs, and I ought never to receive a good Turn, but with a Reſolution to hinder the Author, if poſſible, from repenting of what he has done. If upon ſome particular Reaſon we are unwilling to be obliged to a certain Perſon, in this Caſe it is lawful for us to refuſe the Benefits he offers. But then great Care muſt be taken to do this without giving the leaſt Suſpicion of Contempt; ſince otherwiſe, to reject a voluntary Favour[3], carries in it a manifeſt Affront.

Take away the Neceſſity of *returning* Kindneſſes, and no Man will ever begin them; for then it would plainly be acting againſt Reaſon, to part with our Bounty, whilſt we know it would be thrown away. And thus all Beneficence, all mutual Truſt and good Will muſt be baniſh'd out of the World; there muſt be no ſuch Thing as free Help, or antecedent Merit, no way of endearing and engaging one Man to another. *Comp. Hobbes de Cive,* c. iii. ſ. 8. *Ariſtot. ad Nicom.* l. ix. c. 2[4]. It will hold good for the moſt part, that we are rather to return a Benefit, than to ſerve a Friend in the way of Gratuity; as we ought likewiſe rather to pay a Debt, than give away our Money to our deareſt Confident. In general, what we owe of any kind is firſt to be made good; yet if a free Gift to another Perſon would at the ſame time plead more Honeſty, and more Neceſſity, it is then to have the Preference in our Diſpoſal. Add *Socrates*, his Diſcourſe of brotherly Love, in *Xenophon.* Ἀπομν. 2.
[5] *Tully* is admirable on this Point of *Gratitude: It is,* ſays he, *of all Duties, the moſt indiſpenſibly neceſſary. If* Heſiod *bids us* reſtore what we borrow, if we can, in a larger Meaſure; *what ought we to do when we are as it were* challeng'd *by a* prior *Obligation? Are we not in this Caſe to imitate fruitful Fields, that ſtill return more than they receiv'd? For if we make no Scruple to oblige thoſe whom we hope to be the better for hereafter, how then ſhould we behave ourſelves towards ſuch as we are the better for already? Since there are two ſorts of Liberality, the one of* beſtowing *a Benefit, the other of* returning *it; it is at our Choice whether we will* give *or no; but an honeſt Man is not at Liberty in the Point of* returning, *provided it can be done without Injury.*

It is obſervable, that *Cicero* here makes *Gratitude* a part of *Liberality*, and conſequently, hints, that it is not tyed up to Laws altogether ſo ſtrict as thoſe of *Juſtice*, which commands us to repay what we owe upon Contract moſt punctually and preciſely[a]. It may be remark'd farther, that when he ſays the former kind of Liberality, the *beſtowing* of Benefits, *is in our Choice*, he ought not to be underſtood in an abſolute Senſe; for it is plain we are

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[4] To theſe rare Paſſages of the Antients, we may add a ſmall Sentence taken out of our Author himſelf in his Abridgment of the Duties of a Man and Citizen, *l.* 1. *c.* 8. §. 5. The manner of exerciſing Beneficence and Liberality much enhances the Value of Benefits, as when a Man does a good Office with an Air of Chearfulneſs and Briskneſs, and with all the Signs of a good Will.

Mr. Barbeyrac's *NOTES on* §. XVI.

[1] 'Tis a Maxim of the Scholars of *Zoroaſtres, Præceptum eſt, ut ſi aliquis beneficium facit alteri, tum alteri incumbit illud eadem quantitate rependere, quantum poterit.* In Sadder. Porta. 95. We are commanded, that if any does a Benefit to another, that other is obliged to do the like, if he be able.

[2] As for example, If a Man keeps me from drowning, I have no manner of Obligation to him, if he threw me into the Water; as our Author ſpeaks in his Abridgment of the Duties of a Man and Citizen, *Lib.* 1. *c.* 8. §. 6. See *Seneca de Beneſ. l.* 6. *c.* 26.

[3] Our Author in his laſt Editions interrupts the Thred of his Reaſonings with this Remark, That when one refuſes a Benefit, we ſhould take care that we give no Suſpicion of Contempt to him who civilly offers us his Service, otherwiſe ſuch a Refuſal is a kind of Injury.

[4] *Ariſtotle* maintains, that as it is a greater Duty to reſtore what one has borrowed, than to lend to a Friend; ſo it is ordinarily to make an Acknowledgment of a Kindneſs, than to do one to a Friend; at leaſt there is a greater Reaſon drawn from Honeſty and Neceſſity to engage us to the Duties of Gratitude, than Friendſhip, according to the Paſſage our Author quotes out of *Ariſtotle,* Καὶ τὰς μὲν εὐεργεσίας ἀνταποδοτέον ἐπὶ τὸ πολὺ μᾶλλον, ἢ χαριστέον ἑταίροις, καὶ ὥσπερ δάνειον, ᾧ ὀφείλει ἀποδοτέον μᾶλλον, ἢ ἑταίρῳ δοτέον ——— ἐὰν δ' ὑπερτείνῃ ἡ δόσις τῷ καλῷ, ἢ τῷ ἀναγκαίῳ, πρὸς ταῦτ' ἀποκλιτέον.

[5] His Words in the *Latin* are, *Nullum enim officium referenda gratia magis neceſſarium eſt. Quod ſi ea, quæ utenda acceperis majore menſura, ſi modò poſſis, jubet reddere Heſiodus, quidnam beneficio provocati facere debemus? An imitari agros fertiles, qui multò plus efferunt, quam acceperunt? Etenim ſi in eos quos ſperamus nobis profuturos, non dubitamus officia conferre, quales in eos eſſe debemus, qui jam profuerunt? Nam cum duo genera Liberalitatis ſunt, unum dandi beneficii, alterum reddendi, demus, necne, in noſtra poteſtate eſt; non reddere viro bono non licet, modò id facere poſſit ſine injuria.* De Offic. l. 1. c. 15.

[a] *Vid.* Ambroſe *de Offic.* l. 1. c. 31. *Gell.* l. 1. c. 4.

are under ſome Obligation even to *antecedent Beneficence*; but the Point is, that this Obligation does not carry ſo much Strictneſs in it, as that which binds a Man to *Gratitude*; or to endeavour the approving himſelf by all good Will, and good Service to his Benefactors.

It happens, 'tis true, very frequently that in the doing a Kindneſs there is more true Love on the Part of the *Giver*, than of the *Receiver*. The Reaſon of this is enquired into, by *Ariſtotle* in his *Ethicks*, Book ix. c. 7. There being too much Ground in fact, for that politick Remark of *Tacitus*, *Beneficia eo uſque læta ſunt, dum videntur exſolvi poſſe; ubi multum antevenere, pro gratia odium redditur*, *An.* iv. 8. Add *Hobbes Leviathan*, c. 11, *&c.* Where he tells us, that the receiving great Benefits from a *Superior* inclines to *Love*, but the receiving of the like from *Equals* or *Inferiors* does not, unleſs there is Hope of being able to requite them. "Good "Turns do ſo far yield an agreeable Satisfaction, as "we fanſy ourſelves able to repay them; when they "much exceed this Meaſure, the Debt grows deſperate, and ſo produces a ſullen and a ſecret Hatred, inſtead of a real Kindneſs and Affection.

XVII. But tho' the bare Notion of *Ingratitude* does not imply a real *Injury*, inaſmuch as it is not the Violation of any full and perfect *Right*, yet it paſſes in common Cenſure for a Vice more foul, more odious, and deteſtable, than *Injuſtice* itſelf[1]. For it is look'd on as an Argument of a moſt abject and degenerate Soul, for a Man to declare himſelf unworthy of the fair Opinion which another entertain'd of his Honeſty, to be proof againſt [2] Benefits, and conſequently paſt all Senſe of Humanity[a].

The Account which *Des Cartes* (*in his Diſcourſe of the Paſſions*, Artic. 194.) gives of Ingratitude, is very rational and very elegant. "It is "the Vice, *ſays he*, of Men, who are either madly "proud and vain, and ſo imagine every Thing to "be due to their Merit; or elſe ſenſeleſly ſtupid, "and ſo unable to reflect on the Benefits they re"ceive; or laſtly, pitifully weak and abject, who "when they feel their own Infirmity and Want, "ſue with the meaneſt Submiſſion for the Aſ"ſiſtance of others; which if they chance to ob"tain, they immediately hate the Perſons to whom "they have been obliged, becauſe either wanting "*Will* to make requital, or deſpairing of *Ability*, "and at the ſame time fanſying all the World to "be mercenary, and that no good Turn is done "without hopes of Retribution; they apprehend "themſelves to have exceedingly baulk'd and diſ"appointed their Benefactors[b].

Learned Men have diſputed, whether or no there ought to lie an [3] *Action* againſt this *Vice*, in Courts of Civil Judicature. *Seneca* [c] takes the negative Side of the Queſtion, and the Reaſons he proceeds upon are chiefly theſe; "*Firſt*, That if "a Benefit be ſtrictly to be repaid like a Sum of "Money, or as if it were let out to him, it then "loſes the [4] Name of a Kindneſs, and becomes a "Loan or Debt: *Secondly*, That whereas the re"quiting of a good Turn is eſteemed an Act high"ly *virtuous*, it muſt ceaſe to be *virtuous*, were "it once made *neceſſary*: *Thirdly*, That there muſt "needs ariſe more *Cauſes* on this Head, than all "the [5] Courts in the World would be ſufficient to "try, *Themiſt. Orat.* iii." By the *Perſian* Conſtitution, there is a ſettled Penalty decreed againſt Ingratitude; as being the readieſt Incentive to Hatred, and ill Will. And where this Vice is not puniſhable by Law, it produceth more deſperate Enmity, and more fatal Contention. Add *Xenophon* Cyrop. l. i. And *M. Antonin.* l. ix. c. 42. & *Val. Max.* l. ii. c. 6. ſ. 6, 7. & l. v. c. 3. ſ. 5. To theſe Inſtances and Arguments, other Authors have anſwer'd at large. See *Bœcler's Actio Ingrati.* Our Deſign leads us no farther, than to obſerve, that from every Tranſgreſſion of the Law of *Nature* it does not preſently follow, that there muſt lie an *Action* (or the Reſemblance of an *Action*) againſt a Man in *Nature's Court*. This is certain, that the Divine Juſtice hath reſerv'd ſevere Puniſhments to be inflicted on ungrateful Perſons in another Life; and in this preſent World they ought to ſuffer the Hatred and Deteſtation of all Mankind, and to be adjudg'd unworthy of the leaſt Benefit or Favour. But why a Man cannot be ſued in an *Action*, at the *Civil Bar*, for *ſimple Ingratitude*,

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Mr. BARBEYRAC's *NOTES* on §. XVII.

[1] The Reaſon that *Tully* gives of the evil Eye of Ingratitude is this: *Omnes immemorem beneficii oderunt, eamque injuriam in deterrenda Liberalitate ſibi etiam fieri, eumque qui faciat, communem hoſtem tenuiorum putant*, (i. e.) The Ungrateful is hated by all the World, for their Proceedings diſcourage them who are inclined to Liberality, which is an Injury which every Man ſhares in; inſomuch that the ungrateful Man is accounted the common Enemy of all thoſe who need Help from powerful Perſons. *Cicer. De Offic.* l. 2. c. 18.

[2] Ὃν γὰρ τὸ χρηστὸν οὐκ ἐπόιησεν ἥμερον
Τί δ' ἂν δεξάσειεν ἄλλο τῶν πάντων πότε;

If Benefits will not affect the Mind,
There's nothing in the World will make us kind.
Greg. Nazianz.

Lucian alſo ſpeaks to the ſame purpoſe, as in (*a*). See alſo the Reflections which Mr. *De Evremont* makes upon ungrateful Perſons, *Tom.* III. *p.* 79. and in his Miſcellanies. Printed at *Amſterdam* 1706.

[3] This was practiſed heretofore not only among the *Perſians* (as appears from *Xenophon* Cyropæd. *Lib.* 1. *p.* 3. *Ælian. Hiſt. Animal.* l. 8. c. 3. & *Themiſtius Orat.* 22. *De Amicitia*) but alſo among the *Athenians*. For *Valerius Maximus* ſays, *In qua urbe* (*Athenis*) *adverſus ingratos actio conſtituta eſt.* Lib. 5. c. 3. §. 3. *extern.* See alſo *Lib.* 2. *c.* 6. §. 6. & *Petit. de Legib. Athen.* Lib. 2. Tit. 6, & Lib. 7. Tit. 8. which Paſſages Mr. *Bayle* did not remember, when he ſaid, in his *Thoughts about a Comet*, That none but the *Medes* have made any Laws againſt ungrateful Perſons, for which he quotes *Xenophon* and *Seneca De Beneficiis*, Lib. 3. c. 6. in which laſt the Editions read *Macedonum* for *Medorum*; about which, ſee *Muret. Var. Lect.* Lib. 12. c. 3. See alſo *Briſſon. De. Regn. Perſarum*, Lib. 2. p. 198, 199.

[4] *Seneca*'s Words are theſe, *Primum omnium, pars optima beneficii periit, ſi actio, ſicut certæ pecuniæ, aut ex conducto, aut locato datur.* —— *Deinde, cum res honeſtiſſima ſit referre gratiam, deſinit eſſe honeſta, ſi neceſſaria eſt.* —— *Adjice nunc, quod huic uni legi omnia fora vix ſufficient. De Benef.* Lib. 3. c. 7.

[5] In fine, Beſides, that there is hardly any Man but complains, that he has been ungratefully dealt with, it is very hard to weigh exactly the Circumſtances which increaſe or leſſen the Value of any Benefit. See what *Seneca* ſays of this.

[a] *Lucian* in *Antholog.* Φαῦλος ἀνήρ, &c.

A thankleſs Wretch is like a broken Sieve,
Lets out, and loſes faſter than you give.

Add *Pheraula*'s Judgment concerning the Nature of Man in *Xenophon* Cyropæd. 8.

[b] *Sophocles Ajace.*

A Favour ſhould be treaſured in the Soul,
And made the Mother of a kind Return.

A Wretch that ſtifles Benefits beſtow'd
Scarcely deſerves the generous Name of *Man*.

[c] *De Benef.* l. 3. c. 6, &c.

that is, forgetting a good Turn, or for neglecting to requite it, when he had Opportunity, there ſeems to be this plain Reaſon; that the very Cauſe of my conferring the Kindneſs (that is, of my giving ſomewhat without taking Security for its return) was to afford the Party an Opportunity of ſhewing himſelf grateful out of pure Honeſty, not out of fear of Compulſion; and on my own part to demonſtrate that what I beſtow'd was not done out of a ſordid Deſire of Gain, but out of Humanity and good Nature, ſince I required no *Caution*, or Inſurance of being repaid. *Antoninus*[6] will teach us better *Philoſophy. When thou accuſeſt a Man* (ſays he) *of Falſeneſs or Unthankfulneſs; turn the Cenſure upon thyſelf. For the Fault is without doubt thine; that thou didſt not confer the Favour freely and undeſignedly, without looking for any farther Fruit, than the Action itſelf. Is it not ſufficient Satisfaction to have relieved and aſſiſted one that is a Man as thou art? Doſt thou demand a Reward for doing what thy Nature obliges thee to do?*

But when a Man is guilty of *mix'd Ingratitude*, or when he not only neglects to requite a Courteſy, but anſwers it with Injuries and Abuſes; the Injury thus offer'd founds an *Action in Nature's Court*, or a *Cauſe of War*; and its being accompany'd with an ungrateful Mind, as it highly aggravates the Fact, and renders it more vile and odious, ſo it engages the Sufferer more ſpeedily to ſeek redreſs; and to puniſh the Villain the more ſeverely, in regard, that Benefits themſelves could not reclaim him[a].

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[6] Ὅταν (ſays *Antoninus* in the *Greek*) ὡς ἀπίστῳ ἢ ἀχαρίστῳ μέμφῃ, εἰς ἑαυτὸν ἐπιστρέφου, προδήλως γὰρ σὸν τὸ ἁμάρτημα, εἴτε περὶ τοῦ τοιαύτην τὴν διάθεσιν ἔχοντος ἐπίστευσας, ὅτι τὴν πίστιν φυλάξει, εἴτε τὴν χάριν διδοὺς, μὴ καταληκτικῶς ἔδωκας, μηδὲ ὥστε ἐξ αὐτῆς σῆς πράξεως εὐθὺς ἀπειληφέναι πάντα τὸν καρπόν. Τί γὰρ πλέον θέλεις, εὖ ποιήσας ἄνθρωπον; οὐκ ἀρκεῖ σοι; κατὰ φύσιν τὴν σήν τι ἔπραξας; τούτου μισθὸν ζητεῖς; ὡς εἰ ὁ ὀφθαλμὸς ἀμοιβὴν ἀπῄτει, ὅτι βλέπειν, ἢ οἱ πόδες, ὅτι βαδίζουσιν ὥσπερ γὰρ ταῦτα πρὸς τόδε τι γέγονεν, ἅπερ κατὰ τὴν ἰδίαν κατασκευὴν ἐνεργοῦντα ἀπέχει τὸ ἴδιον, οὕτως καὶ ὁ ἄνθρωπος εὐεργετικὸς πεφυκὼς, ὁπόταν τι εὐεργετικὸν, ἢ ἄλλως εἰς τὰ μέσα συνεργετικὸν πράξῃ, πεποίηκε πρὸς ὃ κατεσκεύασται, καὶ ἔχει τὸ ἑαυτοῦ. Lib. 9. §. 42.

[a] How far the Neceſſity of returning a Benefit is taken off by a ſubſequent Injury, *Seneca* teacheth us, *De Beneſ.* l. 6. c. 4, 5. & Epiſt. 81.

CHAP. IV.

Of the Duty of keeping Faith, and the Diverſity of Obligations to it.

The CONTENTS of every Paragraph of the fourth Chapter.

I. *There muſt be Covenants and Agreements in all human Societies.*
II. *Covenants are to be kept.*
III. *Obligations are natural, or adventitious.*
IV. *Atheiſm deſtroys all natural Obligations.*
V. *A natural, or civil Obligation.*
VI. *What is the Force of each of them.*
VII. *A perpetual and temporary Obligation.*
VIII. *Obligations not mutual.*
IX. *Obligations perfectly, or imperfectly, mutual.*

THE Duties hitherto explain'd, are mutually owing upon account of that common Relation, which *Nature* has eſtabliſh'd amongſt Men; altho' we ſuppoſe no antecedent *Act* to have paſs'd between them[1]. But it would be unreaſonable to confine within theſe narrow Limits, all the Offices that Men are to exerciſe towards each other. For in the firſt place, all are not of ſo good and honeſt Diſpoſitions, as to perform every Thing, whereby they can benefit their Neighbours, out of pure Humanity and Charity; without being ſecure of Retribution. And then, many Things which we ſhould be glad to receive from others, are of ſuch Value and Conſequence, that we cannot in Modeſty deſire them *gratis*. Or perhaps it does not become our Fortune or Station to be *beholden* to another, for ſuch a Benefit. Therefore unleſs an *Equivalent* be paid, commonly the other Party is unwilling to *give*, and frequently we are unwilling to *receive*. Again, *others* are many times ignorant, how they might ſerve and oblige us. *Laſtly*, Inaſmuch as the Power of Man, being *finite*, cannot in the ſame manner extend itſelf to all Perſons, it is agreeable to Reaſon, that ſuch Acts as are not already *beſpoken* by an antecedent Obligation lying on us, ſhould be *made ſure* to thoſe, who by entring into Covenant with us, firſt obtain a Right to receive them[2]. Therefore, that the true Fruits of a ſocial Nature, the *mutual Offices* of Mankind, might be practis'd with more Frequency, and more Regularity, it was neceſſary for Men to bargain, and agree amongſt themſelves, that they would perform to each other ſuch and ſuch Services, as they could not be abſolutely ſecure of by the bare *Law of Humanity*. So that their Buſineſs muſt be to ſettle before-hand what every Man ow'd to another, and what he ſhould by virtue of his *Right* accept and challenge in return[3].

Hence it is eaſy to apprehend how the Offices of Humanity, or Charity, differ from thoſe which are requir'd by full and *proper Right*, and which are the Objects of *ſtrict Juſtice*. The former are not owing upon any Covenant, either *expreſs* or *im-*

Mr. BARBEYRAC's *NOTES* on *Chap.* IV §. I.

[1] See *Chap.* 1. §. 1. *Note* 1. aforegoing, and *Chap.* 9. §. 8. with the Note on it.

[2] The Period which is placed here, and is joined to the foregoing by the word *Deniq;* finally, ſeems deſign'd for a new and the laſt Reaſon to prove the Neceſſity of voluntary Engagements. But, as any one may diſcern, that Period ſuppoſes a Neceſſity of ſuch Engagements already eſtabliſh'd: For it endeavours to ſhew the Right which an Agreement or Promiſe gives over the Actions of another; and ſo has bred Confuſion in our Author's Work. This has proceeded evidently from the Negligence of our Author in inſerting his Additions; for the Sentence, which cauſes this Diſorder, is not found in the firſt Edition.

[3] I have added the following Sentences to compleat our Author's Reaſoning, as he has done himſelf in his Abridgment of a Man and Citizen, *Lib.* 1. *c.* 8. §. 2. This is what is done by Agreements or Promiſes: For ſince our Abilities are ſo limited, that they can't extend at the ſame time and in the ſame manner to the Neceſſities of all Men, Reaſon tells us, that he that has acquired by an Agreement or Promiſe any particular Right to the Actions of another, which were not before, as we may ſay, engaged to any other, has a Power to diſpoſe of theſe Actions according to the Agreement.

plicit; but purely by force of that *common Obligation* which *Nature* has laid upon Mankind. But what I owe another upon *Pact*, or *Agreement*, I therefore owe him, becauſe he has obtain'd a *new Right*, holding good againſt me by virtue of my free Promiſe or Conſent. Farther, whatever I tranſact with another by way of Covenant, is deſign'd not for his Profit, but for my own. Whereas in Duties of Humanity the Caſe is quite otherwiſe. For, although the Performance of theſe be *in general neceſſary*, for the rendring the Life of Man comfortable and commodious, and conſequently be an Advantage to the Performer, by giving him good Grounds to expect fair Treatment; yet with regard to *particular* Acts of Kindneſs, a Man does them not for his own ſake, but for the ſake of the Party who receives them. For a *Benefit*, if conferr'd upon a Principle of *private Intereſt*, loſes its Nature and its Name.

Thus then the Duties of *Humanity*, or *Charity*, and thoſe ariſing from *Covenant*, do afford a mutual Aſſiſtance and Supply to each other; whilſt thoſe things which *Charity* either cannot, or does no ordinarily procure, are obtain'd by *Pact*; and in Matters about which no *Pacts* have paſs'd, *Charity* comes in, and ſerves our Turn as well. And although to fix the Subject, and the Conditions of Covenants, be left to the Pleaſure of particular Perſons; yet that there ſhall be ſome ſuch Agreements, the Law of Nature does (indefinitely, and in general) command; in as much as without theſe Tranſactions there would be no poſſible Means of preſerving Peace and Society in the World. So ſpeaks *Iſocrates adverſ. Callimach.* *So great is the Force of Leagues and Covenants, that ſcarce any Affairs, either of* Grecians *or* Barbarians, *are tranſacted in any other manner. By means of theſe we traffick abroad, and bargain at home. By means of theſe we terminate private Diſſentions and publick Wars. Theſe we all make uſe of, as an univerſal Good to be enjoy'd in common by Mankind* [4].

II. When Men have once engaged themſelves by *Pacts*, their Nature obliges them, as ſociable Creatures, moſt religiouſly to obſerve and perform them. For were this Aſſurance wanting, Mankind would loſe a great part of that common Advantage, which continually ariſes from the mutual Intercourſe of *good Turns*. *Ariſtot.* Rhet. l. I. c. 15. *Take away Covenants, and you diſable Men from being uſeful and aſſiſtant to each other* [1]. Tull. *Off.* l. II. c. 11. *So great is the Force of Juſtice, that even thoſe who live by Outrage and Villany, cannot ſubſiſt without ſome Shadow and Semblance of this Virtue.* Which he ſhews in the Inſtances of Thieves and Pirates. Farther, were not Men more ſtrictly and neceſſarily tied to keeping their Promiſes, we could not with any Certainty build on the Aſſiſtance of others, in the ordinary Affairs of Life. And then *breach of Faith* is the apteſt thing in the World to found an endleſs Succeſſion of Quarrels and Complaints. For in caſe I have actually perform'd my part of the Contract, and the other Perſon fails, whatever I have *done*, or *given*, is abſolutely *loſt*. And if I have not as yet proceeded to any actual Performance, it is however a Trouble, and it may be a Prejudice to me, to have the Courſe of my Deſigns and Buſineſs overturn'd; ſince I could have ſettled things by other Ways and Meaſures, had not this Man offer'd to tranſact with me. And 'tis moſt unreaſonable, that I ſhould be expoſed to Scorn and Cenſure, for entertaining a kind Opinion of a Perſon's Goodneſs and Honeſty. We are therefore to eſteem it a moſt ſacred Command of the Law of Nature, and what guides and governs, not only the whole Method and Order, but the whole Grace and Ornament of human Life, *that every Man keep his Faith* [3], or which amounts to the ſame, that he fulfil his Contracts [4], and diſcharge his Promiſes [a].

III. But in as much as Pacts or Covenants, thoſe eſpecially which are *expreſs*, do impoſe an *Obligation* on us, which Nature did not before enjoin, at leaſt not in ſo preciſe and determinate a Manner; it may not be here inconvenient to run over the principal Kinds, and Diviſions of *Obligations*. *Obli-*

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[4] *Iſocrates*'s Greek is this, Τοσαύτην δ᾽ ἔχουσι δύναμιν [αἱ συνθῆκαι] ὥστε τὰ πλεῖστα τοῦ βίου, καὶ τοῖς Ἕλλησι, καὶ τοῖς Βαρβάροις, διὰ συνθηκῶν εἶναι· ταύταις γὰρ πιστεύοντες, ὡς ἀλλήλους ἀφικνούμεθα, καὶ ποριζόμεθα. ὧν ἕκαστοι τυγχάνομεν δεόμενοι. μετὰ τούτων καὶ τὰ συμβόλαια τὰ πρὸς ἡμᾶς αὐτοὺς ποιούμεθα, καὶ τὰς ἰδίας ἔχθρας, καὶ τοὺς κοινοὺς πολέμους διαλυόμεθα, τούτῳ νόμῳ κοινῷ πάντες ἄνθρωποι διατελοῦμεν χρώμενοι.

Mr. Barbeyrac's *NOTES on* §. II.

[1] The Greek of *Ariſtotle* is this, Ὥστε ἀκύρων γιγνομένων [τῶν συνθηκῶν] ἀναιρεῖται ἡ πρὸς ἀλλήλους χρεία τῶν ἀνθρώπων.

[2] *Cicero*'s Words are, *Cujus* [*Juſtitiæ*] *tanta vis eſt, ut nec illi quidem, qui maleficio & ſcelere paſcuntur, poſſint ſine ulla particula Juſtitiæ vivere.* Conſult alſo *Plato* about this matter, in a Paſſage which *Grævius* quotes, and *Simplicius* upon *Epictetus*, Chap. 58. near the end.

[3] We muſt add, Of what Condition or Religion ſoever he be, to whom we engage our ſelves for any thing. It is a Precept of the Scholars of *Zoroaſtres*, a ſort of Men in this not ſo looſe, and more honeſt, than many Chriſtians: *Cum quocunque feceris pactum, id ne frangas.—— Nec putes tecum dicere, Quamvis pactum fregero, id tamen non erit mihi peccatum, & ſive ſit cum aliquo in Religione noſtra, ſive extra eam, res perinde eſt*, (i. e.) With whomſoever you make an Agreement, you muſt not break it —— Nor muſt you ſay with your ſelf, If I break my Agreement, I do not ſin, whether it be made with a Perſon of our own Religion, or not. In *Tho. Hyde De Relig. Vet. Perſarum, &c.* In *Sadder, Porta.* 28. See alſo the fine Thoughts of *Montaigne* upon the indiſpenſible Neceſſity of keeping a Man's Word, Lib. 3. c. 9. The *Pythagoreans* to accuſtom themſelves to keep their Words in Matters of Importance, ſhewed the greateſt Exactneſs in Things of a trifling Nature. And of this they tell a pleaſant Story. " One *Lyſis*, a Philoſopher of that Sect coming one Day out of *Juno*'s Temple, met " one of his Fellow-Diſciples, named *Euryphamus*, going into it, who deſired him to ſtay till he had payed his Devotions. " Whereupon he ſets him down before the Temple; but *Euryphamus* having unhappily fallen into a deep Meditation, forgot " his Promiſe, and departed at another Door. Nevertheleſs *Lyſis*, without Diſcouragement, ſtaid patiently all that Day, the " next Night, and good part of the next Day, when being in their School, and hearing ſome talking of *Lyſis*, as if they knew " not what was become of him, he called to mind what he had promiſed, and went to relieve this ſcrupulous Obſerver of his " Word. *Jambl. de Vita Pythag.* c. 30. §. 185. *Ed. Kuſt.* Doubtleſs this is an over-nice Exactneſs; but 'tis better to offend on this ſide, than to ſuffer ourſelves to be guilty of the leaſt Negligence.

[4] The Author begins here to diſtinguiſh between Agreements or Contracts, and Promiſes, whereas in other Places he uſes the Word Contract in ſuch a general Senſe, as to comprehend Promiſes, whereas a Promiſe is an Engagement made by him, who makes the Promiſe; and therefore to avoid all Equivocation, and not to make things obſcure without Neceſſity, it is better, when we ſpeak ſo in general, to uſe the Word Engagement.

[a] See *Dionyſ. Halicarn.* l. 2. where he tells the Story of the Conſecrating *Faith* amongſt the Goddeſſes by *Numa*. *Euripides* Heracl. ver. 890. Χρὴ ἀψευδὲς εἶναι τοῖσι γενναίοις στόμα. Truth's the beſt Mark of Honour and of Race.

gations then in the firſt place, are diſtinguiſh'd into *connate* and *adventitious* [1]. *Vid.* Sander. *de Oblig. Jur. Prælect.* I. ſ. 11. The former are ſuch as all Men fall under by Virtue of their being Creatures endued with Reaſon, or ſuch as neceſſarily attend and accompany the rational Nature, conſider'd in that *ſimple* and general Notion. Altho', in regard that all Men are born Infants, and as yet incapable of the exerciſe of Reaſon, theſe Obligations do for ſome time lie without Act, or Force; and do then at length exert their Power, and render Men capable of contracting Guilt, when the Underſtanding, improving by Age and Uſe, makes us ſenſible of them. And from this Period they date their Influence, and produce their penal Effects, ſhould a Man be never ſo negligent in weighing and conſidering their Authority. Therefore *Ignorance of the Law of Nature* is an inſufficient Plea, to excuſe a Perſon of mature Years; tho' he ſhould urge that it never came into his Head to reflect whether this Law had ſettled ſuch a Point, or not. *Adventitious* Obligations are ſuch as fall upon Men by the Intervention of ſome human Deed, not without the *Conſent* of the Parties, either *expreſs*, or at leaſt *preſumptive*.

IV. Amongſt *connate* Obligations, ſuch as are planted, as it were, in our *Being*, the moſt eminent is that which lies on all Men with reſpect to Almighty God, the ſupream Governor of the World; by Virtue of which we are bound to adore his Majeſty, and to obey his Commandments and his Laws. Whoever wholly violates and breaks through this Obligation, ſtands guilty of the moſt heinous Charge of *Atheiſm*; becauſe he muſt at the ſame time deny either the Exiſtence of God, or his Care of human Affairs. Which two Sins, with regard to their moral Conſequences and Effects, are equivalent to each other; and either of them overthrows all Religion, repreſenting it as a frightful Mockery, introduced to awe the ignorant Vulgar into ſome Decency and Duty [a]. Therefore we ought in Juſtice to diſcard and explode, as moſt foul and ſcandalous, that Notion of *Hobbes* [b], in which he would rank *Atheiſm* amongſt the Faults of Imprudence, or Ignorance; as if it were not properly *Sin*, but a *Miſtake*, or *Folly*, more worthy of Pardon than of Puniſhment. The Argument he makes uſe of runs thus, *The Atheiſt never ſubmitted his Will to the Will of God, in as much as he never believ'd there was ſuch a Being. But now it is impoſſible any one ſhould have a ſovereign Power over us, unleſs he obtain'd it by our Conſent. Therefore ſince the* Atheiſt *was never under the Kingdom of God, it follows that he is not obliged by the Laws of that Kingdom.* But here it is moſt groſly falſe, that all Sovereignty is conſtituted by the Conſent of the Subject; for this will hold only with regard to human Dominion; where unleſs by our own Contract and Conſent, we cannot loſe the Power of reſiſting another, who is *by Nature our Equal*. But who will pretend to aſſert that GOD has not a Power of commanding his Creatures, unleſs they voluntarily agree to inveſt him with ſuch Authority? Nay, *Hobbes* [c] has ſufficiently confuted himſelf, by deducing the Right, which God has of ruling and of puniſhing in *his Kingdom of Nature*, from his *irreſiſtible Power*; but did any one ever imagine that an *Atheiſt* was able to *reſiſt the Power of God?* And therefore *Atheiſts* are not, ſtrictly ſpeaking, God's *Enemies* (as *Hobbes* defines Enemies, *who are neither under a common Sovereign, nor under each other*) but his rebellious Subjects, and conſequently guilty of *Treaſon* againſt the divine Majeſty, as *Hobbes* himſelf has elſewhere [d] expreſly acknowledged. And agreeably to this he defines *Treaſon* againſt human Power to be: "When
"one either by Word, or Deed, does in general manifeſt and declare, that he will no longer ſubmit
"to that Man or Council of Men, in whom is
"lodg'd the ſupream Adminiſtration of the State, or
"when a Man wholly throws off the Bond of civil
"Obedience." It is no ſuch obſcure Matter therefore to aſſign the particular Species of *Sin*, to which *Atheiſm* belongs. Nor is the following Aſſertion built on better Grounds, *That Atheiſts cannot be puniſh'd any otherwiſe, than by the Right of War*; as the Poets repreſent the Gods, routing by force of Arms the old Giants that aſſaulted Heaven. On the contrary, that Evils inflicted in *martial* Encounters are not properly *Puniſhments*, we ſhall hereafter have Opportunity to ſhew. A *Sovereign* muſt not preſently be ſaid to make uſe of the *Right of War*, when he reclaims his refractory Subjects. For the bare *Right of Sovereignty* includes thus much, That the Perſon inveſted with it ſhall have the Power of reducing thoſe to Obedience by Force, who refuſe a voluntary Submiſſion. Much leſs are thoſe rebellious Oppoſers of lawful Authority to be accounted *juſt Enemies*, or ſuch as have a Right of making Reſiſtance.

It does not excuſe *Hobbes* to alledge that Paſſage of the *Pſalmiſt*, *The Fool hath ſaid in his Heart, There is no God.* As if there was any ſuch Nicety in the Scripture Language, to call thoſe only *Fools* who ſin out of *Miſtake*, and not thoſe who offend *wilfully*: Or, as if this too were not the higheſt *Folly*, by a *wilful* Sin to incur the moſt intolerable Torments, for the ſake of a very ſlender Pleaſure, or perhaps no Pleaſure at all. Again, it is by no means a matter of ſuch Difficulty, to diſcover the Being of a GOD by natural Reaſon, as to *find out the Proportion between a Sphere and a Cylinder*; the Inſtance which *Hobbes* makes uſe of. It may not be indeed in the power of every unlearned Perſon to form, or to apprehend an artificial and philoſophical Demonſtration of God's Exiſtence; but he cannot thence claim a Privilege of ſecurely doubting or denying it. For in as much as the whole Race of Men in all Ages have conſtantly held this Perſuaſion, whoever would attempt to aſſert the contrary, muſt of Neceſſity, not only ſolidly confute all the Arguments produced on the other ſide, but alſo alledge better and more plauſible Reaſons for his own particular Opinion. And farther, ſince the Safety and Happineſs of Mankind have been hitherto thought to depend chiefly on this Belief, it is requiſite, that he likewiſe prove *Atheiſm* to contribute more to the Intereſt and the good of all Men, than the Acknowledgment of a Deity. Which be-

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Mr. Barbeyrac's *NOTES* on §. III.

[1] *Arrian* in his Diſſertation on *Epictetus*, Lib. 3. c. 2. diſtinguiſhes alſo between Σχέσεις φυσικαὶ, ϗ ἐπίθετοι, Habitudes, or Relations natural and impoſed.

[a] *Ambroſ.* Offic. l. 1. c. 26. Nothing hath more Influence in promoting an honeſt Life, than our Belief, That we have ſuch a Judge of our Actions, as no Secrecy can eſcape, no Indecency but will diſpleaſe, no good Performance but will delight. Add *Lactant. De Ira Dei*, c. 8. [b] *De Cive*, c. 14. ſ. 19. c. 15. ſ. 2. [c] C. 15. ſ. 5. [d] C. 15. ſ. 19.

ing a Task manifeſtly impoſſible, the Atheiſts are to be judg'd Offenders, not only againſt the Divine Majeſty, but againſt all Mankind. And they deſerve the leſs Favour on this Account, becauſe theſe very Men who would reverſe the Judgment of all People and of all Ages, do arrogantly aſſume to themſelves a deeper Sagacity, and a clearer Light of Underſtanding than the World [1] was ever acquainted with before. And conſequently, tho' their Unbelief be indeed an Error, and a moſt fatal and deſtructive one; yet it is ſuch as they did not fall into thro' Imprudence or Simplicity, but by a vain and impudent Pretence of more than ordinary Degrees of Wiſdom[a].

It will be a very eaſy Labour to refute thoſe Arguments, which *Spinoſa*[b] has alledged in defence of this Notion of *Hobbes*. The *Theſis* he lays down to work upon is this, *Every one who cannot govern himſelf by Reaſon, may by the higheſt Right of Nature live according to the Laws of his Appetite.* And foreſeeing it might be here objected, That the Aſſertion was contrary to the Reveal'd Law of God, he anſwers, That *a natural State is both in Nature and Time antecedent to Religion*; which with regard to *natural* Religion is as abſolutely falſe, as what he ſubjoins, *That no Man knows by Nature any Obligation lying on him to obey GOD; and that no Reaſon can obtain this Knowledge, but ſuch as is confirm'd by the Signs of Revelation.* Therefore the Conſequence he draws is moſt abſurd, *That before Revelation, no Man was bound by any ſuch Divine Law, as it was impoſſible for him to be ignorant of*; and, That *a natural State is to be conceiv'd without Religion, or Law; and for that Reaſon without Sin, or Injury.* In all this he only ridiculouſly confounds the *natural* with the *poſitive* Divine Law. He proceeds to aſſert, That Man conſider'd in a *State of Nature*, is free from all *Religion, not only upon account of Ignorance, but by virtue of that common Liberty, in which all are born. For*, ſays he, *if Men were by Nature bound to the Divine Law, or if the Divine Law were a Law by Nature, it would be ſuperfluous that GOD ſhould afterwards enter into a Contract with Men, and oblige them by Oath and Covenant.* Now it is clear that theſe Pacts or Covenants paſs between God and Men in *reveal'd Religion*, not in *natural*, to which a Man immediately ſtands obliged upon account of his being created by God a reaſonable Creature. So that *Spinoſa*'s Concluſion is moſt vain and ſenſeleſs, That *Divine Law began from that time, when Men by expreſs Compact promiſed to obey GOD in all things; by which Deed they receded, as it were, from their natural Liberty, and transferr'd their Right upon GOD, juſt as Sovereignty is conferr'd in civil States.* For the Support of which Doctrine it is neceſſary to ſuppoſe, that Men in a State of Nature had not their Exiſtence from God Almighty.

From this Obligation, by which Men are bound to pay Obedience unto God, ſprings the Obligation of all *Men* towards all *Men, as ſuch*; by virtue of which they are engaged to lead a *ſocial Life.* How this is to be diſcover'd, it has been formerly our Buſineſs to ſhew.

V. There is another famous Diviſion of *Obligation*, into *natural* and *civil*; but ſuch as is by different Authors differently ſtated[c]. *Grotius* obſerves, that the Lawyers ſometimes call a Thing of *natural Obligation*, the doing of which Nature ſhews

Mr. Barbeyrac's *NOTES on* §. IV.

[1] Mr. *Bayle* in his Thoughts about a Comet (*Art.* 177.) diſtinguiſhes between two ſorts of Atheiſts, the one which begins to doubt, and the other which have paſſed all doubting. Of the firſt Sort are ordinarily all thoſe who bear the Name of Learned, but falſly; and glory in their Reaſon and their Contempt of bodily Pleaſure; as alſo thoſe whoſe Souls are ſubject to all ſorts of Vices, which are capable of the worſt Aggravations, and perceiving that the Fears of Hell cauſe them no ſmall Diſquiet, and imagining that 'tis their Intereſt that there ſhould be no God, endeavour to perſuade themſelves that 'tis ſo. Others become Atheiſts becauſe they have been great Sinners, and are full of as much Malice as can croud into any Man's Soul. The ſecond Sort are Infidels without deſign, and moral Men. Mr. *Bernard* in his News about the Republick of Learning, *November* 1701, calls them both Atheiſts by Reflection; but he after diſtinguiſhes them thus, giving the Name of Atheiſm in Fancy to him who begins to doubt, and of Atheiſm in Heart to him who is paſt doubting. According to this Author, 'tis undeniable, That there are Atheiſts in Heart in the World; for, ſays he, Perhaps, 'tis hard to maintain, that there are Atheiſts in Mind in the World, who are confirm'd in Atheiſm; but there are ſuch perhaps as labour under ſo many Scruples concerning the Being of a God, that they think it a Thing ſo very dubious, that they can have no Certainty of it. But the ſame Author ſays, There are Atheiſts without Reflection, who believe no God, becauſe they have never thought of it, but being ſo wholly taken up with ſenſible Objects, it never came into their Minds to ſuſpect that there is any Thing in the World but what they ſee, never enquiring after the Principle of their Being. There is no doubt but there are ſuch Atheiſts, without returning to the fabulous Relations of the *Chineſe* and *Caffres*. In my Opinion, there is nothing more judicious than theſe Reflections, and this Syſtem of the different ſorts of Atheiſts. The Notion of our Author above-mention'd is not much different from the common Hypotheſis of Divines, who with regard to common Experience determine a Matter of Fact by metaphyſical Reaſons. I can't then but wonder, that he gives ſuch a careleſs Solution of the Queſtion, which he touches by the bye, *viz.* Whether Atheiſts ought to be puniſh'd? He maintains elſewhere (*viz.* in his Book, *Of the Duties of a Man and Citizen*) that they ought to ſuffer the moſt ſevere Puniſhments, *Graviſſimis pœnis eſt coercenda eorum impietas.* But on the contrary, Mr. *Titius* ſays, that ſuch Men ought not to be treated ſo ſeverely. For, ſays he, that Method of Puniſhment and Force is not proper to cure a Man of Atheiſm; the only Puniſhment of ſuch as are in Error, if they will not be inſtructed, is to leave them to God's Judgment, *Obſerv.* 95. on *Pufend.* For my part, I profeſs, that if an Atheiſt makes an open Declaration of his Opinion, and labours to get himſelf Followers by miſleading ſuch weak Judgments as are not able to anſwer his Sophiſms and Subtilties, or by encouraging thoſe vitious Perſons, who are ready thro' the Wickedneſs of their Hearts to embrace his Tenets, ſuch a Perſon may with as much Juſtice be puniſh'd as he that teacheth others to thieve, murder, or cheat. In this Caſe our Author's Reaſons are very good: For thoſe who diſturb a Society by endeavouring to deſtroy an Opinion ſo univerſally received, and which is look'd upon as one of the ſtrongeſt Props of it, deſerve as much to be treated as Criminals, as an Atheiſt, conſider'd as ſuch, for perplexing the common Belief of a God. Let him be content that he has found out the unhappy Secret of ſhaking off all Tyes of Religion, and applauding his own Impiety, and not hope that others ſhould follow his Example, but be eaſy, that they reſolve to continue in the common Opinion for the Advantage of human Society, knowing how ſtrong Impreſſions the Fear of God has made upon moſt Men. (See the *Philoſophick Comment.* &c. *Tom.* II. *p.* 482, 483.) But if Atheiſts either in Mind or Heart do not pretend to propagate their Opinions, why ſhould they be puniſh'd purely as Atheiſts? The Nature and End of Puniſhments as they are uſed in human Judicatures, does not, in my Judgment, require that they ſhould be uſed upon ſuch. Their Impiety will be ſufficient Puniſhment, if they continue in it to their Death; but 'tis poſſible they may ſee their Error, and by Conſideration remove the Sophiſms by which they are at preſent blinded. Theſe Arguments will have a ſtronger Force, as to Atheiſts, by Reflection, and therefore need not be enlarged on here.

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[a] *Comp. Jean de Eſpagne de Erroribus Popularibus*, ſ. 1. c. 6. *Bacon* Eſſay 16. and Advancement of Learning, *l.* 3. *c.* 2. Add *Plato de L. L.* l. 9. near the end, where he diſtinguiſheth the ſeveral kinds of Atheiſts, and directs with what Penalties they ought to be reſtrained.

[b] *Tractat. Theolog. Politic.* c. 16.

[c] L. 2. c. 14. ſ. 6.

to be good and honeſt, altho' it be not ſtrictly a Debt: As for an Executor to pay the entire Legacies, without reſerving to himſelf what the [1] *Falcidian* Law allows him; to requite a Courteſy receiv'd; to pay Debts which the *Creditor* has in Law forfeited; or to the exacting of which the *Macedonian* Decree may be oppoſed[2]. When any thing of this kind is voluntarily paid[3], a Man cannot recover it again, on pretence that it was not due[4], tho' he might at firſt have refus'd to pay it.

Sometimes we call that a *natural Obligation* which truly binds us; whether it cauſe in the other Party a *perfect*, or whether only an *imperfect Right*. In like manner by a *civil Obligation* we ſometimes mean ſuch, as is void by the Law of *Nature*, but depends purely on a *civil Law*, of which the *Obligatio literarum* (when a Man confeſſes a Debt in writing, which he really never contracted) is commonly brought as an Inſtance; at other times it ſignifies ſuch as is grounded on both *Laws*, *natural* and *civil*; or ſuch as will bear a good *Action* in Courts of civil Judicature.

Others with more Clearneſs aſſign three Species of *Obligation*, *purely natural*, *purely civil*, *and mix'd*. The firſt depends entirely on *natural Equity*[5]; and in ſuch a manner, as not to found an *Action* in civil Courts. The ſecond ariſes meerly from the Force of *civil Law*, in the Strictneſs and Rigor of which it will bear an *Action*; tho' ſuch an [6] *Action* will always in point of *Equity* be invalidated [7] by the Judge[8], as the *Obligatio literarum* before-mention'd. The third is ſuch as is at the ſame time ſupported by *natural Equity*, and confirm'd by the Authority of *civil Conſtitutions*. This is the Diſtinction commonly made by the Interpreters of the *Roman* Laws.

VI. This Diviſion of *Obligations* into *natural* and *civil*, is a Subject which we ought to inſiſt farther on in our preſent Enquiry; yet not ſo much to derive thence the *Original* of ſuch Tyes, but the *Efficacy* or Force, which they bear in common Life. So that by *natural Obligation* we mean ſuch as binds us only by virtue of the *Law* of *Nature*; and by *civil Obligation*, ſuch as is ſupported and aſſiſted by *civil Laws* and *civil Power*. The Efficacy of both is conſider'd with regard either to the *Subject*, the Perſon in whom the Obligation inheres; or the *Object*, the Perſon in whom it terminates, or to whom it is directed. In the firſt reſpect, the Efficacy or Virtue of *natural Obligation* chiefly conſiſts in this, That it binds a Man's Conſcience; or that every Perſon at the ſame time when he fails of performing it, is ſenſible that he has diſpleas'd Almighty God; to whoſe Mercy as he owes his Being, ſo he knows he ought to pay all poſſible Obedience to his Laws. And altho' we cannot indeed, in the Law of Nature, diſcover any preciſe and determinate *penal Sanctions*, yet we ought on all Accounts to acknowledge, that it is enforced by ſome ſuch due Fruits and Conſequences; and that the Author of Nature will infallibly inflict great Evils on thoſe who violate this *Obligation*, which the juſt Performers of it ſhall as infallibly eſcape. For the Truth of which Belief, amongſt many Arguments, one very conſiderable Preſumption is that remorſe of Conſcience, which attends the Actors of

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Mr. BARBEYRAC's *NOTES on* §. V.

[1] Which is the 4th Part of the Inheritance, which the *Roman* Laws aſſign the Heir; inſomuch that if the Legacies exceed this 4th Part, the Heir is not oblig'd to pay the Overplus. See the *Digeſts*, Lib. 35. Tit. 2. *ad Leg. Falcid.* and *Daumat's Civil Laws* in their Natural Order, *Part* II. *Lib.* 4. *Tit.* 3.

[2] Our Author adds this Sentence to explain *Grotius*'s Words above-mention'd, which *Gronovius* interprets otherwiſe. For he ſays, the Debt is diſcharged by the Puniſhment of the Creditor, when the Debtor is excuſed from paying what he owes to a Man who is disfranchiſed, or condemn'd to perpetual Baniſhment; but *Grotius*'s Quotations, and the following Diſcourſe ſhew, That the Diſcharge granted by virtue of the Puniſhment of the Creditor was made by the *Macedonian* Law. Now this Decree was ſo called from a certain Uſurer, who was the Cauſe of it, call'd *Macedo*, and forbad lending to an Heir, and declares all Obligations void that were made by him. Inſomuch, that they who had lent Money, could not in juſtice require any Thing. See the *Digeſts*, Lib. 14. Tit. 6. §. 4. See alſo the Interpreters of *Suetonius* in the Life of *Veſpaſian*, Chap. 11. There was alſo a Law like it among the *Lucanians*, Ἐάν τις ἀσώτῳ δανείσας χρέος ἐλεγχθῇ, στέρεται αὐτοῦ. If any ſhall lend Money to a Prodigal, he ſhall loſe it. *Nicol. Damaſcen. de Moribus Gent.*

[3] We ought to take particular Notice of this word *Voluntarily*, which our Author adds to expound *Grotius*'s Opinion, who doubtleſs ſuppoſed it. Nevertheleſs, Mr. *Hertius*, both here and in his Diſſertation of an Action for a Debt due naturally, but not by human Laws, which is in *Tom.* III. of his ſmall Tracts and Comments, criticiſes upon *Grotius* and our Author, as if they had ſpoken of a Payment by miſtake. He muſt ſuppoſe that they had forgot the Principles of Law, and did not remember what the *Roman* Lawyers had laid down as an eſſential Condition of requiring again a Thing not due. He that pays a Thing which he knows not to be due, muſt be ſuppoſed to give it. *Et quidem, ſi quis indebitum ignorans ſolvit, per hanc actionem condicere poteſt, ſed ſi ſciens ſe non debere ſolvit, ceſſat Repetitio.* Digeſt. Lib. 12. Tit. 6. *De Condict. indeb. Leg.* 1. *Cujus per Errorem Dati repetitio eſt, ejus conſulto Dati donatio eſt.* Lib. 50. Tit. 17. *De Diverſ. Reg. Jur. Leg.* 53.

[4] *Conditio indebiti* is a Right of requiring a Thing in juſtice, which one has paid, but was not due. See *Digeſt.* Lib. 12. Tit. 6. But that ſuch a Right has no Place by the *Falcidian* Law appears from theſe Words of the *Roman* Lawyers, *Solutum verò non repetitur.* Digeſt. Lib. 35. Tit. 2. Leg. 1. §. 17. As to the *Macedonian* Law, their Opinion is very plain, *Quanquam autem ſolvendo non repetant, quia naturalis obligatio manet.* Digeſt. Lib. 14. Tit. 6. Leg. 9. in the end, and 10.

[5] As for example, If a Minor has borrow'd any thing without the Conſent of his Guardian, the Creditor can demand nothing of him in juſtice; but the Minor is ſtill obliged by natural Right, or in Conſcience, to pay what he has borrow'd. See *Chap.* 6. §. 4. *Note* 5. following.

[6] This appears by full Reſtitutions, but in the main this Obligation being purely civil comes to nothing, as the *Roman* Lawyers themſelves have acknowledged, ſaying, It matters not, if a Man has no Right, if it can be made void by an Exception. *Digeſt. De Diverſ. Reg. Jur. Leg.* 112. See Mr. *Noodt*, *De Forma emendandi doli mali*, Chap. 5.

[7] Among the *Romans* that only was call'd a Law, which was enacted by the Votes of the People, upon the Propoſal of the Head of the Senate. They had alſo *Plebiſcita*, which were the Decrees of the People, made upon the Propoſal of the Officer, choſen out of their own Order. The Laws and *Plebiſcita*, with the *Senatus Conſulta*, or Decrees of the Senate only, the Conſtitutions of their Princes, the Edicts of their Magiſtrates, and Determinations of their Lawyers, make up the Body of the Civil Law. For every Prætor, or Judge, when he enter'd upon his Office, put out an Edict, in which he inſerted not only what he thought juſt and equitable in the Edicts of his Predeceſſors, but he added new Conſtitutions, and ſometimes made void ſome old ones. This is what is called, *Jus Prætorium*, The Law of the Prætor; or *Jus Honorarium*, The Honorary Law, becauſe the Prætor had the Title of *Honoratus*, *i.e.* a Perſon honoured. Hence it is, that the Prætors explain'd and corrected the Deciſions of the Civil Law, and ſupply'd ſome Defects. See the *Inſtitut.* Lib. 1. Tit. 2. *De Jur. Nat. Gent. & Civil.* §. 3, *&c.* I can't here but advertiſe the Reader by the bye concerning the Reſcripts of the Emperors, that Mr. *Skulting*, Profeſſor at *Franeker*, publiſh'd there not long ſince, *viz.* in 1708, a good Diſcourſe to ſhew the Force they were of.

[8] See the *Inſtitut.* Lib. 4. Tit. 13. §. 9.

Wickedneſs, even whilſt they are in fair hopes of eſcaping human Diſcovery, and human Puniſhment. A Diſquiet, which no good and wiſe Man can imagine to proceed from bare Simplicity, from Cuſtom, or from fear of ſecular Juſtice; but from a much higher Principle, a Senſe of God's Sovereignty, and a Dread of his Vengeance. *Cicero pro S. Roſcio*, c. 24. *Every Man that is diſhoneſt, lives in a perpetual Fright, every Man's Wickedneſs haunts him, his Folly and his Madneſs diſturb him; his evil Thoughts and guilty Conſcience terrify and diſtract him. Theſe are the conſtant and the domeſtick Furies, which plague and torture the impious.* Add *Selden. de J. N. & G.* l. 1. c. 4. p. 37, &c. Nor can I believe that any Man by flying to the impious Refuge of *Atheiſm*, ever found there ſo good Security againſt theſe Terrors, but that his wicked Mind would frequently recoil, and ſhake him with more Violence than before. And we have ſcarce had an Inſtance of any ſuch bold Defier of Heaven, who has not at length been driven into a Conſternation by his own Crimes, and turn'd a Penitent in Horror, according to that of *Horace* [a].

Although to bind the Conſciences of Men, be principally the effect of *natural Obligation*, yet the ſame Power is communicated to *civil Obligation*, provided the Object of the latter be not repugnant to the former. And therefore *Civil Laws* do alſo bind the Conſcience, ſo far as they are conſiſtent with the Law of Nature. Both *Obligations* do farther agree in this Reſpect, that the Duties they enjoin, a Man ought to perform voluntarily, and as it were upon his own internal Motion.

And 'tis this which makes the chief Difference between *Obligation* and *Compulſion*; by the latter, the Mind is by external Violence driven upon a thing contrary to its inward Inclinations; but whatever we perform on the former Account, is ſuppos'd to be done upon the Approbation of our own Judgment, and the hearty Diſpoſition of our Will.

If we conſider theſe *Obligations* again, as they regard the *Object*, or as they produce ſome Effect in the Perſon, to whom by Virtue of them ſomething is due, they have this Force common to both, That what being thus due, is paid or perform'd, may be fairly accepted and poſſeſs'd. But when the other Party neglects or refuſes to make good his *Obligation*, there is then a Difference in the manner of compelling him, between the *natural* and the *civil Obligation*, or between thoſe who live in a ſtate of Nature, and thoſe who are ſettled under a Polity, or Government. To thoſe who live in their *natural Liberty*, the Precepts of the *Law of Nature*, being of two kinds, do cauſe the ſame Diſtinction in the *Obligation* to perform them. Thoſe things which *Nature* enjoins one Man to pay to another, without any antecedent *Pact*, as are the Offices of Charity and Humanity, we cannot challenge any otherwiſe, than by gentle and eaſy Methods; as by perſuading, admoniſhing, deſiring, or intreating. But we muſt not apply *Force* to the moſt obſtinate Refuſer; unleſs in Caſe of extream Neceſſity [2]. The Reaſon of which Proceeding ſeems to be this, That human Society cannot be preſerv'd in a very eaſy or peaceful Condition, without the conferring of thoſe mutual good Offices; and therefore Nature ſeems to have ſet them aſide, as conſtant Subjects of exerciſing Mens particular Benevolence, by Means of which they might win on the good Opinions and the Affections of each other. And now it is clear that thoſe things which may be recovered by Force, are not ſo apt to procure the Favour, or to unite the Minds of Men, as thoſe which we give only upon our own free Motion, and which we might deny without Fear, or Danger. But what is due to us, upon an intervening *Pact*, if not voluntarily tender'd, we may procure by *forcible* Means. As we may likewiſe defend by *Force*, our juſt Poſſeſſions and Goods, when an Attempt is made upon them by any injurious Aſſailant. *Civil Obligations*, or ſuch as have been confirm'd by the Authority of *civil Laws*, create an *Action* in Courts of *Juſtice*, by virtue of which I am to carry the Defailant before the Magiſtrate, who has a Power of compelling him to the Performance of his Duty. But even in *States*, *Obligations* purely *natural*, or ſuch as have been enforc'd by the Sanction of *civil Laws*, are left wholly to the common Modeſty and Conſcience of Men, and to their juſt dread of a Divine Sovereign and Judge; and the Subject ought not by a Courſe of Violence to be brought to the Obſervance of them.

What *Obligations* ought to be confirm'd by *civil Ordinances*, it is the Buſineſs of *Legiſlators* to determine; and they are to meaſure their Expediency and Uſe, according as they ſeem likely to contribute to the inward Happineſs, and Tranquillity of the State [3]. As it would be ridiculouſly troubleſome, to diſturb the Judge on every *petit* Account, ſo it would be an Error on the other hand, to imitate the Cuſtom of the *Seres* (in *Strabo* l. xv.) who [4], he tells us, had no Hearings in Court, but upon Murther, or Scandal; theſe being ſuch Miſchiefs as the Sufferer could not prevent; whereas it is in every Man's power not to be cheated in a Bargain, only by conſidering well whom he truſts. Much to the ſame Purpoſe, is what he reports of the *Indians*, That they have no Action at Law, upon Matters of Faith and Truſt, nor do they make uſe of Witneſſes, or Seals, but believe each other on their bare Words. *Comp.* Ælian *V. H.* l. iv. c. 1. *Add.* Senec. *de Benef.* l. iii. c. 15.

VII. *Obligation* may again be divided into *perpetual* and *temporary*. The former is that which cannot be taken off ſo long as the Perſon exiſts, in

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MR. BARBEYRAC'S *NOTES* on §. VI.

[1] Is the ſame with [a] at the bottom of the Page.

[2] See Lib. 1. c. 7. §. 8. and Lib. 2. c. 6. §. 5. aforegoing.

[3] See Lib. 8. c. 1. §. 1.

[4] See Lib. 5. Chap. 2. §. 3. where the Author recites the ſame thing.

[a] Hor. l. 1. Od. 34.

Parcus Deorum Cultor, & infrequens
Inſanientis dum Sapientiæ
Conſultus erro: Nunc retrorſum
Vela dare, atque iterare curſus
Cogor relictos.

Theſe Words of *Horace* our Author uſes here without quoting him; although, as Mr. *Dacier* very well obſerves, the Poet ſpeaks there in Joke only.

whom it inheres. Such is our *connate Obligation* towards God; which, even with reſpect to the Exerciſe, can at no time be ſuſpended or diminiſh'd. Such likewiſe is the *connate Obligation* of all Men towards all, as Partners of the ſame Nature, which no Perſon can throw off, ſo long as he makes a Part of Mankind; yet the Exerciſe of it may ſometimes, with regard to ſome particular Perſons, be ſuſpended. And this happens, when I devolve into a *State of War* with another. For the *Obligation* being *reciprocal*, in caſe one Party break it, and return Hoſtilities for the good Offices of Humanity, the other Party is no longer bound to deal with him in friendly manner; but may maintain his own Safety, and his own Rights, although with the hurt of the unjuſt Oppoſer. Yet the ſame *Obligation* may ſtill be ſaid to remain *perpetual* in this Reſpect, That ſo ſoon as our own Safety is provided for, and enſured, we ought to be ready to renew the Peace, and to return to the exerciſe of all Courteſy and Humanity, towards the Party who began the Contention. Amongſt *adventitious Obligations* we commonly reckon *perpetual*, the *Obligation* of Children towards their Parents, and that which paſſes between Husband and Wife; which ſhall elſewhere be explained at large [1].

Temporal Obligations are ſuch as may ceaſe and be cancell'd, whilſt the Perſons in whom they inhere do yet exiſt in the World.

VIII. Farther, ſince it generally happens, that *Obligations* anſwer one another, it may be uſeful to divide them into *mutual*, and *not mutual*. An *Obligation not mutual* is, when one Party ſtands bound to perform ſomewhat towards another; yet ſo that the other Party ſhall lie under no correſponding *Obligation*, nor be tied to make equivalent Requital. Such is the *Obligation* of Men towards God, by which they are engaged to pay him abſolute Obedience; but he on his Part is not conſtrain'd, by Virtue of any ſuch external *Obligation* [1], to make any Return for their Obedience. Amongſt thoſe *Obligations* where both Parties are Men (if we except a few Contracts, binding only one ſide) there are none to be met with of this ſort. And the Reaſon is, becauſe it ſeems repugnant to the *natural Equality* of Men, that one Perſon ſhould be bound to another, and the other Perſon lie under no Engagement towards him. For we cannot [2] apprehend them to be ſociable Creatures, who are not united by a common Tie, who have not a mutual Communication of Services; but of whom one ſeems to be made as it were for the ſake of the other, and the other is not bound in Return to contribute any thing towards his Intereſt, or Happineſs. Nor, when Men by political Inſtitutions introduced a State of Inequality, was it in their Power, to inveſt any Perſon with ſuch an extraordinary and tranſcendent *Right*, as ſhould diſengage him from all *Obligation* and Duty towards other Mortals [3].

IX. *Mutual Obligations* are ſuch as anſwer to one another; ſo that the Party who on the one hand receives a *Due*, on the other hand is bound to repay it [1]. Theſe again are ſubdivided into *imperfectly mutual*, and *perfectly mutual*. The former are ſuch as anſwer unequally, one of them being oppos'd to another, which is either different in kind, or in Virtue and Efficacy. This ſeems to happen chiefly on account of one of theſe two Reaſons, either that the Perſons are unequal, one having a Right of commanding, the other a Neceſſity of obeying; or becauſe Perſons in other Reſpects equal, as to ſome particular Buſineſs, refuſe to receive an *Obligation* of the ſame Strictneſs on both ſides. For it is clear that *Obligations* do thus differ in Force, or Efficacy, ſome producing a *perfect Right* in the Perſon towards whom they are directed; ſo as to found an *Action* in human Cogniſance, to be proſecuted either by War, or before the Judge, according as the Parties live, either in a State of Nature, or under a Form of civil Government; whereas others produce only an *imperfect Right*, ſo that the Performance of them ought not to be extorted by Violence. From the former of theſe Cauſes ariſe the *Obligations imperfectly mutual*, betwixt Princes and Subjects, betwixt States and particular Members, betwixt Maſters and Servants, Parents and Children; all which will be examined in their proper Places. The latter Cauſe of making *Obligations imperfectly mutual*, chiefly happen in Caſes of *gratuitous Promiſes*, and the Performances of them. For whilſt I promiſe any thing to another out of free Favour, I perfectly oblige *my ſelf* to give it, and the other Party has a Right of requiring it from me. But becauſe I did not engage him to pay me an Equivalent, he is bound to me only by the Law of *Gratitude*, which ties him much more looſly than if he were my Debtor upon *Pact*. For we cannot on ſuch unlimited *Obligation* build our Hopes or our Affairs, and therefore ſhould the Party prove ungrateful in the higheſt degree, we do not reckon our ſelves properly to have receiv'd any Loſs or Prejudice: For 'tis a Miſtake in ſome Authors to aſſert, "That Nature gives us a *perfect Right* to claim a Return of our Benefit, from an ungrateful Perſon [2]; though in moſt Commonwealths, the Courts of Law refuſe to admit an Action on that Score." Nor is this a good Conſequence, *The Neceſſity of returning a Kindneſs is greater than that of giving one; therefore the latter is founded upon an imperfect Right, the other upon a perfect.*

Mr. Barbeyrac's *NOTES* on §. VII.

[1] See Lib. 6. c. 1. and 2.

Mr. Barbeyrac's *NOTES* on §. VIII.

[1] Our Author expreſſes himſelf thus by way of Oppoſition to that which the Goodneſs of God requires of him. See Lib. 2. c. 1. §. 3. and c. 3. §. 5. aforegoing.

[2] This Period, not containing at leaſt directly a Reaſon of what the Author was ſpeaking of before, I ſuſpect that the Word *enim* has crept into the Text inſtead of *etiam*, either through the Careleſneſs of the Author or Printers; altho' it is found in the laſt Edition of 1706, of which Mr. *Hertius* had the Overſight.

[3] We can't maintain this, without encroaching upon the Prerogative of God, who impoſes theſe Duties on Men by the Conſtitution of their Nature. This we ought nicely to obſerve, that we may underſtand the juſt Extent of the Rights of a King, which are founded upon the Power which every Man can and is willing to grant to him over himſelf. See my Notes on Lib. 7. c. 8. following.

Mr. Barbeyrac's *NOTES* on §. IX.

[1] See Lib. 5. c. 2. §. 5. following.

[2] See c. 3. §. 17. aforegoing.

For, however the Caſe may ſtand before, yet when I once have promis'd to do a Favour, there lies a greater *Neceſſity* on me to perform it, than on the other Party to return it[3]. For there may be different Degrees in *Obligations* of the ſame kind[4]; eſpecially when we are to compare ſuch Duties as concur in point of Time[a].

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[3] To perfect the Reaſoning of our Author, we muſt remember, that the Foundation of the Difference between perfect and imperfect Right, ariſeth from the neceſſary or unneceſſary Influence that a thing hath in eſtabliſhing Peace and Society among Men, and not ſimply a degree of Obligation from the matter of the thing. So that though we are more indiſpenſibly obliged to the Duties of Thankfulneſs than of Beneficence, the firſt ought not to authorize us to uſe Force or Juſtice to make us perform them, rather than the laſt; becauſe neither of them are of that Nature, that the Continuance of Peace or Society doth neceſſarily require the Practice of them. In ſome Caſes the Duties of Gratitude ought to give place to thoſe of Beneficence, as when a Benefactor may want, or at leaſt ſpare without any great Loſs or Trouble, a thing of which another Perſon has great need.

[4] See my Notes on *Lib.* 5. *c.* 12. §. 23. following.

[a] *Comp.* Bœcler. ad Grot. *l.* 1. *c.* 1. *ſ.* 4. See what ſhall be ſaid hereafter in *Lib.* 5. *c.* 12. *ſ.* 23.

CHAP. V.

Of the Nature of Promiſes, and Pacts, or Covenants, in general.

The CONTENTS of every Paragraph of the fifth Chapter.

I. *Whence adventitious Obligations ariſe.*
II. *What is Mr.* Hobbes*'s transferring of Right.*
III. *No Man has a Right to all things, as Mr.* Hobbes *aſſerteth.*
IV. *In what a transferring of Right conſiſts.*
V. *A meer Aſſertion doth not oblige.*
VI. *An imperfect Promiſe obligeth, but does not give another a Right.*
VII. *A perfect Promiſe.*
VIII. *Promiſes in the future Tenſe give no Right.*
IX, X, XI. *Whether there be a Power of obliging in bare Pacts or Covenants.*

IT now follows in courſe, that we enquire how ſuch *Obligations* as are not *born* with Men, ſhould by virtue of ſome Act of theirs be laid upon them, by which means there ariſes, at the ſame time, in other Perſons a *Right* which before they wanted. For theſe two moral Qualities have ſuch a mutual Relation and Dependence, that whenever there is produced an *Obligation* in one Man, there immediately ſprings up a correſpondent *Right* in another; for 'tis impoſſible to apprehend that I am *bound* to any Performance, unleſs there be ſome Perſon in the World, who can either fairly require it, or at leaſt fairly receive it of me. Tho' the Remark will not hold *vice verſa*, that where-ever there is a *Right* in one, there muſt preſently be an *Obligation* in another. For example, the Magiſtrate has a *Right* of requiring Puniſhment for Crimes; but ſuch a *Right* as is attended with no *Obligation* in the Criminal[1][a]. Unleſs we ſolve the Doubt by this Diſtinction, That if we take *Right* in a ſtrict and cloſe Senſe, for a Power or Aptitude to *have* any thing, then there is always in ſome other Perſon an *Obligation* anſwering to it; but not if the Word be taken for a Power of *doing* any thing. This then in the firſt place, is clear, that all *adventitious Obligations* proceed either from a *ſimple*, or from a *mutual Act*; of which the former is properly call'd a *free Grant* or *Promiſe*, the latter a *Pact* or *Covenant*.

II. But inaſmuch as all acknowledge that *Promiſes* and *Pacts* do *transfer* a *Right* to others, before we proceed, it may not be improper to examine *Hobbes*'s Opinion [b] about the *transferring* of *Right*. He then, from his Project of a *State of Nature*, having inferr'd, that *every Man hath naturally a Right to every thing*, and having farther ſhewn, that from the Exerciſe of this *Right* there muſt needs ariſe a War of every Man againſt every Man, a State very unfit for the Preſervation of Mankind; he concludes, “ That whilſt Reaſon commands “ Men to paſs out of *this State of War*, into a “ Condition of Peace, which Peace is conſiſtent “ with a Right of every Man to every Thing, it “ at the ſame time preſcribes that Men ſhould lay “ down ſome part of this univerſal Right. A Man, “ he ſays, may lay down, or diveſt himſelf, of his “ Right two ways, either by *ſimply renouncing it*, “ or by *transferring* it to another. The former is “ done, if he declares by ſufficient Signs, that he “ is content it ſhall hereafter be unlawful for him “ to do a certain thing, which before he might have

“ lawfully

Mr. BARBEYRAC's *NOTES on Chap.* V. §. I.

[1] This is not abſolutely true. See my Notes on *Lib.* 8. *c.* 3. . 4, 5. But Mr. *Thomaſius*, to ſhew that Right and Obligation do not always anſwer to each other, alledges the Example of two Perſons, who in a Shipwreck getting upon one Plank, which could not ſave them both, had each of them right to thruſt off his Companion, and conſequently, there was no Obligation to anſwer each other. *Fundam. Jur. Nat. & Gent.* Lib. 3. *c.* 7. §. 10. But this only proves, that there may be a Caſe where one Man's Right becomes of no worth by the Oppoſition of an equal Right in another Perſon. In like manner, certain other Duties ſo claſh ſometimes, that one of them muſt give place in certain Circumſtances, without being leſs obligatory in general. In the Example of the Plank, we muſt ſuppoſe, as I have ſaid elſewhere, that it belong'd no more to the one than to the other, and neither of them was ſeized of it alone. For then the Right of Property of the firſt Occupyer would lay an Obligation of giving place on him againſt whom any of theſe Titles could be alledged. But yet the other, who was not in the ſame Caſe, be it he to whom the Plank did appertain, might lawfully hinder him from uſing that Inſtrument to ſave his Life, which Providence had furniſh'd him with; ſo far is it from this, that he ought to help us, if he can, to ſeize it.

[a] 'Tis true, Puniſhments are not due to Criminals by virtue of any Compact; but ſince the Right of Life and Death, or the Right of the Sword is conferr'd upon Sovereigns, we are oblig'd not to reſiſt 'em when they make uſe of that Right, tho' it be upon our own Perſons. See Mr. *Barbeyrac*'s *French* Tranſlation of this Book, *Lib.* 8. *c.* 3. *ſ.* 4. *Note* 8. and *ſ.* 5.

[b] *De Cive*, c. 2. ſ. 3, &c. & *Leviath.* Engl. Book I. c. 14.

“lawfully done. The latter, if he declare by ſufficient Signs to another Perſon, who is willing to receive ſuch a Right from him, that he conſents it ſhall be for the future, as unlawful for himſelf to reſiſt him in the doing of a certain Thing, as he might before have juſtly reſiſted him.” Hence he infers, That the *transferring of Right conſiſts purely in Non-reſiſtance*; or that, he who in a *State of Nature* transfers a Right to another, does not give the other Party a new Right which before he wanted; but only abandons his *own* Right of reſiſting ſuch a Perſon in the Exerciſe of *his*. Which Aſſertion, according to his *Hypotheſis*, he thus makes out; “Before any ſuch Act of transferring Right, the Perſon to whom it is ſaid to be transferr'd, had a Right to all things, and therefore it was impoſſible to give him a new one; but the Perſon *transferring*, loſes his Liberty of juſt Reſiſtance, which before hinder'd the other from exerciſing his Right in its full Extent. Therefore, whoſoever in a State of Nature acquires a Right, only gains this Privilege, to enjoy his primitive Right ſecurely, and without juſt Diſturbance; for example, If a Man in a State of Nature, by Sale or Gift, makes over his Field to another, he only takes away his own Right to that Piece of Ground, not the Right which all other Men have to it; or which comes to the ſame, he declares that he will not reſiſt, or hinder ſuch a particular Perſon, who has a mind to make uſe of the Field; but he does not by this Act prejudice the reſt of Mankind, who ſtill keep their primitive Right, as well to this Spot of Earth, as to every Thing elſe which Nature affords.”

III. But as we have formerly made out[a], that this *Hobbeſian State* is by no means *natural* to Man, a Creature deſign'd for a *ſocial Life*; ſo neither can we admit of what the ſame Author thus eſtabliſhes as the Conſequence and Reſult of it, ſuch a Right of each Man to all Things, as ſhall produce any Effect in reference to other Men. For the clearer Illuſtration of this Point, it is neceſſary to obſerve, That not every natural Licence, or Power of doing a Thing, is properly a *Right*; but ſuch only as includes ſome moral Effect, with regard to others, who are Partners with me in the ſame Nature. Thus, for inſtance, in the old Fable, the Horſe and the Stag had both of them a natural Power or Privilege of feeding in the Meadow; but neither of them had a *Right*, which might reſtrain or take off the natural Power in the other. So Man, when he employs, in his Deſigns and Services, inſenſible or irrational Beings, barely exerciſes his natural Power, if without regard to other Men, we here preciſely conſider it in *reference* to the Things, or Animals, which he thus uſes. But then at length it turns into a proper Right, when it creates this moral Effect in other Perſons, that they ſhall not hinder him in the free Uſe of theſe Conveniences, and ſhall themſelves forbear to uſe them without his Conſent. For 'tis ridiculous Trifling to call that Power a *Right*, which ſhould we attempt to exerciſe, all other Men have an *equal Right* to obſtruct or prevent us. Thus much then we allow, that every Man has naturally a Power or Licence of applying to his uſe, any thing that is deſtitute of Senſe, or of Reaſon. But we deny that this Power can be call'd a *Right*, both becauſe there is not inherent in thoſe Creatures, any *Obligation* to yield themſelves unto Man's Service; and likewiſe, becauſe all Men being naturally *equal*, one cannot fairly exclude the reſt from poſſeſſing any ſuch Advantage, unleſs by their Conſent, either *expreſs* or *preſumptive*[1], he has obtain'd the peculiar and ſole Diſpoſal or Enjoyment of it. And when this is once done, he may then truly ſay he has a *Right* to ſuch a thing. Or to decide the Buſineſs more briefly, we may make uſe of this Diſtinction, that a Right to all Things antecedent to any human Deed, is not to be underſtood *excluſively*, but *indefinitely* only; that is, we muſt not imagine one may engroſs all to himſelf, and *exclude* the reſt of Mankind; but only that Nature has not *defined*, or determined, what Portion of Things ſhall belong to one, what to another, till they ſhall agree to ſhare her Stores amongſt 'em, by ſuch Allotments and Diviſions. Much leſs will the ſame *Equality* amongſt Men admit, that one ſhould naturally claim a *Right* over another. It is rather true, that no Perſon will have a Right to govern any other Perſon, unleſs he acquire it in a peculiar manner, either by his Conſent, or by ſome other antecedent Deed; as ſhall be made out more at large in its proper Place[2].

IV. The proper Notion then, of transferring and of acquiring Right, will appear with more Exactneſs, if we premiſe, that ſome *Rights* bear a regard to Perſons, others to Things; and that the latter kind of Rights is again divided into Original and Derivative. I acquire a *Right* over a Perſon, if he either expreſly or tacitly conſents, that I ſhall preſcribe to him what he ought to do, to ſuffer, or to forbear; by virtue of which Agreement he both obliges himſelf voluntarily to ſtudy Obedience to my Pleaſure, and at the ſame time grants me a Right of compelling him, in caſe of default, to his Duty, by propoſing ſome conſiderable Evil, which I ſhall otherwiſe bring upon him. A Man then acquires an *Original Right* over *Things*, when all others either expreſly or tacitly renounce their Liberty of uſing ſuch a Thing, which before they enjoy'd in common with him. This original Right being once eſtabliſh'd, by virtue of which the primitive Community of Things was taken off, the transferring of Right is nothing elſe but the paſſing it away from me to another, who before was not Maſter of it. Hence appears the Abſurdity of ſaying, That *the transferring of Right conſiſts barely in Non-reſiſtance.* Inaſmuch as that negative Term cannot expreſs the Force of the *Obligation* ariſing from ſuch an Act; which properly implies an inward Inclination to make good the Contract: Tho' Non-reſiſtance be indeed one Conſequence of the *Obligation*, and without which it cannot be fulfilled. The Inſtance about the *Field*, propoſed by *Hobbes*, does not come

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Mr. Barbeyrac's *NOTES on* §. III.

[1] Our Author reaſons here upon a falſe Suppoſition, which I ſhall confute in its proper Place. See my Notes on *Lib.* 4. *c.* 4. All that can be ſaid is this, that before the Property of Goods was ſettled, no Man ought to exclude another always from the uſe of any one thing, and when they had no farther uſe of it, it return'd to the firſt Occupier, as if he had enjoy'd it himſelf by that Title.

[2] See *c.* 2. §. 7. of this Book, and *Lib.* 1. *c.* 6. §. 12. and *Lib.* 6. *c.* 2, 3. and *Lib.* 7. *c.* 2, 3.

[a] *Lib.* 2. *c.* 2. §. 7, *&c.*

up to the Point in hand; for beſides, that it is very abſurd to call that an Act of *Selling*, when I only quit my Pretenſions to a Thing, whilſt all other Men ſtill keep *theirs*; even according to his own Doctrine, *Propriety* of Things had its Riſe from civil Government[1], after the *State of Nature* was ſuppoſed to be paſs'd and gone. Therefore during the *State of Nature*, no Man could call the Field *his own*, and conſequently not *ſell* it. He ought indeed to have expreſs'd himſelf thus: "Since in a State "of meer Nature things belong'd no more to one "than to another, therefore if a particular Perſon "deſired the ſole Uſe of any thing, to make him "Maſter of his Wiſh, it was neceſſary, that all "other Men ſhould renounce the Uſe of the ſame "Thing. If they did this *gratis*, the Act had "ſomewhat in it like a *Gift*; if with ſome Burthen, or under ſome Condition, it was then a "kind of a *Contract*[2][a], for which we have no "Name. But ſhould one Man have renounced his "Power over ſuch a thing, this could have been "no Prejudice to others[3], and conſequently, he "only would have been debarr'd from the Uſe of "it, who had thus freely quitted all Title to it.

V. Let us now carry on our Enquiries, and examine how a Man may contract an Obligation, and confer a Right on another, by means of his own *free Promiſe*. To underſtand the Nature and Effects of this kind of *Tye*, we muſt in the firſt place obſerve, that there are two ways of ſpeaking about giving, or doing a thing to another, which now is, or which we imagine, will hereafter be in our Power. The firſt way is, when we barely expreſs our preſent Mind about a future Act; yet ſo as to lay no Neceſſity on ourſelves, of perſevering always in the ſame Reſolution. An Inſtance we have in what *Tiberius* in *Tacitus*[1] writes to his Favourite *Sejanus*, *Ipſe quid intra animum volutaverim, quibus adhuc neceſſitudinibus immiſcere te mihi parem, omittam ad præſens referre. I forbear to tell you at preſent, by what Fortunes, and by what Alliances I am conſidering to unite you to myſelf.* Such a bare Aſſertion neither founds an Obligation in me, nor a Right in the other Party[2]. And to render it virtuous and unblameable, there is only this Condition requiſite, that we *ſpeak* as at preſent we really *think*, and do not impoſe upon a Man by Falſehood and Diſſimulation. But we are by no means obliged to continue always in this Deſign; ſince the mind of Man has not only a *natural Power* of changing Opinion, but likewiſe a *Right*; ſo as to do it without Fault, when there is no particular Obligation impoſing a Neceſſity of holding firmly to a Reſolution already taken and declared. Yet theſe Changes of Purpoſe are liable to juſt Cenſure, if either the former Judgment, from which we receded, was better than this laſt; or by altering our Meaſures ſo unexpectedly, we expoſe a Perſon to Diſappointment and Deriſion, who did not deſerve ſo unkind Treatment at our Hands. See the Paſſage between *Q. Cæcilius* and *T. Marius Urbinas in Valer. Max.* l. viii. c. 8. §. 5, 6. See *Grot. Book* II. c. 11. ſ. 2. Tho' it be often a juſt[3] Puniſhment to baſe Flatterers and Deſigners, to balk them of their greedy Hopes, and to cheat the gaping Crows, when they have prepared their Mouths for the Morſel. Vid. *Plin.* 2. Epiſt. 20. Comp. *Grot.* l. ii. c. 11. ſ. 2.

VI. We may call it an *imperfect Promiſe*, when a Man determines his Will to the doing a Favour hereafter, with a ſufficient Sign to make it firm and laſting, or ſo as fully to declare his Willingneſs to lie under an *Obligation*, but not ſo as to give the other Party any proper Right of compelling him to ſtand to his Word. The like to which happens in the Duty of returning Kindneſſes, where the Receiver is obliged to make a grateful Acknowledgment, tho' the Giver has not a full *Right* to require it. Some are of opinion, that it is hardly poſſible to produce an Inſtance of this kind of *Promiſe*, in the *Law of Nature*, barely conſider'd. It is uſual to alledge for Examples, the Promiſe of an abſolute Prince made to his Subject, of a Maſter to his Servant, of a Father to his Son, whilſt yet under his Power; by all which the Parties promiſing, ſtand obliged to make good their Engagement; but the others ſeem to want a *Right* of demanding it from them, becauſe they are allow'd in no *Court* to bring an *Action* againſt them upon Default. But now the Lameneſs or Defect of theſe Promiſes does not ariſe from any intrinſick Weakneſs or Invalidity; but from that ſuperior Quality or Station in the Promiſers, which hinders the *Obligation* from taking its full outward Effect. Others inſtance in

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Mr. BARBEYRAC's *NOTES on* §. IV.

[1] See Mr. *Hobbes*'s Treatiſe *De Cive*, c. 6. §. 16. and c. 14. §. 10. and what our Author ſays, *Lib.* 8. *c.* 1. §. 2. following.

[2] I ſhall explain this Term, *Lib.* 5. *c.* 2. §. 7.

[3] This is grounded upon a falſe Hypotheſis, as I have ſhewn in *Note* 1. of the foregoing Paragraph. The Truth is, that till a Man abandons a thing, of which he had poſſeſſed himſelf, with a Deſign to make uſe of it, it belongs to him, and no Man may diſpoſſeſs him of it; but if he releaſes it to another, as from hand to hand, this latter acquires the ſame Right, and conſequently excludes the Right of all others, until he again in his turn leaves to the firſt Occupier the thing which he had Power to diſpoſe of all the while he had it, becauſe the Ceſſion of him who was in poſſeſſion before him, gave him Power to prevent any other who would be maſter of it.

Mr. BARBEYRAC's *NOTES on* §. V.

[1] *Tac. Annal.* Lib. 4. c. 40. Numb. 9. Ed. Ricq.

[2] *Nulla promiſſio poteſt conſiſtere, quæ ex voluntate promittentis ſtatum capit.* Digeſt. Lib. 45. Tit. 1. *De Verborum Obligationibus*, Leg. 108.

[3] The Author plainly ſpeaks here only of thoſe wandering Hopes which ſome ſuffer others to conceive, or rather give them, to diſappoint the Covetouſneſs of thoſe who would cheat us, or deceive us of our Inheritance. So that here is no real Promiſe, nor any real Declaration of our Will fully, nor irrevocable; but only ſuch hope as was formed at the time when the Words or other equivocating Signs were ſpoken, by which the Deceiver was deluded himſelf, and pleaſed himſelf with Smoke. *See Lib.* 4. *c.* 10. §. 3. following. It may be convenient here to ſay ſomething of ſuch Promiſes, which, tho' made in jeſt, were valid among the *Romans*, provided they were made in the Form of a Stipulation. For if one ſaid to another, Doſt thou promiſe me this or that? And he ſaid, I do promiſe; the firſt had a juſt Action againſt the other, and he was adjudged to make good his Promiſe, tho' he had no deſign to engage himſelf. But at length they found out an Expedient to hinder the Effect of this ſcrupulous Obſervation of Laws, contrary to all Natural Right: It was this, Altho' ſuch a Promiſe would bear a juſt Action, it was eluded, and made null by the Right of the *Prætor*, who found out a poſitive Exception. See upon this Subject the *Julius Paulus* of Mr. *Noodt*, Chap. 11. and his Treatiſe *De forma emendandi Doli mali*, &c. publiſh'd in 1709. *Chap.* 6.

[a] We ſhall explain this Term in *Lib.* 5. *c.* 2. *ſ.* 7.

an imperfect *Stipulation*; when the civil Laws enjoin, that Promiſes ſhall be made under ſuch a particular Form of *ſtipulating* Words; and will not permit a Man to ſue another upon his Promiſe, if it did not run preciſely in thoſe Terms. Here they obſerve, That in caſe the Parties concern'd fully intended to contract a perfect Obligation, and omitted the ſet Form of Law, only thro' Error or Imprudence, the Promiſer is by natural Equity engag'd to perform his Word, tho' the other Perſon cannot force him to it by an *Action* in Courts of civil Judicature. But neither have we in this Example a *Promiſe*, which is *imperfect* upon account of the Law of Nature, but by virtue of a poſitive Law, which ties up its Effect to ſuch a punctual Form of Speech, a Reſtraint, which naturally it did not lie under. A true Inſtance then of all *imperfect Promiſe* is, when I expreſs myſelf in this manner, *I really deſign to do this, or that for you, and I deſire you'd think I am in earneſt, and ſpeak Truth.* In which caſe I am bound to perform my Word, rather by the Law of *Veracity*, than of *Juſtice*; I lay an Obligation on myſelf, but I give the other Party no Right of forcing me to perform it. Men have naturally ſomewhat of Greatneſs and Generoſity in their Temper, upon account of which they had much rather ſeem to do a good Office, purely on the free Motion of their own *Virtue*, than for the ſake of any *Right* which another has to challenge it from them. To this Head we may refer the Promiſes of Men in Favour and Authority, when not by fair Words and general Complements[1], but in a ſerious and particular manner, they engage to aſſiſt us by their Recommendation, Interceſſion, Promotion, or Suffrage; which yet they would not have a Man challenge from them by virtue of any *Right*, but deſire they ſhould be imputed wholly to their Generoſity and Honour. Even the Law of Nature does not ſeem to allow, that a Man ſhould be *compell'd* to the Performance of theſe Promiſes; ſince in the very Act of engaging himſelf he made a tacit Reſerve againſt ſuch Proceeding; that his Benefit might carry the more Grace and Beauty in it, by being remov'd as far as poſſible from Neceſſity and Conſtraint.

VII. A *perfect Promiſe* is, when a Man not only determines his Will to the Performance of ſuch or ſuch a Thing for another hereafter, but likewiſe ſhews that he gives the other a full *Right* of challenging or requiring it from him. When we engage to give away a particular Thing, or to perform a particular Service, the former is a kind of *Alienation* of our Goods, or at leaſt ſomewhat in order to it; the latter is an *Alienation* of ſome part of our natural Liberty; inaſmuch as we are now to ſtick to the Reſtraint and Confinement of our Promiſe about a Matter, which before we might have uſed, or done, or omitted, at our Pleaſure. It muſt be well obſerv'd, that what we here deliver, concerns only ſuch Promiſes as are made betwixt Men[1]; tho' it be impoſſible, that the Divine Promiſes ſhould fail, yet it would be highly arrogant and indecent to ſay, That theſe ſeeming Engagements on God's Part do give a *Right* to Man, which ſhall hold valid againſt his Maker. Add *Grot. loc. cit.* ſ. 3, 4.

VIII. It is a nice Remark of Mr. *Hobbes*[a], and worthy our Notice, That *in relinquiſhing or transferring Right, if we make uſe of no Signs except Words, thoſe Words ought to be of the Time preſent or paſt.* For he, for inſtance, who ſhall ſay in the *future*, *To morrow will I give*, plainly ſhews that he has not given already; and therefore the Right he has over the Thing promiſed continues firm and entire all this Day, and all the next Day too, and ſo on, unleſs in the mean time he actually give it, or paſs away the Right of it by a new Promiſe. Yet in caſe, beſides his Words, he made uſe of other Signs ſufficiently arguing, that it was his Will to transfer the Right at preſent; then the Words, tho' Grammatically future, ſhall not hinder the Engagement from taking full Effect. But where theſe other Signs are wanting, we ought to be very tender of putting ſo wide and forced an Interpretation on Verbs of the future Tenſe, as to make them imply a preſent Act of Alienation. For ſince we are not wont to make over our Goods to others, without the Proſpect of ſome Advantage to ourſelves, which Advantage does not, in theſe Acts of Grace or free Gift, viſibly appear; therefore, in conſtruing ſuch an Act, to which Men are commonly averſe, we ought not to preſume on any Thing farther, than what is by expreſs Tokens of the Will declar'd. Eſpecially ſince it is uſual by theſe Terms to ſignify only a *ſimple Mark of Good Will*[1], and ſuch as ſhall, at preſent at leaſt, have no Effect. So that whilſt a Man ſpeaks in the future[2], he is ſuppos'd to be yet under Deliberation; and before the Time prefix'd, perhaps his Affection and the Merits of the Perſon may alter; or ſome Misfortune may intervene, rendring it incommodious for him to part with what he intended. In the ſame manner as he that makes his *Will*, does not transfer his Right immediately on the Heir; but he is ſuppos'd ever to have this Clauſe or Condition in his Mind, *Such a Perſon ſhall be my Heir, unleſs I alter my Will before my Deceaſe.* Tho' indeed it be look'd upon as an Argument of Levity and Inconſtancy, for a Man to cheat and delude another with falſe Hopes and Expectations.

The Caſe is very different, if I expreſs myſelf thus, *I have given, or do give to be deliver'd to morrow:* For this is plainly, giving a Man to day the Right of having a Thing to morrow, or transferring

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Mr. Barbeyrac's *NOTES on* §. VI.

[1] See §. 10. following.

Mr. Barbeyrac's *NOTES on* § VII.

[1] See *Lib.* 2. *Chap.* 1. §. 3. foregoing,

Mr. Barbeyrac's *NOTES on* §. VIII.

[1] Is the ſame as (1) at the bottom of the *Page*.

[2] We may obſerve here, as Mr. *Hertius* directs us, what the modern Lawyers call, *Tractatus ineundarum Conventionum*, i. e. a Treaty in order to an Agreement; or, *Pacta contractuum præparatoria*, i. e. ſome previous Covenants in order to Contracts, which we may call, Preambles or Diſcourſes, by which we ſeem diſpoſed to enter upon a Bargain, and teſtify ſome Deſire of Agreement, but conclude nothing poſitively. For in this Caſe every Man is free, and there muſt be a new Treaty to render the Agreement full and entire. Hence it is ſaid in the *Digeſts*, That if any one hath promiſed to lend us any Money, we may receive it, or not, as we pleaſe, *Qui pecuniam creditam accepturus ſpopondit creditori futuro, in poteſtate habet, ne accipiendo ſe ei obſtringat*, Lib. 12. Tit. 1. *De Rebus Creditis*, &c. Leg. 30. See what Mr. *Hertius* ſays there, and in his *Paræmia Jur. German.* Lib. 1. c. 8. §. 5.

[a] *De Cive*, c. 2. ſ. 6, &c. & *Leviath.* Engl. *Part* I. *c.* 14. (1) In the laſt Editions of the Original there is *effectum* for *affectum*, which entirely corrupts the Senſe; and yet Mr. *Hertius* has retain'd it in the laſt Edition of 1706.

to him to day the Right over a thing, which ought to morrow to be actually deliver'd to him. Nor is it any Objection againſt what we have been aſſerting, that according to the ordinary Form and Manner of Speech, moſt Promiſes are expreſs'd in Terms of Futurity. For in the moſt ſolemn Engagements by formal *Stipulation*, or by Oath, we uſe the ſame way of ſpeaking, *You* ſhall *have ſuch a thing of me*, *I will give ſuch a thing*, &c. The reaſon of which Cuſtom is, that the delivering of a thing promis'd, generally follows at ſome *Diſtance*. And indeed, we can ſcarce call it a Promiſe, when at the ſame time the Intention of giving is declared, and the thing actually tender'd; inaſmuch as there ſeems here, either to have been no *Obligation*, or ſuch as expired in the very minute that it was contracted. However, it is plain the Generality of Men never think they properly *have* a thing, till they get firm Hold and full Poſſeſſion of it. If then theſe Terms of Futurity occur in a *perfect Promiſe*, as for inſtance, *To morrow I will give you an hundred Pounds*, the Senſe of them amounts to this, *I now give you a Right to have and to require of me the ſaid Sum*; *and I likewiſe oblige myſelf on the Day appointed*, *to deliver it to you accordingly.* We may ſettle the whole Point with more Brevity, by only ſaying, that Verbs of the future Tenſe, made uſe of in Promiſes, and eſpecially the Term of *Giving*, do either imply an *Obligation* hereafter to be contracted, and then they neither transfer the Thing, nor the Right, to another; or elſe they import the delivering of a Thing hereafter, the Right to which either is now, or has been formerly transferr'd; and then they do not hinder the *Promiſe* from being moſt perfect and compleat.

IX. It is requiſite, that whilſt we are engaged on this Point, we endeavour to ſettle a famous Queſtion, which has been much canvaſs'd by Authors, Whether there can be a Force of *obliging* in bare Promiſes, or in bare Pacts, whilſt they are no more than verbal Agreements, and are not ſtrengthen'd by any actual [1] Performance betwixt the Parties [2]? *Connanus* the *Civilian* has been the principal Aſſertor of the negative Side; whom *Grotius* [a], and others have labour'd to confute. And indeed, it has been the fix'd Opinion of wiſe and learned Men in all Ages, that *Faith* ought to be kept inviolably, though given only in *Words*; or that a Man by *ſpeaking* only, without the Intervention of any *Deed*, may lay on himſelf a Neceſſity of ſome future Performance [3] [4]. *Tull.* Off. I. c. 7. *The Foundation of Juſtice is Faith*, that is to ſay, *a Firmneſs and Truth in our Words*, *Promiſes*, *and Contracts*. *Hence ſome will have the word* Fides *to be call'd* Quia fit quod dictum eſt, *becauſe that which was ſaid is done*, *Ulpian in* l. i. *D. de Pactis*. What is ſo agreeable to human Faith, as to obſerve mutual Agreements? *Vid.* D. l. ii. c. 14. *de Pactis*. It was a very wicked Jeſt of the petit Prince of *Bantam*, when being reproved for Breach of Promiſe, he anſwer'd, His Tongue had no Bone in it, to make it more ſtiff than was neceſſary for his Intereſt [5]. Whether *Connanus* has with any Colour oppoſed this univerſal Judgment, will appear, if we beſtow a little time on taking his chief Arguments under Conſideration. In the firſt place then, he ſays, that *he who raſhly believes a Promiſe made without Cauſe*, *is no leſs to blame*, *than the vain Perſon who made it.* Now here all the Difficulty lies in explaining what he means by a Promiſe made without *Cauſe*. If he would be underſtood of ſuch Promiſes as if not perform'd, it brings no Loſs or Prejudice to the Party, to whom they were directed, and if fulfill'd, muſt needs create Trouble or Damage to the Performer; we are willing to allow, that Engagements of this kind produce no *Obligation*. For how can a Man have any Right of requiring me to put myſelf to any Charges, or any Toil, in doing a thing which ſhall profit him nothing [6] [b]? And it is indeed againſt Reaſon, to undertake an Action which can produce no Good, and may produce Evil. Thus for inſtance, ſuppoſe you had got me to promiſe you that I would forbear eating four Days together; upon what account ſhould I ſtand to ſuch a raſh Engagement, if ſo long a Faſt would prejudice my Health, and yet would contribute nothing to your Intereſt or Advantage? Therefore in this Caſe it is alike vain and fooliſh in one Man to make the Promiſe, and in the other ſeriouſly to challenge the Performance. Beſides, ſince Promiſes are Matters of *Grace*, or free Favour, they ought to be interpreted under this Condition or Limitation, *Provided I can compaſs the Thing I ſpeak of*, *without any conſiderable Damage to myſelf*. Nor can the Perſon to whom I make the Promiſe be ſo impudent and unreaſonable, as to deſire that my Kindneſs ſhould be an Injury to me, and that I ſhould enrich him

Mr. BARBEYRAC's *NOTES on* §. IX.

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[1] Συνάλλαγμα. See what is ſaid, *Lib.* 5. *c.* 2. §. 2, 3.

[2] *Comment. Jur. Civ.* Lib. 5. c. 1. But Mr. *Buddeus* in his *Element. Philoſ. Pract.* Part II. c. 4. §. 9 aſſerts, That this Lawyer is falſly accuſed of any ſuch Opinion. Mr. *Hertius* alſo rejects the Opinion of a certain nameleſs Perſon, who juſtified *Connanus*, and maintains, That that Perſon ſpake only of ſimple Contracts, conſidered as they are uſed in the *Roman* Judicature. For he ſays, We muſt here diſtinguiſh between theſe two Propoſitions; the one is, That Promiſes produce a natural Obligation, and the other, That the natural Obligation which ariſes from a Promiſe, does not produce a Civil Obligation, which is founded upon a Maxim of the Law of Nature, which authorizes a Sovereign Prince to declare what Obligations ſhall be valid, and what null. Nevertheleſs, according to Mr. *Hertius*, we need only to read *Connanus*'s Reaſons to convince us, that he denies Promiſes to produce any Obligations able naturally and of themſelves to give a perfect Right, without the Aſſiſtance of the Civil Law.

[3] The *Latin* of *Cicero* is, *Fundamentum Juſtitiæ eſt fides*, i. e. *dictorum conventorumque conſtantia & veritas, eaque de cauſa fidem appellatam, quia fiat quod dictum eſt.*

[4] And *Ulpian*'s, *Quid tam congruum fidei humanæ, quam ea, quæ inter eos placuerunt ſervare?*

[5] *Mr.* Barbeyrac's *5th Note is inſerted in the Text.*

[6] We muſt diſtinguiſh here between Pacts or Agreements, which may be called Momentary, which are perform'd immediately, and leave no durable Effect after them, and Succeſſive, whoſe Performance is accompanied with a long Train of Effects. As to the firſt, there is no Neceſſity that they ſhould have any impulſive Cauſe, or ſuitable Motive; but as to the latter, they do not oblige, unleſs they have a ſufficient impulſive Cauſe, or which comes to the ſame, unleſs they tend to profit. That ſort of Engagements which want this is not only unprofitable, but hurtful to Society; becauſe by the Duration of their Effects they may cauſe Trouble and Diſorder in the Affairs of the World. As for example, if any one promiſe not to alienate his Eſtate without the Conſent of his Neighbour. See the *Digeſts*, Lib. 2. Tit. 14. *De Pactis*, Leg. 61. (and Mr. *Hertius*'s Diſſertation, entitled, *De Pacto, ne Dominus rem ſuam alienet*, Tom. 3. Opuſc.) In fine, Men having eſtabliſh'd Pacts and Covenants for their Advantage, and not to hurt or deceive one another, every Agreement, which aims not at the laſt of theſe Views, may be, and ought to be look'd upon as null by the natural Law. *Tit. Obſerv. in Lauterbach. Obſ.* 59. See *Lib.* 5. *c.* 2. §. 3. *Note* 3.

[a] L. 2. c. 11. ſ. 1, & 4.

[b] Vid. *D. L.* 2. T. 14. Leg. 61.

by my own Loſſes[7]. It often falls out[8], that even not to keep one's Promiſe ſhall be juſt. For all muſt be referr'd to the fundamental Rules of Juſtice; as firſt, that no Man be wrong'd; and ſecondly, that the publick Good be as far as poſſible promoted. It may likewiſe happen, that the Performance of a Promiſe or Contract would prove highly prejudicial[9], either to one of the Parties, or to the other. For if *Neptune* (as it is in the Story) had not made good his Promiſe to *Theſeus*, *Theſeus* had not been ſo unfortunately deprived of his Son *Hippolytus*. Therefore neither are we to keep thoſe Promiſes which are unprofitable to the Perſon to whom they are made; nor thoſe which are more hurtful to ourſelves than advantageous to him. It is a Breach of Duty to prefer a greater Damage to a leſs. If you promiſe to plead another Man's Cauſe, and in the *Interim* your Son falls dangerouſly ill, it will be no Violation of your Duty to recede from the *prior* Engagement; and the Fault will be much greater in the other Party, if he complain of ſuch a Diſappointment. *Tull.* Off. I. Vid. *D. L.* 50. *T.* 17.

Add. *Senec.* de Benef. l. iv. c. 35, 39. *Tull.* Off. l. iii. c. 24. This Caſe is propoſed, *I have a Remedy given me for the Dropſy, upon this Condition, That if it cures me, I am never to uſe that Medicine again. Within a few Years after I have been thus cured, I relapſe into the ſame Diſeaſe, and the Perſon with whom I contracted will not give me leave to make any farther uſe of it. What am I to do here? It is Inhumanity in him to refuſe me, beſides, that my uſing it would do him no hurt. I may therefore ſafely conſult my own Life and Health.*

But if by a *Promiſe made without Cauſe*, *Connanus* underſtands only a gratuitous, or free Promiſe without proſpect of Gain; then his Aſſertion will overthrow the whole Buſineſs of Beneficence and Liberality, and make all the Offices of Humanity baſe and mercenary Performances. For why ſhould not I credit a Man, who knowing his own Abilities has bid me expect ſome free Gift from him, purely that I may have occaſion to love and to eſteem him? And ſince if he had pleas'd, he might ſafely have forborn the Promiſe, why did he order me to depend upon his Word, if he deſign'd not fully to oblige himſelf to the making it good? For the denying of a Benefit is then only void of Injury, when a Man is bound to confer it only by the Law of Humanity; not when by expreſs Promiſe he has given another a *Right* to receive it.

X. *Connanus* urgeth farther, "That ſince Promiſes of this kind commonly ariſe from Oſtentation rather than good Will, or at leaſt from Raſhneſs and Inconſiderancy, ſuppoſing the Deſign to be real; the Fortunes of Men would be in great Danger, were they bound to perform every thing they ſaid." It was perhaps on ſome ſuch Principle, that the Antients imagined the Oaths and Proteſtations of Lovers were invalid, and that the Gods excuſed the Breach of them, as proceeding from Minds blinded with Paſſion. *Plato* in *Sympoſ.* & *Poetæ paſſim.* But indeed the Danger here mention'd is chiefly in Imagination. For we do not attribute a Power of *obliging* to any Promiſes, but to ſuch as are made upon ſerious and deliberate Purpoſe; and he that miſtakes Jeſt for Earneſt[1], ought to pay for his want of Apprehenſion. On the other hand, to promiſe really more than one can conveniently perform, as it muſt be acknowledg'd a Fault, ſo it would be a much greater, and indeed a piece of Barbarity, ſtrictly to challenge and require it. Aurelian *in* Flavius Vopiſcus, *c.* 35. *Setting out on an Expedition, and promiſing the People to beſtow Crowns of two pound weight on them, if he return'd victorious, when the Diſtribution was to be made, the Crowns proved only of Bread, whereas the People expected them of Gold*[2]. And beſides, we ſhould take care to diſtinguiſh between ſuch Terms of [3] Honour and Eſteem, as Perſons make uſe of to expreſs, in an indefinite manner, their good Affection towards us; and ſuch particular Engagements as they bind themſelves by, to perform ſomewhat on our behalf: For Men of good Nature and good Breeding often expreſs their Kindneſs and Civility in very ample Terms; they declare themſelves to be *entirely ours*, and offer all they have to our Service and Diſpoſal[4][a]. Old *Æolus* in *Virgil* had this Piece of Gallantry:

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[7] This is contrary to Nature, according to the *Roman* Lawyers. *Jure Naturæ æquum eſt, neminem cum alterius detrimento & injuria fieri locupletiorem*, Digeſt. Lib. 50. Tit. 16. De Diverſ. Reg. Jur. Leg. 206.

[8] The *Latin* of *Cicero* is this, *Sed incidunt ſæpe tempora, cum ea, quæ maximè videntur digna eſſe juſto homine, eoque, quem virum bonum dicimus, commutantur, fiuntque contraria; ut reddere depoſitum, promiſſum facere, quæque pertinent ad veritatem, & ad fidem, ea migrare interdum, & non ſervare ſit juſtum. Referri enim decet ad ea, quæ propoſui in principio, fundamenta juſtitiæ, primum, ut ne cui noceatur; deinde, ut communi utilitati ſerviatur. Cum tempora commutantur, commutatur officium, & non ſemper eſt idem; poteſt enim accidere promiſſum aliquod, & conventum, ut id effici ſit inutile, vel ei, cui promiſſum ſit, vel ei, qui promiſerit. Nam ſi, ut in fabulis eſt, Neptunus, quod Theſeo promiſerat, non feciſſet, Theſeus filio Hippolyto non eſſet orbatus. Ex tribus enim optatis, ut ſcribitur, hoc erat tertium, quod de Hippolyti interitu iratus optavit.* (See Eurip. Hippolyt. *v.* 1315, *&c.*) *quo impetrato, in maximos luctus incidit. Nec promiſſa igitur ſervanda ſunt ea, quæ ſint iis, quibus promiſeris, inutilia, nec ſi plus tibi noceant, quam illi proſint, cui promiſeris. Contra officium eſt majus non anteponi minori, ut ſi conſtitueris te cuipiam advocatum in rem præſentem eſſe venturum, atque interim graviter ægrotare filius cœperit, non ſit contra officium, non facere, quod dixeris, magiſque ille cui promiſſum ſit, ab officio diſcedat, ſi ſe deſtitutum queratur.* Cicero de Offic. Lib. 1. c. 10. *Si quis medicamentum cuiquam dederit ad aquam intercutem, pepigeritque ne illo medicamento unquam poſtea uteretur, ſi eo medicamento ſanus factus fuerit, & annis aliquot poſt inciderit in eundem morbum, nec ab eo quicum pepigerat impetret, ut item eo liceat uti, Quid faciendum ſit? Cum is ſit inhumanus, qui non concedat uti, nec ei quicquam fiat injuriæ, vitæ & ſaluti conſulendum.* Ib. Lib. 3. c. 24. where there are alſo ſome other Examples.

[9] See *Lib.* 1. *c.* 3. §. 7. *Note* 1.

Mr. Barbeyrac's *NOTES on* §. X.

[1] See §. 5. *Note* 3. aforegoing.

[2] Mr. *Thomaſius* thinks that the People were beſotted when they believed the Crowns ſhould be of that weight; but on the other hand, that the Emperor mocked his Subjects by giving his Promiſe ſuch a ſtrait Interpretation, which look'd like a Trick. There was really cauſe to believe that the Crowns promiſed by the Emperor were not Crowns made of Dough.

[3] *Ea autem ſola Dicta ſive Promiſſa admittenda ſunt, quæcunque ſic dicuntur, ut præſtentur, non ut jactentur*, Digeſt. Leg. 21. Tit. 1. *De Ædilitio edicto*, Leg. 19. See Mr. *Hertius*'s *Paræmia Jur. German.* Lib. 1. c. 10.

[4] Is the ſame as (*a*).

[a] See what *Ahab* ſaid to *Benhadad*, 1 Kings xx. 3, *&c.* Tho' *Joſephus* in his Antiquities, *l.* 8. *c.* 8. otherwiſe interprets the Place. *Grotius* ſaith, *Ahab* underſtood the Words in this Senſe, *I give up myſelf, and all I have in way of Homage and Fealty*; but *Benhadad* took them in a ſtricter Meaning, *for the very Propriety and Poſſeſſion. Add. Polyb. excerpt. Leg.* 13. & Liv. *l.* 36. *c.* 28. concerning *Phaneas* the *Ætolian* Ambaſſador.

——*Tuus, O Regina, quid optes,*
Explorare labor; mihi juſſa capeſſere fas eſt.
Æn. 1. *v.* 80, 81.

——Great Queen, be pleas'd to ſay
The thing you wiſh: my Duty's to obey.

Here the Goddeſs had been uncivil, ſhould ſhe have taken Advantage of his general Compliment. Words of this Nature then, how ever ſeriouſly deliver'd, oblige a Man to no certain Performance; but only ſerve to teſtify his hearty Reſpect and kind Inclination towards another[a]. But thoſe Promiſes by which we impower another to expect ſome particular and determinate Service from us, ought moſt ſtrictly to be fulfill'd, becauſe the other Party building on our Word has adjuſted his Affairs accordingly. So, though there now and then happens an Inſtance of a vain Prodigal, who ſhould have been put under Government for a Fool, or a Madman, that ruins himſelf by profuſe and inconſiderate Engagements, this ought to be no Reaſon why we ſhould affirm all verbal Obligations to be invalid, and baniſh them from the uſe of human Life: As we don't condemn *Suretiſhip* in general, though many have ſuffer'd ſo ſeverely by it. Upon the whole, ſince an expreſs Promiſe paſſes into a Debt, Men ought to be very cautious of engaging for more than they are able to compaſs. And 'tis not Modeſty, but a vicious Weakneſs in any Perſon to be ſo eaſy and tender, that he dares not deny the moſt impudent and unreaſonable Petitioner[5].

XI. What *Connanus* alledges more in defence of his Opinion, may be ſolv'd with little Difficulty: he ſays, "'Tis fit that ſome things ſhould be left " to every Man's Honeſty and free Bounty, and " that all Matters ſhould not be reduced to the " Rigor and Neceſſity of ſtrict Obligation. That " the ſtudy of Integrity and Conſtancy would im" prove amongſt Mankind, were there but a Field " left for thoſe Virtues to exert and exerciſe them" ſelves in; which is hardly poſſible, if Men are " compell'd to obſerve all the Promiſes they make. " But that otherwiſe it was a great and glorious " thing to perform, what by Words or other Signs " you ſhew'd your Intention of doing; and ſo much " the more glorious, the leſs it ſeem'd conſtrain'd. But indeed there is ſtill left ſcope enough for Liberality, though you give a Man a Right of demanding ſomewhat from you, which at firſt you might have ſecurely denied him.

And ſince there muſt needs paſs ſuch a mighty number of Promiſes amongſt Men, whilſt they continually want the Aſſiſtance of each other, it is more for the Intereſt of human Affairs, that there ſhould be leſs Glory in the Act of keeping Faith, than that ſo many Perſons ſhould be deluded by other Mens Inconſtancy and Irreſolution. The Law of Nature commands us to lend to another, ſo far as we can do it without any conſiderable Prejudice to our ſelves. But the Obligation is rendered more ſtrict and binding, if by our own free Offer we reduce this general and unlimited Injunction of Nature to a particular Engagement, and aſſure the Party that he may expect for certain it ſhall be fulfill'd. So that this Argument is plainly falſe, *If I had not promis'd, it had been nevertheleſs the Duty of a juſt and good Man to relieve the Indigence of others; therefore it is laudable to ſtand to Promiſes, not becauſe we have bound our ſelves by giving our Word, but becauſe the Party is in real want of our Succour.*

He is willing to grant thus much, That if a Man by breaking his Promiſe, has caus'd the other Party to ſuffer Damages (who for inſtance might depend perhaps on his Word, and ſo neglect to provide for his own Neceſſities) that in this caſe he ſhould be bound to make good the Loſs ſuſtained. And from this Conceſſion we may as fairly infer, That Promiſes may be challeng'd, and that we ſtand oblig'd to perform them, leſt we prejudice the Perſons to whom they were directed. But it is very dangerous to draw thence ſuch Conſequences as theſe; That *when you would not be in a worſe Condition, ſhould I break my Promiſe, than you was before I made it, I may then have liberty of revoking it; ſuppoſing that nothing has yet been done towards the Performance. And it is more againſt Nature for you to require me to make good this Engagement againſt my Will for your Gain and Benefit, than it would be for me to recal it without your Detriment.* For the Duty of *Humanity* is not fulfill'd by your not hurting another; but you ought as far as you are able poſitively to advance his Good. Therefore when you have peculiarly engaged your ſelf to ſuch a kind Performance on his behalf, to repent of your Deſign only with this Conſideration, That he is not like to be the worſe for your Inconſtancy, looks as if it were a thing not worth a Man's Regard to improve the Condition of his Neighbour. The Caſe then is the ſame with theſe *verbal* Promiſes as with thoſe *Pacts* which have receiv'd the farther Confirmation of ſome Deed between the Parties; and no one will pretend that we may run from thoſe, when we ſee that our change of Mind will not render the other Perſon's Condition worſe, but only negatively, *not better*. Beſides, as *Grotius* well obſerves from this Opinion of *Connanus*, taken in ſo groſs and general a manner as he expreſſes it, 'twill follow, That [1] Articles of Agreement made between the Princes and the People of different Nations, ſo long as nothing has yet been perform'd on either ſide, are invalid; and eſpecially in ſuch places where no particular forms of Leagues or Covenants have been receiv'd into Uſe. And were this true, a ge-

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[5] To which purpoſe *Terence* ſpeaks in his *Andria*, Act 4. Scene 1. v. 5, *&c.*

——*Imo, id genus eſt hominum peſſimum*
In denegando modo queîs pudor eſt paululum:
Poſt, ubi jam tempus eſt promiſſa perfici,
Tum coacti neceſſariò ſe aperiunt & timent,
Et tamen res cogit eos denegare. Ibi
Tum impudentiſſima eorum oratio eſt,
Quis tu es? Quis mihi eſt? Cur meam tibi? Heus
Proximus ſum egomet mihi! attamen, ubi fides?
Si roges, nil pudet. Hic, ubi opus eſt,
Non verentur, illic, ubi nihil opus eſt, ibi verentur.

Plutarch alſo in *Brutus* relates it thus, Τὴν ἀπὸ τῶν ἀναισχύντων λιπαρούντων ἧτταν, &c. It is unbecoming a great Man to yield to impudent Petitioners. *Brutus* uſed to ſay, They do not ſeem to have employed their Youth well, who are not able to deny any thing.

Mr. BARBEYRAC's *NOTES on* §. XI.

[1] We ſhall treat of this, Lib. 8. c. 8, and 9 following.

[a] *Add. Fern. Vaſq. Controverſ. illuſtr.* l. 1. c. 10. ſ. 20, *&c.*

neral Diffidence and Jealouſy muſt reign amongſt Mankind, and no one muſt *believe* another any farther than he can *ſee* him. Which cloſe and immediate way of tranſacting the Condition and Circumſtances of many Men will not admit of; who may nevertheleſs have occaſion to ſettle Buſineſs with each other.

The laſt Argument of *Connanus* taken from the Practice of the *Roman* Courts of Law, which granted an *Action* only upon ſuch Promiſes as were confirm'd by *Stipulation*, is eaſily anſwer'd by obſerving, That the Reaſon of this Caution in the Civil Law was not becauſe ſerious Promiſes do not bind by the meer Law of Nature; but that the Ceremony of theſe ſolemn[2] Forms might put Men on conſidering thoroughly, whether it was expedient for them to enter into a Promiſe, which it would be impoſſible afterwards to revoke. As likewiſe, that the things promis'd might by this means be expreſs'd more punctually and plainly, leſt any Obſcurity in that reſpect might give occaſion to future Cavils and Diſputes [a].

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[2] See Lib. 5. c. 2. §. 3. following. But Mr. *Thomaſius* maintains, nevertheleſs, that they that eſtabliſh'd theſe Forms among the *Romans*, had ſuch Deſigns as tended more to advance their private Intereſt, than the publick Good. The *Patricians* labour'd by this means to keep the People in a Dependence upon them, and by making the Laws obſcure, interpreted them as they pleaſed, and by multiplying Forms of Law without end, opened a large Field for Contentions and Diviſions. This *Pomponius* the Lawyer tells us plainly in a Fragment preſerved in the *Digeſts*. *Deinde ex his Legibus* [*duodecim tabularum*] *eodem tempore fere actiones compoſitæ ſunt, quibus inter ſe homines diſceptarent; quas actiones, nè Populus prout vellet inſtitueret, certas ſolenneſque eſſe voluerunt*, &c. ——— *Et quidem ex omnibus qui ſcientiam* [*Juris civilis*] *nacti ſunt, ante Tiberium Coruncanium* (He was the firſt of the People that arrived at the Dignity of *Pontifex Maximus*, i. e. the High-Prieſt) *publicè profeſſum neminem traditur, cæteri autem ad hunc vel in latenti jus civile retinere cogitabant, ſolumque conſultoribus* [*vacare*] *potius, quam diſcere volentibus præſtabant*, Lib. 1. Tit. 2. *De Origine Juris*, Leg. 2. §. 6. 35. See the *Nævi Juriſpr, Rom.* by Mr. *Thomaſius*, l, 1. p. 12, *&c.* and his *Divine Civil Law*, l. 2. c. 11. §. 60. in the Notes.

[a] *Add.* l. 19. Tit. 5. *D. præſcript. verb.*

CHAP. VI.

Of the Conſent required in making Promiſes and Pacts.

The Contents of every Paragraph of the ſixth Chapter.

I. *Conſent is required to make Promiſes and Pacts.*
II. *Conſent is ſignify'd openly, or tacitly.*
III. *Conſent ſuppoſes the uſe of Reaſon.*
IV. *Great Drunkenneſs hinders it.*
V. *Of ſuch as are under Age.*
VI. *Of Error in Promiſes.*
VII. *Of Error in Promiſes and Contracts.*
VIII. *Of Fraud.*
IX. *A Suſpicion of a Cheat makes Pacts void.*
X. XI. XII. XIII. *Fear makes Promiſes and Pacts void.*
XIV. *How Promiſes, null in themſelves, may be made valid.*
XV. *Of the Conſent of the Perſons to whom a Promiſe is made.*
XVI. *Of the Signs and Inſtruments of Conſent.*

SINCE the regular Effect of Pacts and Promiſes is to abridge and reſtrain our Liberty, and to lay on us the Burthen of neceſſarily doing ſuch or ſuch a thing, which before we might have perform'd or omitted at our pleaſure; there can be no better Argument to hinder a Man from complaining of this Burthen, than to alledge, That he took it upon him by his own free Will and *Conſent*, when he had full Power to refuſe it [1].

II. This *Conſent* is uſually declared by expreſs Signs, as by *Speaking*, *Writing*, *Nodding*, &c. Yet ſometimes, without the help of any ſuch Tokens, it is ſufficiently gather'd from the Nature and Circumſtance of the Buſineſs [a] [1]. And it is well known that [2] *Silence* it ſelf, in many Caſes, is interpreted for Conſent. Thus *to be ſilent, is to own your Crime*, Euripid. Iphigen. in Aulid. *v.* 1142. *vid. D.* L. l. Tit. 17. But in all theſe Exceptions it is ſtrictly required, That the State and Condition of Affairs be ſuch as ſhall on every ſide conſpire to ground the Preſumption; and that not ſo much as one probable Conjecture appear to the contrary. For otherwiſe it would be very hard Meaſure to put a Man under *Obligation*, upon any little Hint or Symptom of Agreement. And thus we ſee wherein the proper Nature of *tacit Pact* conſiſts; that it happens, when we expreſs not our Conſent by the Signs generally made uſe of in human Commerce and Tranſactions; but leave it to be ſuppos'd from the Buſineſs it ſelf, and from the

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Mr. Barbeyrac's *NOTES* on Chap. VI. §. 6.

[1] The wiſe King *Solomon* has expreſſed this Matter well in theſe Words, which *Grotius* has quoted, *My Son, if thou haſt promiſed any thing to another, and thou haſt bound thy hands in favoar of him for whom thou art engaged, thou art ſnared with the Words of thy Mouth, thou art taken with the Words of thy Mouth*, Prov. vi. 1, 2. Hence it is that the *Hebrews* call Promiſes a Bond, *Numb.* xxx. 5. See alſo what *Grotius* ſays, Lib. 2. c. 11. §. 4. numb. 1.

Mr. Barbeyrac's *NOTES* on §. II.

[1] Is the ſame with [a] at the bottom.

[2] *Qui tacet, non utique fatetur, ſed tamen verum eſt, eum non negare.* Digeſt. l. 50. Tit. 17. *De Diverſis Regulis Juris.* Leg. 142. See Numb. xxx. 5. with Mr. *Le Clerc*'s Notes, and Mr. *Hertius*'s *Paræmia Jur. German.* c. 7.

[a] *Labeo ait convenire poſſe vel re, vel per epiſtolam, vel per nuncium; inter abſentes quoque* [*poſſe*]: *ſed etiam tacite conſenſu convenire intelligitur.* *Digeſt.* l. 2. Tit. 14. *de Pactis*, *Leg.* 2. *Conventiones etiam tacitæ valent.* Ibid. Leg. 4. See alſo l. 13. Tit. 6. *Commod. vel contr.* Leg. 13. §. 2. in fin.

Circumſtances that attend it [3]. What we moſt commonly meet with of this kind is, That when ſome principal and leading Contract has been entred upon by *expreſs* Agreement, ſome other *tacit* Pact is included in it, or flows from it, as we cannot but apprehend upon conſidering the Nature of the Affair. In the ſame manner moſt Covenants leave ſome *ſlight* Exceptions and Conditions to be *underſtood.* But we muſt have a care of ſtretching theſe Indulgences any farther than is well conſiſtent with the carrying on of Trade and Buſineſs in the World; leſt they ſhould prove of ill Conſequence to the Validity of Contracts, by rendring them too ſlippery and uncertain.

Of *Tacit Pacts*, it may not be amiſs to offer theſe few Inſtances: A Stranger comes into a *State* where Foreigners are treated with great Civility, and he comes in a friendly manner here; though he does not expreſly ſwear Fealty to the Government, yet he is ſuppos'd by the very Act of his coming, tacitly to have engaged, That according to his Rank and Condition, he will conform to every Law of the Place, ſo ſoon as he ſhall underſtand that ſuch a Law was deſigned to reach all manner of Perſons who ſhould abide in thoſe Territories. And on the other ſide, the Government tacitly engages to grant him Security and Protection, and the Benefits of publick Juſtice.

A Man is abroad at a diſtance from his Family and his Concerns, in the mean time a Neighbour without particular Orders, tranſacts ſome Buſineſs for him; here again we muſt ſuppoſe a *tacit* Pact, by virtue of which the one having lent his free Aſſiſtance and Service, the other is bound to requite the Pains, and to refund the Charge. In as much as it may be fairly preſum'd [4], That had the abſent Party known how Affairs ſtood, he would readily have conſented to the whole Management.

A Gueſt ſits down to a Table at a publick Houſe; and though he has not exchang'd a Word with the Hoſt about the Price of his Dinner, yet by the bare Act of ſitting down to eat, he is ſuppos'd to conſent to the Payment of his Scot; ſince all know that this is not a Place where Men are treated for nothing.

In like manner, the *Obligation* between a *Guardian* and his *Ward* [5] has its Riſe from a *tacit* Contract [a].

As for thoſe *tacit* Pacts which we obſerv'd to flow from principal Contracts, and which we may call *Acceſſary*, theſe Examples will ſhew the Nature and the Manner of them. A Man that bargains with another to have free *Ingreſs* to a Place [6], is ſuppos'd at the ſame time to obtain Liberty of *Regreſs* from it, though this be not expreſly mentioned; becauſe otherwiſe the former Agreement would be to no purpoſe. A Prince or Magiſtrate, who by Covenant gives leave to Strangers to frequent his Markets, is ſuppos'd to conſent likewiſe, That they ſhall carry home the Goods they purchaſe there. As on the contrary, it would be moſt ridiculous Madneſs for me, ſuppoſing I have ſold a Field to another, to deny him the Liberty of poſſeſſing it here, and to deſire he would tranſlate it to another place. In the ſame manner, he who lets out a Chamber to hire, is ſuppos'd to conſent withal, that the Lodger ſhall make uſe of ſuch other parts of the Houſe, as he cannot be without; as of the Doors, Entries, and the like; at leaſt ſo far as to have free Acceſs to his Apartment, and free Paſſage from it.

Inſtances of *tacit* Exceptions and Conditions are ſo frequent, that 'tis not neceſſary to ſet down any in particular. But we muſt obſerve this of them in general, That they were ever to be interpreted with the greateſt Strictneſs and Severity of Judgment; and that they will hold good no farther than it appears from very ſure Grounds and Preſumptions, that they were conſented to by the Parties whom they concern. *Add. D.* XXII. *tit.* 3. *de Probation. & Præſumptionib. Leg.* XXIV. For otherwiſe it would be eaſy to thruſt a troubleſome *Obligation* upon a Man againſt his Will. And were too great a Licence given to theſe ſecret and *implied* Reſerves, there is ſcarce any Covenant, which might not be either annull'd or evaded [7] [b].

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[3] A tacit Conſent properly ariſes from certain things done, or omitted on purpoſe; but yet of themſelves do not imply directly an Approbation of the thing that is doing. Further, we diſtinguiſh a preſumptive or ſuppoſed Conſent, as the *Roman* Lawyers ſpeak, which conſiſteth in this, That tho' a perſon be abſolutely ignorant of what paſſes, and conſequently could neither indirectly nor directly agree to it, yet we ſuppoſe he acquieſces in it, becauſe we believe, That if he knew it, he would freely conſent, or at leaſt that he ought ſo to do by the Maxims of Natural Equity: But this ſort of Conſent is of no uſe nor neceſſity in Civil Life; and the Lawyers invented it only to found certain Obligations upon, for which they could not ſee any true Principles. If we conſider this Matter well, we ſhall find that what they refer to a preſumptive or ſuppoſed Conſent, may eaſily be deduced, either from a tacit Conſent, properly ſo called, or from the neceſſary Duties of Society, without any other Conſent. And hence it is, that Terms *tacit* and *preſumptive* are often uſed one for another in this Caſe. Our Author diſtinguiſhes neither the Terms nor Notions, as appears from the Examples he alledges of them that do another's Buſineſs in his Abſence from his Family, and of thoſe who take upon them a Guardianſhip. *Titius*'s *Obſerv. on Pufendorf,* 205, 206. and in *Compend. Lauterbach, Obſerv.* 56. See l.4. c. 13. §. 5. Note 11. We may alſo find ſome very good Remarks upon this Diſtinction of a tacit and preſumptive Conſent in Mr. *Thomaſius*'s *Inſtit. Juriſprud. Divin.* l. 2. c. 7. §. 19, &c. whoſe Notions, tho' they ſeem different, may eaſily be made to agree with our Author's, which I have recited and repreſented in my manner. See alſo Mr. *Thomaſius*'s Diſcourſe, entitled, *Philoſophia Juris de Obligationibus & Actionibus*, which is the third among his Diſputations at *Leipſick*, c. 2. §. 132, *&c.*

[4] See the foregoing Note, and what is ſaid farther, l. 4. c. 13. Note 3. following.

[5] See l. 4. c. 4. §. 15. and l. 5. c. 4. §. 1. Note 5.

[6] See *Grotius, De Jure Belli & Pacis,* l. 3. c. 21. §. 16. and Mr. *Hertius*'s Diſcourſe, *De Literis Commeatûs pro Pace,* §. 13.

[7] Is the ſame with [b].

[a] *Add Grot.* l. 3. c. 24. See what we ſhall ſay hereafter in Book 4. c. 4. ſ. 15. [b] The *Roman* Lawyers give this Inſtance of a *tacit Pact* in l. 2. tit. 14. *D. de Pactis,* leg. 2. If I reſtore to my Debtor his Bond or Caution, it ſhould ſeem there is a tacit Agreement between us, that I demand not the Loan. Yet here according to the Simplicity of Natural Law, there appears to be no occaſion of introducing a *tacit Pact*, ſince it is much plainer to ſay, That by the returning back the Caution the Debt is ſuppos'd to be forgiven, and conſequently no room left for an *Action* upon it. But that the *Civil* Law choſe this round-about way of proceeding, was the effect of Caution, leſt an Obligation really contracted ſhould ſeem to be cancell'd by bare Conſent. Another Example they produce, and ſay, Suppoſe that in a Leaſe of a Farm there be this Clauſe, That in caſe the Farmer does not till the Ground as he ought, the Proprietor may let it to another: Muſt it not be meant, That the Farmer is obliged not to damage the Land, in conſideration that the Lands are Lett at a low price? But on the contrary, if it happens to be Lett at an higher price, 'tis for the advantage of the Proprietor; becauſe there ſeems to have been a tacit Agreement between them, that no advantage ſhould come thereby to the Farmer. *Digeſt.* l. 19. tit. 2. *Locati, conducti,* leg. 51. in the beginning, *Ea Lege fundum locavi, ut ſi*

non

III. To make a Man capable of [1] giving a ſerious and firm *Conſent*, 'tis above all things neceſſary that he be maſter of his Reaſon, ſo far as to underſtand the Buſineſs in hand, to know whether it be convenient for him, and whether he have Strength and Ability to perform it; and when he has well conſider'd theſe Points, to be able to expreſs his Agreement by ſufficient Indications. Hence it follows, that the Promiſes of Infants[2], of Madmen, and of Ideots[3], are utterly invalid. But as to the Caſe of Madneſs, it is particularly to be obſerv'd, that this does not render a Man's Actions null and void in moral Eſteem, any longer than during the actual Continuance of it. But ſo long as he enjoys lucid Intervals of Senſe, there's nothing hinders why he ſhould not be able *effectually* to oblige himſelf for ſuch time as the Diſtemper allows him the uſe of his Reaſon. Yet the Fit returning ſuſpends his Power of contracting or of performing any Buſineſs, till he again recover the Government of himſelf and of his Actions. Therefore the common Maxim in the Civil Law, That *Madneſs coming upon a Man deſtroys not any Buſineſs which he had before duly perform'd*, is to be underſtood of ſuch Actions or Concerns as can be compleated and diſpatch'd at once. Of this kind is a *Will* or *Teſtament*[4], which being once rightly made, ſtands good; unleſs it be revoked by a ſufficient Declaration to the contrary; ſuch as a diſtracted Perſon cannot give. But in caſe a Man lies under ſuch an Obligation as is to be fulfill'd by diſtant Acts, all requiring the uſe of Reaſon, it is plain that if he fall into Diſtraction, the Duty is thereby ſuſpended. Thus if a Perſon bargain with me to work at my Affairs for a certain time; if he happen to be ſeiz'd with a Phrenſy, the Obligation expires, in as much as he is now incapable of making it good. Although indeed, in hopes that a Perſon in this Condition may recover his Health, we uſually ſuppoſe him ſtill to have inherent in him all his former Obligations, Powers, and Rights, the charge of exerciſing which is for a time committed to others. But if the Madneſs be judg'd incurable, the Perſon is in all legal and moral Conſideration to be accounted *Dead*[5]. Vid. Dig. l. I. *tit.* 6. *De his qui ſui vel al. jur. ſunt. Leg.* viii. *tit.* 18. *De Offic. Præſid. Leg.* xiv. *&* *l.* iii. *tit.* 3. *De Procurat. & Defenſor. Leg.* ii. *&* *l.* ix. *tit.* 2. *Ad leg. Aquilian. leg.* v. *ſ.* 2.

IV. Farther [1], ſince the uſe of Reaſon is exceedingly hindered, and ſometimes entirely oppreſs'd by Drunkenneſs, it is an uſual Queſtion, Whether a Perſon under that Diſorder can bind himſelf by any Covenant or Promiſe? Which we think ought to be decided in the Negative, in caſe the Intemperance were ſo great, as entirely to drown and overwhelm the Underſtanding. For it can by no means be eſteemed a real and deliberate Conſent, if a Man ſhould with never ſo much Eagerneſs of Inclination run into an Engagement, and expreſs his Agreement by Signs which would at other Times be valid, whilſt his Mind lies as it were under a ſtupifying Charm, and he is bewitch'd out of his Reaſon. It would indeed be highly impudent for a Perſon to challenge the Obſervance of ſuch a Promiſe, eſpecially if it could not be perform'd without conſiderable Burthen or Trouble. And if it farther appear, that he purpoſely took advantage of the other Man's Weakneſs, and cunningly drew him into an Engagement under that Diſtemper of his Brain, he ſtands liable to be puniſh'd as an arrant *Cheat*. But when a Man, after the drunken Fit is over, ſhall upon being put in mind of his Promiſe, acknowledge and confirm it; it ſhall then be *Obligatory*, yet not by virtue of what paſs'd when he was drunk, but of what he ſince did when he was ſober[2]. Yet the Merriment of a chearful Cup, which rather revives the Spirits, than ſtupifies the Reaſon, is no hindrance to the contracting of juſt Obligations; eſpecially if they be afterwards renew'd at more ſober Seaſons. To this purpoſe, the account which *Tacitus*, *De Mor. Germ.* c. 22. gives us of the old *Germans* is very remarkable. *'Tis at their Entertainments*, ſays he, *that they commonly make up Differences, contract Alliances, chooſe Princes, and*

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non ex Lege coleretur, relocare eum mihi liceret, & quo minoris locaſſem, hoc mihi præſtaretur (nec convenit, ut ſi pluris locaſſem, hoc tibi præſtaretur) videtur autem in hac ſpecie id ſilentio conveniſſe, nequid præſtaretur, ſi ampliore pecunia fundus eſſet locatus, (i. e.) *ut hæc ex conventione pro locatore tantummodo interponeretur.* But yet in the Caſe propos'd, without ſuppoſing any ſuch feign'd Agreement, it is more natural to affirm, that the Conditions on which this kind of Contract was founded, cannot be extended ſo far as to benefit the Hirer, who is indeed worthy of no manner of Favour, in as much as he hath neglected to cultivate his Land according to Bargain. *Vid. D.* l. 17. tit. 1. *Mandati, vel contra*, leg. 6. ſ. 2. l. 19. tit. 2. *Locati, conducti*, leg. 13. *in fine, &* 14. *Cod.* l. 2. tit. 3. *De Pactis*, leg. 2.

Mr. Barbeyrac's *NOTES on* §. III.

[1] Every true Conſent ſuppoſes, 1. A Phyſical Power of conſenting. 2. A Moral Power, 3. A ſerious and free uſe of them. Our Author treats of the firſt here, and the others afterwards.

[2] *Infans, & qui infantiæ proximus eſt, non multum à furioſo diſtant.* Inſtitut. Lib. 3. Tit. 20. *De Inutil. Stipul.* §. 9.

[3] *Furioſus nullum negotium gerere poteſt, quia non intelligit quod agit.* Inſtitut. l. 3. tit. 20. *De Inutil. Stipul.* §. 8. *Furioſi,*--- *nulla voluntas eſt.* Digeſt. Lib. 50. Tit. 17. De Diverſ. Reg. Juris Leg. 40.

[4] *Nam neque teſtamentum recte factum, neque ullum aliud negotium recte geſtum, poſtea furor interveniens perimit.* Inſtit. Lib. 2. tit. 12. §. 1. See alſo Cod. Lib. 6. tit. 22. *Qui teſtamenta facere poſſunt*, &c. Leg. 9.

[5] We call properly a Civil Death, the State of them who are condemned to Death, perpetual Baniſhment, or any other Puniſhment, which implies an Excluſion from Society and a Civil Life, upon which account they are as if they were not. Among the antient *Romans* ſuch as loſt their Freedom, or Right of Incorporation, either both together, or the laſt only, were accounted in the ſame State, which was called *Capitis Maxima, & Media Diminutio*, as the *Digeſts* ſpeak. *Intereunt autem homines quidem maxima aut media capitis diminutione.* Dig. Lib. 17. tit. 2. Pro Socio, Leg. 63. §. 10. See alſo, *Inſtit.* Lib. 1. tit. 16. *De capit. Diminutione.*

Mr. Barbeyrac's *NOTES on* §. IV.

[1] I have tranſpoſed this Paragraph, and put the Author's fifth Section inſtead of it, making this my fifth, becauſe the Author after he had ſpoken of the Promiſes of ſuch as have loſt their Reaſon, ought, according to his own Method, to have went on to the Promiſes of Infants, and not have interrupted the thread of his Diſcourſe by treating of the Promiſes of Drunkards, which might better make a Chapter by it ſelf, becauſe Drunkenneſs is a tranſient Accident, whereas Infancy and Folly are States of long continuance. By this Tranſpoſition, not at all inconvenient, I preſerve the Natural Order of things, which will be my Excuſe.

[2] 'Tis a general Rule, that ſuch Agreements as are null upon account of ſome Incapacity of the Perſons making them, may become valid, if that Incapacity ceaſes, and the Perſon approves or ratifies the ſaid Agreement. So if a Minor, being come to Age, ratifies or executes a Contract which he made in his Minority, it becomes as irrevocable as if it were made after he came of Age. See *Digeſt.* l. 26. tit. 8. *De Authoritate & Conſenſu Tutorum & Curatorum*, leg. 5. §. 2. & Cod. l. 2. tit. 46. *Si major factus ratio habuerit.* See alſo what our Author ſpeaks §. 14. in this Chapter, and what I have ſaid in my *Treatiſe of Sports*, l. 2. c. 1. §. 7.

in fine diſpatch moſt Affairs of Peace and War. They think no time ſo proper as this, becauſe the generous Heat of the Liquor, as it opens their Hearts, and takes off all Diſguiſe from their Thoughts, ſo it inſpires them with brave Reſolutions and hardy Attempts. They are Strangers to Craft and Diſſimulation, and the Liberty of the Table gets out all they know, and all they deſign. But the ſettling and finiſhing of Buſineſs is left to the next Day, when their Minds are cloſed, and their Judgments grown cool. Thus they make the right Uſe of each Time; they conſult whilſt they cannot diſſemble, and they reſolve when they cannot miſtake. The like is reported of the *Perſians* by *Herodot.* in *Clio*, l. i. c. 133. *Athenæus*, l. iv. c. 10. *Curtius*, l. vii. c. 4. *Add. Plutarch Sympoſ. Quæſt.* l. vii. c. 9, & 10.[3]

It is true indeed, that Faults committed in Drunkenneſs are not on that account excuſable[4]. Legiſlators have then thought fit to puniſh even Ignorance, when the Perſon is the cauſe of his own Ignorance. And therefore a double Penalty is uſually enacted againſt drunken Offenders. For here the Exceſs, and conſequently the Ignorance, was of the Man's own procuring, it being in his Power to avoid them. *Ariſtot. Ethic.* l. i. c. 5. ſ. 10. It was one of *Solon*'s Laws, That a Governor taken in Drunkenneſs ſhould be put to Death; and *Pittacus* decreed, that a Fault committed under this Diſorder ſhould have a twofold Puniſhment. *Laert.* l. i. in *Pittac.* Becauſe, though a Perſon whilſt the fit is on him knows not, perhaps, what he does, yet in as much as he voluntarily applied himſelf to the uſe of ſuch Things as he knew would caſt a Cloud on his Underſtanding, he is ſuppoſed to have yielded Conſent to all the Effects of that Diſorder. Yet it will not follow from this Conſideration, that the Promiſes of drunken Men are Obligatory; becauſe there is great difference between committing a Crime, and contracting an Obligation. For ſince there lies an abſolute Prohibition againſt all Sin, therefore Men are to avoid all Occaſions that may probably draw them into a Violation of their Duty. And how many Enormities Drunkenneſs betrays a Man to, is obvious to the meaneſt Apprehenſion. An Action then in itſelf ſinful, can by no means loſe that Character by proceeding from another Sin which led and diſpoſed a Man to it. But on the other hand, ſince it is left to our free Pleaſure, whether we will contract new Obligations, or no, we are not (as in the other Caſe) bound to avoid all Occaſions which may render our Conſent imperfect and invalid. As we are not bound to decline Sleeping, out of a Fear that others ſhould interpret our [5] Nodding or Winking for a Token of Agreement to ſomewhat which they propoſed. To this purpoſe, *Sueton* tells us a jeſting piece of Knavery in *Caligula*. He made an Auction of his ſuperfluous Gladiators; and as the Cryer was performing the Sale, *Aponius Saturninus*, a Gentleman of the *Pretorian* Dignity, happening to ſleep upon one of the Benches, the Emperor commanded the Cryer to take notice of the worthy Chapman that nodded * to the Price propoſed. And the Buſineſs was ſo managed, that the poor Gentleman had laid out ninety thouſand Seſterces before he knew a Word of his Bargain. *Vit. Calig.* Chap. 38. Therefore if Drunkenneſs had no other ill Effect, but that it made a Man ſeem to give ſome Indications, which at another time would imply Conſent, it would not on this bare Account be eſteem'd unlawful. And ſince a Man cannot contract an Obligation by Promiſe or Pact, without agreeing to it, and at the ſame time underſtanding the Buſineſs, we cannot infer his Conſent to ſuch an Engagement from his firſt conſenting to make uſe of a Thing, which would probably hinder the Exerciſe of his Reaſon. Eſpecially, if we conſider, that Men ſeldom drink meerly for the ſake of ſtupifying their Brain, but their general Deſign is to comfort and chear up their Spirits; and the former Effect ſteals upon them almoſt inſenſibly, whilſt they unwarily proſecute the latter. To make the Difference appear more manifeſtly, we may add, that ſince the Property of a Crime or Offence is to bring ſome Evil upon ſome Man, and of a Promiſe to bring him ſome Good, which before was not his due, and ſince to be *poſitively hurt*, or injured, is more odious in the eyes of common Juſtice, than barely *not to acquire* ſome Benefit, there is much more reaſon why Drunkenneſs ſhould invalidate a Promiſe, than why it ſhould cancel a Tranſgreſſion. As for a Man's being bound to pay for that uſeleſs load of Wine which he pours down, after his Stomach is already overcharg'd, and which he wauld refuſe, were he in his Senſes; this Obligation ariſes from the Contract made at the firſt ſitting down, by which he engaged himſelf to give the Price of whatever he ſhould drink, though he drank it to no purpoſe. If during this Fit of ſottiſh Extravagance he be guilty of any miſchievous Frolicks, as throwing away the Liquor, deſtroying the Veſſels, or the Windows, and the like, he ſtands bound to make Satisfaction by the general Law of *Reparation of Damages*.

V. How [1] long Children continue under ſuch a Weakneſs of Reaſon, as renders them incapable of contracting Obligations, we cannot univerſally determine; in as much as ſome arrive at a Maturity of Judgment ſooner than others. Therefore in ſettling this Point, regard is to be had to the daily Actions and Proceedings of the Perſons, from whence the beſt Conjectures are to be made about their Underſtanding; or commonly we have recourſe to the poſitive Laws of the Country; all *States* almoſt having fix'd this Period by their particular Conſtitutions, and ſooner or later [2], according as they found their People to be naturally more briſk and apprehenſive, or more ſluggiſh and heavy. Amongſt the *Jews*, a young Man might oblige himſelf by Promiſe after thirteen Years of Age, and a young Woman after twelve. But becauſe Perſons of tender Age, though they may ſometimes tolerably *underſtand* Buſineſs, yet for the moſt part act with too much Vehemence and Raſhneſs, are too free and eaſy in their Promiſes, eager and over-confident in their Hopes, proud of being thought generous and liberal, ambitious and haſty in contracting Friendſhips, and not furniſh'd with prudent Caution and Diffidence, it has been wiſely order'd in moſt Commonwealths, That in contracting all Obligations [3] they ſhall be ſway'd by the Authority of graver Heads; till ſuch time as their Raſhneſs and Heat of Youth ſhall appear in a good meaſure to be abated. Hence in ſome Places, whatſoever they do in their own Names, during their Minority, is declar'd null and void; in others, if they have been cozen'd or over-reach'd, they are allow'd to recover full Satisfaction [4]. *Vid.* l. xi. ſ. 3, *&c.* l. xxiv. ſ. 1. l. xliv. *D. de Minoribus.* The Law of Nature itſelf plainly directs, that theſe Proviſions ſhould be made by poſitive Conſtitutions. Eſpecially ſince he would juſtly forfeit the Character of his Honeſty, who ſhould make his Advantage upon this *eaſy* Age, and enrich himſelf at the Coſt of thoſe, who for want of Judgment and Experience, either could not foreſee, or do not rightly apprehend the Loſs [a] [5]. The ſame Law of Nature enjoins, that when any Statutes or Cuſtoms of this kind have been eſtabliſh'd in a Commonwealth, they ſhall be ſtrictly obſerv'd; not only by the Subjects amongſt themſelves, but in all their Tranſactions with Foreigners. Not ſo much as (as *Grotius* ſays in B. ii. c. 11. §. 5.) becauſe he who enters into Contract in any Place, is during that Affair, bound by the Laws of the Country as a kind of temporary Subject, as becauſe no State will admit of an [6] *Action* in its Courts of Juſtice, upon a Buſineſs not conformable to its Conſtitutions, unleſs it has particularly declared, that in judging the Cauſes of Strangers the bare Law of Nature ſhall be followed. The ſame is to be ſaid of Contracts made by Letter, between the Subjects of different States, when upon Default, either of them ſues the other in the Courts of his own Country. For though here the injured Party may not have made himſelf, ſo much as for a time, a Subject of the other Commonwealth; yet, if he deſires Redreſs by its Aſſiſtance, he muſt ſubmit his Caſe to the ſtanding Laws [7]: Or ſuppoſing two Subjects of the ſame Nation ſhall enter into a Pact or Promiſe, in ſome place which acknowledges no Sovereign, as on the wide Ocean, or in ſome Deſert *Iſland*, they muſt nevertheleſs have recourſe to the Laws of their Country, if they would obtain a full and perfect Right to what they bargain'd for; or an *Action* to hold good in Court upon Failure on either ſide. How the Caſe ſtands with Reference to the Acts of thoſe Perſons who are placed above the Power of civil Laws, it will be our Buſineſs elſewhere to enquire [8].

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[3] See Mr. *Thomaſius*'s Diſcourſe, *De Hominibus propriis, & Liberis Germanorum*, §. 12. *Max. Tyrius*, l. 12. and Dr. *Potter*'s *Greek Antiquities*, l. 4. c. 20. as alſo *Briſſon. de Reg. Perſ.* l. 2.

[4] Some Nations inflicted a double Puniſhment upon ſuch as had committed any Crime in their drink; and by one of *Solon*'s Laws it was enacted, if a Ruler or Magiſtrate were found drunk, he ſhould be put to Death. The Words are, Τῷ Ἄρχοντι, ἂν μεθύων ληφθῇ, θάνατον εἶναι τὴν ζημίαν. *Diog. Laert. in Solone*, l. 1. §. 57. See *Menage* upon this Paſſage.

[5] In all the Editions of the Original it is *nictando*; but beſides, that the ſhutting of the Eyes is no ſign at all of Conſent, the Paſſage of *Suetonius*, which our Author quotes, ſhews, that either he or the Printers ſet it down for *nutando*.

Mr. BARBEYRAC's *NOTES* on §. V.

[1] This Paragraph is the fourth in the Original. See Note 1. on the former Paragraph.

[2] This Age is not the ſame for all Contracts, for there are ſome Things that they can do at 14 Years of Age, and others not till 25.

* *Crebro capitis motu nutantem.*

VI. Another thing which invalidates *Conſent* [1], and by Conſequence the Promiſes or Pacts that are built upon it, is *Error* or Miſtake [2]; through which it comes to paſs, that the Underſtanding is

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[3] The *Attick* Law in this reſpect put *Women* in the Caſe with *Minors*; not allowing them to bargain for any thing beyond a Buſhel of Barley, διὰ τὸ τῆς γνώμης ἀσθενὲς, on Account of the Weakneſs of their Judgment. *Dion. Chryſoſt. Orat.* 75. *Iſæus. Orat.* 9.

[4] The Law grants this Privilege to him who hath been injured by any Act, as a Party to it, to look back to the Age he was of before that Act, if there be a juſt Cauſe. See *Digeſt.* l. 4. tit. 1. and what Mr. *Hertius* ſays upon that Title in his *Obſervat. in Compend. Juris Lauterbach*, where he carefully diſtinguiſhes the Maxims which may be drawn from natural Right, from the Subtilties which the Roman Lawyers have perplexed the Matter with. See alſo *Daumat*'s *Civil Laws*, Part 1. l. 4. tit. 6.

[5] We ought to obſerve (as Mr. *Placette* ſpeaks in his Treatiſe of Conſcience, p. 60.) That if, for Example, we meet with ſuch a dull underſtanding at the Age aſſigned by the Law, that there is not Senſe enough to oblige them ſufficiently, we ought not to play upon their Simplicity, and engage them to do what we pleaſe upon that Pretence. Doubtleſs ſuch an Action would be unjuſt; and in this caſe we ought to ſay, as in many others, We ought to attend more to the Intention of the Law, than the Terms. But here is another important Queſtion to be examined into, and that's this, Whether if a Young Man engages himſelf before he arrives at the Age fixed by the Law, he is bound in Conſcience to do what he has promiſed? For Example, If he has borrowed any thing before that Age, is he bound to pay it when he comes to it? Mr. *Placette* ſeems to have determined this Queſtion very well in theſe Words, The Caſuiſts of the Church of *Rome*, even the ſtricteſt of them, anſwer by this Diſtinction, If the young Man has made a good uſe of what he borrowed, and in general, if the Agreement he has made be profitable and advantageous to him, he is obliged to ſtand to it; but he is not obliged, if he hath got nothing by the Bargain, *viz.* if he has ſpent what he borrowed upon his Debaucheries, and other Exceſſes. But Mr. *La Placette* adds, This is not my Opinion, and ſays, I can't allow, that a Man ſhould get by an ill Action, and free himſelf from his Engagement by a Fault. We may have regard to other things, and in the firſt Place conſider whether he with whom we have contracted loſeth any thing otherwiſe by the breaking the Bargain. For if he loſeth nothing, but all the Damage he ſuffers, is only, that his Hopes are diſappointed, I believe we are not obliged to make good the Promiſe we have made in that manner without any ill Deſign. Did he foreſee the ill uſe that was likely to be made of what he lent? If he did foreſee it, and did lend with an evil Intention, he ought to loſe what he lent, and impute the Loſs to himſelf; but if he had no ill Deſign, and lent freely, 'tis my Opinion he ought to be paid; and I am perſuaded, to do the contrary, and take the Advantage of the Law, is a Fault, which not only a tender Conſcience, but an honeſt Man in the Eſteem of the World, ought to be aſhamed of. See my Treatiſe of Sports, l. 2. c. 4. §. 12. and what this Author ſays, l. 4. c. 2. §. 11. following.

[6] Mr. *Hertius* in his Treatiſe, *De Colliſione Legum*, which is in Tom. 1. of his Comments and ſmall Tracts, proves at large, that we often judge according to the Laws of another State, when we have made an Agreement, either where the thing of which we have treated is found to be, or where one of the Parties has his Dwelling.

[7] *Grotius* is of Opinion, l. 2. c. 11. §. 5. numb. 3. that in this Caſe we ought to judge only according to the Rules of natural Right; and Mr. *Hertius* agrees to his Opinion. See the fore-mentioned Diſcourſe, §. 56. and another of the ſame Volume *De Commeatu Literarum*, §. 16, *&c.*

[8] See l. 8. c. 10.

Mr. BARBEYRAC's *NOTES* on §. VI.

[1] The three Conditions which are generally required in a full and free Conſent, as I have noted above, §. 3. Note 1. are not to be met with, 1. In Promiſes made in jeſt and by way of Compliment. 2. In Promiſes made by Miſtake. 3. In Promiſes made by the Deception of others. 4. Nor in ſuch as are made thro' Fear.

[2] This the Law ſays, *Non videntur, qui errant, conſentire*, Digeſt. l. 50. tit. 17. leg. 116. §. 2. See alſo *Leg.* 76. & l. 2. tit. 1. *De Juriſdictione*, leg. 15. So *Seneca*, *Demens eſt, qui fidem præſtat errori.* De Benef. l. 4. c. 36. He muſt be a Fool, who will perform what he has promiſed through Error: But here we muſt mean an Efficacious Error, as this Term is expounded, l. 1. c. 3. §. 10. Note 2. and not a Concomitant Error: For by this Diſtinction our Author's Rules in ſome places muſt be explained and rectified. *Titius Obſerv.* 212. See the Notes upon the next Paragraph.

[a] *Demens eſt, qui fidem præſtat errori.* Sen. de Benef. l. 4. c. 36.

cheated in its Object, and the Will in its Choice and Approbation. We ought here carefully to diſtinguiſh, whether the Caſe relate to a *Promiſe*, or to a *Pact*. As for Promiſes, we may lay down this for a certain Rule, that if a Promiſe be grounded upon Belief and Preſumption of ſome Fact [3] which really never was, or when in making an Engagement of this kind I ſuppoſed ſuch an Action, or ſuch a Quality, without regard to which I ſhould never have given my Conſent; in this Caſe my Promiſe is naturally null and void; provided it appear evident from the Nature and Circumſtances of the Buſineſs, that I agreed to the Propoſal purely on account of that Fact, or of that Quality, which I took for granted. Becauſe, here I did not promiſe abſolutely, but upon Preſumption of a neceſſary Condition; which Condition failing, whatever was built upon it, muſt conſequently come to nothing[a]. Thus, for Inſtance, ſuppoſe I have been inform'd that you have done me a Kindneſs in promoting and well-ordering my Affairs, and upon this ſcore I have promis'd you a Gratification; you will not ſay I am bound to ſtand to my Word[4], when I find the Intelligence was abſolutely falſe. By the ſame Rule we may decide the Caſe propoſed by *Cicero* in *Lib.* i. *De Oratore*, c. 38. “A falſe Report was brought home of the [5] Death of a certain Soldier abroad in the Wars. His Father believing the Story, alter'd his *Will* in favour of another Heir, and afterwards died. The Soldier at laſt returning ſafe, ſues the Poſſeſſor of his Inheritance.” It was here urged for the Plaintiff, that the *Civil Law* declares ſuch Wills of a Father to be *null*[6], in which the Son is neither made Heir, nor yet particularly, and by Name, diſinherited; neither of which was done in the *Will* now under Conſideration. But to this the Defendant might have return'd, that the Law cited on the other ſide plainly ſuppoſed that the Father knew his Son to be living, which here he knew not, but imagin'd the quite contrary. Therefore it might perhaps have been a more clear and eaſy Way of aſſerting the Soldier's Title, to proceed only upon the Law of Nature, and to alledge, that the Father's Will was grounded upon Suppoſition of his Son's Death, which proving falſe, the Will became void and ineffectual; ſince it appears that his belief of that Report was the ſole Reaſon of his altering his Meaſures. And hence too it is eaſy to anſwer that over-nice Queſtion of Sir *Thomas Browne* in his *Religio Medici*; *Whether it was lawful for the Perſon whom* Lazarus *had made his Heir* to poſſeſs the Goods[7]; or whether the Owner upon his being reſtored to Life, had not a Right to challenge them again? Where the latter muſt without doubt be affirm'd. For the reaſon why the Goods of the Deceas'd paſs away to others is, becauſe they themſelves are taken out of the World, and conſequently have no farther need of theſe Poſſeſſions. Hence in many places, ſome part of the Goods are ſet aſide to be given to the Poor, or to the Church for the Benefit of the Soul of the Deceas'd. And in the *Pagan* Superſtition, it is uſual to bury or burn ſome of the Goods with the dead Body, for the Service of another Life.

But in caſe the Promiſer was negligent in ſearching into, and examining the Condition upon which he built his Conſent, he ſhall be bound to repair any Damage that is ſuſtain'd by the other Party, upon account of his idle Engagement.

If the Promiſe was not grounded upon the Preſence or Abſence of ſuch a Quality, as a neceſſary Condition, then tho' the Promiſer was miſtaken in that Point, yet his *Obligation* ſhall ſtand good. If the Promiſe were but *in part* occaſion'd by an Error, it may as to the reſt of it remain valid; unleſs one Part were included by way of Condition in another; or unleſs the Parts cannot ſeparately be perform'd; for then an Error in part deſtroys the whole.

VII. As for Miſtakes in *Pacts*, it ſeems neceſſary to diſtinguiſh whether the *Perſon* was thro' Error drawn into the Bargain, or whether there proves to be an Error as to the Thing or *Subject* for which he bargain'd. In the former Caſe we ſhould again enquire, whether any Step is made towards Performance, or not. If I am prevail'd with to enter into a Pact or Contract upon Miſtake, and I find this Miſtake out, before any thing is done in order to the fulfilling of the Agreement, it is but equitable, that I ſhould have liberty to retract; eſpecially if upon making the Engagement, I plainly declared the Reaſon of my Proceedings[1]. But if the *Error* be not diſcover'd till the *Pact* is either wholly or in part perform'd, then the Perſon who lay under the Miſtake, cannot demand a Releaſement any farther than the other ſhall, upon a Principle of Humanity, be content to allow him[2]. For inſtance, a Man being at a Diſtance from home, receives falſe Intelligence, that he has loſt all his Horſes. Upon this Information he enters into Contract for the Purchaſe of new ones; but before the Money or the Horſes are deliver'd, he finds himſelf to have been deceiv'd in the former News. Here we judge he is not bound to fulfil the Bargain, inaſmuch as the Seller very well knows, that the falſe Account of his Misfortune at home was the Reaſon of his Purchaſe. Yet he is in Equity obliged to make ſome Conſideration to the Seller; at leaſt to repay the Damage which he ſuſtains by loſing the Bargain. But in caſe the Money and Horſes were on both ſides deliver'd, tho' the Buyer ſhould now find that he has no occaſion for his Purchaſe, yet he cannot force the Seller to refund the Price, and to take back his Horſes, unleſs this Condition was expreſly mention'd in the Agreement.

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[3] The Lawyers diſtinguiſh between an Error of Fact, and an Error of Right, *i. e.* of Right poſitive, and build divers Determinations upon it. See *Daumat*'s *Civil Laws*, Part I. l. 1. tit. 18. §. 1.

[4] Mr. *Thomaſius* in his *Juriſprud. Divin.* l. 2. c. 7. §. 43. ſays, That a Man is obliged in this Caſe to keep his Word, eſpecially if he did not expreſly inſert that Condition in his Promiſe, or he in whoſe behalf he is engaged, uſed no falſe Pretences to perſuade him. But from the Moment that he knows in any wiſe that he promiſed upon the Account of ſome Service done by him to whom he made the Promiſe, the Condition is of the ſame Nature as the Thing. And ſo the Non-performance of the Condition makes the Promiſe null, as much as if he had declared it before-hand in expreſs Terms; ſince, as we may ſuppoſe, nothing elſe could incline him to promiſe. Another Thing is in the Caſe of Horſes bought upon a falſe Report, as our Author ſpeaks in the following Paragraph, where read *Note* 2.

[5] The Words in *Latin* are, *De cujus* [*Militis*] *morte, cum domum falſus ab exercitu nuncius veniſſet, & Pater ejus, re credita, teſtamentum mutaſſet, & quem ei viſum eſſet, feciſſet Hæredem, eſſetque ipſe mortuus; res delata eſt ad Centumviros, cum Miles domum reveniſſet, egiſſetque lege in hæreditatem paternam teſtamento exhæres filius.* See alſo, *Val. Maximus*, l. 7. c. 7. §. 1. and Mr. *Schulting*'s Oration *De Juriſprud. M. T. Cicer.* p. 260. Mr. *Thomaſius* in the Place before quoted, §. 44. obſerves, that this Example is nothing to the purpoſe. For, he ſays, the Senſe of a Will ought to be expounded in a clear different manner from an Agreement or Promiſe, as well becauſe a Will gives no Right to him to whom the Teſtator has bequeathed his Goods, as becauſe he requires an Acceptation on his part. Beſides, in Wills we ought to have ſome regard to the Laws; and above all, to ſuch Conſtitutions as are made in behalf of Children. But it is evident, that our Author ſpeaks here only of the manner how the Queſtion ought to be determined by Natural Right only. I ſhall ſhew in its proper Place, that a Will gives a Right to him that is appointed an Heir, altho' it be not an irrevocable Right.

[6] So the Law ſpeaks, *Inter cætera, quæ ad ordinanda teſtamenta neceſſario deſiderantur, principale jus eſt de liberis hæredibus inſtituendis, vel exhæredandis; ne præteritis iſtis, rumpatur teſtamentum.* Digeſt. l. 28. tit. 2. *De liberis & poſthumis Hæredibus inſtituendis, &c.* Leg. 30.

[7] There was a Book printed in 1705, wherein this Queſtion was ſeriouſly handled. The Title is, *Henrici Verduyn.* &c. *Diſquiſitio Juriſprud. de Teſtam. & Hæredit. Lazari bis mortui, aliorumque bis mortuorum. In ordinem redegit & ----- auxit Tobias Boel, Junior Ictus.* We may learn the Subſtance of it in a little time from the Extract of it given in the Works of the Learned printed at *Paris*, *Anno* 1705, *&c.*

[a] 15. *D. de Juriſdict.*

But when there happens to be a miſtake about the *Thing* which is the Subject of the Contract, then the Buſineſs is *null*; not ſo much upon account of the Miſtake[3], as becauſe the Laws and Terms of the Agreement are not really fulfill'd. Inaſmuch as in all Bargains the *Matter*, about which they are concern'd, and all the Qualities of it, good or bad, ought to be clearly underſtood, and without ſuch a diſtinct Knowledge the Parties cannot be ſuppoſed to yield a full Conſent. And therefore upon diſcovery of any Defect, the Perſon who was likely to ſuffer may either draw back from the Engagement, or may compel the other to ſupply what is wanting[4]; and likewiſe to make Satiſfaction for Damage, if occaſion'd by his Deceit or Default. And this, not only if the Defect be immediately found out, but if it appear at ſome Diſtance of Time. Which Period or Interval, when it is not fix'd

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Mr. BARBEYRAC's *NOTES on* §. VII.

[1] Provided (as our Author ſays in his Abridgment of the Duty of a Man and Citizen) that the other that makes the Contract receives by it no Damage, or that it be repair'd to him. The Example that is alledged a little lower, ſhews, that it is another Condition which the Author puts. But ſee *Note* 2.

[2] The Author is not conſiſtent with himſelf here. For, if in the firſt Caſe there is any good Reaſon to excuſe him who has made a miſtake, ſo that he may lawfully retract, why ſhould not the ſame Reaſon be good in the ſecond Caſe? [The delivering of a thing conſider'd in itſelf is a Phyſical Act, which can't deprive him of his Right, who has it; nor give it to him that has none. Whence it comes to paſs, that when one hath paid what he ought not, he has not leſs Right to require again what he has done, than if he had forgiven him that which he had not deliver'd. See Mr. *Thomaſius*'s *Juriſprud. Divin.* l. 2. c. 7. §. 45, 46.] Further, if in the firſt Caſe we have Right to recant, how are we obliged to repair the Damage? The truth is, in both Caſes we are indiſpenſibly obliged to keep our Word. For if the Error be invincible, 'tis nevertheleſs only concomitant (ſee *l.* 1. *c.* 3. §. 10. *Note* 2.) and conſequently does not exclude a neceſſary Conſent in our Agreements. In fine, this Reaſon obliges us to conclude, that the Price doth not at all influence the Engagement farther than as it is an Indication of our manner of Dealing, and can't be formally inſerted into it as a Condition to render it null, ſo that the Error which is committed thereupon can have no manner of Effect as to the Validity of the Contract. The *Roman* Lawyers own the Truth of this Principle in a like Caſe, I mean, in the Subject of a Delegation made thro' miſtake. See *Digeſt.* l. 46. tit. 2. *De Novationibus & Delegationibus*, Leg. 12, 13. The ſame thing has place in an *Onerous Contract*. For example, in a Bargain of Sale, when there is a Miſtake, as to the Perſon with whom we treat, taking him for another. For this is only an Error concomitant, having nothing in the Contract which neceſſarily requires that he with whom we treat ſhould be certainly ſuch or ſuch a Man, or at leaſt that he ſhould declare himſelf, and we ſhould affirm, that we dealt only with *Peter* (for example) and no other. Moſt of the Interpreters of the *Roman* Laws do indeed quote ſome Laws, which ſeem to eſtabliſh the contrary; but if we examine thoſe Places, we ſhall find that they treat of ſome Act of Liberality or Service, or ſuppoſe in the Perſon dealt with ſome Care, Induſtry, or other particular Quality; for then 'tis eſſential to a Contract, that the Contractor be certainly he whom we believe him; inſomuch that if we are miſtaken in that, the Error is efficacious. *Titius Obſerv. in Pufend.* 214. and in *Lauterbach.* 513.

[3] The Author oppoſeth things here one againſt another, which have no Appearance of Oppoſition, but are the Conſequents one of another. For the Error, in which one of the Contractors was, ſhews, that he conſented to a thing that really was, and conſequently, that the other Contractor did not ſatisfy the Intention of the firſt. *Titius Obſerv.* 215. In fine, this hath place alſo, when the Seller as well as the Buyer really believes, that a Baſon of Tin, for example, is Silver, and no other Metal. For the Error of both the Contractors does not hinder, but that it is eſſential to the Bargain, that the Baſon ſold ſhould be Silver, and no other Metal. See *Digeſt.* l. 18. tit. 1. *De contrahenda Emptione*, leg. 14. But it is not ſo, when the Thing, or the Quality of it, wherein the Error conſiſts on both ſides, doth not come into the Bargain. As for example, if a Man ſays only, How much will you have for this Baſon or Metal? without explaining himſelf any farther, whether he is about buying a Veſſel or maſſy Piece of Silver. In that Caſe, ſays Mr. *Thomaſius*, the Contract is in Strictneſs good and valid, altho' fair dealing does require, that the Seller, to whom he has paid for Tin inſtead of Silver, ſhould give him part of the Price back again. For we muſt lay this down as a general Maxim, That in a doubt, if a Man miſtakes, 'tis ſo much the worſe for him; becauſe it belong'd to him to explain himſelf. See *Juriſprud. Divin.* l. 2. c. 7. §. 39, *&c.* and *c.* 11. §. 22, 23. and what ſhall hereafter be ſaid, *l.* 5. *c.* 12. §. 5. *Note* 4.

[4] This is too much from the purpoſe. Something more exact ought to have been ſaid to give us an Idea of the Effects of an efficacious Error. This Maxim may be added to thoſe of our Author, If he that is miſtaken aims at that chiefly wherein the Error lies, the Agreement is abſolutely void, and he hath liberty to recant; but if he had not the thing itſelf in view, altho' he could heartily wiſh it had been what he believed it, the Agreement is good, and he can have a Right only to demand ſome Satiſfaction for the Fault he overlook'd. As for example, if a Man in a great Neceſſity buys an Houſe, which afterwards he finds to be ſubject to ſeveral Services, as he did not principally endeavour to have it free from all Services, that alone don't break the Bargain; but he may demand of the Seller, that he leſſen the Price in proportion to the Inconvenience that thoſe Services bring, with which he did not think the Houſe was charged. It is very probable that the *Roman* Lawyers did follow this Principle in their Practice. Nevertheleſs the Determinations which we find in their Writings are neither accurate enough, nor conſonant one with another, as this Reaſon will ſhew. That they may build the Efficaciouſneſs of Error upon the Connection of the thing in which they are miſtaken, with the Eſſence of a Bargain, they only conſider the Natural Conſtitution of the thing in itſelf. Hence they diſtinguiſh the Error which hath for its Subject the Subſtance or Matter of a thing about which they treat, from that which falls only upon the Qualities of the thing. But here we are not examining what relation the Object of Error hath to the Matter of an Agreement, we only enquire upon what Foot the Bargainers conſider'd it; and if it appear that they had only ſome certain Quality in view, 'tis the Error alone that reſpects that Quality, that can make the Bargain null, as much as if it fell upon the thing itſelf. *Titius Obſerv. in Pufend.* 216. and in *Lauterbach.* 511. See *Note* 5. at the bottom of the following *Page.*

by the civil Laws, is to be determin'd by the Arbitration of ſome honeſt Referee; that no Indulgence may be given, either to the Fraud of the one Party in concealing, or to the ſupine Negligence of the other in examining the Buſineſs. And the larger Space of Time is to be allow'd, if the Defect were ſuch as did not appear to external View, or could not be diſcover'd but by Men of extraordinary Sagacity and Skill.

As to that common Maxim with the *Civilians*, that an Error in the *Eſſentials* of a *Pact* diſannuls the Agreement[a], but not an Error in the *Accidentals* or Circumſtances; we are ſo to interpret it, as by the *Eſſentials* to underſtand, not only what makes up the *Phyſical Eſſence* of the thing bargain'd for, but likewiſe thoſe Qualities of it, to which the Contractor had an eſpecial Eye and Regard[5]. For it frequently happens, that in a Bargain ſome *Quality* of the thing ſhall be chiefly eſteem'd and valu'd, and the *Subſtance* or natural Conſtitution be only look'd on as a neceſſary Adjunct or Vehicle[6]. Thus my Contract will not only be void, if I buy ſuch a particular Slave of a Merchant, and he ſends me a different Perſon[7]; but likewiſe if I bargain'd with him for one skilful in the Art of Cookery, and the Man whom I receive proves utterly ignorant of the Buſineſs, and incapable of ſerving me in that Condition[b].

VIII. Much more ought a *Miſtake* to render a Promiſe or Pact *invalid*, if it were occaſion'd by the [1] *Fraud* of one of the Parties, who by that means drew the other into the Engagement. What Force or Effect the Practice of Deceit in theſe Matters will bear, may be clearly ſtated by making theſe Enquiries; firſt, as to the Author of the Knavery, whether it be he with whom we bargain'd, or a third Perſon. And in the next place, whether the Deceit was really the Cauſe of our Engagement, without which we had not ventur'd upon it, or whether it was only accidental to the Buſineſs, which we had nevertheleſs undertaken, but were now cheated in the *Thing* and its Qualities, or the true Price and Value of them. If the Trick was put upon us by a third Man, the Party with whom we tranſact not having been acceſſory to it, and the *Thing* for which we bargain'd proves without Fault[2]; in this caſe the Agreement ſhall ſtand good[3]; but we may recover of the Knave whatever we loſe by his contrivance. If the Party himſelf with whom I contract, by ſome Deceit draws

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[5] The Intention of the Contractors muſt be known by the Circumſtances. Here's an Example taken out of the Determinations of the *Roman* Lawyers, wherein yet they do not expreſs exactly the Difference between the two Caſes propounded, *Quod ſi me virginem emere putarem, cum eſſet jam mulier, emptio valebit, in ſexu enim non eſt erratum. Cæterum ſi ego mulierem venderem, tu puerum emere exiſtimaſti, quia in ſexu error eſt, nulla emptio, nulla venditio eſt.* Digeſt. l. 18. tit. 1. *De contrahenda Emptione*, &c. Leg. 11. §. 1. The Reaſon why, if a Slave which is bought prove a Woman, whereas he thought it a Man, the Bargain of Sale is not void, is, becauſe there is no other apparent Mark of a Woman from a Man, but the Bigneſs, he had no Cauſe to think he bought a Man rather than a Woman, but that he did not ſufficiently explain himſelf; ſo that the Error is only concomitant, and can't turn to the Prejudice of the Seller. But 'tis not the ſame as to the Sex, which are ſo differenced by the Habits, that they can't be miſtaken, unleſs by ſome Fraud or Diſguiſe. And ſo the Buyer muſt be ſuppoſed to make his Markets for the Sexes according to their Habits, and then the Error is efficacious, and conſequently the Bargain is null. *Titius in Lauterbach. Obſ.* 514. If the Buyer believing that he purchaſes a Man, the Seller, who knows his Intention well, leads him into an Error, and ſells him a Woman without declaring it, the Contract is void, as the Law ſpeaks, *Si quis virginem ſe emere putaſſet, cum mulier veniſſet, & ſciens errare venditor eum paſſus ſit, redhibitionem quidem ex hac cauſa non eſſe, verum tamen ex empto competere actionem ad reſolvendam emptionem, & pretio reſtituto mulier reddatur.* Digeſt. l. 19. tit. 1. *De Action. Empt. & Vendit.* leg. 11. §. 5. See what Mr. *Noodt* ſays upon this Law in his Treatiſe, *De forma emendandi Doli mali*, &c. *c.* 9.

[6] *Pleraſque res aliquando propter acceſſiones emimus, ſicut cum Domus propter Marmora, & Statuas, & Tabulas pictas ematur.* Digeſt. l. 18. tit. 1. leg. 34. *in initio.*

[7] Vid. l 18. *Princ. D. de Contrab. emptione.* Cicero (*pro Q. Roſcio*, c. 10.) ſpeaking of a Slave who was at the ſame time claim'd by *Fannius* and *Roſcius*; What belong'd to *Fannius?* (ſays he) his *Body*; what to *Roſcius?* his *Activity*. Not his Face but his Skill was valuable. The ſhare which *Roſcius* had in him was worth double to that which *Fannius* could challenge, *&c.*

Mr. BARBEYRAC's *NOTES* on §. VIII.

[1] By Fraud (which the *Civilians* call *Dolus malus*, or *Dolus* only) is underſtood any ſort of Surprize, Deceit, Craft, Cheat or Diſſimulation. In a word, any corrupt Methods, direct or indirect, poſitive or negative, by which Men maliciouſly deceive others. For there are innocent Errors, as that of a Medicine, which inſtead of curing enrages the Diſtemper. *Itaque ipſe* [*Labeo*] *ſic definiit, Dolum malum eſſe omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera eſt.* Digeſt. l. 4. tit. 3. *De Dolo malo*, leg. 1. §. 2. *Non fuit autem contentus Prætor DOLUM dicere, ſed adjecit, MALUM, quoniam veteres dolum etiam bonum dicebant, & pro ſolertia hoc nomen accipiebant*, &c. ibid. §. 3. See Mr. *Noodt*'s Treatiſe *De forma emendandi Doli mali*, c. 1, & 2. In fine, tho' where there is a Fraud in the one Part, there is always an Error in the other; yet ordinarily the Invalidity of a Contract is entirely founded upon the evil Intention of the Contractors: For that Reaſon alone is in the main ſufficient to make an Engagement void.

[2] The Lawyers call a Damage without Deceit, *Dolus in reipſa*, which is grounded on this Law of the *Digeſts*, l. 45. tit. 1. *De Verbor. Obligation.* leg. 36. *Si nullus Dolus interceſſit ſtipulantis, ſed ipſa res in ſe Dolum habet*, &c. But we ought rather to call it the Vice or Fault of a thing, than a Fraud. For the word *Fraud* agrees properly only to a perſonal Cheat (as we ſay) which ſuppoſes an ill Deſign in one of the Parties, or a third, and an actual Performance of ſome Deceit. *Fraudis interpretatio* (as the *Roman* Lawyers themſelves ſpeak) *ſemper in Jure civili, non ex eventu duntaxat, ſed ex conſilio quoque deſideratur.* Digeſt. l. 50. tit. 17. *De Diverſ. Regul. Jur.* leg. 79. Otherwiſe the Law from whence this Diſtinction of a perſonal and real Fraud is inferred, is commonly miſunderſtood, as Mr. *Thomaſius* obſerves in his Diſcourſe *De æquitate Cerebrina* leg. 2. *Cod. de reſcindend. Vendit.* c. 2. §. 4. See *l.* 5. *c.* 3. §. 9.

[3] It being underſtood that the Motive which by the Deceit of a third Perſon, inclined us to promiſe or treat, hath a neceſſary Relation to the Foundation of the Engagement, *i. e.* that the Error is purely concomitant. For if (for example) any one makes me believe that all my Horſes are dead, and I declare to him that ſells me others, that I did not buy them, but upon this Suppoſition, that the News is true: The Moment that I diſcover the Falſhood, the Bargain is void, by virtue of the Condition which was formerly mention'd, and the Seller is to take care of him that hath deceived me. See §. 7. *Note* 2. before-going.

[a] Vid. *l.* 57. *D. de Oblig. & Act.*

[b] *Add.* l. 9, 10, 11, 14, 41. ſ. 1. *D. de Contrab. emptione.*

me into the Buſineſs[4], I am then free from all Obligation to performance[a]. If the Deceit were not *antecedent* to the Contract, but happen'd *in it*, with reference to the *Thing* bargain'd for, its Qualities, *&c.* the Agreement ſhall be ſo far void, as that it ſhall be at the pleaſure of the ſuffering Party, either to reverſe the whole Buſineſs, or to require Satisfaction for his Damage[5]. A Matter not *eſſential* to the Agreement, nor expreſly conſider'd in it, ſhall not prejudice its Validity; tho' perhaps one of the Parties might have a ſecret and ſly Reſpect to ſome ſuch thing in the very Act of driving the Bargain[6]. Upon what Right a Man may proceed, in caſe he be egregiouſly cheated, as to the *Price* of any thing contracted for, we ſhall hereafter examine and declare.

IX. It comes now in courſe, that we conſider the Point of FEAR, what Power it has in rendring human Acts incapable of producing an *Obligation.* There are two Species of Fear, which eſpecially fall under this Enquiry. The former ariſes from ſome Vice or ill Diſpoſition in the Perſon with whom we tranſact, or elſe from his ill Will to us in particular; whence we entertain a probable Suſpicion, that he will deceive us. The other denotes a vehement Terror of the Mind, caus'd by the threatning of ſome grievous Miſchief, unleſs we engage in the Promiſe or Pact deſired. As to the firſt ſort of Fear, this is evident beyond diſpute, that if I ſee a Man who makes it his common Practice to cheat all the World, and reckons every piece of Knavery a piece of Wit[1]; or if as to the preſent Buſineſs I find he has a manifeſt Deſign upon me; I ſhall be a ridiculous Fool, if by truſting to his Faith, I expoſe myſelf to his Fraud, and to his Scorn. For he that runs into a Snare with his Eyes open, falls not only without help, but without pity[2].

(**) *Promiſi lingua, eadem nunc nego;*
Dicendi, non rem perdendi gratia hæc nata eſt mihi;
Plaut. Curcul. Act. v. Scen. iii. ver. 27, 28.

'Twas my Tongue ſaid it; and my Tongue unſays it. Nature never gave me a Voice to be the Inſtrument of my own undoing. And again in *Rudent:* Act. v. Scen. ii. ver. 68. and Scen. iii. ver. 17, 18.

Quæ hæc factio eſt? non debes? non tu juratus es mihi?
Leno. *Juratus ſum, & nunc jurabo ſi quid voluptati eſt mihi.*
Jus jurandum rei ſervandæ, non perdendæ, conditum eſt.

What a ſtir's here? Don't you owe it? Did not you ſwear Payment?

Pimp. Yes, I ſwore and I'll ſwear again, whenever it pleaſeth my Fanſy. Oaths were invented to preſerve Mens Goods and Eſtates, not to ruin them.

The Character which *Polybius* in *B.* VI. *p.* 498. *A.* Ed. *Wech. Caſaub.* gives of the *Grecians* is not much

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[4] Indeed 'tis abſurd to imagine that a Man can by a deſign'd and wicked Cheat, lay a valid Obligation upon another on our Account. *Nemo ex ſuo delicto meliorem ſuam conditionem facere poteſt* (ſay the moſt judicious *Roman* Lawyers.) *Digeſt.* l. 50. tit. 17. *De Diverſ. Reg. Jur.* leg. 134. §. 1. Nevertheleſs, theſe Lawyers, as Mr. *Titius* obſerves (on *Lauterbach. Obſerv.* 116, 117.) deliver here many vain Diſtinctions. For they affirm, that a Fraud, which has been the Cauſe of a Contract, does render it null in itſelf, and by Right (*Ipſo Jure*) unleſs when Sincerity may be pretended, *i. e.* when a favourable Conſtruction can be put upon it by the Rules of Equity, if we do not inſiſt rigorouſly upon the Terms. But in an Act of rigorous Right, where we muſt ſtrictly obſerve what is ſaid or written, the Fraud does not hinder the Contract from being valid, altho' it may be reverſed by a full Reſtitution. For the Laws in this Caſe always allow the Benefit of Reſtitution, which comes to the ſame thing as to the Damage of the Perſon cheated. But according to Natural Right, a Fraud does no leſs diſannul a Contract of rigorous Right, than a faithful Contract. Mr. *Titius* (*in Lauterb. Obſerv.* 1148, &c.) maintains alſo with Reaſon, that this Diſtinction of Acts of good Faith and rigorous Right is not conformable to Natural Right by the Principles which ought to take place in all ſorts of Acts, which admit of an equitable Conſtruction, as Mr. *Noodt* acknowledges, *De Forma emend. Dol. mali,* &c. *c.* 4. where he obſerves that before the Prætor *Caius Aquilius Gallus* there was no regard had to Contracts of rigorous Right, unleſs there were ſome formal Agreements, and the Perſon cheated were a Minor. See *l.* 5. *c.* 2. §. 8. *infra.*

[5] The Interpreters of the *Roman* Law have hitherto affirm'd, that in this laſt Caſe a Contract is neither null by Right, nor ſubject to be made void by a full Reſtitution, when it is tranſacted by a Contract of good Faith, and has no other Source than an Action done in good Faith, beſides the Exception of Deceit. But the famous Mr. *Noodt,* who has made admirable Diſcoveries in the moſt knotty Parts of the Civil Law, undertakes to prove in his Excellent Treatiſe *De Forma emendandi Doli mali in contrahendis negotiis admiſſi apud Veteres,* printed in 1709, That this Diſtinction of the modern Lawyers has no Foundation in the Writings of the Antients, and that every Fraud, whether it conſiſts in the way of treating, or be found in the thing itſelf, or the Price, renders the Contract made in good Faith always null in itſelf, and by the Civil Law, inſomuch that the Perſon cheated being ſummoned by the other Contractor to anſwer it, has no more to do but prove the Cheat on his part, without oppoſing to him the Exception of a Fraud, and the Prætor or Judge muſt declare the Contract null by Right. But if he who is damaged becomes the Plaintiff, he may either declare the Contract entirely null by Right, or ſuffer it to be in force, if he judges it convenient, ſaving to himſelf in both Caſes to require a Reparation of the Damage which comes to him by the Cheat, when the Defendant ſhall demand a Ceſſation of the Contract. This laſt Circumſtance is remarkable, and I took the more notice of it, becauſe it confirm'd the Notion I had deliver'd in my Treatiſe of *Sports,* where I had ſaid (before Mr. *Noodt*'s Treatiſe appear'd) following my own Reaſon, *l.* 2. *c.* 1. §. 11. That there is this particular in all Contracts made by Force or Error, or, in a word, which are not perfectly free on the Part of one of the Contractors, that it is lawful for this laſt to make what Advantage he can of it, but the other hath no Right to eaſe himſelf of the Damage done him contrary to his Intention, *&c.* Mr. *Noodt* hereupon quotes a Law of the *Code,* which imports, that after a Matter concluded, if he who has ſome way been guilty of a Cheat, requires a Nullity of the Contract, ſuch a Demand, which is ſhameful, ought not to be granted to its Author. *Tranſactione finita, quum ex partibus tuis magis dolum interceſſiſſe, quam eorum, contra quos preces fundis, confitearis, inſtaurari grave, necnon criminoſum tibi eſt.* Lib. 2. tit. 6. leg. 30.

[6] Altho', adds our Author in his Abridgment of the Duties of a Man and Citizen, *l.* 1. *c.* 9. §. 13. the other Contractor has directly led us into that Thought till the Bargain was concluded.

Mr. Barbeyrac's *NOTES on* §. IX.

[1] *Plautus* has given us a good Character of theſe ſort of Men in the Perſon of a Seller of Slaves, who demanding if he had not promiſed to pay the Money for which he had ſold a Boy, in caſe any one would warrant him to be free, anſwers, as in the *Latin* Quotation at (**) in the Text.

[2] Our Author leaves us here to gueſs at his Meaning about the Validity of an Agreement, which notwithſtanding the Knowledge of the ill Deſign of the other Contractor, we have engaged ourſelves in with him for ſomething; but he explains himſelf in his Abridgment of the Duty of a Man and Citizen, *l.* 1. *c.* 9. §. 14. where he lays down this Rule, He that truſts to the Promiſes or Agreements of a Perſon who makes no Scruple of violating his Faith, and breaking his moſt ſacred Engagements, acts with a great deal of Imprudence, but that is not a Reaſon ſufficient to render the Engagement null and of no Effect. The Reaſon is plain, he ought to have taken care not to engage, and if he be deceived 'tis his own Fault, he can blame none but himſelf.

[a] Vid. *Diodor. Sic.* l. 2. c. 28.

better. The publick Bankers of *Greece* (ſays he) if you lend them only a ſingle Talent with ten Bonds, as many Seals, and twice as many Witneſſes, yet will never be prevail'd upon to be honeſt. But whether this Fear or Suſpicion of being deceiv-ed, can render invalid a *Pact* already made, and can abſolve the ſuſpecting Party from a neceſſity of Performance, will appear when we ſhall have conſider'd the Opinion of Mr. *Hobbes*, on this Point. He then lays it down for a Rule, that *a Covenant wherein neither of the Parties perform preſently, but truſt one another, in a State of Nature, becomes void, if on either ſide there ariſe a juſt Fear* [a]. Which Aſſertion we cannot admit of, but under this Conſtruction; that one Party after the Covenant is made has juſt Reaſon to fear, that when he has perform'd the Engagement on his ſide, the other Perſon will fly off. And by a juſt Reaſon to fear, we mean ſuch as is grounded on plain Indications and Proofs. For it is highly injurious to queſtion a Man's Fidelity without good Evidence, when we have experienc'd it in former Inſtances. And indeed Mr. *Hobbes* himſelf by a ſubjoyn'd *Note*, brings his Words to this qualified Senſe; *Unleſs*, ſays he, *there ariſe ſome new Cauſe of Fear from ſome Fact, or other ſign of the Will, in one Party, tending to Non-performance, the Fear cannot be eſteem'd juſt. For that which could not hinder a Man from promiſing, ought not to be admitted as an Hindrance of performing.* That is, tho' before the entring into the Covenant, one of the Parties might entertain ſome Suſpicion, that the other would impoſe upon him; yet by the very Act of covenanting with ſuch a Perſon, he as it were renounces this Fear, and declares it inſufficient to hinder his believing and truſting him. And otherwiſe, no Engagement could paſs between them. But at firſt this ſeems to have been *Hobbes*'s Judgment, that a *Pact* thus made would be *void*, tho' there ſhould no ſuch Fear ariſe after the Concluſion of it, as appears both from his Work *of a Body Politick* [3], written in the *French* Tongue, where we do not meet with this Reſtriction; and from the reaſon aſſigned by him in the *Latin* Treatiſe, for that Rule of his at preſent under our Examination. And the reaſon he gives for it is this, *Becauſe he that performs firſt, betrays himſelf to the covetous Deſigns of the other Party, upon account of the ill Diſpoſition of moſt Men, inciting them to ſtudy and advance their own Intereſt by Right or Wrong. But it is againſt Reaſon, that one ſhould perform now, whilſt it is improbable that the other will perform hereafter.* Whence it is plain [b], That he derives the Cauſe of this Suſpicion and Diffidence from the general Pravity of Mankind. And by this Means muſt the greateſt number of Mortals be branded as Perſons unfit to deal with; and in general, all Faith and Truſt be baniſh'd from amongſt thoſe who are not ſubject to a common Ruler or Judge. For ſince we cannot be infallibly certain of any Man's Honeſty, and ſince the World is for the moſt part inclin'd to Wickedneſs; and farther, ſince in a State of Nature every Man orders his Buſineſs according to his own Opinion, *and is Judge of the Juſtneſs of his own Fears*, it will follow, that a Suſpicion, though vain and groundleſs, ſhall render a Contract invalid; and therefore that *Pacts* are of no manner of uſe, except under civil Governments. And it is an exceeding hard Cenſure, to think the greateſt part of Men ſo groſly vile and wicked, as that (ſetting aſide the civil Power) the Fear of God, the Regard to Faith and Truſt, and the Force of ſound Reaſon, ſhall have ſo little Influence on their Minds. Whereas, on the contrary there ſeems to be ſtampt on the Souls of all Men, in indelible Characters, a juſt Senſe of the Duty of keeping their *Faith* ſacred and inviolable; an Argument for which Truth we may draw from this eaſy and natural Reflection, That we can find no Man who will openly profeſs *Perfidiouſneſs*, but every one who recedes from his Word or Bargain, pretends to have done it on very juſt and weighty Reaſons. A Commonwealth which breaks its Faith with one of its neighbouring States, immediately engages its Faith again, to procure the Alliance and Confederacy of another; and thus endeavours to avert the Danger it lay under from that Baſeneſs and Treachery, by the Help of the ſame Duty which before it violated. We ought therefore to preſume, that every Man will do what is juſt and honeſt, till his contrary Practice forces us to change our Opinion. To diſtruſt every Body, ſays *Lucian*, is a moſt ridiculous Folly [4]. From all which we may venture to conclude, That this *diſtruſt of Mens Faith ariſing from the general Pravity of human Nature, is not ſufficient to juſtify the Non-performance of Contracts* [5]. And therefore the Excuſe of the *Mitylenians* for deſerting the Confederacy of the *Athenians*, was vain and groundleſs, as it is given by their Ambaſſadors in *Thucydides*, B. iii. c. 12. Edit. *Oxon.* Pag. 154. *When they had War, they for Fear courted us; and when they had Peace, we for Fear courted them. Thus our Faith on both ſides was not preſerv'd as is uſual by mutual good Will, but by mutual Diſtruſt; and they who could be firſt encouraged by Security were likely to be the firſt that ſhould break the Union.*

Nay, ſhould we diſcover ſome particular Vices in a Perſon, this is not always a good Reaſon for us to recede from an Engagement made with him [6]. For there are many Vices which have no ill Influence on the Duty of keeping Faith. Thus ſuppoſe a Man to be inclin'd to Luſt, Drunkenneſs, or Cruelty, thoſe ill Habits, conſider'd barely in themſelves, do not hinder but that he may be a ſtrict Obſerver of his Word, and a conſtant Performer of his Covenants. And farther ſtill, ſhould we find a Perſon addicted to ſuch Vices as do commonly prejudice Fidelity and Truſt; as if we obſerve in him a deſultory Lightneſs and Inconſtancy of Mind, an inſatiable Deſire of Riches, or a violent Strain of Ambition; yet even theſe Qualities do not give us an abſolute Liberty of refuſing to make good our Word, when we have paſs'd it on his Account. For in the firſt place, it may often happen that a Man out of a particular Inclination may practiſe Diſhoneſty towards *others*, and yet may live fairly and juſtly with *me*. And then (as has been lately obſerv'd) by my very Act of bargaining with a Perſon whoſe Diſpoſition I am acquainted with, I declare thoſe Vices which I know him guilty of, to be inſufficient to hinder me from truſting him, and ſo renounce all my Privilege of making Exception againſt his preſent Morals, after the Buſineſs is concluded between us. For otherwiſe nothing would have been firmly tranſacted, ſuppoſing one Party at firſt to have made ſuch a Reſerve as ſhould, when he pleas'd, overthrow the whole Proceedings[7]. Though indeed when I have been once deceiv'd by a Man, I ſhall act very imprudently, if I engage in any Contract with him again, without requiring particular Security. And the very Proverb will tell me, That if ſuch a Knave cheats me once, 'tis *his* Fault, but if he cheats me a ſecond time, 'tis *my own*[8]. *Add. Senec. de Benef.* l. iv. c. 27. *Cic. de Invent.* l. i. c. 39. Or even after the *Pact* is concluded; ſuppoſe I find by evident Tokens, that he is contriving to play me a Trick, I ſhall be an egregious Fool, if I betray my ſelf voluntarily to his Deſigns. *Cicero de Invent.* l. i. c. 39. It's the higheſt Pitch of Madneſs to rely on their Fidelity, whoſe Perfidiouſneſs you have often experienc'd. Hence *Menelaus* cries out in *Homer*. l. iii. Iliad. v. 105, 106.

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[3] This is a Miſtake of our Author, for 'tis only a Tranſlation into *French*, as Mr. *Barbeyrac* obſerves.

[4] The Author here cites a Paſſage from *Lucian*'s Dialogue of the Liar or Incredulous, Γελοῖα ποιεῖς, ἔφη ὁ Ἴων, ἀπιστῶν ἅπασι. Theſe are the Words of a Man very incredulous in Matters of Magick, who reproved another that did not believe his Relations concerning it; but if our Author had minded the Connection of the Diſcourſe, he would have found that he had miſapply'd theſe Words; to which the judicious Maxim of the Philoſopher *Seneca* had been more pertinent, *Utrumque enim vitium eſt, & omnibus credere, & nulli; ſed alterum honeſtius dixerim vitium, alterum tutius*, (i. e.) We muſt neither truſt all the World, nor diſtruſt them, both of theſe Things are faulty; but the firſt in my Opinion is moſt honeſt, and the other moſt ſafe, *Epiſt.* 3. See *Heſiod* in his Book *De Oper. & Diebus*, ver. 372. And as to the following Maxim of our Author, ſee l. 8. c. 4. §. 3. following.

[5] The Greek is, Καὶ οἱ μὲν ἡμᾶς ἐν τῷ πολέμῳ δεδιότες ἐθεράπευον, ἡμεῖς δὲ ἐκείνους ἐν τῇ ἡσυχίᾳ τὸ αὐτὸ ἐποιοῦμεν. ὅ τε τοῖς ἄλλοις μάλιστα εὔνοια πίστιν βεβαιοῖ, ἡμῖν τοῦτο φόβος ἐχυρὸν παρεῖχε, δέει τε τὸ πλέον ἢ φιλίᾳ κατεχόμενοι, σύμμαχοι ἦμεν, καὶ ὁποτέροις θᾶσσον παράσχοι ἀσφάλεια θεάτος, οὗτοι πρότεροί τι καὶ παραβήσεσθαι ἔμελλον.

[6] Mr. *Hertius* here quotes to this Purpoſe certain Words of *Terence*, which he makes a Buyer of Slaves to ſpeak, *Leno ſum, fateor, pernicies communis adoleſcentium, perjurus, peſtis; tamen tibi a me nulla eſt orta injuria*, (i. e.) I own, I am a Buyer of Slaves, the Ruin of young Men, a perjured Perſon, a common Plague; but for all this I have done no Injury. *Adelph.* Act. 2. Scene 1. v. 34, 35.

[a] *De Cive*, c. 2. ſ. 11.

[b] And much more plain from his expreſs Words in the Engliſh *Leviathan*, where the ſame Doctrine is thus delivered: If a Covenant be made, *&c.* p. c. 68.

Ἄξετε δὲ Πριάμοιο βίην, ὄφρ' ὅρκια τάμνῃ
Αὐτὸς, ἐπεὶ οἱ παῖδες ὑπερφίαλοι ϗ ἄπιστοι.

Bring *Priam*'s ſelf to ſee the Contract made,
For *Priam*'s Sons are faithleſs and unſtaid.

Add. Polyb. l. viii. c. 1, 2. l. x. c. 34. *Cicero in Verr.* i. 15. He who hath proved falſe to his own Party is the common Enemy of Mankind. No wiſe Man ever truſted a Traytor. *Idem pro Rabir.* 13. When a Man hath been once perjur'd, he ought to be no more believ'd, though he ſwear by all Heaven together. *Add. Senec. de Benef.* l. iv. c. 27.

Thus much we willingly allow, that in caſe a Man openly diſclaims all Religion, or if he entertain ſuch Opinions as amount to the ſame, we ought to place no farther Truſt in his Pacts or Promiſes, than as either his manifeſt Advantage and Intereſt obliges him to ſtand to them; or as we can by Force reduce him, if he fly off. Such Perſons are thoſe profeſs'd Atheiſts[9], who either deny the *Being*, or the *Providence* of God; and nearly related to them, are the Maintainers of the Mortality and Impunity of human Souls. For 'tis impoſſible, but that Men of theſe Principles ſhould meaſure all Right and all Juſtice by their own Profit and Convenience. Into the ſame Herd we may pack all thoſe who practiſe ſome Villany or Vice for their ſet Trade and Employment; as Pirates[10], Thieves, Murtherers, Pimps, Courteſans, and other profligate Wretches, who take Perjury for a Trifle, and make a Jeſt of ſacred *Obligations*. Thus *Tacitus* ſpeaks upon the Occaſion of one *Gannaſcus*, who having ſerved the *Romans* a long time, run over to the *Germans*. *Nec irritæ aut degeneres inſidiæ fuere adverſus transfugam & violatorem fidei*, i. e. (*Ann.* xi. c. 19.) The Treachery ceas'd to be diſhonourable by being practis'd againſt a perjur'd *Renegado*[11].

And this we are farther ready to acknowledge, that although the Argument of Mr. *Hobbes*, which we have here endeavour'd to refute, does not perform the Service he intends it for; that is, does not take off the Validity of *Pacts* in a *natural State*; yet is in ſome meaſure capable of good uſe, in as much as we may draw from it the following Rules of Prudence; Never to depend much on a Covenant, but when we know that the Intereſt of the other Party is concern'd in the Performance of it, as well as our own; and that upon Default he is likely to ſuffer ſome greater Evil or Inconvenience, than he can incur by ſtanding to the Agreement.

That he who enters into a Contract with his Superior ſhould ſo order Matters, as that his Superior ſhall be oblig'd to be the firſt Performer. For if the weaker Perſon diſcharge his Part firſt, the Effect will probably be, either that he ſhall be diſappointed and deluded; or that he muſt depend entirely on the Favour and good Grace of the other, for what he expects in return.

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[7] There is a Paſſage in *Cicero* very pertinent to this Purpoſe, *Nam illud quidem, Neque dedi, neque do fidem infideli cuiquam, idcirco recte a poeta, quia cum tractaretur Atræus, perſonæ ſerviendum fuit; ſed ſi hoc ſibi ſumunt, nullam eſſe fidem, quæ infideli data ſit, videant ne quæratur latebra perjurio*, (i. e.) When the Poet makes *Atræus* ſay, I never have, nor do believe a faithleſs Perſon, he had reaſon to make that wicked King ſay ſo, to make up his Character. But if we lay down this as a general Rule, That Credit given to a faithleſs Man is void, I fear under that pretence an Excuſe will be found for Infidelity and Perjury. *De Offic.* l. 3. c. 29.

[8] *Cicero*'s Latin is, *Primo quidem decipi incommodum eſt, iterum ſtultum, tertio turpe ——ſumma igitur amentia eſt, in eorum fide ſpem habere, quorum perfidia toties deceptus ſis.* De Invent. l. 1. c. 39. See alſo *Homer*'s *Ilias*, l. 3. v. 105. *Cicero*, l. 1. *in Verrem*, c. 15. *Sen. De Benef.* l. 4. c. 27. *Polyb.* l. 8. c. 1, 2. and l. 10. c. 34.

[9] Mr. *Vander Muelen* in his Commentary upon *Grotius*, Tom. 2. will not agree to the Opinion of our Author. For he ſays, Experience ſhews, that thoſe ſort of Men have not ſo altogether put off Humanity, but are uſually conformable to the Rules of Honeſty and good Senſe eſtabliſhed among Men; and if they do not act with any fear of a Deity, yet they do it with the Proſpect of their own Advantage and Preſervation. So that though we know that a Man is infected with that deteſtable Opinion, we have no Right under that pretence to break our Word with him, and neglect to perform the Agreements made with him. We were at our Liberty to agree with him, or not; but from the Moment that we have concluded an Agreement with him, we are neceſſarily obliged to perform it. It is a clear different thing when we deal with Traitors, Thieves, Pirates, &c. Mr. *Bayle* has alſo proved at large in his Thoughts upon a Comet, and the Enlargement of that Work, that Atheiſts are not always wicked and faithleſs, and that they may through a Principle of Honour or other human Motives abſtain from groſſer Vices.

[10] The Author here ſpeaks only of that Circumſpection that we ought to uſe in treating ſuch Men. For he denies not but we are obliged to obſerve what we have freely promiſed. See what he ſpeaks a little lower, §. 11. in the place where he examines the Maxim of *Cicero*. *De Offic.* l. 3. c. 29. See alſo l. 8. c. 4. §. 5.

[11] We may eaſily diſcern that this Paſſage is not very pertinently alledged.

Thus *Socrates* of *Achaia* replied to the Demands of King *Artaxerxes*; The King deals moſt unreaſonably by us; what he deſires to receive from us, he would have to be immediately deliver'd; but what he is to give us in return, he expects we ſhould afterwards humbly ſue for. *Diod. Sic.* l. xiv. c. 24. For the ſame Reaſon, *facilior fides ſperatur ex pari*, we may truſt more ſafely to the Faith and Honeſty of an Equal, *Quintil. Declam.* 312.

And laſtly, That he expoſes his Safety to manifeſt Danger, who by performing a Covenant weakens himſelf, and ſtrengthens the other Party; upon hopes that in Requital, and according to the Agreement, he ſhall afterwards receive the like Aſſiſtance and Succour. For 'tis a piece of Folly to give a real and ſubſtantial *Good*, in exchange for Words, Writings, or Seals, when we have nothing to oppoſe to the Charms of Ambition and Covetouſneſs, but the ill-grounded hopes of Honeſty and Fidelity [12].

Maurocen. Hiſt. Venet. l. v. p. 193. *Ed. Ven.* I dare not venture to place the Security of our Affairs in a League. For ſuch is the Nature of Confederacies, that they are frequently hindred and interrupted by the various Events of Things; different Ends propos'd draw the Strength and Minds of the Allies different ways; and whilſt each State purſues its own private Intereſt, the common Good is diſregarded or betray'd. Reinforcements and Supplies are neither ſent in equal Proportion, nor at the time agreed upon; hence ariſe Suſpicions, and Eſtrangement of Affections, from this open Quarrels, and from Quarrels utter Deſertions, and Violations of the main Contract; and thus at length, thoſe of the Confederates who are leaſt able to make Reſiſtance, become a Prey not only to their Enemies, but to their Allies.

X. We are now to proceed to that other Species of *Fear*, ariſing from the Approach or the Apprehenſion of ſome grievous Miſchief. And in ſtating this Point it is neceſſary, that we go back to furniſh our ſelves with ſome clear and fundamental Principles. And ſuch is this undoubted and original Truth, That *our Will naturally inclines to what it looks upon as good.* Now it appears no leſs good and deſirable to the Will, to avoid an imminent Evil, than to acquire an abſent Benefit; and towards the attaining of both theſe Ends, we employ the moſt likely *Means*, although they be ſuch as we ſhould not barely on their Account chooſe or embrace. For we commonly make uſe of Methods in themſelves ungrateful and troubleſome for the eſcaping of a Danger, as for the acquiring of a Pleaſure [1]. Though indeed, the Hopes of compaſſing a Good does more ſweeten the Grievouſneſs of theſe Means or Methods, than the Care of preventing an Evil. For which Reaſon *Ariſtotle* [a] calls thoſe only *mixt* (that is, partly voluntary, partly involuntary) Actions [2], which are undertaken for the ſake of declining ſome Miſchief which we are like to ſuffer; as in that trite Inſtance, of throwing Goods over-board in a Storm. Though as great Hardſhips as any of this kind are undergone by the Wreſtlers, and other Engagers in the publick Games, to prepare their Body for thoſe Exerciſes [b]. What we would obſerve then is this, That although Actions perform'd upon Fear of a greater Evil, ought to be accounted ſpontaneous, and tho' the leſſer Evil, which in thoſe Caſes we chooſe, is, as Things then ſtand, the real Object of our Deſire; yet all this is not ſufficient to found an *Obligation* in us towards another. For ſince every *Obligation* is directed towards ſome other Party, to whom it is to be made good, and who thereby obtains a correſpondent Right of compelling us to Performance; to produce ſuch an Engagement, 'tis not enough that one Perſon has in him the due Grounds or Principles of an *Obligation*, but it is requiſite, that there be in ſome other Perſons Principles fit to create a *Right*. For we can have no Notion of an *Obligation*, unleſs a *Right* anſwer to it, or be conſequent upon it: As I can owe nothing, if there be no Perſon who can rightly demand any thing from me. Therefore ſuch *Fear* alone invalidates and deſtroys an *Obligation*, as is caus'd by ſome *Vice* or Imperfection in the other Party, rendering him incapable of acquiring a *Right* [3]. And ſuch a Defect is every *injurious* Action; which cannot be ſaid to produce a *Right* without a manifeſt Contradiction [4]. For to pay what

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[12] This Quotation is not very neceſſary, becauſe that Hiſtorian there treats in general of the Inconveniences which ariſe by Alliances of one State with another.

Mr. BARBEYRAC's *NOTES on* §. X.

[1] As for Example, The antient Wreſtlers, as our Author obſerves a little lower, underwent chearfully the Regimen of a very auſtere Life, and great Fatigues, that they might win the Crown of the Olympick Games. See *Epictet. Enchirid.* c. 35. *in fine.* What our Author ſays here is not contrary to the Maxim which we have defended above after him, l. 1. c. 6. § 14. For tho' in general Man is more ſenſible of Evil than Good, that hinders not, but that ſometimes he may reſolve to do ſome things diſagreeable in themſelves upon ſome Occaſions, to obtain a Good which he looks upon as much more conſiderable, or to avoid an Evil more troubleſome. And then the Hope of Good makes us think the Means leſs troubleſome, than the Deſire of avoiding the Evil does, as well becauſe we embrace theſe Means with an entire Liberty in the firſt Caſe, and not in the latter, as becauſe the Acquirement of Good is ſomething poſitive, which produces a new Pleaſure and Advantage, whereas a Deliverance from Evil leaves us in the ſame Eſtate we were.

[2] See l. 1. c. 4. § 9. before going.

[3] *Nihil conſenſui tam contrarium eſt, qui ac bonæ fidei judicia ſuſtinet, quam vis atque metus, quem comprobare contra bonos mores eſt.* Digeſt. l. 50. tit. 18. De Diverſis Reg. Jur. leg. 116. See tit. 2. l. 4. *Quod metûs cauſa geſtum erit*, and Mr. *Daumat*'s Civil Laws in their natural Order, Part 1. l. 1. tit 18. § 2. We may add alſo what *Cicero* ſays, *Jam illis promiſſis ſtandum non eſſe, quis non videt, quæ coactus quis metu, quæ deceptus dolo promiſerit? Quæ quidem pleraque Jure Prætorio liberantur, nonnulla Legibus.* De Offic. l. 1. c. 10. (*i. e.*) As for Promiſes extorted by Fear or Fraud, who ſees not that we are not obliged to keep them? The Prætor himſelf frees us from many of them, and the Laws from ſome others. "*Solon* (as *Plutarch* relates) by allowing Men who had no Children to give all they had by Will to whom they pleaſed, yet did not thereby approve of all ſorts of Donations indifferently, but of thoſe only that were given freely without any Violence, and without a Mind corrupted with the Potions, or Fawnings of a Woman, being juſtly perſuaded that there is no difference between Seducement and Force; and placing in the ſame Rank, Surprize and Force, Pleaſure and Pain, as the things which equally cloud our Reaſon. Εὖ πάνυ καὶ προσηκόντως τὸ πεισθῆναι παρὰ τὸ βέλτιστον, οὐδὲν ἡγούμενος τοῦ βιασθῆναι διαφέρειν, ἀλλ' εἰς ταυτὸ τὴν ἀπάτην τῇ ἀνάγκῃ, καὶ τῷ πόνῳ τὴν ἡδονὴν θέμενος, ὡς οὐχ ἧττον ἐκστῆσαι λογισμὸν ἀνθρώπου δυναμένων.

[4] See the Law of the *Digeſts*, cited §. 8. Note 4.

[a] *Ethic.* l. 3. c. 1. See what we have ſaid of theſe in l. 1. c. 4. ſ. 9.

[b] *Vid. Epictet. Enchir.* c. 35.

another has a *Right* to demand, is a Precept of the *Law of Nature*; and ſhould an Injury (*that is*, a *Deed* or Fact directly contrary to that *Law*) be able to cauſe any ſuch Effect, the *Law of Nature* would lend Strength and Aſſiſtance to its Enemy, and manifeſtly contribute to its own Deſtruction. We may as well ſay, that a Law which forbids Thieves, may at the ſame time reckon their Trade and Practice amongſt the honeſt ways of Gain[5].

XI. But, before we apply theſe Remarks more cloſely to the Point, it is neceſſary that we make farther Enquiry, whether the Author of the *Fear* was the Party with whom we are engaged in Buſineſs, or ſome other Perſon. And then again, whether he had a juſt Power and Authority of preſenting ſuch a Fear to our Mind, or not. For this is true beyond Diſpute, that in caſe I have taken an *Obligation* upon me through Fear of Miſchief, threatned by a *third Perſon*, neither at the Inſtigation, nor with the Confederacy of the Party to whom the Engagement was made[1], I ſtand firmly bound to perform what I promis'd him. For there appears no Fault in him, which might render him incapable of acquiring a *Right* upon me; and on the contrary, he may juſtly challenge a Requital, in that he lent me his Aſſiſtance, in warding off the Danger I apprehended from another Quarter[2]. Thus, if I hire a Guard of Soldiers to defend me againſt Robbers, I am no doubt oblig'd ſtrictly to pay them the Price of their Service. And a Man who being reduc'd to a low Condition, procures by large Promiſes the Help of others, and having by their Means eſcap'd the Danger, is afterwards backward in performing, contracts the double Guilt of Perfidiouſneſs, and of Ingratitude.

A Promiſe is likewiſe valid, if made to a third Perſon, through our Awe and Dread of a lawful Superior[3]; who had a juſt Right of commanding us, and of denouncing a Penalty upon Default. For here the Party to whom I make the Engagement is in no Fault; and I can only blame my ſelf for being driven to a thing through Fear of Puniſhment, which I ought voluntarily to have undertaken. Thus ſhould a King lend a Body of his Soldiers for Guards to a foreign Prince, and for the greater Security, command them to ſwear Obedience to the Stranger; they ſhall not afterwards fly from their new Obligation, upon pretence that they were brought to it by *Fear*; ſince the *Fear* proceeded from *him*, who had a ſovereign Right of laying this Injunction on them, and of forcing them by any Methods to their Duty. In the ſame manner,

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[5] To clear this Matter, it is neceſſary to make ſome Reflections. 1. The Reaſon which our Author alledges, taken from the Incapacity made by the Cauſe of Fear, to acquire any Right from the other Contractor, is very good, but there is another drawn from the Perſon in whom the Fear is, That his Conſent is not ſo free as is required in all Promiſes and Agreements, which ought to be perfectly voluntary. 'Tis not here as it is in Actions criminal and evil in themſelves, which ought not to be committed for fear of the greateſt Menaces, though the Fear yielded to may leſſen the Crime. Becauſe as we ought and may obey the Law that forbids them, we are thought to be free ſo far as is neceſſary to make us culpable, though we have nothing in view but the Trouble which we are immediately threatned with. But in the Matters of Promiſes and Agreements, all that is not done without Artifice and Conſtraint from him with whom we engage, is looked upon with Reaſon not to have a good ground of Conſent, and conſequently is void in itſelf, becauſe we act about things indifferent, which we need not determine farther than we ſee convenient. The Law that leaves us at liberty to do them or not, lays no Neceſſity upon us to keep what we are engaged to contrary to our Will and Intereſt. Reaſon and Prudence will oblige us rather to depart from our Rights, than expoſe our ſelves to the ill Effect of Force; but if there be no Damage to us, nothing can oblige us to make good an Act which is null in itſelf, unleſs we fear a worſe Conſequence than appears in doing it. Mr. *Daumat*, who has uſed (in his Civil Laws reduc'd to a natural Order, Part 1. Lib. 1. tit. 18. § 2.) this Reaſon to ſhew the Nullity of forced Engagements, but explains them obſcurely, has not forgot the other Reaſon taken from him who is conſtrained to promiſe or treat. 2. Our Author ſeems to think that the Evil, which being apprehended, is ſufficient to make forced Promiſes and Agreements void, ought to be very terrible, whoſe Proſpect may affright the moſt courageous Perſons. 'Tis certainly the Opinion of the *Roman* Lawyers, who confine this Fear to the Danger of loſing Life, or ſuffering ſome violent bodily Pain. *Metum accipiendum Labeo dicit, non quemlibet timorem, ſed majoris malitatis-----qui merito & in hominem conſtantiſſimum cadat.* Digeſt. l. 4. tit. 2. leg. 5, 6. *Talem metum probari oportet, qui ſalutis periculum, vel corporis cruciatum contineat.* Cod. l. 2. tit. 4. De Tranſactionibus, *leg.* 13. But ſuppoſing always, that the Fear is unjuſt, I do not ſee why the Apprehenſion of a ſmall Evil is not ſufficient to make Promiſes and Agreements void, if that be the principal Motive, and without it Conſent had not been given. The leaſt Injuſtice, in my Opinion, gives no more Right to the Author of it than the greateſt. But the Fear muſt not be a vain one, for he that reſigns himſelf up to panick Fears, muſt blame himſelf. *Vani timoris juſta excuſatio non eſt*, Digeſt. l. 50. tit. 17. De Diverſis Reg. Jur. *Leg.* 184. Otherwiſe, as Mr. *Daumat* obſerves, all the World would not have the ſame Reſolution to reſiſt Force and Menaces. There are ſome Men ſo very weak and timorous, that they yield to the leaſt Impreſſions; ſo that the leaſt Force prevails as much on them, as the greateſt on the moſt courageous, and 'tis principally for their ſake that the Laws puniſh Matters of Fact and Oppreſſions. But if the ſame Laws do not allow the Fear of a ſmall Evil to be ranked among the Cauſes of nulling a Contract, it proceeds from hence, according to the judicious Reflection of Mr. *Placette* in his Treatiſe of Reſtitution, that the Lawgivers would prevent the Multiplication of Suits, which are without Contradiction a great Evil; but they have left, adds he, the Rights of Conſcience entire, and their Authority hinders not but that we may obſerve exactly what that inward Law preſcribes upon that and the like Subjects. We muſt then conclude, that by natural Right all Force, and every kind of Violence, direct or indirect, all Menaces, and in general all unlawful Influences which oblige Men, contrary to their Inclination, to give their Conſent, which otherwiſe they would not, takes away that Liberty which is neceſſary to make an Engagement valid, and conſequently renders all Promiſes and Agreements in ſuch Caſes null and void. I ſhall farther add only one Paſſage in *Plato*, wherein that Philoſopher aſſerts, That the Agreements to which a Man is obliged by an unjuſt Force, ought to be valid no more than thoſe which are contrary to the Laws, or are not in our Power to execute, by reaſon of ſome unforeſeen Accident, Ὅσα τὶς ἂν ὁμολογῶν ξυνθῆται, μὴ ποιῇ κατὰ τὰς ὁμολογίας, πλὴν ὧν ἂν νόμοι ἀπείργωσιν, ἢ ψήφισμα ἤ τινος ὑπὸ ἀδίκου βιασθεὶς ἀνάγκης ὁμολογήσῃ, καὶ ἐὰν ἀπὸ τύχης ἀπροσδοκήτου τὶς ἄκων κωλυθῇ, δίκας εἶναι τῶν ἄλλων ἀτελοῦς ὁμολογίας ἐν ταῖς φυλετικαῖσι δίκαις, *&c. De Legibus*, l. 11. Tom. 2.

Mr. BARBEYRAC's *NOTES* on §. XI.

[1] Whether the Evil be at a diſtance and uncertain, or it be according to all Appearance juſt ready to happen. In the firſt Caſe it is plain, that Fear from a third Perſon can't invalidate a Promiſe or Agreement. In the other, though the Fear be preſent, it has no manner of Influence upon the Nature of a Promiſe or Agreement. All that is done is, that it gives the Perſon engaged a Right to accuſe the third Perſon, by whoſe unjuſt Force he made the Engagement, and without which he had made no Contract. *Titius*'s *Obſerv.* 224.

[2] *Si quo magis te de vi hoſtium vel latronum, vel populi tuerer, vel liberarem, aliquid à te accepero, vel te obligavero; non debere me hoc edicto teneri, niſi ipſe hanc tibi vim ſummiſi. Cæterum ſi alienus ſum à vi, teneri me non debere; ego enim operæ potius meæ mercedem accepiſſe videor.* Digeſt. l. 4. tit. 2. leg. 9. § 1.

[3] *Non eam vim quam Magiſtratus intulit, ſcilicet jure licito, & jure honoris, quem ſuſtinet.* Ibid. leg. 3. § 1. This Author in his Abridgment of the Duties of a Man and Citizen, l. 1. c. 9. § 15. adds, With Reſpect or Deference to a Perſon to whom we have great Obligations. And 'tis for this Reaſon that he reports an Example of a Child who married againſt his own Inclination to pleaſe his Father, although he could have abſolutely freed himſelf. See l. 6. c. 2. § 14. following.

ſhould we ſuppoſe that a Father might betroth his Daughter to a Man, quite againſt her Inclination; and in this Caſe, when ſhe, out of fear of her Father's Authority, has given her Faith to the leſs agreeable Spouſe, ſhe cannot afterwards diſappoint him. For there is no Fault in him, to prejudice his *Right*, accruing from that *Promiſe*; and the Daughter ought freely to have obeyed her Father's Pleaſure; and ſo cannot plead *Compulſion*, when ſhe has no Right to reſiſt. Thus far then it is a Point of Moment to conſider who was the Author of the *Fear*. But in other Caſes, the Rule of the *Roman* Lawyers holds good, That it *makes no difference from what Perſon the Fear proceeds*; that is, when one has a *Right* of putting us into ſuch a Fear; and when the Fear is actually the *Cauſe*, not the bare *Occaſion* only of the *Promiſe*, or *Pact*, conſequent upon it [4].

Thoſe *Promiſes* then, or *Pacts*, we take to be invalid, which a Man is compell'd to engage in by the unjuſt Force of the Party to whom they are made. For ſince he who extorts any thing from another, by uſing unjuſt Terrors, is by the Law of Nature bound to reſtore it; and muſt conſequently make good what the other Perſon loſes by ſuch a forced Bargain. So [5] *Seneca l.* iv. *Controv.* 26. The Queſtion is, whether Force and Neceſſity render a Buſineſs invalid, when they did not proceed from the Party contracting? What Influence (will he ſay) "can your Compulſion have on me, when it "was not I that compell'd you? The Puniſhment "cannot be mine, unleſs the Fault were mine. "But the other denies this way of arguing. The "Law, ſays he, as to the preſent Caſe, doth not "proſecute him that offers the Violence, but aſ"ſiſts and relieves him that ſuffers it; it ſeeming "unreaſonable, That a Man ſhould be bound by "an Engagement thruſt upon him againſt his "Will. Whence the Neceſſity proceeded, is a "Point of no weight in the Diſpute. That which "renders the Contract unjuſt, is the hard Fortune "of the Sufferer, not the Perſon of the Doer. *Idem Controv.* l. iv. *c.* 8. If it be ſaid it was not I that applied the Force, but another; the Anſwer is, That Man who makes his Advantage by Violence, offer'd by ſome other hand, is no leſs guilty, than if he had been himſelf the actual Performer.

The Neceſſity of *Reparation* in the Party who offer'd the Violence, takes off all Obligation to *Payment* in the Party who ſuffer'd it; becauſe ſhould he offer to *do* [6], or to give what in the Agreement he promis'd, he ought in common Juſtice immediately to receive full Recompence, or full Reſtitution [7]. And 'twould be a fooliſh and idle way of acting, when we are once got clear of the Danger, to pay *voluntarily* what we promis'd *upon Force*, and then to require Reparation of the Damage [8]. *Martial.* L. XI. *Epig.* 59.

Quid ſi me tonſor cum ſtricta novacula ſupra eſt,
Tunc libertatem divitiaſq; roget?
Promittam: Nec enim rogat illo tempore tonſor,
Latro rogat; res eſt imperioſa timor.
Sed fuerit curva cum tuta novacula theca,
Frangam tonſori crura manuſq; ſimul.

My Barber with his Razor on my Throat,
Asks me for Wealth and Freedom, and what not:
I promiſe all, whilſt Danger ties my Hands,
For not the *Barber*, but the *Rogue* demands;
But when fierce Razor to ſafe Sheath withdrew,
I'd ſpoil his Dancing and his Fiddling too.

Eſpecially ſince the other Party, when he demands or accepts our Promiſe, does by that very Act declare manifeſtly, that 'tis far from his Thoughts and Deſigns to make us any Satisfaction. Beſides, how ridiculous would it be in you to reckon it a piece of *Merit*, when you forbear a Miſchief which the Laws forbid you to commit, to pretend that you do a Man a *Kindneſs*, by refraining from ſome notorious Villany? And therefore *Cicero* [a] utterly denies himſelf to have been *obliged* to *Antony*, for not killing him at *Bruduſium*. *What Benefit, what Favour is it* (ſays he) *that you withheld your Hands from the fouleſt Wickedneſs? What Kindneſs can Thieves boaſt of, but that they ſpared a Man's Life, when it was in their Power to have murder'd him?*

Horat. l. I. Epiſt. 16.
Non furtum feci, nec fugi, ſi mihi dicat
Servus, habes pretium loris, non ureris aio.
Non hominem occidi; non paſces in cruce Corvos.

[9] *Id. de Arte P.*
——*vitavi denique culpam,*
Non laudem merui.

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[4] *In hac actione non quæritur, utrum is qui convenitur, an alius metum fecit; ſufficit enim hoc docere, metum ſibi illatum, vel vim; & ex hac re eum qui convenitur, etſi crimine caret, lucrum tamen ſenſiſſe. Nam cum metus habeat in ſe ignorantiam, merito quis non aſtringitur, ut deſignet, quis ei metum, vel vim adhibuit, & ideo ad hoc tantum Actor aſtringitur, ut doceat metum in cauſa fuiſſe, ut alicui acceptam pecuniam faceret, vel rem traderet, vel quid aliud faceret.* Digeſt. l. 4. tit. 2. *Quod metus cauſa,* leg. 14. §. 3.

[5] The Latin of *Seneca* is, *An, ſi eſt in re vis & neceſſitas, ita tamen reſcindantur, quæ per vim & neceſſitatem geſta ſunt, ſi vis & neceſſitas à paciſcente adhibita eſt? Nihil, inquit, meâ, an tu cogaris, ſi non à me cogeris, meam culpam oportet eſſe, ut mea pœna ſit. Non inquit, neque enim Lex adhibenti vim iraſcitur, ſed paſſo ſuccurrit, & iniquum illi videtur, id ratum eſſe, quod aliquis, non quia voluit pactus eſt, ſed quia coactus eſt. Nihil autem refert, per quem illi neceſſe fuit. Iniquum enim, quod reſcinditur, facit fortuna ejus, qui paſſus eſt, non perſona facientis.* And again, *Non mea, inquit, ſed aliena vis fuit; æquè dignus eſt pœna, qui ipſe vim adhibet, & qui ab alio admota ad lucrum ſuum utitur.* See alſo Mr. *Noodt, De Juriſdict. & Imperio.*

[6] There is no Neceſſity here to have recourſe to this Fiction of Law; and our Author ought the more to have avoided it, becauſe he condemns it himſelf, when he criticiſes upon *Grotius*'s Opinion, at the end of §. 12. in this Chapter. He had better have inſiſted upon the Principle he laid down above, *viz.* The Incapacity that the Author of Force ſhould obtain any Right by ſuch extorted Engagements, and the want of Liberty in the Perſon which gives ſuch a forced Conſent. See §. 10. Note 5. The Argument our Author uſes here, can only be *ad hominem* againſt the *Roman* Lawyers, who having ſearched into the idle Fallacies of this Head, as they have done in other Matters, maintain, That the Contracts of Rigorous Right extorted by an unjuſt Fear, are valid in Equity, altho' they ought afterwards to be diſannulled by the Prætor. See *Inſtitut.* l. 4. tit. 13. *De Exceptionibus*, §. 1. and Mr. *Noodt, De Forma emendandi doli mali*, c. 16.

[7] This is a Term of Law, by which is underſtood a Diſcharge which two Perſons Debtors to one another, give one another. Of this our Author will treat in Lib. 5. c. 11. §. 5. Vid. *Digeſt.* l. 44. tit. 4. *De doli mali & metus Exceptione,* leg. 8.

[8] This Note is put into the Text.

[9] *Horace* is there treating of another Matter, and ſo the Quotation is not proper.

[a] *Philip.* 2.

Speak, Slave, your Merits, I ne'er fled nor ſtole;
You've 'ſcaped the Scourge, and ſtill your Hide keeps whole:
I've done no Murther; and you feed no Fowl.

I merit Pardon, but I win no Praiſe.

Add. l. vii. ſ. 3. *D. de pactis*. Seneca, l. ii. *Controv.* 13. Not to do a Villany will never paſs for a Benefit. *Quinctil.* Declam. 330. To make an end of an Injury is by no means to begin a Kindneſs.

No more is a Man bound to perform his Promiſe, who in a Caſe of this Nature [10], gives *Security* for the Perſon in Diſtreſs; although his own Fear is not the Cauſe of his entring into the Engagement. For ſince *Suretiſhip* is a kind of inferior Contract, admitted to confirm and ſtrengthen the main Buſineſs; it would be abſurd (at leaſt with regard to natural Law) to attribute more Efficacy to the former than to the latter; to make the principal Debtor leſs ſtrictly obliged, than he who comes into the Buſineſs purely for his Aſſiſtance [a]. The Caſe is otherwiſe, if this third Party, for the relief of the Sufferer, contract an Obligation, in which he himſelf is the Principal, not the Surety, or the Acceſſary. For inſtance, if a Man out of Kindneſs and Pity ſhould promiſe ſome Reward to a Villain, upon Condition he will ſet a poor Wretch at Liberty, whom he has got under his Power [11]. For here the Contractor himſelf is not properly put under *Fear*, nor can he uſe thoſe Exceptions, which might be made by the Perſon he delivers; in as much as he engages upon his own Score, not in the Name of the other, and cannot be ſaid to build his Bargain on a primary Obligation; ſince indeed, none paſs'd, but what he freely ſet on foot, and of which he took the whole Burthen on himſelf. And he ought to eſteem it a thing well worth his Pains or Coſt, to have ſaved the Life of an innocent Man, and to have acquired the Glory of Beneficence in ſo extraordinary a Degree.

But if a Perſon in this captive Condition, upon making Terms for his Liberty ſhall leave Hoſtages to continue under the Power of the Villains, till ſuch time as he ſhall have perform'd what he promiſed; he is then indeed bound to make good his Word; yet not by virtue of his Contract with the Rogues, but of that whereby he ſtands engaged to the Friends whom he has left in his room. In *Morocco*, and other Parts of *Africk*, the whole Body of *Chriſtian* Slaves paſs their *Faith* for each particular Man of their Number, that he ſhall not go off; and by means of this *Security* they are allowed to walk the City without their Chains; and in caſe one of them make their Eſcape, the reſt are obliged to pay the Price he was valued at. Whether an *Oath* added to Promiſes of this kind, does more confirm and eſtabliſh their Force, we ſhall hereafter examine.

It is a noted Saying of *Tully* in his third Book of *Offices*, c. 29. [12]. *If you have agreed with Thieves to give them ſuch a Sum to ſave your Life, it is no Deceit to recede from your Promiſe, though you have given your Oath too for the Performance. For Robbers or Pirates are not in the number of any particular and lawful Enemies, but ſhould be look'd on as the Adverſaries of Mankind; and therefore no true Faith or Oath can properly paſs between us and them.* Which Aſſertion we thus far allow holds good, that a Promiſe made to ſuch Men through the Compulſion of Fear ſhall not be binding. But the reaſon on which *Tully* proceeds, is not ſatisfactory to many Perſons; eſpecially, if extended to ſuch *Pacts* or *Promiſes* as we commence with the ſame Villains, without being brought to it by Violence. For tho' by the common Cuſtom of Nations [13] a lawful Enemy and a Robber are treated in a different Method, yet the latter cannot be ſaid immediately to loſe all *Rights* of Humanity; at leaſt, if he ſtill deal with ſome Perſons in a fair and peaceable manner. For when he tranſacts with me without influencing my Conſent by Fear, he bargains not as a *Robber*, but like any other Man. Now a Robber is call'd a *common Adverſary*, becauſe he does not, like other Enemies, offer War peculiarly to any Party; but practiſes hoſtile Force upon all, without Diſtinction, that fall into his Hands. Upon which account, in order to quell and to ſuppreſs him, there is no need of the Formalities of denouncing War, and liſting Soldiers againſt him; but Nature commiſſions every Man to proſecute him in a military way. But it may ſtill be affirm'd, that as by *Tully*'s own Confeſſion, a State of Hoſtility does not hinder us from being bound to obſerve Faith with an Enemy; ſo neither is this *common Hoſtility* of the Robber an Hindrance to our performing a Covenant made with him; eſpecially if, as we have all along ſuppos'd, he lays aſide the Part of an Enemy in the Act of Covenanting.

Grotius forms another Objection to this purpoſe; "Such as are notoriouſly wicked, and are no part "of any civil Society, may, if we regard the Law "of Nature, be by any Man puniſh'd. (This [14] "*Hypotheſis* we ſhall examine in another place.) "Now they who may be puniſh'd, and even with "Death, may likewiſe be deſpoil'd of their Goods, "may be diſpoſſeſs'd of their Rights. But, a"mongſt their *Rights*, that which accrues to them

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[10] This is the Deciſion of the *Roman* Lawyers, who ſay at the ſame time, That if the Surety has engaged thro' Fear, and he for whom he is Surety engageth himſelf voluntarily, the Engagement of this latter is good, but of the other null. *Labeo ait, Si quis per metum Reus ſit conſtitutus, & fidejuſſorem nolentem dederit, ipſe & fidejuſſor liberabitur. Si ſolus fidejuſſor metu acceſſit, non etiam Reus, ſolus fidejuſſor liberabitur.* Digeſt. l. 4. tit. 2. *Quod metus cauſa*, leg. 14. § 6. See l. 5. c. 10. § 9. following.

[11] Mr. *Hertius* maintains, that in this laſt Caſe the Engagement is not valid, unleſs there be an open Donation of what is delivered or promiſed on that account. For, ſays he, though he be engaged in Perſon, 'tis only to ſave another, who is unjuſtly oppreſſed. The Author himſelf in the following Chapter, § 9. puts the like Engagement among ſuch as are extorted by Fear, or gotten by Surprize, and in Sport. This Criticiſm is well grounded, altho' in the Caſe he is ſpeaking of the Engagement be free, he to whom it is made can acquire no more Right by our Promiſe, than by thoſe for whom the Engagement is made.

[12] *Cicero*'s Latin is this, *Ut ſi prædonibus pactum pro capite pretium non attuleris, nulla fraus eſt, ne ſi juratus quidem id non feceris. Nam pirata non eſt perduellium numero definitus, ſed communis hoſtis omnium; cum hoc nec fides debet, nec jusjurandum eſſe commune.* See alſo what is ſaid, l. 4. c. 2. § 8.

[13] *Heliodor. Æthiop.* l. 1. c. 3. p. 56. When we make War upon Thieves, we do not finiſh it with the uſual Ceremonies of Articles and Leagues. The Greek is, Οὐ γὰρ ἐπὶ ῥητοῖς ποτὲ λῃστρικὸς ἔληξε πόλεμος, οὐδὲ ἐν σπονδαῖς ἔχει τὴν τελευτήν. But ſee *Grotius*, l. 3. c. 19. §. 2. Numb. 2.

[14] See l. 8. c. 3. §. 4. following.

[a] Vid. *Inſtit.* l. 3. tit. 21. *De Fidejuſſor.* §. 5.

" from our Promiſe is one; and therefore that too " may by way of Puniſhment be taken from them. But *Grotius* anſwers this Argument with great Eaſe. For he that voluntarily bargains with a Thief, knowing him to be ſuch, does by that very Act renounce all Exception againſt his Perſon, which might otherwiſe render the Promiſe invalid. Elſe the Buſineſs was vain and inſignificant, and nothing really paſs'd between them. Should I be got out of my Road, and promiſe a Thief ſome Reward for ſetting me right again, there is no doubt to be made, but I ought freely to pay it. And thus too the *Roman* Lawyers rightly maintain, " That whatſoever is depoſited with us by a Thief, ought to " be reſtored to him [15], if the true Owner of it " does not appear. To which they ſhould add this farther Condition, That the Man who receives the thing in truſt, does not know the Fraud of the other. For in Caſe he is ſatisfied that the Perſon is a Villain, and that the Goods are ſtolen, I do not ſee how he can take them in Charge, without bringing himſelf in as an Acceſſary to the Crime.

XII. But many indeed there are, who maintain that *Pacts* and *Promiſes*, though extorted thro' Fear, have yet the Force and Power of *Obliging* [1]. Some urge the Authority of the *Roman* Law, which by giving full Reſtitution [2] ſhould ſeem to ſuppoſe, that thoſe Engagements are in ſtrict Juſtice *binding*, but ought to be reliev'd and corrected in Courts of *Equity*. But 'tis eaſy to vindicate the Practice, without drawing any ſuch Concluſion from it. For ſince the Parties are Members of a civil State, the *Court* does not preſently take it for granted, that one of them offer'd Violence to the other; and ſince that Point may bear a Diſpute, it ſeems convenient ſo long to keep up ſuch a Contract, and to ſuppoſe it good, till the Judge ſhall receive manifeſt Evidence, That the Allegation of *Fear*, on which the *Action* was grounded, was really juſt and true. But it does not follow hence, That Contracts of this kind, or other Buſineſs which may be diſannull'd by a *peremptory Exception* at Law, are in themſelves firm and obligatory; ſince the Formality of that way of Proceeding, though proper *civil* Judicature, yet is not agreeable to the Simplicity of the Law of Nature; at leaſt, when the Caſe happens between Perſons who do not acknowledge a common Judge. *Grotius* aſſerts [a], " That a Man who makes a " Promiſe through *Fear*, is therefore naturally obliged to perform it, becauſe he plainly gave his " Conſent, and ſuch Conſent as was full and " abſolute, according to the preſent Poſture of " Things [3]. For, as *Heliodorus* ſays, l. v. c. 15. " p. 253. Edit. *Lugd.* Life is ſo precious, that we " ſeldom think we buy it too dear; though he " had never paſs'd his Conſent, had he been ſe- " cure from the Danger. But in anſwer to this, 'tis ſufficient to repeat what we formerly obſerv'd, That ſince every *Obligation* ariſing from a Contract, ſuppoſes a correſpondent *Right* in the other Party, it is not enough that I have in me the neceſſary Cauſes and Principles of an *Obligation*; but 'tis requiſite, that the Perſon with whom I deal, be free from all ſuch Defects as might hinder him from obtaining a *Right* upon me. And therefore my having the *Power* to give a thing, does not preſently make another have a *Power* of receiving it. Since then an *Obligation* without a *Right* anſwering to it, is of no Uſe or Purpoſe; it cannot be imagined, that my bare Conſent ſhould bind me to a Performance, which the Law of Nature forbids the other Perſon to receive at my Hands. And this is manifeſtly the preſent Caſe. For the ſame Law which prohibits the Application of Violence and Terror, muſt needs at the ſame time prohibit the Acquirement of any *Right*, or any *Gain*, by ſuch wicked Means. What *Grotius* ſubjoins appears not altogether agreeable, " That if he to whom " the Promiſe was made, did obtain it of the other " Party, by putting him in a *Fear*, though never " ſo ſlight, he is oblig'd to releaſe the Promiſer, if " he deſire it; not becauſe the Engagement was in- " valid, but by reaſon of the Damage which he un- " juſtly occaſion'd. Now if I can at my Pleaſure " or Deſire be freed from my Obligation, I am al- " ready actually quit of it. What need is there then of this round-about way of Application? *You ought to releaſe me from my Obligation, if I requeſt it?* Is it not more eaſy, and more natural to ſay, *Since you compell'd me by Force to make the Promiſe, I owe you nothing; and 'tis idle in you to demand that of me, which ſhould I pay, you are oblig'd immediately to reſtore* [4]*?* *Add.* Senec. *Controverſ.* iv. 26.

XIII. The ſame Opinion is defended by Mr. *Hobbes* [b], though by different Arguments. He ſays, *Covenants entred into by Fear are not therefore invalid, becauſe they proceed from Fear; for then it would follow, that thoſe Covenants by which Men unite in Civil Life, and make Laws, muſt be invalid; for*

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[15] *Quod ſi ego* [*cui ſpolia abſtulit Latro*] *ad petenda ea non veniam, nihilominus ei reſtituenda ſunt, qui depoſuit, quamvis male quæſita depoſuit.* Digeſt. l. 16. tit. 3. *Depoſiti vel contra*, leg. 31. §. 1. See l. 4. c. 13. §. 5. following.

Mr. BARBEYRAC's *NOTES* on §. XII.

[1] This is the Opinion of Mr. *Montagne* in his Eſſays, *l.* 3. *c.* 1. who thus delivers himſelf, What my Fear has once made me reſolve, I am obliged to make good without Fear; and though nothing forces me to it but my Tongue without my Will, yet I am obliged to make good my Word. As for my ſelf, whenever I have inconſiderately deliver'd my Thoughts, I have made a Conſcience nevertheleſs of diſowning them. Otherwiſe we ſhall come by degrees to aboliſh all the Right which a third Perſon obtains by our Promiſes. *Quaſi vero forti viro vis poſſet adhiberi* (*Cicero de Offic.* l. 3. c. 30. upon which ſee *Græveius*'s Notes.) In this alone hath the Law a ſecret Intereſt to excuſe us in the Non-performance of our Promiſes, if we have promiſed a thing wicked and unjuſt in it ſelf, for the Right of Virtue ought to prevail above the Right of an Obligation.

[2] This hath only place in Contracts of ſtrict Right, for thoſe of good Faith would be null in themſelves, and by the Civil Law. It is true, that according to the *Roman* Lawyers, the Words *annul, make void, reſcind, make good fully*, may be indifferently applied to both ſorts of Contracts, becauſe when we are brought to Juſtice by the Contractor, who would oblige us to keep them, the Judge may declare them null one way or other, either as having no Force in themſelves by the Tenure of the Civil Law, or being void by ſome Exception made by the Defendant. See §. 8. Note 5. foregoing; and Mr. *Noodt*'s Treatiſe, *De Forma emendandi doli mali*, &c. *c.* 15, 16. where it will appear, that our Author's Reaſon to excuſe the Courſe of Proceedings in the *Roman* Court is no way ſolid, ſince the Judge had always time to know the Force, whether the Contract were in itſelf good, or not.

[3] *Heliodorus*'s Greek is, 'Ανθρώποις ψυχὴ πάντων προτιμότερον. A trivial Sentence.

[4] Here we may apply the Maxim of the *Roman* Lawyers, *Non videtur quiſquam id capere, quod ei neceſſe eſt alii reſtituere,* (*i. e.*) He ſeems not to receive any thing, that muſt of Neceſſity reſtore it. *Digeſt. de Diverſ. Reg. Juris*, leg. 51. on which ſee the Note of *Dion. Gothofred.*

[a] *Lib.* 2. *c.* 11. §. 7. [b] *De Cive*, c. 2. §. 16.

the Fear of mutual Slaughter is the Cauſe of one Man's ſubmitting himſelf to the Government of another. It would follow likewiſe, that a Man acts irrationally, who believes his Captive bargaining with him for his Ranſom. Now in the firſt of theſe Reaſons, there is a plain Ambiguity in the Term of *Fear*. For that *Fear* which engages Men to enter into *civil Societies*, is of a quite different kind from that which we are now conſidering [1]. The former is a Caution againſt ſome Evil which may happen indefinitely; I know not when, nor which way: The latter is a dreadful Apprehenſion of grievous Evil juſt now coming upon me, and which I am not able to reſiſt. Therefore the Covenants which we make for the Procurement of mutual Aſſiſtance againſt a common Enemy, are entirely of another Nature, from thoſe by which we promiſe ſome Reward, to free our ſelves from a Danger which a Villain unjuſtly brings upon us [2]. As to the latter Reaſon, we readily acknowledge, that a Rogue acts very *irrationally*, when having firſt extorted a Promiſe by Force, he afterwards yields Credit to the Perſon, as if the whole Buſineſs had been honeſtly and fairly tranſacted. For that Wickedneſs and Folly ſhould meet together, is no Contradiction. On the other ſide, we may venture to ſay, That he would not act very *rationally*, who being got ſafe from a Miſchief, with which he was unjuſtly threatned, ſhould freely pay the Ruffian the Price of his Villany [3]. (**) *Dionyſ. Halicar.* l. viii. p. 509, *in fin.* Edit. *Lipſ.* “Whatever is extorted from private Men, or from publick States, by Force and Neceſſity, holds no longer than the Neceſſity it ſelf continues.

He adds, *'tis univerſally true, that Pacts oblige, whenſoever a Good is receiv'd, and when the Act of promiſing, and the Thing promis'd are both lawful. But is it lawful for me both to make a Promiſe for the reſcuing of my Life, and alſo to give what I will of my own, even to a Robber?* But indeed, what the Robber in this Caſe performs for the Traveller, in forbearing to take away his Life unjuſtly, cannot be call'd a *Good*. The abſtaining from an *Injury* ought not paſs for a *Benefit*. And we are then only ſaid to have done ſome Good to a Man, when we have conferr'd ſome Advantage on him, which he wanted, or ſecured and preſerved ſome which he before enjoy'd; or have deliver'd him from ſome Evil or Danger, which fell upon him *without our Fault* [4]. As to the latter part of the Argument, it is no good Conſequence to ſay, “It is *lawful* for me to promiſe and to pay the Villain; therefore he has a Right of requiring the Performance from me; or therefore I ſtand bound towards him by ſome inward Tie upon my Conſcience. We may do many things *lawfully*, which we cannot be engaged to do by any *Obligation*. I may *lawfully* throw away my Goods; but does it therefore follow, that another can *oblige* me to ſuch an Extravagance? So that the Rule which the ſame Author lays down on this Subject in his *Leviathan* [a], is likewiſe falſe; *Whatſoever I may lawfully do without Obligation, the ſame I may lawfully covenant to do through Fear; and what I lawfully covenant, I cannot lawfully break.* For he ought to have added this Condition, Provided the other Party can honeſtly demand it of me.

XIV. There is on this Point ſtill one Queſtion behind, which requires our Examination; ſince Promiſes made through Miſtake, or through Fear, are void; ſuppoſe the Party after he gets rid of his Miſtake, or of his Fear, is inclin'd to ſtand to his Bargain, What muſt be the way of ratifying ſuch Promiſes, and of putting them in full Force? For an *Obligation* that was at firſt invalid [1], may afterwards recover its Strength by the Intervention of ſome new Cauſe, fit to create a *Right*; which in the preſent Caſe muſt be a clear and voluntary Conſent. Some then are of Opinion, That for the Confirmation of ſuch a Promiſe, no more is requiſite, than an internal Act of the Mind, or a full and free Agreement to the Buſineſs, tho' it be not expreſs'd by any outward Sign. For the outward Sign, they ſay, has paſs'd before; and this being now enforced by the clear and free Determination of the Mind, nothing is wanting to the Production of a firm Engagement. Others diſlike this way of deciding the Controverſy; becauſe they conceive that the internal Conſent, and the external Sign, ought to exiſt together, and that therefore an antecedent external Act cannot be a Token of a ſubſequent internal Act, which perhaps was not then thought of. And upon this Account, they, to make ſuch a Promiſe valid, require a new verbal Promiſe and Acceptance. *Grotius* [b] offers a middle Judgment, that 'tis indeed abſolutely neceſſary, ſome Signs ſhould be uſed to declare ſuch a ſubſequent internal Conſent, becauſe the other Party would elſe have no Aſſurance of his Right; but there is no Neceſſity the Signs ſhould be *verbal*,

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Mr. Barbeyrac*'s NOTES on* §. XIII.

[1] See Lib. 7. c. 1. §. 7.

[2] For, as our Author adds, nothing hinders but that a Man may be both wicked and imprudent at the ſame time, according to the Saying of *Menander* recorded by *Stobæus*, Serm. 2. 'Ασυλλόγιστόν ἐστιν ἡ πονηρία, Wickedneſs is a thing that always wants Reaſon and Conſideration.

[3] The Words of the *Roman* Ambaſſadors to *Marcius Coriolanus* make to our purpoſe, as they are cited by *Dionyſius Halicarnaſſenſis*, as at (**) in the Text.

[4] And therefore it was a fooliſh Excuſe alledged by *Polycrates* in *Herodotus*, l. 3. p. 112. *Thal.* Edit. Græc. *H. Steph.* when he pillaged his Friends and Enemies without Diſtinction; that to reſtore to his Friends what he took from them, would be a greater Obligation, than if he had altogether forborn the Injury.

Mr. Barbeyrac*'s NOTES on* §. XIV.

[1] There is among the general Rules of the *Roman* Law, a Maxim which appears quite contrary, *Quod initio vitioſum eſt, non poteſt tractu temporis convaleſcere*, Digeſt. l. 50. tit. 17. *De Diverſis Reg. Jur.* leg. 29. And this Maxim is afterwards applied to the making of an Heir, *Quæ ab initio inutilis fuit inſtitutio, ex poſt facto convaleſcere non poteſt*, Ibid. leg. 210. But we may diſcern from divers Examples of the *Roman* Law, that this Principle has not always been followed, even in the matter of Wills. See *Digeſt.* l. 12. tit. 1. *de Rebus Creditis*, &c. leg. 12, &c. and *Dionyſ. Gothofredus* upon the Rules quoted above, as alſo Mr. *Daumat*'s Civil Laws in their Natural Order, Part 2. l. 1. tit. 1. Sect. 2. §. 31.

[a] Cap. 14. [b] Lib. 2. c. 11. §. 20.

ſince others may ſerve as well to the purpoſe; as ſuppoſe the [a] Promiſer underſtanding his Error, or being deliver'd from his Fear, ſhall voluntarily give what he engaged for, or if the thing be already given, ſhall not endeavour to recover it, when he has convenient Means; or ſhall treat afterwards with the other Party about the ſame things, as he would about any thing elſe, which the ſaid Party lawfully poſſeſſes. To which Deciſion we readily ſubſcribe.

XV. We are farther to obſerve, That to the rendring of a Promiſe good and valid, there is required, not only the Conſent of the Perſon who makes it, but likewiſe of him to whom it is made [1][2]; and this latter Conſent too (as well as the former) muſt be expreſs'd by Signs ſufficient; and for this a bare Nod will ſerve, if the thing offer'd, be either a matter of free Bounty, or have been before requeſted. For if the other Party do not conſent, or do abſolutely reject the Propoſal, the thing promiſed ſtill remains in the Power of the Promiſer, though he had *ſworn* to part with it; for even an Oath cannot transfer a Right before *Acceptance*, and has only this effect, That it makes it unlawful for me to revoke my Offer, till I am aſſured of the other Man's Refuſal. For he that profers any thing of his own to another, does neither intend to force it upon him againſt his Will, nor quite to give it over, and throw it away at a Venture; and therefore he loſes nothing of his Right and Title to it, in caſe the other Perſon refuſe to take it. If a *Requeſt* paſs'd beforehand, it ſhall continue in Force, unleſs it be expreſly revoked; and in this caſe the *Acceptance* is ſuppoſed to have been made in the very Petition; provided ſtill, that what is offer'd, be equal to what was deſired. For if a Man aſk me to lend him a greater Sum, and I profer a leſs, [to make ſuch a Engagement good, his *expreſs Acceptance* is neceſſary; in as much as this leſſer Sum may perhaps no ways anſwer his Occaſions, or turn to his Profit; and therefore unleſs this *expreſs Acceptance* intervened, he ſhall be reſponſible only for ſuch a Sum as he firſt aſk'd me to ſupply him with [3]. It may not here be amiſs, to conſider *Plutarch*'s Obſervation, *Sympoſ.* l. ix. q. 13. p. 742. B. Edit. *Wech.* That the Words of the Perſon that propoſeth the Conditions, have much more Power and Authority, than his to whom they are offer'd, in as much as he has no Liberty of adding to them: That is, becauſe the latter can obtain no Right, but what reſults from the Conſent of the former. If the Promiſer ſhew his Agreement to the Requeſt of the other Party, barely by Nodding, or any other Sign of the like Nature, it ſhall be ſuppos'd that the Requeſt was tacitly repeated [4]. *Add. Grot.* l. ii. c. 16. ſ. 32.

Add. l. iii. *D. de pollicit. Vid. D.* l. L. tit. 12. *de pollicit.* Whence ſome have concluded, That to render a Promiſe valid, the bare Act of the Promiſer is ſufficient. *Grotius* (l. ii. c. 11. ſ. 14.) anſwers, That a Promiſe once made cannot indeed be revok'd; ſo as always to lie ready for Acceptance, tho' before Acceptance, the Obligation is not fully contracted. But thoſe who look more cloſely on that Paſſage in the Civil Law may find, That *Ulpian* teaches no more than this [5], a Covenant is the Conſent and Agreement of two Perſons, but a Promiſe is only on the part of the Offerer; where it is not denied, but that Acceptance makes even the latter firm and obligatory. And indeed the State or City, of which *Ulpian* ſpeaks, had before ſignified its Acceptance, in caſe the Promiſe were made on the Account of Honours already granted, or now deſired; and only refuſed it when the Promiſe was made without Cauſe [6], *Vid.* l. I. ſ. 1. *d. t.* l. xix. *D. De donat.* And again, l. iii. ſ. 1. *d. t.* Things thus deliver'd without

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[a] This is determined in the *Code* on the account of a Perſon who complained that a Bill for a Sum of Money was extorted from him, which he upon that account paid. *Quum te non ſolum caviſſe, verum etiam ſolviſſe pecuniam confitearis, qua ratione, ut vim paſſus reſtitui, quod illatum eſt, poſtules, perſpici non poteſt; quando veriſimile non ſit, ad ſolutionem te properaſſe, omiſſa querela de Chirographo, utpote per vim extorto, niſi & in ſolvendo vim te paſſum dicas,* (i. e.) Seeing you confeſs that you did not only give Security for, but paid the Money, we can't ſee how you can obtain a Reſtitution, as if it were forced from you, becauſe you ſhould have complained of the Bill, as extorted, unleſs you can aver that you were alſo forced to pay it, l. 2. tit. 20. *De his, quæ vi,* &c. leg. 2. It is alſo ſaid in *leg.* 4. of the ſame Title, that Conſent after the Force offered makes the Contract valid, *Si per vim vel metum mortis, aut cruciatûs corporis, venditio à nobis extorta eſt, & non eam poſtea conſenſu corroboraſtis,* &c.

Mr. BARBEYRAC's *NOTES on* §. XV.

[1] *Non poteſt liberalitas nolenti acquiri,* Digeſt. l. 39. tit. 5. *De Donation.* leg. 19. §. 2. Liberality can't be attributed to a Perſon unwilling. And again, *Invito beneficium non datur,* l. 50. tit. 17. *De Diverſ. Reg. Jur.* leg. 69. A Kindneſs can't be done to a Man againſt his Will. See l. 44. tit. 7. *De Obligat. & Act.* leg. 55.

[2] The *French* changes the Order of the Author here to render his Reaſonings more clear.

[3] *Plutarch*'s Greek is, Κυριώτερον εἶναι τὸν τοῦ προκεκλημένου λόγον——οἱ δὲ δεξάμενοι καὶ ὑπακούσαντες οὐκέτι κύριοι προστιθέντες.—— Farther, Mr. *Hertius* obſerves here, that there is this Difference between Engagements advantageous to one Party only, and ſuch as are for the Advantage of both, that in this laſt the Promiſe muſt exactly anſwer to the Demand, whereas in the firſt no ſuch thing is required. For if any one (as the *Roman* Lawyers expreſs it) ſays thus, Wilt thou give me ten Crowns? and I anſwer, twenty; I am engaged for ten only. But on the contrary, if he ſays, Wilt thou give twenty Crowns? and I anſwer, ten, I am engaged for no more than ten; for ten is included in twenty, but twenty is not in ten. But in a Contract of Hire, for Example, if the Leaſor require ten Crowns, and the Leaſee thinks he has hired for five, the firſt is not obliged to paſs it over for that, tho' five be contained in ten. On the contrary, if the Leaſor believes he has Lett for five Crowns, and the Leaſee underſtood him ten, this laſt is obliged to pay no more than the former meant, as the Laws following direct. *Si ſtipulanti mihi decem, tu viginti reſpondeas, non eſſe contractam obligationem, niſi in decem conſtat; ex contrario quoque ſi me viginti interrogante, tu decem reſpondeas, obligatio niſi in decem non eſt contracta; licet enim oportet congruere ſummam, attamen manifeſtiſſimum eſt viginti & decem ineſſe.* Digeſt. l. 45. tit. 1. *De verb. Obligat.* leg. 1. §. 4. *Si decem tibi locem fundum, tu autem exiſtimes quinque te conducere, nihil agitur. Sed etſi minoris me locata ſenſero, tu pluris te conducere, utique non pluris erit conductio, quam quanti ego putavi,* Lib. 19. tit. 2. *Locati conducti,* leg. 52.

[4] For Example, if one ſays to another, Wilt thou lend me a thouſand Crowns, and I will pay thee 5 *per Cent.* Intereſt, and repay it in five Months? and he only anſwers, Yea, or, I will; 'tis as much as if he had ſaid, Yea, I will lend you a thouſand Crowns, for which you ſhall pay me Intereſt at 5 *per Cent.* and repay me in five Months; and ſo he engages himſelf under thoſe Conditions, and he can require no more of him, and on the other ſide he can do no leſs lawfully to oblige us.

[5] *Ulpian*'s Words are theſe, *Pactum eſt duorum conſenſus, atque conventio; pollicitatio vero offerentis ſolius promiſſum, & ideo eſt illud conſtitutum, ut ſi ob honorem pollicitatio fuerit facta* [*municipibus*] *quaſi debitum exigatur.* Digeſt. l. 50. tit. 12. *De Pollicitationibus,* leg. 3. *in princip.*

[6] *Si quidem ob honorem promiſeris, decretum ſibi, vel decernendum, vel ob aliam juſtam cauſam, tenebitur ex pollicitatione; ſin vero ſine cauſa promiſerit, non erit obligatus,* (i. e.) If one promiſe for ſome Honour conferred or to be conferred, or for ſome other juſt Cauſe, he ſhall be obliged by his Promiſe; but if he promiſes for no Cauſe, he is not obliged, *Ibid.* leg. 1. §. 1. See alſo, Lib. 39. tit. 5. *De Donat.* leg. 19.

[a] Lib. 19. §. 2. *Digeſt. de Donatione.*

Cauſe[7], are forbidden to be claim'd; becauſe the Propriety of the Things being already transferr'd on the Community, they could not properly be deliver'd without the publick Acceptance.

Since in all *Obligations* whatſoever, there is required the Conſent of the Perſon to whom they are directed[8], or who obtains a *Right* by them; declaring (by himſelf, or Deputy) that he accepts the *Obligation*, and the *Right* which it transfers to him; and this with Signs ſufficient to expreſs the inward purpoſe of his Mind; we may hence underſtand ſomewhat as to the [9] *Firmneſs of Religious Vows*, or Engagements voluntarily undertaken with regard to Almighty God. And it ſeems impoſſible to make theſe with any *Force*, unleſs God has by Revelation declared his Acceptance of them; or unleſs he has conſtituted ſome Vicegerent upon Earth, to judge of their Validity. For otherwiſe a Man cannot be certain, whether it is the Will of God he ſhould, or ſhould not bind himſelf in this manner; whether his *Vows* are pleaſing or diſpleaſing to Heaven. Eſpecially ſince the Subject of *Vows* muſt be ſuch Matters, as God has not by way of Command punctually and preciſely required at our Hands. For 'tis abſurd and contradictory, to reckon that an extraordinary Performance, which is a matter of ſtrict and neceſſary Duty; and how can we be aſſured, except by Revelation, that any Act which God has not enjoin'd, will be acceptable to him? And to engage in *Vows* without knowing whether they will be received, or not, is idle and uſeleſs. But may we not, in many Caſes, reaſonably preſume on the Divine Conſent and Approbation? This we think can only be done in thoſe things which are *Indefinitely* agreeable to the Law of Nature, and therefore to the Will of God; but in which the Application to Perſons, *Places*, and *Times*, and the Allotment of the particular *Quantity* are left to the Pleaſure, and the Judgment of Men. Thus we take thoſe *Vows* to be good and juſtifiable, by which a Man binds himſelf to beſtow ſuch a Sum of Money in Charity to the Poor, or on other pious Uſes; provided that ſuch an Act of Bounty be no Hindrance or Prejudice to any Duty abſolutely neceſſary: Or if he enjoin himſelf ſet Days of Faſting; or reſolve to abſtain from ſome particular Meats and Drinks, within a fixt Meaſure and Quantity; or if he deny himſelf the uſe of ſome ſuperfluous Ornaments; as the wearing of Jewels, Pearls, and Gold; or lay any Command or Prohibition on himſelf of the like Nature; all which Performances fall under ſome general *Virtue*, tho' the determinate Manner and Proportion of them are not Matters of ſtrict Precept. On the contrary, ſuch Vows as only create trouble to the Undertaker, and no Benefit to other Men; we eſteem no better than idle and ſuperſtitious, eſpecially if they prove an Hindrance to other Duties.

A Scruple has been moved ſometimes, whether the *Obligation* in the *Promiſer* begin at the very Moment, when the Offer is *accepted* by the other Party; or whether it is farther neceſſary, that the *Acceptance* be formerly made known to the Promiſer? And here it is certain, a *Promiſe* may be deſign'd, and be expounded two ways, either thus, *I engage myſelf to do the thing, if it ſhall be accepted*; or thus, *I engage myſelf to do the thing, if I ſhall underſtand that it will be accepted.* Now which of theſe two *Senſes* the Promiſer intended, is to be gather'd and preſumed from the Nature of the Buſineſs. If the *Promiſe* were a matter of pure Generoſity, without Reſtriction or Limitation, we are to believe it was meant in the former Senſe; becauſe here the Promiſer haſtens as it were to *bind* himſelf, without ſtaying for any Formality in the other Party. But thoſe Promiſes are to be underſtood in the latter Senſe, which expreſs ſome arbitrary or mixt Condition eſſential to the Engagement[10]. Compare *Grot.* l. ii. c. 11. ſ. 15.

XVI. It remains that we add a Remark or two about the *Signs* of Conſent, which are abſolutely neceſſary to the producing of any Obligation, in as much as the bare Acts of the Will can have no Effect amongſt Men, unleſs manifeſted and declared by ſome external Tokens. Of *Signs*, the more imperfect are ſome particular Motions and Geſtures, neceſſary to be uſed in Commerce, when the Parties tranſacting are unacquainted with the Language of each other. The more perfect are *Words*, and ſuch Words as are underſtood on both ſides[1]. See 1 *Cor.* xiv. 11. And to make theſe declare the Will more clearly and more firmly, it has been a conſtant Practice, both to make uſe of Witneſſes in Contracts of Weight and Moment[2], to whoſe Memory and Conſcience Appeal might be made, in Caſe either of the Parties denied the Engagement, or cavil'd at the Expreſſion; and alſo (as a higher Degree of Confirmation) to ſet down the Terms of the Covenant in *Writing*[3]. Inſtead of which the *Grecians* ſometimes uſed *Tallies*, v. *D. L.* xxii. *Tit.* 4. *de fide*

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[7] *Si quis, quam ex pollicitatione tradiderat rem Municipibus, vindicare velit, repellendus eſt à petitione*, Ibid. leg. 3. If any Man require a thing which he hath given to his Freemen, he is to be denied his Petition,

[8] Mr. *Thomaſius* in his *Fundament Jur. Nat. & Gent.* l. 2. c. 7. §. 5. draws a Conſequence from hence to ſhew the Vanity (*palliatam ambitionem* he calls it) of ſuch Authors, who ſay in their Prefaces, that 'tis to make good their Promiſes to the Publick that they put out this or that Work. And Mr. *Bayle* had before ſaid in his Advertiſement of his Continuation of divers Thoughts about a Comet, that the Promiſes of ſuch Authors is not looked upon as an Engagement by Contract, nor is the Publick concerned if they break their Word.

[9] See Mr. *Le Clerc*'s Notes upon *Gen.* xxviii. 21. and *Numb.* xxx. 3.

[10] Theſe Terms will be more fully explained, c. 8. of this Book, § 4.

Mr. Barbeyrac's *NOTES on* §. XVI.

[1] Hence it comes to paſs perhaps (as our Author adds in his later Editions) that the *Turks* do not think themſelves oblig'd to keep thoſe Contracts or Treaties which are not written in their own Language and Characters. See *Marſelaer Legat.* l. 1. c. 30. But provided that Contractors underſtand each other, it matters not in what Language the Contract is written, as the *Roman* Law has judiciouſly determined. *Utrum autem Latina, an Græca, vel qualibet alia lingua ſtipulatio concipiatur, nihil intereſt, ſcilicet, ſi uterque ſtipulantium intellectum ejus lingua habeat. Nec neceſſe eſt eadem lingua utrumque uti, ſed ſufficit congruenter ad interrogata reſpondere. Quin etiam duo Græci Latina lingua obligationem contrahere poſſunt.* Inſtit. l. 3. tit. 16. *De Verborum Obligat.* § 1.

[2] *Teſtimoniorum uſus frequens & neceſſarius eſt*——*ad fidem rei geſtæ faciendam.* Digeſt. l. 22. tit. 5, *De Teſtibus*, leg. 1. *in princip:* & leg. 11. The uſe of Teſtimonies is uſual and neceſſary to prove Matters of Fact. We ſhall treat of the uſe of Witneſſes, l. 5. c. 13. § 9.

[3] *Fiunt enim de his Scripturæ, ut quod actum eſt, per eas facilius probari poteſt.* Writings are made in Covenants, that the Matters of Fact may be more eaſily proved, *Digeſt.* l. 22. tit. 4. *De Fide Inſtrumentorum*, &c. leg. 4. See Mr. *Daumat*'s Civil Laws in their Natural Order, Part 1. l. 1. tit. 1. Sect. 1. § 10, &c. and l. 3. tit. 6. Sect. 2. See alſo *Pollux*, l. 9. c. 6. § 70. and Mr. *Hemſterhuis*'s Note on it.

inſtrum. For the Memory of Witneſſes may be treacherous, or their Integrity capable of Corruption[4]; but Writings are a much ſtronger Security, both againſt Forgetfulneſs, and againſt Unfaithfulneſs. And as for *bare Words*, it is an uſual way to elude them, by pleading that they were utter'd thro' Raſhneſs, before the thing had been conſider'd. But *Writings* do exclude all ſuch Prevarication; whilſt they are drawing up, they ſet the Buſineſs clearly and leiſurely before the Eyes of the Contractor; ſo that if he once declare his Approbation of them, he muſt be judg'd to have yielded full Conſent to the Engagement, and cannot afterwards pretend that he was drawn in by Paſſion, or Precipitancy. Nor are *Writings* liable to ſuch violent and crafty Intepretations, as are often put upon Mens Diſcourſe; in which one Particle artificially inſerted, and thro' the quickneſs of the Pronunciation paſſing undiſcover'd, ſhall unravel and overturn the whole Affair. And therefore it is not without good Reaſon, That more Credit is given to authentick and unqueſtion'd *Inſtruments*, than to the Depoſitions of *Witneſſes*; ſince what a Man teſtifies againſt himſelf, is much ſtronger Evidence, than what can be offer'd by others; and ſince the Charge never lies ſo heavy upon him, as when his own Authority is produc'd againſt him: Yet the Force of unqueſtionable Witneſſes muſt then be admitted as Superior, when they make out by ſufficient Proofs, that the Inſtruments produced are ſuppoſititious or corrupted.

Farther, although the Strength and Firmneſs of *Covenants* does not abſolutely depend on ſuch Writings or Deeds, in as much as they may rightly be made without them[5], and may as to the Law of Nature ſtill hold good, though theſe Tokens ſhould by any Accident be loſt[6]; yet in Courts of civil Judicature, where they proceed on full and manifeſt Evidence, the greateſt Regard imaginable is had to Credentials of this kind. And commonly if ſuch are not produc'd, the Party who ſues another upon a Debt, or Promiſe, loſes his Cauſe; unleſs he can make it appear, that they were once actually in his Cuſtody, and that he has been depriv'd of them by ſome Misfortune. And for this reaſon it will become a careful Man to ſecure his Buſineſs by good and legal Inſtruments; and not to rely too much on the bare Words, or Faith of thoſe he deals with. Thus King [7] *Perſeus* (in *Plutarch De vitioſo pudore, p.* 533. *B. T.* 2. Ed. *Wech.*) lending a Friend Money, required Security in the common Form. The Gentleman deſiring the reaſon of his Strictmeſs; I lend according to Law (replied *Perſeus*) that I may receive without Law; in a fair and friendly manner. *Juvenal, Sat.* 13. *ver.* 75.

Tam facile & pronum eſt Superos contemnere teſtes,
Si mortalis idem nemo ſciat.

When *Muræna* (in *Appian. Mithridat.* p. 214. C. Ed. *H. Steph.*) made War upon *Mithridates*, and was accuſed by that King's Commiſſioners of Acting againſt the League, he ſophiſtically denied, that he ever ſaw any League. The meaning of which was, that *Pompey* had not indeed left *Articles* of Peace in Writing, but thought it ſufficient to ſhew his Agreement by *Fact*, and accordingly had drawn off his Army. *Richerius* reports of the *Turks*, that they are ſo conſtant to their Promiſe, ſo ſecure of mutual Fidelity, that in their Bargains they uſe no Bond or Writing; but the whole Buſineſs depends on the Word of the Parties, if preſent; if not, on the bare mentioning of their Names. *Garcilaſs de la Vega* teſtifies the like of the old Inhabitants of *Peru*, *Royal Comment.* l. viii. c. 16. It is vulgarly known, that if a Creditor ſhall reſtore the Inſtrument of Obligation[8], or ſhall cancel or deſtroy it with his own free Conſent, and with the Privity of the Debtor, it ſhall be ſuppos'd that the Debt is forgiven; but not if the Debtor got the Writings out of his Hand by Stealth, or any other unlawful Means. And from all this it appears, that *Seneca* [a] [9] carries his Philoſophy a Strain too high, when he calls Bonds and Papers of Contract by no better a Name, than *Inania habendi ſimulachra*, vain and idle Images of Title and Poſſeſſion.

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[4] Writings on Parchment were invented to put Men in Mind, or convince Men of their Word, the Diſgrace of Mankind, (as Mr. *de la Bruyere* ſpeaks in his Characters, Chap. *Of Man*) which 'tis likely he took out of *Seneca* (*De Benef.* l. 3. c. 15.) *Adbibentur ab utraque parte teſtes, ille per tabulas plurium nomina, interpoſitis parariis, facit*——*O turpem humano generi fraudis, ac nequitiæ publicæ confeſſionem! Annulis noſtris plus quam animis creditur*——*in quid imprimunt ſigna! Nempe, ne ille neget accepiſſe, quod accepit,* (i. e.) Witneſſes are produced on both ſides, the one produces a Scroll of many Names drawn up by the Scrivener——. Oh horrid Confeſſion of the publick Fraud, and Wickedneſs of Mankind! We truſt more to our Seals than Souls! Why do we impreſs our Seals? Leſt ſuch as we deal with ſhould deny what they received.

[5] *Si res geſta* (ſay the *Digeſts*, l. 22. tit. 4. *De fide iuſtrumentorum*, &c. leg. 5.) *ſine literqrum quoq; conſignatione, veritate factum ſuum præbeat, non ideo minus valebit, quod inſtrumentum nullum de ea interceſſit.* See l. 5. c. 13. §. 8. following, (*i. e.*) If a Matter of Fact were duly and truly done without any Writings ſealed, 'tis not of leſs Force becauſe there is no Inſtrument made concerning it.

[6] *Nec oberit tibi amiſſio inſtrumentorum, ſi modo manifeſtis probationibus eos debitores apparuerit,* (i. e.) The loſs of a Bond is no Prejudice, if the Debt can be fully proved. *Cod.* l. 4. tit. 21. *De fide Inſtrum.* leg. 1. See alſo, leg. 4, 5, 7, 8, 10. and l. 4. tit. 19. *De Probationibus*, leg. 20, 21.

[7] This Note is in the Text.

[8] See §. 2. Note 7. above.

[9] *Seneca*'s Words are, *Video iſtic diplomata, & ſyngraphas, & cautiones, vacua habendi ſimulachra.*

[a] *Benef.* l. 7. c. 10.

CHAP. VII.

Of the Matter of Promiſes and Covenants.

The Contents of every Paragraph of the ſeventh Chapter.

I. *We are obliged to things poſſible to be done only.*
II. *Promiſes of things impoſſible are void.*
III. *Impoſſibilities which ariſe about Covenants.*
IV. *Whether our utmoſt Endeavour is ſufficient?*
V. *Whether a Man be obliged to bear ſuch Afflictions as are above Man's Courage and Strength?*
VI. *There is no Obligation to things unlawful.*
VII. *Diſhoneſt Bargains do not oblige, though in our Power.*
VIII. *Nor ſuch as can't be performed, but by ſome foul Action.*
IX. *Whether things diſhoneſtly given can be recovered.*
X. *Other Mens Goods are promiſed in vain.*
XI. *Yea, and our own, if they are under any Obligation to another.*

We are in the next place to enquire into the Matter or Subject of Promiſes, and of Covenants; or to what things only we can bind our ſelves by our Word or Bargain. In this reſpect then it is indiſpenſibly requiſite, that we have both a *natural* and a *moral Power* of doing what we engage for; or that the Performance be neither above our *Strength*, nor forbidden us by any *Law*. For when a thing is placed within my Reach and Ability, and I have likewiſe a Liberty to diſpoſe of it, there is no reaſon why I ſhould not voluntarily *oblige* my ſelf to confer it on another, ſo often as I can by this means contribute to the Uſe and Advantage of human Life. On the other Hand, it would be vain and impertinent to contract an Obligation about ſuch Matters, as either exceed our Strength, or are prohibited by a ſtronger Obligation lying upon us; in as much as, directly and lawfully, it could produce no Effect.

II. It follows evidently from hence, That *no Obligation can lie to Impoſſibilities* [1]; a Sentence commonly in the Mouths of all ſorts of Perſons, but ſuch as cannot fully be underſtood without a clear and accurate Examination. In order to which it may be, in the firſt place, convenient to diſtinguiſh between thoſe Obligations which we voluntarily bring on our ſelves by our own Act, and thoſe which are laid on us by the Command and Authority of our Superiors. He that of his own free Motion binds himſelf to perform a thing which he *knows to be impoſſible*, cannot be reckon'd well in his Wits [2]: For he reſolves and engages to do that, which at the ſame time he foreſees he ſhall never be able to compaſs.

But it does not always follow, That he who by Pact or Promiſe undertakes an *Impoſſibility*, ſhall be entirely free from all *Neceſſity* of Performance, tho' the thing it ſelf cannot ſtrictly be accompliſh'd. Indeed, if I have promis'd a Man ſomewhat, which I had then good Grounds to think would be in my Power, but which is now above my Power, or will be rendred ſo before the Day of Performance, by an Accident of which at the time of the Bargain I was invincibly ignorant; I ſeem in this Caſe, neither obliged to make good my Word, nor to repair the Loſs which the other Party ſuffers by the Diſappointment. Eſpecially, if the Poſſibility of the thing were either expreſly mention'd as a neceſſary Condition, or tacitly preſuppoſed on both ſides [2]. For inſtance, I promiſe to lend a Horſe, which at preſent is at ſome Diſtance from me; and the Horſe dies before he gets to me; as I cannot here be bound to make the Horſe forth coming, ſo neither am I reſponſible for any Damage the Man ſuſtains, who was to have uſed him. For he muſt conceive me to have built my Promiſe on this tacit Condition, *provided the Horſe arrive ſafe at my Hands*; which Condition failing without my Default, the Force of the Promiſe ſinks and is ineffective. If both the Promiſer, and the other Party, know the thing to be impoſſible, and know each others Conſciouſneſs as to this Point, the Engagement ſhall paſs for no better than a Jeſt. But if the Promiſer only knew the Impoſſibility, and not the other Party, he ſhall pay to him what he loſes by being thus impoſed on. If the Promiſer was careleſs, and neglected to examine and weigh his own Strength, ſo as to promiſe an Impoſſibility, which upon due Conſideration he might have found to be ſuch, the main Obligation ſhall be void; becauſe he ſuppoſed the thing to be poſſible, as a tacit Condition of the Agreement: Yet upon account of his Neglect and Default, he ſhall be bound to anſwer the Damage which befalls the other Party, through the Diſappointment; but then it muſt be obſerv'd, That the Hope and Expectation of Advantage from ſuch an inſignificant Promiſe ought not to come under the Notion of Damage. The ſame Rule holds good in Covenants, ſo that he who through Negligence has bargain'd to perform what is impoſſible, ſhall be free upon paying what the other Party ſuffers; but then he muſt likewiſe releaſe the other Party from any Obligation made on his ſide; or if the thing be already given or perform'd, he muſt either reſtore it, or offer an Equivalent.

Mr. Barbeyrac's *NOTES* on Chap. VII. §. 2.

[1] See l. 1. c. 5. §. 8. aforegoing.

[2] Or he deſigns to banter him to whom he is engaged. Mr. *Thomaſius* in his *Inſtit. Juriſpr. Div.* l. 2. c. 7. §. 81. diſtinguiſhes here two ſorts of Impoſſibilities: The one of things abſolutely impoſſible to all Men, as to fly, to touch the Sky with the Hand, *&c.* the other of thoſe which are impoſſible to certain Men only, as to have Children, to pay two thouſand or an hundred thouſand Crowns, *&c.* The Rules which our Author gives hereafter about the Caſes wherein one is bound to fulfil his Promiſe, tho' of a thing impoſſible; theſe Rules, I ſay, reſpect the laſt ſort, and not the firſt. For he that will believe that a Man may fly, or drink up the Sea, is as great a Fool as he that engages to do it.

[2] Vid. lib. 2. ſ. 3. *&c. Digeſt. Si quis cautionibus*, &c.

III. But farther, when the thing at the time of making the Promiſe or Pact appear'd poſſible, and afterwards becomes impoſſible, we muſt enquire whether this happen'd by meer Chance, or by Default and Deceit. In the former Caſe the *Pact* is diſannull'd, if nothing has yet been perform'd on either ſide. If any thing have been already done towards it by one of the Parties, the other ſhall give it back, or pay the value of it [1]; if neither of theſe can be done, he is to uſe his beſt Endeavours, that the Man be not a loſer by him. For in Contracts the firſt Regard is had to the thing expreſly mention'd in the Agreement; when this cannot be obtain'd, it is ſufficient to give an Equivalent; but whatever happens, all imaginable Care is to be uſed, that the other Party ſuffer no Prejudice. But when a Man ſhall by Trick and Deſign render himſelf incapable of performing his Part, he ſhall not only be bound to do the beſt he can, but he ought likewiſe to have ſome Puniſhment inflicted on him, as it were in ſupply to his Defect.

Theſe Principles, well applied, might determine moſt of the Doubts in the Caſe of *Inſolvent Debtors*. A Man that falls into ſuch a Condition by Misfortune, and without his own Default, is obliged only to uſe his utmoſt Endeavour to give every one their due. And here Equity and Humanity [2] engage us to make an Allowance of Time, ſo much as ſhall be neceſſary for him to look about him, and to ſeek out all honeſt ways and means of Payment [a]. For to ſeize immediately on all he poſſeſſes, and to ſend him and his Family a begging, would be a moſt unmerciful Barbarity. The *Roman Laws* [3] were ſo favourable to certain Perſons, in Caſes there ſpecified, as to order that they ſhould be condemned in no deeper Sum than they were able to make good [b]. Yet unleſs the Creditor ſhall have forgiven all that exceeds their preſent Abilities, they ſhall be bound to pay the Reſidue, upon the Improvement of their Fortune and Condition. Thoſe who have turned Bankrupt out of Knavery, or ſome other way, by their own Fault, may be juſtly compell'd to undergo ſome painful Puniſhment [4]; that their Body may in ſome meaſure pay for the Defect of their Purſe [c].

In the Caſe between the Creditor and the Debtor, there is another Point that ought to be conſider'd; through what Cauſe or what Neceſſity the Man contracted ſo deep Scores. And he deſerves more or leſs Commiſeration and Favour, as the Cauſe was more or leſs grievous and unavoidable. For this reaſon Merchants and other great Traders, though undone by meer Accident and Misfortune, are reckon'd to be in a Condition leſs capable of Mercy, than others who have been driven by ſome particular Urgency to the like inſolvent State. For the former took up ſo large Sums on Truſt, purely for the ſake of making farther Gain and Advantage by them. And in as much as they profeſs *the Art of growing Rich* as their peculiar Calling, they are to be blamed for not foreſeeing and preventing even Caſualties, ſuch as the loſing all they are worth at one ſudden Stroke; ſince they ought not to have ventured their whole Effects in a ſingle Bottom. This is contrary to the Judgment of *Pliny*, who thinks it the ſafeſt Courſe to try the Uncertainty of Fortune by Variety of Poſſeſſions. *Epiſt.* 19. *l.* iii. *numb.* 4. Ed. *Cellar.* King *Philip* (in *Juſtin. l.* ix. *c.* 1. *in fin.*) beſieging *Byzantium* without Succeſs, at the ſame time made an Inroad into *Scythia*, for the ſake of Plunder; ſeeking (according to the Policy of Merchants and Dealers) to defray the Expences of one War with the Spoils of another.

Livy (*l.* xl. *c.* 21. *p.* 661. *in fin.* Ed. *Gronov.*) reports of *Antigonus*, That being in great Diſtreſs at Sea, when he had all his Friends with him in the Ship, he call'd his Children about him, and ſtrictly charg'd them both to remember themſelves, and to caution their Poſterity, That they never engaged with their whole Family together *in* Difficulty or Danger.

Yet it is plain the antient *Romans* had little regard to theſe different Circumſtances. For thus *Seneca* argues (*Benef. l.* vii. *c.* 16.) [5] Can you imagine our Forefathers were ſo imprudent, as not to apprehend how unjuſt it muſt be to put a Man who had waſted a Loan in Dice or Lewdneſs, in the ſame Caſe with him, who by Fire, Thieves, or ſome ſadder Misfortune, had loſt other Mens Money with his own? They allow'd no Excuſe, that Men might learn in all Caſes moſt ſtrictly to keep their Faith. And it were more ſafe to reject the juſt Plea of a few, than to admit all to a Privilege of offering their Apologies. In *Moſcovy*, inſolvent Debtors are firſt ſound-

Mr. BARBEYRAC's *NOTES on* §. III.

[1] This is true in ſuch Agreements where the transferring Property is not concerned, as in Contracts of Hiring; but it is not ſo in them, where a Right of Property is acquired, as for Example, in a Bargain and Sale. For if a thing ſold periſh by miſchance, the Loſs is the Buyer's, who has the Property and the principal Right in him, if we conſider the Principles of natural Right. Hence it is that the Seller keeps the Price of his Goods, or cauſes the Buyer to pay it, tho' he has never received them. *Titius Obſervat.* 230. See what is ſaid, l. 5. c. 5. §. 3.

[2] See what I have ſaid in my Treatiſe of Sport, l. 3. c. 5. §. 33.

[3] Such were, for Example, the Husbands who were obliged to pay back their Wives Portions. *Maritum in id quod facere poteſt, condemnari, exploratum eſt,* (*i. e.*) It is a known thing to condemn the Husband to do what he can, *Digeſt.* l. 24. tit. 3. *Soluto matrimonio dos quemadmodum petatur*, leg. 12. The Men of War, l. 42. tit. 1. *De re judicata*, &c. leg. 6. Divers Relations, as Father and Mother, Patrons, the Wives and Children, as alſo their Fathers and Mothers, Givers, Fathers in Law, *Ibid.* leg. 16, 17, 19, 21. See alſo leg 49, 50. and l. 42. tit. 3. *De ceſſione bonorum.*

[4] ——————*Cujus Fortuna laborans*
Non potis eſt auro venales ſolvere noxas,
Arctatur vinclis——————

Whoſe deſp'rate Fortune, ſince it can't by Gold
Redeem its Crimes, Bonds therefore it muſt hold.

Gunther. Ligurin. l. 8. near the End. See Mr. *Hertius*'s *Paræmia Jur. German.* l. 1. c. 89.

[5] *Seneca*'s Latin is this, *Quid tu tam imprudentes judicas majores noſtros fuiſſe, ut non intelligerent iniquiſſimum eſſe, eodem loco eum haberi, qui pecuniam, quam à Creditore acceperat, libidine, aut alea inſumpſit, & eum, qui incendio, aut latrocinio, aut aliquo caſu triſtiore, aliena cum ſuis perdidit? Nullam excuſationem receperunt, ut homines ſcirent fidem utrique præſtandam; ſatius enim erat à paucis etiam juſtam excuſationem non accipi, quam ab omnibus aliquam tentari.* De Benef. l. 7. c. 16.

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[a] See *Matth.* xviii. 25, 26. [b] Vid. l. 12. *Digeſt. De ſoluto matrimonio*, l. 6. l. 16, 17, 19, 21. *Digeſt. De Re judicata*, l. 49. 50. d. t. l. 4. l. 6. l. 7. *Digeſt. De Ceſſione Bonornm.* [c] Vid. *Gell.* l. 20. c. 1. *circa fin.* as likewiſe *Appius*'s Diſcourſe in *Dionyſ. Halicarn.* l. 5. p. 330, *&c.* Edit. *Lipſ. in fin.* compared with *Livy*, l. 8. c. 28.

ly whip'd, and then compell'd to be Slaves to their Creditors [7].

IV. It is proper for us on this Subject to examine the Notion of Mr. *Hobbes* [a], which he ſeems to lay down in too general a Manner, That *Covenants do not oblige to the thing itſelf, but only to the utmoſt Endeavour.* That is, ſince we are not obliged to Impoſſibilities, and ſince nothing is in our power but our utmoſt Endeavours, what we cannot by its means obtain, is to us impoſſible, and conſequently is excluded from being the Matter of Obligation. But he ought indeed to have inſerted this Condition, *Provided we have not by our own Fault and Fraud incapacitated our ſelves for ſuch a Performance.* For if this be our Caſe, the Obligation is not ſatisfied by our utmoſt Endeavour; but when our power of Payment ceaſeth, our Puniſhment muſt come in to make up the reſt. Therefore the Aſſertion ought to be limited to thoſe Covenants, in which upon account of ſome *Thing* or *Action* at preſent reach'd out unto us, we promiſe ſome future Labour or Aſſiſtance. For here, ſince ſuch Futurities are uncertain to human Foreſight, ſo that either our Strength may by ſome Accident be impair'd, or ſome unaccountable turn of Things may render it extremely difficult, if not utterly impoſſible for us to meet with an Opportunity of Performance; and farther, ſince our Sagacity may be miſtaken either in rating our own Power, or in weighing the Difficulty of the Undertaking; the Contractors muſt for theſe Reaſons be ſuppos'd to have been mindful of their own frail Nature, and conſequently not to have agreed on any future Action or Work, but with this Condition and *Proviſo*, That their Abilities and Opportunities remain'd the ſame, and that they had not overrated their preſent Strength. In theſe Caſes then, he who has us'd his utmoſt Endeavour may be rightly ſaid to have done his Duty; eſpecially when in the very midſt of the Performance ſome croſs Adventure, which we could not poſſibly have prevented, falls in, and either quite intercepts, or wreſts aſide the Fruit of our Labour.

That the Rule will hold good only in this kind of Covenants, is farther evident from what Mr. *Hobbes* diſcourſeth immediately before. *We very frequently*, ſays he, *contract about ſuch things as then indeed ſeem poſſible, but which afterwards we find to be impoſſible* [b]; *yet this does not free us from all Obligation. And the reaſon is, becauſe he who promiſes an Uncertainty hereafter, receives a preſent Good, on the Condition of returning the like. But now the Will of him who offers the preſent Good, has for its abſolute Object any return of good equal in Value to the thing expreſly promis'd by the other Party; but the thing it ſelf is affected, not ſtrictly and abſolutely, but under Condition of its Poſſibility.* Yet on the contrary, I would chooſe to ſay, That whoſoever exhibits to another any preſent Good, does abſolutely and directly bend his Deſire towards that particular future Good, expreſs'd in the Bargain; and this as well in Contracts of *giving*, as in Contracts of *doing*. For the Law of Nature doth not ſeem to afford Ground for that Diſtinction which ſome make, that in Bargains of *giving* a Man is preciſely obliged to give [1], whereas in Bargains of *doing*, he is not preciſely obliged to do the Work, but may be releas'd by a Commutation. But when he cannot obtain what was peculiarly promis'd, he then, to keep himſelf from ſuffering Loſs, deſires ſomething of equal Value. And if this too cannot be paid him, nor the thing reſtor'd which he firſt gave on his Part, the other Man fully ſatisfies his Obligation by offering what his Abilities will admit of.

But in Contracts of *Lending*, and others of the ſame Nature, it will not hold that the Debtor is freed from his Obligation, by uſing his utmoſt Ability and Endeavour. For when any thing is taken in way of *Loan* (eſpecially if it be not in a caſe of extreme [2] Neceſſity) the Creditor ſuppoſes that the Debtor is both willing and able to pay, and the Debtor himſelf pretends as much; and on this Suppoſition the whole Contract is founded. If then at the time prefix'd for Payment, the Debtor with all his Stock and Effects cannot make up the Sum; tho' here it be at preſent impoſſible to ſqueeze more out of him; yet he ſhall ſtand engaged to make good the reſt hereafter [c].

In *ſimple Promiſes* when we engage to do a thing which is not, as to the Event, fully and abſolutely in our Power; ſome ſuch Condition as this ought always to be underſtood, *If Fortune favour me*, *if no croſs Accident intervene*, or what better becomes the Piety of a Chriſtian, *if it pleaſe God* [d]. But poſitively to ſwear or vow that we will accompliſh ſuch an uncertain Enterprize, is not only moſt extravagant Raſhneſs, but moſt wicked Preſumption. Such was the Oath of *Labienus* and his Party, recorded by *Cæſar*, by which they engaged themſelves not to return into their Camp without obtaining the Victory [e].

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[7] Among the *Athenians* alſo inſolvent Debtors were given to their Creditors to be made their Slaves, or to ſell them into Foreign Countries, and many were forced to ſell their Children; but *Solon* aboliſh'd that inhumane Cuſtom. See *Plutarch* in his Life. Some alſo have thought, that among the *Romans* there was a Law of the 12 Tables, which allowed Creditors to cut their Debtors in Pieces, and part them among them, which Opinion is ſupported by the Authority of *Quinctilian, Inſtit. Orat.* l. 3. c. 6. *Aul. Gell. Noct. Attic.* l. 20. c. 1. and *Tertull. Apologet.* c. 4. But Mr. *Bynkerſhoek* proves fully in his Obſervation, l. 1. c. 1. that it allowed only the Sale of his Perſon to his Creditor by way of Auction. We may compare with this Book a Memoir found in the *Acta Eruditorum* at *Leipſick*, Febr. 1710.

Mr. Barbeyrac's *NOTES* on §. IV.

[1] It is a Principle of the Roman Law, *Si minus, quia non facit, quod promiſit, in pecuniam numeratam condemnatur; ſicut evenit in omnibus faciendi obligationibus*, (i. e.) If a Man performs not his Promiſe, he is fined a certain Sum, as is uſual in other Obligations of doing a thing. *Digeſt.* l. 42. tit. 1. *De Re Judicata*, &c. leg. 13. §. 1. *Secundum quem Celſus ait poſſe dici, juſta æſtimatione facti dandam eſſe petitionem*, (i. e.) According to whom *Celſus* ſays it may be affirmed, that the Deſire may be anſwered by the Value of the Deed, l. 45. tit. 1. *De Verbor. Obligat.* leg. 72. *in init.* But this is obſerved at this Day in many Caſes, and in the Roman Law there are divers Limitations about it, as Mr. *Hertius* obſerves, with others before him, that the Reaſon of this Maxim was, That the *Romans* eſteemed it a kind of Slavery to be conſtrained to do any thing for another. *Et ſunt quidem hæ Pœnæ, ſi quis generaliter tractare velit, inciviles, invitum hominem jubere facere, quod facere non poteſt*, (i. e.) They are Puniſhments generally ſpeaking, unfit for Society, to force a Man to do that againſt his Will which he cannot do. *Digeſt.* l. 48. tit. 19. *De Pœnis*, l. 9. §. 10. See *Vinnius* upon the *Inſtit.* l. 3. tit. 16. *De Verbor. Obligat.* §. 7. And Mr. *Thomaſius*'s Diſcourſe *De Pretio affect.* c. 2. §. 4.

[2] See my Treatiſe of *Sport*, l. 3. c. 5. §. 31.

[a] *De Cive*, c. 2. ſ. 14.

[b] It muſt be ſuppoſed that we have not had Opportunity of making Tryal.

[c] See *Matth.* xviii. 25, *&c.*

[d] See *James* iv. 15.

[e] *Cæſar de Bel. Civ.* l. 3. c. 87. n. 6. Add. *Acts* xxiii. 21. & *Selden. de J. N. & G.* l. 4. c. 7.

V. There is another knotty Queſtion propoſed by Mr. *Hobbes*, which we ought here to diſcuſs, Whether a Man can by Covenant oblige himſelf to ſuffer ſuch Evils, as exceed the ordinary Strength and Conſtancy of human Minds? For inſtance, whether he can bind himſelf *not to reſiſt another, who ſhall go about to kill or to wound him?* Now whoever cloſely and carefully conſiders this Point, will be able to diſcover on what account Mr. *Hobbes* thought good to take the negative Side; namely, to ſhew that bare Pacts are not a ſufficient Guard and Caution to the Security of Mankind; and that 'tis not enough for a Man to engage by Covenant, that he will freely undergo due Puniſhment, ſo often as he ſhall commit an Injury; but for the Preſervation of Peace in the World, it is farther neceſſary that civil Governments ſhould be eſtabliſh'd, which may bring Offenders to Juſtice, tho' againſt their Wills. Which Principle we acknowledge to be moſt juſt and true, and ſhall enlarge upon it in its proper Place. At preſent it may be worth our while to examine more nearly the Arguments which he produces. He ſays then, *No Man is by any Covenant which he ſhall make, obliged not to reſiſt another, when he offers mortal Violence, or Wounds, or any bodily Miſchief. For there is implanted in every one the higheſt Degree of Fearfulneſs, by which he apprehends the threaten'd Evil, as the greateſt imaginable, and therefore, by a natural Neceſſity, flies and avoids it as much as poſſible; and is ſuppos'd incapable of doing otherwiſe. When he is arrived at ſuch a height of Fear, it cannot be expected but that he will conſult his own Safety by Flight, or by Combat. Since then no Man can be obliged to an Impoſſibility, thoſe to whom Death, or Wounds, or other corporal Pains are preſented, and who have not Conſtancy enough to bear them, are not bound to venture the Trial.* Upon this Argument we may remark, that to ſuffer Death without Reluctancy, is not a thing abſolutely beyond human Strength. And therefore if God has commanded us to lay down our Lives, rather than commit ſome particular Action, no doubt but we are ſtrictly bound to yield a ready Obedience. But thus much we are willing to acknowledge, that ſince ſuch a Degree of Conſtancy is beyond the Strength of the Generality of Men, no one ſhall be preſumed to have bound himſelf by his own free Covenant to ſuch a rigorous Task. For human Laws and human Contracts ought all to be made with an Eye and Regard to human Infirmity.

Yet this Conſideration ought not to be drawn ſo far, as to prejudice the Force of military Diſcipline; as if a Soldier under imminent Peril of Death might deſert his Poſt, upon pretence, that a Man cannot be *obliged to undergo Death*, as being a thing *impoſſible*. For we deny that it is a thing above the Fortitude of Mankind, eſpecially of the military Sex, to ſuſtain a probable Danger of Death, ſtill join'd with a Power of reſiſting to the laſt. And there ſcarce ever happens ſuch a Caſe in War, that ſome Perſons muſt be thrown away, and offer'd up as Victims to the Enemy, without a Liberty and an Opportunity of defending themſelves by Courage, or by Craft. So that it appears from the Neceſſity of preſerving Commonwealths, and from the Uſe and Practice of all Nations, that whenever it is requiſite, a Commander may lawfully enjoin a Soldier to oppoſe the Enemy in ſuch a Station aſſign'd him to his laſt Breath, tho' 'tis probable he may die upon the ſpot; and may as lawfully inflict capital Puniſhment on thoſe who ſhall quit their Poſt, after ſuch an expreſs Order to the contrary. For he that liſts himſelf in the Number of armed Men, does by that Act lay aſide all Claim to the Excuſe of natural Fearfulneſs, and is bound not only to enter the Field, but likewiſe not to leave it, without the Order of his Leader. Neither is there any Abſurdity in that martial Puniſhment of *killing a Man, becauſe he declined being killed.* For is it not much worſe to ſuffer ignominiouſly under the Hand of the Executioner[1], than to fall with Honour under the Sword of the Enemy[2]? *Add.* l. i. ſ. 28. *De Senatuſconſulto Silaniano & Claudiano*, &c. By one of the *Roman* Laws, Servants who preferr'd their own Lives before their Maſters were puniſh'd with Death, *D.B.29.t.5.* We muſt add, that in caſe a Perſon be of ſo weak and cowardly a Temper, as to ſhrink at thoſe Dangers which the common Hardineſs of Men is able to ſuſtain; his peculiar Infirmity of Mind ſhall by no means abſolve him from his *Obligation.*

Mr. *Hobbes* proceeds to obſerve, that ſince *we dare truſt him, who is bound to us by Covenant, whilſt we lead Criminals to execution in Chains, and under Guards; it ſhould ſeem that they are not by Covenant ſufficiently obliged to Non-reſiſtance.* The Remark in moſt Caſes is true[3], yet ſometimes Perſons really bound by Covenant to us, are not ſo abſolutely truſted, but that we think it expedient to provide againſt their Perfidiouſneſs by a Security of arm'd Men[b]. He adds, *A Covenant of this kind would be uſeleſs; a Man indeed may covenant thus,* Unleſs I do this or that in the appointed day, kill me; *that is, you ſhall have a Right of proceeding to capital Puniſhment againſt me upon my Default; but to covenant thus, Unleſs I do ſo or ſo, I will not reſiſt you when you come to kill me, is a thing both unpractiſed and inſignificant.* He proves his Point after this manner: “Such a Covenant muſt be made, either between a State and a Subject, or between two “Subjects of the ſame State, or between two Perſons living in a Condition of natural Liberty.

Mr. BARBEYRAC's *NOTES on* §. V.

[1] This proves, that when a Puniſhment is once fixed, it is better to die fighting courageouſly, than run the Riſque of the Scaffold or Halter; but this doth not prove, that there is nothing abſurd or unjuſt in eſtabliſhing ſuch a Puniſhment. To clear this we muſt affirm, that it is ſometimes neceſſary that a Man expoſe himſelf to Dangers, yea, to Death, for the Preſervation and Defence of many others, the Safety of the Publick being to be preferred before our private. And when one is engaged, as in this Caſe of which we are ſpeaking, and many others, we have no reaſon to complain of him that inflicts the Puniſhment, to which we have openly or tacitly conſented, if we perform not our Engagements. See what is ſaid, *l.* 8. *c.* 2. following.

[2] *Servi quotiens Dominis ſuis auxilium ferre poſſunt, non debent eorum ſaluti ſuam anteponere——Ultimum itaque ſupplicium pati debet* [*Ancilla, cui Percuſſor Dominæ mortem minatus erat, ſi proclamaſſet*] *vel hoc, ne cæteri ſervi credant, in periculo Dominorum ſibi quemque conſulere debere.*

[3] See what is ſaid *l.* 8. *c.* 3. §. 4. *Note* 8.

[a] *De Cive*, c. 2. ſ. 18.

[b] *Senec. Thyeſt.* ver. 644, 645, 646.

——*Arx urbem premit,*
Et contumacem regibus populum ſuis
Habet ſub ictu.——

——A Caſtle aws a Town,
And holds a People, ſtubborn to their Kings, under the Stroke.

“In the firſt Caſe it would be uſeleſs, becauſe 'tis enough to ſecure to a State the Power of puniſhing Offenders, if each particular Subject engages by Oath or Fealty, that he will not forcibly defend or reſcue any Perſon, who ſhall be thus led to ſuffer Juſtice. In the ſecond Caſe it would be alike impertinent; becauſe in civil Governments private Men have not the Right of killing. In the third and laſt Caſe, it would be of no more Uſe or Force than in the former; becauſe if the Parties covenanted, that one of them ſhould be kill'd upon Non-performance, a preceding Covenant muſt be ſuppos'd to have paſs'd, importing that he ſhall not be kill'd before the day fix'd for Performance.” For according to his *Hypotheſis*, in a *State of Nature*, before any Pacts have been introduced, each Man hath a Right of killing each Man elſe. “Therefore upon default of Performance, on the ſet day there returns a Right of War, or a hoſtile State, in which it is lawful for any Man to attempt what he pleaſes againſt another; and conſequently the Right of reſiſting will return at the ſame time.” I would rather chooſe to eſtabliſh the Truth of the Aſſertion another way, by ſaying, that the Force of Covenants, if ſtrain'd to the higheſt, does reach ſo far, as not only to lay on the Parties an intrinſical Neceſſity of performing the Conditions, but likewiſe to give each of them a Right of compelling the other to a Compliance[4], in caſe he draw back, by propoſing and preſenting ſome Evil. And that therefore every Covenant may be reſolv'd into this Senſe, *I engage to do this or this for you; if I fail, you ſhall have a Power of compelling me by violent Means.* Now to add a ſecond Covenant about Non-reſiſtance, would here be uſeleſs and abſurd. For then this ſecond Covenant muſt be enforc'd again by a third, including ſome Penalty, as *if I reſiſt you, when you attempt to compel me to Performance, you ſhall have a Power of offering Violence or Evil to me.* Thus it is plain, the ſecond Covenants add nothing at all to the firſt; for the firſt gave a Power of reducing the Defailant by Violence; and 'tis as eaſy to break this as that. What need is there then of backing one Covenant with another, when ten may as well be broken thro' as one?

The laſt Argument urg'd by Mr. *Hobbes*, runs thus: *Could there be ſuch a thing as a Covenant for Non-reſiſtance, we ſhould by it be obliged out of two preſent Evils, to chooſe that which appear'd the greater. For certain Death is a greater Evil than Reſiſtance and Combat. But of two Evils it is impoſſible for us not to chooſe the leſſer; therefore by ſuch a Covenant we ſhould be tied to an Impoſſibility, which contradicts the whole Nature of mutual Engagement.* Now here it is neceſſary, that the Rule about *chooſing the leſſer Evil*, be accurately ſtated and explain'd. And this properly ſpeaking, can take place only in two *unprofitable* or *hurtful Evils*, conſider'd as ſuch. In which Caſe it looks like a kind of Gain, to ſuffer only a Part of an inevitable Loſs or Damage: But the ſame Rule muſt by no means be extended and applied to the Caſe of two *diſhoneſt Evils*, or of two Evils, the one *diſhoneſt*, the other *unprofitable*. For of two Evils of Commiſſion, we are to chooſe neither[5]. But it ſometimes happens, that we cannot fulfil two affirmative Precepts, the Omiſſion of which, ſeparately conſider'd, would be ſinful, yet upon their meeting together the Omiſſion of one of them is look'd upon as lawful. And in this Caſe of the two *Evils of Omiſſion*, the leſſer is to be choſen, or rather the interfering with a more noble Precept, ſhews the Omiſſion of the leſs noble Precept to be no *Evil*, or *Sin*. For in all inferior and ſubordinate Laws, this Reſtriction is ever underſtood, *So far as we can comply with them, and not intrench on Engagements of a higher Nature.* Thus not to obey God, and not to obey the civil Magiſtrate, if taken aſunder, are both notoriouſly Sins; and yet, ſuppoſing both the Obligations cannot at once be anſwer'd, as when the Magiſtrate commands any thing contrary to the Divine Law, in this Caſe, Diſobedience to our earthly Governors ceaſes to be Evil; becauſe that Law which binds us to conform to the Will of human Sovereigns, is always underſtood with this Proviſo and Condition, that they enjoin nothing repugnant to the Laws of God.

We are in many Caſes likewiſe permitted, rather to chooſe the bare Execution of another Man's Sin[6], or a Concurrence by way of Inſtrument, than ſome Evil, very prejudicial, or very grievous to be born, with which we are threaten'd upon refuſal. Which Point we have elſewhere more largely diſcuſs'd.

Neither is it allowable, as was juſt now hinted, to make any ſuch Compariſon between an Evil, troubleſome or damageable, and a Sin, ſo as to chooſe the latter rather than the former; as for inſtance: If a Man ſhould rather act contrary to his expreſs Duty, than ſlip the Opportunity of ſome Advantage, or ſuſtain ſome real Loſs; how poſitive ſoever his corrupt Judgment may be in concluding the Sin to be the leſſer Evil. For, were this admitted, the Force and Efficacy of Obligations would depend upon every Man's Opinion; and conſequently would vaniſh into nothing, if I were not bound to an Action, when the Omiſſion of it upon account of ſome external Regard, appear'd to me more deſirable than its Performance. Thus it would be but a poor Excuſe for a Thief to alledge for himſelf, that he thought it a leſs Evil to lay Hands on the Goods of his Neighbours, than to get his Livelihood by his own Pains and Labour. Indeed Obligations are ſo far from loſing their Force in theſe Caſes, that they never exert it more vigorouſly; for 'tis the very Nature of ſuch Engagements to produce in Men an intrinſical Neceſſity of ſuch Performances, as they would otherwiſe be averſe to, upon outward Conſiderations and Reſpects.

VI. To make a Promiſe or Pact truly *obligatory*, it is farther requiſite, that we have a *moral Power* of performing the thing agreed upon. And if the thing be unlawful, and we conſequently want this Power, we cannot tie ourſelves by any ſuch Engagement[1][2]. For every Promiſe receives its

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[4] And by conſequence the other is obliged not to reſiſt, till he ſhall obtain his Right, otherwiſe his Right will do him no good. See concerning this Mr. *Thomaſius*'s *Juriſprud. Divin.* l. 3. c. 7. §. 88, *&c.*

[5] See *l.* 1. *c.* 3. §. 8. aforegoing, and what I have ſaid in my Treatiſe of *Sport*, l. 4. c. 5.

[6] See what is ſaid above, *l.* 1. *c.* 5. §. 9. and hereafter *l.* 8. *c.* 1. §. 6. with the *Notes*.

Mr. Barbeyrac's *NOTES on* §. VI.

[1] *Pacta quæ contra Leges Conſtitutioneſque, vel contra bonos Mores fiunt, nullam vim habere indubitati Juris eſt.* Cod. de Pactis, *leg.* 6. See alſo the *Digeſt.* l. 28. tit. 7. *De Conditionibus Inſtit.* leg. 15. l. 45. tit. 1. *De Verborum Obligat.* leg. 35. §. 1. & leg. 123. & *Inſtit.* l. 3. tit. 20. *De inutil. Stipulat.* §. 24.

[2] 'Tis indiſputably certain, that *Pacts* againſt Laws, Conſtitutions, and good Manners, have no Power of binding Men. *C. de Pactis*, leg. 6. *Vid. D.* 28. tit. 7. *de Condition. Inſtitut.*

Force from the Ability of the Promiſer[2], and never reacheth farther; for a Man cannot bind himſelf with any Effect to a Buſineſs which he wants Ability to compaſs. But now the Law by forbidding any Action takes from us the *moral Power* or *Ability* of ſetting about it, and of entring on any Obligation to perform it. For would it not be moſt abſurd and contradictory, that an Obligation which derives its Virtue from the Law, ſhould put us under a Neceſſity of doing ſomewhat which the Law abſolutely prohibits? And when we are once plac'd in Subjection to Laws, the bare Act of our own Will is not ſufficient to repeal or to evade them. Therefore he who promiſeth a thing unlawful, ſins,

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[2] The Validity of unlawful Agreements not being ſufficiently explain'd by our Author, who has treated of it too generally, and without regard to ſuch true Principles as the Solution of divers Caſes contain'd in it depends on, I have thought fit to propound ſuch Meditations as I have had about this Subject, ever ſince the firſt Edition of this Book, under theſe Heads:

I. That every Act which is attended with ſomething contrary to the Rules of Virtue, is not invalid upon that Account barely, provided that the thing in which we are engaged be innocent in itſelf; it implies, that one or other of the Contractors, or both of them, offend in certain reſpects, *viz.* the Engagement, without conſidering the Parties, as not accompanied with all the Qualities of Right. Not to ſpeak of ill Motives, which render the moſt innocent Actions criminal. As for example, a Merchant who deals in contraband Goods, may act againſt his own and Family's Intereſt, without being obliged to perform the Bargains he has made for them. A Vintner, who ſpends all his time in drinking with Drunkards, certainly does ill, as well as they to whom he gives an Opportunity to be drunk; yet he is not obliged to pay for the Wine theſe Men have drank, nor are they leſs obliged to pay him for it. Gameſters by Profeſſion commit divers ſorts of Sin by playing, as I have ſhew'd in my Treatiſe of Games, but that does not hinder, that ſuch as have gain'd by fair Play, may lawfully take their Winnings, and require what is due to them. Further, we ought to conſider that the End of a Law which forbids certain things, is not only to make void all that may be done upon that account; but to hinder their Commiſſion, and, above all, to ſtrip them of their proper and immediate Effects, eſpecially if they are of any Continuance. So, for example, if a Judge, who is corrupted, gives an unjuſt Sentence, he, in whoſe Favour it is given, may in Conſcience take the Benefit of the Judgment; but if the Effect of an Engagement contracted by means of ſome unlawful thing, exiſts entirely, the Law will not authorize it, but leaves the things in the State they were, and denies the Contractor its Protection, as not deſerved by him. This being laid down, we muſt

II. Diſtinguiſh between that which is contrary to Natural Right, and that which is unlawful only, becauſe it is forbidden by ſome Civil Law. As to thoſe ſorts of Agreements which proceed from the firſt ſort of things unlawful, I ſhall reduce them to theſe following Rules. 1. If after any one has engaged himſelf in a thing unlawful in itſelf, he will not perform it, he to whom he is engaged can't force him, and he can't reaſonably complain that he has broke his Word, whether he hath got any thing by it, or no. The Reaſon of it is, not only becauſe (as our Author ſpeaks very well) the Lawgiver by forbidding it takes away all Liberty to do it, and by conſequence alſo all Right of requiring it of any Perſon whatſoever; but alſo in every Matter wherein he is engaged contrary to his Duty, it may be preſumed that he did not give his full and free Conſent, eſpecially if he be to act any enormous Crime, as if a Man promiſe to blaſpheme, or commit Sacrilege, or Perjury, or murder a Man, *&c.* When then he comes to repent of his Criminal Engagement, 'tis not a bare Preſumption, tho' that be ſufficient, but 'tis an infallible Sign that he did not think that he promiſed ſuch things, and he to whom he promiſed them ought to acquit him for that Reaſon, ſince 'tis the very ſame which we all make uſe of in not keeping our Word. If he has got nothing by it, he has loſt nothing, tho' he deſerves it. But if he hath given any thing, as it was under a Condition, and that ſuch an one as is thought morally impoſſible, he muſt reſtore it, becauſe it was not given with any regard to him, and ſo much the more, becauſe he can't keep it without giving ſome Reaſon to believe that he does really repent; and that to his Fault in promiſing he adds another of having a Deſign of making an Advantage of his Error, and cheating him of his Subſtance. Reſtitution is in this Caſe indiſpenſibly neceſſary, ſince he that gave it thought he did well in promiſing a thing upon a bad Foundation; as if a blind Perſon thro' a falſe Zeal ſhould promiſe another to change his Religion againſt the Dictates of his own Conſcience. 2. If he whom we have engaged to commit a Crime, doth actually execute it, we are not obliged to pay him what we have promiſed him. This were to reward a Crime, and encourage thereby not only him that has already broken the Law, but others to break it hereafter for the like Motives. On the other ſide, he to whom the Promiſe is made, may and ought to know, that he does not think it a thing to which any Man would engage himſelf with mature Deliberation; and if he pretends certainly to enjoy the Reward of his Crime, he is a Fool to truſt to a bare Promiſe. The only reaſonable Foundation for hopes that a Man's Word will be kept, is the Honeſty of him that gives it; and can we repoſe any Confidence in that Man, who requires things contrary to Honeſty? How faithful ſoever he may be believed, who expects us to keep our Engagements, in that he has ſolicited us to do an ill thing, have we not reaſon to think that he will no more ſcruple to break his Word, than to require what he propoſed, when we gave him ours? He certainly offends againſt Charity, who will oblige any Man to do an ill thing for a Reward's ſake. But ſince it belongs to us to reject his Propoſition, and we are indiſpenſibly obliged ſo to do, he can't require the Performance of our Promiſe upon a pretence that we do him an Injury, or fruſtrate his Deſign; becauſe, tho' he ſeems to be injured, he muſt blame himſelf for it. As he ought to repent that he hath attempted with too much Succeſs, ſo he muſt preſume that we promiſed but looſely, and are left to hearken to our own Paſſions. 3. But when we have given any thing on the Occaſion or Proſpect of an evil Action, we can demand nothing again from him who hath received it. For when the Wickedneſs is done, there is no help; we do not render ourſelves more culpable by leaving that which is not in our Power to take away. When there is only a bare Promiſe, the Will of transferring the thing promiſed upon that Account, muſt not be thought full and entire: We promiſe much eaſier than perform, and when we have promiſed on the View of ſome Criminal Action, there is a Space before the Execution following to preſume he may recant his raſh Engagement; but the ſame Moment that he delivers the thing agreed on, he ſtrips himſelf abſolutely of the Right of Property, and he to whom he gave it, acquires it, by a Title diſhoneſt indeed, but not unjuſt in relation to us; becauſe it ſhews the ſame Conſent of the Proprietor as if he had done ſomething honeſt or indifferent. The Validity of an Alienation conſider'd in itſelf doth not depend on the Nature of the Subject for which we part with a thing in reſpect to another. Let the Motive be good, or not, we are Maſters of our own Goods, and may diſpoſe of them as we pleaſe; all the Abuſe of them is, when we beſtow them not with a Proſpect of ſomething honeſt, or at leaſt indifferent. If a transferring of Property becomes null only becauſe there was ſomething diſhoneſt in the Subject, we ſhall eaſily find a thouſand Pretences to elude the moſt lawful Contracts. A Man, for example, who has borrow'd Money at the moſt reaſonable Intereſt, may refuſe to pay any Intereſt, or require what he hath paid, under a pretence that he believes paying of Uſury unlawful, and contrary to Natural Right. But (ſays Mr. *Titius Obſerv. in Lauterbach*, 354.) one of the Contractors gains, and the other loſes; and why ſhould either of them have any Advantage, ſince they both ſin? I anſwer with our Author, §. 9. That he that hath given, believes himſelf to have receiv'd a thing of equal value. As is the Price, ſuch is the Pay. 'Tis not material, whether in the main there be any Advantage, 'tis ſufficient that the Pleaſure of Satisfaction is reputed for a real Gain. Further, tho' if we conſider him who hath received, that he deſerves no Reward for his Crime, no more doth he deſerve to recover what he hath given. For he that rewards another for committing a Sin, is commonly eſteem'd, and that with reaſon, more to blame than he who ſuffer'd himſelf to be corrupted, becauſe he committed the Wickedneſs with more Deliberation, and bribed a Perſon to do evil, who perhaps would not have been guilty of ſuch a foul Action. To deprive a Man then of all Right of recovering what is actually given for an Action evil in its own Nature, it may ſuffice, that the Acquirement was made near to the Rules of Contracts uſed in Caſes honeſt or innocent, that is to ſay, there was no Fraud nor Force practiſed on the part of the Receiver, and the Price was not exorbitant. But it may be further ſaid, Can any Man in Conſcience retain the infamous Reward of the Crime he has committed? No, without doubt. If we ſuppoſe a Perſon to examine himſelf, and conſult his own Conſcience, the Queſtion is needleſs: For ſuch an one can't but repent, and then he will neither regard nor demand the Reward of Iniquity, nor keep it, if he has received it already. But if it be reſtored, it will not follow that he has any Right to require it; and if he knows that he may require what he has given on this occaſion, he may have recourſe to thoſe Means which are proper to recover what another refuſes to give. The Caſe has place chiefly in the Independence of the State of Nature, and it ſeems to me that then the Reſtoration is not more juſt in reſpect but he ſins doubly, who performs it [a]. Whence this farther Conſequence may be drawn, that thoſe Promiſes are not to be kept [3], which would prove hurtful to the Perſon to whom they are made; it being a general Command of the Law of Nature, that we do no harm to another, knowingly and wilfully, though he out of Folly ſhould deſire it.

Moreover, ſince a good and valid Obligation cannot be contracted about unlawful Matters, it follows that Acts undertaken againſt legal Conſtitutions, are, by Virtue of the ſame Law, null and void, or the Magiſtrate is ſuppoſed to have already declar'd them ſo [b]. Yet in many Caſes, it is a conſtant Practice in Commonwealths, to impoſe a Fine on the Performer of ſome unlawful Act, and not to diſannul the Act, becauſe there was perhaps, more Indecency in the momentary Performance, than in the Effects conſequent upon it; and becauſe frequently the Inconveniences attending a Diſannulment would be greater than the Act it ſelf, if permitted to ſtand valid, would produce [c] [4].

VII. To proceed diſtinctly in a cloſer Examination of this Point, it is firſt mov'd as a Queſtion, whether an Obligation for the Performance of an Act in it ſelf vicious, be good and valid, whilſt things ſtand as at firſt, and no ſtep is made towards the Execution? And here it is certain, That ſuch a vicious [1] Agreement does produce an Obligation on neither ſide, and that Parties ought in Honeſty to recede from their Bargain [2]. *Senec. Hercul. Oet.* v. 480, 481.

Præſtare fateor poſſe me tacitam fidem,
Si ſcelere careat; interim ſcelus eſt fides.

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reſpect to him that gave, than the Approbation of the Subject for which he gave, can be a Commendation to him. 'Tis upon this that we muſt ground the Maxim of the Roman Law, which imports, That if an Agreement be diſhoneſt, both in reſpect to him that gives and receives, the firſt can't require any thing again, but in this Caſe the Poſſeſſor has the Advantage. *Porro autem, ſi & dantis & accipientis turpis cauſa ſit, poſſeſſorem potiorem eſſe, & ideo repetitionem ceſſare, tametſi ex ſtipulatione ſolutum eſt*, Digeſt. l. 12. tit. 5. *De condictione ob turp. & injuſt. cauſam*, leg 8. In which nevertheleſs the Roman Lawyers do not always follow their own Principles, ſince when Men play at the Game call'd *Hazard*, which was forbidden, and look'd upon as diſhoneſt, they allowed the Loſer to require his Money again, even beyond the ordinary Term of Preſcription. But as I have ſhewed in my Treatiſe of *Gaming*, l. 3. c. 9. §. 15. in this laſt Caſe the unhappy Gamſter can have no recourſe to Juſtice to recover his Money, becauſe in taking upon him to game, he renounces the Benefit of the Law. The ſame thing may have place in my Judgment, and for the ſame Reaſon, in all other diſhoneſt Engagements, ſuppoſing that the Law permits Men to recover again what they have given on that Account. Thus much of things evil in themſelves, and contrary to the unchangeable Rules of natural Right, after which it will not be hard to ſtate the Validity of ſuch Agreements as are not unlawful, otherwiſe than as they border upon ſuch things as civil Laws forbid. But here we muſt diſtinguiſh between a Stranger and a Fellow-Citizen. 1. If we treat with a Stranger about things forbidden in our Country, he either knows them forbidden, or not. If he knows them, he has either ſearched out the Agreement, or not; if he has ſearched out the Agreement, we are obliged neither to do the thing, nor to make good the Damage he may have by it, but only to reſtore what he has already given. The Reaſon is, becauſe in this Caſe he may and ought to ſuppoſe that we are but ſlightly engag'd, and that we are tempted by the advantageous Propoſitions that he made us. Beſides, we often expoſe our ſelves to great Mulcts, and other Puniſhments more troubleſome, of which we can't ſuppoſe that any Perſon would run the riſque. But if we our ſelves had ſearched the Agreement, we are not really obliged to execute the ſame thing, but we muſt indemnify him with whom we are engaged. I ſay, we are not obliged to execute the ſame thing; for tho' Strangers are not ſtrictly obliged to inform themſelves of what paſſes among us, and may behave themſelves as they ſee convenient, without enquiring into the particular Laws of our State, yet they ought in Equity to preſume, that a Citizen who recants an Engagement which he has entred into contrary to his Duty, did not engage with mature Deliberation, or at leaſt did not foreſee the Obſtacles that oppoſed the Execution of his Promiſe. But ſince he has ſearched the Agreement, and ſeems to have paſſed all theſe Conſiderations upon it, 'tis juſt that ſome way or other he ſhould indemnify him that has truſted to him. But if the Stranger knows not of the Prohibitions, whether he has ſearched the Agreement, or no, then we have a more indiſpenſible Obligation to render to him all that he hath ſuffered by truſting to our Word; and we ought to think our ſelves happy that he doth not impute it to us as an Injury that we are ſilent, and let him take other Meaſures than he would have done if we had ſpoken our Minds freely. But if the Prohibitions come only when the Market is made and concluded, then we are not obliged to make good any Damages. For in this we ought to be ſuppoſed not to have conſented but under a tacit Condition, that there was no Obſtacle from the Sovereign. 2. But if thoſe that treat together about a thing forbidden by the Law, are Members of the ſame State, they are both ſubject to the Puniſhment really, becauſe they could not be ignorant of the Law, and upon that Account they are looked upon to treat together as if there were no Law about it, and ſo to renounce the Benefits which might accrue thereby to either of them. So, though they did ill to engage themſelves, they ought, as far as in them lies, to ſuffer their Engagement to continue in force, and neither of them to break it without the Conſent of the other; yet if we can't execute the thing to which we are engaged without ſome great Prejudice, he to whom we have promiſed ſhould content himſelf with an Equivalent. I ſay, every one ought, as far as in him lies, to ſuffer the Engagement to take effect, for ſo long as there is nothing done on either part, each of them is free to recant, as if they had done a thing evil in its own Nature, becauſe in this Caſe we may be thought to have conſulted well, or acted with mature Deliberation. As for Example, if I have promiſed any Man to game with him contrary to Law, I am no more obliged to meet him, than to preſent my ſelf in the Field to that Man who has challenged me to a Duel, which I have accepted; but when I have actually play'd and loſt, I cannot have a recourſe to Law to recover my Money, nor uſe any forcible way to regain it; eſpecially if there was no Cheat put upon me by him who has won it of me. See my Treatiſe of *Gaming*, l. 3. c. 9. §. 15, 16. So again, If a Merchant has promiſed another to furniſh him with certain contraband Goods; when they have agreed for the Price, the one may refuſe to ſtand to the Bargain that he ought not to have made, and the other, with whom he has not kept his Word, ought to repent that he had promiſed ſuch a thing, and be eaſy that it took not effect; but if the Merchandize be actually delivered, or any thing be received as an earneſt of Delivery, which is therefore hoped, neither the Buyer can lawfully refuſe to pay the Price agreed on in the firſt Caſe, nor the Seller himſelf to deliver the Bargain without ſome Prejudice to himſelf, and incurring a great Puniſhment: For then 'tis ſufficient to reſtore what he has received, or an Equivalent. With theſe Limitations nothing hinders but that an Engagement contrary to the Laws purely civil may be of Force between one Bargainer and another. There are Agreements which the Laws forbid, but they ſuffer them nevertheleſs to ſubſiſt contrary to their Prohibition, for they may be valid between the Parties, altho' the Law nulls them, in as much as that and the Magiſtrate allow no Action for the Relief of either of them after they have conſented with full and entire Liberty.

[3] See what is ſaid, l. 5. c. 12. §. 22. in the End.

[4] See *Grotius*, l. 2. c. 5. §. 14, 16. with the Notes of *Gronovius* the Father, and what our Author ſays above about Imperfect Laws, l. 1. c. 6. §. 16.

Mr. BARBEYRAC's *NOTES on* §. VII.

[1] This is the Determination of the Roman Law, *Generaliter novimus turpes ſtipulationes nullius eſſe momenti, veluti ſi quis homicidium vel ſacrilegium ſe facturum promittat.* Digeſt. l. 45. tit. 1. *De Verbor. Obligat.* leg. 26, 27.

[2] Thus *Apollonius Tyanæus* (in *Philoſtrat.* l. 3. c. 7, p. 130. Ed. *Morel.* Pariſ.) having promiſed to bring a Veſſel richly laden in the Hands of Pirates, led 'em a quite contrary Courſe, and deluded their Expectation of Booty.

[a] *Add.* l. 15. *D. de Condition. Inſtitut.* l. 35. ſ. 1. l. 123. *D. de Verb. Obligat.* [b] *Lex Wiſigothorum*, l. 2. tit. 5. c. 7. [c] Thus in *Apollonius Rhodius, Argon.* l. 4. *Alcinous* being conſtituted Umpire between the *Colchians* and the *Argonautes*, gave Judgment as follows, "That if *Medea* had been acquainted with *Jaſon*'s Bed, ſhe ſhould ſtill remain in his Poſſeſſion, if not, ſhe ſhould be "reſtored to her Father. We have the ſame Story in *Hygin. Fab.* 23. *Apollodor. Biblioth.* l. 1. ſ. 25. *Orpheus in Argon.*

Thus for Inſtance, if a Man hire an Aſſaſſine to commit a Murther, and the Aſſaſſine upon better Thoughts reſolves againſt the Villany, the Hirer cannot compel him to fulfil his Covenant. And on the other Hand, if the Hirer repenting of his wicked Deſign, orders the Aſſaſſine not to proceed, the Aſſaſſine ſhall not force him to continue in his Reſolution for fear of loſing the promis'd Wages. Neither ſhall he in this Caſe demand the Money of the Hirer, as on whoſe account purely he now deſiſted, and was hindred from earning it. Nay, if after he has been thus countermanded he go on, and accompliſh the Miſchief, the Hirer ſhall not be guilty of the whole Fact, but ſhall be condemn'd only in ſo much as ſhall ſeem a proportionable Penalty, for conceiving a Murther in his Imagination, of which he repented before it was put in Execution.

Grotius[a] obſerves, That a Promiſe of this kind is therefore *vicious* and *void*, becauſe it is made to excite a Man to do a wicked Act[b].

VIII. It is a ſecond Point of Enquiry, whether in Caſe ſuch a Villany having been once committed, according to the Bargain, the other Party be obliged to pay the Price agreed upon? Which *Grotius* affirms; becauſe, ſays he, the Price or Reward before the Fact was accompliſh'd had indeed a Blemiſh and Imperfection, as being the Incentive to Wickedneſs, which Blemiſh ceaſeth, when the Wickedneſs is once paſt, and the Crime perform'd. But we cannot but declare our ſelves of a contrary Opinion; for a Bargain of this kind is ſo far from ceaſing to be vicious, when the Deed is over, that it ſeems then to arrive at its higheſt pitch of Baſeneſs, as having gain'd its end. Unleſs it be a ſmaller degree of Sin to have ſtolen, than to think of ſtealing; to receive the Wages of Villany, than to hope for and expect them; to pay the Reward, than to promiſe it. Indeed if the Promiſe be in its ſelf vicious, becauſe it is the *Incentive to Wickedneſs*, the fulfilling of the Promiſe will certainly be vicious, as being the *Recompence of Wickedneſs*, and an Encouragement and Invitation to new Miſchiefs. And on this account ſome ſecret Stain or Blemiſh is commonly thought to ſtick on ſuch Rewards, even after they have paſs'd to a third Poſſeſſor by a juſt Title; becauſe they were at firſt the *Wages of Iniquity*. Thus the *Jews* were forbidden to bring the Price of Whoredom, as an Offering, into the Houſe of God[c]. Thus when *Judas*[d] brought back the Wages of his Treaſon, the chief Prieſts thought it not lawful to put it into the Treaſury. And thus it is a known Proverb, That *a Family ſeldom thrives on an ill-gotten Eſtate*[1]. Therefore we can by no means aſſent to what *Grotius* delivers, That till *the Time of performing the Villany, the Force and Efficacy of a vicious Promiſe remains in ſuſpenſe*; juſt as doth the Efficacy of conditional Promiſes, till the Condition be made good, and of Promiſes about things at preſent impoſſible, till the things do really fall under our Power, as we have probable Hopes they will, at our firſt making the Bargain: But that *when the Fact is once committed, the Obligation then breaks out, and exerts its Force, which was not at firſt entirely wanting (in as much as the thing was done by mutual Conſent) but was only hindred from diſplaying it ſelf by that Vice or Defect, with which it is attended*; namely, its contributing to the Commiſſion of a Sin. But ſhould we admit this Doctrine, the Edict of Natural Law forbidding us to enter into Covenant about unlawful Matters, would be void, if when the wicked Terms of the Covenant on one ſide were put in Execution, the other Party muſt by the Law of Nature be bound to ſtand to his Agreement. What an inſignificant Order would it be to prohibit Theft, if the Act of ſtealing being once over, the Goods were to remain in the Poſſeſſion of the Thief, without Blame or Danger? And that Remark is very falſe, "That there was not originally wanting to "the vicious Covenant, an internal Force of oblig-"ing; but that it was only kept in Suſpenſe upon "account of the attending Wickedneſs, till ſuch "time as it ceas'd to be an Incentive to Sin." For to give a Pact an inward obligatory Force, it is not enough that it be made with the Conſent of both Parties, but the Subject of it ought to be ſuch a thing as Men have a Right and Power of diſpoſing of at their Pleaſure. Otherwiſe if mutual Conſent were ſufficient to produce an Obligation, it would be eaſy to overthrow all Laws, ſhould Men but enter into a *Covenant* to break them; and thus the Law of Nature would manifeſtly contribute to its own Deſtruction. It is our Judgment then, that with regard to the Law of Nature, neither the Actor of a Villany can by any proper Right demand the Wages promis'd him, nor is the Perſon who hired him bound to pay the Reward by any inward Tie affecting the Conſcience. And that therefore the Court of natural Juſtice does not think it ſelf concern'd to enquire, whether or no a Man has committed a Wickedneſs *gratis*, or to trouble it ſelf in giving him Relief. Indeed, if the Cut-throat here, or any other Man retain'd for the Execution of ſome unjuſt Violence, ſhall upon the other Party's refuſing to pay him his Hire, do him ſome Miſchief in Revenge, no Body will pity the Sufferer, nor think that he had been treated injuriouſly, but only that he has been dealt with in his own Way. This then we muſt obſerve, That although Covenants, in themſelves *vicious*, are not obligatory by any intrinſical Force or Virtue, nor fit to produce an *Action* in Courts of Juſtice, yet they have ſome kind of Effect upon a Man, who having at firſt freely conſented to them, refuſes afterwards to make them good. For they hinder him from having any Right to complain of hard Uſage, in caſe the other Perſon violently bring him to a Compliance, or inflict ſome Evil on him for his Refuſal. It is true the Law of Nature forbids, that a Man ſhould have forfeited his *Claim*, by another's dealing injuriouſly, or be compell'd to pay what he does not juſtly owe, or ſhould be puniſh'd for denying ſo unreaſonable a Demand. But he who agrees to a vicious Covenant, does by that very Act quit all claim to the Favour of this Law, in as much as he endeavours, ſo far as he is able, to give another an un-

Mr. BARBEYRAC's *NOTES* on §. VIII.

[1] This Proverb, as any Man may perceive, makes not much to our Author's Purpoſe; becauſe it is deſigned to ſhew, that ill-gotten Goods will not proſper, and that they vaniſh as they came.

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[a] Lib. 2. c. 11. ſ. 9.

[b] Thus *Apollonius Tyanæus* (*in Philoſtrat.* l. 3. c. 7. p. 130. Edit. *Morel.* Pariſ.) having promiſed to bring a Veſſel richly laden into the Hands of Pirates, led 'em a quite contrary Courſe, and deluded their Expectations of Booty.

[c] *Deuteronom.* xxiii. 18. *Joſeph.* Antiq. 4. 8.

[d] See *Matth.* xxvii. 6.

juſt Power over him. And thoſe Evils are adjudg'd to fall very deſervedly on Perſons, to which they give Occaſion by their own Fault [2]. For Inſtance, the Law of Nature forbids, that a Virgin ſhould be robb'd of that Title and Character againſt her Will; yet if ſhe once conſents to her own Diſhonour, ſhe has ſuffer'd indeed an irreparable Loſs, but ſhe cannot complain of any Injury that has been done her [3]. And thus too in Commonwealths, where *Duels* are prohibited by Law, a Man who has receiv'd a Challenge, is not bound to come into the Field, tho' he has given his Word to appear. Yet if he freely meets his *Antagoniſt*, and happens to be wounded in the Encounter, he cannot ſay, that he has ſuffer'd Wrong, or demand the Charge of his Cure.

Grotius, in favour of his Opinion, urges the Example of the Patriarch *Judah* in the Scripture [a], who appear'd very earneſt and ſolicitous to ſend *Thamar* the Price of her playing the Harlot. To this Mr. *Selden* [b] anſwers: “That in the Judgment of thoſe Times it paſs'd for lawful, for a Woman free from Marriage, and other Reſtraints, to beſtow her ſelf upon a Man, without any Condition of living together; and this either *gratis*, or for a Reward. And that therefore this Agreement was able to produce a Good and Valid Obligation, being made about a Matter, which if not naturally, yet was *civilly* lawful, or according to the Opinion of States and People in thoſe Days. We may ſay farther, That moſt Men think they ought in point of Generoſity to pay ſomething for the purchaſe of their Pleaſures. And beſides, *Judah* might not expreſs ſo much Care and Concern [4], leſt the Harlot ſhould loſe her Wages, but leſt he himſelf ſhould loſe his Staff and Ring, the Pledges he had left in her Hands. Another Argument on *Grotius*'s ſide, may be alledged in that Paſſage of the *Roman Laws* [c] [5], *What is given to a Strumpet cannot be recover'd; yet not becauſe both Parties are in a Fault; for indeed the whole Offence, as to this Point, is on the ſide of the Giver. 'Tis vicious in the Strumpet to practiſe ſuch a Profeſſion, but 'tis not vicious in her to receive the Fees of her Profeſſion.* The Meaning of which Determination is no more than this: Tho' to make an open Trade of Lewdneſs, and to own as much before the *Ædiles*, did not fall under the Penalty of the Laws in the *Roman* State; yet all good and virtuous Men thought it moſt baſe and ſcandalous to engage in ſuch a way of Life. However, when Perſons had once fix'd themſelves in ſo vile a Calling, they contracted no new Vileneſs, by making the uſual Gain and Advantage of it. Or to ſpeak more conciſely, the Buſineſs was thus; the *Romans* granting Toleration to *Courteſans*, the Bargains and Contracts made on the Score of that Profeſſion, were in their Law adjudg'd to hold good and valid. *Ovid* indeed hath accuſed theſe Bargains of Injuſtice upon another Score,

Sola viro mulier Spoliis exultat ademtis:
Sola locat noctes, ſola locanda venit.
Et vendit quod utrumque juvat, quod uterque petebat;
Et pretium, quanti gaudeat ipſa, facit.
Quæ Venus ex æquo ventura eſt grata duobus;
Altera cur illam vendit, & alter emit?
Amor. Lib. I. El. 10. *v.* 29, &c.

'Tis the Nymph's Privilege the Spoils to win,
To let her Nights to hire, and traffick with her Sin.
She ſells what both enjoy, what both invite,
And ſets the Price upon her own Delight.
What both with Pleaſure doth alike ſupply,
'Tis hard if *one* muſt ſell and t'other buy.

This ſtill remains true, That a Man cannot fairly pretend to be diſpleas'd with a piece of Wickedneſs, which has been undertaken with his Conſent, and for his Service.

Medea to *Jaſon*, in *Ovid*'s Epiſt. *Ep.* 12. *v.* 131, 132.
Ut culpent alii, tibi me laudare neceſſe eſt,
Pro quo ſum toties eſſe coacta nocens.

Others may blame, you muſt of Force commend,
For whoſe ſweet ſake I dared ſo oft offend.

Niſus to *Minos*, *Metamorph.* l. viii. v. 130, 131.
Scelus hoc patriæque, patrique, officium tibi ſit.
What's to my Country, and my Friends a Sin,
To you's a Kindneſs.

Senec. in Medea. v. 500. 503.
—— *Cui prodeſt Scelus, is fecit,*
Tibi innocens ſit, quiſquis pro te eſt nocens.

The Gainer by a Villany is deem'd the *Actor*; he that ſins for you, ſhould in your Eyes be ſpotleſs Innocence.

Though it be a very uſual, and a very good Cuſtom of Princes to take the Benefit (in ſome Caſes) of Mens *Treaſons* and *Villanies*, and to puniſh the *Traytors* and the *Villains*, that the Infection may not ſpread by Encouragement. Of this Proceeding, we have a very remarkable Inſtance, recorded by *Paulus Oroſius* in his Hiſtory [d]. *Sulpitius* having been voted in Senate a *publick Enemy*, was brought into their Hands by the Treachery of his own Slave; the *Conſuls*, with a wiſe Diſtinction, order'd the Fellow to be preſented with his *Freedom*, as a Reward for his Service to the State, and to be caſt headlong down the *Tarpeian* Rock, as a Puniſhment for betraying his Maſter. Add *Zonar. Tom.* III. *in Theophil. in initio.*

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[2] It is a Maxim of the *Roman* Lawyers, *Quod quis ex culpa ſua damnum ſentit, non intelligitur damnum ſentire*, He that brings a Loſs on himſelf by his own Fault, is not ſuppoſed to ſuffer any. *Digeſt.* l. 50. tit. 17. §. 203.

[3] Though in this Caſe *Ovid*'s Rule commonly holds true ———— *Ipſo*
Crimine dotata eſt, demeruitque virum, Epiſt. *Heroid.* 6. *ver.* 137, 138.
She brings her Portion in her Crime, and wins the Husband in the Spark.

[4] He mightily feared, and that with Reaſon, that if his Pledge were known to the World, his Wickedneſs would be divulged, and himſelf expoſed to the Scoffs of the Inhabitants. And for this Reaſon 'twas that he did not go himſelf to find *Thamar*,

[5] *Sed quod Meretrici datur, repeti non poteſt, ut Labeo & Marcellus ſcribunt; ſed nova ratione, non ea, quod utriuſque turpitudo verſatur, ſed ſolius dantis; illam enim turpiter facere, quod ſit Meretrix, non turpiter accipere, cum ſit Meretrix.* Digeſt. l, 12. tit. 5. *De Conditione ob turp. vel. injuſt. cauſam*, leg. 4. §. 3.

[a] *Gen.* xxxviii. 20, *&c.* [b] *De J. N. & G.* l. 5. c. 4. [c] Lib. 4. ſ. 3. *D. de Condict. ob. turp. Cauſ.* & l. 12. tit. 5.
[d] L. 5. c. 18.

IX. The

XI. The third Queſtion moved on this Head is, whether a Reward given for villainous Service, may be redemanded or recover'd? And here the Law of Nature affords no Pretence for ſuch a Recovery, provided the *Receiver* has not dealt deceitfully with the other Party. And the other has not ſuſtained a great Damage [1]. In as much as the *Giver* by delivering up the thing promis'd, intended no doubt to transfer the Propriety of it; and this too in way of Debt, in Conſideration of a Service perform'd for him, which he himſelf valued at this Rate. Now we know that when any thing is given, even *Gratis*, all Right of Recovery ceaſeth. Nor will it alter the Caſe to urge, That the thing was here obtain'd on an unjuſt Title, and by Ways and Means expreſly forbidden by the Laws. For this Allegation cannot with any colour be made by the Perſon who gave the Reward; in as much as he voluntarily bargain'd for the wicked Service, and when that was perform'd for him, thought himſelf to receive ſomewhat equal in Value to the Price agreed upon; nor can he complain of a Villany, of which he himſelf was the principal Author. Indeed the *Illegality of the Means* by which the Reward was required, if conſider'd in regard to the publick Authority, ſhall produce this Effect, That it ſhall be in the Magiſtrate's Power, to take the thing from the Receiver by way of Puniſhment, and (if he ſees fit) to reſtore it to its firſt Owner. For Inſtance, if a cunning Strumpet ſhould chouſe an unwary young Man out of a conſiderable Sum of Money, ſhe may fairly be obliged to refund; ſince even in the moſt vicious Bargains ſome Shadow of Juſtice is kept up, and the Laws of Contracts in ſome ſort obſerv'd.

But farther, ſince it is accounted moſt baſe and vile in a Man, to demand a Reward for doing a thing which it is his Duty to perform *Gratis*, it is made another Queſtion, whether what he have promis'd or given for a thing before juſtly due to us, may be with-held or recover'd. Some anſwer abſolutely [a], That if we reſpect the Law of Nature, Promiſes of this kind are good and valid, ſince thoſe likewiſe are ſo, which we make without any particular Reaſon or Proſpect. Yet at the ſame time whatſoever Damage is ſuſtain'd by violent Extortion, ought to be fully repair'd. Perhaps the Buſineſs may be more clearly ſettled, if we diſtinguiſh whether the thing which we ſay was before due to us, was due upon an imperfect, or upon a perfect Obligation. If the former, our Promiſe of a Reward for it ſhall hold good, and we cannot ſue for Recovery. Thus for Inſtance, although the Law of Humanity obliges me to ſet a Traveller in his Way, and though ſuch a piece of Service may perhaps coſt me no Trouble, yet if I bargain to receive ſome Conſideration on that Account, I may fairly demand the Payment, and the other Perſon cannot recover what he thus parts with; unleſs I forced him to make a large and unreaſonable Promiſe, by filling his Head with falſe Frights, or any other Stratagem of Knavery. Thoſe Promiſes are likewiſe valid, which we make to incite another to the more ready, and the more exact Performance of his Duty. For theſe paſs for matters of free Bounty and Gratuity. But if the thing was before owing to us in a *perfect* Manner [b], and yet the Perſon who is to perform it, refuſes Compliance, unleſs upon our Promiſe of a new Reward, we take this Caſe to be the ſame, as in Engagements made through Fear or Guile; and therefore to require the ſame way of Proceeding. If then, in a State of natural Liberty, a man refuſe to pay me my due, it is plain he does it upon Preſumption of his own Strength, and becauſe he believes it is not in my power to compel him. And conſequently, if he deny to fulfil a Covenant fairly made, without a new ſupplemental Condition, he immediately gives me juſt Cauſe of uſing Hoſtility to reduce him. And if my preſent Affairs will not permit me to engage in a Method of War, but incline me to agree, though on hard Terms [2], I may afterwards require Satisfaction for the Damage I now ſuffer; unleſs I end the Matter by an Act of voluntary Forgiveneſs. Yet it quite alters the Caſe, if his denial did not proceed from meer Unfaithfulneſs and Wickedneſs; but from his being able to ſhew that he was exceedingly injured in the former Covenant, to which he now demurs. As for the Members of Commonwealths, if *they* refuſe to anſwer an old Bargain without ſome additional Reward, they will be compell'd to be honeſt by a Courſe of publick Juſtice.

To this we may add the Diſtinction of the *Roman* Lawyers [c] in Caſes of *vicious Service*, whether the Fault or Wickedneſs was on the part of the Receiver only, or of the Giver only, or of both. In the firſt Inſtance, they allow an Action of Recovery; not in the other two.

X. We are likewiſe *morally* unable or uncapable to perform any thing [1], or to oblige ourſelves to ſuch Performance, about the Goods or Actions of other Men; which are not ſubject to our Pleaſure and Diſpoſal. And being thus independent from us, we cannot by any Act of ours, whether of Promiſe or of Bargain, give another a Right over them, by Virtue of which he ſhould claim them as his Due. Hence 'tis a Rule with the Civilians [2], “ That in caſe “ one Man promiſe that another ſhall give or ſhall “ do ſuch or ſuch a Thing, neither of them ſhall

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Mr. BARBEYRAC's *NOTES on* §. IX.

[1] See what I have ſaid about this Matter in my large Note on §. 6. And l. 4. c. 13. §. 16.

[2] Mr. *Hertius* affirms the contrary, and his Reaſon is, that by ſubmitting to a new Treaty, tho' upon hard Conditions, he deprives himſelf of his Right. And if one ſuch Agreement, adds he, made after War be valid, why ſhould it not be ſo when Men think by that Means to avoid it? But ſee l. 8. c. x. §. 1.

Mr. BARBEYRAC's *NOTES on* §. X.

[1] Add alſo the things which are not in our Diſpoſal, altho' otherwiſe they really belong to us. See what I have ſaid in my Treatiſe of *Games*, l. 2. *c*. 4. §. 4. *&c*.

2. The Words are, *Si quis alium daturum facturumve quid promiſerit, non obligabitur; veluti ſi ſpondeat, Titium quinque aureos daturum.* Inſtitut. l. 3. tit. 20. *De inutil. Stipulat.* §. 3. See *Cujas, Obſerv.* 12. 36.

[a] See *Grotius*, l. 2. c. 11. ſ. 10. [b] *Add.* l. 12. tit. 5. *D. de Condict. ob turp. cauſ.* [c] *Liban. Orat.* 5. I receive only thoſe Advantages which the Law allows me; and where is the Favour in this Caſe? He that hath been obliged with Kindneſs, ought to make Requital to his Benefactor. But we can owe no ſuch return to a Judge, who doth not act out of Favour to us, but as the Neceſſity of the Law directs him.

“ ſtand obliged.[3]” Which is very juſt and true, if we ſtick to the bare Words of ſuch a Promiſe: But becauſe it ſeems inconvenient, that an Act ſeriouſly undertaken ſhould produce no Effect, we are apt commonly to interpret Promiſes of that kind in this Senſe, that the Perſon promiſing will take the Care to bring the other Party to performance[4], in whoſe Name he now ſeems to make the Engagement: But if I make a Promiſe to a Man in ſo expreſs and direct Terms as theſe, that I will endeavour to prevail on a third Perſon, to do for him ſo or ſo; I am then obliged to labour by all means *morally poſſible*, to move that Perſon to a Compliance. We ſay by all *means morally poſſible*, that is, ſo far as the other Man can honeſtly deſire me, and ſo far as is conſiſtent with the Nature and Method of civil Life. And if in this Caſe, I omit nothing on my part[5], and yet the third Perſon refuſe to grant the Requeſt, I am not bound to make good the Default; unleſs this was an expreſs Part of my Promiſe, or was imply'd in the Nature of the Buſineſs[6]. But if I promiſe in this manner, *Unleſs a third Perſon do ſo or ſo, I will forfeit thus much*, it is manifeſt that if the third Perſon fail, my Engagement will ſtand good againſt me. Somewhat like this we meet with in the *Roman* Conſtitutions[7], which decree that in caſe a Perſon diſpoſes in way of Legacy, a thing which belong'd to another Man, and which he knew ſo to belong, the *Heir* ſhall be obliged to redeem, and to reſtore it, or if it cannot be redeemed, to give the Value of it to the Owner. Yet certain it is, that a Promiſe of what kind ſoever, cannot lay an Obligation on the third Perſon, nor give the other Man a Right of requiring any thing immediately from him.

But if the third Perſon be one placed under my Governance and Command, his Things or Actions are not accounted another's, but my own; ſo far as my Authority over him extends. And thus far I can by Promiſe or other Engagements effectually diſpoſe of them, ſo as not only to bind myſelf to ſee the Agreement made good, but to cauſe that the Perſon in whoſe behalf I tranſact, ſhall as ſoon as he is acquainted with my Pleaſure, be obliged by virtue of my Power over him, to perform the Condition. Tho' the common and regular Way of proceeding in theſe Caſes, is to apply to the principal Promiſer, and to require him to force the Perſon under his Care and Direction to a Compliance; and upon the Obſtinacy and Default of the govern'd Party, the Action at Law ſhall lie againſt his Governor, unleſs he has reſign'd his Charge, and left him wholly to his own Diſpoſal.

XI. *Laſtly*, I am morally incapacitated to make a Promiſe with any Effect, to a third Perſon, about ſuch Things or Actions of mine, to which another has already acquired a Right; unleſs perhaps this other Party be content to wave his Claim[1]. For he who by a former Engagement has made over his Right, can have no Power left to diſpoſe of it anew. And all Pacts and Promiſes might be cancell'd and eluded with very little Trouble, were we allow'd to enter into new ones, either directly contrary to the former, or any way inconſiſtent with them, as to the Performance. In this Caſe therefore, the latter Contract is diſannull'd and render'd ineffectual by the former, or as we ſhould rather ſpeak, the former ſhews that the latter can be of no Force or Uſe. Hence, for inſtance, are all thoſe Covenants void, which Subjects make either among themſelves, or with others, in prejudice of the

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[3] So alſo the *Digeſts* direct, *Quæcunque gerimus, cum ex noſtro contractu originem trahunt, niſi ex noſtra perſona obligationis initium ſumant, inanem actum efficiunt, & ideo, neque ſtipulari, neque emere, vendere, contrahere, ut alter ſuo nomine recte agat, poſſumus.* Digeſt. De Obligat. & Action. *l.* 44. *tit.* 7. *leg.* 11. *Certiſſimum enim eſt ex alterius contractu neminem obligari.* Cod. l. 4. tit. 12. *Ne Uxor pro Marito*, &c. leg. 3.

[4] In this latter Caſe the *Roman* Lawyers themſelves affirm, that the Promiſe obliges. *Quod ſi effecturum ſe, ut Titius daret, ſpoponderit, obligatur*, i. e. If he promiſed to procure that *Titius* ſhould give, he is obliged, *Inſtitut. ubi ſupra.* See Mr. *Hertius*'s Diſſertation, *De Oblig. alium datur. facturumve* in *Tom.* III. of his Commentaries and ſmall Tracts, printed in 1700.

[5] So *Livy*, l. 2. c. 31. He ſeem'd to have ſatisfied his Obligation, inaſmuch as he contributed nothing on his ſide to hinder the Buſineſs from being perform'd. See *Grotius*, *Book* II. *c.* 11. *ſ.* 22. and *Book* III. *c.* 21. *ſ.* 30.

[6] This hath place only in ſuch Engagements where both Parties are concern'd, and not in ſuch as are the pure Effect of the Liberality of one of the Parties. See the Examples cited by Mr. *Hertius* in the Diſcourſe laſt mention'd, *Sect.* 1. §. 8.

[7] Theſe are the Words, *Non ſolum autem Teſtatoris vel Hæredis res, ſed etiam aliena legari poteſt; ita ut Hæres cogatur redimere eam, & præſtare; vel ſi non poteſt eam redimere, æſtimationem ejus dare —— Quod ita intelligendum eſt, ſi defunctus ſciebat alienam rem eſſe, non ſi ignorabat.* Inſtit. l. 2. tit. 20. *De Legatis*, §. 4. *Idemque Juris eſt, ſi potuiſſes emere, & non emeres.* Dig. *l.* 32. *leg.* 30. §. 6. The Reaſon of this Law, which appears at firſt Sight very harſh and rigid, is, That the Teſtator is preſumed unwilling to do a thing ſo ridiculous as to give away what he had nothing to do with. So that he is accounted to have bought the thing bequeathed, if it can be, if not, the Legatee muſt have an equivalent. See Mr. *Daumat*'s Laws in their Natural Order, *Part* I. *Lib.* 4. *tit.* 2. *Sect.* 3. §. 3, &c.

Mr. BARBEYRAC's *NOTES* on §. XI.

[1] This Author in his Abridgment of the Duties of a Man and Citizen expreſſes himſelf after a more general way, *l.* 1. *c.* 9. §. 19. Unleſs the other waves his Claim of Right (*Niſi forte in eum caſum quo alterius jus expiraverit*) which may fitly be added here. Mr. *Thomaſius* in his *Inſtit. Juriſprud. Divin.* l. 2. c. 7. §. 95, 96, 97. adds another Reſtriction to the Words recited: Unleſs he that hath promiſed may fairly hope that the Caſe may happen. So a Servant may ſafely engage himſelf to ſerve another Maſter, when the time which he is hired to ſerve his preſent Maſter is expired. And the Owner of an Houſe may promiſe to let an Apartment of his Houſe to another, when the time which the preſent Occupier is to enjoy it is expired. But it is an unlawful Promiſe, and conſequently null, to engage himſelf to become a Subject of another Prince or State, upon Condition that the State of which he is a Member be ruin'd by a Civil War, or deſtroy'd after ſome other manner. By the *Roman* Laws no Man can promiſe faithfully to give a Man a Freeman, when he is made a Slave, nor a publick Thing, upon ſuppoſition that it may become our private Poſſeſſion. *Nec in pendenti erit ſtipulatio ob id, quod publica res in privatum deduci, & ex libero ſervus fieri poteſt —— Sed protinus inutilis eſt.* Inſtit. l. 3. tit. 20. *De Inutil. Stipulat.* §. 2. And 'tis not without Reaſon, adds Mr. *Thomaſius*, that Chriſtian Princes declare a Promiſe of Marriage made by a Perſon married, in caſe his Wiſe or her Husband die, to be null, and puniſh both Parties that have made ſuch a Promiſe. Nevertheleſs, the ſame Author in his *Fundam. Jur. Nat. & Gent.* and his *Notes* upon *Huber. de Jur. Civ.* ſays, that the Puniſhment inflicted in this Caſe ſeems to be very rigorous, and ſavours of Popiſh Principles about Marriage as a Sacrament. But *Grotius* thinks ſuch a Promiſe invalid in its own Nature, *l.* 2. *c.* 11. §. 8. *n.* 3.

Duty and Allegiance they owe to their lawful Sovereigns[a][2].

It is a common Rule, That *he who has the Precedency in Time, has the Advantage in Right:* Not that Time conſider'd barely in itſelf can make any ſuch Difference; but becauſe the whole Power over a thing being formerly ſecur'd to one Perſon, bars all others from obtaining a Title to it afterwards. And hence too it comes to paſs, that a Servant cannot diſpoſe of his Labour[3], otherwiſe than his Maſter pleaſes, to whom by virtue of a former Contract it entirely belongs. By the *Roman* Laws, a Slave could not enter into any *Obligation*, even with his own Maſter, beſides the general *Obligation* imply'd in that State and Condition of Servitude; and the Reaſon of this was, becauſe his Maſter had before a full Right over all that he poſſeſs'd, and all that he could do to any advantageous Purpoſe.

If a Man, contrary to theſe Duties, ſhall have deceived and prejudiced another by promiſing a thing, which either was not his own, or was before otherwiſe beſtow'd and ſecur'd; he ſhall be oblig'd to make good the Damage; and in many Caſes ſhall be liable farther to ſuffer the Penalty of *Cozenage*[4].

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[2] See Mr. *Hertius*'s *Parœmiæ Jur. German.* l. 1. c. 49, 50. The ſame Author in his *Notes* upon this Place of our Text, obſerves, that the Maxim takes place chiefly in conditional Bargains, which by the *Roman* Law are contracted by a ſingle Agreement; but as to other Engagements, 'tis not always true. Whereupon he alledges an Example of a thing ſold to two Buyers, but deliver'd to the laſt: But ſee what our Author further ſays, *l.* 5. *c.* 5. §. 5. againſt *Grotius*, whoſe Principles Mr. *Hertius* follows, tho' here he ſays nothing in defence of them.

[3] Our Author obſerves here, that according to the *Roman* Laws a Servant can't oblige himſelf to his Maſter, *Sed Servus quidem non ſolum Domino ſuo obligari non poteſt, ſed ne quidem ulli alteri.* Inſtitut. l. 3. tit. 20. *De inutil. Stipulat.* §. 6. And the Reaſon is, adds he, that the Maſter has a Right to all the Goods, and profitable Actions, or Labour and Service of his Slave, as he is ſo. So that a Slave can't oblige himſelf to his Maſter, but by the general Engagement he is under as his Slave.

[4] Thus Cheats and Tricking is call'd in the *Roman* Law, which have not a Proper Name; but chiefly that ſort which our Author is ſpeaking of, as when one engages for a thing that belongs to another, or one thing for another; eſpecially if the firſt be of more value than the laſt. As for example, If one gives Copper gilt for Silver gilt. See *Digeſt.* l. 47. tit. 20. *Stellionatus.* And Mr. *Daumat*'s Civil Laws, *&c.* Part I. l. 1. tit. 18. Sect. 3.

[a] *Gramond.* Hiſt. Gall. *l.* 5. He that is born under a Prince, doth originally engage his Faith and Allegiance to him; and whoſoever attempts to draw them away, is a moſt unjuſt Invader of another's Rights; nor will any ſuch Covenant hold good, being made contrary to the Laws and Conſtitution of the Kingdom. He that gives his Promiſe againſt his Prince, is by the very Act releas'd from the Obligation.

CHAP. VIII.

Of the Conditions of Promiſes.

The CONTENTS of every Paragraph of the eighth Chapter.

I. *How many ways is a Promiſe made?*
II. *What is a Condition?*
III. *A Condition refers to the time preſent, or the time to come.*
IV. *A Condition is either caſual, arbitrary, or mixt.*
V. *An impoſſible and unlawful Condition.*
VI. *The Addition of Place.*
VII. *The Addition of Time.*
VIII. *The Difference between Bargains and conditional Promiſes.*

CONCERNING Engagements by Promiſe, this is farther to be obſerv'd, that ſome are made *purely* or *ſimply*, and ſome under *Condition*[1], or that ſometimes we oblige ourſelves *abſolutely* to ſuch or ſuch a Performance, and ſometimes we ſuſpend our Obligation, till certain Clauſes or Proviſo's are made good.

II. A *Condition* is an *Appendage* [1] added to ſuch Acts, as are productive of Rights and Obli-

Mr. BARBEYRAC's *NOTES on* Chap. VIII. §. I.

[1] The *Roman* Lawyers add to this Diviſion, the Determination of the *Time* and *Place* of their Performance. *Vid. Inſtit. Book* III. *tit.* 16. *ſ.* 2, *&* 5. Our Author himſelf alſo ſpeaks of theſe two Circumſtances a little farther. The Words in the *Inſtitutes* are, *Omnis ſtipulatio aut pure, aut in diem, aut ſub conditione fit* —— *Loca etiam inſeri ſtipulationi ſolent* ——*Purè, veluti QUINQUE AUREOS DARE SPONDES? Idque confeſtim peti poteſt.*

Mr. BARBEYRAC's *NOTES on* §. II.

[1] *Sub conditione ſtipulatio fit, cum in aliquem caſum differtur obligatio; ut ſi aliquid factum fuerit, vel non fuerit, committatur ſtipulatio, veluti,* SI TITIUS CONSUL FUERIT FACTUS, *QUINQUE AUREOS DARE SPONDES?* Inſtit. ubi ſupra, §. 4. We ought alſo to obſerve that there are tacit Conditions included in an Agreement, which are not expreſſed. As if a Perſon ſelling his Eſtate makes a Reſerve of the Year's Profits, this Reſerve ſuppoſes a Condition that there ſhall be ſome Fruits on its *Interdum pura ſtipulatio ex reipſa dilationem capit, veluti ſi id quod in utero ſit, aut fructus futuros, aut domum ædificari ſtipulaus ſit. Digeſt.* l. 45. tit. 1. *De Verbor. Obligat.* leg. 73. *In Princip.* See what is ſaid above *c.* 6. §. 2. Further, Mr. *Hertius* obſerves here, that we muſt diſtinguiſh Conditions properly ſo call'd, *viz.* what the Lawyers call a *Modus*, and what we call a *Condition.* For example, I have Land engaged, and I ſell it upon Condition of freeing of it at ſuch a time. In this Caſe the *Roman* Law allows the Buyer to have an Action againſt the Seller to force him to free his Land at the time appointed, or let him into Poſſeſſion. *Nam ſi id actum eſt, ut omni modo intra Kalendas Julias venditor fundum liberaret, ex empto erit actio, ut liberet; nec ſub conditione emptio facta intelligetur, veluti ſi hoc modo emptor interrogaverit, Erit mihi fundus emptus, ita ut intra Kalendas Julias liberes? vel ita, ut intra Kalendas à Titio redimas? Si vero ſub conditione emptio facta eſt, non poterit agi, ut conditio impleatur.* Digeſt. l. 18. tit. 1. *De contrahend. empt.* &c. leg. 41. *init.* So that ſuch a Clauſe does not ſuſpend the Obligation, nor diſannul it, that it has no Effect, but only prevents the Exaction of the Engagement till it takes place. This ſort of Agreement may be referred to the Laws which the Lawyers call *Sub Modo*, on condition that the Legatee ſhall do this or that thing, or with a Proſpect of it. See the Interpreters upon the *Digeſts*, l. 35. tit. 1. *De Conditionibus & Demonſtrat.* &c. Hence it is, that Mr. *Hertius* calls the like Clauſe conſider'd in mutual Promiſes and Engagements, *Cauſa finalis, propter quam aliquid fit vel præſtatur,* which implies, that it is not altogether juſt, ſince in the Example that I have alledged after him, we may clearly ſee that there is no final Cauſe or Mo-

gations, by virtue of which their whole Force and Efficacy is made to depend on ſome particular *Event*, proceeding either from Fortune, or from human Pleaſure[2]. So that to the true Nature of a *Condition*, theſe two things are requiſite, firſt that it have the Power of deferring and ſuſpending the Force of the Obligation, and ſecondly that the *Event* expreſs'd in it do not as yet appear; at leaſt that it be at preſent uncertain, as to our Underſtanding.

III. Hence we may conclude, that thoſe additional Clauſes are not properly *Conditions* (tho' they ſeem to be ſuch in a Grammatical Senſe) which refer to the Time preſent, or paſt. For *Futurities* only are dark and obſcure to mortal Apprehenſions, but as for things which are now before us, or have already gone over our Heads, we have uſually a clear Knowledge of them; and therefore they can include no Power capable of ſuſpending our Aſſent. And therefore it is given as a Rule in the *Inſtitutions*[1], that Conditions which regard the time preſent, or the time paſt, as ſuppoſe I ſhould ſay, I will give ſuch or ſuch a Thing, *if* Titius *has been Conſul*, or *if* Mævius *be ſtill alive*; do either immediately cancel and annul the Obligation, or elſe do not put it off at all, nor hinder it from being pure and abſolute. For if the things annex'd for Conditions, are not as they are ſuppos'd to be, the Engagement is to no purpoſe; but if they are ſo, the Promiſe is valid as ſoon as it is made, and begins *abſolutely to oblige*. Yet here it muſt be obſerv'd, that a Condition regarding the time preſent or paſt, may be added to an Obligation, in caſe both or either of the Parties tranſacting be uncertain of the Thing. And Promiſes of this kind ſeem to imply a convenient Space of Delay. Inaſmuch as nothing can be demanded by virtue of them, until it ſhall be made clearly apparent to the Promiſer, that the Matter inſerted as a Condition has really happen'd; and the Proof of this muſt neceſſarily take up ſome time. For inſtance, a Man unskill'd in Hiſtory may be drawn in to promiſe another Perſon ten Pounds, if *Cæſar* ever paſs'd the *Rhine*. Now here before the Sum can be claim'd, it muſt be made evident from the Authority of creditable Hiſtorians[2], that ſuch an Adventure was actually perform'd. Again, if I promiſe in this manner, "I will give ſo much Money, in caſe *Mævius*, "who is travelling abroad, be ſtill alive;" the other Perſon can then only require the Money, when I have receiv'd certain Aſſurance of *Mævius*'s Life. But if we take a cloſer View of theſe Matters, we ſhall find that the above-mention'd Promiſes, and the reſt of the ſame Nature, ought to be interpreted in this Senſe, I will give you ſo much *if you prove to me* that *Cæſar* paſs'd the *Rhine*, or that *Mævius* the Traveller is now living; and thus they become truly *conditional*; but then the *Condition* is not the Truth and Certainty of the *preſent*, or *paſt* Act, conſider'd in themſelves, but the *future* Proof of it to the promiſing Party. It is certain therefore, that if the Truth of the Matter inſerted was known on both ſides, and the Perſons were in earneſt, the Promiſe is not *conditional*, but *abſolute*. Again, if both knew the Matter to be falſe, the Promiſe ſhall paſs for a Jeſt, and conſequently produce no Obligation. If a *future* Thing be added which they knew muſt infallibly come to paſs, as ſuppoſe, *if the Sun riſe to morrow*, 'tis generally agreed that ſuch a Clauſe ought not to be reckon'd a *Condition*; inaſmuch as the *future* Event being already known to be moſt certain and neceſſary, does not delay the Obligation, nor hinder it from taking place this very Inſtant. Yet becauſe we ought not eaſily to preſume that the Clauſe is added for no reaſon, it is worth while to conſider, whether in ſuch a Promiſe, the Particle *if* be not put for the other Particle *when*[3]; ſo that the Engagement ſhall not be conditional, but only made for a Day hence; as ſuppoſe thus, *I will give ſuch or ſuch a thing to morrow, when the Sun riſeth*.

And thus we find that every *Condition*, properly ſo call'd, includes ſomewhat which is at preſent uncertain, at leaſt to one of the Parties, between whom the Buſineſs is tranſacted; and the Obligation remains in Suſpence[4], till the thing ſhall hereafter come to paſs, or ſhall be demonſtrated, by good

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tive, but only a Stipulation, by which the Seller puts off the Delivery of the thing ſold, till he can redeem it, which he engages to do at a certain time. Theſe ſorts of Promiſes may be referred to thoſe which are made for a certain Day, becauſe the time is always prefix'd, or which will come ſooner or later, tho' it be not appointed. Mr. *Hertius* maintains with Reaſon, as ſome others do, that where there is a doubt, a Promiſe ought to be thought purely conditional rather than made on a ſure Foot.

[2] Our Author here includes fully the Effect of Conditions, for they not only ſuſpend the Effect of an Engagement, but diſannul or change them where they are already. Mr. *Daumat* in his *Civil Laws*, &c. *Part* I. *l.* 1. *tit.* 1. *Sect.* 4. §. 6. ſays well, that Conditions are of three ſorts, according to the different Effects which they produce. The firſt is, ſuch as accompliſh the Engagements that depend on them, as when 'tis ſaid the Sale ſhall take place if the Goods be deliver'd on ſuch a day. The ſecond is, ſuch as diſſolve a Bargain, as when 'tis ſaid, in caſe ſuch a Perſon comes at ſuch a time, the Hire of the Houſe ſhall be void. The third is, ſuch as neither accompliſh nor diſſolve an Agreement, only making ſome Change in it, as if one agree that in caſe an Houſe that is Lett be reſign'd to the Tenant without certain Moveables which are promiſed him, the Hirer ſhall have it ſo much the cheaper. Read the fore-quoted Section of Mr. *Daumat*.

Mr. Barbeyrac's *NOTES on* §. III.

[1] *Conditiones quæ ad præſens vel præteritum tempus referuntur, aut ſtatim infirmant obligationem, aut omnino non differunt; veluti, SI TITIUS CONSUL FUIT, vel SI MÆVIUS VIVIT, DARE SPONDES? Nam ſi ea ita non ſunt, nihil valet ſtipulatio; ſin autem ita ſe habent, ſtatim valet*, Inſtit. l. 3. tit. 16. *De Verbor. Obligat.* §. 6. See Mr. *Bynkerſhoek*'s *Obſervat. Jur. Rom.* l. 4. c. 15.

[2] I know not on what our Author grounds himſelf here, ſince in the Moment which Men treat, the Fact, either preſent or future, on which the Effect of a Promiſe depends, is poſitively true or falſe, the Obligation from that Inſtant ſeems either abſolutely null or valid, and conſequently no Condition properly ſo call'd can ſuſpend the Engagement. All that reſults from ſuch a Clauſe is, that the Promiſe can't be claim'd till the Truth of the Fact be proved; for as the *Roman* Lawyers ſpeak very well, *Quæ per rerum naturam ſunt certa, non morantur obligationem, licet apud nos incerta ſint*. Inſtitut. l. 3. tit. 16. *De Verbor. Obligat.* §. 6. Theſe ſorts of Promiſes paſs for conditional only, when we treat about a Matter of Fact, of which there is no Certainty whether it will be true or no. For then the Uncertainty produces the ſame Effect as if the Clauſe depended upon a future Accident.

[3] The Conjunction, *Si*, which can't be expreſſed in our Language, is elegant in the *Latin*.

[4] *Quia quæcunque ſub conditione traduntur, ita demum fieri poſſunt propria & peculiaria, ſi conditio conſummata eſt*. Quintilian Declam. 336. Mr. *Hertius*, who quotes this Paſſage, obſerves at the ſame time that the Diſtinction made by the *Roman* Law about this Matter agrees not with the Natural Law. The Lawyers ſay, that there is a Difference between Engagements upon condition, and ſuch as depend on a Promiſe at a certain time. In the firſt nothing is due before the thing ſuppoſed exiſts, whereas in the other there is a due from the Moment the Promiſe is made, tho' the Perſon can't demand any thing till the time is come. *Cedere diem ſigni-*

Evidence, to have already happen'd. When the *Condition* appears true, the *Obligation* begins to have a *pure* and abſolute Force; if the *Condition* fail, the *Obligation* expires with it.

IV. Conditions are commonly divided into *poſſible* and *impoſſible*. The former are ſuch as make an Obligation depend on ſome Event, which may *naturally* or *morally* happen. And are again ſubdivided into *caſual*, *arbitrary*, and *mixt* [1]. A *Caſual Condition* is ſuch as depends, either on the pleaſure of a third Perſon, not obnoxious to our Power and Authority, or elſe on mere Chance and Fortune in reſpect of us, as ſuppoſe in ſuch a Promiſe as this, *I will give you Ten Pounds, if* Caius *marries* Titia; *or if it don't rain within theſe three Days*, &c. an *arbitrary* Condition is ſuch as depends, as to its being or not being, on the Will and Power of him, to whom a Promiſe is made under that Limitation [2]. But ſhould a *Condition* be annexed, depending on the Pleaſure of the Promiſer [3], the Engagement would be inſignificant; as if one ſhould ſay, *I will give you Ten Pounds, if I think fit*. For the Senſe of ſuch a Speech amounts to no more than this: I make you an abſolute Promiſe that at preſent, and hereafter too, it ſhall be my Choice to promiſe abſolutely, or not. And therefore the other Party can hence acquire no *Right*, unleſs the Offer be afterwards improved to a full and perfect Engagement; ſince the *Condition* here mention'd may be perpetually ſtopt, or eluded by the Promiſer. So that we may reaſonably ſay, That *what is perfectly in our Power, ought not to be confounded with, or thrown amongſt, Matters of Chance or Accident.* If the Condition be indeed in the power of the Promiſer, and yet ſuch as he is not able, or is not willing always to elude, it muſt be enforced by ſuppoſing a particular Time, beyond which it cannot be deferr'd; as if I ſay, *I will give you ſuch a Sum of Money, if I marry*, that is, *when I marry*.

From what has been hitherto offer'd, we may be able to explain more accurately the Aſſertions of *Grotius* [a] upon the ſame Head. He ſays, That *if the thing promiſed be not at preſent in the Power of the Promiſer, but may be hereafter, then the Strength and Efficacy of the Promiſe lies in ſuſpenſe; for it muſt then be ſuppoſed to have been made conditionally, that is, in caſe the Promiſer ſhould have it in his Power.* Now this Rule we allow to hold good, provided that the other Party knew the thing not to be at preſent in the power of the Promiſer. For otherwiſe it looks like Knavery, when a Man expects an abſolute Promiſe, which ſhall begin to bind immediately, to put him off with a conditional one, which cannot take place till hereafter. He adds, *If the Condition whereby the thing is promiſed, may be brought into our Power, be it ſelf in our Power* [b], *we are obliged to do whatever is morally fit and juſt, for the Performance of it:* That is, if I promiſe you any thing, which at preſent is impoſſible to me, but may by my Pains and Care be hereafter rendred poſſible, I am bound to uſe all my Endeavours, that I may become able to diſcharge my Engagement [4]. For Inſtance, a young Student in the Law promiſes a Man to plead all his Cauſes in the Court, if he arrive at any good Skill in his Profeſſion. Here according to *Grotius*'s Rule, the Student is under an Obligation to ply his Buſineſs with his utmoſt Strength and Diligence, that he may make himſelf fit for the Bar. But this will not hold, unleſs the Perſon promiſing has expreſly declared, or given fair Preſumption, that he will ſet himſelf in earneſt to the acquiring ſtrength for the Performance. Otherwiſe the Condition may be delay'd *in infinitum*. We may obſerve too, that *Grotius* here uſeth the Term, *Conditio Poteſtativa*, quite contrary to that Senſe in which we have above defined it; he makes it to be in the power of the Promiſer, we in the power of him to whom the Promiſe is directed.

Laſtly, A *mixt* Condition is that the fulfilling of which depends partly on the power of him who receives the Promiſe, and partly on Chance; as thus for Inſtance, *I will give you a Sum of Money, if you marry ſuch a Gentlewoman*. Now this is not purely at your Pleaſure; for the Gentlewoman may refuſe your Suit, or may die before the Match is finiſh'd.

We have only this to add, That a Condition is then look'd upon as perform'd, when the other Par-

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ficat, incipere deberi pecuniam. Venire diem ſignificat, eum diem veniſſe, quo pecunia peti poſſit. Ubi pure quis ſtipulatus fuerit, & ceſſit, & venit dies; ubi in diem, ceſſit dies, ſed nondum venit, ubi ſub conditione, neque ceſſit, neque venit dies, pendente adhuc conditione, Digeſt. l. 50. tit. 16. *De verbor. ſignif.* leg. 213. Hence they infer, that what Men pay through Miſtake, before the Condition is fulfilled, may be recovered, as if it were not due; but 'tis not ſo in Payments made before the time. *In diem Debitor, adeo Debitor eſt, ut ante diem ſolutum repetere non poſſit——ſub conditione debitum, per errorem ſolutum, pendente quidem conditione repetitur, conditione autem exiſtente, repeti non poteſt*, l. 12. tit. 6. *De Conditione indeb.* leg. 10. 16. See Laws 17, 18. But Mr. *Hertius* thinks, that if we judge by the Light of Reaſon only, we may require our Due as well in the laſt as firſt Caſe. For (ſays he) in both, according to the *Roman* Law, neither of the Parties can recant without the Conſent of the other, before the Exiſtence of the ſuppoſed Fact, or the Term agreed on. In both the Obligation deſcends upon the Heirs, in both Caſes there can be no Action at Law. All the difference then that can be is this, That the Condition may fail ſometimes, whereas the Term, either fixed or uncertain, will come certainly. Hence Mr. *Hertius* concludes, contrary to the Opinion of many Doctors, that when we promiſe a thing which is not in Nature, and which can't take place, but on the account of a future Engagement regulated by the Laws, the Promiſe is really conditional, tho' there be a time fixed; as if a Man promiſes any one the Fruits of a Year, and to give ſuch a Portion with his Daughter. For it ſuppoſes that there will be Fruit, and that the Marriage will be compleated. *Vid. Digeſt.* l. 23. tit. 3. *De Jure Dotium*, leg. 21. & l. 45. tit. 1. *De Verb. Obligat.* leg. 73.

Mr. BARBEYRAC's *NOTES on* §. IV.

[1] We find this Diviſion in the *Code*, l. 6. tit. 51. *De Caducis tollend.* §. 7. *Sin antem aliquid ſub conditione relinquatur, vel caſuali, vel poteſtativa, vel mixta, quarum eventus ex fortuna, vel ex honoratæ perſonæ voluntate, vel ex utroque pendeat*, &c.

[2] Theſe ſorts of Conditions, as our Author obſerves here, are alſo called promiſcuous in the *Digeſts*, l. 35. tit. 1. *De Conditionibus & Demonſtrat.* &c. leg. 11. §. 1,

[3] *Stipulatio non valet, in rei promittendi arbitrium collata conditione*, Digeſt. l. 45. tit. 1. *De Verb. Obligat.* leg. 17. *Illam autem ſtipulationem, SI VOLUERIS DARI? inutilem eſſe conſtat*, Ibid. leg. 46. §. 3. See alſo, the 108 Law, §. 1. & l. 18. tit. 1. *De contrahenda Emptione*, &c. leg. 7. *princip.* &c. & l. 44. tit. 7. *De Obligat. & Action.* leg. 8.

[4] Probably (ſays Mr. *Thomaſius* in his *Inſtit. Juriſpr. Divin.* l. 2. c. 7. §. 112.) *Grotius* had ſome Example in his Mind, as this, *I'll marry you, if I commence Doctor*. From whence Mr. *Thomaſius* infers, that as he had not a ſtock of Learning great enough to commence Doctor in an Univerſity, a young Man who promiſes Marriage on that Condition may eaſily diſengage himſelf.

[a] Lib. 2. c. 11. ſ. 8. n. 2. [b] *Si conditio poteſtativa.*

ty concern'd, does himſelf hinder it from being perform'd[5].

V. *Impoſſible* Conditions[1] are either *naturally* or *morally* ſo; that is, ſome matters by the Nature of things *cannot* be done, others by the Laws *ought not* to be done. Such Conditions annex'd[2], eſpecially if both Parties knew them to be ſuch, do, according to the plain and ſimple Conſtruction of the Words, render the Promiſe negative, and therefore null. In Buſineſs tranſacted between thoſe who live in a State of natural Liberty, a *Conditon naturally impoſſible* does plainly ſhew that the whole thing is void: Only with this difference, that to deny ſome Requeſts in ſuch a round about way, by making the Anſwer run affirmatively, but clogg'd with an impoſſible Condition, is uſually reckon'd an Affront; when a plain Denial might not have been taken ill[a]. And as to this Point, if the Condition be morally impoſſible, the Caſe is the ſame, as if it were naturally ſo. Should the other Party accept of this vile Condition[3], and actually fulfil it, how far he may then claim the Performance of the Promiſe[4], is eaſily to be gather'd from the preceding Chapter, §. 8.

In Commonwealths, Proviſion may be made by Civil Ordinances, that in a Promiſe utter'd under a Condition naturally impoſſible, eſpecially if the Party to whom it is directed knows not that it is impoſſible, the Condition ſhall be null, and the Man reſcued from the Cheat and Deluſion. As for thoſe Pacts and Promiſes, to which vicious Conditions are annex'd[5], the Laws of all Countries moſt wiſely declare them void; leſt the Contracts of private Men ſhould tend to the Subverſion of the publick Eſtabliſhment. And thus the *Roman* Laws diſannull'd all impoſſible, vile, or jeſting Conditions inſerted in *Wills*[6]; becauſe it was thought moſt abſurdly unreaſonable, that Men in a Buſineſs

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[5] The Author ſays here, The other Contractor. (*Si per alterum ſtet, quo minus conditio impleatur.*) But the Law to which he refers us ſhews that 'tis badly expreſſed thro' Inadvertence. This is the Fact: A Man buys a Library upon Condition that the Magiſtrates ſhall allow him a place to ſet it in; but he is the Cauſe himſelf why they deny him a place. Hereupon the Lawyers determine that the Seller may force him to take away the Books, and pay the Price agreed on, becauſe the Buyer prevented the Performance of the Condition. *Labeo ſcribit, Si mihi Bibliothecam ita vendideris, ſi Decuriones Campani locum mihi vendidiſſent, in quo eam ponerem, & per me ſtet, quo minus id à Campanis impetrem, non eſſe dubitandum, quin præſcriptis verbis agi poſſit. Ego etiam ex vendito agi poſſe puto, quaſi impleta conditione, quum per emptorem ſtat, quo minus impleatur,* Digeſt. l. 18. tit. 1. *De contrahend. Emptione,* &c. leg. 50. Further, it is certain, and it is a Maxim of the *Roman* Law, That if either of the two Contractors hinder the Accompliſhment of a Condition which 'tis their Intereſt not to be fulfilled, whether the thing depend upon his own Fact, or not, the Condition is accounted as fulfilled in reſpect to him, and the other has a full Right to require the Performance of his Promiſe. The Lawyers extend this to the Promiſe of Enfranchiſement, and to a Legacy by which a Perſon is made an Heir upon certain Conditions; inſomuch that when the Slave, Legatee, or Heir ſo made, have performed what is expected on their part, they have gained their Liberty, Legacy, and Inheritance. *In Jure civili receptum eſt, quoties per eum, cujus intereſt conditionem non impleri, fiat, quo minus impleatur, perinde haberi, ac ſi conditio impleta fuiſſet, quod ad Libertatem, & Legata, & ad Hæredum inſtitutiones perducitur; quibus exemplis ſtipulationes quoque committuntur, cum per promiſſorem factum eſſet, quo minus ſtipulator conditioni pareret,* Digeſt. l. 50. tit. 17. *De Diverſ. Regul. Jur.* leg. 161. See alſo leg. 39. 174. of the ſame Title, and l. 35. tit. 1. *De Condit. & Dem.* leg. 24. where we muſt read with *Hotman, Obſerv.* 4. 28. *Cujus intereſt conditionem NON impleri.*

Mr. BARBEYRAC's *NOTES* on §. V.

[1] Impoſſible Conditions are not, properly ſpeaking, true Conditions. For they neither ſuſpend an Engagement, nor diſannul and change an Agreement which is already valid. For they either cauſe the Promiſe to be abſolved from the beginning, or cancel the Engagement forthwith, or hinder it from coming to an iſſue. Before we defined a Condition, we have diſtinguiſhed the different Significations. *Titius Obſervat.* 237. Further, the Clauſe which contains an Impoſſible Condition, is either Affirmative or Negative. Our Author ſpeaks only of the firſt ſort. As for the other, 'tis evident that it abſolves from an Engagement, as if we promiſe a thing to any one on Condition that he will catch the Moon in his Teeth, or commit Parricide. See the ſame Mr. *Titius Obſerv.* 239. We may alſo find ſeveral Things about Conditions in general in Mr. *Thomaſius*'s Diſcourſe, *De Filios ſub conditione ſi ſe filium probaverit, hærede, inſtituto,* and principally Chap. 2. It is the 10th in thoſe printed at *Leipſick.*

[2] *Sub Impoſſibili Conditione factam ſtipulationem conſtat inutilem eſſe,* Digeſt. l. 44. tit. 7. *De Obligat. & Action.* leg. 1. §. 11. *Non ſolum ſtipulationes*——*ſed etiam cæteri quoq; contractus, veluti emptiones, locationes* —— *quia in ea re, quæ ex duorum pluriumve conſenſu agitur, omnium voluntas ſpectetur, quorum proculdubio in hujuſmodi actu, talis cogitatio eſt, ut nihil agi exiſtiment appoſita ea conditione, quam ſciunt eſſe impoſſibilem,* Ibid. leg. 31. See alſo the *Inſtitutes,* l. 3. tit. 20. *De inutil. Stipul.* §. 11.

[3] *Generaliter novimus turpes ſtipulationes nullius eſſe momenti, veluti ſi quis homicidium vel ſacrilegium ſe facturum promittit,* Digeſt. l. 45. tit. 1. *De Verbor. Obligat.* leg. 26, 27. *Item quod Leges fieri prohibent—veluti ſi ſororem ſuam nupturam ſibi aliquis ſtipuletur,* Ibid. leg. 35. §. 1. The ſame Lawyers ſay, with Reaſon, that it hath place, when likewiſe the thing is afterward allowed by the Laws, becauſe we muſt judge of a Promiſe according to the time it was made in. *Nullius momenti fore ſtipulationem, perinde ac ſi ea conditio, quæ natura impoſſibilis eſt, incerta eſſet, nec ad rem pertinet, quod jus mutari poteſt, & id quod nunc impoſſibile eſt, poſtea poſſibile fieri; non enim ſecundum futuri temporis jus, ſed ſecundum præſentis debet æſtimari ſtipulatio,* Ibid. leg 137. §. 6.

[4] 'Tis plain, not. For every Promiſe made on ſuch a Condition, is null in it ſelf, inſomuch that none hath Right to require the Accompliſhment. 'Tis another Queſtion, whether we may require a thing actually given by virtue of a Promiſe made on ſuch a Condition already executed? See what is ſaid Note 2. upon §. 6. of the foregoing Chapter.

[5] See the Text quoted in Note 3. and *Digeſt.* l. 7. tit. 8. *De uſu & hibitat.* leg. 8. §. 1.

[6] That is to ſay, the Legacies which the Teſtator makes to depend upon ſuch a Condition, were not allowed to be effectual. *Sub Impoſſibili Conditione vel alio modo factam inſtitutionem placet non vitiari,* Digeſt. l. 28. tit. 7. *De Conditionibus,* Inſtit. leg. 1. *Conditiones contra Edicta Imperatorum, aut contra Leges, aut quæ Legis vicem obtinent ſcriptæ, vel contra bonos mores, vel deriſoriæ, aut hujuſmodi, quas Prætores improbaverunt, pro non ſcriptis habentur, & perinde acſi conditio Hæreditati, ſive Legato adjecta non eſſet, capitur Hæreditas Legatumve,* Ibid. leg. 14. See Mr. *Daumat*'s Civil Laws in their Natural Order, Part 2. l. 3. tit. 1. Sect. 8. §. 18, &c. 'Tis eaſy to diſcern the difference as to Validity, which the Laws make here between Promiſes and Agreements made between Men when they are alive, under an impoſſible Condition, or diſhoneſt, and the Diſpoſals of a Teſtator attended with the like Condition. In the firſt the Condition is impoſed by the Conſent of both Parties, who knowing it, 'tis ſo much the worſe for him, becauſe he knows how things were managed, and could have no reaſon to look upon it as a ſerious Action. See leg. 31. of the *Digeſts, De Obligat. & Action.* quoted Note 2. foregoing. But 'tis not ſo in Wills. The Legatee has no Knowledge of the Teſtator's Deviſes, and ſo is far from looking upon his Declaration as a Trifle, that he believes he acted ſeriouſly in his laſt Moments, although the Condition ſeemed to inſinuate the contrary.

[a] When *Militiades* in *Corn. Nep.* c. 1, 2. ſummon'd the *Lemnians* to yield up their Iſland to the *Athenian* Power, they anſwer'd in a ſcoffing manner, that they'd then ſurrender, when the North-wind, which was directly contrary to *Athens,* brought him from home to *Lemnos.* The General took no more notice, but ſailing by them, poſſeſſed himſelf of *Cherſoneſus,* and there fix'd his Seat and Command; and ſoon after return'd to *Lemnos,* whither now the North-wind directly carried him, and claim'd their Promiſe; his Home, as he ſaid, not being now *Athens,* but *Cherſoneſus.* The Inhabitants not daring to make Reſiſtance, fairly quitted the Iſland; but it was, *non dicto, ſed ſecunda fortuna adverſariorum capta,* not won by the force of their Words and Engagement, but by the good Fortune of their Enemy. Such was the Promiſe of *Leſdeguier* made to *Mapheo Barberini* about profeſſing the *Romiſh* Religion, which we find in *Gramond.* Hiſt. *Gal.* l. 16. p. 708.

ſo very ſerious and grave, ſhould be put upon with trifling and impertinent Clauſes[a].

VI. If in Promiſes mention be made of a certain Place, without mention of a certain time, it is taken for granted, that ſo much time ſhall be allow'd for performing the Promiſe, as will ſerve to bring a Man conveniently into the Place of Action[1].

VII. But in caſe a limited Time be expreſly added, this will cauſe that the Obligation ſhall not exert its Effect till ſuch a Space be expir'd, or that no Demand ſhall be made before the appointed Day[1].

VIII. It may be convenient in the laſt Place to examine in what Points theſe *conditional Promiſes* differ from *Pacts*, and in what Points they may be reſembled to them. In this then both thoſe kinds of Engagements ſeem to agree, that as the former do not bind, unleſs the Condition be made good, ſo the latter, when one Party forbears to perform the Articles, do by no means oblige the other[1]. And hence it is a common Remark, that the particular Heads of a Contract are in the manner of ſo many *Conditions*. Some indeed make one Exception to our Rule about *Facts*; that in caſe any Article ſhould be added, not for uſe, but perhaps out of Gallantry or Compliment, the Non-performance of ſuch a Matter ſhall not releaſe the other Party from his Obligation. But as little Indulgence as poſſible ſhould be granted to this Exception; as well leſt Men ſhould abuſe it by applying it to the principal Articles, as becauſe it is not to be preſum'd, that Perſons would clog a ſerious Covenant with Clauſes impertinent and unneceſſary. *Gramond.* Hiſt. *Gall.* l. xvi. obſerves of the ſecret Articles of Marriage between *Charles* the Firſt, when Prince of *Wales*, and *Henrietta* of *Bourbon*, that they were added by the moſt Chriſtian King in compliment to the Court of *Rome*; neither Party imagining that they were intended to be kept.

Promiſes under a *poteſtative* or *arbitrary Condition*, do in this agree with *Pacts*, that in both a Man muſt perform ſomewhat on his ſide, before he claim the Promiſe or Bargain of the other Party: But in this they differ, that in the former the Perſon promiſing does not think it much his Intereſt whether the thing be perform'd, or no; at leaſt he does not intend to oblige the other Party to a Compliance, but leaves him to uſe his own Pleaſure. But in *Pacts*, as the Reaſon why I have undertaken any Performance, is the Proſpect of ſomewhat to be done for me by the other Perſon; ſo if he fail in his part, I am not only releas'd at preſent from mine, but I may oblige him by force to ſtand to the Agreement.

Mr. BARBEYRAC's *NOTES* on §. VI.

[1] *Loca etiam inſeri ſtipulationi ſolent, veluti CARTHAGINI DARE SPONDES? Quæ ſtipulatio licet pure fieri videtur, tamen reipſa habet tempus adjectum, quo promiſſor utatur ad pecuniam Carthagini dandam,* Inſtit. l. 3. tit. 16. *De Verbor. Obligat.* §. 5. See *Digeſt.* l. 45. tit. 1. leg. 73. *in Princip.* & leg. 137. §. 2. As alſo Mr. *Daumat*'s Civil Laws, *&c.* Part I. l. 1. tit. 1. Sect. 3. §. 6. And *Digeſt. Tit. De eo quod certo loco dari oportet,* l. 13. tit. 4.

Mr. BARBEYRAC's *NOTES* on §. VII.

[1] *Id autem quod in diem ſtipulamur, ſtatim quidem debetur, ſed peti prius quam dies venerit, non poteſt,* Inſtit. l. 3. tit. 16. §. 2. See Mr. *Daumat* in the Place above-cited, §. 7. Farther, it is certain that whenever there is no time fix'd for the performing of the thing engaged, the Promiſe is forthwith to be executed, and will admit of no other Delay than the Nature of the Thing requires. *Quotiens autem in obligationibus dies non ponitur, præſenti die pecunia debetur, niſi locus adjectus ſpatium temporis inducat, quo illo poſſit pervenire, Digeſt.* l. 45. tit. 1. *De Obligat. & Action.* leg. 41. §. 1. See alſo *Lib.* 50. tit. 17. *De Diverſ. Reg. Jur.* leg. 14. And *Seneca*'s *Excerpt. Controv.* 3, 5. *ſub fin.*

Mr. BARBEYRAC's *NOTES* on §. VIII.

[1] See what is ſaid *Lib.* 5. *c.* 11. §. 9.

[a] Thus *Eumolpus*'s Will runs in *Petronius*, " Let all thoſe to whom I have given Legacies, beſides my Children, receive " them upon theſe Terms and Conditions, that they cut my Body in pieces, and eat it amongſt them before the People." Of the ſame kind is *Tireſias*'s merry Story in *Horace*, l. 2. ſ. 5, 84, *&c.*

Me Sene, quod dicam, factum eſt. Anus improba Thebis,
Ex Teſtamento ſic eſt elata: Cadaver
Unctum oleo largo nudis humeris tulit Hæres:
Scilicet elabi ſi poſſet mortua: Credo
Quod nimium inſtiterat viventi. ——

Which Place the Scholiaſt thus interprets, " The old Gentlewoman order'd by Will, that her officious Heir ſhould carry her " Body naked, well oil'd, upon his Shoulders to the Grave, with this pleaſant Thought, that ſhe might at leaſt ſlip from him " now ſhe was dead, tho' he had ſtuck ſo cloſe to her during her Life, that ſhe could never before eſcape his Importunity." See more on this Point in the *Civilians*, in *Lib.* 7. tit. 8. *D. de uſu & habit.*

CHAP. IX.

Of the Miniſters or Agents concern'd in contracting Obligations for other Men.

The CONTENTS of every Paragraph of the ninth Chapter.

I. *We may promiſe and bargain for another.*
II. *How many ſorts of Commiſſions there are?*
III. *How if a Deputy die before he has finiſh'd?*
IV. *The Difference between a Deputy and Mediator.*
V. *How far another may accept a Promiſe for us.*
VI. *Heirs can't accept a Promiſe for a Perſon dead.*
VII. *Of a Burden annex'd to a Promiſe.*
VIII. *The general Diviſion of Pacts or Bargains.*

IT is very uſual for us to confirm and ratify Pacts and Promiſes, not immediately by ourſelves, but by ſome Agent or Proxy. What Rules are to be obſerv'd in ſuch Proceedings, it is now our Buſineſs to explain. This then is certain, that a Man is *oblig'd*, not only when he makes known his Conſent to the Perſon towards whom the *Obligation* is directed, immediately from his own Mouth, but alſo when he ſignifies the ſame to another Man, whom he has impower'd to tranſact on his behalf. The Agent in ſuch an Affair is to be look'd on as a kind of *inſtrumental* Cauſe; inaſmuch as he not only does all by another's Authority [1], but likewiſe acquires no proper Right, brings no Obligation to himſelf, referring to the Perſon with whom he is appointed to treat; but obtains a Right only for the Perſon who has employ'd him, and to him indeed he ſtands under an Obligation to manage his Concerns with Honeſty and Faithfulneſs. For thoſe Actions of another do produce an *Obligation* or a *Right* in us, and are conſequently to be eſteem'd *ours*, for the performing of which we have inveſted the other Perſon with full Power, and have openly profeſs'd that we will acknowledge them for our own. But before a third Man can treat to any Effect or Purpoſe with ſuch a Perſon, 'tis neceſſary he be well aſſur'd that we have choſen and conſtituted him the Interpreter of our Will, and that we will account whatever he acts as perform'd by ourſelves. On this Foundation depend moſt of the Rules of the *Roman* Law concerning Deputations againſt the [2] Maſters of Ships for the Facts of their Deputies againſt [3] Merchants, for the Tranſactions of their Factors, and againſt the [4] Maſter of a Family for the Deed of his Slave, or his Son.

II. Now we are wont to depute another to covenant in our Name, either by a general Commiſſion [1], impowering him to do whatever he thinks moſt convenient for our Affairs; or by an expreſs and limited Form, preſcribing him both the Subject and the Manner of his proceeding. In the former Caſe I ſtand oblig'd by whatſoever he has concluded about the Buſineſs in hand, honeſtly, or *bona fide*. It is neceſſary to add this Reſtriction; for he cannot bind me by what he does treacherouſly, and with a knaviſh Deſign of circumventing and abuſing me; inaſmuch as when I conferr'd ſuch Authority upon him, I muſt be thought to have ſuppos'd his Integrity as an eſſential Condition. Nay, the acting *bona fide*, or uprightly and faithfully, implies this farther, that what the *Subſtitute* performs, ſhall not derogate from the Honour and Advantage of his *Principal*; at leaſt ſo far as the preſent Poſture of Things will bear. For to be ignorant of theſe Points is almoſt as groſs a Fault, as open Diſhoneſty [2]. The ſame muſt be ſaid of thoſe blank Papers with our Names ſubſcrib'd at the bottom, which we often deliver to our Agents to be fill'd up and turn'd into Inſtruments of Obligation. Theſe ſhall not bind us at all, if any ſuch Matters be inſerted in them, as are diſagreeable to the Nature of the Affair given in Charge, and ſuch as we cannot be preſumed to have conſented to [3].

We have a famous Inſtance of ſuch a Cheat in Blanks recorded by *Zonaras*, Tom. iii. and by *Glycas*, Tom. iii. in *Roman. Lacapen. circa princip.* The Patriarch *Trypho* being accus'd of extreme Ignorance, and as one that was not ſo much as capable of writing, to confute the Cenſure, wrote down his Name in a fair Paper, before the Judges appointed: This Paper *Theophanes* of *Cæſarea* fill'd up with a formal Reſignation, and ſo brought it to the Emperor; who, as the Plot had been laid, took hence an occaſion to eject the Patriarch. A *Latin* Poet, as our Author obſerves, ſharply reproves the Pope, who by ſigning blank Papers hath been the Cauſe of a thouſand Forgeries.

> *An pulchrum ſatis eſt, & ſummo Præſule dignum,*
> *Impreſſas ſigno vacuas emittere chartas,*
> *Quas poſſit lator variis inſcribere nugis,*
> *Cum volet, & miſeris falſas affingere culpas?*
>
> Gunther. Ligurin. v. 656.

If I depute a Man with limited Orders, he cannot lay an *Obligation* on me beyond the Bounds of his Inſtructions.

If any Aſſent be ſent with a double Commiſſion, one *open*, to ſhew the Perſon with whom he is to tranſact, the other *ſecret*, preſcribing what Steps he ſhall take, and how far he ſhall proceed; it may be made a Queſtion, Whether the *Agent* ſhall oblige his *Principal*, if he exceed his private and ſecret Orders, yet ſo as to keep within his *open Commiſſion*, where the affirmative Side ought to be maintain'd [a]. For by my *own Inſtructions* I bind myſelf to the third Perſon, with whom the Contract is made, that I will ratify and make good what my Agent ſhall conclude on. And by my *ſecret Orders* I bind my Agent not to recede from ſuch poſitive Terms; in which Point if he tranſgreſs, he ſtands accountable to me for ſo much as I loſe by his Miſmanagement: But I am ſtill tied to perform to the third Perſon, what was thus granted in my Name. For otherwiſe there could be no manner of Safety in treating by Commiſſioners, it being ever to be fear'd leſt their *ſecret Directions* ſhould differ from their *open Powers*; neither could there be a more ſpecious Pretence made uſe of to overthrow all Affairs tranſacted by Mediation, and to deceive and abuſe Men with vain Treaties [b]: But it muſt be obſerv'd, we ſuppoſe, here, as in the

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Mr. Barbeyrac's *NOTES on Chap.* IX. §. I.

[1] *Uſus autem procuratoris perquam neceſſarius eſt, ut qui rebus ſuis ipſi ſupereſſe, vel nolunt, vel non poſſunt, per alios poſſint, vel agere, vel convenire,* Digeſt. Lib. 3. tit. 3. *De Procuratoribus*, leg. 1. §. 2. *Poteſt quis per alium, quod poteſt facere per ſeipſum,* Decretal. Lib. 6. *De Regul. Jur.* c. 68. *Qui facit per alium, eſt perinde ac ſi faciat per ſeipſum,* Ibid. c. 72.

[2] It is called *Actio Exercitatoria*, which is treated of *Digeſt*. Lib. 14. tit. 1.

[3] *Actio Inſtitutoria*, ſee *Digeſt*. Lib. 14. tit. 3. *Code*, Lib. 4. tit. 25. And Mr. *Daumat*'s Civil Laws, *&c.* Part I. Lib. 1. tit. 16. Sect. 2, 3.

[4] See *Inſtit*. Lib. 4. tit. 7. *Quod cum eo qui in aliena poteſtate eſt, negotium geſtum eſſe dicitur,* and *Digeſt*. Lib. 15. tit. 4. *Quod juſſu.*

Mr. Barbeyrac's *NOTES on* §. II.

[1] *Procurator autem vel omnium rerum, vel unius rei eſſe poteſt,* Lib. 3. tit. 3. *De Procuratoribus*, §. 1.

[2] *A Procuratore dolum, & omnem culpam, non etiam improviſum caſum præſtandum eſſe, Juris auctoritate manifeſte declaratur,* *Code*, Lib. 4. tit. 35. leg. 13. See alſo leg. 21. and upon this whole Matter, Mr. *Daumat*'s Civil Laws, *&c.* Lib. 1. tit. 16. Sect. 1, *&c.*

[3] In fine, 'tis certain that a Man is bound by his own Hand, altho' he to whom the Blank is committed fills it up otherwiſe than he intended, provided there be no falſe Dealing between the third Perſon and him. This appears by the Example which Mr. *Hertius* brings of a Man of Buſineſs, who being employ'd by his Maſter to borrow a thouſand Crowns, took up two thouſand upon his Blank Bond; for here was no fault in the Lender, but in him only who imprudently intruſted his Deputy.

[a] See *Grot.* l. 2. c. 11. ſ. 12.

[b] Vid. *Wicquefort*'s *Memoires touchant les Ambaſſadeurs*, p. 582, 583, 588.

former Caſe, that the Agent when he thus tranſgreſſes the Bounds of his private Inſtructions, did it not out of a diſhoneſt and treacherous Deſign[4].

III. If we make uſe of a Deputy in tranſmitting a Promiſe to another Man, and the Perſon employ'd happen to die before he have declar'd our Propoſal to the other, or obtain'd his Aſſent, it is plain his Promiſe may be revok'd[1]. For my expreſs Will in this Caſe was to contract an Obligation by the Words of this Perſon only, whom I intruſted with the Affair: And therefore although he may have declar'd his Meſſage to a third Man, whence it may come to the Ears of the Party to whom it was directed, yet this way of communicating the Matter can lay no Tie upon my Conſcience. For it was neither my Deſign in the leaſt to render my ſelf *oblig'd* by the means of this third Perſon, nor is he ſo fully acquainted with my Will, as to give another any good Aſſurance of it. But the Caſe is otherwiſe as to a Bearer, whom I intruſt only with Letters of mine, expreſſing my Pleaſure to a Perſon at a Diſtance. Though the Bearer die before he reach the Perſon, and the Letters are deliver'd by another, yet this is no Hindrance to the contracting of a firm Obligation. For here the Letters, and not the Bearer, are the inſtrumental Cauſe of the Engagement; and it ſignifies nothing to either of the Parties concern'd, by what Hands the *Deeds* were convey'd and preſented.

IV. On many other Accounts there is a great Difference, whether a Man act by my Deputation purely as a Meſſenger, and a Bearer of my Opinion and Pleaſure, or as an Agent and Mediator, with a Liberty of interpoſing his own Judgment in ſome Points of the Buſineſs. Which *Grotius* in l. ii. c. 11. ſ. 17. thus expreſſeth in other Words: *Whether the Perſon be pitch'd on to ſignify the Promiſe I make, or whether he be authoriz'd to make the Promiſe himſelf.* In the former Caſe, if I revoke my Promiſe before it hath been accepted by the other Party, my Revocation ſhall ſtand good, although the Meſſenger being unacquainted with it, ſhould go on in ſignifying my firſt Reſolution. But if a Man acts for another in the latter way of Deputation, unleſs the Change of Mind be notified to him, it ſhall be void, and his *Principal* ſhall ſtand *oblig'd*, if he proceed to ſettle the Buſineſs[1], as he was at firſt commiſſion'd. For the *Principal*, when he choſe to offer his Promiſe by ſuch an Agent, lodg'd the *obliging Power* in his *Perſon*, and not in his *Pocket*; that is, he intended him not barely for the Meſſenger of his Purpoſe, but for one that ſhould employ his own Judgment, as well as his bodily Service in the Affair[2]. The ſame Diſtinction the *Civilians* apply to the Queſtion, Whether a Grant ſhould hold good, in caſe the Donor die before it be accepted? Which they affirm, if the Perſon deputed to carry the Grant were of the former kind, becauſe then nothing would be wanting on the Donor's Part. But they deny it, if the Agent was of the latter ſort; becauſe the Donor did not fully make the Grant, but only order'd it to be made; or had not yet actually offer'd the Thing, but only given Commands for its being offer'd. Yet ſee *Ziegler* on *Grotius*, lib. ii. c. 11. ſ. 17. where he delivers it as his Judgment, that the Donation may be accepted, in caſe the Perſon deputed made offer of it during the Donor's Life. But one would wonder how the other Party ſhould make any Stop or Delay at Acceptance, if the Donation be ſuppos'd to have been thus communicated. *Grotius* ſays, that the ſame Rule is to be followed in deciding the Controverſy, Whether a Perſon thus acting by a Commiſſion, can bring an Action againſt the Heir of the *Principal*, or *Donor*, for Recovery of the Charges he hath been at ſince the Donor's Death, in executing his Orders[3]? In which Caſe, the Author of the Books to *Herennius*, l. ii. c. 13. informs us, that two *Roman* Judges gave a quite contrary Sentence.

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[4] That is to ſay, There was no Tricking between him and the third Party, otherwiſe he is to make good the Damages of him whoſe Buſineſs he manages; but the Engagement itſelf is not leſs valid in reſpect to the other Contractor by virtue of his Orders, which are the Foundation of the Treaty, as I ſpake in the firſt Edition of this Work. Nevertheleſs I have obſerved that Mr. *Hertius* maintains the ſame thing, and ſends us to his Diſcourſe, *De Obligatione mandantis & mandatarii, contemplatu tertii*, §. 2. which is in Tom. 3. of his ſmall Tracts and Comments printed in 1700.

Mr. Barbeyrac's *NOTES on* §. III.

[1] *Si adhuc integro mandato mors alterutrius intervenit*, i. e. *vel ejus qui mandaverit, vel illius qui mandatum ſuſceperit, ſolvitur mandatum*, Inſtit. Lib. 3. tit. 27. §. 10.

Mr. Barbeyrac's *NOTES on* §. IV.

[1] The Lawyers apply this Law here, *Si mandaſſem tibi ut fundum emeres, poſtea ſcripſiſſem ne emeres, tu antequam ſcires me vetuiſſe, emiſſes, mandati tibi obligatus ero, ne damno afficiatur is qui ſuſcepit mandatum*, Digeſt. Lib. 17. tit. 1. *Mandati vel contra*, leg. 15. See alſo Lib. 1. tit. 18. *De Officio Præſidis*, leg. 17. *Clementin.* Lib. 1. tit. 4. Chap. *De Renunciatione*, and *Coſtalius* on *Digeſt*. Lib. 3. tit. 3. *De Procurat. & Defenſoribus*, leg. 65.

[2] Mr. *Thomaſius* in his *Juriſprud. Divin.* Lib. ii. c. 7. §. 118. ſays, That we muſt diſtinguiſh ſeveral Caſes here, and examine chiefly whether the Revocation of an Engagement be addreſſed to the Meſſenger, or to him to whom we are engaged by his Means? And further, whether the Revocation be ſent before the Promiſe was accepted? If the Revocation be addreſſed to the Meſſenger, and he to whom he is to deliver his Commiſſion has accepted the Promiſe before he knew of the Revocation, the Promiſer is obliged to make good his Engagements, tho' he who was obliged to let him know it received the Countermand either before or after the Acceptation. And ſo all that can be done is this, if the Meſſenger has given it contrary to Order, he may be charged with an ill Management of his Commiſſion. But if the Revocation be addreſſed to him to whom our Engagements are made, and he has accepted the Promiſe before he received the Revocation, we muſt then obſerve whether we had a Deſign to engage ourſelves in caſe the Promiſe were once accepted, or we were only ſuppoſed to have notice of an Acceptation? For it is clear, that we may revoke our Word by means of ſuch a Suppoſition. But if he to whom we are engaged has received our Revocation before he accepted our Promiſe, the Engagement is null, whether it be addreſſed to a third Perſon, or himſelf. For in this laſt Caſe there is a Fraud in reſpect of the latter.

[3] 'Tis a Rule of the Civil Law, That a Commiſſion is of no Force, when he that gave it is dead before the Execution; and that altho' he has expreſly ordered his Proctor to do ſuch or ſuch a thing after his Death, unleſs it be to build him a Tomb, or buy a piece of Ground for that End. This Mr. *Noodt* has ſhewed very well, againſt the Opinion of ſome famous Lawyers, in his *Obſervat.* Lib. 2. c. 1, 2, 3, 4. But if we conſider the Law of Nature, we may decide it by other Principles, *viz.* by examining whether the Nature of the thing or the Circumſtances do probably make it appear, that he that gave the Commiſſion intended it ſhould be executed after his Death. For in this Caſe the Proctor ought to execute it, and all Perſons concerned ought to yield to it. We muſt alſo ſuppoſe that the Proctor knew of the Death of him that gave the Commiſſion; for if he were ignorant of it, whatever he did in that time is valid by the Civil Law, which here follows the Principles of Equity. *Nam Mandatum ſolvitur morte* [*Mandatoris*] *ſi tamen per ignorantiam impletum eſt, competere actionem utilitatis cauſa dicitur*, Digeſt. Lib. 17. *Mandati vel contra*, leg. 6. §. 10. *princ.* See alſo the *Inſtitutes*, Lib. 3. tit. 27. §. 10.

V. As we may declare our Conſent to an Engagement by an Agent or Miniſter, ſo it is a farther Queſtion, Whether a third Perſon may accept, in our behalf, a Promiſe made to us by another? And here the Diſpute is not about thoſe Perſons whom we have commiſſioned to make Acceptance in our Name; for what we do by them, we are ſuppoſed to have done our ſelves, and when we have intruſted a Matter to another Man's Pleaſure, our Will and Conſent is included in his. But the Doubt regards only thoſe whom we have not in this manner authorized. And here *Grotius* obſerves[a], "That we ought to diſtinguiſh, " whether he who makes us a Promiſe on behalf " of a third Perſon, does addreſs and bind himſelf " immediately to us, or whether he promiſes di" rectly to the abſent Party, and uſeth us only for " Witneſſes of the Act; that is, whether the Words run thus, *I promiſe you that I will give* Seius *ſuch a thing, and you are Witneſs of this my Reſolution.* In the former Caſe, according to the natural Senſe and Import of the Promiſe, ſo ſoon as I have accepted it, I acquire a Right of taking care that the thing mentioned be transferr'd to the third Perſon, if he too will accept it; ſo that the Promiſer in the mean time cannot revoke his Engagement. Yet he to whom the Promiſe was immediately directed, may remit it before the third Man has declared his Acceptance. The Promiſe then ſeems, on the whole, to amount to this, *I will give* Seius *ſuch a thing, if you pleaſe.* And conſequently it is in your Power and Choice, whether you will transfer the Promiſe on *Seius*, or whether, by refuſing the Offer, you will hinder it from coming to him by your Means. And this is all you can do; for if I am abſolutely reſolv'd to confer the Kindneſs, I may perform it without your Mediation or Aſſiſtance. But if you declare your Approbation of the Propoſal, I am not then at liberty to repent, before the Matter hath been made known to *Seius*; and if he join his Acceptance to yours, the Promiſe ſhall by the Law of Nature be good and valid. Indeed the *Roman* Laws declar'd all thoſe *Stipulations* to be *null*[1], which were made for the Benefit of a third Man, without having a Penalty annex'd to them. And the reaſon they gave for their Judgment is this, That the original Deſign of inventing *Stipulations*, was to enable a Man to obtain ſomewhat for his own Advantage; whereas if the thing promiſed be to paſs to a third Man, he who obtains the Promiſe does not ſerve his own Intereſt, nor is himſelf concern'd in the Gain. But if I make a *penal Stipulation*, that is, if I procure ſuch an Engagement as this, *Unleſs you give* Seius *an hundred Pounds, you ſhall by way of Puniſhment pay me Fourſcore*; I then acquire thus much *Right* at leaſt, that if you do not make good the firſt Sum on my Friend's account, I can demand the latter on my own. This Rule of the *Roman Courts* ſeems to have been introduced for the leſſening the Number of *Suits*. For the Judge might well rebuke the Importunity of ſuch a Complainant, who ſhould give him and others a publick Trouble, without being himſelf concern'd or intereſted in the Affairs. And tho' it cannot indeed be ſaid to be no Advantage to us, when by our Means we derive a Benefit on a third Perſon, in as much as we thereby oblige him to a grateful Senſe of our Service; yet it was thought very improper to grant a Man an *Action* for the recovery of a thing in *another's Name*, which that *other* Party could not demand in *his own*; and conſequently to give a Man the Privilege of purchaſing the Friendſhip of a third Perſon at the Charges of a ſecond.

But in the other Caſe, when the Promiſe runs after this manner, *I engage, or I declare before you, that I will give* Seius *ſuch a thing*, if you are not commiſſion'd by *Seius* to accept the Offer[2], your Agreement to it will have no Force or Virtue; you neither acquire a Right for your ſelf, nor for *Seius*, who does not acknowledge your Act for his own. And therefore it ſignifies nothing, whether the Witneſs here yield his Conſent to the Promiſe, or not; ſince it is not directed to his own proper Perſon. And the Promiſer, in as much as *Seius* obtains no Right by the Witneſſes acceptance of the Propoſal, may revoke it without Injury; tho' not always without a breach of Conſtancy and Truth.

VI. It is farther certain, that if any Offer be made to a Perſon yet living, by Letter, Meſſenger, or the like, and he happen to die before he has accepted of it, his Heirs cannot accept of it for him; and conſequently that ſuch a Promiſe may fairly be revoked. For the Promiſer ſeems plainly to have referr'd the Acceptance to the Choice of the deceas'd Party, not to his Heirs. Nor is he preſumed to have thought of this Accident, or to have been willing that his Promiſe ſhould ſtand good upon ſuch a Suppoſition. We

Mr. Barbeyrac's *NOTES on* §. V.

[1] The Words are, *Alteri ſtipulari——nemo poteſt. Inventæ enim ſunt hujuſmodi ſtipulationes ſive obligationes ad hoc, ut unuſquiſque adquirat ſibi, quod ſua intereſt. Cæterum ſi alii detur, nihil intereſt ſtipulatoris. Planè ſi quis velit hoc facere, pœnam ſtipulari conveniet, ut niſi ſit ita factum, ut eſt comprehenſum, committatur pœnæ ſtipulatio etiam ei, cui nihil intereſt. Pœnam enim cum ſtipulatur quis, non illud inſpicitur, quid interſit ejus, ſed quæ ſit quantitas in conditione ſtipulationis. Ergo ſi quis ita ſtipuletur, Titio dari, nihil agit, ſed ſi adjecerit pœnam,* NISI DEDERIS TOT AUREOS DARE SPONDES? *Tunc committitur ſtipulatio,* Inſtit. l. 3. tit. 20. *De Inutil. Stipulat.* § 19.

[2] Mr. *Thomaſius* in his *Inſtit. Juriſprud. Divin.* lib. 2. c. 7. § 119. obſerves, That we muſt carefully diſtinguiſh whether he whom we take to witneſs have any Intereſt, or no, that we give to a third what he accepts in his own Name, altho' without his Conſent; a Diſtinction which the *Roman* Lawyers have not forgotten, and of which they alledge an Example of a Guardian, who making over the Management of the Eſtate of his Pupil to another, engaged that he ſhould manage his Affairs well; or of a Perſon who obliged himſelf to give ſuch or ſuch a thing to his Commiſſioner; or of a Debtor, who engaged ſomething for his Creditor, that he may not be obliged himſelf to pay, what he is engaged to give him, if he do not diſcharge him at the end of a certain Term, or to hinder him from ſelling a thing engaged till a certain time. For in this and like Caſes, the Engagement is as valid as if the Promiſe had been directly made to him to whom we have promiſed. *Sed & ſi quis ſtipuletur alii, cum ejus intereſſet, placuit ſtipulationem valere. Nam ſi is, qui pupilli tutelam adminiſtrare cœperat, ceſſerit adminiſtrationem contutori ſuo, & ſtipuletur rem pupilli ſalvam fore, quoniam intereſt ſtipulatoris fieri, quod ſtipulatus eſt, cum obligatus futurus ſit pupillo, ſi male res geſſerit, tenet obligatio. Ergo & ſi quis Procuratori ſuo dari ſtipulatus ſit, quod ſua intereſt, ne forte vel pœna committatur, vel prædia diſtrahantur, quæ pignori data erant, valet ſtipulatio,* Inſtit. Lib. 3. tit. 20. *De Inutil. Stip.* § 19. In fine, this Remark of Mr. *Thomaſius* is delivered in ſuch a manner in the Edition of this Work, which I have, which is the laſt printed in 1702. that he ſeems to have fallen upon another ſort of Promiſe, which is accepted by a third Perſon without his Conſent; for having made mention of this after the other, he adds, *Sed in poſteriori caſu*, &c. but this, doubtleſs, is a Miſtake in the Impreſſion for *Priori*; for the Correctors have over paſſed a great number of others.

[a] Lib. 2. c. 11. ſ. 18.

are often inclined to make a Grant to a Perſon, to be afterwards by him transferr'd to his Heirs, which we are by no means diſpoſed to give to his Heirs immediately; it being a very material Point to conſider on whom we beſtow our Favours [1].

VII. It may in the laſt place be enquired, whether a Man can add a *Charge* or *Burthen* to his *Promiſe*, after the Words have been once delivered [2]? For that he may *before* annex what Conditions he pleaſeth, is true beyond Diſpute. This then may be done, ſo long as the Promiſe is not yet perfected by Acceptance, nor made irrecoverable, by the plighting of Faith for his Performance. For the other Party, before he accepts of the Profer, can acquire no Right to it; and therefore in the mean time, as the Promiſer may, if he thinks fit, utterly withdraw it, ſo he may load and clog it with new Conditions. But when a Grant is compleated by the Act of both Parties, no farther Terms can be annex'd to it [1]. *Vid. Cod.* lib. iv. *De Donat. quæ ſub modo.*

'Twill be ask'd, What if the Burthen be added for the Sake and Benefit of a third Perſon; as ſuppoſe I ſay, *I'll give you ſuch a Sum of Money, provided you'll ingage to maintain* Seius *a Year at the Univerſity?* We anſwer, that he who binds himſelf under this Burthen, may recall it ſo long as *Seius* has not yet confirm'd the Promiſe by his Acceptance; before which it does not of *Right* belong to him.

VIII. The moſt general Diviſion that can be applied to *Pacts*, ſeems to be this, all of them create a *Right*, but in ſome that *Right* extends it ſelf to the common uſe of Mankind, in others it is limited to the particular Benefit of certain Perſons. For the Life of Men would have proved too plain and ſimple, had they not, to the Ordinances of Nature, added their own Inſtitutions; by means of which their Proceedings were regulated, not only with more Convenience, but with more Comelineſs and Grace. Of this latter kind, the principal are [1], *Speech*, or *Diſcourſe*, the *Propriety*, and the *Value* of Things, together with *Sovereignty*, or Command; all which preſuppoſe ſome univerſal *Pacts*, *tacit* or *expreſs*, by Virtue of which they have been tied up to certain *Forms* and Rules. And the introducing and ſettling of theſe Engagements, was what Nature her ſelf, ſuppoſing the Increaſe of Mankind to a great Number, directed and adviſed; as conducing in the higheſt degree to the Peace, and to the Ornament of human Life. Having therefore finiſh'd our Enquiries about Covenants in general, we will proceed to examine theſe Inſtitutions, to diſcover on what *Pacts* they are founded, and what Precepts of the Law of Nature, ſuch as we have already term'd *Hypothetical* or Conditional, do ariſe from them.

Mr. BARBEYRAC's *NOTES on* §. VI.

[1] The Law is this, *Neratius conſultus, an quod beneficium dare ſe, quaſi viventi, Cæſar reſcripſerat, jam defuncto dediſſe exiſtimaretur? Reſpondit, non videri ſibi, principem, quod ei quem vivere exiſtimabat, conceſſiſſet, defuncto conceſſiſſe, quem tamen modum eſſe beneficii ſui vellet, ipſius æſtimationem eſſe,* Digeſt. l. 50. tit. 17. *De Diverſ. Reg. Jur.* leg. 191.

Mr. BARBEYRAC's *NOTES on* §. VII.

[1] The Words are, *Perfecta donatio conditiones poſtea non capit.*

Mr. BARBEYRAC's *NOTES on* §. VIII.

[1] Mr. *Titius* in his *Obſervat.* 241, reproves many things here, of which I ſhall mention ſuch only as to me appear well grounded, *viz.* 1. All the Duties of Society, of which our Author treats hereafter, and which flow from thoſe three Generals, which I have ſpoken of above, Chap. 1. § 1. Note 3. and are only the Conſequences applied to divers Objects which are preſented to us in a Civil Life; Conſequences from whence reſult ſuch Maxims, which have a Place either without ſuppoſing any other thing than the Quality of a Man, or ſuppoſing ſome Deed or human Eſtabliſhment. So that the Eſtabliſhments of which our Author ſpeaks make the Matter of the Duties of natural Right as well abſolute as conditional. 2. All the Eſtabliſhments of which our Author treats are not founded upon an Agreement. The Introduction and Uſage of the Word in general depends not upon any Agreement, either expreſs or tacit, if by Agreement we mean an obligatory Conſent. See what is ſaid, Chap. 1. of the following Book, § 5, Note 1. The Property of Goods is not originally founded upon any Agreement, as ſhall be ſhewn, c. 4. of the ſame Book, § 4, Note 2.

[2] Vid. *Grot.* l. 2. c. 11. ſ. 19.

OF

OF THE
LAW of NATURE
AND
NATIONS.

BOOK IV.

CHAP. I.

Of SPEECH; *and the* OBLIGATION *which attends it.*

The CONTENTS of every Paragraph of the first Chapter.

I. *Of the Uſe of Speech.*
II. *Of the Diverſity of Signs.*
III. *Of the Origin of Speech.*
IV. *Words ſignify according to Impoſition.*
V. *Impoſition is attended with a Compact.*
VI. *This Compact is either general, or particular.*
VII. *Whence the Obligation of diſcovering our Mind to another.*
VIII. *What Truth is, and what a Lye.*
IX. *Every Untruth is not a Lye; and therefore not criminal.*
X. *Of the Right which is violated by Lying, and whence 'tis deriv'd.*
XI. *How far Part of the Truth may be honeſtly conceal'd.*
XII. *Simulation in Things, how far lawful.*
XIII. *Of ambiguous Speech.*
XIV. *Of mental Reſervations.*
XV. *How far we may be allowed in ſpeaking falſly to Infants.*
XVI. *It is lawful to ſpeak what is falſe, for the Preſervation of others.*
XVII. *How far the Governors of States may be indulg'd in giving out falſe Reports.*
XVIII. *In what manner it is lawful to deceive an ill-deſigning Curioſity.*
XIX. *It is lawful to ſpeak falſe to a profeſs'd Enemy.*
XX. *Whether a guilty Perſon arraign'd may deny the Charge.*
XXI. *What the Advocates or Council may, in this reſpect, do for their Client.*

THAT Man was deſign'd by Nature for a Life of Society, this alone might be a ſufficient Argument, that he only of all living Creatures is endued with the power of expreſſing his Mind to others by articulate Sounds: A Faculty, which, abſtracting from this ſocial Condition, we cannot conceive to be of any Uſe or Advantage to Mankind. 'Tis well obſerv'd by *Ariſtotle* [1], *Nature doth nothing in vain; and Man is the only Animal whom ſhe hath inveſted with the Privilege of Speech:* Not ſuch as conſiſts in the bare Repetition of borrow'd Sounds, like the Talk of Parrots, but ſuch as is join'd with a Senſe and Underſtanding of what the Words import. By means of which one may be able to teach another; one may in the moſt convenient manner command another, and the other apprehend his Commands; without which Aſſiſtance, there would ſcarce be any Shadow of Society, Peace, or Diſcipline among Men; or at beſt, ſuch only as would be in the higheſt degree rude and unpoliſh'd. *For* (as the Philoſopher goes on) *Voice* (or a certain Kind of inarticulate Sound) *is no more than an Indication of Pleaſure or Pain, and is therefore to be found in other Animals. Nature having in them proceeded ſo far, as to give them a Senſe of what is agreeable or diſtaſteful, and an Ability of ſignifying in ſome*

Mr. BARBEYRAC's *NOTES on* Chap. I. §. I.

[1] Οὐθὲν γὰρ, ὡς φαμὲν, μάτην ἡ φύσις ποιεῖ, λόγον δὲ μόνον ἄνθρωπος ἔχει τῶν ζώων· ἡ μὲν οὖν φωνὴ τοῦ ἡδέως καὶ λυπηροῦ ἐστι σημεῖον, διὸ καὶ τοῖς ἄλλοις ὑπάρχει ζώοις· μέχει γὰρ τούτου ἡ φύσις αὐτῶν ἐλήλυθεν, ὥστε αἰσθάνεσθαι τοῦ λυπηροῦ, καὶ τοῦ ἡδέως, καὶ ταῦτα σημαίνειν ἀλλήλοις· ὁ δὲ λόγος ἐπὶ τῷ δηλοῦν ἐστι τὸ συμφέρον, καὶ τὸ βλαβερὸν, ὥστε καὶ τὸ δίκαιον, καὶ τὸ ἄδικον· τοῦτο γὰρ πρὸς τὰ ἄλλα ζῶα τοῖς ἀνθρώποις ἴδιον, τὸ μόνον ἀγαθοῦ τε καὶ κακοῦ, καὶ δικαίου, καὶ ἀδίκου, καὶ τῶν ἄλλων αἴσθησιν ἔχειν· ἡ δὲ τούτων κοινωνία ποιεῖ οἰκίαν καὶ πόλιν, Ariſtot. Politic. l. I. c. 2.

ſort theſe Affections amongſt themſelves. (Whence it appears, that the Sounds utter'd by Brutes, of whatſoever kind, are determin'd by Nature, not by Cuſtom and Inſtitution, like human Diſcourſe). *But Speech was given to ſignify farther what was uſeful, or prejudicial; juſt, or unjuſt: It being the Prerogative and Property of Men, above their Fellow-Creatures, to have a Senſe of Good and Evil, of Juſtice and Injuſtice, and the like; ſince from their Society and Communication proceed the united Bodies of Families and Commonwealths*[a]. And ſince that Want and Weakneſs, which particular Men lye under, may by the Aſſiſtance of others be conveniently remov'd, and yet another cannot apply himſelf to my Aid, unleſs he firſt underſtand what I deſire; which he may do moſt readily by means of ſome Signs and Tokens, and eſpecially by articulate Words; therefore, that the moſt uſeful Inſtrument of human Life may duly obtain its End, in uniting Men in Society; and leſt by the Abuſe of Speech Man ſhould be render'd leſs ſociable, than if he were dumb or ſilent, it muſt be ſuppos'd a Precept of the Law of Nature, *That no Man deceive another by thoſe Signs, which have been inſtituted to expreſs our Meaning and our Thoughts.*

II. Now to trace this Point from its firſt Head, we muſt underſtand, that the Nature and Ability of thoſe Objects which affect our Senſes, is ſuch as not only gives us notice of their own Preſence or Approach, but likewiſe affords our Reaſon an Opportunity of attaining the Knowledge of other Things. And this either becauſe there is a natural Alliance and Connexion between thoſe Objects and the Things with which they thus bring us acquainted; or becauſe Beings endued with Senſe and Underſtanding have, without this natural Relation, fix'd ſuch Notions upon them, as to make them capable of repreſenting continually the Images of certain Things to the Mind. Hence ariſeth the Diſtinction of *Signs* into thoſe which are natural, and thoſe which owe their Force and Validity to Cuſtom and Compact. Of the former kind, we are on every ſide ſupplied with Inſtances from the Frame of Nature; as the Day-break is the Sign of the Sun's riſing quickly after; Smoak is the Sign of Fire; and the like. By Compact, Men have impoſed the Uſe and Power of *Signifying*, on certain Things, Actions, and Motions, and above all, on *Words*, or articulate Sounds form'd by the Tongue, and afterwards reduced into Letters: And all theſe are found to be in uſe either with ſome certain Perſons, or with the greateſt Part of Mankind, or in general, with all the World. Under the firſt of theſe Claſſes may be rank'd the Light-houſes and nightly Fires on the Coaſts, for the Direction of Veſſels: By the Abuſe of which *Nauplius* of old is reported to have driven the *Grecians*, in a Tempeſt, upon the Rock of *Caphareus*, to revenge the Death of his Son *Palamedes*[b]. As likewiſe thoſe other Marks ſet up to guide Ships by Day, and to point out the Rocks and Quickſands, together with the *Mercuries*, pointing Hands, and other Conveniences for Information of Land-travellers. And thus heretofore the *Perſians* by lighting Fires all along on the tops of their Hills, uſed in a very little time to ſpread ſome Reports or Alarms thro' every part of the Kingdom[c]. An infinite Variety of theſe Signs are met with in Commonwealths, employ'd for the acquainting the Subjects with ſome particular Matters. To which Head belong Clocks, Bells, Spears ſet up at Auctions, Buſhes, Signs before Houſes, and the like. In War, the Sound of Trumpet, Beat of Drum, Diſcharge of Cannons, Waving of Colours, *&c.* And ſo too, certain Geſtures and Motions have been taken up amongſt moſt People to denote ſuch or ſuch Intentions of the Mind: To go out of the way, to riſe up, to bow, to kiſs the Hand, are Signs of Honour and Reſpect with the greateſt part of the World. To uncover the Head in the Ceremony of ſaluting, or to pluck off the Shooes in ſome Places is interpreted as a Mark of Honour, in others of Contempt. It is in ſome Countries look'd on as reproachful to point with the Finger, to bend the Noſe, to bid *a Fig for one* (*fare le fica*, as the *Italians* call it) with many the like Motions. To take by the Beard is in ſome Nations the higheſt Affront, with others it paſſes for a Token of Veneration; as with the *Tartars*, with ſome of the *Indians*, and, as ſome think, with the antient *Gauls*[d]. 'Tis likewiſe a common Practice to expreſs by ſome Geſture our deſire of performing ſuch an Action as would require that particular Motion of the Body, by which in ſtrange Countries we, after a ſort, ſupply our Ignorance of the Language. To affirm a thing by gently bending our Head; to deny by throwing it on our Shoulders; to refuſe by turning our Back, are Cuſtoms almoſt univerſally receiv'd. As for our pointing out a certain Thing or Place by ſtretching our Hand or Finger towards it, this perhaps ought to be reckon'd amongſt the natural, rather than amongſt the arbitrary Signs. What Diſcoveries may be made by Nods, Winks, Motions of the Fingers, or of the Feet, when particular Men have once agreed on thoſe ways of Intelligence, is vulgarly known, and need not be farther inſiſted upon in our preſent Deſign[e]. *Lucian*[f] tells us of a famous Artiſt in *Nero*'s Court, who expreſs'd the Amour of *Mars* and *Venus* as well by dancing, as he could have done by Narration; whom for this reaſon a certain barbarous Prince begg'd of the Emperor for an Interpreter. And the Sieur *De Sancy*, the *French* Ambaſſador at the *Otto-*

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[a] Add. *Iſocrat. ad Nicocl. paulo poſt princip. Plin.* N. H. l. xi. c. 51. That Power of explaining our Mind, which hath diſtinguiſh'd us from the Beaſts, hath cauſed another Diſtinction between Man and Man, no leſs conſiderable than that between Man and Beaſt. *Quinctilian* is large on this Subject, —— *Inſtitut. Orat.* l. 2. c. 16.

Sophocl. Oedip. Colon. p. 310. Edit. *H. Steph.*

The wiſe Inventions which our Mind conceive
Our Speech declares ——

Pliny (N. H. l. 7. c. 1.) expreſſeth the Neceſſity of Speech in a very ſmart Sentence, when he obſerves that, *Externus alieno non eſt hominis vice*; one Foreigner is not a Man to another. Add. *Garcilas de la Vega*, Comm. Reg. l. 7. c. 1.

[b] Add. l. 10. *D. de incend. ruin. naufrag.* & Lib. 47. tit. 9.

[c] Which Cuſtom is deſcribed by *Barclay* in his *Argenis*, l. 1. Add. Polyb. l. 10. c. 39, *&c.* Περὶ πυρσείας καὶ φρυκτωρείας, *Caſaubon.* Epiſt. 812. Edit. *Græv. Jul. African.* κεστῶν, l. 2. c. penult. See likewiſe *Ferdinand Pinto*, c. 61. where he ſpeaks of the Horn, which amongſt the *Japoneze* every Man keeps in his Houſe for a Signal upon occaſion.

[d] From that Place in *Livy*, l. 5. c. 41.

[e] *Æſchyl.* Agamem.

Σὺ δ' ἀντὶ φωνῆς φράζε καρβάνῳ χερί.

—— *Barbarian*, let your *Hand*
Supply your want of Speech ——

[f] *De Saltatione*, Tom. I. p. 807. Edit. *Amſterd.*

man Court, gives an account of two *Mutes* whom he ſaw there, one by Nation a *Turk*, the other a *Perſian*, who by reaſon of their uſing different Signs and Motions, could not underſtand each other; till at length a third *Mute* was found out, who was able to perform an Interpreter's Part between the two former.

III. But that which we are chiefly concern'd about in our preſent Enquiries, is Speech or Diſcourſe, the moſt common and the moſt uſeful Sign amongſt Men, and introduc'd for the ſake of communicating Notions and Thoughts. Of the Riſe of which *Diodorus Siculus*, Lib. i. p. 8. Edit. *Rhodom.* thro' his Ignorance of the true Origin of Mankind, gives this fabulous Account: *The firſt Men who were born into the World, led a ſavage Life, without Culture or Refinement; going out in Herds to the Paſtures, and feeding on the moſt juicy Plants, and thoſe Fruits which plain Nature produced. Being infeſted with the Wild Beaſts, Uſe taught them to aſſiſt each other, and Fear compell'd them into Society; by means of which they grew acquainted, by degrees, with the Reſemblance of their Shapes and Features. And having from confus'd Voice, and without Signification, arriv'd by ſlow Attempts to pronounce articulate Words, ſhewing every thing by Signs, that they had occaſion to obſerve, and to communicate; they at length gain'd ability to inform one another of all Matters by Diſcourſe. But, inaſmuch as there were many of theſe Communities eſtabliſh'd in different Parts of the World, and every Man join'd his Words together meerly as it happen'd, all did not ſpeak in the ſame manner. And hence aroſe the Number and the Variety of all ſorts of Languages. Lucretius*'s Deſcription is exactly of a piece with this, *l.* v. *v.* 1027, *&c.*

At varios linguæ ſonitus natura ſubegit
Mittere, & utilitas expreſſit nomina rerum;
Non alia longè ratione, atque ipſa videtur
Protrahere ad geſtum pueros infantia linguæ,
Cum facit ut digito, quæ ſint præſentia, monſtrent.
Proinde putare aliquem tum nomina diſtribuiſſe
Rebus, & inde homines didiciſſe vocabula prima,
Deſipere eſt: nam cur hic poſſet cuncta notare
Vocibus, & varios ſonitus emittere linguæ,
Tempore eodem alii facere id non poſſe putentur?
Præterea, ſi non alii quoque vocibus uſi
Inter ſe fuerant, unde inſita notities eſt
Utilitatis? & unde data eſt huic prima poteſtas,
Quid vellet, facere ut ſcirent, animoque viderent?
Cogere item plures unus, victoſque domare
Non poterat, rerum ut perdiſcere nomina vellent;
Nec ratione docere ulla ſuadereque ſurdis,
Quid ſit opus facto: faciles neque enim paterentur;
Nec ratione ulla ſibi ferrent amplius aures
Vocis inaudito ſonitus obtundere fruſtra.

Kind *Nature* Power of framing *Sounds* affords
To Man, and then *Convenience* taught us *Words*;
As *Infants* now, for want of *Words* deviſe
Expreſſive Signs, they ſpeak with Hands and Eyes,
Their *ſpeaking* hand the want of Words ſupplies.
That *One* the various *Names of Things* contriv'd,
And that from *him* their Knowledge *all* deriv'd,
'Tis fond to think: For how could that Man tell?
The Names of Things, or liſp a Syllable,
And not another Man perform't as well?
Beſides, if others us'd not *Words* as ſoon,
How was their *Uſe*, and how their *Profit* known?
Or how could he inſtruct the other's Mind,
How make them underſtand what was deſign'd?
For *his*, being *ſingle*, neither Force nor Wit,
Could conquer *many* Men, nor would they ſubmit
To learn his *Words*, and practiſe what was fit.
How *he* perſuade *thoſe* ſo unfit to hear?
Or how could *ſavage they* with patience bear
Strange *Sounds* and *Words* ſtill *rattling* in their Ear?
Mr. *Creech.*

He concludes, that ſince brute Creatures could by different Sounds expreſs different Motions of their Mind,

—— *Quid in hac mirabile tantoperè eſt re,*
Si genus humanum, cui vox & lingua vigeret,
Pro vario ſenſu varias res voce notarent[a]*?*

—— Since *Organs* fit, ſince *Voice* and *Tongue*,
By *Nature*'s Gift beſtow'd to *them* belong;
What wonder is it then, that *Men* ſhould frame,
And give each *different* Thing a *different* Name?
Mr. *Creech.*

The chief Deſign of *Lucretius*, in theſe Arguments, ſeems to have been to oppoſe *Cratylus* in *Plato*, who celebrates the firſt Inventor of Words, and the firſt Author of the Names of Things, as a Perſon of the higheſt Wiſdom: An Opinion which we ſhall examine by and by. And indeed thoſe who believ'd the firſt Mortals to have crawl'd out of the Earth,

Mutum & turpe pecus,

A Dumb and Dirty Herd,

could not eaſily hit on any other Account. For 'tis manifeſt, that no Languages are born with a Man, but all are learnt by Uſe and Experience. Whence it comes to paſs, that Perſons born deaf, are likewiſe dumb. And 'tis look'd on almoſt as a Prodigy, when ſuch an one is taught to ſpeak; as hath been in the preſent Age perform'd on the Brother of *Velaſco*, Conſtable of *Caſtile*; who having been deaf from his Cradle, was made to ſpeak, to write, to read, and to underſtand Authors. And an Inſtance of the like wonderful Operation was not long ſince given by Dr. *Wallis* at *Oxford*. Nor doth it look probable, that ſome one Man in the Beginning ſhould have fram'd a whole Language, with an exact Contexture of Words, and a juſt Agreement and Conformity to the Things which they were to repreſent. But 'tis the general Opinion of *Chriſtians*, founded on the Authority of the Holy Scriptures, that the firſt Language was by Almighty God immediately infus'd[b] into the Original Pair, which their Children eaſily learnt, by the Uſe and Cuſtom of hearing. And that, as for the Diverſity of Tongues, this was miraculouſly produced by the Confuſion at *Babel*. Yet ſome have doubted, whether even the Language which *Adam* ſpoke, was at firſt compleatly full and perfect, and rich enough to expreſs all manner of Conceptions; inaſmuch as the Scripture directly mentions only the Names which he ſet on living Creatures. As it is certainly true of moſt Tongues, that they were at firſt very poor, and very plain, but were enrich'd in time with Copiouſneſs and Elegance: As likewiſe that they have, in a long Courſe of Years, undergone very ſignal Alterations; and that from their Corruption and Confuſion many new ones have, within the Compaſs of a few Ages, ſprung up in the World [a].

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[a] Add. *Diog. Laert.* l. 10. p. 754. Edit. *Steph. Vitruv.* Architect. l. 2. c. 1.

[b] See Mr. *Le Clerc* upon *Gen.* ii. 23. and his Remarks upon the Critical Hiſtory of Father *Simon*, p. 422. See likewiſe the Preliminary Diſſertation upon the Bible, by Mr. *Dupin*, p. 122. Edit. *Holl.*

IV. But this is moſt clear and evident, That the Power of ſignifying determinately, thus or thus, that is, of raiſing ſuch certain Ideas in our Mind, doth not belong to Words by Nature, but ariſeth purely from the Pleaſure and the Impoſition of Men [1]; for otherwiſe no Reaſon could be given, why different Words ſhould, in different Languages, be applied to expreſs the ſame thing. Which is likewiſe true concerning the different Forms and Characters of Letters. St. *Auſtin* (*de Doctrin. Chriſtian.* l. ii. c. 24.) hath made this Obſervation on the Point; "That one Letter faſhion'd like a Croſs (X) imports one Thing amongſt the *Greeks*, and another amongſt the *Latins*; not by the Appointment of Nature, but by the Pleaſure and Conſent of Men, in fixing ſuch different Significations; and a Perſon who underſtands both Languages, when he would expreſs his Mind in Writing to a *Grecian*, uſeth this Character differently from what he doth when he writes to a *Roman*. Thus too the Word *Beta*, under one and the ſame Sound, in *Greek* is the Name of a Letter, in *Latin* the Name of a Pot-herb: And when I ſay, *Lege*, theſe two Syllables are by thoſe different People underſtood in different Senſes." See the *Art of Speaking*, by Father *Lami*, B. I. c. 14. Edit. *Amſt.* 1699. Nor is it any Preſumption to the contrary, that we believe *Adam* [2] to have given Names to the Creatures, not as it fell out by Chance, but with the higheſt Reaſon and Deſign; ſuch as were taken from the peculiar Nature of the Things, and fully and accurately expreſs'd their diſtinguiſhing Properties, ſo as that upon the firſt Sound of the Words, the Nature of each Thing might be underſtood; as *Philo* the *Jew* reports [b]. For although we ſhould grant that the Names ſet on Animals, and ſome other Things (for no Man can eaſily prove this of *all*) were ſuch as denoted their Genius and Diſpoſition, or their principal Affection; yet thoſe very *Primitives* whence theſe Names were deriv'd, ſignify merely at Pleaſure. For Inſtance, though *Adam* gave this Reaſon for the Name of *Eve*, *Becauſe ſhe was the Mother of all Living*; yet that the Word *hava* ſhould import *to live*, is abſolutely owing to Impoſition: And though in all Languages, Things allied by Nature are uſually allied in Name, there being obſerved in moſt Words of this kind, ſome Conformity of Structure, and which the Grammarians term *Analogy*; yet this is by no means conſtant and regular, many Words having very particular Ways and Methods of Variation; and even this *Analogy* it ſelf, inaſmuch as it conſiſts in a certain Inflexion and Combination of Words, is it ſelf eſtabliſh'd by human Appointment. This is the Judgment of *Quintilian* himſelf [c]; *We muſt remember* [3], ſays he, *that the Rule and Method of* Analogy *cannot univerſally be drawn, ſince in many Places it is apparently inconſiſtent with it ſelf: For* Analogy *was not, at the firſt Production of Mankind, ſent down immediately from Heaven, to teach them the due Form of Speech; but was invented after they had accuſtom'd themſelves to Diſcourſe, and had obſerv'd the particular Cadences of every Word. It is not therefore built upon Reaſon, but Example; nor is it the Law, but the Experiment and Remark of Speaking*; Analogy *being indeed the Effect of nothing but Cuſtom.*

In *Plato*'s *Cratylus* [4], the Opinion of the Perſon whoſe Name the Dialogue bears, is to this purpoſe; that *every individual Being includes in its Nature the true Reaſon of its Name*; which is vain and abſurd: *And that that is not properly the Name of a Thing, by which Men agree to call it, by uttering ſuch or ſuch a Portion of their Voice*; which in one ſenſe may be admitted for true; that is, when ſome particular Men, contrary to common uſe, impoſe odd Names on Things for the Deception of others: As in the Caſe of Jugglers, Strowlers, and Gypſies; with regard to which, *feign'd Names* are oppos'd to *true*; being fix'd on Perſons, or Things, contrary to the publick Impoſition; *but there is one and the ſame true Reaſon of Names, innate alike to the* Greeks *and* Barbarians; which Aſſertion is likewiſe falſe. *Hermogenes* in the ſame Dialogue thus delivers his Opinion on the other ſide; *I can never be perſuaded that there is any other Rule or Standard for the*

Mr. Barbeyrac's *NOTES on* §. IV.

[1] See the Art of Speaking by *P. de Lami*, Lib. 1. c. 14.

[2] This is the Opinion of *Philo* the *Jew* in the Creation of the World. For Mr. *Hertius* quotes another Paſſage here very unfitly, where he treats of the Suitableneſs of the Seventy's rendring the Original Hebrew into Greek, as *Philo* affirms, who ſays, that they have found proper Words to expreſs the Senſe of the Law of *Moſes*, Καὶ οὗτοι συντρέχοντα τοῖς πράγμασιν ὀνόματα ἐξεῦρον. From which laſt Word Mr. *Hertius* might have obſerved, that he ſpeaks of more than one Perſon, and that it ought not to be tranſlated *adinvenit*, *he* found out, but *they*, ſeeing the Sequel of the Diſcourſe can't otherwiſe be clear. The Paſſage is in the Life of *Moſes*, Lib. 2. Several of the *Rabbins*, and moſt of the Chriſtian Interpreters follow *Philo*'s Judgment; but nothing is worſe grounded. See Mr. *Le Clerc* on *Gen.* ii. 19. and *F. Malbranche* in his Enquiries after Truth, p. 387.

[3] The Latin of *Quintilian* is this, *Sed meminerimus, non per omnia duci analogiæ poſſe rationem, cum & ſibi ipſa plurimis in locis repugnet——Non enim cum primum fingerentur homines, Analogia demiſſa cælo formam loquendi dedit, ſed inventa eſt, poſtquam loquebantur, & notatum in ſermoni, quid quoque modo caderet, itaque non ratione utitur, ſed exemplo; nec lex eſt loquendi, ſed obſervatio, ut ipſam Analogiam nulla alia res fecerit, quam conſuetudo.* But here *demiſſa* is falſly printed for *dimiſſa*, which is doubtleſs a Fault in the Printing, though it is not ſet down among the *Errata*.

[4] Our Author gives himſelf liberty in theſe four firſt Paragraphs of this Chapter to enlarge upon Things very evident in themſelves, and well known; and therefore ought rather to be ſuppoſed than proved in a Work of this Nature; and here is particularly in this Place a long Confutation of ſome Reaſonings which are met with in one of *Plato*'s Dialogues. I would willingly have left it quite out, but not daring to aſſume that Power, have thought it ſufficient to let the Reader know that it is an uſeleſs Digreſſion.

Plato's Words are, Ὀνόματος ὀρθότητα εἶναι ἑκάστῳ τῶν ὄντων φύσει πεφυκυῖαν, καὶ οὐ τοῦτο εἶναι ὄνομα, ὅ, τι ἂν τινες ξυνθέμενοι καλεῖν, καλῶσι, τῆς αὑτῶν φωνῆς μόριον ἐπιφθεγγόμενοι· ἀλλὰ ὀρθότητά τινα ὀνομάτων πεφυκέναι, καὶ Ἕλλησι καὶ βαρβάροις τὴν αὐτὴν ἅπασι, Herm. Οὐ δύναμαι πεισθῆναι, ὡς ἄλλη τις ἐστὶν ὀρθότης ὀνόματος, ἢ συνθήκη, καὶ ὁμολογία, οὐ γὰρ φύσει ἑκάστῳ πεφυκέναι ὄνομα οὐδὲν οὐδενὶ, ἀλλὰ νόμῳ καὶ ἔθει τῶν ἐθισάντων, καὶ καλούντων.

[a] Comp. *Hobbes*'s *Leviathan*, c. 4.

[b] This Opinion is ill founded, as Mr. *Le Clerc* makes appear in his Notes upon *Gen.* ii. 19. See *Malbranche*'s Search after Truth, p. 387.

[c] *Inſtit. Orat.* l. 1. c. 6.

Names of Things, than Compact or Conſent: 'Tis my Judgment, that the Name which a Man fixeth on any thing, whatever it be, is true and proper; and that if he afterwards alter that Name for another, the laſt is no leſs true and right than the former; as 'tis uſual with us to change the Names of our Servants (which will hold good, provided no Prejudice be hence done to the common Agreement) *for nothing naturally hath ſuch or ſuch an Appellation, but derives it purely from the Law and Cuſtom of Speaking.* What *Socrates* diſputes on the ſide of *Cratylus*, doth by no means turn the Cauſe; thus for Inſtance, when he ſcouts it as an Abſurdity, *If I ſhould give the Name of a Horſe to what we commonly call a Man, it would follow, that the ſame thing might be truly ſtiled, A Horſe and a Man.* It may be anſwer'd, in ſhort, that Words of publick Uſe derive all their Force from publick Impoſition, which private Perſons ought not, to its Prejudice, to contradict; as we ſhall ſhew more at large hereafter. Again, that Argument of his is no better than a Fallacy; *If a whole Propoſition may be falſe, therefore a part of it, as ſuppoſe, the Noun, or Name of a thing, may be likewiſe falſe.* For a ſingle Word is not capable of that Falſity, which we ſometimes diſcover in entire Propoſitions. The long Diſcourſe he afterwards makes about the Propriety of Terms, will only hold in ſome Derivatives, but not in Primitives. And ſince the ſame things are in different Countries expreſs'd by different Words, it likewiſe frequently happens, that Words which ſignify the ſame thing, have an *Etymology* utterly diſtinct. Thus Θεὸς the *Greek* Name for *God*, is deriv'd from Θέειν *to run*; becauſe the Stars which are perpetually *running* their Courſe, were look'd on as Gods by the Antients: But what Affinity is there in the *Latin* Tongue between *Deus* and *Curro?* So Man is in *Greek* term'd ἄνθρωπος, *quaſi* ἀναθρῶν ἃ ὄπωπε, from *conſidering* or *contemplating the Objects which he beholds.* But muſt we therefore ſay, that *homo* in *Latin* comes from *contemplatio?* The Soul in *Greek* is named ψυχὴ from ἀναψύχειν, *to cool or refreſh*: But is *refrigeratio* in *Latin* for this Reaſon, the Theme of *Anima?* And the ſame may be ſhewn in any other Inſtances. In ſhort, however diligent any Perſon may be in tracing Etymologies, and aſſigning the Reaſons of Words, yet when he hath gone as high as he can, to the primitive and ſimple Terms, he will be forc'd to acknowledge, that they are purely owing to Impoſition[a]. What can be more ridiculous, than that of *Socrates*, when, in the Diſputation of which we have been ſpeaking, he is required to give a Reaſon for the Words πῦρ and ὕδωρ, he can ſay nothing elſe, but that they owe their Original to the *Barbarians?* Indeed he himſelf confeſſeth, that there can be no farther Queſtions or Anſwers, about Reaſons and Derivations, when we are once arriv'd at the *firſt Element of both.* Though he afterwards is very ingenious to no purpoſe, in tracing out the Reaſons even of primitive Words: And yet after all, when he hath argued ſo long, in all Appearance, for *Cratylus*'s Opinion, he at laſt fairly doubts on the whole Matter.

Soſipater Chariſius *[b] the Grammarian, thus diſcourſeth out of *Varro*, *The* Latin *Tongue is made up of Nature, Analogy, Cuſtom, and Authority. The Nature of Verbs and Nouns is immutable, and delivers to us neither leſs nor more than what is receiv'd. Thus if a Man ſhould ſay* ſcrimbo *inſtead of* ſcribo, *he would be convinced, not by the Power and Virtue of Analogy, but by the very Conſtitution of Nature*[c]. But we muſt confeſs our ſelves at a loſs to find out this Neceſſity of Nature, unleſs it be ſaid, that the *Latin* Tongue having in it an extraordinary Sweetneſs, wonderfully agreeable to the Ear, it muſt hence come to paſs, that we reject, at the firſt hearing, any harſh and untunable Conjunction of Letters in that Language[d]. *Arnobius* †[e] ſpeaks excellently to this Point; *No way of Speaking*, ſays he, *is by Nature either true and right, or falſe and improper: For what natural Reaſon can be given, or what Law, in the general Conſtitution of the World, that we ſhould ſay,* hic paries, *and* hæc ſella? *Since neither do thoſe things admit of different Sexes, ſo as to be diſtinguiſhed by the Maſculine and Feminine Genders; nor can the moſt learned Critick inform me of the Original Reaſon and Meaning of theſe Terms,* hic *and* hæc; *or why the firſt ſhould be applied to the Male, and the ſecond to the Female Sex. All this proceeds from the arbitrary Appointment of Mankind.*

Grotius[f] rightly rejects the Opinion of thoſe who make this to be the difference between *Things* and *Words*, that the latter are naturally the Signs of our Thoughts, the former not. Indeed if the Meaning of the Aſſertion be no more than this, that Words were inſtituted for no other end, but to be the Signs of our Conceptions, and that therefore their whole Nature and Eſſence conſiſts in their Power of ſignifying; whereas when *Things* are uſed for Signs, this is merely extrinſical and accidental to them; we ought then by all means to admit it as true. But if it be intended in this Senſe, that the Power of ſignifying ſuch or ſuch a particular Matter inheres naturally in Words, but not in Things, the Poſition is falſe and groundleſs. And on the contrary it is true, that Words naturally, and without reſpect to human Impoſition, ſignify nothing at all, unleſs it be ſome ſuch confuſed and inarticulate Sound as we make uſe of in Sorrow, or in Laughter, which ought rather to be call'd *Noiſe*, than *Speech.* If the ſaid Notion be thus explain'd, that ſuch is the Nature of Man above all other Animals, that he can ſignify to others the Conceptions of his Mind, and that Words were invented to be the Inſtruments of Communication, then the Aſſertion is true, but not compleat: For it ſhould be added, that theſe Diſcoveries are conveyed, not by Words alone, but by Nods and other Motions. As we find ſeveral dumb Perſons who are able to expreſs their inward Conceptions after a very ſurprizing and artificial manner. Hence, in the *Roman* Law [a], thoſe who have not the Gift of Speech, are yet ſuppoſed to ſay thus or thus, *By that Striving and Straining which they uſe, and that Sound and inarticulate Voice which is utter'd by them.* And 'tis a Rule in the ſame Law [b], That dumb Perſons may contract Matrimony, by *mutual Conſent, without Words*; that is, it ſhall be ſufficient if they expreſs their Agreement by dumb Signs. Nay *Pliny* [c] tells us of ſome Nations of *Ethiopia*, who had no other Speech amongſt them, beſides theſe Geſtures and Motions of the Body [d].

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* His Words are, *Latinus ſermo conſtat natura, analogia, conſuetudine, authoritate; natura verborum nominumque immutabilis eſt, nec quicquam aut plus aut minus tradidit nobis, quam quod accepit. Nam ſi quis dicat ſcrimbo, pro eo quod eſt ſcribo, non analogiæ virtute, ſed naturæ ipſius conſtitutione convincitur.*

† *Arnobius*'s Words are, *Nullus ſermo natura eſt integer, vitioſus ſimiliter nullus. Quænam enim eſt ratio naturalis, aut in mundi conſtitutionibus Lex ſcripta, ut hic Paries dicatur, & hæc Sella? Cum neque ſexus habeant fœmininis generibus, maſculiniſque diſcretos, neque quiſquam docere doctiſſimus me poſſit ipſum hic & hæc quid ſint, aut cur ex his unum ſexum virilem deſignet, fœmininis generibus id quod ſequitur applicetur. Humana iſta ſunt placita.*

[a] To this we may add the Remark of *Quinctilian*, Inſtit. Orat. l. 1. c. 6. p. 64. Edit. *Lugd. Bat.* Shall it be affirm'd likewiſe, that Man took his Name of *Homo*, becauſe he was, *Humo natus*, born of the Earth? As if all Animals had not the ſame Original! Or, as if thoſe Primitive Mortals firſt ſet a Name upon the Earth, and then upon themſelves!

[b] *Inſtitut. Grammat.* l. 1. *ex Varrone.* [c] We meet with the ſame in *Diomedes*, l. 2. [d] Vid. *Huart.* Tryal of Wits, c. 11. The Reaſon alledg'd by *P. Nigidius*, to prove that Words ſignify according to Nature, in *Aul. Gell.* l. 10. c. 4. is altogether vain and frivolous. [e] Lib. 1. *adverſ. gent.* p. 45. Edit. *Pariſ.* 1605. [f] Lib. 3. c. 1. ſ. 8.

To the ſame Head belong thoſe Marks and Characters which do not denote Voices or Words, but immediately the very Things themſelves. And this, either upon account of ſome Agreeableneſs which they bear to the things repreſented; as in moſt of the *Egyptian Hieroglyphicks*; or becauſe the Impoſition of Men hath inveſted them with ſuch a Power, as in the *Chineſe* Characters, by which they expreſs entire Notions and Sentences.

It may not be inconvenient to remark ſomewhat concerning that kind of Impoſition, by which ſuch a peculiar or proper Name is affix'd to Perſons, Places, and ſome other Things; the Deſign of which is, that one Man, one Place, one City or Country, may be diſtinguiſhed from another; and that by theſe Marks there may be a mutual Underſtanding between Men, in determining their Words or Actions. Now as the proper Terms of other things follow the manner of appellative, or common Nouns, ſo with regard to the proper Names of Men, it is to be obſerv'd, that the Power of impoſing them uſually belongs to thoſe who have others under their Authority and Government: Thus Parents are wont to give Names to their Children, Maſters to their Slaves and Vaſſals, and Princes to thoſe of their Subjects, on whom they confer any ſignal Honour. In caſe this Office be omitted by thoſe Superiors who have ſuch a right to perform it; or in caſe many have been inveſted with the ſame Title, it ſhall be lawful for every Perſon to take upon himſelf ſome Term and Note of Diſtinction: But as no Man ought to aſſume another Name [5], when by ſuch an Act of his, the general End of impoſing Names may be intercepted and hindred; or when upon this Alteration, any Damage or Prejudice, or any probable Danger and Suſpicion of it, is likely to accrue to another Perſon; ſo neither ought any Man to hide or diſſemble his true Name; unleſs in ſuch a Caſe, when by this Concealment we do not prejudice the Rights of others, and yet procure ſome Advantage to our ſelves, or effect our Deliverance from Loſs or Danger; according to thoſe Rules which we ſhall hereafter deliver about the Obligation to ſpeak Truth. Add. *Valer. Max.* l. ix. c. *ult.* and l. vii. c. 3. n. 8, 9. See the Oration of *M. Anton. Majoragius* on the ſame Subject, and *Caſaubon* ad *Baron.* Exercitat. XIII. n. 13.

V. As all Signs, except thoſe which we call *natural*, denote ſome determinate thing by virtue of human Impoſition, ſo this Impoſition is attended with a certain Agreement, Conſent, or Compact, tacit or expreſs; from the Force of which [1] there ariſeth a Neceſſity of applying ſuch a Sign to ſuch a particular thing, and to none elſe. The like Covenant muſt be ſuppoſed in relation to all thoſe *Things* which we uſe for *Signs*, whatever Account we follow of the Origin of human Speech. For although we conceive the primitive Languages to have been immediately infuſed into Men, yet ſince each Perſon ſeparately enjoy'd his Power of Diſcourſe, and could uſe it freely as he pleas'd, by applying any Words to any Things; this Faculty would not have obtain'd its proper End and Uſe, unleſs an Agreement had paſs'd between Men, that each Party ſhould exerciſe their Talent in the ſame uniform manner, and conſtantly expreſs the ſame Things by the ſame Words [2]. For ſince he who is placed in a State of natural Liberty, doth not hold his Powers at the Beck and Controul of others, but hath the Privilege of uſing them as his own Judgment ſhall direct, another Perſon would have no manner of Right to require of me, that I ſhould apply my Powers in ſuch a particular way [3], and

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[5] Nor Sirname, which may have the ſame Effect: For both of them are forbidden by the *Roman* Law, under pain of ſuffering the ſame Puniſhment, as they who are found guilty of Fraud. *Falſi nominis vel cognominis adſeveratio pœna falſi coercetur*, Dig. l. 48. tit. 10. *De Lege Cornelia de falſis*, &c. Leg. 13. *princ.* See the Notes of *Dion. Gothofred.* on it.

Mr. Barbeyrac's *NOTES on* §. V.

[1] It is more probable, that the Signification of Words is ſettled by a bare Conſent, where there is no Obligation to conſider it in it ſelf. For, 1. Men never met together to agree upon the preciſe Signification of Words, or Rules of Speech. It came to paſs inſenſibly, and without any Reflection; neither was there any tacit Agreement properly ſo called. We may every Day diſcern new Words, Expreſſions, and Turns of Speech to come into uſe, which put a new Senſe upon the Terms already received. And how comes it to paſs that they are practiſed by others? No Man pretends to lay any Obligation upon them, farther, than as they ſerve to convey the Truth from one to another in Converſation. 2. If the Signification of Words were ſettled by any obligatory Agreement, either expreſs or tacit, the leaſt Change, contrary to common Uſage, would make it criminal, though no Man received any Damage by it, which none will dare to maintain, and which is daily confuted by our uſual Practice, which all muſt own, and which on the contrary ſerves marvelouſly to ſet off and enrich all Languages. This is what Mr. *Titius* ſays very near, *Obſerv.* 245.

[2] This proves well enough the Neceſſity of a bare Conſtitution, but not of an obligatory Conſent. The Obligation, which reſpects the uſe of a Word, depends upon other Principles, as will appear from what is ſaid, §. 7, *&c.* both in the Text and Notes. Whenever we are obliged to ſpeak and manifeſt our Thoughts clearly, we ought to follow the common Uſage, and chooſe the moſt ſuitable Terms; but in any other Caſe we may put a different Senſe upon Words, which is not uſed, and ſpeak in Terms clear contrary to what we think, which could not be done, if there were any Agreement, either open or tacit, which accompanied the Inſtitution of Language.

[3] It is in the Latin, *the ſame Faculties* or *Powers*. But good Reaſoning, and what the Author adds, That their Thoughts may be underſtood by that Means, ſhew, that he would, or ought at leaſt to have placed that Word at the end of the Sentence, which he ſpeaks at the beginning, of the Faculties of Men in general, although, in my Opinion, he expreſſes himſelf unfitly in all the Editions.

[a] Lib. 33. tit. 13. *D. de Supell. leg.* 7. [b] Cap. 25. X. *de Sponſal.* [c] N. H. l. 6. c. 30. [d] Add. *Quinctilian*, l. 11. c. 3. *Inſtit. Orat.* Of the Marks or Signs uſed by the *Peruvians* under their *Yncas*, ſee *Garcilaſs de la Vega*, l. 6. c. 9.

no otherwiſe, ſo as to enable him to apprehend my Thoughts and Intentions, unleſs we had before ſettled this Point by ſome Pact between us: The full Extent and Force of which Pact is this, that altho' Signs do not inform us of the Minds of others by an infallible, but only by a probable Certainty, Men being naturally capable of Diſſimulation and Diſguiſe. (To this purpoſe the Saying of *Archidamus* in *Plutarch*, Apophth. *Lacon.* p. 219. B. Edit. *Wech.* is obſervable: *A Sheep always uſeth the ſame Tone* [*]; *but a Man hath the Art of varying his Expreſſion and Addreſs, till he carries his Deſign.* *Moſchus* Idyll. i. v. 8, 9. Κακαὶ φρένες, &c.

——The Fouleſt Heart, the Faireſt Tongue:
His Mouth belies his Mind——)

Yet that which any Perſon hath expreſs'd by theſe Signs, ſhall be preſumed to be his ſerious purpoſe. And therefore as to Matters of *Right*, the Effect ſhall follow the Conſent of the Party, as by Signs declar'd; though perhaps his inward Thoughts and Reſolutions were really different from theſe outward Indications [a]; for otherwiſe the Uſe and Deſign of ſuch general Marks would be utterly fruſtrated. But the mutual Communication of good Offices amongſt Men could not be exercis'd, unleſs they had ſome certain Information of the Wants and Wiſhes of each other; and ſince the Condition of human Nature would not allow this to be convey'd in any other way than by Signs ſtriking upon the Senſes; therefore the uſe of thoſe Signs was by ſome ſettled Compact to be ratified and circumſcribed, that every Perſon might clearly apprehend what Service or Aſſiſtance was deſired of him by others [4].

VI. This Compact and Agreement about the Uſe of Signs, and eſpecially of Words, is either *general*, or *ſpecial*. The former is ſuppos'd to paſs between Men who ſpeak the ſame Language, engaging them to expreſs particular Things, and principally thoſe which belong to daily Intercourſe and Commerce, by ſuch certain Words as the Uſe of the preſent Times will approve and authorize: For 'tis this Uſe,

Quem penes arbitrium eſt & jus & norma loquendi,

And at the Will of which,

Multa renaſcentur quæ jam cecidere, cadentque
Quæ nunc ſunt in honore vocabula——

Uſe may revive the obſoleteſt Words,
And baniſh thoſe that now are moſt in Vogue;
Uſe is the Judge, the Law, and Rule of Speech.
My Lord *Roſcommon* [b].

There arc, ſays *Sextus Empiricus* [c] [1], *and were, and ever will be, various Alterations and Revolutions of Words; for the Age is ſtill delighted with Change; and not more in Plants and Animals, than in Speech.* And the ſame Author [d] hath this admirable Remark to the ſame purpoſe [e]: *As in a City or Country, he who is contented to take the Money that commonly paſſeth, may live under that Government, and buy and ſell, drive Bargains, and Trade without Moleſtation or Hindrance; but he who will not comply with the Coin ordinarily current, but frames a new kind according to his own Fancy, and offers it in Payment, is manifeſtly out of his Senſes; ſo in Life, he who will not follow the common Speech (like the common Coin) when eſtabliſh'd by Uſe and Cuſtom, but invents a new Language peculiar to himſelf, is not many Degrees remov'd from a Madman.* Indeed, that ſuch a Compact is abſolutely neceſſary, appears from hence; that Men could receive no manner of Uſe or Benefit from Speech, unleſs the Parties ſpeaking were mutually underſtood. *We are all deaf*, ſays *Tully* [e], *in thoſe Languages with which we are not acquainted.* And ſo [f] *Ovid* complains in his Baniſhment,

Barbarus hic ego ſum, quia non intelligor ulli,

Not underſtood, I'm a *Barbarian* here.

We may obſerve farther, that as moſt Tongues are varied by Dialects, ſo it often happens that Words of the ſame Tongue have in different Places different Significations: The Meaning and Importance therefore of ſuch Words ſhall be determin'd by the Cuſtom of the Place where the Buſineſs is tranſacted; unleſs it ſhall appear that the Stranger hath not yet agreed to quit his own native Phraſe, to conform to the Idiom of the other Party. And thus too there are ſeveral Words which in ſome Places and Times are look'd on as ſcandalous and reproachful, in others not. Of this the Name of *Tyrant* is a known Inſtance. In the ſame manner, the Term of *Barbarian*, which the *Greeks* and *Romans* held to be ſo diſgraceful, the *Gothic* King *Theodoric* frequently applies to his own Nation. And in *the Law of the* Burgundians, *Barbari* is very of-

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[*] The Greek is, Πρόβατον μὲν ἀεὶ τὴν αὐτὴν φθέγγεται φωνὴν, ἄνθρωπος δὲ πολλὰς, καὶ ποικίλας, ἕως ἂν τὸ δόξαν ἐπιτελέσῃ.

[4] On this Occaſion we may obſerve by the bye, that we find the People of *Cuma* obtaining leave to uſe the Latin Tongue in common Talk, and to have their Sales proclaim'd in it, after their humble Petition for this Privilege, *Liv.* l. 40. c. 42. Tho' generally the *Romans* appeared to have been very ambitious of ſpreading their own Language, without being ſolicited to that purpoſe. Vid. *Valer. Max.* l. 2. c. 2. ſ. 2.

Mr. Barbeyrac's *NOTES* on §. VI.

[1] His Words are, Καὶ μὲν παντοῖαι γίνονται τῶν φωνῶν μεταβολαὶ, καὶ περὶ τοῦ γεγόνασι, καὶ εἰσαῦθις γενήσονται, φιλομετάβολον γάρ τι ἐστὶν ὁ αἰὼν, οὐκ εἰς φυτὰ μόνον, καὶ ζῶα, ἀλλὰ καὶ εἰς ῥήματα.

[3] The Greek is, Ὥσπερ γὰρ ἐν πόλει νομίσματός τινος προχωροῦντος κατὰ τὸ ἐγχώριον, ὁ μὲν τούτῳ στοιχῶν δύναται καὶ τὰς ἐν ἐκείνῃ τῇ πόλει διεξαγωγὰς ἀπαραποδίστως ποιεῖσθαι, ὁ δὲ τοῦτο μὲν μὴ παραδεχόμενος, ἄλλο δὲ τι καινὸν χαράσσων ἑαυτῷ, καὶ τοῦτο νομιτεύεσθαι θέλων, μάταιος καθέστηκεν, οὕτω κἂν τῷ βίῳ ὁ μὴ βουλόμενος τῇ συνήθως παραδεχθείσῃ, καθάπερ νόμισμά τι, ὁμιλίᾳ κατακολουθεῖν, ἀλλ᾽ ἰδίαν αὐτῷ τέμνειν, μανίας ἐγγὺς ἐστιν.

[a] Add. *Grot.* l. 2. c. 4. ſ. 3. [b] *Horat.* A. P. v. 70, &c. *Quinctilian*, Inſtit. Orat. l. 1. c. 6. p. 60. Edit. *Lugd. Bat.* † To retain Words that have been long aboliſhed and abrogated, is a Mark of Inſolence, and of Vain-boaſting in Things of no Importance. Add. *Gell.* l. 1. c. 10. [c] *Adverſ. Mathemat.* l. 1. c. 3. p. 17 Edit. *Genev.* [d] Ibid. c. 10. [e] *Tuſc. Queſt.* l. 5. c. 40. [f] *Triſt.* 5. *El.* 10. v. 37.

‡ The Author's Words are, *Sed abolita atque abrogata retinere inſolentiæ cujuſdam eſt, & frivolæ in parvis jactantiæ.*

ten the Style which thoſe People beſtow on themſelves. It is here likewiſe worthy to be conſider'd, that moſt Terms of Speech, beſides their principal, have a kind of acceſſory [4] or additional Signification, by which we at the ſame time expreſs our Judgment, Paſſion, or Eſteem. And this is the reaſon, that of many Words which as to their main Importance exactly fall in with each other, ſome are opprobrious and injurious, others not; becauſe this additional Signification is found in ſome, and not in the reſt. Thus if I give a Man *the Lye*, I not only ſignify that his Speech is diſagreeable to his Thought, but farther denote, that he did this with an ill Intention, and on account of procuring my Prejudice or Hurt. And 'tis on the ſcore of this latter Indication that the Words are look'd upon as contumelious and injurious. So if I call any Perſon an *Impoſtor*, or an *Ignoramus*, I affront him; becauſe thoſe Names, beſides their proper meaning, include, by the bye, ſomewhat of Contempt and Reproach: Whereas there are many other Words, by which I may, without any ſuch Affront or Abuſe, ſignify myſelf to have been hurt by another, or ſhew that another is ignorant of ſome things; and which conſequently ſhall only declare the direct Senſe, without any ſuch Indication of Diſgrace. Sometimes this *additional Mark* ariſeth, not from the general Impoſition of Men, but from the Tone of the Voice (which is different according as we either teach and admoniſh, or flatter and court, or chide and reprove) from the Lines of the Face, from particular Geſtures, and other natural Signs, which are wont very conſiderably to alter, diminiſh, or increaſe, the principal Signification of Words. And thus too a figurative Speech very often denotes ſome Paſſion in the Speaker, whereas a plain Expreſſion barely imports the thing aſſerted: *Uſque adeone mori miſerum eſt*[a]? denotes no more than if we ſhould ſay barely, *non eſt uſque adeo miſerum mori*; becauſe it includes a Contempt of Death. From the ſame *acceſſory Meaning* it comes to paſs, that ſome Words are accounted obſcene, others not; tho' as to the main they ſignify the ſame thing; nay, tho' the thing be not really in itſelf foul or indecent. The reaſon of which Difference ſeems in part to be this; that ſince ſome Words expreſs a Thing or an Act more looſly and generally, others in a more diſtinct manner, and with particular Circumſtances; therefore he who makes uſe of the latter ſort, at the ſame time betrays his Luſt, with regard to ſuch a Thing or Act, and diſcovers a Satisfaction and Approbation which a Man of Virtue and Breeding would be aſham'd of. Sometimes too the Obſcenity of Words proceeds from hence, that they either denote a Contempt of the Thing ſignified, or elſe are uſed only among the baſer People, or towards ſuch to whom we owe no Reverence or Reſpect[b]. *Caſaubon*, in his Comment on *Perſius*[c], hath diſputed at large, whether it be allowable to apply obſcene Words even to the Reproof and Correction of Vice, which is the ordinary Practice of ſatyrical Writers.

Thoſe Words are grounded on *ſpecial Compact*, which either have been inveſted with a peculiar Signification, different from what they bear in common Uſe, or which are utterly unknown to the ordinary Methods of Speech. Of which kind are all thoſe *Terms of Art*, uſed by Mechanicks, and others; which on account of either the Multiplicity and Confuſion of Things, or the meer Pleaſure of the Authors, have either been invented a-new, or apply'd to another Meaning than what they obtain'd in vulgar Diſcourſe. Now that no Man may be deceiv'd by theſe Terms, amongſt Perſons who underſtand the particular Art, the very Nature of the Buſineſs in hand will be a ſufficient Caution and Security. And amongſt the unskilful they ought to be explain'd and limited by common Words. Which Explication and Settlement is likewiſe neceſſary, when either Artificers differ about the uſe of their Terms; or when any Perſon for ſome particular Reaſons thinks fit either to coin new Words, or to fix a new Senſe on old ones[d]. Some few Perſons in Confederacy may, and often do frame to themſelves peculiar Words and Marks of Things, or put a different Signification on vulgar Terms, ſo as to be underſtood by each other, and by none beſides. (And how far this Practice is lawful, will appear from the Sequel of our Enquiry.) In which Point it is enough, if thoſe Words or Marks rightly diſcover my Mind to thoſe, with whom I have thus enter'd into a particular Covenant about their uſe: And this holds too in other Signs, determin'd by the peculiar Impoſition of certain Men. Amongſt theſe the principal are the military Tokens and Signals of War; of which *Silence* itſelf hath been ſometimes uſed for one. Thus in *Polyænus*[e] the *Arcadian* General undertaking by Night to ſurprize the *Spartans* at the *Togæa*, gave his Soldiers no other Sign but this, That they ſhould kill all who ask'd for any Sign. The *Arcadians* therefore were ſilent; but the *Spartans* not knowing their Fellows in the dark, and ſo demanding the *Word*, were ſlaughter'd by the Enemy. And ſo *Pammenes*, in the ſame Author[f], put a Cheat upon his Enemies by altering the Signal of the Trumpet, and quite inverting the ordinary Method and Uſe; commanding his Men to fall on when a Trumpet ſounded a Retreat, and to retire when it ſeem'd to call them to a cloſe Engagement.

VII. But we muſt carefully obſerve, that altho' by this general and ſpecial Compact we are bound to uſe our Words and other Signs in the manner that hath been agreed upon; yet we are not hereby in the leaſt oblig'd to open and diſcover our Minds to all Perſons. To which may be apply'd the Saying of *Apollonius Tyanæus* (in *Philoſtrat.* l. iv. c. 11. p. 191. Edit. *Par. Morel An.* 1608.) Palamedes *invented Letters, not only for the ſake of writing, but likewiſe that Men might come to the Knowledge of thoſe things which were not to be written.* But to effect this, it is neceſſary that another Obligation be added, ariſing either from ſome particular Covenant, or from the general Command of the Law of Nature: Or laſtly, from the Quality and Condition of the Buſineſs which is at preſent to be tranſacted by Speech [1]. Thus, for inſtance, if I undertake to be an Inſtructor to any Perſon, I am engag'd (by the Contract *of Letting*

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[4] Our Author hath taken all this from *The Art of Thinking*, Part I. c. 14. where we may find the Reflection better managed. I do not know why he did not quote the Book, ſince he is not ſparing of Citations.

[a] *Virgil.* Æn. 12. v. 646.

[b] *Vid.* Ciceron. *Epiſt. ad Famil.* IX. 22.

[c] *Sat.* 4. *p.* 342

[d] Add *Bacon's* Advancement of Learning, *l.* 3. *c.* 4. in the beginning.

[e] *Stratagem.* l. 1. c. 11. & l. 5. c. 16.

[f] *Lib.* 5. c. 16.

Mr. Barbeyrac's *NOTES on* §. VII.

[1] To explain this Matter diſtinctly, we are to obſerve, that Speech, as all other Actions of an indifferent Nature, is to be govern'd by three great Principles of Duty, of which we have ſpoken before, but muſt now repeat them, *viz.* Religion, Self-love, and Society. I. When we ſpeak to God, we muſt always ſpeak the Truth freely. This is evident of itſelf, tho' our Author proves it briefly in the beginning of §. 10. Nor may we ever abuſe our Speech, when we ſpeak to Men, to the Diſhonour of God. See what I have ſaid after our Author in *Note* 2. upon *Lib.* 2. *Chap.* 4. §. 3. II. When we make uſe of Speech in behalf of ourſelves, either to ſecure or defend ourſelves, or to procure ourſelves ſome innocent Advantage, which neither entrenches upon the Glory of God, or the Rights of our Neighbour. In this Caſe 'tis not only permitted, but expreſly ordain'd by the Law of Nature, either to ſpeak the Truth, or be ſilent; or to feign and diſſemble, as a lawful Defence of ourſelves, or our innocent Advantage requires. III. The Duties of Society oblige us alſo, either to ſpeak the Truth plainly, or be ſilent, or feign and diſſemble, if by that Means we can either do good to others, or avert the Danger which threatens them, without doing any thing contrary to the Glory of God, or to the Damage of any Man. Thus, as our Author ſpeaks, *Lib.* 2. *c.* 3. §. 4. we muſt give Counſel faithfully to them that deſire it, and ſhew them the right way, who are out of it. But on the contrary, we muſt be ſilent in things which may be prejudicial to any Perſon when ſpoken, either as to their Perſon, Goods, or Reputation. Thus if a mad Man running after another with a Sword in his Hand to ſlay him, asks us which way he went, we may not only, but we ought to ſhew him another way than that which the Perſon purſued took to ſave himſelf. And I can't think that any Man will dare to maintain the contrary. By the ſame Reaſon the wiſe Midwives of *Egypt* did very well to find out ſo good an Excuſe to *Pharaoh*, as we may ſee by the Reward God gave them. In ſhort, the greateſt Abuſe of Speech is, without Contradiction, this, To make it an Inſtrument of Damage to another. See §. 15. following. Hence it follows, that Men ought above all things to act ſincerely in Bargains, and keep their Word inviolably when they have made a ſerious Engagement. Moreover, we ought to remember what I have elſewhere obſerv'd, that when the Duties of Society and Self-love are equally concern'd, theſe laſt ought to be follow'd, and ſo we may lawfully uſe our Speech for our own Advantage rather than any others. This is grounded upon Mr. *Titius*'s *Obſerv.* 248, *&c.* tho' his Opinion is not a whit the leſs ſingular. It is certain, that, as *Grotius* has obſerv'd, *Lib.* 3. *c.* 1. §. 9. moſt of the Heathen Philoſophers and Antient Chriſtians believed with St. *Auguſtin*, That whatever may be call'd a *Lye*, is always unlawful, altho' that Matter be not well explain'd, as our Author has done after *Grotius*. And ſince theſe two famous Works have appear'd in the World, very few, who have been converſant in the Study of Natural Right, but have embraced their Notions. See, for example, Mr. *Thomaſius*, *Juriſprud. Divin.* Lib. 2. c. 8. Mr. *Buddeus*, *Elem. Phil. Pract.* Part. II. Sect. 6. §. 3, *&c.* Mr. *Fabricius* in a Note upon the falſe *Abdias*, which makes a part of the Apocrypha of the New Teſtament; Mr. *Noodt De Forma emend. doli mali*, &c. c. 3. and ſeveral other famous Writers. I might alſo alledge a great Philoſopher of our Time, who had not occaſion to explain this Point in his Writings, but he does not treat of it with Authority, wherefore I ſhall come to examine their Reaſons. Thoſe that maintain, that all Speech which is utter'd contrary to our Thoughts, is eſſentially faulty, ought to alledge good Proofs for it, taken either from the Nature of the Thing, or from ſome convincing Paſſage of Scripture. 1. As to the Nature of the Thing, I have not yet ſeen any thing ſatisfactory produced. Our Author proves it well; and I will examine in a few Words the new Hypotheſis of a modern Author in *Note* 2. on §. 10. All that has hitherto been ſaid with any ſhew of Reaſon, may be reduced to theſe two or three Difficulties, which are not hard to be reſolved. The firſt is this, If the Opinion, ſay they, that allows Men to feign and diſſemble upon certain Occaſions, either in Deed or Word, be once received, all Confidence in one another muſt be baniſh'd from the Earth, and by conſequence all Society deſtroy'd. For a Man can't open his Mouth, or do the leaſt Thing; but it will be firſt demanded of him, Whether he does not believe, that he may in that caſe do otherwiſe than he thinks? But this Argument ſeems to be built on a Suppoſition entirely falſe, *viz.* That the Confidence by which our Dealings in this Life are maintain'd, is grounded only on this Perſuaſion, that they who ſpeak, ought to ſay or do nothing but what anſwers exactly to their Thoughts, their own Conſcience being Judge. For Experience and the Knowledge of the World prove the contrary evidently. I own, that Profeſſed Liars, Natural Diſſemblers, Falſe Dealers, or Slaves to vile Intereſt, in a word, all thoſe whoſe Honeſty is dubious, are not proper Objects of our Confidence, and we ought not to truſt them, but with very great Caution, if they ſhew that they believe that one may lawfully ſometimes ſpeak contrary to Truth, or profeſs, that they believe it always allowable. But when we have to do with honeſt Men, we put not the leſs Confidence in them becauſe we know they may uſe an innocent Feint or Diſſimulation, and becauſe we have ſeen them uſed ourſelves in certain Caſes with good Reaſon for their own particular Advantage, or that of their Parents and Friends. As every one is willing to have that Liberty, ſo he readily grants it to others; and he can't refuſe it them, or impute it to them as a Crime, without being accounted, and that juſtly too, unreaſonable and fooliſhly nice. But, ſay they, the Benefit which may be obtain'd by a Lye will vaniſh into nothing, if we once teach that a Lye is allowable. For a Lye can be of no Advantage but upon this Suppoſition, that they to whom we Lye, believe that we do not Lye, and that we make a Conſcience of ſpeaking the Truth. If there be an Occaſion offer'd wherein 'tis lawful to Lye, 'tis to adminiſter a Medicine to a ſick Perſon that may ſave his Life. But ſuppoſing that we are taught that Phyſicians are exempted from ſpeaking Truth upon that Occaſion, it will happen that they will not be believed, tho' they ſpeak Truth; and ſo we ſhall fall into Inconveniencies infinitely greater than thoſe which we endeavour to avoid, by allowing them ſometimes to Lye. Either the ſick Perſon believes that the Phyſician will not Lye, or at leaſt that he may as well ſpeak the Truth; but how can he believe the firſt, if he knows that upon ſuch Occaſions he may Lye? And will not the Doubt keep him from taking the Medicine preſented to him? To this I anſwer, that all this is made evidently falſe by Experience. Whatever rigid Divines and Caſuiſts may ſay, 'tis certain, that there are a thouſand little Lyes, which almoſt all the World believe allow'd, and which nevertheleſs fail not to produce their Effect. When one is in general perſuaded that others are innocent, he is not always upon his guard to examine upon every Occaſion particularly, whether the Perſon we have heard may not have reaſon to perſuade us that a Thing is falſe, which is not. We are not ſo ready to diſtruſt one another when we have no Cauſe of Suſpicion; and there is ſcarce any Man, who, tho' he has been innocently deceived by his Phyſician or Friend, will not nevertheleſs believe them again upon the like Occaſion, if they know how to take him aright, and behave themſelves well. He may perhaps doubt a while after, but the firſt Impreſſions, and the innocent Artifice, when it has had effect, is ſoon forgotten; but if ſometimes it is not ſucceſsful, it only proves that there were not good Meaſures taken, or that ſome Circumſtances render'd the Thing unprofitable, but that proves not that it was unlawful and criminal in itſelf. Some object farther, that if to ſpeak contrary to a Man's Thought is an Action of like Nature with local Motion, and other outward Actions, which having nothing unlawful in themſelves, may become good or evil, according to the different Intentions by which they are done, there will be no evil to make uſe of that Means for our moſt vile and trifling Intereſts, as if I deſire a Pin when it is neceſſary, or ſtoop to take it up when I ſee it lie upon the Boards of my Chamber, nothing hinders but that I may tell a Lye to get it, provided I do no Man any wrong by it. But this Conſequence does not ſeem to be well drawn. For the uſe of Speech is not only guided by Juſtice, Humanity, and Charity, but alſo by Maxims of Prudence. For no wiſe Man will have recourſe to the leaſt Diſguiſe, but in Caſes of Neceſſity. Let us hear a pleaſant antient Writer upon this Subject, whom neither *Grotius* nor our Author have quoted. Οὐδὲ περὶ τούτων λέγω, ὁπόσοι τῆς χρείας ἕνεκα ψεύδονται, συγγνώμης τοιγαροῦν οὗτοί γε μᾶλλον καὶ ἐπαίνου τινὲς αὐτῶν ἄξιοι, ὁπόσοι ἢ πολεμίους ἐξηπάτησαν, ἢ ἐπὶ σωτηρίᾳ τῷ τοιούτῳ φαρμάκῳ ἐχρήσαντο ἐν τοῖς δεινοῖς, οἷα πολλὰ, καὶ Ὀδυσσεὺς ἐποίει, τήν τε αὑτοῦ ψυχὴν ἀρνύμενος, καὶ τὸν νόστον τῶν ἑταίρων, ἀλλὰ περὶ ἐκείνων, ὦ ἄριστε, φημὶ, οἳ αὐτὸ ἄνευ τῆς χρείας τὸ ψεῦδος περὶ πολλοῦ τῆς ἀληθείας τίθενται, ἡδόμενοι τῷ πράγματι, καὶ ἐνδιατρίβοντες ἐπ' οὐδεμιᾷ προφάσει ἀναγκαίᾳ, *Lucian in Mendac. vel Incredul. in Princip.* "I ſpeak not, ſays the Diſcourſer in the Dialogue, of them who Lye for their Profit, " they are to be excuſed, and ſome commended; as for example, ſuch as Lye to deceive their Enemy, or them who make uſe " of it as a Remedy to eſcape ſome great Danger, as *Ulyſſes* often did to ſave his Life, or to procure the return of his Compa-

and Hiring) to explain and communicate to him all that belongs to that Art or Profeſſion. If I ſend a Perſon with a Commiſſion to ſearch into the State of ſuch or ſuch an Affair, he is bound by

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“ nions, but that which ſurprizes me moſt, is to ſee ſome Men, without any Advantage to themſelves, to delight more in “ Lying than ſpeaking the Truth, and continue in it all their Days without Neceſſity. Indeed, when Men lye in Bravery, and make a Trade of it, they loſe all Credit with the Wiſe. Otherwiſe, though an honeſt Man believes he may innocently, for ſome good Reaſon, by his Diſcourſe and Actions, make another underſtand him of a thing he thinks not, yet he does not therefore neglect a Correſpondence between his Words, and Actions, and Thoughts, as the moſt natural Uſe of the Tongue, and other outward Motions, ſo that this Agreement is diſturbed againſt his Will, being forced to it by the Conſtitution of humane Affairs, and by the Indiſcretion, Imprudence, and Malice of the greateſt part of Mankind; at leaſt, if he be not engaged in a thing that brings Trouble, his Candour and Freedom, which are the Characters of a truly good Man, will hinder him from ſpeaking or doing any thing which may make his Sincerity and Fidelity be ſuſpected in the leaſt. But there is another thing which ought to keep us from uſing any Equivocation, but with much Reſerve and Circumſpection, which is, that we ought not only to avoid all Evil, but every thing that tends to it. For it is certain, that by Lying, Feigning, and Diſſembling upon ſlight Occaſions, Men get a Habit of Diſſimulation and Counterfeiting, which degenerates into a Vice, becauſe it will incline us to be inſincere with thoſe to whom we ought faithfully to diſcover our Thoughts. For this Reaſon it is, that we ought to take very great Care to keep Children from Lying (See *Montagne*'s Eſſays upon this Subject, l. 1. c. 9. and the Treatiſe of Educating Children by Mr. *Locke*, §. 134, *&c.*) becauſe this Artifice can ſerve only to hide their Faults, and they are not of Age ſufficient to diſcover the Occaſions, when Diſſimulation and Counterfeiting is innocent, and ſo they'll come in time not to ſpeak one Word of Truth, but always have a Lye ready for the leaſt thing. But as to ſuch as are become Men of Underſtanding, 'tis not to be feared but that they'll be able to ſet due Bounds to this Permiſſion of Feigning and Diſſimulation, provided they ſeriouſly labour to regulate their Conduct by the Light of right Reaſon, without which they may abuſe the leaſt diſputable and commonly received Moral Principles, and by which they'll be full of Reverence toward God, Lovers of Juſtice, careful to give every Man his Due, averſe to all fraudulent Dealing, and in a word, a truly good Man; and I dare anſwer for him, will never be guilty of any unlawful Diſſimulation, and as far as is poſſible, he will ſo order himſelf, that his Words and Actions ſhall exactly agree with his Thoughts. I ſay, as far as is poſſible, for as the famous *Engliſh* Chancellor, the Lord *Bacon*, judiciouſly obſerves, “ *Serm. fidel.* c. 6. Diſſimulation is a neceſſary Conſequence of Silence and Secrecy (*Taciturnitatis*) inſo- “ much, that whoſoever will conceal a thing, muſt diſſemble, do what he can. In truth, Men are too cunning to ſuffer us “ to remain in a perfect Indifference, without ſhewing any Inclination to one or other of the things which they deſire to “ know. They'll attack you, examine and pump you with a thouſand Queſtions, ſo cunning, that unleſs you maintain an “ obſtinate and ridiculous Silence, you muſt diſcover ſomething of your Sentiments; and if you do nothing to diſcover them, “ they'll make ſuch Conjectures upon your Silence, that it will be all one as if you had ſpoken. You may guard your ſelf a “ long time by Equivocation, and dark Expreſſions, but, in a word, there can be no perfect Concealment, if ſome Degree of “ Diſſimulation be not allow'd; and ſo Diſſimulation is nothing elſe but a neceſſary Dependent upon Silence. To keep a “ juſt Temper, every Man muſt get himſelf a Reputation for Sincerity and Veracity, an Habit of Silence and Secrecy, and an “ Ability to feign and diſſemble, when it is neceſſary. It is eaſy to anſwer all the other Difficulties raiſed againſt the Opinion of our Author, and to oppoſe greater to the contrary. It ſhall content me to obſerve, that if this laſt be true, thouſands of Actions which the World accounts innocent, muſt be condemned, and are practiſed every Day with Deliberation. I do not ſay, by moſt of them who are zealous Defenders of this Opinion, but by all Men generally, we may ſay, that the Queſtion comes to this, Whether (for Example) a Man may ſay, that ſuch a one is not at Home, or find out ſome Trick to free our ſelves from an indiſcreet and importunate Perſon? I do not believe that any Man of Senſe will deny himſelf to have committed ſuch Faults, tho' he is ſorry for them. Nevertheleſs, there is no Medium; either we muſt condemn our ſelves for it, or reſign our ſelves to the Indiſcretion, Imprudence, and often to the Malice of another, by a general Sincerity, and without Reſerve, or we muſt allow a Permiſſion to ſpeak and act contrary to our Thoughts. Further, to ſhew the Weakneſs of the Opinion I am now oppoſing, I deſire it may be conſider'd, what Abſurdities they engage themſelves in, who maintain the contrary Opinion: For theſe are three Maxims of St. *Auguſtin*, which Mr. *La Placette* approves in *Part* 1. *Moral Eſſays*, 1. That if all Mankind were at the Point of Deſtruction, and 'twere poſſible to ſave them all by a Lye, the Lye muſt be avoided, and all Mankind periſh. 2. That if by telling a Lye we could prevent one or more of our Neighbours from ſinning, we ought rather to ſuffer our Neighbour to ſin, than tell a Lye. 3. If by Lying we could keep our Neighbour from eternal Damnation, we ſhould rather leave him to periſh, than ſave him by the loſs of Truth. In fine, it is in no wiſe neceſſary to determine, when and how many times we are permitted to lye; that depends upon Circumſtances, which are infinite, and every Man's Judgment. Here, as in many other moral Subjects, we can give general Rules only. As often as they to whom we ſpeak have no Right to require of us to ſpeak freely what we think, we do them no Injury if we conceal the Truth from them. And ſo the diſguiſing of the Truth has not the principal Property of a true Lye, which is to give them with whom we treat reaſon to complain, that we have not dealt ſincerely with them. But it does not follow, that we may always ſpeak or act in a manner different from our Thoughts, when a Perſon hath a Right to require the contrary of us. I have alledged the Reaſons that concern our ſelves above, or the Conſequences of taking too large a Liberty. I own that this Permiſſion may be eaſily abuſed, and therefore the ſureſt way is to uſe it as little as poſſible; but a good uſe may be made of it; and in what a bad Caſe ſhall we be, if we muſt condemn and diſuſe all thoſe things, by which Men take an Occaſion to excuſe or juſtify their Irregularities? But, II. If it be true, as we have ſhewed, that the Principles of natural Right afford nothing to prove, that all Diſcourſe, and in general, every exterior Sign differing from our Intentions and Knowledge, is criminal of it ſelf. There is no Evidence to prove that the Holy Scriptures condemns it abſolutely, at leaſt, if we may ſay (what indeed I don't believe) that the Law which forbids Lying and Diſſimulation, is a poſitive Law only. Thus we can't alledge any Text, either in the Old or New Teſtament, where Lying or Diſſimulation is mention'd, but it is accompanied with ſome Fraud or Cheat, and by which at leaſt ſome Duty of Charity is broken. Nothing is more common in the Writings of the *Hebrews* and *Helleniſts*, than to underſtand by Truth, Fidelity in keeping our Engagements; and by Lying, Perfidiouſneſs, Deceit, and Injury done our Neighbour, after ſome manner or other. The Reaſon that St. *Paul* gives for his Exhortation, *To avoid Lying, and ſpeak the Truth every Man to his Neighbour*, inſinuates plainly enough, that he did not extend his Prohibition to Lyes profitable, and altogether innocent. See *Veltbuyſen De Princ. Juſti & Decori*, where we may find Reflections which I have omitted. Farther, we may obſerve in the Scripture ſeveral Examples of good Men, who are not blamed for having uſed Diſſimulation, and an innocent Lye. See Mr. *Le Clerc* on *Gen.* xii. 13. Moreover, there is one that proves plainly, that it is ſometimes commendable to ſpeak contrary to what we think, and that is, of the *Egyptian* Midwives mentioned before by the Bye. See *Exod.* i. 20, 21. As to my ſelf, I think an unanſwerable Argument for my Opinion may be drawn from it. 'Tis evident, theſe Women did not ſpeak the Truth to *Pharaoh*; and if any one doubt of it, he will be convinced, if he reads what Mr. *Le Clerc* ſays about it in his Remarks upon the 17th Queſtion of his Uncle; and moſt of our Interpreters and Divines agree with him. Nevertheleſs, God hath greatly rewarded that Lye, and conſequently not only excuſes it, but approves it. For it is an empty metaphyſical Subtilty to ſay, That God rewarded not the Lye, but the Act of Mercy, which thoſe wiſe Women ſhewed; as if one and the ſame Action could be good and evil in divers Reſpects, or as if a good Intention could render an Action, in its own Nature evil, good. But if this Example do not ſatisfy, behold another, which will make it plain, that God permits, yea, requires ſometimes, that Men uſe an innocent Deluſion. 'Tis of the Prophet who is ſpoken of, 1 *Kings* xx. 35, *&c.* This Holy Man, by God's Order, having cauſed himſelf to be beaten, ſet himſelf in the way where King *Ahab* was to paſs, and cover'd himſelf with a Veil, that it might not be known that he waited for him; when he perceived him coming, he cried out, and implored his Help; and he tells him how he came in that Condition by an Accident, which he had feigned. He ſays, That being in the middle of the Battel, a certain Man brought a Priſoner to him, and charged him to keep him ſafe upon pain of Life, or paying a Talent; but while he was buſy up and down, his Priſoner got away. Hereupon the King ſends to the Prophet that he had condemned himſelf; and then the Prophet unveiled himſelf, declared to him why God had ordered him to uſe ſuch an Artifice, *viz.* That *Ahab* might condemn himſelf by judging in the like Caſe. See Mr. *Le Clerc*'s Notes upon the Place.

Covenant to acquaint me with all the Diſcoveries and Informations he hath gain'd about that Matter. If I am to exerciſe towards another any Duty of Humanity, which muſt be perform'd by Speech, it is manifeſt my Words muſt be agreeable to my Thoughts and Intentions. If a Man undertake to write an Hiſtory[2], he is to deliver nothing which he knows to be falſe, by virtue of that general Obligation by which we are bound to promote the Uſe and Benefit of others. As we are likewiſe by a common Engagement tied to expreſs our Minds by the cleareſt and plaineſt Signs, in all ſuch Caſes, when if we do otherwiſe, we may bring ſome Hurt or Prejudice on innocent Perſons. So, laſtly, in all Commerce and Buſineſs between Men, in which, by the Conſent of the Parties, ſome Right or Obligation is to be produc'd, we are to declare our Meaning openly and clearly to the Perſons with whom we deal. For otherwiſe there could be no poſſible way of rightly adjuſting thoſe Concerns. But ſince it doth not always ſo happen, that I am bound by any of theſe Rules to open my Thoughts to another about any Affair, eſpecially ſuch as is private and particular, it is evident from hence, that I am not under an Engagement to unfold all my Opinions and Intentions to Men alike, but thoſe only which they have a Right (either perfect or imperfect) to underſtand; which Right ſuppoſeth a correſpondent Obligation on my part: And that therefore I may fairly conceal and diſſemble thoſe Things, which another hath no Right to know, and which I my ſelf have no Obligation to diſcloſe[a]: Nay, in ſuch Caſes, where no body elſe is injur'd in his Right, and where the Advantage or the Safety of myſelf, or of ſome other Perſon, cannot otherwiſe be procur'd, it ſhall be allowable for me apply the common Signs in ſuch a manner, as to expreſs what is really contrary to my Judgment. For ſince the Compact about applying Signs in ſuch a certain way, bears a regard to other Obligations, which are by the means of theſe Signs to be fulfilled; therefore when thoſe Obligations ceaſe, there appears no reaſon why I may not make a different Uſe of the Signs, if I injure no Man, and at the ſame time have no greater Convenience of benefitting my ſelf or others.

VIII. From theſe Principles and fundamental Rules, it is eaſy to underſtand both the Nature of *Truth*, which Men are obliged to ſpeak and profeſs; and the Nature of a *Lye*, which is ſo abhorr'd by all the good and honeſt, and the imputation of which every Man looks on as the fouleſt Diſgrace[b][1]. The former then conſiſts in this, That the Signs which we make uſe of, and eſpecially our Words, do in a proper and convenient manner repreſent our Thoughts to another, who hath a Right to underſtand them; and to whom we are bound, either by a perfect, or an imperfect Obligation to diſcover them: And this to the end, that he, by apprehending our Meaning, may obtain ſome Benefit, or may eſcape ſome undeſerv'd Evil, which would have follow'd upon our deceiving him. So that beſides that *Logical Truth*, which conſiſts in a Conformity between Words and Things, this *Ethical* or *Moral Truth*, of which we are now treating, ſuperadds the Intention and Obligation of the Speaker: On which Score, he who declares the Truth out of Error, or Imprudence, hath barely recited the Logical Truth, but hath not exercis'd the Moral. And he who blabs out any Matter without any Obligation in himſelf, or any Right in the other Party, ought to be eſteem'd rather an idle Prattler, than a Speaker of Truth. And hence 'tis eaſy to gather, what muſt be the Nature of a *Lye*; namely that it is, when our Signs or Words bear a different Senſe from our real Conceptions; whereas the Perſon to whom the Signs were directed, had a Right to underſtand, and to judge of thoſe Conceptions; and we on our part lay under an Obligation to make him apprehend our Meaning. I take this to be a more clear and diſtinct way of ſhewing the Neceſſity we ſtand under to declare our real and undiſguiſed Intentions, than if I ſhould derive the Sin and the Baſeneſs of *Lying*, barely from that general Rule of *natural Law*, that *No Man is to be hurt*; as if the whole Nature of a Lye conſiſted in its Power of *hurting*. For ſtrictly ſpeaking, we do not *hurt* another by with-holding from him what he hath only an *imperfect Right* to receive; and yet the Violation of ſuch an *imperfect Right* is ſufficient to conſtitute a Lye. For the ſame Reaſon *Philoſtratus*'s Notion of a Lye is confus'd and unaccurate, when he reports[c], That amongſt ſome of the *Indians*, any Student in Philoſophy who was found guilty of this Vice, was render'd incapable of bearing any Magiſtracy or Honour, *Becauſe he had by Lying cheated the common Society of Mankind*. But, as in all Acts by which we recede from Law, Error, Imprudence, and Raſhneſs are diſtinguiſh'd from *Malice*, or wicked Deſign, ſo neither is any Man properly ſaid to *lye*, but he who with evil Intention, and pre-conceiv'd Malice, tells another what is really different from his Sentiments or Reſolutions, either to prejudice or to delude him. And hence, he who having been deceiv'd by another Man, delivers things which he himſelf takes to be true, reports a *Lye*, but is not himſelf the Lyar. Yet a Perſon, who catching up Things with too haſty a Credulity, afterwards diſperſeth them amongſt others, expoſes himſelf to the Cenſure of Raſhneſs and Folly. Nay, the ſpreading of another Man's Lye, or of a Matter not certainly known, may in ſome Caſes bring an Obligation on the Publiſher to repair the Damage occaſion'd by the Report; eſpecially when ſuch a Publication approacheth near to that Treſpaſs which the *Civilians* term *culpa lata*[d][2].

IX. Having thus diſcover'd the true Source, and the genuine Foundation of Truth and of Lyes, we may aſſure our ſelves, that thoſe Authors are miſtaken, who aſſert, That a *Lye* and an *Untruth* are really the ſame thing, and that he deſerves to be branded with the Name of a *Lyar*, who ſays any thing differing from his Judgment; and that conſequently to ſpeak otherwiſe than we think, is in its own Nature baſe and ſinful. An *Untruth* is when you apply Words in ſuch a manner, as that another ſhall conceive from them a Senſe not agreeable to your inward Imaginations. But now, if the other Party have no Right, by Virtue of which he ought clearly to underſtand my Meaning; and if I do not hereby prejudice any Man without Cauſe, there ſeems to be no Reaſon, why, if I find it convenient for me, I may not uſe thoſe Words rather according to my own Pleaſure, than the Pleaſure of another. Hence every *Lye* is an *Untruth*, but every *Untruth* cannot come under the Name of a *Lye:* And if we take *Ariſtotle*[1] in this Senſe, when he affirms, *That a Lye is in itſelf foul and diſgraceful*, there will be no need of *Grotius*'s Limitation, who explains καθ' ἀυτὸ, *in itſelf*, by *Generally*, or *without regard to the Circumſtances*[a]. For ſuch an *Untruth* as eſcapes Cenſure, by virtue of ſome particular Circumſtances, ought, on no Account, to ſuffer the odious Character of a *Lye*. And, on the other ſide, that every *Lye*, properly ſo called, is in its own Nature baſe and ſcandalous, ſeems to be beyond diſpute.

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[2] See what our Author has ſaid in his Diſcourſe, *De Obligatione erga Patriam*, §. 23.

Mr. Barbeyrac's *NOTES on* §. VIII.

[1] See §. 10. following. [2] See Lib. 3. c. 1. § 4. Note 2. before-going.

[a] *Æſchyl.* Cœphor. σιγᾶν θ' ὅπου, &c. v. 580. The Art of Silence and of well-term'd Speech.

[b] *Sophocl. Trachin.* p. 347. Edit. *H. Steph.* ὡς ἐλευθέρῳ ψευδεῖ καλεῖσθαι, &c.

What Fate ſo grievous to a Free-born Man
As to be call'd a Lyar———————?

Add *Montaign*'s Eſſays, l. 1. c. 9. l. 2. c. 18.

[c] *Apollon. Tyan.* l. 2.

[d] See the Story of *Ceſell. Baſſus* in *Tacit.* Ann. l. 16. c. 1, &c.

It is worth remarking on this Head, that the very ſpeaking what is true may ſometimes create and conſtitute a *Lye:* Which not only happens when a Perſon affirms the Truth with the Air and Addreſs of a *Lye*, and by his [2] Manner, his Geſtures, and his Actions, which uſed to be as it were the Life and Soul of Diſcourſe, makes his Hearers believe the contrary to what he delivers; as *Quinctilian* ſhews us how 'tis poſſible to be guilty of a *Lye*, as well as of a *Solœciſm*, by a baſe Action, when we ſpeak one thing, and hint another, by a Poſture or a Nod; but it chiefly takes place in thoſe, who by a Practice of frequent Lying have depriv'd themſelves of all Credit and Belief. Now ſuch Perſons as they are not eaſily regarded, how willing ſoever they may be to deliver ſerious Truths; ſo they have an opportunity of abuſing the Diffidence of a Hearer[3], to his Deception and Deluſion; who thinking them to be always like themſelves, may eaſily be cheated by believing quite the contrary of what they averr. The Inſtance in the Fable is well known, where the Boy ſo often tricked the Countrymen with a falſe Alarm of the Wolf, that at length, when the Wolf really appear'd, he could not gain Credit enough for their Aſſiſtance. *Ageſilaus*[4] turn'd this Fetch into a Stratagem of War. For in as much as 'tis reckon'd moſt impolitick in a General openly to proclaim his Reſolutions, for which reaſon the Enemy is not wont to believe what is given out in this free and *ſecure* manner, *Ageſilaus* by this piece of Subtilty prevail'd on the *Perſian* Nobleman who oppos'd him, to march his Army quite another way than what he had thus publiſh'd that he would take himſelf[b].

But as no Man will preſume to condemn the wiſe Gravity of *Epaminondas*[c], who could not bear to utter a Lye, tho' in jeſt: So, on the other hand, it is very weak to believe, that a Perſon always incurs a heinous Guilt, when, without injuring any one elſe, and for the Advantage of himſelf and others, he delivers Words differing from his real Thoughts. It were therefore to be wiſh'd with *Cicero*[5], *That all Simulation and Diſſimulation were utterly baniſh'd from human Life*, and that Men were arriv'd at ſuch a happy Temper, as that no one ſhould envy the Goods of another, or plot to rob him of them: that no one ſhould abuſe the Simplicity and Credulity of others to their Prejudice or Deception: and laſtly, that no one ſhould in any inſtance reſiſt the Command of right Reaſon: Such a ſtrict and accompliſh'd Perſon *Achilles* pretends to be in *Homer*[d]; it is his brave Declaration,

> Ἐχθρὸς γάρ μοι κεῖνος, ὁμῶς ἀΐδαο πύλῃσιν,
> Ὅς γ' ἕτερον μὲν κεύθει ἐνὶ φρεσὶν, ἄλλο δὲ βάζει.
>
> *Like Hell I hate the Man, whoſe Tongue reveals*
> *A different Tale from what his Heart conceals.*

But ſince he, who is ever freely publiſhing and declaring his own Concerns, lays himſelf open to the Fraud of wicked Men; and ſince moſt Perſons are inclined rather to be won upon by Artifice and Shew, than to be convinc'd by ſolid Plain-dealing; therefore it may not be adviſable for us to exclude from human Society, the Art of innocent Diſſimulation, till all the Wickedneſs, and all the Folly of Mankind is turn'd into Probity and Wiſdom. *Pindar*'s Remark is excellent to this Purpoſe, *Nem.* Od. v. v. 30, *&c.*

> [6] *Not Truth with open Face and open Heart*
> *Is ſerviceable always, always wiſe:*
> *But often 'tis in Life the nobleſt Art,*
> *To know the prudent Uſe of Silence or Diſguiſe.*

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[a] Lib. iii. c. 1. ſ. 9.

[b] *Xenophon* Rer. Græcar. l. iii. c. 4. p. 292. Edit. *H. Steph.* *Cornel. Nep.* in *Ageſil.* c. iii. To this Head likewiſe belongs the ſleight of the Old Fox in *Terence, Heautontimor.* Act. iv. Scen. 3.

[c] See *Cornel. Nep.* c. iii. n. 1.

[d] *Iliad.* ix. v. 312, 313.

Mr. Barb. *NOTES on* §. ix.

[1] His Words are, Καθ' ἀυτὸ δὲ τὸ μὲν ψεῦδος φαῦλον, καὶ ψεκτὸν, *Eth. Nicom.* l. iv. c. 13.

[2] According to the Judgment of *Quinctilian*, Inſtit. Orat. l. i. c. 5. *In geſtu etiam nonnulli putant idem vitium ineſſe, cum aliud voce, aliud nutu, vel manu demonſtratur*, which is the ſenſe of our Author.

[3] 'Twas upon this Principle that the judicious Conduct of *John de Vega* was grounded, when he adviſ'd *Diego de Mendoza*, who ſucceeded him in his Embaſſage, That he would not find the leaſt Truth in the Miniſters of that Court. *Mendoza* replied, Then they have met with their Match, for if they tell me one Lye, I'll tell them an hundred. But, ſays *Vega*, I took another courſe ſometimes, for I anſwer'd their Lyes with as many Truths; and I found that it turned to as good an account: For they never believed me. Thus we ſee how Lyars may be deceived. This is related by *John Antonio de Vera* in Diſc. ii. concerning an Ambaſſador, quoted by *Amelot de la Houſſaie* upon the 13th Letter of *Oſſat*.

[4] Here we may add ſome Verſes of *Horace*, Epiſt. l. i. Ep. 17. v. 55.

> *Nota refert Meretricis acumina, ſæpe catellam,*
> *Sæpe periſcelidem raptam ſibi flentis, uti mox*
> *Nulla fides damnis, veriſque doloribus adſit*, &c.

[5] Offic. l. iii. c. 15. *Quod ſi Aquilliana definitio vera eſt, ex omni vita ſimulatio, diſſimulatioque tollenda eſt.* *Cicero* ſpeaks here only of Feigning and Diſſimulation, accompanied with Injuſtice and Falſe-dealing; although in the manner our Author expreſſes it in the Original, he ſeems to take the Orator's Words in a general ſenſe, as *Grotius* has indeed done in §. 13. of the Chapter often quoted. See Mr. *Noodt, De Forma emendandi doli mali in contractibus admiſſi apud Veteres*, c. ii.

[6] *Pindar*'s Greek is this,

> Ὀυ τοι ἅπασα κερδίων
> Φαίνοισα πρόσωπον ἀλάθει' ἀτρεκὴς
> Καὶ τὸ σιγᾷν πολλάκις ἐςὶ σοφώτατον, ἀνθρώπων νοῆσαι.

Theſeus's Wiſh in *Euripides*, *Hippol. Coron.* v. 925, *&c.* is but vain and fruitleſs. Tho' 'tis certain at the ſame time, that he who makes uſe of theſe practices of Concealment and Cunning farther than is neceſſary for his own Defence, renders himſelf unfit to be truſted, and uncapable of being dealt with in any honeſt Affair or Buſineſs; in as much as 'tis impoſſible, but that ſuch a Perſon muſt be ſuſpected in all that he ſays or does.

The Arguments by which ſome attempt to prove that every *Untruth* is in itſelf odious and ſinful, are of no weight. They tell us, "That the Falſe-ſpeaker defileth and diſgraceth his Tongue, that moſt noble Member, by ſuch an Abuſe; that he deprives himſelf of Credit, to the great ſtop and hindrance of many good Offices amongſt Men; ſince he never fails to gain this amongſt other Diſadvantages, *not to be believed tho' he ſpeak the Truth.* But this Charge holds good only againſt a ſtrict and proper Lye, not againſt ſuch Falſities as Prudence often adviſeth and recommends. They add, "That to falſify, argues a Man to be of a low and abject Spirit; ſince he who could rely upon ſolid Plainneſs and Truth, would have no need to ſeek Refuge in Tricks and Shifts. But thoſe Untruths, which are both innocent and unneceſſary, do not always proceed from meanneſs of Soul: And ſometimes, amongſt wicked Men, Honeſty and Truth itſelf cannot be ſupported, but by indirect and artificial Methods. Others are more fond of this Argument; "Speech is given to be an Interpreter of the Mind; ſince then every Untruth is contrary to this End, it ought likewiſe to be eſteem'd repugnant to the Order of Nature: and farther, that to have the Tongue differ from the Mind, quite diſturbs that Harmony which ſhould appear in the Powers and Faculties of Man. In Reply, we willingly allow, that Speech is the Interpreter of the Mind; but 'tis in ſuch a manner, as that it ought not to blab out more than the Mind gives it commiſſion to diſcloſe, the Mind being to judge what is convenient to be declared, and what to be concealed.

X. We have aſſerted every Lye to be a Violation of ſome Right; but what kind of Right this is, and how acquired by Men [1], all are not agreed in explaining. Some conceive, that ſince both God and Men have a natural Ability to underſtand the Truth, which is obſtructed by the contrary Speeches, therefore they have, on this very account, a Right of requiring others to expreſs themſelves in an intelligible manner. Now with regard to Almighty God, the thing is beyond diſpute: For to uſe any kind of Falſity in our Addreſſes to him, is not only extremely irreverent, as if bare and open Truth were not as prevalent with the Divine Majeſty, as Colours and Fictions; but alſo in the higheſt degree fooliſh, ſince God doth not ſtand in need of the Information of Men. And therefore *Cain* [a] was not only impious, but ſtupid, in endeavouring to conceal his Brother's Murder from God, eſpecially by ſo impudent and ſo rude a Reply. And thus far that of *Sophocles* [b] will hold good, *I hate a Man, who being taken in Wickedneſs, attempts to make his Excuſe.* But otherwiſe, this is no good Conſequence; A Perſon is naturally capable of underſtanding a matter, therefore he hath a Right to underſtand it; nor doth a *phyſical* Ability always infer a *moral.* As for that which ſome add to what we are now ſaying, That he who hears an *Untruth*, doth yet underſtand the Words; and therefore that Falſe-ſpeaking doth not take away the Right of *Underſtanding*; this is nothing at all to the purpoſe. For ſuch an one underſtands indeed; but he underſtands only a Shadow and Fiction, inſtead of the Truth which he deſires.

Others there are which derive that Right which is violated by *Lying*, not from *Nature*, but from the Art of Men; that is, from ſome tacit Compact: For, ſay they, ſince Diſcourſe, and other the like Marks and Tokens were introduc'd by human Inſtitution, Men at the ſame time laid a mutual Obligation on each other to uſe theſe Signs in ſuch a manner, as to be able hence to make a Judgment of the Perſon's Sentiments, with whom they ſhould confer [2]: Becauſe, without ſuch an Obligation, and if every Perſon were allow'd to apply Words how he pleas'd, and to hinder others from apprehending his Meaning, this Invention of Signs had been altogether vain and fruitleſs. This is the Opinion of *Grotius* [c], on which we may make this Remark, That there is not ſufficient

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[a] *Geneſ.* iv. 9.

[b] *Antigone.* p. 234. *init.* Edit. *H. Steph.*

[c] Lib. iii. c. 1. ſ. 11.

Mr. BARB. *NOTES on* §. X.

[1] Our Author (in §. viii. before-going) recites the Words of *Philoſtratus*, *De Vit. Apoll. Tyan.* Lib. ii. c. 12. That among the *Indians*, if a Student in Philoſophy was taken in a Lye, he was condemned not to be capable of any Office or Dignity, becauſe by Lying he would deſtroy the univerſal Society of all Mankind, ὡς παραποιήσαντα βίον ἀνθρώπȣ. The Reaſon which our Author makes uſe of upon this Occaſion is very improper to diſcover diſtinctly the Foulneſs of Lying; but he had done better, if he had ſaid, that *Philoſtratus* ſpeaks nothing of it: For this is one of the Places where our Author miſtakes the Senſe of the Writer he quotes. For theſe are his Words, "When any *Indian* is dead, there is a Magiſtrate appointed to go to the dead Perſon's Houſe, and enquire how he hath liv'd. If that Magiſtrate lye, or ſuffer himſelf to be deceived for want of making an exact Enquiry, the Laws put him out of his Office, and render him incapable of all Offices. Becauſe he has repreſented the Man's Life otherwiſe than it was. This is all *Philoſtratus* ſays, l. ii. c. 30.

[2] Mr. *Placette* in his Treatiſe of Lying, c. 6. affirms, "That that which makes a Lye evil, is the Sin committed, and not the Original Compact, which is much eaſier to imagine than prove; but a New and Particular Compact, which is made with them to whom we ſpeak, every time we ſpeak to them. For indeed, *adds he*, when I ſpeak to any Man, I do two things; I oblige my ſelf to ſpeak what I think, and require that he ſhould believe me. If he to whom I ſpeak believes what I ſay, the Bargain is not only made but executed on the part of him to whom I ſpake. If I lye on my part, I break the Treaty I am making with him, and conſequently I ſin againſt the Law of Nature, which requires, that all Agreements be faithfully executed. When he to whom I ſpeak refuſes to believe what I ſay, and ſo accepts not the Agreement I propound, he ſtill appears to diſcredit my Proceedings, as if I deſigned to make an Agreement which I would not keep. So that whether a Man believes what I ſay, or not, I am always obliged to ſpeak Truth. But I fear that this New and Particular Compact of Mr. *Placette* will be more hard to prove than the Original Compact, which he rejects. For in both theſe ſorts of Agreements the Conſent is implied only. There ought to be ſomething to ſecure it by a clear Conſequence. And ſo it lies upon Mr. *Placette* to prove that this New and Particular Compact reſults from the very Nature of the Action, which we always do when we ſpeak to any other, (i. e.) from the Nature of Speech, conſider'd barely as ſuch. I own, that the Natural Intention of Speech is to communicate our Thoughts one to another; but it is ſufficient that we do it on all occaſions when any one hath right to require it. The eſtabliſh'd Cuſtom and Good of Society require no more. Farther, as I have already ſaid in Note 1. Men never pretend to engage to ſpeak always, and to all the World, whatever they have in their Minds, ſo that they never reſerve to themſelves a Liberty of ſhewing a contrary Intention by their Actions or Words, and a Man may not reaſonably require the like of others.

Care taken in it to diſtinguiſh between thoſe two Obligations, one of which regards the applying Signs in general in ſuch a due manner, that another may underſtand our Thoughts; and the other engageth us to diſcover by thoſe Signs our real Meaning to ſuch or ſuch a particular Perſon; which two are very different, and proceed from diſtinct Principles: For in as much as Words borrow their Signification from the Force of Impoſition, we muſt ſuppoſe ſome [3] Agreement to have paſſed between Men who ſpeak the ſame Language, that in common uſe they would apply ſuch Signs to expreſs ſuch things. But the Obligation which ties me actually to addreſs thoſe Signs to another, or to open my Mind to him about ſuch a certain Affair, ariſeth either from ſome general Command of the Law of Nature, or from a particular Covenant, as has been above explain'd. Hence it appears what Judgment we ſhould make of their Notion, who deny the Nature of a Lye to conſiſt in the Violation of a Pact, on this Principle, "That whatever "is conſtituted, not by Nature, but by the Com-"pact of Men (eſpecially *tacit*) is to be derived "and to be valued from the point of *Profit*, and "from that alone, *Whereas that Men ſhould underſtand all that others ſay, doth not ſeem to be a thing ſo very profitable and beneficial. On the contrary, it is much for our Intereſt, that we ſhould have a full Liberty of covering either with Silence or proper Colours, ſuch Matters as may be kept ſecret without the Prejudice of other Men, and with our own Advantage.* Here thoſe Points are confounded, which ought to have been with Accuracy diſtinguiſh'd. For in this, that a Man ſhould underſtand the Thoughts of all others; or that all others ſhould underſtand his, there is indeed no Profit; nor did Men, by introducing of Speech, lay any ſuch mutual Obligation on themſelves. But we have already ſhewn how far any Perſon is bound to declare himſelf to another, and how far the other hath a Right to underſtand him. Suppoſing then an Obligation in us to communicate our Thoughts to ſuch or ſuch a Man, upon this the other Obligation which attended the Introduction of Speech falls in, and exerts its Force, engaging us ſo to apply our Words, that the Party may apprehend our Meaning. And of this the Profit or Advantage is ſo very great, that without it there would be no manner of uſe in Speech.

XI. Thus much being premiſed, it will not be difficult to judge how rightly thoſe ſeveral Caſes, in which the Truth is not preciſely ſpoken, are yet, in common Eſtimation, exempted from the Character of Lyes. And here firſt of all ſome diſtinguiſh between ſpeaking what is *Falſe*, and not ſpeaking or diſſembling ſome part of what is *True*; affirming the former to be unlawful, but the latter to be often innocent. On which point we are to know, that although to hold our Tongue cannot properly be term'd a Lye, eſpecially if we uſed no other Sign equivalent to Speech; yet our *Silence* may on another account become criminal: As ſuppoſe we hinder by it ſome Good which we were obliged to procure; or cauſe ſome Evil, which we were bound to avert. This is what the Poet calls

> ——*animumque nefas ſcelerare ſilendo,*
> Sil. Ital. l. xvi. ver. 610.

> The Soul with ſilent Miſchief to defile.

Thus a Watchman, who is ſet to give notice of the Enemy's Approach, ſhall incur the ſevereſt Puniſhment upon Neglect of Information. *Polybius* [a] [1] ſays, *that an Hiſtorian, who profeſſeth to give an account of Affairs, is no leſs a* Lyar, *if he ſuppreſs and conceal what really happen'd, than if he relate what is falſe.* But in a matter which I am not obliged to declare to another, if I cannot with Safety conceal the whole, I may fairly diſcover no more than a part. An Inſtance of this is uſually given in the Caſe of *Jeremiah*, who in the xxxviiith Chapter of his Propheſy, v. 25, *&c.* [b] being conſulted by the King concerning the iſſue of the Siege, prudently hides that Particular from the Princes, as the King expreſly order'd him; aſſigning another Reaſon of the Conference, which notwithſtanding was alſo really true. Here the Prophet told only a part of the Truth, being in no wiſe obliged to diſcloſe the whole. To the ſame purpoſe the Story of *Athanaſius* is produced, who meeting himſelf with thoſe who were ſent to apprehend him, and being ask'd, Whether he had ſeen *Athanaſius?* anſwer'd, *That he ſaw him lately paſs by this way, and that he was now gone on board.* For here he was under no Obligation to betray himſelf. As to the Example of *Abraham* in *Geneſis* xx. 12. ſome queſtion whether that moſt holy Man acted prudently in calling *Sarah* his Siſter, and concealing their Marriage: For he knew her Beauty to be ſuch, as might kindle a Paſſion in the Beholders, and at the ſame time that unmarried Perſons are reckon'd more capable of Addreſſes than others [2]. Nor, ſay they, was *Abimelech*'s Expoſtulation with him unjuſt; and on the contrary, it was moſt inhuman in *Abraham* to ſuppoſe that there was no Piety or Honeſty in a State, before he arrived to be their Inſtructor. Others excuſe the Patriarch on this Argument, That the hope of Life commonly bends the greateſt and moſt ſtubborn Souls; and that ſcarce any thing is look'd on as baſe and infamous, which is undertaken on the ſcore of declining Death. But this Point we leave undecided.

XII. *Grotius* diſtinguiſhes likewiſe between thoſe Signs which have been invented and determin'd μετὰ συνθήκης, or *with a mutual Obligation*, and other things about which no ſuch Agreement hath paſs'd (for no doubt when a Compact hath been made concerning the uſe of any thing, we are exactly to conform to that ſpecified Uſe) and as to the latter ſort, he is of Opinion, that 'tis allowable to

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[a] Lib. 12. c. 7. p. 660. B. Edit. *Caſaub. Wech.*

[b] See *Grot.* l. 3. c. 1. ſ. 7.

Mr. Barb. *NOTES on* §. x, xi.

[3] This is true; but, as is aboveſaid, that Conſent has no Obligation in it ſelf; and if there were no other Reaſon to lay a Neceſſity upon us to make known our Sentiments, nothing would hinder but that every one might ſignify what he pleaſed by all Terms, ſo that of the two Obligations, of which our Author ſpeaks, one is only a Condition neceſſary to acquit us of the other.

[1] Ἀγνοῶν, ὅτι τὸ ψεῦδος ȣ̓χ ἧττόν ἐςι περὶ τȣ̀ς ȣ̓ τὰ γεγονότα γράφοντας ἐν ταῖς ἱςορίαις, l. 12. c. 7.

[2] But, as Mr. *Le Clerc* has obſerved, *Abraham* might have feigned many other Excuſes to let them know that *Sarah* could not be his Wife, or to put off his Anſwer about his Marriage, till he could get out of *Egypt*. Whereas, had he owned her for his Wife, he had laid Snares for his own Life to take him off, and get rid of him; becauſe he was the only Obſtacle that hindered the Enjoyment of *Sarah*.

miſapply them, even when we foreſee that the other Party will thence be led into a falſe Judgment, provided either that no farther Hurt follow this Deception, or that the Hurt which follows it, is (ſetting aſide the Conſideration of the Deceit) lawful; and when we might fairly have hurt him in an open manner: And to this we willingly ſubſcribe. For ſince no Agreement, either general, or particular, is ſuppos'd to have paſs'd, which might have laid a neceſſity on me to apply the thing in ſuch a manner, and no otherwiſe, to the end that the ſaid Party might gather my Meaning from it; therefore I am preſumed to be left at full liberty as to its Uſe, ſo long as I hurt no Man injuriouſly, or without Cauſe. The Party may thank himſelf for the wrong Notion he hath form'd; and attribute it to his over-curious Impertinence in paſſing Judgment on other Mens Buſineſs. Whilſt I am exerciſing my proper Right, I am not always obliged to hinder another from taking up a falſe Opinion in other reſpects harmleſs. For inſtance, if a Man, to keep himſelf from being frighted in the Night, or to have a Light always at hand for ſome occaſion, ſhould ſleep with a Candle in his Chamber; he is not bound to put it out, how deeply ſoever his Neighbour may fanſy that he ſits up at his Buſineſs. The Example of our Saviour, *Luke* xxiv. 28. is a Caſe of no Difficulty. For every Man may at his pleaſure uſe the Geſture there repreſented: And nothing is in common Life more frequent, than to feign our ſelves in a readineſs to be gone, that we may diſcover whether or no we are welcome Gueſts: we being ſeriouſly reſolved to depart, unleſs we are ſolicited and importun'd to ſtay. The Caſe of St. *Paul* in *Acts* xvi. 3. ſeems a Matter of higher Conſideration [1]. But as to the other Inſtance alledged by *Grotius*, of deceiving an Enemy, by counterfeiting Flight, Clothes, Colours, Sails, Arms, and the like; this Practice is allowable beyond Diſpute; ſince we might lawfully have done him what Miſchief we could, by the moſt plain and open Means.

XIII. It is the Judgment of the ſame Author [a], "That we do not always contract the Guilt of *Lying*, when we uſe an ambiguous Word or Expreſſion, which admits of divers Significations, either in common Speech, or by the Cuſtom of *Art*, or by ſome Figure unuſual or not intelligible, provided our inward Meaning is agreeable to any one of theſe Significations; although we believe that the Perſon to whom we ſpeak will underſtand it in a different Senſe. But he very rightly adds, That ſuch equivocal Speeches are not raſhly to be approv'd of and allow'd; being only juſtifiable when they ſerve for the Inſtruction of one committed to our Care; or for the avoiding ſome pernicious and inſnaring Queſtion [b]; or for the procuring ſome Benefit to our ſelves, without the Damage of others [c]:" For elſe, if you are under an Obligation to diſcover your Mind clearly to me, 'tis the ſame thing whether you deceive me by a plain Lye, or by a doubtful Expreſſion; eſpecially ſince the latter muſt, to ſerve your Purpoſe, be ſo fram'd and contriv'd, that I may lay hold on the more obvious and vulgar Senſe, whilſt the more abſtruſe and uncommon anſwers to your inward Conceptions: Otherwiſe, if both Significations are alike probable, ſcarce any Perſon will be ſo ſupinely negligent, as not to aſk you which way you would be underſtood? But to ſpeak ambiguouſly or obſcurely to one whom we intend to inſtruct, or whoſe Proficiency we would thus try and examine, is on no account faulty; if the good End we propoſe may by this means be better obtain'd, than by more plain and direct Application. To this Purpoſe is the Inſtance in St. *John* vi. v. 5, *&c.* [d]. So if I am not obliged to declare my Mind at all to ſuch or ſuch a Perſon, nothing hinders but that I may as well let him be miſtaken, as let him be ignorant, if, beſides that Miſtake, he incur no other undeſerv'd Prejudice. And therefore no one will cenſure *Athanaſius* [1] for the Deception he put on his Purſuers, which we have already recited [e].

It is hence evident, that we ought to interpret *Grotius*, with ſome Caution, when he ſays [f], "It is requiſite to the general Notion of a *Lye*, that what is either ſpoken or written, or by any Marks and Tokens expreſs'd, cannot otherwiſe be underſtood, than in ſuch a Senſe as is different from the intention of the Perſon thus declaring." For in Caſes where a Man is bound clearly to diſcover his Meaning, he ought ſo to frame his Expreſſions, as that the ſame Senſe which either the Nature of the Buſineſs in hand, or the common Uſe and Cuſtom of Speech ſuggeſts, ſhall be likewiſe agreeable to his real Thoughts; nor can he, with the leaſt Reaſon, bid the Hearer thank himſelf for the Miſtake or Damage he ſuffers, only on the account of not diving into all the remote Quirks and Terms of Expreſſion, utterly foreign to the preſent Affair; that is, for not being a Conjurer. And the Remark of *Iſocrates* [g] muſt be own'd for a certain Truth [2], *That to uſe ambiguous Sayings in judicial Contentions about Bargains, and Matters of Intereſt and Moment, is ſcandalouſly baſe, and ſhews a very high degree of Wickedneſs.*

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[a] *De Æquivocis*, l. 3. c. 1. §. 10. n. 1, 2.

[b] *Vid.* Senec. *Troad.* v. 597, *&c.*

[c] 1 *Sam.* xxvii. 10.

[d] *Vid.* Grot. *ubi ſupra.*

[e] *Vid.* Theod. *Hiſt. Eccl.* l. 3. c. 9.

[f] Lib. 3. c. 1. ſ. 11. n. 1.

[g] *Panathenaic.* *p.* 486. Edit. *Par.* 1621.

Mr. Barb. *NOTES on* §. xii, xiii.

[1] We may be well ſatisfied with what *Grotius* hath ſaid about this Matter, which I ſhall ſet down. St. *Paul* was not ignorant that the *Jews* went this way, that the Command to be circumciſed, which was then aboliſhed, did yet oblige the Poſterity of the *Iſraelites*, and as even St. *Paul* and *Timothy* himſelf were once perſuaded. But this was not in St. *Paul's* Intention, but his Deſign was thereby to gain a familiar Converſe himſelf with the *Jews*, and procure it at the ſame time for *Timothy*. In truth, the very ſame Moment that the Divine Law which commanded Circumciſion was abrogated, Circumciſion could no longer be a Sign of the Inſtitution which every one was indiſpenſably to bear. But the Evil, which the Error in which the *Jews* were for ſome time, and which they ought to be deliver'd from, was not ſo conſiderable as the Good which St. *Paul* labour'd to draw from it, I mean the Eſtabliſhment of the Doctrine of the Goſpel. The Greek Fathers often give the Name of *Oeconomy* or *Wiſe Management* to this Diſſimulation, *&c.* See *Gataker* upon *Marcus Antoninus*, l. 11. §. 18.

[1] See the News of the Republick of Learning, *March* 1699.

[2] The Greek is, Οἷς χρῆσθαι [λόγοις ἀμφιβόλοις] περὶ μὲν συμβολαίων, καὶ πλεονεξίας ἀγονιζόμενον· αἶσχρον, καὶ πονηρίας οὐ μικρὸν σημεῖον.

XIV. Much more ought we to abhor and deteſt thoſe *mental Reſervations* [1], which the wicked Artifice of ſome Men hath invented, by wreſting Words to a quite contrary Senſe to what they outwardly and plainly import; and this even in Caſes where there was an Obligation to ſpeak the Truth, and in Aſſertions confirm'd by Oath. The Effect of which is, that a Perſon ſeems outwardly to affirm what he inwardly intends to deny, and ſo *vice verſa*. A Practice by which the whole Uſe and Deſign of Speech is utterly perverted, no Man being ſure in what Senſe he ought to take the Words of another. Nor is the Invention leſs abſurd than it is pernicious. For ſince Diſcourſe was originally introduced as a means of declaring what we conceive in our Minds; and ſince our Thoughts, ſo long as they do not come abroad, are of no manner of Uſe or Effect in human Life; by what Authority can theſe ſecret Reſerves, ſo repugnant to the common Cuſtom of Mankind, take away that Effect which the uttering of Words would otherwiſe naturally produce? Thus much indeed is uſual with us, to annex to a general Expreſſion ſome tacit Condition or Reſtriction, taken from the ſubject Matter, or ſome other Circumſtances; by means of which we dextrouſly adapt our Speech to the Buſineſs under Debate, and free it from Confuſion or Inconvenience. But where would be the Reaſon, or where the Subtilty of my Proceeding? If, for inſtance, being ask'd, whether I have done ſuch a thing, I ſwear *I have not done it*, meaning another thing, or the ſame at another time? Or, if when a Man deſires Money of me, I tell him, *I have none*; that is, none to give him? Or, if I promiſe that *I will give it him*; that is, meerly for Form and Faſhion's ſake, ſo as to take it immediately again? 'Tis a fooliſh Argument which is urged to excuſe ſuch Perſons from the Sins of *Lying* and of *Perjury*, *That they do not indeed ſpeak that particular determinate Truth which the Hearers apprehend, and which the Words imply, yet they ſpeak another Truth of a different kind.* As if it were at all ſatisfactory to my Queſtion, to be told a Truth of any other different kind, and utterly foreign to the Buſineſs which I am now upon: Or, as if a Man did at all promote my Purpoſe, or the Reaſon of my Enquiry, if when I ask of *Chalk*, he anſwers me of *Cheeſe* [a]! No leſs ridiculous is that other Plea, that if in theſe Caſes we put the open Speech and the *mental Reſervation* together, they will make an entire Propoſition; which taken in that united Senſe, ſhall not be falſe. As for inſtance, if I ſay, *I am not a Prieſt*, keeping this Clauſe in my Mind, *ſo as to be under any Obligation of telling you that I am*; this whole Propoſition taken together will be true, *I am not a Prieſt, ſo as to be under any Obligation of telling you that I am.* But in as much as Diſcourſe was invented with regard to others, not that every Man ſhould talk to himſelf; ſo the Truth or Falſhood of it is meaſur'd according to that which we openly declare to thoſe with whom we converſe.

XV. That we are not guilty of *Lying*, tho' we ſpeak a thing which bears a wrong Signification [1]; to Children or Perſons out of their Senſes, is generally aſſerted; and therefore 'tis thought very allowable. The Reaſon aſſign'd by *Grotius* * is, *Becauſe ſince ſuch Perſons have not the liberty of Judging, they cannot ſuffer Injury with reſpect to that liberty which they want.* This Principle we do not take to be ſufficient: For to ſpeak chiefly of the Caſe of Infants, it is plain indeed, that they ſo far want the Faculty of Judgment, as ſimply and raſhly to catch at any thing, ſpoken or repreſented to them in a wrong manner; not being able by reaſoning to diſtinguiſh Truth from Falſhood: Yet ſince they make a part of Mankind, and on that account have a Right not to be hurt by others, as they have likewiſe to receive the common Office of Humanity, and to be furniſhed with good Notions, particularly by their Parents, and thoſe who have the Care of their Education [b], and are at leaſt capable of apprehending what is eaſy and familiar; we are by all means to hold, that they have thus far the ſame Right with Perſons of advanced Age, that what ought to be ſhewn or declar'd to them, ſhall be propoſed in ſuch manner as that they may underſtand it. But for as much as through the weakneſs of their Reaſon, and the ſtrength of their Paſſions, they have ſcarce any Reliſh for plain Truths, therefore 'tis convenient to inſtruct them by Fables, and to keep them in Awe by falſe Terrors, till ſuch time as they grow weary of Trifles, and are able to apprehend and to value the real Solidity of things. And thus we addreſs to them by Fiction and Diſguiſe, not to ſport with their Ignorance, or to procure their Harm; but only becauſe they cannot well be applied to in any more ſerious Method of Information [2]. *Strabo* is

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[a] Add Mr. *Paſcal*'s Letters Provincial, *Lett.* 9.

[b] Add *Matt.* xviii. 10.

Mr. BARB. *NOTES* on §. XIV, XV.

[1] See Mr. *Placette* in his Treatiſe of Lying, *&c.* c. 8.

[1] For the ſame Reaſon we may invent ſomething falſe to deceive an Infant innocently, and to accommodate ourſelves to its Capacity: As alſo, we may ſo behave our ſelves towards ſuch as uſe feeble Reaſonings, either becauſe they think them well grounded, ſince they are ſuitable to their Underſtandings, or they are pre-poſſeſs'd, and there is no other way to make them receive the moſt profitable Truth. Hence it is, that we find in the New Teſtament ſeveral Texts of the Old deliver'd in a Senſe in which the *Jews* commonly underſtood them, tho' they did not agree to the Original; and ſeveral Arguments *ad hominem* founded upon them, or upon other Opinions of the *Jews*, which were falſe and uncertain. See the *Latin* Notes of Mr. *Le Clerc* upon the New Teſtament, and particularly upon the Epiſtle of the *Galatians*, and his *Parrhaſiana*, Tom. I. of the firſt Edition, pag. 82, *&c.*

* *Grotius*'s Words are, *Quia cum illis non ſit Judicii Libertas, non poteſt eis circa illam Libertatem injuria fieri.*

[2] *Lucretius* expreſſeth this by a fine Similitude, l. 1. v. 935, *&c.*

Sed veluti pueris abſinthia tetra medentes
Cum dare conantur, prius oras pocula circum
Contingunt mellis dulci flavoque liquore,
Ut puerorum ætas improvida ludificetur,
Labrorum tenus; interea perpotet amarum
Abſinthi laticem, deceptaque non capiatur,
Sed potius tali facto recreata valeſcat.

——— ——— Phyſicians uſe
In giving Children Draughts of bitter Juice
To make them take it, tinge the Cup with Sweet,
To cheat the Lip: this firſt they eager meet,
And then drink on, and take the bitter Draught,
And ſo are harmleſly *deceiv'd*, not *caught*:
For by this Cheat they get their Health, their Eaſe,
Their Vigour, Strength, and baffle the Diſeaſe.

Mr. *Creech.*

So the Mother in *Theocritus*, Idyll. 15. v. 40.

——οὐκ ἀξῶ τυ, τέκνον· μορμὼ, δάκνει ἵππος.

——— You muſt not go, my dear Delight,
For there are Bug-bears, and the Horſes bite.

admirable on this Point [3] [a]: “Not the Poets alone, *ſays he,* but long before them publick Societies and States made choice of the Art of Fables; and the Lawgivers themſelves, in regard to the common Advantage, when they had firſt reflected on the Genius and Temper of Rational Creatures. For Man is led on with a moſt greedy Deſire of Knowledge; and our earthly Acquaintance with theſe feigned Relations is the firſt ſtep this Paſſion makes towards its own Satisfaction. Here Children begin their Information, and willingly improve their Stock, for the ſake of communicating it to others. The Reaſon of all this is, becauſe Fables do ever carry ſomewhat of Novelty in them, whilſt they report not common and conſiſtent Things, but what is very ſtrange and unuſual. But now whatſoever is thus new and ſurprizing, and what Men never heard of before, cannot fail to be ſweet and agreeable: And 'tis this which breeds in them a covetous Solicitude, and an Eagerneſs after farther Delight. In caſe the Story be wonderful and prodigious, this Delight is highly increas'd; which is the Bait that tempts the young Learners to Induſtry and Study. It is fit therefore that they ſhould at firſt be thus caught and inſnar'd with Pleaſures, but when they have attain'd to a more mature Age, they are to be diſciplin'd and inſtructed in the ſolid Knowledge of Things; their Mind and Judgment being now ſtrengthned and confirm'd, and they no longer ſtanding in need of being flatter'd and humour'd in their Good [b]. In the ſame manner it is very lawful to apply Fictions to Perſons out of their Senſes, in all ſuch Caſes where they are not capable of apprehending true Reaſon.

XVI. And indeed, all in general, upon whom we cannot by plain Speech obtain the good end we deſign, we may, without the Cenſure of *Lying*, by feign'd Addreſſes lead into a Miſtake, for their own Intereſt and Safety. Nor is it needful to draw the Reaſon of this Practice from hence; “That we may preſume, in ſuch a Caſe, the other Party will not think hard of our Treſpaſs on his Liberty of Judgment; nay, that he will give us Thanks for the Advantage he receives from it: And therefore what is done with his Conſent and Approbation, can be no Injury to him. For he had indeed a Right, that our Speech ſhould procure him ſome Benefit, or deliver him from ſome Miſchief; but not that it ſhould produce the quite contrary Effect; which it would have done, had he underſtood the plain Buſineſs without Art or Colour. And therefore in theſe Caſes we ought as much to accommodate our Diſcourſe to the Temper and Condition of the Hearer, as Phyſicians do their Medicines to the Patient's Strength and Conſtitution. Since then no Perſon can be ſaid to have had a Right of hearing Words under ſuch a Form as would have prov'd fatal to him, it cannot be properly affirm'd, that there is any waving or remitting of Right in the preſent Caſe. And then for the Speaker, ſince he was in his part obliged to perform this Office thro' the mediation of Speech, either by the Law of Humanity, or by ſome ſtricter Engagement, 'tis manifeſt, that he cannot be bound to apply his Speech in ſuch a manner as ſhall make it loſe its End and Effect. Therefore all ſuch feign'd Speeches, as either ſave and protect Innocence, appeaſe Rage, aſſwage Grief, or procure any Benefit or Convenience to others, which could not have been obtain'd by direct and open Expreſſions, are not only to be exempted from the number of Lyes, but to be applauded as ſo many Inſtances of Wiſdom. Vid. *Exod.* i. 17, 19. 1 *Sam.* xix. 12, *&c.* xx. 5, 28, 29. 2 *Sam.* xiv. 4, *&c.* 2 *Cor.* ix. 2, 3, 4. *Plin.* l. iii. Epiſt. 16. Of *Arria*, *Hor.* Od. l. iii. 11. v. 35, 36. Of *Hypermneſtra*,

Splendide mendax, & in omne virgo
Nobilis ævum;

Gallantly falſe, and prais'd in Endleſs Fame.

Euripid. Phœniſſ. v. 998, *&c.* Sadi Roſar. Perſic. c. 1. *A beneficial Falſity is better than a deſtructive Truth.* Heliodor. Æthiop. l. i. c. 3. p. 52. Edit. Lugd. Bat. *Feigned Speeches are then good and commendable, when they turn to the advantage of the Hearer, and do not prejudice the Speaker* [1]. We have a famous Example of this proceeding in the Story of [2] *Rahab* the Harlot, *Joſh.* ii. 4. And though *Grotius* obſerves on this place, that *before the Goſpel, a Lye which contributed to the preſervation of good Men, was not eſteem'd faulty; and that therefore this Act is commended by the Apoſtles,* Hebr. xi. 31. and *James* ii. 25. as *agreeable to the Times in which it was perform'd*; yet 'tis our Judgment, that the ſame thing may even now be lawfully done, provided no civil Obligation be prejudiced by it [c]. To the ſame Head belongs the Caſe of thoſe Commanders, who in the heat of an Engagement raiſe the drooping Spirits of their Men by ſome falſe Inſinuation or Report, on the ſtrength of which Encouragement they may force their way to Victory and Safety: Or thoſe, who before a Battle leſſen and undervalue the Number of the Enemy. Vid. *Cornel. Nep.* Eumen. c. 3. The like Inſtances are frequent in all Hiſtories. Xenoph. Apomn. l. iv. p. 462, 463. Edit. Græc. H. Steph. *If a General obſerving his Men to be in a Conſternation, falſly tells them that there are freſh Succours ready at hand for their Re-*

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[a] Lib. i. p. 19. *Geogr.* Ed. Par.

[b] See the Fables of *Æſop* peculiarly recommended by *Philoſtratus,* Apollon. l. v. c. 5. As alſo the Fables of *De la Fontaine,* and the Diſcourſe of Mr. *Buddeus,* Entitled, *Philoſophus Fabularum Amator,* among his *Analecta Hiſtoriæ Philoſophicæ.*

[c] Add *Socrat.* Eccleſ. Hiſt. l. iii. c. 14.

Mr. BARB. *NOTES* on §. XV, XVI.

[3] The Greek is, Καὶ πρῶτον, ὅτι τοὺς μύθους ἀνελέξαντο· οὐχ οἱ ποιηταὶ μόνον, ἀλλὰ καὶ αἱ πόλεις πολὺ πρότερον, καὶ οἱ νομοθέται, τοῦ χρησίμου χάριν, βλέψαντες εἰς τὸ Φυσικὸν πάθος τοῦ λογικοῦ ζώου. Φιλειδήμων γὰρ ὁ ἄνθρωπος, προοίμιον δὲ τούτου τὸ Φιλόμυθον· ἐντεῦθεν οὖν ἄρχεται τὰ παιδία ἀκροᾶσθαι καὶ κοινωνεῖν λόγων ἐπὶ πλεῖον. Ἄιτιον δὲ ὅτι καινολογία τίς ἐστιν ὁ μῦθος, οὐ τὰ καθεστηκότα Φράζων, ἀλλ' ἕτερα παρ' αὐτὰ, ἡδὺ δὲ τὸ καινὸν, καὶ ὃ μὴ πρότερον ἔγνω τίς· τοῦτο δ' αὐτό ἐστιν, καὶ τὸ ποιοῦν Φιλειδήμονα. Ὅταν δὲ προσῇ καὶ τὸ θαύμαστον, καὶ τερατῶδες, ἐπιτείνει τὴν ἡδονὴν, ἥπερ ἐστὶ τοῦ μανθάνειν Φίλτρον. Καταρχὰς μὲν οὖν ἀνάγκη τοιούτοις δελέασιν χρῆσθαι· προϊούσης δὲ ἡλικίας ἐπὶ τὴν τῶν ὄντων μάθησιν ἄγειν, ἤδη τῆς διανοίας ἐῤῥωμένης, καὶ μηκέτι δεομένης κολάκων.

[1] The Greek is, Καλὸν γάρ ποτε καὶ τὸ ψεῦδος, ὅταν ὠφελοῦν τους λέγοντας, μηδὲν καταβλάπτῃ τοὺς ἀκούοντας.

[2] She knew that God by an extraordinary Judgment would deliver the *Canaanites* to the *Iſraelites,* otherwiſe ſhe did not act the part of a good Citizen in hiding the Spyes of a People who came to invade their Country. See Mr. *Le Clerc*'s Note upon that place.

lief, and by this Stratagem composeth their Fears, and keeps them in heart; under what Species of Actions ſhall we reckon it? In all appearance under thoſe that are juſt and good. In *Sophocles* (*Philoctet.* v. 108, 109.) when *Neoptolemus* asks *Ulyſſes*, * *Don't you think it baſe to affirm a Falſity?* His Anſwer is, *No, in caſe the Falſity be a means of Safety.* Add *Frontin.* Stratag. l. i. c. 11. l. ii. c. 7. *Polyæn.* l. i. c. 33. Stratag. Of *Leotychydes*, *Maxim. Tyrius*, Diſſert. iii. p. 29. Edit. Lugd. *The bare telling the Truth is no ſuch brave and comely thing, unleſs it be done to the Benefit of thoſe we are to inſtruct. Thus a Phyſician often deceives his Patients, a General his Soldiers, a Maſter of a Ship his Crew, and we cenſure neither of them upon this account. For in ſome Caſes, a feigned Story doth Men good, when the plain Truth would do them harm* [3]. Though I know not whether *Ageſilaus*'s Stratagem of this kind deſerves Commendation; who, when he ſaw his Soldiers in ſome Fright and Concern at their being like to be over-power'd by the oppoſite Forces, wrote in his Hand the Word *VICTORY*; and taking the Beaſt's Liver out from the Sacrificer, printed thoſe Letters upon it, and then ſhew'd it to the Troops, as a Divine Promiſe of Succeſs [a]. For the ſame Reaſon Phyſicians are not to be accounted *Lyars*, when they perſuade a nice or a froward Patient of the Sweetneſs or Mildneſs of what they apply for his Cure. *Liban.* Declam. 29. p. 664. D. Edit. *Pariſ. Morell. We ſee the Phyſicians beguiling their Patients Appetite with harmleſs Deceits. The ſame we ought to practiſe towards thoſe that are in Health, ſo often as 'twould be better for them to be deceiv'd, than to be truly inform'd.* [4] Yet I queſtion whether the Artifice of *Eraſiſtratus*, Phyſician to King *Seleucus*, in making him believe that his Son *Antiochus* was in Love with his Wife, may be admitted into this Number. Vid. *Lucian*, De Dea Syra. The Conduct of *Joſeph* is juſtifiable on the like account, who, to work his Brothers to a ſerious Repentance for their Crime in ſelling him, and to judge how they ſtood affected towards his Father and towards *Benjamin*, held them a long time in Conſternation and Suſpence by feigned Accuſations [b]. Laſtly, that the Fables of the Poets, by which they inſinuated *Truth* under a taking Diſguiſe, are not to be condemn'd for criminal Falſities, every one will eaſily admit [c]. And thus far the Saying of *Sophocles* will hold good,

Δοκῶ μὲν οὐδὲν ῥῆμα σὺν κέρδει κακὸν [d].

I judge no Speech amiſs that is of Uſe [5].

XVII. The Governours of States may ſometimes too very lawfully uſe a manner of Speaking not ſtrictly true [e]; in as much as their Counſels and Reſolutions, if divulg'd, frequently come to nothing, or perhaps turn to the prejudice of the Commonwealth. And therefore when bare Silence is not a ſufficient Covering, they may veil their Deſigns with feigned Speeches, to divert the Curioſity of inquiſitive Men. *Lying*, ſays *Plato* [1] [f], *is uſeful to Mankind only in the way of Phyſick; and therefore ſhould be allowed to publick Phyſicians, but ought not to be touch'd by private Patients. Princes and Governours (if any Perſons elſe) may be permitted to uſe the ſame Stratagem* [2], *either for the Ruin of the Enemy, the Preſervation of the Subjects, or any*

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[a] *Plutarch. Apophth. Lacon.* p. 214. E. T. 2. Edit. *Wech.* [b] *Gen.* xlii, &c. *Joſeph.* Antiq. Jud. l. ii. c. 3. [c] Vid. *Plutarch.* De audiend. *Poet.* [d] *Electra*, v. 61. [e] Vid. *Grot.* l. iii. c. 1. §. 15. [f] *De Republ.* l. iii. p. 611. Edit. *Wech.*

Mr. BARB. *NOTES* on §. XVI, XVII.

* The Greek is, Neopt. Οὐκ αἰσχρὸν ἡγῇ δῆτα τὰ ψεύδη λέγειν; Ulyſſes, Οὐκ εἰ τὸ σωθῆναί γε τὸ ψεῦδος φέρει.

[3] The Greek is, Οὐδὲν γὰρ σεμνὸν τό τ' ἀληθῆ λέγειν, εἰ μὴ γίγνοιτο ἐπ' ἀγαθῷ τοῦ μαθόντος, οὕτω καὶ ἰατρὸς νοσοῦντα ἐξαπατᾷ, καὶ ϛρατηγὸς ϛρατόπεδον, καὶ κυβερνήτης ναύτας· καὶ δεινὸν οὐδὲν, ἀλλὰ ἤδη ψεῦδος ὤνησεν ἀνθρώπους, καὶ τ' ἀληθὲς ἔβλαψεν.

[4] The Greek is, Καὶ μὲν καὶ τοὺς ἰατροὺς ὁρῶμεν τὰς τῶν καμνόντων ἐπιθυμίας ἀπάταις ἀναβάλλοντας; ἤδέ που καὶ πρὸς ὑγιαινόντας τοῦτο ποιοῦμεν, ὅταν ᾖ κρεῖττον, τοῦ τ' ἀληθὲς ἀκοῦσαι, τὸ παρακρουσθῆναι. But our Author, who quotes this Paſſage, alſo obſerves, that it may be doubted, whether we may uſe that as an innocent Cheat, which *Eraſiſtratus* made uſe of to cure the Prince *Antiochus*, who was in Love with his Mother-in-law *Stratonice*. We may find the Story in *Lucian*'s Work, *De Dea Syriaca*, and Mr. *Fontinelle*'s Dialogues of the Dead, both Antient and Modern, *Dial.* 5. Our Author a little higher alſo diſallows a piece of Craft which *Ageſilaus* made uſe of to encourage his Soldiers: Without doubt, becauſe it contain'd an Affront to the Deity.

[5] But theſe Words do not ſignify what our Author ſuppoſes, following the Latin Tranſlation (not excepting the *Oxford* Edition in 1705. of the two Tragedies of this Poet.) There is nothing that one may not ſpeak innocently, if it tends to our Advantage. Mr. *Dacier* tranſlates them differently, but perhaps to no better Purpoſe. He gives us the whole train of the Diſcourſe, to ſhew us that theſe Words ought to have a different Senſe. At length, ſaith *Oreſtes*, "What evil is it to me if I paſs for Dead, if "I ſhew by my Actions that I am full of Life, and I have gain'd an immortal Name? As for me, I am perſuaded there can be no "ſad Preſage, where there is ſo much Profit." But there may be, as I believe, a better Tranſlation given, more agreeable to *Oreſtes*'s Thoughts, and to the Greek, thus: "I am perſuaded that no Report can tend to our Diſhonour, and hurt our Reputation, "when ſo much Profit may ariſe from it." This appears from what follows. "How many of the Sages, who were for a long time "taken for Dead, have returned to Life again, and were the more honoured by all the World? I hope I ſhall have the ſame good "Luck, and after the Report of my Death is diſperſed every where, I ſhall of a ſudden appear again to my Enemies, *&c.* In theſe laſt Words the Original thus imports, τῆς δὲ τῆς φήμης ἀπὸ, *&c.* From whence it appears, that ῥῆμα is the ſame as φήμη. In fine, We may compare this Expreſſion, ῥῆμα κακὸν, with a like one in the New Teſtament, *Happy are ye, when Men ſhall ſpeak all manner of evil* (πᾶν πονηρὸν ῥῆμα) *againſt you falſly*, Matth. v. 11.

[1] The Greek is, Ἀνθρώποις δὲ ψεῦδος χρήσιμον, ὡς ἐν φαρμάκου εἴδει, δῆλον, ὅτι τό γε τοιοῦτον ἰατροῖς δοτέον, ἰδιώταις δὲ οὐχ ἁπτέον —— Τοῖς ἄρχουσι δὴ τ' πόλεως, εἴπερ τισὶν ἄλλοις προσήκει ψεύδεσθαι, ἢ πολεμίων ἢ πολιτῶν ἕνεκα, ἐπ' ὠφελείας τῆς πόλεως, τοῖς δὲ ἄλλοις πᾶσιν οὐχ ἁπτέον τοῦ τοιούτου. We ought to obſerve, that *Plato* treats here of ſuch Lyes only as concern a State, as appears by what follows, and does by no means condemn ſuch innocent Lyes as private Men uſe one with another. This Philoſopher at the End of the foregoing Dialogue owns, that there is a profitable Lye, which is not to be hated. As for Example, when one ſpeaks a falſe thing to one's Enemy, as well as to thoſe Friends who agree not, to hinder ſome Miſchief. This is a Medicine which we ought to uſe. Here *Plato* keeps to the Notion of a Medicine, and repreſents the Sovereign and his inferior Magiſtrates as ſo many Publick Phyſicians, who alone conſequently may make uſe of a Lye for the Benefit of the State. But he always ſuppoſes, that in Matters that do not concern the Government, whoever can procure an Advantage to another by a Lye, or ſome other innocent Fallacy, he is really a Phyſician to whom it belongs to adminiſter that Medicine. Τί δὲ δή; τὸ ἐν τοῖς λόγοις ψεῦδος, πότε καὶ τί χρήσιμον, ὥϛε μὴ ἄξιον εἶναι μίσους· ἆρ' οὐ πρός τε τοὺς πολεμίους, καὶ τῶν καλουμένων φίλων, ὅταν διὰ μανίαν, ἤτινα ἄνοιαν, κακόν τι ἐπιχειρῶσι πράττειν, τότε ἀποτροπῆς ἕνεκα, ὡς φάρμακον, χρήσιμον γίνεται. See alſo Lib. ii. *&* *de Legibus*, Lib. ii. & Lib. xi. So that *Grotius* had not throughly examined the Senſe of *Plato*, when he ſays, That that Philoſopher ſeems ſometimes to allow, and ſometimes to deny Phyſicians, properly ſo called, a Liberty to ſpeak contrary to their Thoughts; and *Gronovius*, who criticizes on *Grotius*, does not much mend the Matter, affirming, that *Plato* allows it only to Magiſtrates and Phyſicians.

[2] See what our Author ſays in his Diſcourſe, *De Concordia Veræ Politicæ cum Relig. Chriſtiana*, §. 10.

way for the advantage of the Community: But all others ought ſtrictly to abſtain from this Practice. A famous Inſtance we have in *Solomon*'s Judgment, 1 *Kings* iii. 25. And ſo *Claudius* in *Sueton*[a], brought a Woman to own her Son, whom ſhe firſt, on probable Arguments, deny'd, by commanding her to marry him. Thus a Father and a Son being arraign'd together for Murther of a Prieſt, when it could not be made out which of the two had committed the Fact, each refuſing to accuſe the other; *Charlemagne*, as we are told, gave Sentence of Death upon them both; upon which the Father confeſs'd himſelf the Murtherer. So, it being a Law in *Spain*, that in caſe a Female-ſlave be with Child by her Maſter, ſhe ſhall be immediately reſtor'd to Liberty: Once it happen'd, that a Nobleman's Maid was diſcover'd to be in this Condition; the Nobleman denied the thing, and the Proofs alledg'd not being evident, King *Alphonſo* order'd the Child to be publickly ſold into Servitude; the News of which Sentence mov'd the Father to diſcover himſelf. So when *Neleus*, being about to lead abroad a Colony, was commanded by the Soothſayers to purge his Army of all polluted Perſons; he pretended that he himſelf had murder'd a Child, and ſo ſtood in need of Expiation; and by this means perſuading others to confeſs themſelves guilty, he left all thoſe behind him, whom he had thus convicted of Impurity[b]. 'Tis a Proverb with the *Spaniards*, *Tell a Lye, and you'll get out the Truth.* To the ſame Head belongs the Diſſimulation and Concealment about the Sickneſs or Death of Princes, for the prevention of Tumults. Though we are not willing to extend this Liberty ſo far as to juſtify the politick Devices of *Numa*[c]. Nor will the ſame Privilege hold at all in the caſe of Promiſes and Engagements[d].

XVIII. But farther, *Grotius*[e] having thus aſſerted, " That every Lye ariſeth from the impairing " of ſome Right which one Man may have to " underſtand the Mind of another; *concludes* " *from hence*, That we cannot be charg'd with " this Fault[1], when we direct a feigned Diſcourſe " to one who is not deceiv'd by it, tho' a third " Perſon ſhould thence happen to entertain a wrong " Opinion. For 'tis to be ſuppos'd, that I and he, to whom I addreſs'd my ſelf, are tranſacting ſome private Buſineſs, which doth not at all belong to the Perſon who overhears us. Therefore the Man with whom I am dealing is certainly not deceiv'd with my manner of Speech, becauſe he well apprehends my Meaning by it, juſt as if I ſhould relate a Fable, or uſe an Irony or Hyperbole to one who knew how to put the right Conſtruction upon the Words. And as for the third Man, I do not contract the Guilt of Lying in reſpect of *him*, becauſe I have no buſineſs with him, and conſequently he hath no Right to underſtand my Sentiments. So that if he take up a falſe Notion, from Expreſſions applied to another Perſon, not to himſelf, he is to lay all the blame on his own Curioſity and Impertinence. But leſt this Poſition ſhould be abuſed to ill purpoſe, we are to add, as a neceſſary Caution, that 'tis by no means allowable for two Perſons to make uſe of ſuch Occaſions as theſe by way of Stratagem to delude or expoſe a third. For altho' it be never ſo true, that this third Man hath not a perfect Right to know my Judgment, yet the Law of Humanity and Charity requires that my Speech do not occaſion his undeſerved Prejudice. Therefore we ought on all accounts to make this Diſtinction, whether the third Party overhears our Diſcourſe without his own Fault, or whether out of a buſy, or a malicious Humour, he purpoſely intrudes into our Secrets. And therefore this Aſſertion chiefly holds good againſt theſe inquiſitive goſſiping Knaves, who make it their employment treacherouſly to catch up what other Perſons drop in private Company. Now when we apprehend our ſelves to be watch'd by ſuch ſly Deſigners, and yet are not inclin'd to be altogether ſilent, we are wont to diſappoint their buſy Curioſity, by throwing in a ſett of Talk quite impertinent to the Affair which we were before debating of; or by agreeing to tell ſome Story, which our politick Eves-dropper hugging as a mighty Diſcovery, may, upon his communicating it to others, be ſufficiently laugh'd at for his Pains; provided neither he nor any Perſon elſe ſuffer any farther damage by this Contrivance. We know very well 'tis a general Duty, not to leſſen the Honour and Reputation of others, nor to ridicule and expoſe them. Yet, as we do not think ourſelves guilty of any Sin, when we diſcover the Miſtake of another, ſuppoſing it to be done without either Bitterneſs or Inſolence (things ſo unworthy of Men of Senſe and Breeding) although we ſhould hereby rather diminiſh, in ſome reſpect, than improve his Credit: So what ſhould hinder us from correcting a Fault in a Man's Morals, when it proves troubleſome to us, even by Sport and Ridicule, that we may incline him to leave off the Habit? For to amend and reform others cannot therefore be judg'd unlawful, becauſe it tends to the Diſparagement of their Worth and Excellency. Thus, ſince 'tis the common Intereſt of Mankind, that each Man ſhould not underſtand the Secrets of all, it is eſtabliſh'd as 'twere by the general Conſent of Nations, that[2] ſeal'd Letters ſhould be open'd by him only to whom they are directed

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[a] Cap. 15.

[b] *Ælian. Var. Hiſt.* l. viii. c. 5.

[c] Add *Polyæn.* Stratagem. l. ii. in *Epaminond.* n. 6, & 12. *Polyb.* l. xvi. c. 11.

[d] Add *Bacon*'s Eſſ. vi.

[e] Lib. iii. c. 1. §. 13. n. 1.

Mr. Barb. *NOTES on* §. XVIII.

[1] Some of the Fathers of the Church, as *Grotius* obſerves, recite here the Cenſure which St. *Paul* paſs'd on St. *Peter*, who being at *Antioch*, withdrew himſelf from the Company of the new converted *Gentiles*, becauſe he would not offend the *Jews*, *Gal.* ii. 11, *&c.* For ſay St. *Chryſoſtome* and St. *Jerome*, St. *Peter* knew very well that St. *Paul* did not cenſure him in earneſt, but did it ſeemingly only to comply with the Weakneſs of the Brethren preſent. But 'tis plain, that St. *Paul* ſpoke very ſeriouſly, and blames St. *Peter*'s Carriage, as attended with inexcuſable Hypocriſy, becauſe by withdrawing from the *Gentiles*, he gave an occaſion to believe that the Obſervation of the Ceremonies of *Moſes*'s Law was abſolutely neceſſary to render them acceptable to God; and this is contrary to the End and Deſign of the Goſpel. See the Interpreters on the place.

[2] See Mr. *Hertius*'s Diſcourſe, *De Commeatu Literarum*, §. 3. in Tom. i. of his Comments, and ſmall Tracts, where he alſo obſerves, that it has always been taken for a great Incivility and an inhuman Baſeneſs, to publiſh the Letters we receive from others, becauſe it may produce ſome Prejudice to the Writer. Upon which occaſion it may be ſeaſonable to rehearſe the brisk Reproof which *Cicero* gave *Marc Antony* long ago. " He alſo read a Letter, which he ſaid he had received from me. O Man " without Humanity; and who knows not what it is to live! For is there any Man, who has convers'd ſo little with honeſt Men,

" as

directed: Therefore if I find any Perſon intercepting and ſearching my Letters, it can be no Crime if I contrive to let ſome Writing fall into his Hands, which ſhall give him no great Satisfaction in the reading. As a greedy Boy, who hath got a trick of plundering the Cupboard, ſuffers no injury, if amongſt the other Proviſion he meets with a Bait not very ſweet or ſavoury. It was a pleaſant piece of Deception, that which *Herodotus*[a] reports of *Nitocris* or *Semiramis*, who order'd the following Words to be engraven on her Sepulchre, *If any* Babylonian *Prince happens to be in great Diſtreſs for Money, let him open this Tomb, and take out as much as he pleaſeth.* King *Darius*[3] afterward removing the Stone, found no Treaſure, but only this Rebuke, *If thou hadſt not been inſatiably covetous, thou wouldſt never have plunder'd Coffins to enrich thee:* Or, as *Maximus Tyrius*[b] gives the Story, *All Curſes follow thee, thou moſt greedy of Mankind; who for the ſake of Gold haſt preſum'd to diſturb and violate the Dead*[*]. To give Credit to ſuch Inſcriptions is no more an Argument of Avarice than Folly. In the Story of *Papyrius* in *Gellius*[4][c], the Senators rightly commend the Cauſe of the young Gentleman's Fiction; that is, the Wit and Secrecy of ſo unexperienced Years; but adjudge the *manner* of it to be a little undutiful and diſreſpectful to his Mother; eſpecially ſince the Jeſt occaſion'd a Petition not much to the Honour and Credit of the Ladies, That one Wife ſhould rather have two Husbands, than one Husband two Wives. Nor could I ever prevail with my ſelf to be heartily angry with that Senator in *Plutarch*[d], who, to divert his Wife's Importunity in asking about the Secrets of the Houſe, told her a ſtrange Tale of a *Quail*[5], ſaid to be ſeen fly through the *Forum* with a golden Helmet. Though he ought indeed at the ſame time to have taken care that this babbling Dame ſhould not put others into a groundleſs Fright by her Report. For then the preſent Miſtake, which laſted but an inſtant, would have been ſufficiently recompenſed by the Diverſion and Satisfaction which follow'd it. Now if we are bound to uſe Caution, that the Perſon whom we have juſtly and deſervedly impos'd upon, ſhould not deceive others; much leſs will it be allowable to perſuade one Man of what is falſe, with deſign that he may delude a third Perſon; although perhaps the former do not hereby ſuffer any particular Hurt. For indeed to be thus made the Inſtrument of deceiving another, is in itſelf mean and unworthy: And as for our part, 'tis the ſame thing, whether we abuſe a Man immediately by our own Act, or by the Intervention of ſome Perſon elſe, whom we have ſuborn'd for that Service. Though 'tis an Art which many practiſe; firſt, to cheat thoſe whom they intend to make uſe of for the cheating of others. Vid. *Senec. Thyeſt.* v. 320. As *Davus* obſerves[6], there's a great deal of difference, *ex animo omnia, ut fert natura, facias, an de induſtria?* Whether a Man acts according to real Intention and the plain Guidance of Nature, or according to the Affectation of Art and Deſign, *Terent. Andr.* Act iv. Scen. 4. Add *Gell.* l. xii. c. 12.

XIX. This is manifeſt, that ſince the Obligation to diſcloſe our Mind ceaſeth with regard to Enemies, it cannot fall under the Sin of Lying, to give them a feign'd Relation[e], to terrify them with falſe Rumour's, or any ways to procure their Prejudice, provided no undeſerved Loſs or Damage enſue to a third Party who is our Friend. For why may not we by Stratagem and Subtilty, and without endangering our own Perſons, hurt him whom we have Licence to attack with open Violence? The Reaſon why ſome have diſdain'd this Method of Hoſtility[f], was not becauſe they thought any Right to be violated by it, but becauſe among the moſt fierce and martial Souls no Action againſt an Enemy is look'd on as glorious, but ſuch as carries in it ſome ſort of Vigour and Force of Body and Mind. But what we ſpeak about deceiving and circumventing an Enemy, is by no means to be extended to any Pacts[1] or Treaties ſet on foot about concluding or intermitting the War. For ſince the Law of Nature commands us to maintain Peace as far as may be done with Convenience, and to repair any Breach that may happen in it, we muſt ſuppoſe ourſelves commanded at the ſame time to uſe thoſe Means without which this End can ne'er be obtain'd. But now Enemies cannot poſſibly come to an Accommodation, unleſs there be on both ſides an Obligation to the clear Diſcovery of their Mind, in reference to what is tranſacted betwen them; and conſequently unleſs their mutual Diffidence be remov'd by a Neceſſity and Engagement to ſpeak the Truth in all Articles and

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[a] Lib. i. p. 48. Edit. *H. Steph.*

[b] *Diſſertat.* 10. *in fin.* *Vid.* Olearii *Itin. Perſic.* l. iv. c. 7.

[c] Lib. i. c. 23.

[d] *De Garrulitate*, p. 507. Tom. ii. Edit. *Wech.*

[e] See *Grot.* l. iii. c. 1. ſ. 17, 18.

[f] *Vid.* Grot. *ubi ſupra*, & ſ. 20.

Mr. Barb. *NOTES on* §. XVIII, XIX.

" as upon a little brangle with a Friend to make no ſcruple to publiſh and read the Letters he has received from him before all " the World? Is it not to baniſh all Friendſhip out of the World, to take away the liberty of Friends writing one to another " when they are abſent? How many Trifles do we put into our Letters, which being divulged, will appear ridiculous? And how " many ſerious things, which ought not to be made publick? *At etiam literas, quas me ſibi miſiſſe diceret, recitavit, homo, & humanitatis expers, & vitæ communis ignarus! Quis enim unquam, qui paululum modo bonorum conſuetudinem nôſſet, literas ad ſe ab amico miſſas offenſione aliqua interpoſita, in medium protulit, palamque recitavit? Quid eſt aliud tollere è vita vitæ ſocietatem, quam tollere amicorum colloquia abſentium? quam multa joca ſolent eſſe in epiſtolis, quæ prolatæ ſi ſint, ineptæ videantur? quam multa ſeria, neque enim ullo modo divulganda*, Philip. ii. 4. See an Example of this indiſcreet Rudeneſs in the News of the Republick of Letters, *December* 1685, where Mr. *Bayle* cenſures the Author of the Dialogue between *Photinus* and *Irenæus*, &c. which was the famous Mr. *Gautier* a Miniſter.

[3] This Example ſeems not much to our Author's Purpoſe, relating only the manner how *Darius* was cheated by the Inſcription which *Nitocris* Queen of *Babylon* had cauſed to be engraved on her Tomb. For, ſays he, he muſt be a ſimple and covetous Man to believe ſuch an Inſcription.

[*] The Greek is, Ὦ πάντων ἀνθρώπων ἀπληστότατε, ὃς ἔτλης νεκροῦ θίγειν δι' ἔρωτα χρυσοῦ.

[4] Mr. *Bouhours* relates this Story alſo in *French* in his Diſcourſes between *Ariſtæus* and *Eugenius*, Diſc. 3. concerning a Secret. But ſome Men ſuſpect it to be a meer Fable. See Mr. *Thomaſius*'s *Nævi Juriſpr. Rom.* p. 126.

[5] Our Author calls it a *Quail*, but the Original is Κόρυδος, *a Lark.*

[6] I can't ſee what the Paſſage here alledged by the Author makes to his purpoſe. For the true Tranſlation of them (as Madam *Dacier* gives us it) is, *Do you think that there is but ſmall difference in things done by natural Inſtinct, and on a ſudden, and ſuch as are done by Premeditation and Conſultation?*

[1] See what is ſaid, l. v. c. 9. §. 3. And l. viii. c. 7, 8.

Conditions of Peace. And when 'tis aſſerted as lawful to delude or miſchief an Enemy by any feign'd Report; this ought on no account to be carried ſo far as to juſtify the ſpreading of falſe Crimes and Imputations, in order to the impairing his Honour and Credit. The ſtate of Hoſtility doth indeed licenſe me to conceal my Meaning from my Foe, or by ſcattering falſe News to open my way to his Hurt. But he that goes about to charge an Enemy with any grievous Crime, and would have his Accuſation believ'd by thoſe who are at peace with him, muſt lay aſide all the Stratagems and Deceits of War, and ſet up for an Aſſertor of plain Truths; and therefore, with regard to thoſe Perſons who are ſuppos'd to be his Hearers, he is to play the part of an Hiſtorian, or ordinary Relator. Whence, if he voluntarily recede from the Truth and Reality of things, he cannot avoid the double Guilt of Lying and Slandering. Again, to charge an Enemy falſly to his Face, is a Mark of a low and impotent Reviler. To return Lyes for Lyes, is to imitate the Folly and Vanity of the Adverſary [a]. As for the Notion of *Lipſius*, in his Treatiſe of Politicks [b], who reckoning up the Perſons towards whom we may be allowed to practiſe Simulation or Diſſimulation, joins Foreigners to Enemies; this ought no farther to be admitted, than as it is for our Advantage to hide our Deſigns or our Affairs from their Notice. For that we ſhould by feign'd Speeches procure their Harm or Loſs, is what Nature itſelf will not bear; on account of that nearneſs of Blood by which all Mankind ſtand related and allied to each other.

XX. 'Tis a Queſtion of more Difficulty, Whether a Criminal or an Offender arraign'd on any account may deny the Fact [1] with which he is charg'd, or endeavour to elude the Accuſation by feign'd Arguments, and yet not incur the Guilt of Lying? And here we do not ſpeak of the Divine Tribunal, in reſpect of which the ſafeſt Courſe is to fly immediately to humble Confeſſion, and an earneſt imploring of Pardon: Since it would not be leſs Impiety than Folly, to uſe Excuſes or Denials before an Omnipotent Judge. And 'twas on this Principle that *Joſhua* made the Exhortation to *Achan*, which we have in *Joſh.* vii. 19, 20. For there the Criminal was before detected by the Hand of Heaven. The preſent Enquiry therefore is confin'd to human *Judgments*; which are principally deſign'd for theſe two Ends and Uſes: Firſt, that every Man may obtain what is his Right and Due: And, Secondly, that fit Puniſhments may be inflicted for the Correction and Reſtraint, both of thoſe, who have dared with wicked purpoſe actually to violate the Rights of others; and of thoſe too, who by reaſon of their cold Affection towards Juſtice would have proceeded to the ſame Commiſſions, did they not dread the ſuffering thoſe Evils, which they have ſeen fall ſo heavily on other Offenders. Now, to decline the Severity of this Proceſs, ſome think it by no means allowable to make uſe of falſe Speeches: Firſt, becauſe the Judge hath an eſpecial Right to underſtand the Truth. Wherefore, neither the Sanctity of the Magiſtrate, who preſides in the Name of God, nor the Neceſſity which the Subject lies under to Obedience, will give the leaſt place or countenance to Contumacy or Circumvention. Beſides, they ſay, this Permiſſion appears rather dangerous than needful or beneficial; in as much as conceal'd Crimes do the more Miſchief. Eſpecially if what is deliver'd in excuſe, be not only falſe in *Fact*, but in *Theory*; every ſuch Untruth being of ill Conſequence, not only conſider'd by itſelf, but likewiſe in regard that one Error gives Occaſion and Riſe to an infinite Train of others. Yet the contrary Opinion is by many preferr'd; who ſay, we ought to diſtinguiſh in every Crime between the Damage done, and the baſe Guilt or Commiſſion; to the former of which Reſtitution properly anſwers, and to the latter Puniſhment. By the Law of Nature every Man ought to make Reſtitution for Damage occaſion'd by his Fault; and at the ſame time the ſuffering Party ought, upon his Sorrow and Reparation, to admit him to Pardon. Therefore every guilty Perſon is, by an Obligation ſtrictly ſo call'd, bound to be always ready to repair any Damage he hath caus'd.

But no Man is tied to offer up himſelf freely to Puniſhment, and to be an Informer againſt himſelf. So that if the Fact be not known, and an open [2] Reſtitution would be a Confeſſion of the Guilt, in this Caſe the Reſtitution is to be made in ſome indirect and ſecret manner. All Puniſhment muſt be inflicted upon Men againſt their Wills; otherwiſe it could never obtain its due End, which is to deter the preſent Offender, and all other Perſons from Sin. But whatever we lie under an *Obligation* to perform, is to be undertaken by our own free and voluntary Motion. Since then no Perſon is properly *obliged* to invite and call down Puniſhment on his own Head [3] [c], but

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[a] Add Mr. *Paſcal*'s Epiſt. 15. *cum Annotat.*

[b] Lib. iv. c. 14. n. 32.

[c] Vid. *Digeſt.* 48. tit. 21. *De bonis eorum qui ante ſentent.* &c. Leg. 1.

Mr. Barb. *NOTES* on §. xx.

[1] *Plato* without doubt took the Negative Part here. For he will not allow a Private Perſon to lye before a Magiſtrate, and ſays, 'tis a greater Fault, than for a ſick Man to lye to his Phyſician, a Scholar to his Maſter, &c. His Words are, Ἀλλὰ πρός γε δὴ τοὺς τοιούτους ἄρχοντας ἰδιώτῃ ψεύσασθαι, ταυτὸν καὶ μεῖζον ἁμάρτημα φήσομεν ἢ κάμνοντι πρὸς Ἰατρὸν, ἢ ἀσκοῦντι πρὸς παιδοτρίβην, περὶ τῶν τοῦ αὐτοῦ σώματος παθημάτων μὴ τ' ἀληθῆ λέγειν, &c. *De Republ.* l. iii. p. 389. *Ed. Steph.* Nay, he goes farther, and maintains, that every one of his own accord is to accuſe himſelf and Relations, that they may ſuffer the Puniſhments which the Law inflicts, though they be Capital, as his Words import. Εἰ μὴ εἴ τις ὑπολάβοι ἐπὶ τοὐναντίον κατηγορεῖν δεῖν· μάλιστα μὲν ἑαυτοῦ ἔπειτα δὲ καὶ τῶν οἰκείων, καὶ τῶν ἄλλων· ὃς ἂν ἀεὶ τῶν φίλων τυγχάνῃ ἀδικῶν, καὶ μὴ ἀποκρύπτεσθαι, ἀλλ' εἰς τὸ φανερὸν ἄγειν τὸ ἀδίκημα, ἵνα δῷ δίκην, καὶ ὑγιὴς γένηται. Ἀναγκάζειν δὲ καὶ αὑτὸν, καὶ τοὺς ἄλλους μὴ ἀποδειλιᾷν, ἀλλὰ παρέχειν μύσαντα καὶ ἀνδρείως, ὥσπερ τέμνειν, καὶ κάειν Ἰατρῷ, τὸ ἀγαθὸν, καὶ καλὸν διώκοντα, μὴ ὑπολογιζόμενον τὸ ἀλγεινὸν, ἐὰν μέν γε πληγῶν ἄξια ἠδικηκὼς ᾖ, τύπτειν παρέχοντα· ἐὰν δὲ δεσμοῦ, δεῖν· ἐὰν δὲ ζημίας ἀποτίνοντα· ἐὰν δὲ φυγῆς, φεύγοντα· ἐὰν δὲ θανάτου, ἀποθνήσκοντα. In Gorgia, p. 480. *Ed. H. Steph.*

[2] Mr. *Thomaſius*, who in his Treatiſe, *De Juriſpr. Divin.* l. ii. c. 8. §. 85, &c. is of a contrary Judgment to our Author, objects, that the Condition of making good the Damage cauſes that the Crime can't be concealed, as is ſuppoſed; becauſe by making good the Damage, the Crime is owned. But he afterwards anſwers it himſelf in his Book, Entituled, *Fundam. Jur. Nat. & Gent.* where he changes his Opinion, and ſays, that the guilty Perſon may, either by way of Accommodation, or by Friends, ſatisfy the Perſon injured in ſuch a manner, that he ſhall not know who it was that wrong'd him, or if he has ſome knowledge of him, the thing ſhall not be ſo notorious as to bring him to Puniſhment.

[3] The Words are, *Ignoſcendum cenſuerunt Principes ei, qui ſanguinem ſuum qualiter qualiter redemptum voluit.*

muſt, indeed, as he is a Man, naturally abhor it in the higheſt degree; eſpecially if it tend to Death, or ſome other grievous Evil; there appears no reaſon why he may not decline it any way poſſible, provided he do not hereby injure a third Party [a]. Nor can it much conduce to the Intereſt of a Commonwealth, that after Reparation hath been made for the Damage, any ſuch Fact, as we now ſpeak of, ſhould be puniſh'd; that is, a Fact not open and notorious, and which conſequently might be diſguis'd or excuſed by ſome Colour or Plea. Therefore, as none but a Fool will deny manifeſt Faults, ſo from what hath been here alledg'd, it ſeems allowable for a Man to wipe off an Imputation by a falſe Defence. Tho' for a Priſoner to urge falſe Opinions, can ſeldom turn to his Advantage, the Court being ſuppos'd well skill'd in Right and Equity. A Judge indeed hath Power and Liberty to get out the Truth by any poſſible Means [4], in caſe the Fact be of ſuch Conſequence, that the Safety of the Publick abſolutely requires it ſhould be puniſh'd. And therefore he cannot be tax'd with Lying, if to bring the Party to a Confeſſion, he make uſe of ſome Stratagem or Fiction: As ſuppoſe, by pretending that he hath receiv'd full Information ſome other way, or by threatning that he will proceed to ſuch or ſuch Severities, if the Perſon accus'd perſiſt in his Obſtinacy, and the like. But it cannot hence preſently be concluded, that the Criminal himſelf is bound to own the Charge: Becauſe neither doth every Power, which denotes the bare Exerciſe of ſome Act, infer an [5] *Obligation* in the Object towards which it is directed: And beſides, there are other ways for the Judge to penetrate into the Buſineſs, as by Arguments and Witneſſes, which Witneſſes, when examin'd about the Crimes of others, are obliged, though unſworn, to declare the Truth, in Obedience to the Command of Authority. Farther, Self-preſervation is a thing which challengeth ſo much Favour and Allowance, that 'tis reckon'd odious to puniſh the moſt notorious Offenders, without giving them a Hearing [6] [b]. On which account, no Perſon is blamed for caſting any Veil or Colour over his Fault. The Divine Tribunal and the Human are not in all reſpects alike; nor doth a mortal Judge preſide with ſuch Majeſty and Authority as Almighty God. And if a Priſoner be not bound to make a voluntary Confeſſion, his Denial cannot in the leaſt impair that Obedience which he owes to the Civil Power. 'Tis true, a Crime, which hath been reſolutely and ſtubbornly diſown'd, commonly meets with the ſeverer Puniſhment; becauſe free Confeſſion is generally a ſign of Penitence, which much leſſens the Malignity of the Offender: Yet whether it be more advantageous cunningly to deny a Fact, or to embrace the Ingenuity of an open Acknowledgment, is a Point which belongs to another kind of Enquiry, not to that which we are now engag'd in, and which confines itſelf to Matters of ſtrict Duty, what a Man is bound to do, and what not [7]. Which of theſe two Opinions ought to be choſen rather than the other, any Man will apprehend, who hath Judgment enough to weigh the Arguments offer'd on both ſides. 'Tis very remarkable, that which *Hayton* reports in his Hiſtory of the *Tartars*, c. 48. *That although in other reſpects they are moſt notorious Lyars, yet in two things they ſtrictly obſerve the Truth: Firſt, that no Man among them arrogates to himſelf the Glory of an Exploit which he really hath not perform'd: And, Secondly, that whoever hath committed a Crime, though ſuch as he knows will coſt him his Life, when examin'd by his Lord, never conceals the Matter.* And amongſt the *Japoneſe*, to be diſcover'd in a Lye before the Judge is a capital Offence.

XXI. But 'twill be ask'd, What liberty may the Council or the Advocate fairly take in this Caſe? Our Opinion is, that we ought here to diſtinguiſh between *civil Caſes* and *criminal*. In the former it doth not appear that the Advocate can with a ſafe Conſcience hinder the injur'd Party from obtaining his Right as ſoon as poſſibly he may. And therefore in ſuch Controverſies we condemn, as unlawful, not only falſe Allegations and feign'd Reaſons, but likewiſe all dilatory Exceptions and Demurs; in as much as all theſe are a Let and Hindrance to the one Party from paying what he owes; and to the other from receiving what is due to him [c]: But in criminal Caſes, where the Diſpute regards only the Puniſhment, we judge it ought farther to be conſider'd, whether the *Council* be aſſign'd by the publick Authority, or by the particular Appointment of the Priſoner. If by the former, it doth not ſeem allowable for them to make uſe of feign'd Arguments and falſe Colours; ſince the Deſign of the Court, in deputing them, was only that they might wipe off any Calumny thrown upon the Priſoner, and take care that he ſuffer no Injuſtice. Which End is ſufficiently anſwer'd by a bare Refutation of the Proofs offer'd by the Accuſer. But he whom the Priſoner particularly chooſeth and retains to plead in his behalf, ſince he only acts as his Client's Interpreter, may, in our Judgment, lawfully uſe the ſame Method of Defence which the Priſoner might have uſed, had he anſwer'd for himſelf. *He is under a very great Miſtake*, ſays *Tully* [1], *that fanſies he hath got our real Opinion and Authority for all that he meets with in our Judiciary Orations. Whatever we deliver'd on thoſe Subjects is to be aſcrib'd to the Cauſes, and to the Times, not to the Man, or to the Pleader.* And

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[a] Yet compare l. xiii. *D. De cuſtodia & exhibitione reorum.* [b] Vid. l. xlviii. tit. 17. *Princ. D. De requir. vel abſent. demand. & Grotii* Annotat. in *Flor. Sparſionib.* [c] Comp. l. ix. §. *ult. D. Ad L. Cornel. de falſis.*

Mr. BARB. *NOTES on* §. xx, xxi.

[4] Yet *Grotius* on *Deut.* xiii. 8. obſerves, that the *Jews* were allow'd to uſe Artifice in the Diſcovery of Criminals, only when the Party was accuſed of enticing others to Idolatry.

[5] There is always ſome Obligation, though it is not always ſo far extended as Right. See l. iii. c. 5. §. 1. n. 1. And l. viii. c. 3. §. 4. n. 8.

[6] The Words are, *Neque enim inaudita cauſa quenquam damnari æquitatis ratio patitur.*

[7] We may eaſily diſcern that our Author embraces the laſt Opinion.

[1] *Tully*'s Words are, *Sed errat vehementer, ſi quis in orationibus noſtris, quas in Judiciis habuimus, authoritates noſtras conſignatas ſe habere arbitratur. Omnes enim illæ orationes cauſarum & temporum ſunt, non hominum ipſorum & Patronorum. Nam ſi cauſæ ipſæ pro ſe loqui poſſent, nemo adhiberet Oratorem*, Orat. *pro A. Cluentio*, cap. 50. In truth, *Cicero* explains this Maxim but ſorrily, and extends it to things which our Author approves not of. See Mr. *Le Clerc*'s Queſtions taken out of *Jerom.* Quæſt. 8. §. 14.

in his Second Book of *Offices* [2] he maintains, ſometimes to defend a guilty Perſon, is not contrary to any Duty of Religion. Nor is Juſtice in any great danger of ſuffering by this Permiſſion: For, ſince the Judge is ſuppoſed fully to underſtand the Law, the Advocate, by producing falſe Laws or falſe Authorities, is not likely to prevail to any purpoſe: And he is never credited upon his bare Aſſertion, but obliged to produce ſufficient Proof. And therefore, if a guilty Perſon do by this means ſometimes eſcape unpuniſhed, the Fault is not to be charged on the Advocate, or on the Priſoner, but on the Judge, who had not the Wiſdom to diſtinguiſh between Right and Wrong: Yet *Plato* [a] would not grant even this degree of Indulgence in his Commonwealth. And the antient *Egyptians* held it for a certain Maxim, That the *Harangues* of the Lawyers very much darken'd and perplex'd the Law [b]. Eſpecially, ſince, as *Euripides* [c] obſerves, *Truth always ſpeaks plain*; and therefore doth not ſtand in need of the Windings and Turnings of Interpreters: Whereas, * *unjuſt Speeches being always ſick and weak in themſelves, require ſtrong and ſubtil Medicines for their Support.* 'Tis a Saying of Pindar †, *Three Words are enough to ſet off a good Cauſe.* And *Iſocrates*, amongſt his other Rules to *Demonicus*, adviſeth him, *Never to undertake in Court the Defence of a Wicked Man: For*, ſays he, *People will think you are inclined to thoſe Practices your ſelf, which you defend in others* ¶.

It is hence evident how far we may admit of *Quinctilian*'s Aſſertion [3] [d]; *A Wiſe Man*, ſays he, *is on ſome Occaſions allow'd the privilege of Lying: and an Orator, if he cannot otherwiſe bring the Judge to Reaſon and Equity, muſt neceſſarily apply himſelf to the moving his Affections.* And again, *That which at the firſt Propoſal appears ſo harſh and ſtrange, may however be maintain'd upon reaſonable Grounds; namely, that a good Man in defending a Cauſe may ſometimes go about to perplex the Truth, and deceive the Judge* [4] [e]. But the inſtances which he offers require a more ſtrict Examination. Firſt, he affirms, *That a Perſon arraign'd for plotting againſt a Tyrant may be defended by falſe Allegations* [5] [1]. And this is built upon the *Grecian* Hypotheſis, which makes the killing of Tyrants lawful. Otherwiſe, to defend by feign'd Arguments, a Perſon guilty of Treaſon againſt the Prince to whom we have our ſelves ſworn Allegiance, is therefore unlawful, becauſe every Subject is bound to guard and preſerve his Sovereign to his utmoſt Ability. Whereas the deſire or endeavour of ſheltering a Conſpirator from juſt Puniſhment would be utterly inconſiſtent with that Obligation. He proceeds to urge, *What if a Judge ſhould be about to condemn a Man for ſome good Actions, unleſs we can prove the Actions not to have been perform'd, ſhall not the Orator who appears in his behalf be allow'd the uſe of ſuch Means to preſerve this innocent, and what is more, this worthy and commendable Member of the State* [2]? But indeed ſuch a Caſe as this can hardly be ſuppos'd. For nothing ought to be honour'd with the Name of a good Action, but what is agreeable to the Laws of the Commonwealth. And it doth not appear how any Man ſhould be brought into Judgment for ſuch a Performance. Let us imagine therefore, that a Perſon by ſome good and noble piece of Service hath incurr'd the Envy of Wicked Men, and that theſe Wicked Men have afterwards got poſſeſſion of the Seat of Juſtice. Here if the Fact were openly known, and an Accuſation brought againſt him for it, 'twould ſignify nothing to diſown it. As 'twould have been idle for *Cicero*, had he been arraign'd for putting to death the Aſſociates of *Catiline*, to deny the Charge. But if the Fact may ſtill be diſſembled with ſome colour and probability, there's no reaſon why an innocent Priſoner may not be defended by feign'd Arguments before a wicked Judge. As for the other inſtance of *Quinctilian*, *When a Man is to diſſuade from ſome Undertaking, juſt indeed naturally and in itſelf, but in the preſent Juncture of Affairs diſadvantageous to the State* [3]; there's no need he ſhould endeavour by falſe Reaſons to prove thoſe juſt Things to be unjuſt; but 'tis ſufficient for him to ſhew, that what may juſtly be done, is not always neceſſary to be done; and that the Times now require us to chooſe what is uſeful and profitable, rather than what in ſtrictneſs may ſeem more commendable and right; and all this may be urged without receding from the Truth. Another Caſe propos'd by *Quinctilian* is, *When an Orator hath good Hopes of the Criminal's future Reformation* [4]. And this indeed may prevail with him to be the more willing to lend the Priſoner all his Parts and Cunning in order to his Deliverance, becauſe he is aſſur'd that 'twill not be to the prejudice of the Publick, that ſuch a Perſon ſhould go unpuniſh'd. But to reſcue a good Commander from ſuffering for a manifeſt Crime, when his Life is neceſſary for the Honour

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[a] *De LL.* l. xi. *ſub fin.* [b] *Diodor. Sicul.* l. i. c. 6. [c] *Phœniſſ.* ver. 475. [d] *Inſtit.* l. xi. c. 17. [e] *Inſtit.* l. xii. c. 1.

Mr. BARB. *NOTES* on §. xxi.

[2] His Words are, *Nec tamen habendum eſt Religioni, nocentem aliquando, modo ne nefarium impiumque, defendere. Vult hoc multitudo, patitur conſuetudo, fert etiam humanitas.* Our Author reflects upon the beginning of this Sentence, and falls thereby into a pleaſant Miſtake. For having read theſe Words of *Cicero*, *Habendum eſt Religioni*, he ſuppoſes him to mean, that 'tis not contrary to Religion; and ſo ſays of him, *Religioni non contrarium tradit*; whereas Boys know, that *habere Religioni* ſignifies only, *To make a ſcruple of a thing.*

* His Words are, Ὁ δ' ἄδικος λόγος Νοσῶν ἐν αὑτῷ, φαρμάκων δεῖται σοφῶν.

† The Greek is, Εὐώνυμον ἐς δίκαν τρία ἔπεα διαρκέσει. Nem. vii. 70.

¶ *Iſocrates*'s Words are, Μηδενὶ πονηρῷ πράγματι μήτε παρίςασο, μήτε συνηγόρει, δόξεις γὰρ καὶ αὐτὸς τοιαῦτα πράττειν, οἷάπερ ἂν τοῖς ἄλλοις πράττȣσι βοηθῇς.

[3] His Words are, *Et mendacium dicere etiam ſapienti aliquando conceſſum eſt: & affectus, ſi aliter ad æquitatem perduci Judex non poterit, neceſſariò movebit Orator.* ii. 18.

[4] The Latin is, *Verum & illud quod prima propoſitione durum videtur, poteſt afferre ratio, ut vir bonus in defenſione cauſæ velit auferre aliquando Judicii veritatem.* xii. 1.

[5] The Latin of this long Sentence of *Quinctilian*, which our Author examines in the following part of the Chapter, is this, [1] *Sit aliquis inſidiatus Tyranno, atque ob id reus: utrumne ſalvum eum nolet is qui à nobis ſinitur Orator? an ſi tuendum ſuſceperit, non tam falſis defendet, quam qui apud Judices malam cauſam tuetur?* [2] *Quid ſi quædam bene facta damnaturus eſt Judex, niſi ea non eſſe facta convicerimus: non vel hoc modo ſervabit Orator non innocentem modo, ſed etiam laudabilem civem?* [3] *Quod ſi quædam juſta natura, ſed conditione temporum inutilia civitati ſciemus, nonne utemur arte dicendi, bona quidem, ſed malis artibus ſimili?* [4] *Ad hoc nemo dubitabit, quin ſi nocentes mutari in bonam mentem aliquo modo poſſint, ſicut poſſe interdum conceditur, ſalvos eſſe eos magis è Republica ſit, quam puniri. Si liqueat igitur Oratori, futurum bonum virum, cui vera objicientur, non id aget, ut ſalvus ſit? Da nunc ut crimine manifeſto prematur Dux bonus, & ſine quo vincere honeſte Civitas non poſſit: nonne ei communis utilitas Oratorem advocabit?* Ib.

and Succeſs of the State, the beſt Expedient is, not to have recourſe to Falſhood and Fiction, but rather to take that plain and open Method which *Tully*[a] tells us, was us'd by *Antonius* the Orator, in his Defence of *M. Aquilius*[6].

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[a] In *Verrem*, l. v. c. 1. *circa finem*.

Mr. BARB. *NOTES on* §. XXI.

[6] This *Aquilius* being accuſed of cruel Extortion and Oppreſſion, *M. Antony* the Orator open'd his Breaſt to ſhew the Judges the horrible Wounds he had received in the Defence of the Commonwealth.

CHAP. II.

Of an OATH.

I. *The Sanctity of an Oath.*
II. *What an Oath is.*
III. *It muſt be taken only by the Name of God.*
IV. *And according to the Religion of him that ſwears.*
V. *Of the Intention of him that ſwears.*
VI. *An Oath is an additional Bond of an Obligation.*
VII. *Of Oaths obtained by Deceit.*
VIII. *Of Oaths obtained by Fear.*
IX. *Oaths to perform things unlawful bind not.*
X. *Nor thoſe, which hinder a greater good.*
XI. *An Oath doth not alter the Nature of thoſe Actions to which they are joined.*
XII. *An Oath excludes all Cavils.*
XIII. *But is not always to be interpreted ſtrictly.*
XIV. *Or without ſome tacit Conditions and Limitations.*
XV. *An Oath is to be explained by the intention of the Impoſer.*
XVI. *Of an Oath made in another's ſtead to oblige him.*
XVII. *How an Heir is obliged by the Oath of the Dead.*
XVIII. *A Diviſion of Oaths ; as,* 1. *For Confirmation.* 2. *In bearing Witneſs.* 3. *Deciſive of a Controverſy.* 4. *Suppletory or Clearing.*
XIX. *Whether every breach of an Oath is Perjury.*
XX. *Of the ways of diſpenſing with Oaths.*

WE proceed to examine and ſtate the Nature of an *Oath*, which is judg'd to add great ſtrength and confirmation to our Diſcourſe, and to all our Acts which have any dependence upon Speech : which though we might have treated of very properly and conveniently hereafter, when we come to explain the enforcements of Pacts and Covenants ; yet we choſe to aſſign it this particular Place rather than any other, becauſe the Cuſtom of Swearing is us'd for the Eſtabliſhment and Security not only of Covenants, but of bare Aſſertions. (To which purpoſe it may not impertinently be obſerved, that amongſt the *Jews* no Oaths or Vows were eſteem'd obligatory, but ſuch as were openly deliver'd in [a] Words.)

An *Oath* the very *Heathens* look'd on as a thing of ſo great Force, and of ſo ſacred Authority, that they believ'd the Sin of Perjury to be purſued with the ſevereſt Vengeance ; ſuch as extended itſelf to the Poſterity of the Offender, and ſuch as might be incurr'd by the bare Thought and Inclination, without the Act. Vid. *Grot.* l. ii. c. 13. ſ. 1. *Philo Jud.* de Sacrificiis *Abel.* & *Cain.* p. 113. E. Edit. *Genev. Our Aſſertion derives its Force from the Oath, the Oath from God*[1]. Thus *Diodorus Siculus*[2] [b] reports of the *Egyptians*, *That by their Laws Perſons who had forſworn themſelves, were adjudg'd to capital Puniſhment, as guilty of the two greateſt Crimes ; in violating that Piety which they ow'd to God ; and in deſtroying Faith from amongſt Men, the ſtrongeſt Pillar of human Society.*

II. An *Oath* then is a religious Aſſeveration, by which we either renounce the Mercy, or imprecate the Vengeance of Heaven, if we ſpeak not the Truth. That this is the Senſe and Purport of *Oaths*, appears from thoſe Forms of Words in which they are commonly expreſs'd ; as, *So help me God, God be my Witneſs, God be my Avenger*, and other equivalent Terms, which amount to much the ſame. For when a Superior, who hath a right of Puniſhing, is appeal'd to as a Witneſs, his Vengeance is likewiſe invoked in caſe of Breach of Faith ; and God who knows all things, being ever a Witneſs, is ever an Avenger. *Plutarch*, Quæſt. *Roman.* 44. obſerves[1], that *every Oath terminates in the Curſe of Perjury* ; or, that is the Ground and Bottom upon which all Swearing depends. In the ſame place enquiring into the Reaſons why the *Flamen Dialis* amongſt the *Romans* was not allow'd to ſwear, he delivers himſelf to this purpoſe : *Was it*

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[a] Vid. *Grot.* in *Levit.* v. 4. *Numer.* xxx. 3. *Deut.* xxiii. 23.

[b] Lib. i. c. 77. p. 69. A. Edit. *Rhodom.*

Mr. BARB. *NOTES on* Chap. II. §. I, II.

[1] The Paſſage of *Philo* the *Jew*, which our Author quotes, reſpects the difference between Oaths made by God, and ſuch as are made by Men, which conſiſts in this, That an Oath adds a Force to our Words, whereas God's Oath takes all its Force from his Word. So are his Words, Καὶ συμβέβηκε τὴν μὲν ἡμετέραν γνώμην ὅρκῳ, τὸν δὲ ὅρκον αὐτὸν Θεῷ πεπιστῶσθαι. I am miſtaken, if our Author did not think that *Philo* meant by theſe laſt Words, *That the Force of Oaths made by Men proceeds from the Fear they have of God.* The Impropriety of the Latin Tranſlation, conſider'd with the following part of the Diſcourſe, was apparently the Cauſe he ſo underſtood it, otherwiſe he could not have quoted this Paſſage, which had been nothing to his purpoſe.

[2] *Diodorus*'s Words are, Πρῶτον μὲν οὖν κατὰ τῶν ἐπιόρκων θάνατος ἦν παρ' αὐτοῖς [Αἰγυπτίοις] τὸ πρόστιμον, ὡς δύο τὰ μέγιστα ποιούντων ἀνομήματα, Θεούς τε ἀσεβούντων, καὶ τὴν μεγίστην τῶν παρ' ἀνθρώποις πίστιν ἀνατρεπόντων. See ſeveral other Authorities in *Grotius*, l. i. c. 13. §. 1.

[1] The Greek is, Πᾶς ὅρκος εἰς κατάραν τελευτᾷ τῆς ἐπιορκίας. See alſo *Grotius*, lib. ii. c. 13. §. 10.

becauſe an Oath is a kind of Torture, or the only Force that may be applied to the Souls of free Subjects; whereas the Prieſt ought to be exempt from all Violence, as well in Mind as in Body: Or becauſe every Oath terminates in the Curſe of Perjury; whereas all Curſing is ominous and unlucky; which is the Reaſon that the Prieſts are forbidden by the Laws to uſe Imprecations towards others? And indeed the Conduct of the Athenian *Prieſt was commended, who being order'd by the People to devote* Alcibiades *with the uſual Ceremonies, refus'd; alledging, That his Buſineſs was to preſide in good Wiſhes, not in bad. Or, was it, becauſe the Guilt of Perjury might turn to the Danger of the Publick, if an impious forſworn Wretch were to offer Vows and Prayers in behalf of the State, and to perform the Offices of religious Worſhip?* Nor can a more grievous Puniſhment light upon Mankind, than their loſing all Title to the Protection and Aſſiſtance of Providence. Yet when we ſay, that God is invok'd as a Witneſs in Swearing, it ought on no account to be hence inferr'd, that an Oath ſhould be look'd on as the Teſtimony of God; or as if God himſelf gave Atteſtation to the Veracity of the Swearer [2]; which ſeems to be the Opinion of Biſhop *Sanderſon* [a]. But when an Omniſcient and Omnipotent Being is call'd to be both a Witneſs or Guarantee, and likewiſe an Avenger, we therefore preſume upon the Truth of what is deliver'd, becauſe we cannot conceive any Perſon to be arriv'd at ſuch a pitch of Impiety, as lightly to ſtir up the Divine Vengeance againſt himſelf. And hence Perjury appears to be a moſt monſtrous Sin, in as much as by it the forſworn Wretch ſhews, that he at the ſame time contemns the Divine, and yet is afraid of human Puniſhment; that he is a daring Villain towards God, and a ſneaking Coward towards Men [b]. The ſcope and meaning of *Oaths* is likewiſe ſuggeſted by the End for which they have been introduc'd: and that is, that Perſons might be the more firmly engag'd to declare the Truth, or to perform their Promiſes, by the juſt Awe and Dread of the Divinity, infinite in Knowledge, and infinite in Power; whoſe Wrath they thus invite down upon their own Heads, if they knowingly deceive: Whereas perhaps there would not have been Force and Security enough in the Fear of Men, whoſe Strength they might fanſy themſelves able to baffle or to decline; or whoſe Diſcovery they might hope to eſcape [c]. For in Caſes where the Party with whom we tranſact, if he deceive us after his bare Word or Promiſe, cannot poſſibly lie conceal'd, nor avoid human Puniſhment, it ſeems ſuperfluous to put him to his *Oath*. 'Tis the Advice of *Demoſthenes* [d], *Thoſe who eſcape your Juſtice, leave to the Vengeance of the Gods; but thoſe on whom you can lay hands, never conſign over to Providence, without puniſhing them your ſelves.* And for this reaſon we ſhould judge it to be an Abſurdity in the *Civil Law* [e], when, on the contrary, it allows a Woman to ſwear that ſhe is not with Child. This Caution will appear to have the more Weight, if we conſider that the too frequent uſe of Oaths doth in many Perſons much impair the Reverence due to them. It was an excellent Leſſon which *Pythagoras* [3] gave his Scholars; *Very rarely and very hardly to be brought to an Oath, but if they had once ſworn, moſt inviolably to obſerve it.* Nor is *Iſocrates*'s Precept on the ſame Subject to be deſpis'd; *Never ſwear,* ſays he, *on the account of Money, though you could do it with the greateſt Safety and Aſſurance; leſt you draw upon your ſelf a double Imputation, of Perjury with ſome, and of Avarice with others* [f].

But as 'tis juſt and right to pay the moſt religious Reverence to *Oaths*, ſo is it vain Preſumption to expect or deſire that their Truth or Falſhood ſhould be evinced by an immediate Miracle; as if God were obliged to exerciſe his judicial Office, at the pleaſure and humour of Men. And yet this was a Superſtition which very much obtain'd of old, not only amongſt the Heathens, but in the ignorant and barbarous Ages amongſt Chriſtians themſelves. *Sophocles* [g] [h] plainly ſpeaks of the *Fiery Ordeal*;

Ἡμεν δ᾽ ἕτοιμοι καὶ μύδρους αἴρειν χεροῖν,
Καὶ πῦρ διέρπειν, καὶ Θεοὺς ὁρκωμοτεῖν.

Prepar'd we ſtood to lift the burning Steel,
To tread the Flames, and by all Heaven to ſwear.

'Tis remarkable what *Phil. Baldæus* in his Treatiſe of the Idolatry of the *Indians* [i] reports of the *Malabars, That amongſt them, the Perſon who is to take a Purgative Oath, hath his three firſt Fingers dipt in melting Butter, and then wrapt up in Leaves, which three Days after are uncover'd, to ſee the Effect. Others are order'd to ſwim over a River between* Colchis *and* Cranganor, *full of Crocadiles: Others to reach an Apple out of a Pot ſtuft with Serpents, and by the ſucceſs of theſe Attempts a Judgment is made of their Innocence* [k].

And indeed if we would confeſs the Truth, Oaths either infer or preſuppoſe the Diffidence, Unfaithfulneſs, Ignorance, and Impotency of Mankind. For what need would there be of ſuch Engagements, if we could ſecurely rely on the Faith and Conſtancy of others; or if there were no Examples extant

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[a] *De Obligat. Jurament. Prælect.* 1. ſ. 6.

[b] *Vid.* Charron. *de la Sageſſe,* l. iii. c. 8. n. 7.

[c] *Lucian.* Phalar. 1. p. 731. Edit. *Amſt. It may perhaps be an eaſy matter to deceive Men, but 'tis impoſſible to lie conceal'd from God,* Plin. l. iv. Epiſt. 25. n. 4. Edit. *Cellar. Men of wicked Inclinations take Confidence and Encouragement from that Reflection,* quis ſciet? *Who will ever know what we do?*

[d] *De falſa legat.* p. 209. Edit. *Genev.*

[e] *Vid.* l. iii. ſ. 3. *D. de jurejur.*

[f] *Ad Demonic.* Hobbes *De Cive*. c. 2. ſ. 23. Add. *Valer. Max.* l. ii. c. 10. ſ. 2. *ext.* They are the trueſt Men, *qui colendo fidem jurant,* who have no other Oath than to keep their Word without Swearing. *Vid. Curt.* l. vii. c. 8. n. 29. Edit. *Cellar.*
In *Sophocles, Oedip. Colon. Oedipus* thus beſpeaks *Theſeus,* ver. 642.
I'll not require an Oath as from the Wicked.
Theſeus replies, Oaths could not force more than my Word ſhall pay.
Epict. *Enchir.* c. 44. & *Simplic. in loc. Vid. Not.* Grot. *in* Matth. v. 34.

[g] *Antigon.* v. 269.

[h] See Dr. *Potter*'s Græcian Antiq. l. ii. c. 6.

[i] See the Forms of Exorciſms in *Marculph.* Cap. *ult.*

[k] See likewiſe *Bern. Varen.* Deſcript. *Japon.* c. 18. & *Jodoc. Schouten.* in Deſcript. Regn. *Siam.* where he gives an account of their judicial Proceedings. *Euſeb.* in *Stob.* Serm. xxvii. *It's the Advice of many Men, that we ſhould ſtrictly make good what we ſwear: But I think it no leſs a Duty of Religion to conſider well before we ſwear.* Add. *Grot.* in *Matth.* v. 34.

Mr. BARB. *NOTES* on §. II.

[2] See Mr. *Placette*'s Treatiſe about an Oath, lib. i. c. 1.

[3] His Words are, Σπανίως μὲν ὀμνύναι, χρησαμένους δὲ τοῖς ὅρκοις πάντως ἐμμένειν.

of Perfidiouſneſs; or if we had ſtrength enough to compel Perſons to make good what they owe? Laſtly, what Occaſion would the Judge have to enquire the Truth of ſworn Witneſſes, unleſs he were ignorant of it himſelf? And from this Principle I ſhould draw the Reaſon of that Speech of the Emperor *Frederick* in the Poet [a].

Juramenta petis? Regem jurare minori
Turpe reor. Nudo jus & reverentia verbo
Regis ineſſe ſolet, quovis juramine major.

Doſt thou deſire an Oath? it is below
A Prince to Subjects ſuch Reſpect to ſhow.
The Sacred Awe that guards a Prince's Word,
Hath ſtronger Tyes than ſtricteſt Oaths afford.

Not only to have Faith and Honeſty kept up inviolably in the World, is in the higheſt Manner the Intereſt of Princes; but likewiſe becauſe 'tis unbecoming their Majeſty, to ſeem liable to the leaſt ſuſpicion of Perfidiouſneſs, Falſhood, or Deceit. Thus we are told, that amongſt the old *Peruvians* Oaths were not at all in uſe; but the Perſons who were to give their Teſtimony, barely promiſed *they would confeſs the Truth to the* Ynca [b].

III. Since GOD alone is of [1] infinite Knowledge, and of infinite Power, the Abſurdity is manifeſt of Swearing by any thing which we do not look upon as Divine; in ſuch a ſenſe as to invoke it for a Witneſs of our Speech, and for an Avenger of our Perjury. Hence as it was uſual for the Heathens to ſwear by the Stars, becauſe they judg'd them to be ſo many Deities; ſo for a Chriſtian to imitate them in that Practice, would be a Mixture of Impiety and Folly. As for thoſe Forms attributed to ſome of the Antients, as that of *Socrates* [2], *by a Dog, by a Gooſe* (whatever *Porphyry* [c] pretends to the contrary) and by the *Plane-Tree*, that of Zeno, *by a Caper*; and that of others, *by Crambe* [d], we are to eſteem them meerly jocular. They ſwore by theſe, as *Apollonius* [e] ſaith, *not as by Gods, but to avoid Swearing by the Gods*; when by the practice of the generality of Men it was grown into an ill Cuſtom, to apply Oaths as the ſupplemental Ornament of Speech.

But that which was moſt in uſe by the Antients, was to ſwear by thoſe things which each Perſon held moſt dear, or ſet uppermoſt in his Veneration and Eſteem. So *Aſcanius* in *Virgil*,

Per caput hoc juro, per quod pater ante ſolebat;
Æn. IX. v. 300.
By this my Head; my Father's Oath before.

So we every where read of Perſons ſwearing by their own Life and Soul, and by the Life and Soul of thoſe Friends who ſtood firſt in their Affections. And the Lovers thought themſelves very Religious in ſwearing by the *Bright Eyes*, the *Sweet Lips*, the *Golden Treſſes* of their Miſtreſs [f]. All which Speeches are by no means to be interpreted in this ſenſe; either that thoſe things were invoked as Witneſſes and Avengers of Falſhood, as *Apuleius* [g] amongſt others believed; nor that they were cited to give Teſtimony under the Notion of belonging to God, and expreſſing ſomewhat of the Divinity, namely, his Truth, Goodneſs, and Power, and which the Perſon thus ſwearing hereby acknowledgeth, that he enjoys by God's Mercy; and that he is unwilling to loſe by God's Juſtice; as if he ſhould ſay, *I ſwear by my Life*, that is, *by God to whom I owe my Life*; which is the Opinion of many, and particularly of Biſhop *Sanderſon* [h]. But they only thus invok'd GOD himſelf, deſiring that if they ſwore falſly, he would be pleas'd to puniſh their Crime in thoſe things eſpecially, for which they were moſt nearly and tenderly concern'd [i]. Thus it was the ordinary Cuſtom of the *Athenians*, in their ſolemn Oaths to devote themſelves and their Family to Deſtruction, if they deceiv'd; and on the contrary to beg all Happineſs from the Gods on themſelves and Friends, if they ſwore truly; as is evident from frequent inſtances in *Demoſthenes* [k]. And they firmly believ'd, that the Violation of ſuch Engagements would draw down the Anger of Heaven upon the Heads of others, as well as upon their own. *Pliny* [l] tells a Story of one *Regulus*,

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[a] *Gunther. Ligurin.* l. iii. v. 510, &c.
[b] *De la Vega*, Comment. Reg. l. ii. c. 3.
[c] Lib. iii. περὶ ἀποχῆς.
[d] Vid. *Athenæum* Deipnoſoph. l. ix. c. 2.
[e] In *Philoſtrat.* l. vi. c. 9.
[f] *Ovid Amor.* l. iii. El. 3. 13, 14.

Perque ſuos illam nuper juraſſe recordor,	On her own Eyes and mine a Curſe ſhe laid;
Perque meos oculos; & doluere mei.	And mine have ſmarted for the perjur'd Maid.

[g] De Deo *Socrat.*
[h] *De Jurament. Obligat. Prælect.* 1. Sect. 4.
[i] *Ovid.* Triſt. l. v. El. 4, 45, 46.

Per caput ipſe ſuum ſolitus jurare, tuumque	By his own Head how often would he ſwear,
Quod ſcio, non illi vilius eſſe ſuo.	And yours, not leſs the Darling of his Care?

[k] Add. *Antiphon.* Orat. 15.
[l] Lib. ii. Epiſt. 20. n. 5, 6.

Mr. Barb. *NOTES on* §. III.

[1] What Confuſions, Abſurdities, and Contradictions the Notions of the Heathens were! Theſe two Attributes of the Deity, which are the Foundation of an Oath, were ſo well known to them, as to give a great Force to that Act of Religion. They believ'd that God was preſent in all places, and ſaw all things, the moſt ſecret Thoughts of the Heart not being excepted. This appears, for Example, by this Fragment of the Comedian *Philemon*, who takes the *Air* for *Jupiter*.

Ἐγὼ δ' ὃ Θεοῦ 'ϛιν ἔργον, εἰμὶ πανταχοῦ.	I'm ev'ry where as a God ought to be,
———'Ο δὲ παρὼν ἁπανταχοῦ,	And ſo know all things neceſſarily.
Πάντ' ἐξ ἀνάγκης οἶδε, πανταχοῦ παρών.	

Stob. De Rerum Nat. Tit. 3. Collect. Cler.

And ſo in the Prologue of *Plautus*'s *Amphitryo*, ver. 57, &c. *Mercury* thus ſpeaks,

Utrum ſit, annon, voltis? Sed ego ſtultior,	I know your Minds, for I am God,
Quaſi neſciam vos velle qui Divus ſiem,	And can't be ignorant of your Thoughts.
Teneo quid animi veſtri ſuper hac re ſiet.	

See *Lucian* in Chronoſol. Tom. ii. p. 614. *Ed. Amſt.* As to God's Omnipotence, theſe Verſes of *Ovid* are ſufficient to alledge,

————*Immenſa eſt, finemque potentia Cæli.*	God's Power's immenſe, and has no Bounds:
Non habet: & quicquid Superi voluere, peractum eſt.	Whate'er the Gods will have done, muſt be perform'd.

[2] See *Menage* upon *Diogenes Laertius*, lib. ii. §. 40. where he hath amaſſed together many things relating to this Matter. It ſhall ſuffice at preſent to relate the Words of *Philoſtratus*, of which our Author quotes only a part. Πρὸς ταῦτα ὁ Θεσπεσίων, ἐγένετό τις ἔφη, Σωκράτης, Ἀθηναῖος, ἀνόητος, ὥσπερ ἡμεῖς, γέρων, ὃς τὸν κύνα, καὶ τὴν χῆνα, καὶ τὴν πλάτανον, θεοὺς τε ἡγεῖτο, καὶ ὤμνυ· οὐκ ἀνόητος, εἶπεν, ἀλλὰ θεῖος, καὶ ἀτεχνῶς σοφός· ὤμνυ γὰρ ταῦτα, οὐχ ὡς θεοὺς, ἀλλ' ἵνα μὴ θεοὺς ὤμνυ.

who made a gainful Trade of Perjury, in relation to Wills and Teſtaments; that giving a Viſit to a ſick Lady (*Verania* Wife to the famous *Piſo*) and perſuading her that by his Aſtrological Obſervations he foreſaw ſhe ſhould recover: The Lady being eaſily credulous under ſo great an apprehenſion of Danger, call'd for her Will, and ſet down *Regulus* for her Heir; but ſoon after falling into Extremities, ſhe died with this Exclamation againſt her Deceiver; *O wicked and perfidious! O worſe than perjur'd Villain, who forſwore himſelf by the Life and Safety of his own Son!* The Reflection which *Pliny* makes on the thing is this, Regulus *uſeth this Stratagem not more frequently than wickedly; whilſt he imprecates the Wrath of the Gods, whom he every day deceives, upon the Head of the unfortunate Youth*[a].

And hence too we may gather the Meaning and Deſign of thoſe Oaths, which were heretofore made by the *Life*, the *Genius*, the *Safety* of Princes; which we are told are ſtill cuſtomary amongſt the *Perſians*, and are eſteemed more ſtrict and ſacred, than thoſe in which the Name of God is immediately invoked. For they did this, not as thinking there was any Divinity in their Princes, whilſt alive, nor as imprecating their Diſpleaſure if they ſpoke falſe; but becauſe many of them either in good earneſt, or at leaſt in Flattery, intended hereby to ſhew, that they preferr'd their Prince's Safety to their own; and therefore look'd upon it as a more horrid Perjury to devolve the Wrath of God upon *Him*, than upon *Themſelves* [3]. So that the ſenſe of thoſe *Proteſtations* was properly this; *So may my Prince be happy and ſafe, as I perform what I now Promiſe*; that is, unleſs I fulfil my Engagement, I deſire the Divine Judgment may light upon my Prince's Head. St. *Auguſtin*[b] ſpeaks very pertinently to this purpoſe. *What elſe, ſaith he, is that which we call* (Jurare) *to ſwear, but* (Jus reddere) *to pay the Due or Right; to God, if we ſwear by God; to our Children, if we ſwear by them? And what Right do we owe to our own Safety, to our Children, or to our God, but the Right of Love and of Truth, not of Treachery and Falſhood? When any Man ſays,* By my Safety, *he pawns and engageth his Safety to Providence, for the truth of what he affirms; when he ſays,* By my Children, *he conſigns over his Children as ſo many Pledges to God; deſiring that whatever comes out of his own Mouth may fall upon their Head; Truth, if he declares Truth; Falſhood, if he ſpeaks falſly. Whatſoever therefore a Perſon names in his Oath, whether his Children, his own Life, or Safety, or any thing elſe, he devotes and binds it over to Almighty God.* And hence, although *Philo* the *Jew* is juſtly to be prais'd for condemning raſh and profane Swearing, yet we can by no means approve of his Doctrine, when he delivers himſelf ſo looſly, as in the following Terms[c]: *If,* ſays he, *the Exigency of Affairs neceſſarily requires an Oath, it is more becoming to ſwear by the Health or the proſperous Age of our Father or Mother, if alive; or by their Happy Memory, if they are dead. For their Act of producing their Children into Life from nothing, makes them the Images and Repreſentatives of the Divine Nature*[4]. *They too deſerve Commendation, who, as often as they are urged to ſwear, by delaying and heſitating ſtrike an awe, not only into the Spectators, but into thoſe very Perſons who require the Oath at their Hands. For 'tis a Cuſtom with ſome, when they have pronounced the firſt Words of the Form,* So help me, *to leave off abruptly, adding what they pleaſe beſides in their Mind and Thoughts. For the Sentence may be fill'd up by ſubjoining not only the* Higheſt, *or* the Creator of all things, *but* the Earth, the Sun, the Heavens, *or* the World. Nor do I ſee any Excuſe that can be brought to juſtify that Oath of the Chriſtian Soldiers recited by *Vegetius*[d], which carries in it too groſs an exceſs of Reverence towards the Emperors. *They ſwear,* ſays he[5], *by God, and by Chriſt, and by the Holy Spirit, and by the Emperor's Majeſty, which next to God is to be loved, and to be worſhipp'd by Mankind. For when our Prince hath been once inveſted with the Title of* Auguſtus, *we are to pay to him, as to a preſent mortal God, faithful Devotion and moſt watchful Service.* For though we ſhould grant the following Clauſe, *A civil or a military Perſon then ſerves God, when he faithfully loves him who reigns by God's Appointment and Authority*; yet this is by no means a Reaſon why they ſwear by the Majeſty of the Emperors in the ſame manner as by the Name of God. Nor is it to be ſuppoſed, that common Soldiers ſhould be capable of ſo much Subtilty as to diſtinguiſh the Words (*by*) in the ſame Form into two different Senſes, one as apply'd to God, another as ſpoken of the Emperor. This is certain

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[a] *Lyſias* Orat. adverſ. *Diagiton.* " I am ready with a well aſſured Mind, whenever you pleaſe to require it, to ſwear by the " Lives of theſe my Children, and of thoſe which I have ſince had by a ſecond Bed. And I am not yet arriv'd at ſo deſperate a " degree of Miſery, nor am ſo unreaſonably covetous of Money, as that I ſhould be willing to devote my Family to a Curſe, only " that I may leave them a Maintenance; or by an unnatural Wickedneſs to rob my Father of his Eſtate.

And here likewiſe it may be remarked by the Bye, that the *Banjans* in *India*, who ſet the higheſt Value and Reſpect on their Cows, eſteem it a moſt ſacred Oath to hold a Knife near the Cow, and ſay, *If what I affirm be falſe*, or *if I do not perform my Bargain, may the Cow be ſtruck through with this Knife*, *Pietr. della Valle* Itin. Part ii. Epiſt. 1.

[b] Citat. à *Grotio* in Flor. Sparſ. ad l. xxxiii. *D. de Jurejur.*

[c] *De ſpecial. legib.*

[d] *De re militar.* l. ii. c. 5.

Mr. Barb. *NOTES on* §. iii.

[3] Hence it appears, ſaith our Author, that ſuch Perſons were with Reaſon puniſhed very rigorouſly, who were perjur'd, after they had ſworn by the Head, Throne, or Health of the Prince, becauſe they believed, that by ſuch an Oath they expoſed that ſacred Perſon, upon whoſe Safety the whole Kingdom depended, to Divine Vengeance. See what *Herodotus* ſays of the *Scythians*, Lib. iv. and *Zoſimus*, Lib. v. In the Capitularies of *Charles the Great*, Men are forbid to ſwear by the Life of the King or his Children, Lib. iii. c. 42. See the *Digeſts*, lib. xii. tit. 2. *De Jurejur.* &c. leg. xiii. §. 6.

[4] *Philo*'s Words are, Ἄξιον ἐπαινεῖν καὶ τοὺς, ὁπότε βιασθεῖεν ὀμνῦναι, τῷ μέλλειν καὶ βράδυνειν καὶ ἀποκνεῖν ἐμποιοῦντας δέος οὐ μόνον τοῖς ὁρῶσιν, ἀλλὰ καὶ τοῖς προκαλουμένοις εἰς τὸν ὅρκον, εἰώθασι γὰρ ἀναφθεγξάμενοι τοσοῦτον, νὴ τὸν, ἢ μὰ τὸν, μηδὲν προσλαμβάνοντες, προφάσει τῆς ἀποκοπῆς, τρανοῦν ὅρκον οὐ γενόμενον· ἀλλὰ καὶ προσλαβέτω τὶς, εἰ βούλοιτο, μὴ μὲν τὸ ἀνωτάτω καὶ πρεσβύτατον εὐθὺς αἴτιον, ἀλλὰ γῆν, ἥλιον, ἀστέρας, οὐρανὸν, τὸν σύμπαντα κόσμον. See the Interpreters upon St. *Matthew*, v. 34. and *Ariſtophanes*'s *Ranæ*, ver. 1422. where Mr. *Spanhemius* quotes this Paſſage of *Philo*, *De Spectaculo*, for *De Legibus Special.*

[5] The Hiſtorian's Words are, *Jurant autem per Deum, & per Chriſtum, & per Spiritum Sanctum, & per Majeſtatem Imperatoris, quæ ſecundum Deum generi humano diligenda eſt & colenda. Nam Imperatori, cum Auguſti nomen accepit, tanquam præſenti & corporali Deo, fidelis eſt præſtanda devotio, & impendendus pervigil famulatus. Deo enim vel privatus, vel militans ſervit, cum fideliter eum diligit, qui Deo regnat authore.*

from *Euſebius*'s Eccleſiaſtical Hiſtory [6] [a], that to ſwear by the Fortune of the Emperor was accounted one of the Marks of abjuring Chriſtianity; which therefore St. *Polycarp* reſolutely refus'd to the laſt. And ſo too it may be juſtly queſtion'd, whether we ought to approve of that Oath preſcrib'd by *Charles Gonzaga* to his new Order of Knights, in the Form following; *I ſwear by the Immortal God, and by the Antient Nobility which I profeſs* [b]. Hence likewiſe it appears, That the Antients had good reaſon for puniſhing with the utmoſt ſeverity Perſons who had forſworn themſelves by their Prince's Life or Safety; inaſmuch as they were thought hereby to make him obnoxious to the Divine Puniſhment, whoſe Succeſs and Preſervation is yet ſo cloſely connected to the publick Security [c]. Thus we find the *Scythians* in *Herodotus* [d], as often as their King happen'd to be ſick, making ſtrict enquiry whether any of the Subjects had ſworn falſly by the Royal Throne; and if ſuch a Perſon was diſcover'd, he ſuffer'd Death for his Perjury. In *Zozimus* [e] the *Roman* Magiſtrates declar'd they could not accept of the Propoſals of *Alaric*, though fair and juſt, becauſe they had ſworn by the Life of their Prince, that they would never conſent to a Peace with the Invader. *If their Oath had been directed to God*, they ſay, *they might poſſibly have wav'd it in this neceſſity, relying on the Divine Mercy for the pardon of ſo impious a Crime; but ſince they had bound themſelves by the Life of the Emperor, they thought it abſolutely unlawful for them to break through ſo ſolemn an Engagement.* In the *Capitulary* of *Charles* the *Great* [f], we find a Prohibition againſt ſwearing *by the Life of the King, or of his Sons.* As to the *Civil Law*, *Ulpian* doth not deny it to be an Oath, when a Man ſwears by his *own Safety* [7]; but ſays, it is not valid, unleſs it were expreſly propos'd to him in thoſe particular Terms [g]. Becauſe Oaths being taken for the Benefit and Security of him that requires them; therefore Cuſtom makes it neceſſary they ſhould be form'd in the Words which he propoſeth, ſo that they may fully bear his Meaning, and anſwer his Deſign [h]. Whereas, if the Party who is to ſwear might chooſe his own Words, he would have an opportunity, by inſidious or equivocal Expreſſions, to evade the force of his Obligation. Another Reaſon for *Ulpian*'s Aſſertion may be, becauſe ſuch Speeches and Proteſtations continually loſing ſomewhat of their Reverence by daily Uſe, no Man can be bound to let the trite Form of another Party (with which he often lards his Diſcourſe when he doth not think on't) paſs for a ſerious and ſolemn *Oath.* And Mr. *Hobbes* [i] is in the Right, when he cenſures theſe cuſtomary Expreſſions, as not properly *Oaths*, but profane Abuſes of the Name of God, ariſing from an ill Habit of being too poſitive and vehement in Talk.

From what hath been offer'd it is clear, that Execrations, although ſtrictly taken, as when a Man barely lays Curſes, or imprecates Miſchief on himſelf or others, they are not Oaths; yet are on all Accounts to be reckon'd part of an Oath, as they reſpect any Aſſertion or Promiſe, which they are added to bind [k]. And this is to be extended likewiſe to thoſe Prayers or Wiſhes, by which a Man makes the performance of his Oath the Condition of his obtaining ſuch or ſuch a Bleſſing. As that of the Boy in *Ælian* [l], *So may I crack* Timeſias'*s Skull.* Thus we find *Julian*, to encourage his Army, conſtantly ſwearing (as the Hiſtorian ſpeaks [m]) not by the *Graces*, but by the Greatneſs of his commenc'd Exploits; *So may I bring the* Perſians *under the Yoak*; *ſo may I relieve the weak Condition of the* Roman *World*: As *Trajan* is reported ſometimes to have confirm'd his Speeches, by adding, *So may I ſee* Dacia *reduc'd into the form of a Province; So may I lay Bridges over the* Danube *and* Euphrates [n]. 'Tis remarkable in the *Patanes*, a People of *Indoſtan*, that they are ſo extravagantly proud, as to uſe for an Aſſeveration, *May I never come to be a King in* Dehli, *if I don't make good my Promiſe.* And hence too it appears what Interpretation we ought to put on thoſe Oaths which we meet with in Scripture, when even good and pious Men ſwear by ſome created Thing [o]. That amongſt the *Jews* of the latter Ages, nothing was more common than Oaths [8], *By the Head, by the Heaven, by the Earth, by the Temple, by the Gold of the Temple, by the Altar, by the Gift upon the Altar*, is evident from St. *Matthew* xxiii. v. 16, *&c.* Where our Saviour reproves them ſeverely for their profane Abuſes, and impertinent Cavils in this Matter. The *ναὶ μὰ τόδε σκῆπτρον* in *Homer* [p], *Didymus* thus expounds, *We are to know*, ſays he, *that in ſwearing by the Sceptre they ſwear by God himſelf, the great Governour and Controller of Kingdoms* [q]. Yet *Ovid* hath given us another ſort of an Explication:

> *Nam ſibi quod nunquam tactam Briſeida jurat*
> *Per ſceptrum; ſceptrum non putat eſſe Deos* [r].

> Who by his Sceptre ſwore *Briſeis* free,
> Ne'er took the Wood to be a Deity.

We learn from *Procopius* [s], that the *Perſians*, in the latter Times of that Nation, uſed to ſwear by *Salt.* And in one of the *Byzantine* Hiſtorians, we

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[a] Lib. iv. c. 15. [b] *Gramond.* Hiſt. Gall. l. v. [c] Vid. *Grot.* in *Sparſ. Flor.* ad leg. 23. *D. de Jurejur.* [d] *Melpomen.* p. 154. init. Edit. *H. Steph.* [e] l. v. *in fine.* [f] Lib. iii. c. 42. [g] Add. l. iii. ſ. 4. l. iv. l. v. princ. d. t. [h] Comp. *Liv.* l. xxii. c. 38. init. [i] *Leviath.* c. 14. [k] Comp. *Ziegler* ad *Grot.* l. ii. c. 13. ſ. 10. [l] V. H. l. xii. c. 9. [m] *Ammian. Marcellin.* l. xxiv. c. 3. [n] Add *Grot.* ad *Gen.* xxiv. 2. [o] Vid. *Gen.* xlii. 15. 1 *Sam.* xxv. 26. 2 *Sam.* xiv. 19. 1 *Kings* ii. 23. 2 *Kings* ii. 4, 6.

[p] Iliad α, v. 234. [q] This place of *Homer* is thus imitated by *Valerius Flaccus*,

> *Hanc ego, magnanimi ſpolium Didymaonis, haſtam,*
> *Quæ neque jam frondes, virides nec proferet umbras,*
> *Ut ſemel eſt excuſſa jugis & matre perempta,*
> *Fida miniſteria, & duras obit horrida pugnas;*
> *Teſtor, & hoc omni ductor tibi numine firmo.* l. iii. 707.

> This Spear the Spoils from ſtout *Didymaon* won,
> Which ne'er ſhall bud, or form a ſhady Crown,
> Since from its dying Mother rudely torn
> On bloody Services it hath been born,
> (Faithful in rough Encounters!) here I call
> To bind my Oath, whilſt I engage for all.

Comp. *Virgil.* Æn. xii. v. 206.

[r] Ovid. *De Remed. Amor.* 783, 784. Add *Grot.* l. ii. c. 13. ſ. 11. [s] *De Bell. Perſic.* l. i. c. 3.

Mr. Barb. *NOTES* on §. III.

[6] I have recited the Paſſages of *Origen* and *Tertullian* about this Matter in my Notes upon Dr. *Tillotſon*'s 22d Sermon, which, though a ſhort one, contains a ſtrong Confutation of ſuch Chriſtians who abſolutely condemn the uſe of all Oaths.

[7] The Words of the Civil Law are, *Qui per ſalutem ſuam jurat, licet per Deum jurare videtur* (*reſpectu enim Divini Numinis ita jurat*) *attamen ſi non ita ſpecialiter jusjurandum ei delatum eſt, juraſſe non videtur: & ideo ex integro ſolenniter jurandum eſt*, Digeſt. l. xii. tit. 2. *De Jurejurando*, &c. Leg. 33.

[8] As the Heathens did. See Mr. Baron *Spanhemius* upon *Ariſtophanes*'s *Plutus*, v. 129.

find *Mahomet* the *Turkiſh* Emperor adjuring, *by Bread and Salt*, his Vizier *Bajazet* [a].

IV. To proceed: That part of the Form in *Oaths*, under which God is invok'd as a Witneſs, or as an Avenger, is to be accommodated to the religious Perſuaſion [1] which the Swearer entertains of God: It being vain and inſignificant to compel a Man to ſwear by a God whom he doth not believe, and therefore doth not reverence. And no one thinks himſelf bound to the Divine Majeſty in any other Words, or under any other Titles, than what are agreeable to the Doctrines of his own Religion; which in his Judgment is the only true way of Worſhip. And hence likewiſe it is, that he who ſwears by falſe Gods, yet ſuch as were by him accounted true, ſtands oblig'd; and if he deceives, is really guilty of Perjury. Becauſe whatever his peculiar Notions were, he certainly had ſome ſenſe of the Deity before his Eyes; and therefore by wilfully forſwearing himſelf he violated, as far as he was able, that Awe and Reverence which he ow'd to Almighty God [b]. Yet when a Perſon requiring an Oath from another, accepts it under a [2] Form agreeable to that Worſhip which the Swearer holds for true, and he himſelf for falſe, he cannot in the leaſt be ſaid hereby to approve of that Worſhip. Thus a *Chriſtian*, when he admits of the Oath of a *Jew*, doth on no account ſubſcribe to his Opinion, who denies the one only true God, the Maker of Heaven and Earth, to be the Father of our *Lord Jeſus Chriſt*. Yet I doubt whether the Example [3] of *Laban* in this Caſe, alledg'd by *Grotius* [c], from *Gen.* xxxi. 53. comes up to the Purpoſe; for *the God of* Abraham, *and the God of* Nahor, *and the God of the Fathers, was the living and true God* [d].

V. But farther, it is requiſite to the Force and Obligation of an Oath, that it be taken with deliberate Thought, and real Deſign. And therefore he ſhall by no Means ſtand bound, who not thinking himſelf to ſwear, hath happen'd to utter Words which imply an Oath; or who hath barely recited the Form; or who, being by Virtue of ſome Office appointed to give other Perſons their Oath, tells them how they ſhall ſpeak after him [e]. In this Caſe *Lucian*'s Saying will hold good, *We are not to conſider his Mouth, but his Heart* [f]. It was vain therefore in *Cydippe* to fanſy herſelf religiouſly oblig'd, by reading the Oath which *Acontius* had wrote upon the Apple. And ſo indeed *Ovid* [g] hath taught her to argue,

Quæ jurat, mens eſt; nil conjuravimus illâ.
Illa fidem dictis addere ſola poteſt.
Conſilium prudenſque animi ſententia jurat,
Et niſi judicii vincula nulla valent.
Si tibi nil dedimus præter ſine pectore vocem,
Verba ſuis fruſtra viribus orba tenes.
Non ego juravi; legi jurantia verba, &c.

The Mind muſt ſwear; with that *we* never ſwore;
Yet that alone can add a binding Power.
Oaths are the Act of Wiſdom and of Thought;
Words give the Thread, but Judgment ties the Knot.
Since all we ſaid an empty Sound we prove,
Sound without Senſe hath loſt its Force to move.
We did not *take*, we did but *read* the Form, *&c.* [1].

But 'twould be moſt ſenſeleſs and abſurd, if a Man deſigning to ſwear, or at leaſt pretending ſuch a Deſign, ſhould yet refuſe to be ty'd by what he ſays; and ſhould urge in Excuſe, that when the *Oath* was adminiſter'd to him, his Intention was barely to recite the formal Words, but not to lay any Obligation on his Conſcience [h]. Not ſo much (if we conſider the immediate Reaſon) becauſe Obligation is the neceſſary Effect of an *Oath*, and inſeparable from it; as becauſe otherwiſe the whole uſe of Oaths, nay and the whole Method of engag-

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[a] *Ducaſ.* Hiſt. *Byſant.* c. 22.

[b] *Juvenal.* Sat. xv. 37, 38.

——— Numina vicinorum
Odit uterque locus; cum ſolos credat habendos
Eſſe Deos, quos ipſe colit.

Each calls the other's God a ſenſeleſs *Stock*,
His own *Divine*, though from the ſelf-ſame Block.
Mr. *Tate*.

Add. l. xii. t. 2. l. v. ſ. 1. *De Jurejur.* which is not contradicted by §. 3. d. l. &c. or the Deciſion of *Canon-Law*, Queſt. 5. Cauſ. 22.

[c] Lib. ii. c. 13. ſ. 12.

[d] Add. *Juſ. Can.* xvi. *Quæſt.* 5. *Cauſ.* 22.

[e] Add. l. lxiv. t. 7. l. iii. ſ. 2. *D. de Obligat. & Action.*

[f] *Pro Lapſ. inter ſalutand.*

[g] Epiſt. *Heroid.* xxi. v. 135, *&c.*

[h] See *Grot.* l. ii. c. 13. ſ. 2, 3.

Mr. Barb. *NOTES on* §. iv, v.

[1] *Divus Pius, jurejurando, quod propria ſuperſtitione juratum eſt, ſtandum reſcripſit,* Digeſt. lib. xii. tit. 2. *De Jurejurando,* &c. leg. 6. §. 1. Our Author adds, that §. 3. of the ſame Law is not contrary to this he has cited, no more than the deciſion of the Canon Law, *Cauſ.* 22. *Quæſt.* 5. Further, as *Gronovius* obſerves in his Notes upon *Grotius*, Hiſtory furniſhes us with Examples of ſuch Heathens as have been puniſhed for their Impieties committed againſt their falſe Gods, ſuch as *Cambyſes* in *Juſtin.* l. i. 9. The *Gauls*, who robb'd the Temple of *Delphos*, ibid. l. xxiv. 8. *Pyrrhus* and a Roman Garriſon, *Liv.* xxix. 18. See Mr. *Bayle*'s Thoughts on a Comet, *Art.* 118.

[2] Mr. *Placette* in his Treatiſe of an Oath, l. i. c. 13. diſtinguiſhes here between, requiring an Infidel to ſwear by his falſe Gods, and propoſing an Oath barely to him. In the firſt he is induced to commit an Act of Idolatry, which can never be allowed; but in the other he tempts him not to Idolatry, though he has reaſon to believe that he will commit the Sin in doing what is required. The Reaſon is, becauſe what he requires is innocent; for 'tis not unlawful to ſwear. But if he adds any thing Criminal to what is required, he does it of his own accord, without being determined or induced by him who propoſed the Oath. If it were otherwiſe, no Man that hath an urgent occaſion for a Sum of Money, which no body will lend him at reaſonable Intereſt, could be permitted to borrow it of an Uſurer, who he knows very well will not lend but at exorbitant Uſe, *&c.* This is what is ſaid, but to me this diſtinction of Mr. *Placette* ſeems not neceſſary. To require an Oath of a Heathen is in my Opinion the ſame thing as to deſire him to ſwear by his falſe Gods. He can't ſwear but by the Object of his Religious Worſhip; and if he ſwears by any thing elſe, no Man will take it for an Oath. The truth is, though an Oath conſider'd in itſelf is a Religious Act, yet in common dealing it ought to be look'd upon as no more than a Civil Act. 'Tis a Security that is required, and the Force of it depends upon the Impreſſion that the fear of God makes upon Mens Minds; which imports no more, than that he that ſwears, calls the true or ſome falſe God to witneſs, provided we ſwear not lightly and without neceſſity. I compare it to *Naaman*'s Action, who, to diſcharge his Office, went into the Temple of *Rimmon*, and bowed himſelf there, to ſupport his Maſter the King of *Aſſyria*, which the Prophet *Eliſha* did not diſallow. See 2 *Kings* v. 18. and *Joſh.* xxiii. 7. where the *Iſraelites* are forbidden to ſwear by other Gods, which refers to the reſt of the *Canaanites*, with whom they were to have no Converſe, leſt they ſhould be won to ſerve and worſhip their Gods, to which they were too much diſpoſed.

[3] This Example is very well apply'd. It is very clear from *Joſh.* xxiv. 2. that *Terah* the Father of *Abraham*, and *Nahor* the Father of *Terah* ſerved ſtrange Gods. See Mr. *Le Clerc* upon that place in *Geneſis*, and on c. xiv. 33. of the ſame Book.

[1] We may find the like Adventure in *Anton. Liberalis Metamorph.* chap. i.

ing each other by mutual Signs, would be baniſh'd out of human Life; if any Perſon might be able by his ſecret Intention to hinder an Action from obtaining ſuch an Effect as it was firſt inſtituted to produce. Therefore, whatever your inward Purpoſe might be, you ſhall certainly be bound by your Oath, when both the Party to whom you ſwore, apprehended this to be your Meaning and Deſign, and you your ſelf, when you utter'd the Words, evidenc'd by all outward Tokens, that you were in earneſt, and not in jeſt. And 'tis indeed a downright Contradiction to deſire to take an Oath, and yet not to be obliged by the Oath; to deſire to promiſe, and not to be bound by your Promiſe; to deſire to utter Words in a ſerious Manner, and yet not to let them bear that Uſe and that End which hath been aſſign'd them by the common Agreement of Men. Thus 'twas groſly ridiculous for the *Milaneſe* to tell *Frederick* I. *We ſwore indeed, but we did not promiſe to keep our Oath*[a]. And 'tis much to the ſame Effect, what Father *Paul* reports in his Hiſtory of the Council of *Trent*[b]; That *during the Vacancy of the Holy See, the Cardinals are wont to draw up a Form conſiſting of ſo many Heads, for the Reformation of the Papal Government, which each of them ſwears he will exactly obſerve, in caſe the Election falls on him. Tho' the Experience of all Ages teſtifies, that not one of them ſo ſtands to the Engagement; inaſmuch as immediately after their being choſe Popes, they declare, that either they could not be tied by any ſuch Bonds; or that their very Inveſtiture with that Dignity quite releaſes them from the Obligation.* If therefore any Perſon ſhall pretend that he took an Oath with ſuch a prepoſterous Deſign, the Excuſe ſhall avail nothing towards reverſing what he promis'd, but ſhall paſs for meer Trifling. We may illuſtrate the Caſe by a like Inſtance: A Perſon who hath his Doctor's Degree conferr'd on him in the Schools, is nevertheleſs a Doctor, though we ſhould ſuppoſe, that he, who pronounc'd the Form of his Promotion, thought all the while of dignifying an Aſs. But if a Player upon the Stage inveſt another with the Habit and Formalities of that *Degree*, he ſhall be juſt as much a Doctor as he was before. *Ipſa ſtatim ſcena rem fictam eſſe teſtatur*, as *Quinctilian*[c] obſerves on a like Occaſion; *the Place ſhews the Action to have been inſignificant.* Whence we ſee that 'tis an idle Queſtion, Whether a Perſon be obliged, who deliberately utters the Words of an Oath, yet with an Intention not to ſwear? for if he barely rehears'd the Words without any farther Purpoſe, 'tis plain he hath neither ſworn, nor is oblig'd. But when the Matter hath been perform'd in earneſt; that is, when he who ſpoke the Words, gave all Proofs of his real Deſign to ſwear, and the other Party underſtood him in that Senſe, no doubt but the Oath is properly taken, and the Obligation contracted, whatever ſecret Drift the Swearer might entertain in his own Mind [2].

VI. We ought likewiſe carefully to obſerve, That Oaths do not of themſelves produce a new and peculiar Obligation [1], but are only applied as an additional Bond to an Obligation in its Nature valid before. For whenever we ſwear, we always ſuppoſe ſome Matter, upon Non-performance of which we thus imprecate the Vengeance of Heaven. But now this would be to no purpoſe [2], unleſs the Omiſſion of the thing ſuppos'd had been before unlawful, and conſequently unleſs we had been before oblig'd. Tho' indeed it frequently happens, that we comprehend in one Speech both the principal Obligation, and the additional Bond of the Oath; as for Inſtance, if I ſay, *So God be my Helper, as I ſhall pay you an Hundred Pounds.* And yet it doth

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[a] *Radevic.* l. ii. c. 25. Add. *Grot.* ad *Matt.* v. 33.

[b] Lib. i. Add. l. v. p. 358. Edit. *Gorinch.* 1658.

[c] *Declam.* 342.

Mr. Barb. *NOTES* on §. v, vi.

[2] Except Oaths extorted by ſome unjuſt Fear.

[1] *Grotius*, Lib. ii. c. 13. §. 14. ſuppoſes on the contrary, that every Oath by which we engage our ſelves to do or not do any thing to another, contains a double Promiſe; the one reſpecting the Perſon that took the Oath, and the other the God by whom we ſwear; and that one of theſe Promiſes may oblige, though the other does not. Mr. *La Placette*, who had been once of this Opinion, hath retracted it publickly. He maintains, in his Treatiſe of an Oath, lib. ii. c. 2. "That, properly ſpeaking, we promiſe "nothing to God in an Obligatory Oath, otherwiſe there would be no difference between a Vow and an Oath. See what our Author ſays, §. 8. Moreover, we often ſwear to do things wherein God is not at all concerned, and ſometimes with which he is diſpleaſed. For it is ridiculous to ſay that we have promis'd a thing to any Man, who has no Intereſt by it, or which will be no Advantage to him, becauſe it diſpleaſes him. Laſtly, Promiſes become void in themſelves, when they are not accepted. If then an Oath confirms a Promiſe made to God directly, it can't be of force, till we know that God accepts it; and how can we be aſſured of this, that God accepts a thouſand Promiſes confirmed by an Oath, if they have no reſpect at all to his Service? what then is there in an Obligatory Oath, more than a bare Promiſe made to the Perſon who is ſworn to? Mr. *La Placette* finds nothing that can give us a better Notion of this, than Treaties of Warranty ſo common among Princes. "Two Men, *ſays he*, make a Bar-"gain, but one ſuſpects the other will break it; to aſſure himſelf of the contrary, he propounds taking of an Oath, *i. e.* to take "God for the Warranty of the Agreement, and conſents, that in caſe he breaks it, God ſhall declare againſt him, and puniſh his "Perfidiouſneſs." I thought, when I read theſe Words, that he had been of our Author's Opinion, which ſeems to be a Conſequence of it; and I thought, when I put out the firſt Edition of this Work, I had given three good Reaſons for my Opinion, as may appear from the Extract made of them by Mr. *Bernard* in the News of the Republick of Letters, *June* 1701. but I now ſee, that Mr. *La Placette* ſtill maintains, That Oaths may be of Force and Obligatory, although the Promiſes added to them be null. This he pretends to prove in the End, but the Reaſons he brings are weak, and not to the purpoſe, as I ſhall ſhew hereafter. And we may eaſily foreſee, that he can produce nothing ſatisfactory in this matter, and agreeable to his own Principles. He rejects the Opinion of a double Promiſe included in an Oath, becauſe we can have no certainty that God accepts an infinite number of things indifferent in their own Nature, to which we engage our ſelves by Oath. But then he ought to be ſure that God will be the Warranty of the Oath taken, after the ſame manner as the Prince, who is Warranty in a Treaty, ought to agree to it. For here is no Revelation, and I defy Mr. *La Placette* and all the rigid Caſuiſts to prove that God will be Warranty in an Engagement otherwiſe invalid, at leaſt, that it is his Will, that the Holineſs of an Oath may ſecure to the wicked Man the benefit of his Extortion. According to Mr. *La Placette*, Fraud diſpenſes with keeping an Oath, and why may not Violence have the ſame effect?

[2] This Reaſon does not appear to be good, or at leaſt is not well expreſs'd. For as the Author ſays a little after, and §. 19. it happens ordinarily, that we engage our ſelves and ſwear at the ſame time, otherwiſe we can't conceive of an Obligation antecedent to an Oath, and valid without any dependence upon that religious Act. The Notion of an additional Bond, which the Author mentions above, is ſufficient to prove what he maintains. Men engage not themſelves by ſwearing, but ſwear to confirm their Engagements. An Oath, in reſpect of the Obligation we take on us, is as Modes and Accidents are to the Subſtance, without which they can't ſubſiſt. So that from the Moment that the Engagement, to which we have called God to witneſs, includes ſomething that makes it null in itſelf, an Oath loſeth all its Force, and we ſwear only with the Mouth, as all thoſe apparently do, from whom a Promiſe by Oath is extorted either through fear of Death, or ſome other great Danger.

not follow, that an Oath is unneceſſary or ſuperfluous, becauſe it is thus added to an Obligation before firm and good in itſelf. For although all Men, except downright Atheiſts, believe that God will puniſh the violation of Promiſes, not confirm'd by Oath; yet they believe at the ſame time, and with good Reaſon, that thoſe Wretches will feel a more ſevere Vengeance, who have in expreſs Terms call'd down the Wrath of God upon themſelves, and, ſo far as in them lies, have ſhut themſelves out from all Hopes of Mercy; whilſt they engag'd in Wickedneſs with ſo full a Purpoſe and Deſign, as to ſhew, that they valued not the diſpleaſure of Him who is able to beſtow the greateſt Good, and to inflict the greateſt Evil. Whence we may conclude, that thoſe Acts which were before attended with ſome inward Flaw hindring any Obligation to ariſe from them, cannot be rendred obligatory even by the Addition of an Oath. As neither can a prior Obligation, truly valid, be diſannull'd by a ſubſequent Oath, or the *Right* which it gave another Perſon, be revers'd. Thus for a Man to ſwear that he will not pay a juſt Debt, can be no Prejudice to the Claim of the Creditor.

VII. And hence too it follows, that ſince in Promiſes and Pacts, Conſent, grounded upon Miſtake, is not effectual towards producing an Obligation, therefore an Oath is not binding, in caſe it be evidently made out, that the Perſon who ſwore ſuppos'd ſome Matter to be otherwiſe than it really proves to be; and which if he had not thus ſuppos'd, he would not have taken the Oath: eſpecially, if his Miſtake was caus'd by the Deceit of the Party to whom he ſwore. For here the Point ſuppos'd was in the nature of a Condition, which failing, all that was built upon it falls of courſe. Thus if a Perſon brings me ſome very welcome News from a remote Place, in conſideration of which I ſolemnly ſwear to reward him; in caſe I afterwards find his Relation to have been falſe, my Oath ſhall fix no Tie upon me. Grotius[a] adds, *If it be doubtful whether a Man would not have ſworn, altho' he had not been thus miſtaken, then he ſhall ſtand to his Oath. Becauſe Simplicity and plain Meaning are the moſt agreeable attendants of Oaths, and all Tricks and Evaſions are ſtrictly to be baniſh'd from them: And likewiſe, becauſe the Promiſe was not built on that Miſtake only, though ſuch a falſe Proſpect might be the occaſion of its being expreſs'd in larger Terms.* But this doth not clearly ſettle the Caſe; for who ſhall be the Judge whether in this Caſe, abſtracting from the Miſtake, the Promiſe would have been nevertheleſs made? Certainly, not the Party towards whom the Oath was addreſs'd: For how is it poſſible he ſhould be able rightly to diſcern what Mind the other Perſon would have been of, upon ſuppoſal of ſuch or ſuch a Condition? But neither can the Perſon who ſwore give a full Determination of this Difficulty; ſince we are not wont to be equally pleas'd with the ſame things propos'd at different Times, or at the ſame time in different Manners. It ſeems probable therefore that even ſuch an Oath is not valid; at leaſt, ſo far as it is founded upon Miſtake. Yet if the Party who made it, thinks he ſhall pay ſome kind of Regard to the Honour of God, in not receding from it altogether, he ought to judge by the Condition of his Affairs, how far he may conveniently go in the Performance. And whilſt we are ſpeaking of this Caſe, it will not be improper to make a Reflection or two on the Oath which *Joſhua* perform'd to the *Gibeonites*[b]. Where we may firſt obſerve, That the Subtilty uſed by that People was not culpable, nor did fall under the Notion of a *Lye* ſtrictly ſo term'd. For who will blame a Man for endeavouring by ſome Fiction of Speech to preſerve his Life from an Enemy bent upon his Deſtruction? Nor, properly ſpeaking, was this Stratagem the Cauſe of any Damage to the *Iſraelites*: For what doth a Man loſe by being hinder'd from ſhedding the Blood of another Perſon, whom he may nevertheleſs ſpoil of all his Poſſeſſions, and drag into perpetual Servitude, ſo weaken'd and diſarm'd, as to be incapable of future Oppoſition or Reſiſtance? The whole Point therefore turns upon this Queſtion, Whether or no it was the expreſs Command of God, that they ſhould kill all and each of the Inhabitants of *Canaan*, without Diſtinction; even ſuch as ſhould voluntarily ſubmit to their Yoke, and from whom they could apprehend no Danger hereafter? If this be abſolutely affirm'd, *Joſhua*'s Oath was void. For then the only uſe of it would have been to evade a Divine Injunction; that is, *Joſhua* would have invok'd God to puniſh him, if he did not break his Command. Nor can it be urg'd, that *Joſhua* was therefore willing to keep his Oath, leſt it ſhould ſomewhat abate the Awe and Reverence towards the Divine Majeſty, in thoſe Nations, to ſee him break a Covenant which he had call'd God to atteſt. For the Inconvenience in this reſpect would have been the ſame, had he neglected to put the Divine Command in Execution. Grotius[c] therefore is of Opinion that the Order in *Deut*. vii. 2. and xx. 16. is to be underſtood with this Limitation[1], *unleſs any People ſhould ſubmit upon the firſt Summons*; which he urgeth

[a] Lib. ii. c. 13. ſ. 4. n. 1.

[b] *Joſh*. ix.

[c] Ibid.

Mr. Barb. *NOTES on* §. VII.

[1] In this Hypotheſis there is more Difficulty. For when *Joſhua* knew how things were, he ſtill certainly determined to receive the *Gibeonites*; not to treat with them as Equals, and make them his Allies, but as Tributaries, or at leaſt as Slaves to the Children of *Iſrael*. So that he could not diſpenſe with his Word, though an Oath had not intervened in the League concluded with them. But Mr. *Le Clerc* has fully proved, that *Grotius* is miſtaken in his Notion, and confutes him thus: The Law expreſly excepts the Seven Nations of the *Canaanites* from the number of ſuch as they ought to offer and give their Lives, if they would yield at Diſcretion. See *Deut*. xx. 15, 16. Farther, there is a great difference between a Law which orders the Deſtruction of a People, for fear that if they are ſpared they will enſnare their Conquerors into Idolatry, and a Law that orders the Deſtruction of all, at leaſt every one of them that does not voluntarily become tributary, and embrace the Religion of their new Maſters. If the laſt had been *Moſes*'s Meaning, he would have deliver'd himſelf clearly in ſome of the Places where he mentions the *Canaanites*. This Matter ought to have been taught the *Hebrews* carefully, yet we do not find any Footſteps of an Exception to that ſevere Order given by God in ſeveral Places to ſlay the Seven Nations of *Canaan* with the edge of the Sword, and make no Treaty with them. Again, the Vow, which the *Hebrews* call'd *Cherem*, was of that Nature, that he that had vow'd it could not redeem it, but it muſt be deſtroy'd. See *Lev*. xxvii. 29. Now it appears from ſeveral Places, that the Seven *Canaanitiſh* Nations ought to be look'd upon as ſuch, as may be ſeen in the Law mention'd, *Deut*. vii. 2. The Examples alledg'd by *Grotius* do not prove the contrary. For, 1. The Hiſtory of *Rahab* is a particular Inſtance, from whence no Conſequence can be drawn. 'Tis no wonder if the *Hebrews*, to whom ſhe had done ſo conſiderable a piece of Service, ſpared her; and ſo much the more, becauſe ſhe did it before

urgeth many Reaſons to confirm. Mr. *Selden* likewiſe has ſhewn at large[a], that the utter Slaughter and Extirpation of thoſe People was rather a Permiſſion to the *Iſraelites*, than a Command. And others think this the more probable, becauſe the Reaſon aſſign'd for that Commiſſion againſt the *Canaanites* was, partly leſt the *Iſraelites* ſhould imitate their Idolatry, being then ſtrangely prone to foreign Superſtition; and partly leſt the antient Inhabitants, if left in any conſiderable Numbers, ſhould gain Strength to turn out their new Gueſts; eſpecially in caſe they were allow'd to live with them upon equal Terms[b]. This Danger therefore being once ſurmounted, they judge it would have been no Fault to admit ſome to Mercy and Favour; eſpecially ſuch as ſhould abjure their Idolatrous Worſhip. However this were, 'tis plain that *Joſhua*, upon diſcovery of their Fraud, interpreted his Oath in a more ſtrict and ſevere Senſe. They had profeſs'd themſelves the Servants of the *Iſraelites*, a Phraſe common with the *Eaſtern* Nations, and had deſir'd a League. *Joſhua* had promis'd them their Life, and had enter'd into League with them, according to their Petition: And by this Agreement (had they prov'd ſuch as they pretended, that is, none of the Number of thoſe Nations which God had deſign'd to Deſtruction) they had been left in Poſſeſſion of their Goods and Liberties[c]. But on account of the Deception they had us'd, he inſiſts ſtrictly upon his Words; and, as it appears, left them nothing but their Life and neceſſary Maintenance[d].

VIII. But what are we to think of Oaths extorted by unjuſt Fear? Surely the Perſon who by means of this Fear procur'd a Promiſe upon Oath, is no leſs obliged to releaſe the Promiſe thus violently obtain'd, than if no Oath had been added to confirm it. Therefore there appears no reaſon, why [1] Compenſation ſhould not be admitted in this Caſe, in oppoſition to the claim of the Injurious Party; according to the Rules laid down by us, when we treated of the general Subject of Fear. Indeed 'tis the Opinion of *Grotius*[e], that *if either the Words of the Oath do not reſpect the Man, by conferring any Right upon him; or if they do reſpect him, yet ſo as that ſomewhat may be oppoſed to his Claim, then the effect of the Oath ſhall be this: That the Man ſhall obtain no Right, but that the Swearer ſhall nevertheleſs ſtand to his Oath, by virtue of his Obligation to Almighty God.* And he urgeth, as an Inſtance, the caſe of one, who by ſome unlawful Fright, or Terror, hath forced a Promiſe from another. But if we

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[a] Lib. vi. c. 16.

[b] See *Judg.* i. 34. ii. 2. iii. 5, 6.

[c] 1 *Kings* xx. 4.

[d] Add. *Ambroſ.* Off. l. iii. c. 10.

[e] Lib. ii. c. 13. ſ. 14.

Mr. BARB. *NOTES on* §. VII, VIII.

before they had declared War againſt her Country. 2. 'Tis certain that *Solomon* contented himſelf to make the Remnant of the *Canaanites* tributary to him, 1 *Kings* ix. 20, 21. But the Law, which order'd the Deſtruction of that People, did not extend to their Poſterity; it is enough to ſuppoſe that it reached to them only, over whom God made them victorious in *Joſhua*'s time, or after, till they were well ſettled, and in poſſeſſion of as great an extent of Ground as was neceſſary. So that if any of the *Canaanites* eſcaped into the neighbouring Countries, as the Text above quoted ſeems plainly to prove, and they after fell into the Hands of the *Iſraelites* or their Poſterity, they ought not to ſlay them without Mercy. 3. As to what is ſaid in the Book of *Joſhua*, chap. xi. v. 19, 20. That there was no Town of the Seven Nations of the *Canaanites* that would make Peace with the *Iſraelites*, becauſe God had hardned their Hearts, ſo that they fought againſt *Iſrael*, that he might deſtroy them utterly without ſhewing them any Mercy: 'Tis not meant, as *Grotius* tells us, that the *Iſraelites* were obliged to ſpare them which yielded to them at diſcretion, but that through the influence of Divine Providence all the Seven *Canaanitiſh* Nations, except the *Gibeonites*, agreed together to fight, and would not ſubmit to the *Hebrews*, who would not have had the Courage to have put them all to the Sword without Mercy, as Divine Juſtice had reſolved to puniſh them, had they laid down their Arms and open'd their City-Gates to the Conquerors. Theſe are Mr. *Le Clerc*'s Reaſons, to which I freely aſſent. But if this be ſo, what ſhall we ſay to *Joſhua*'s Oath? As for me, I can ſee no Reaſon but we may ſay, that his Oath was raſh and null in itſelf. The Sacred Hiſtorian ſeems to grant the firſt, when he ſays, v. 14. that they did not ask Counſel at the Mouth of the Lord, *i. e.* of *Urim* and *Thummim*. In truth, ſince he ſuſpected ſomething, as appears from Verſe 7. he ought to have been cautious how he engaged himſelf by Oath in a Matter of ſuch Conſequence, and in a manner run the hazard of oppoſing God's Command, which being ſo formal and abſolute, the Artifice of the *Gibeonites* had been ſoon diſcover'd, and then *Joſhua*'s and the Elders of *Iſrael*'s Oath had been of no Force. For all the World agrees that an Oath engaging us upon a thing unlawful is of no Force, ſee §. ix. following. Nevertheleſs we ſee that *Joſhua* thought himſelf obliged to keep his Oath. 'Tis poſſible that God by ſome poſterior Act might ratify this Oath, though the Holy Scripture, which omits many Circumſtances, ſpeaks nothing of this Ratification. The ſevere Puniſhment which God laid on the *Iſraelites* and Poſterity of *Saul* for ſlaying the *Gibeonites*, 2 *Sam.* xxi. 1, *&c.* may give ground to ſuch a Conjecture, although the Action of *Saul* was otherwiſe inhuman and cruel; becauſe, as I ſay with Mr. *Le Clerc*, the Law which order'd the Deſtruction of the *Iſraelites* was not in being. But be that as it will, it is certain, that a Superior may render an Act good contrary to his own Prohibition, eſpecially in the Caſe of a poſitive Law ſo rigorous as this we are treating of. Moreover, we know that the Civil and Canon Law permit certain Acts confirmed by an Oath to be valid, though forbidden by thoſe Laws, and ſo the Oath does not render them effectual of themſelves. See *Grotius*, lib. ii. c. 5. §. 14. n. 4. and §. 16. and c. xiii. §. 20. n. 4. and what our Author ſays §. 19. following. Nor is it hard to diſcover why God would ratify *Joſhua*'s Oath. The Breach of ſo ſolemn a Promiſe made with an Oath, which is accounted by all people in the World a moſt ſacred and inviolable Act, would have doubtleſs begat an ill Opinion both of the *Iſraelites* and of God himſelf with all the neighbouring Nations, with which they were to live in Peace, ſo that they would have had no Commerce with them, nor value their Word. Our Author pretends that the ſame inconvenience will follow upon our Neglect to execute an abſolute Order of God; but in vain, becauſe it is not in the leaſt to be feared, that the Neighbours would make any ſuch Reflection. They might think it ſtrange, that the *Iſraelites* ſhould treat the People they conquer'd with ſo much Rigour, but they could never be offended in the leaſt to ſee that Rigour mitigated by the Sanctity of an Oath. See what I have ſaid in the firſt Edition of this Work. But Mr. *Le Clerc* has changed his Opinion, as appears from his Comments upon the other Books of the Old Teſtament printed in 1708. where he ſays, That the *Iſraelites* did ill in not informing themſelves fully of the place from whence the *Gibeonites* came, although theſe laſt might uſe any innocent Arts to ſave their Lives; but he believes that they did not inſert that Clauſe in the Treaty, but it was made upon the ſuppoſition, that the *Gibeonites* were a People who dwelt at a great diſtance, upon which account it was null. But the *Iſraelites* not inſiſting upon that, and having directly ſworn that they would do them no harm, they were obliged to keep their Word, which they had confirmed with an Oath, and ſo much the more, becauſe it engaged them to do nothing contrary to their Law, as he proves by the ſame Reaſons that *Grotius* had uſed. To this Action of the *Iſraelites* we may apply a Sentence of *Publius Syrus*, which ſhews that we do well to keep our Word, though we have committed a Fault in giving it. *Etiam in peccato rectè præſtatur fides*, v. 192. We muſt look into Mr. *Le Clerc*'s new Edition of the Pentateuch, to ſee how he confutes his own Reaſons; for I hear, that while I am writing this Comment (in 1709.) he has reprinted that firſt Part of his uſeful Work on the Old Teſtament.

[1] See what is ſaid on lib. iii. c. 6. §. 11. n. 6. As to the Queſtion itſelf, we ſhall find in Mr. *Muelen*'s Comment on *Grotius*, Tom. ii. p. 487. the Reaſons brought on each ſide, tho' what is ſaid by our Author may be ſufficient for any Man of Judgment.

would truly ſettle this Point, we ought to diſtinguiſh between the different Kinds and Natures of Oaths. Firſt, for thoſe Words which are directed not to Man, but to God; as if I ſay either alone, or before Witneſſes, *I ſwear to God that I will give* Seius *thus* or *thus*[a]. Here the Oath hath the Nature of a Vow, by which I promiſe to God that I will perform ſomewhat in reſpect to his Honour; and conſequently by which I intended to transfer a Right on God, and not on Man. The caſe is quite otherwiſe in Oaths which are directed to Men, or in which I promiſe a Man ſomewhat, calling God to witneſs. For here the Obligation ſeems altogether to expire, if it appear that the Perſon, to whom the Promiſe was made, lay under ſome Fault which render'd him uncapable of receiving it. Thus in a Promiſe to a Thief, I neither directed the Engagement towards God, nor expreſs'd my ſelf thus, That I would, in regard to the Honour and Glory of the Divine Name, pay the Man what was mention'd. And tho' we ſhould grant never ſo freely and abſolutely, that even ſuch an Oath hath likewiſe the Force of a Vow: Yet ſince a Vow binds not, unleſs it be accepted by God, how ſhall I be ſure that 'tis conſiſtent with the Divine Pleaſure and Approbation, that I, an innocent Perſon, ſhould rob my ſelf of my Goods, to beſtow them on an ungodly Villain, only to put him into a way of making ſome gain of his Wickedneſs? And then there is no Fear that my neglect of my Oath ſhould leſſen the Awe and Reverence of God in ſuch a Wretch, who by his very Profeſſion, and way of Living, ſhews how little he values God and Religion. Yet if there be any Man who in this caſe, to avoid giving Scandal to the Weak, and that he may not ſeem, now he hath eſcaped the Danger, to treat the Divine Name in a ſlighting or irreverent Manner, which before was the cauſe of his Deliverance; if any Man, we ſay, on theſe Conſiderations, is reſolv'd to part with the Sum thus promis'd, it ſeems not only to be more ſafe and expedient, but likewiſe more acceptable to God, that he ſhould rather convert it to pious Uſes, than to the maintaining of the Wretch in his villainous Courſes. And this method of proceeding is the more juſtifiable and ſecure in Governments, where all Oaths of this kind are by the municipal Laws declared void[2]. The Examples alledg'd by *Grotius* to the contrary will, to thoſe who rightly conſider things, appear not at all to reach the Purpoſe. 'Tis ſtrange that *Matthæus* the *Civilian*[b] ſhould, in his Diſcourſe on this Point, commend the Act of *Julius Ceſar*, *who being taken by Pirates, and made ſwear to pay his Ranſom, ſent the Money, but afterwards putting to Sea, took them and brought them to Execution.* For *Plutarch*[c], *Velleius*[d], *Sueton*[e], and *Polyænus*[f], who all tell the Story, do none of them mention a Word about any ſuch Oath: And *Matthæus* ſeems in this to follow the Notion of thoſe who fanſy that a Perſon, thus compell'd to ſwear, may ſatisfy his Oath by paying, juſt for the preſent, what he promis'd; yet ſo as that it ſhall be lawful for him immediately after to recover what he gave, either by his own Strength, or by calling in the aſſiſtance of the Magiſtrate. Which is indeed but a vain piece of Superſtition; it being the ſame thing not to pay, and immediately to take back what we paid. *Tully* aſſerts[g], That it is no Fraud to withhold from a Robber a Ranſom promis'd him for ſaving our Life[3], for this Reaſon, *Becauſe a Robber is a common*

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[a] Add *Paul Servit.* de Inquiſit. p. 55, 56, 57. when he diſtinguiſheth between an Oath directed to God, and an Oath given to Men.

[b] *De Criminibus*, tit. *de perjur.* n. 5.

[c] *In ejus vita init.*

[d] Chap. 41, 42.

[e] Chap. 4. & 74.

[f] Lib. viii. c. 23.

[g] Offic. l. iii. c. 29.

Mr. Barb. *NOTES* on §. VIII.

[2] This is thus decided by a Conſtitution of the Emperor *Frederick* II. inſerted in the *Code*, lib. ii. tit. 28. *Si adverſus venditionem*, Leg. 1. *per vim autem, vel per juſtum metum*, i. e. not by a juſt Fear, but by ſuch a Fear as is ſufficient to move a Perſon not very timorous. *Extorta etiam à majoribus* [*ſacramenta*] (*maximè ne querimoniam maleficiorum commiſſorum faciant*) *nullius monumenti eſſe jubemus.* The Poet *Gunther* alſo makes mention of a like Conſtitution of the Emperor *Barberoſſa* in his *Ligurinus*, l. viii. v. 793, &c.

Juramenta metu, mortiſque dolore coacta,
Præcipuè ne quis multis nocitura loquendo
Publicet, aut in ſe crudeliter acta queratur,
Nullius meriti, vel ponderis eſſe jubemus.

Oaths took on Force, or Fear of threat'ned Fate;
And chiefly thoſe forbidding to relate
Deſigns of publick Harm, or to complain
Of cruel Wrongs, we here revoke as vain.

Our Author quotes theſe Verſes at the End of the next Chapter. See *Feud.* lib. ii. tit. 53. §. 3.

[3] Mr. *La Placette*, in his Treatiſe of an Oath, l. ii. c. 21. takes our Author's Words in a wrong Senſe. Theſe are his Words. "He makes *Cicero* ſay, That there is a Fraud in keeping theſe ſort of Promiſes." Whereas theſe are Mr. *Pufendorf*'s Words, *Cicero quoque, prædoni pactum pro capite pretium, ſine fraude non afferri aſſerit.* Where the whole Connexion of the Diſcourſe ſhews, that there is no appearance of any ſuch Imputation to *Cicero* by our Author, but that he fairly relates the Opinion of that famous Orator. For he ſays not, *non ſine fraude afferri, ſed ſine fraude non afferri*; which is very different, and comes up exactly to the Senſe of *Cicero*'s Words, which are, *Si prædonibus pactum pro capite pretium non attuleris, nulla fraus eſt, ne ſi juratus quidem id non feceris*, &c. Mr. *La Placette*, after he has made this Miſtake, infers from it what our Author never did, and of which none ought to ſuppoſe him guilty without very great Reaſon, ſuppoſing that through Careleſſneſs it had been ill expreſs'd, as it happens to him ſometimes; he infers, I ſay, from thence, that Mr. *Pufendorf* ſeems to aſſert, that a Traveller can't in Conſcience, to ſave his Life, either promiſe Thieves the Sum that they demand of him, or pay it them; and that 'tis an Offence againſt the Publick to do either of them. So that this Oath is ſinful, and we ought not to make it; ſince no Man may lawfully oblige himſelf to that which he can't do without a Sin. And ſo upon ſuch Occaſions a good Man ought rather to ſuffer himſelf to be kill'd, than promiſe a Shilling to ſuch Thieves as offer to ſpare his Life, provided he'll oblige himſelf to do a thing which is in his Power. I am of Opinion, that Thieves trouble not themſelves, whether it be in their Power or no to perform the Promiſe which they have extorted, with or without an Oath. In fine, there is not the leaſt thing in our Author, which can give ground to ſuſpect any ſuch Notion as he attributes to him, nor can it be inferred from his Principles, but by ſuppoſing the thing in queſtion. He affirms, that a Man is not bound to keep a forced Oath, but he elſewhere leaves him at liberty to obſerve it or not, as he ſees fit, and ſo makes it a matter of Prudence; and though he believes he can't keep it without offending againſt the Publick, yet it follows not, that he may never do it, becauſe he ſuppoſes (to ſpeak properly) that it is no true Oath; and as he makes no Engagement with the Thief, who had no Right to require or accept it, ſo he called not God to witneſs; and ſo 'tis paſt all Contradiction, that he only ſwore with his Mouth. Mr. *La Placette*, after theſe weak Reaſonings, concludes nevertheleſs with this ſharp Cenſure: "See how the Liberties which the Enemies of ſevere Morality propound, do uſually end! They carry the Severity and Rigour "much farther than thoſe whom they accuſe of caſting good Souls into Deſpair." But I'll refer it to any judicious Man to examine whoſe Books have done more Harm and leſs Good, whether thoſe who are of our Author's Judgment, or thoſe Moral Divines who are full of Myſteries, ſcholaſtick Notions, and metaphyſical Impulſes to the higheſt Degree, and impracticable Maxims. Mr. *La Placette* affirms alſo, "That to maintain that a forced Oath doth not oblige, is to do great Miſchief to Society, by mak- "ing Pyrates and Banditti deſperate, and hindring them from coming to any Treaty." But he may aſſure himſelf, that they will neither read this Author's nor his own Works. They depend more upon the Fear which ſuch Men have of falling into their Hands again, than upon the Obligation which lies upon them indiſpenſibly to keep their Word or Oath. See what is ſaid upon the *Corſairs* of *Barbary*, l. viii. c. 4. §. 5. following. As for the Treaties in which we engage our ſelves to an Enemy or Conqueror through Fear, we ſhall ſpeak of that, l. viii. c. 8.

Enemy to all Mankind, to whom no Faith can be engag'd, with whom no Covenant can be tranſacted. For which he is cenſured by *Grotius*[a], who obſerves, That although a Robber hath no Title to thoſe common Rights which the Law of Nations hath eſtabliſh'd between Enemies, in a fair and open War, yet he ought to be admitted to Fellowſhip and Communion ſo far as the Law of Nature extends; one Precept of which is, That Covenants be faithfully obſerv'd. And yet there are not wanting Arguments which might be urg'd in *Tully*'s Defence[4]; as, That ſince a Robber is a common Foe to all Men, or ſuch an one as without any precedent Injury or Provocation ſpoils and murthers all that fall into his Hands, and conſequently makes it his very Profeſſion to break and diſturb that Society which God hath ordain'd amongſt Men; therefore he ought to receive no Benefit from any ſuch common Bond (as Oaths are) invented by Men to knit themſelves more firmly together, after the Divine Appointment hath made them ſociable Creatures. And that a way of Life, which declares for Atheiſm, ought not to be admitted to any Gain or Advantage from Religion. As, on the other ſide, the Oaths and Proteſtations of ſuch Villains are little regarded or relied on by Wiſe Men[b]. And we find the *Pander* in *Terence*[c] reckoning it amongſt the neceſſary Accompliſhments of his Art, *to have the knack of Perjury*. Nic. Machiavel. Hiſt. Florent. l. iii. *When Religion and the Fear of God are once extinct, the Conſequence is, that Men regard and obſerve their Oaths only ſo far as ſuits with their Advantage; uſing them not with an intention of performance, but as Means and Inſtruments of deceiving with greater Eaſe; and thinking themſelves to have won the more Praiſe and Glory, the leſs Trouble and the greater Security they have met with in bringing about their knaviſh Deſigns.*

IX. It is farther requiſite, in order to the Validity of an Oath, that the Obligation be lawful, which it is added to confirm[1]. Therefore a Promiſe, tho' ſworn to, ſhall be of no Force or Effect, if the Subject of it were a matter either repugnant to the Natural or Divine Law, or to any Human Law (if the Party lives under Civil Government) inconſiſtent with the Natural and Divine[d]. The Example of *David* is moſt illuſtrious in this Caſe[e]; who having in his Paſſion ſworn to deſtroy the Houſe and Family of *Nabal*, for denying him a reaſonable Kindneſs in abuſive and ſlanderous Language, yet being pacified by the Interceſſion of *Abigail*, he thanks God, that he hath been thus hindred from a more ſinful Performance of a ſinful Engagement[2]. And ſo *Alboinus* was no doubt in the right, for retracting a Vow which he had made to cut off all the Inhabitants of *Pavia*, upon their refuſing to ſurrender at his Summons. For 'tis abſurd to invoke the Divine Vengeance upon any Action[f], but ſuch as God himſelf hath, under a ſevere Penalty, forbidden. To do otherwiſe would be to abuſe the Awe and Reverence which we owe to the Divine Majeſty, in making it, as it were, a means of affronting him. And the deſign of introducing Oaths amongſt Men was, that they might add Strength to good Actions, not that they might afford Excuſe and Protection to bad. *Dionyſ. Halicarn.* l. xi. p. 694. Edit. *Lipſ. The Gods would have us make uſe of Covenants for juſt and honeſt Deſigns, not for thoſe that are vicious and unreaſonable*[3]. The very *Alcoran* forbids Men to ſwear unlawfully[g]; as ſuppoſe, That they will never come near their Wives: And injoins any Perſon who hath happen'd to make ſuch an Oath, to ſet a Slave at liberty by way of Expiation, before he preſumes to break it. And here 'tis made a Queſtion, Whether a Man falling amongſt Thieves, and being by them compell'd to ſwear that he will for ever keep Silence, and as far as in him lies, provide for their Security, be bound to ſtand to his Oath? To which we are inclined to anſwer in the Negative; in caſe his Silence be likely to prove the occaſion of expoſing many other Perſons to Danger. For as to his own part he might lawfully enough ſuffer the Villains to eſcape with Impunity; but not if their Safety was to be follow'd by the Murther and Ruin of many innocent Men. And we might apply to a Perſon under theſe Circumſtances the Saying of *Ateius Capito* to *Tiberius* in *Tacitus*, *Sane lentus in ſuo dolore eſſet; reipublicæ injurias ne largiretur; So far as he was concern'd himſelf, or, in regard to his own particular Grievance, he might be as merciful as he pleas'd; but he ought not to forgive the Injury done to the Commonwealth.* Ann. III. c. 70. In *Gunther. Ligurin.* l. viii. *ubi ſupra*, *Frederick* makes the following Ordinance:

Juramenta metu mortiſve dolore coacta,
Præcipue, ne quis multis nocitura loquendo
Publicet, aut in ſe crudeliter acta queratur,
Nullius meriti vel ponderis eſſe jubemus.

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[a] Lib. ii. c. 13. ſ. 15. & lib. iii. c. 19. ſ. 2. [b] See what has been ſaid in l. iii. c. 6. towards the End. [c] *Adelph.* Act. ii. Scen. 1. v. 35. [d] See the Paſſages collected out of the Fathers by *Gratian*, Cauſ. 22. Quæſt. 4. See *Grotius*, lib. ii. c. 13. ſ. 6. [e] 1 *Sam.* xxv. [f] See *Grotius*, lib. ii. c. 13. ſ. 7. [g] *Paul Warnefrid.* de Geſt. *Longobard.* l. ii. c. 27. Add. l. v. c. 40. in fin. *Æn. Sylv.* Hiſt. Bohem. c. 18. [h] Cap. *de Diſputat.*

Mr. Barb. *NOTES on* §. viii, ix.

[4] With the Limitation which our Author makes above, lib. iii. c. 6. §. 9, and 11. about the End.

[1] 'Tis in this Senſe that we may allow the common Maxim to be true, That an Oath that ought not to be made, ought not to be kept; for if the thing to which we oblige ourſelves be good or indifferent in itſelf, the Oath is valid and obligatory, whether we ſin or not in making it. Here are two Examples which will clear this Matter: A Man obliges himſelf by Oath never to ſwear all his Life; nevertheleſs ſome time after he ſwears, and by this ſecond Oath obliges himſelf to reſtore ſomething he has borrowed. Doubtleſs he ſins by making the ſecond Oath, which he ought not to have done, but yet is bound to keep it. Another borrows, and ſwears he will reſtore what he has borrowed, having yet no Deſign to do it. He commits an horrible Sin by it, but will any Man ſay he is not obliged to perform his Oath? The Maxim by which he acts is not true, but in reſpect to ſuch Oaths by which he engages himſelf to do ſome wicked Action, or forbear ſome good one, which he ought to do. This is what Mr. *La Placette* ſays, l. ii. c. 5. of his Treatiſe of an Oath.

[2] See the Comment of Mr. *Le Clerc* upon this Story. Mr. *Hertius* obſerves here, that *David* was not yet a King, and the refuſal of ſuch a Service did not authorize him to uſe thoſe Methods with the Refuſer. He was not in extreme Neceſſity, and if he had, that was not Cauſe ſufficient to revenge himſelf in that terrible Manner.

[3] The Greek is, Θεοὶ γὰρ ἐπὶ καλαῖς, καὶ δικαίαις παραλαμβάνεσθαι φιλοῦσιν ὁμολογίαις, οὐκ ἐπ᾽ αἰσχραῖς, καὶ ἀδίκαις. See what Mr. *Buddeus* ſays about the Oath that *Hamilcar* made his Son *Hannibal* to ſwear when he was a Child, That he never ſhould have Peace or Amity with the *Romans*, *Spec. Juriſprud. Hiſt.* §. 68, &c. among his *Selecta Jur. Nat. & Gent.*

Oaths took on Force, or fear of threat'ned Fate;
And chiefly thoſe forbidding to relate
Deſigns of publick Harm, or to complain
Of cruel Wrongs, we here revoke, as vain.

X. But to go farther, altho' the thing promis'd be not in itſelf unlawful, yet the Oath ſhall be invalid, in caſe it hinders any greater moral Good [1], or if we are by it withheld from diſcharging any Duty of Humanity or Piety [a]. And under this Head we may rank thoſe Oaths, by which Men tie themſelves up from diſcovering and communicating to others any honeſt Art, tending to the Uſe and Benefit of Mankind [b]: “Unleſs I or others, who are already privy to the Secret [2], can ſufficiently ſupply the Needs of Men in this Particular; and upon ſuppoſal that my Diſcovery cannot prejudice and endamage the Party who required the Oath from me. Such an Oath we find in *Lucian* [*Tragopodag.*] Tom. ii. p. 118. in fin. Edit. *Amſt.* *The Sacred Oath of Silence which I have taken, ſuffers me not to declare what you deſire. To which is added the Command of my dying Father, enjoining me never to diſcloſe the force of this Compoſition.* Plin. Nat. Hiſt. l. xxv. c. 1. *It adds ſome kind of Strength and Authority to our Knowledge, when we refuſe to communicate it to others.* The Reaſon of all which is, becauſe we owe all our Proficiency in good and uſeful things to Almighty God, and are each of us bound to carry our Endeavours to the higheſt degree that we are capable of attaining. ſo that 'tis not in our power to abridge ourſelves of this Liberty, or by our own Acts to abſolve our Conſciences from a Duty enjoin'd by the Law of God. Oaths of this kind were not uncommon amongſt the *Jews*, which are inſiſted on at large by other Authors [c]. Thus too we judge that Oath to have been invalid, which *Narſes* in *Paulus Diaconus* [d] requir'd of an Old Man who had dug up a quantity of Gold, engaging him never to acquaint any Perſon with his good Fortune. And the Old Man was in the right, when upon the Death of *Narſes* he diſcover'd the Treaſure to *Tiberius* the Emperor. And in this reſpect the caſe of a Vow is the ſame with that of an Oath: For neither is a Vow to be look'd on as good and valid, not only if it be unlawful, but if it be ſilly and impertinent. The *Spartan* who had ſworn to throw himſelf headlong down the Promontory *Leucate*, when he beheld the dreadful Height, turn'd back at the Proſpect; and being reproach'd for his want of Reſolution, wiſely anſwer'd [e], *I did not conſider that my firſt Vow ſtood in need of a much greater Vow to bind and confirm it* [f].

X. Laſtly, That Oaths do not alter the nature and ſubſtance of thoſe Promiſes and Pacts to which they are join'd [1], is ſufficiently evident. Thus an Oath about a thing abſolutely impoſſible, is not obligatory; though the Party is guilty of a very heinous Sin, in thus raſhly abuſing the Divine Name. So an Oath added to a Promiſe which was before conditional, doth by no means render it abſolute. For the Oath, which ſuppoſeth ſuch a Condition, doth no leſs ſtand and fall with that Condition, than the bare Promiſe would have done without this Confirmation. Thus too an Oath, as well as any other Promiſe, ceaſeth and expires upon failure of the Quality which the Perſon held when he ſwore, and with regard to which alone the Oath was made. For inſtance, a Magiſtrate, when he leaves his Office, is no longer bound by the Oath which he took at his admiſſion. And on the other ſide, the Subjects owe no farther Obedience to a Magiſtrate, who hath either quitted his Dignity, or been fairly depriv'd of it; though no ſuch Releaſe be expreſly and in formal manner granted them. For thus much is implied in the very Nature of the Affair [g]. So likewiſe it is no leſs requiſite to Promiſes confirm'd by Oath, than to others which are not ſo confirm'd, that they be accepted by the other Party. And he who obtains a Right by any Covenant, may equally releaſe the performance of it, whether it was ſworn to, or not. In the ſame manner we are to judge from the Nature of Covenants, whether an Act undertaken contrary to Oath be only unlawful, or whether it be likewiſe void and ineffectual [h]. For unleſs the Swearer did by his Promiſe diveſt himſelf of his Right, and confer it on another, though he afterwards give the thing to a third Perſon, yet the Act ſhall be valid. If a Man, for Inſtance, hath ſworn that he will leave ſuch a thing in Legacy to any Party, and afterwards ſells it to another Party, the Sale ſhall not be void, though the Seller is perjur'd [2]. Thus if a Perſon, who, in the Life-time of his Parents, hath promis'd them upon Oath that he will never marry ſuch a particular Woman, ſhall neverthleſs after their Deceaſe take her for his Wife; the Man indeed will be guilty of Perjury, but the Marriage ſhall ſtand good and firm, unleſs the municipal Laws ordain the contrary. Farther, an Oath added to a Promiſe or Pact ſhall derive its Force and Efficacy either from natural or

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[a] See *Grot.* l. ii. c. 13. ſ. 7.

[b] Vid. *Matt.* xxv. 27.

[c] Vid. *Grot.* l. ii. c. 13. ſ. 7. & notas ſuas ad *Matt.* xv. 4, *&c.* *Selden.* de J. N. & G. ſecund. *Hebr.* l. vii. c. 2. *Conſtantin. l'Empereur in Babakama*, c. 9. ſ. 20. *Gratian.* c. 21. Cauſ. 22. Quæſt. 5.

[d] Lib. xviii. Add. *Gratian.* c. 2. Diſtinct. 13.

[e] Vid. *Plutarch.* Apophtheg. Lacon. in fin.

[f] See the Paſſage of *Guntherus* above-mentioned.

[g] Add. *Grot.* d. l. ſ. 18.

[h] Vid. *Grot. ubi ſupra*, ſ. 19.

Mr. Barb. *NOTES on* §. x, xi.

[1] Moſt of the Examples alledged by *Grotius* and *Puſendorf* conſiſt of things abſolutely unlawful, as Mr. *Thomaſius* very well obſerves, *Juriſpr. Divin.* lib. ii. c. 9. §. 20. In truth every one is neceſſarily obliged to honour and help his Father and Mother; and although no Man hath right to require our Service rigorouſly, the Law of Humanity lays an indiſpenſible Obligation on us to do all the Good we can to another. And ſo no Man may directly ſwear with a good Conſcience that he will forſake his Father or Mother in their Need, to do no Kindneſs to ſuch or ſuch a Man, *&c.* We may then ſuppoſe here, I think, this Caſe, that a Man may do a thing innocent and permitted in itſelf, yet he can't well diſcharge himſelf of it, without putting himſelf out of the the way of doing ſome other Duty; or a thing good and laudable in itſelf, but joined with ſomething better, which lays a greater Obligation upon him, as our Author ſpeaks in ſeveral Places. As for Example, every Man is free to give his Eſtate to whom he pleaſes; but ſuppoſe any one imprudently ſwears to give out of it, to any one who has no need of it, or to the Poor, a Sum from which he can't diſengage himſelf with Reputation, without entrenching upon his Duty to ſuch Perſons as are more nearly related to him, and whom he is obliged to maintain. In this Caſe an Oath is altogether void.

[2] See Mr. *Placette*'s Treatiſe of an Oath, l. ii. c. 10. §. 183, *&c.*

[1] See *Cujacius*'s Obſerv. 22.

[2] That is to ſay, adds Mr. *Hertius*, ſuppoſing we have no good Reaſons to revoke our Promiſe.

from civil Law, according to the Nature of that Promiſe or Pact. For the Oath hath not in itſelf a Power of cauſing that which otherwiſe produced only a natural Obligation, to produce likewiſe a civil; unleſs the municipal Laws interpoſe particularly in the Matter. As neither can it change the Species of an Act: A bare Donation, for inſtance, cannot by the addition of an Oath be turned into a *chargeable Contract*, nor *vice verſa*. And here we fall in with the common Queſtion, Whether a Contract confirm'd by Oath, in which the ſwearing Party is remarkably prejudiced, may be revers'd, and the Party reſtor'd in full to what he loſt? *Grotius*[a] takes the negative Part, adding for a Reaſon, *That although, in this Caſe, we may perhaps owe the Man nothing, or however leſs than is required, yet we are bound to perform our Oath to God*: Which Argument we juſt now conſider'd and rejected. The Expounders of the *Roman* Law handle the ſame Queſtion at large in their Obſervations upon *Lib.* ii. *tit.* 28. *C. Si adverſus vendit.* and the *Authentick* ſubjoin'd: which many *Civilians*, and eſpecially thoſe of the *French* Nation, cenſure as unjuſt. To the Reſcript of *Alexander* they anſwer [3], *That it doth by no means contain a general Deciſion, but was directed wholly to a particular Caſe.* For the matter ſtood thus: The Emperor was petition'd here by a Soldier, who muſt conſequently be a Man of ripe Judgment, being in his eighteenth Year; and yet he alledg'd no extraordinary Loſs or Damage, but only his Defect of Age. Now the Contract, which this Perſon had made and confirm'd by an Oath, that religious Prince would on no account evacuate: and his pious Caution had no leſs a Precedent than *Hercules* himſelf; who, as the Hiſtorian[b] reports, never ſwore but once in his Life. And then as for the *Authentick*, they ſay it was extorted by Force from the Emperor *Frederick* by Pope *Honorius* III. who refus'd to grant him his Imperial Crown on any other Terms: and that *Frederick* had reſolv'd to alter it, but was prevented by Death. The Reaſon why [4] the Pope ſhould inſiſt on obtaining that Decree, is eaſy to be diſcover'd by all thoſe who are acquainted with the Policy of the *Roman* Court[c]. We, for our Parts, muſt think it neceſſary to the clear Determination of the Point, firſt of all to obſerve, that thoſe Pacts, in which there appears a very conſiderable Inequality, thoſe which depend on any Deceit, Fraud, or unjuſt Fright, and thoſe which are ſtruck without Thought and Deliberation, have all of them a natural and intrinſick Defect, and are therefore ſuch as the Law of Nature enjoins ſhould be either revers'd, or corrected. But that the Party's being under the Age of Five and Twenty, is not ſufficient of itſelf to render the Covenant defective. Tho' thus much indeed may fairly be preſum'd, that the Minor had ſuffer'd ſome Damage in the Tranſaction, on account of his weak and unexperienc'd Judgment, which lays him open to the Circumvention and Treachery of others. But if there appears no ſuch Damage, no Reaſon can be given why the Act ſhould be diſannull'd. This being premis'd, we affirm, that if a Covenant or Promiſe made under Oath be in no other reſpect faulty, it cannot be revers'd on this bare Score, that it was made by a Minor, provided he was capable of underſtanding the Buſineſs in Hand. But if the other Party was guilty of any Deceit; or if, without any ſuch Deceit, the Minor happens to ſuffer any ſignal Prejudice, only through Infirmity of Age, the Oath ſhall not hinder him from petitioning either to have the Bargain revers'd, or at leaſt amended to his Advantage. For in this Caſe, the Youth, who ſwears to the Contract, ſuppoſes it to be free from all Defect, and the other Party pretends as much. This then is, as it were, the Condition on which his Oath is founded, and upon failure of which it comes to nothing. The Caſe is different, if a Youth, without any Deceit in the Perſon with whom he deals, hath knowingly and deliberately given more than the Purchaſe was worth. For then the Buſineſs was a mix'd Act, made up partly of a Contract, and partly of a Donation. It is unneceſſary to add, as a general Remark, that a Perſon ſubject to the Power and Authority of another, cannot oblige himſelf farther than he is by that Authority allow'd[d]. If he exceed theſe Bounds, the Governour may, if he thinks fit, declare the Buſineſs to be void, whether ſworn to, or not.

XII. Yet in as much as Oaths are made by the Invocation of the Divine Majeſty, whom no Man can fraudulently deceive, and whom no Man can ſecurely mock and deride, they ought to be allow'd this Effect; that, on their account, all Tricks and Cavils ſhall be excluded from every Buſineſs which they are added to confirm [1]. Hence the *Roman* Cenſors juſtly condemn'd the Subtilty of that Captive; who having obtain'd leave to depart from the Enemy's Camp, giving his *Oath* to return, when he was got a little way, ſtept back, on the Pretence of having left ſomething behind him, and then fix'd himſelf at *Rome*, as if he had fulfill'd what he ſwore [2]. The Fallacy of *Dercyllides* deſerves a Cenſure no leſs ſevere; who beſieging the Tyrant of *Scepſis*, ſolemnly ſwore to him, *That if he would come out to a Parly, he ſhould immediately return into the City.* The Tyrant coming out on his Promiſe, *Dercyllides* commanded him, on Pain of Death, to ſet open the Gates, and then told him, *Now I give you leave to return into the City, and I intend too with my Army to bear you Company*[e]. For *Fraud*, as

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[a] d. l.

[b] *Plutarch*. Quæſt. *Rom.* xxviii.

[c] That this Law is not obſerv'd in *France*, we have the Teſtimony of *Mornay*, add. *d. l.* See likewiſe *Auguſt. Barboſa* ad d. l. & *Groenewegen*. de LL. *abrogat.*

[d] See the laſt Section of this Chapter.

[e] *Polyæn.* Strateg. l. ii. c. 6. The wicked ſhuffling of the *Locrians* is likewiſe to be condemn'd, as we find it reported by *Polyb.* l. xii. c. 4.

Mr. BARB. *NOTES on* §. XI, XII.

[3] The Reſcript of *Alexander* is this, *Imp. Alex. A. Florentino Militi. Si minor annis viginti quinque emptori prædii caviſti nullam de cætero te eſſe controverſiam facturum, idque etiam jurejurando corporaliter præſtito ſervare confirmâſti, neque perfidiæ, neque perjurii me auctorem tibi futurum ſperare debuiſti.* The New Conſtitution of *Frederick* is, *Sacramenta puberum ſponte facta ſuper contractibus rerum ſuarum non retractandis inviolabiliter cuſtodiantur*, Code l. ii. tit. 28. *Si adverſus venditionem.*

[4] This has afforded the Clergy a Means to gain to themſelves, under a pretence of Religion, the Eſtates of Children under Age, *viz.* Boys at fourteen Years, and Girls at twelve.

[1] The Oath makes the Cheat the more Criminal; but indeed every Action done without an Oath excludes alſo all vain Subtilties. See what is ſaid upon the Paragraph following.

[2] For the Fraud heightens, and doth not take away the Perjury. *Fraus enim aſtringit, non diſſolvit perjurium*, Cicero de Offic. l. iii. c. 32.

Tully obſerves [a], *doth not looſen Perjury, but bind it ſtronger than before.* Thus *Harry Stephens*, in his preliminary Treatiſe to his Apology for *Herodotus* [b], is very pleaſant on the common Sophiſm of the Tradeſmen, when they ſwear they cannot afford a Thing under ſuch or ſuch a Price, unleſs they deſign to loſe by it; obſerving that in this Conduct they have always an Eye to the Proverb, *A Tradeſman loſeth when he doth not get.* I know not whether we are to rank under this Head the Act of the Count *de la Fontain*, who in the Battle at *Rocroy* was carried in a Chair; having bound himſelf by Oath, *Never to fight againſt the* French *on Foot, or on Horſeback* [c]. Or that of Pope *Alexander* VII. who having, at his Admiſſion to the *Papal Dignity*, ſworn that *he would never receive his Kinſmen in* Rome (*di non recivere i ſuoi parenti in* Roma) by the Advice of the *Jeſuits* made uſe of this Evaſion; he receiv'd his Relations firſt at the Caſtle of *Gandolf*, and then brought them with him into the City [d]. Or what *Tavernier* reports [e] of the *Dutch* Agents of their *Eaſt-Indian* Company; who, before they leave *Holland*, engage themſelves by Oath never to drive any Trade on their own private Account, but to reſt ſatisfy'd with the Salary allow'd them by the Publick. Yet when they once arrive at the *Indies*, many of them marry, and ſuffer their Wives to carry on that forbidden and clandeſtine Traffick. 'Tis a barbarous Story, which *Ælian* [f] tells of *Cleomenes* the *Spartan*, that making *Archonides* privy to his Deſign on the Kingdom, he ſwore to him, *If his Enterprize ſucceeded*, πάντα σὺν τῇ ἀυτοῦ κεφαλῇ πράττειν, *that he would do nothing without his Head.* But having ſecured the Government, he cut off his Friend's Head, and kept it in a Veſſel of Honey, and before he undertook any Buſineſs turn'd towards the Veſſel, and declar'd his Reſolutions. *Aryandes*, in *Polyænus* [g], treating with the *Barcæans*, brought their Commiſſioners to a Trench, which he had contriv'd for that Purpoſe, lightly cover'd with Earth and Wood, and there ſwore to them, That he would obſerve the Articles of Agreement, *as long as the Earth continued.* And preſently after throwing down the Trap, ruſh'd upon the City, when under no Suſpicion of Violence [h]. To the ſame Caſe belongs the common Inſtance of two Rogues; one of which ſteals a thing, and the other hides it; the former ſwearing that he hath it not, the latter, that he did not take it; who are both to be judg'd guilty of Perjury. It was a moſt groſs Evaſion of the *Turkiſh* Emperor *Solyman*, when having ſwore to [3] *Ibrahim Baſſa*, that *he would never hurt him while he liv'd*, he order'd him to be kill'd in his Sleep, as if he were not then to be reckon'd amongſt the Living. On the other hand, the Antients extol the Conſtancy of *Q. Metellus Numidicus* [i], for refuſing to ſwear to the Law propoſed by *Saturninus*; though *Marius* the Conſul, and others, endeavoured to perſuade him to a Compliance, by telling him, That *the preſent Neceſſities of the Commonwealth would juſtify him in taking the Oath, and that he might decline the Force of it by this ſecret Reſerve, That he ſwore to the Law, provided it were a Law*; that is, if it were duly propos'd and enacted. Whereas it would be eaſy for him afterwards to ſhew, that it was indeed no Law, being made in the time of *Thunder*, when, by the Rites of their Religion, they were forbidden to tranſact any Buſineſs in the Aſſemblies of the People. Yet that good Man choſe rather to go into Baniſhment, than to make uſe of this ſhift; knowing that when Perſons ſwore to a Law, they muſt, at leaſt in Pretence and Appearance, acknowledge the manner of its Enactment to be right and true. But we think *Lycurgus* to have been over ſolicitous, when he order'd his Aſhes to be thrown into the Sea, for fear, if they ſhould be brought to *Sparta*, the People ſhould fanſy their Oath to expire, by which they had bound themſelves not to repeal his Laws, 'till he ſhould return home. For the bringing back of a dead Body can with no Propriety be look'd on as the Return of the Perſon to whom it belongs [k].

XIII. Yet on the other ſide, the interpretation of Oaths is not always to be extended, but ſometimes to be made in the cloſeſt and narroweſt Senſe, if the Subject Matter ſeem to require it [1]; as ſuppoſe we ſwore to the Prejudice of another, and confirm'd in this ſolemn manner not Promiſes, but Threats, which are not in themſelves capable of conferring any Right on another [l]; the common Inſtance of which Caſe is the Example of the *Iſraelites* in *Judges* xxi. who having ſworn not to give their Daughters to the *Benjamites*, afterwards perſuaded them to ſteal themſelves Wives, and interceded for them with the Virgins Fathers. For 'tis one thing to *give*, and another thing *not to reſume* what hath

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[a] Off. iii. *ubi ſupra.* Add. *Stobæ.* Serm. xxviii. of *Lydia.* *Tacitus*, Ann. xii. *Rhadamiſtus*, as if he would pretend to be mindful of his Oath, doth not uſe his Sword or his Poiſon againſt his Uncle or Siſter; but, as they lay upon the Ground, ſtifles them with a load of heavy Garments.

[b] Chap. xvi.

[c] *Benj. Prioli* Hiſt. Gall. l. 2.

[d] *Il Nepotiſm. Rom.* Part I. l. iii.

[e] Voyages, Part II. c. 14.

[f] V. H. l. xii. c. 8.

[g] Lib. vii. c. 34. *Strateg.*

[h] Yet *Herodotus*, *Melpom. cir. fin.* attributes this Action to the *Perſians.*

[i] Vid. *Appian.* l. i. *de Bell. Civil.* p. 368. Edit. *H. Steph.* *Plutarch.* in *Mario.*

[k] Vid. *Plutarch. Lycurg. Juſtin.* l. iii. c. 3.

[l] See *Grot.* l. ii. c 13. ſ. 5.

Mr. BARB. *NOTES on* §. XII, XIII.

[3] Our Author unfitly imputes this to *Ibrahim.* See the Continuers of *Chalcondylus* upon *Solyman* II.

[1] It is certain, that we ought to reſtrain the Senſe of the Words of an Oath, as the Nature of the thing requires, but that is not peculiar to an Oath, ſingle Promiſes and Agreements neceſſarily require it. As for the Examples which our Author alledges, they have moſt of them a ſhew of Subtilty, either wicked, or unprofitable and ſuperſtitious. It is not ſufficient to give the Words of an Oath a Senſe that may rigorouſly be put upon them; we muſt alſo ſee, if in the Circumſtances in which they were pronounced that Senſe is ſuitable, and agrees with the Intention of him that ſwears, and him to whom the Oath is made. If it be not ſo, and the Senſe in which the Terms are taken contains nothing that can render it null, I don't know how any can ſecure themſelves from Perjury by putting another Senſe upon them, which was not thought on in taking the Oath; but if in following the Senſe which was in view when the Oath was taken, the Oath is null in itſelf, we ought not to put another Senſe upon the Words, tho' they are capable of it, and we may without ſcruple diſpenſe with keeping a like Oath in any manner. See Mr. *Titius*'s *Obſerv.* 273. who ſends us to Mr. *Thomaſius*'s *Inſtit. Juriſpr. Divin.* l. ii. c. 8. §. 50, *&c.* where he maintains the ſame thing againſt our Author, as I have ſeen my ſelf ſince the firſt Edition of that Work, but 'tis the eleventh and not the eighth Chapter. I ſhall ſpeak ſomething of each of theſe Examples in particular in the following Notes.

been forcibly taken[2]. And there was the more Reaſon for inſiſting thus cloſely on the Words of the Oath, becauſe it had been Cruelty to extinguiſh a whole Tribe[3], though for the moſt heinous Offence: and perhaps they had in their Oaths excepted this very Caſe[a]. In *Ammianus Marcellinus*[b], *Athanaricus* the *Gothick* Judge and Commiſſioner for the Treaty of Peace, alledging, that he was bound by a dreadful Curſe, and by the Commands of his Father, “Never to tread upon the *Roman* “Ground, and no Arguments proving ſufficient “to move him to the contrary; it being likewiſe “diſhonourable for the Emperor to paſs over to “him; the wiſe Heads found out this Expedient, “to have the Emperor and the Judge meet in “their Boats about the midſt of the River (the “*Danube*) and thence to ſettle the Articles of Agreement between their People on both ſides[4]. So when the *Romans*, in *Livy*[c], requir'd the *Achæans* to repeal ſome Decrees which they had made, the latter urg'd in their own Excuſe, *That they were engaged by Oath not to do it.* But *Appius*, the *Roman* Commiſſioner in the Affair, telling them, *he would by all means adviſe them to undertake that willingly, which otherwiſe they would be brought to by Compulſion:* They were ſo terrified, as only to requeſt, *That the* Romans *would give themſelves the trouble of making what Alterations they thought fit, and not bring the* Achæans *under the Curſe of Perjury.* Here, we ſee, they look'd on the Caſe of not oppoſing a formidable Superior in cancelling the Laws, to be different from that[5] of repealing them by their own free Act. Thus *Agamemnon*, in *Euripides*, refuſeth to puniſh *Polymneſtor* of *Thrace*[d], in regard that he was the Friend and Allie of the *Grecians*[6], yet he promiſeth *Hecuba* not to hinder her from taking any Revenge on him by her own Force, and on her own Account[e]. Thus the knaviſh Servant in *Terence*[f], begging the Maid to take the Child which he had in his Arms, and to lay it at his Maſter's Door, being demanded, why he could not do't without Aſſiſtance? anſwers, *Becauſe if my Maſter makes me ſwear that I did not lay it here by my ſelf, I may do it with a ſafe Conſcience.* But *Davus* was in our Opinion but a very poor *Caſuiſt*; it being in this reſpect the ſame, to perform a thing by one's ſelf, or by another. The Emperor *Aurelian*, when he found the Gates of *Thyan* ſhut, ſwore in a Rage, *That he would not leave in it one Dog alive*[7][g]. *Alexander* the Great having reſolv'd to deſtroy the City *Lampſacus*, when *Anaximenes* came to petition him on the Behalf of the City, immediately ſwore, *He would do nothing which* Anaximenes *ſhould deſire.* *Anaximenes* took the advantage of the Oath, and deſir'd him to deſtroy *Lampſacus*[8][h]. *Antigonus*, on account of a ſtrange Dream which he had[i], fully deſigning to kill *Mithridates*; and diſcovering the Matter to his Son *Demetrius*, after he had forced him to ſwear that *he would never ſpeak of it*; *Demetrius* being concern'd for the Life of the young Prince, took him once aſide from

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[a] Add. *Joſeph. Archæol.* l. v. c. 2. & *Ambroſ.* Off. l. iii. c. 14.

[b] Lib. xxvii. c. 4.

[c] Lib. 39. c. 37.

[d] *Hecub.* v. 869, *&c.*

[e] Add. *Polyb.* Excerpt. leg. viii. circa fin.

[f] *Andr.* Act. iv. Scen. 3.

[g] *Aurelian* was but juſt in interpreting his Threats according to the ſtricteſt Senſe, when he commanded his Men to run up and down, and kill all the Dogs they met with, *Flav. Vopiſc. Aurelian.* c. 22. Add. *Valer. Max.* l. vii. c. 3. Sect. 4. *inter extern.*

[h] When *Etearchus* in *Herodotus* in (*Melpom.*) p. 171, 172. Edit. *H. Steph.* had obliged *Themiſon* by Oath to aſſiſt him in any Service he ſhould command, and afterwards order'd him to throw his Daughter into the Sea; *Themiſon*, tying the young Lady to Ropes, let her down amongſt the Waves, but preſently pull'd her up again without Harm.

[i] Vid. *Appian.* de Bello *Mithridat.* p. 176. Edit. *H. Steph.*

Mr. Barb. *NOTES on* §. xiii.

[2] But as Mr. *Vander Muelen* has alſo obſerved in his Comment upon *Grotius*, Tom. ii. p. 472. if at the time that the *Iſraelites* ſwore, they had been demanded what they meant by not giving their Daughters in Marriage, could they ſincerely ſay, that they intended thereby to hinder them from taking them; and the rather, becauſe without any prejudice to their Oath they were free to adviſe the *Benjamites* to have recourſe to ſuch an Expedient, and afterwards to intercede for them to the Fathers of the Virgins they had taken away? We may add, that theſe ſort of Oaths, which give no Right to any Perſon, are properly ſpeaking, Vows. Now what aſſurance can we have that God accepts them? And on the contrary ought we not to ſuppoſe that he rejects them, ſince they only proceed from a principle of Hatred and Animoſity? In a word, all minatory Oaths have two eſſential Marks which render them null; the firſt is, That ſo long as there is any Knowledge of them in the Perſon againſt whom any thing is threatned to be done, or not, he always hopes that they'll not be performed; the other is, That theſe ſort of Oaths are always made raſhly and without Conſideration; for they either proceed from Hatred next to Madneſs, or ariſe from ſuch a Motion of Choler, as cauſes a menacing with an Oath of ſuch as we are not angry with, becauſe we love them, and would make them ſenſible that they have committed things that have provoked our Indignation. In all theſe Caſes we ought to beg God's Mercy for thoſe unwarrantable Paſſions with which we have ſuffered our ſelves to be tranſported, and for the Raſhneſs we have been guilty of in uſing his Holy Name, as if he ought to authorize our Paſſions and Weakneſſes; but we are not obliged to keep ſuch Oaths, and we often ſin much more in executing our Threatnings with Rigour.

[3] Mr. *La Placette*, in his Treatiſe of an Oath, l. ii. c. 9. maintains, That it is impoſſible to prove with the leaſt Solidity, that theſe Oaths are evil. “There was indeed, *ſays he*, a great deal of Severity in this Treatment; but we muſt alſo own, that it was “deſerved. This Deciſion certainly is not moderate, if we conſider the Nature of the Thing determined, for it authorizes an Action very harſh, or rather extremely cruel; but as to the Deciſion it ſelf, it ſeems to me, that to qualify it ſingly with *Moderation* is a Term very ſweet and pleaſing. It is not neceſſary that I ſhould prove this, but ſend the Reader to the Hiſtory it ſelf, and to Mr. *Le Clerc*'s Commentary upon it.

[4] If the Peace could not have been concluded, unleſs *Athanaricus* had went into the *Romans* Country, he had been diſcharged of his Oath by this only, that Caſes of Neceſſity are always excepted.

[5] We muſt ſay the ſame thing in this Example as in the preceding. Otherwiſe all publick Deliberations may be revoked, when it is neceſſary for the Good of the State, there being nothing in which this Condition is not tacitly included.

[6] In this Example there is no Oath, and the Explication of *Agamemnon*'s Words helps not the Matter.

[7] This way of keeping Oaths is to burleſque them. The *Hebrews* have a proverbial Expreſſion ſomething like this of *Aurelian*, which is to make them paſs under the Edge of the Sword, underſtanding it of Men, and not of Beaſts, although the Words properly taken belong only to Dogs. See 1 *Sam.* xxv. 22. and what Mr. *Le Clerc* ſays of it againſt *Bochartus*. The Truth is, the Emperor's Oath was null. See what I have ſaid in Note 2. And ſo was *Alexander*'s for the ſame Reaſon, when *Anaximenes* begged the contrary to what he wiſhed for.

[8] As the Propoſition of *Etearchus* was wicked, it is clear that *Themiſon*'s Oath was null, and that he ought not to keep it in the Senſe that the Tyrant took the Words, as alſo that he did wrong in putting the Virgin into the Sea, although he reſolved to pull her out again; for he could not be ſure that the Cords would not break, or that he ſhould not do her ſome Miſchief in throwing her into the Sea.

the Company, and ſaying nothing to him[9], only wrote with his Javelin in the Duſt, ſo as to be obſerv'd by him, *Fly, Mithridates*[a]. To the ſame Head belongs that Inſtance which *Sueton*[b] gives of *Ceſar*'s great Clemency of Nature; That having ſworn to crucify the Pirates by whom he had been taken, he orders them firſt to be ſtrangled, and then faſtned to the Croſs. Of the like kind was *David*'s Oath of Safety to *Shimei*, 2 *Sam.* xix. 23. notwithſtanding which, on his Death-bed he commands *Solomon* to take due Care that ſuch a wicked Rebel ſhould not die a peaceable Death, 1 *Kings* ii. 9. For *David*'s Promiſe of Pardon was made only in his own Name. Nor did he here properly enjoin *Solomon*, that he ſhould drag the Man to Puniſhment for his old Crime, but only that he ſhould diligently watch ſo notorious a Villain, and by no means ſpare him, if taken in a ſecond Fault. And *Solomon* acted with great Wiſdom[c], in obliging ſo turbulent and ſo implacable an Offender to live in the Royal City under his Eye, for fear he ſhould engage in new Treaſons, threatning him with Death upon his Diſobedience in this Particular; which Condition *Shimei* himſelf gladly approved of, and accepted. Nor did it fall out without the ſpecial Direction of Providence, that being caught tranſgreſſing this Command, he ſuffer'd the juſt Reward of his former, as well as of his preſent Guilt. Add. *Montaign*'s Eſſ. l. i. c. 7. Perhaps we ought to allow a Place under this favourable Head to the Action of *Mary* Queen of *Hungary*, Wife to the Emperor *Sigiſmund*, who having promiſed Indemnity to *Hervatus*, Governor of *Croatia*, by whom ſhe had been taken, and very hardly uſed; upon the Recovery of her Liberty is ſaid to have put her Husband upon revenging the Injury; alledging, *That ſhe had no Power to engage for* him, *though ſhe might for her ſelf. Bonfin.* Rer. Hungar. l. iii. c. 2. I know not whether we may put in the ſame rank the Act of *Timoleon* recorded by *Polyænus*; he was engaged in Purſuit of *Milarchus*[d] the Tyrant, an impious Wretch, who had cheated many Perſons out of their Lives, by ſwearing to preſerve them, and afterwards deſpiſing his Oath. The Tyrant made an Overture of coming in Perſon to *Syracuſe* to take his Tryal, provided *Timoleon* would not be his Accuſer: *Timoleon* ſwore he would not; and on theſe Terms *Milarchus* came to *Syracuſe*: *Timoleon* bringing him into the open Aſſembly, addreſſed him in the following manner, *I will not accuſe you, for ſo I covenanted beforehand*; *but I'll command you inſtantly to be executed: for he who hath deceiv'd ſo many to their Ruin, may juſtly be thus deceiv'd himſelf.*

XIV. In like manner an Oath doth not exclude any tacit Conditions or Limitations properly ariſing from the Nature of the Subject. As ſuppoſe I have given a Perſon his Option to deſire of me whatever he pleas'd; if his Requeſt ſhall be either unjuſt, or abſurd, I am not tied by my Engagement. For he that makes an indefinite Grant to another, before he knows what he will aſk, preſuppoſeth that the other Party will petition for what is honeſt, what is morally poſſible, what is not ridiculous, and what is not miſchievous either to himſelf, or to any beſides[1]. 'Twas a good Caution of *Phœbus* to his raſh Son,

> *Ne dubita, dabitur (Stygias juravimus undas)*
> *Quodcunque optâris; ſed tu ſapientius opta*[e].

> I've ſworn by *Styx*, doubt not, I'll not refuſe
> Whate'er you aſk; but with more Wiſdom chuſe.

Such a Caſe as this gave occaſion to that noted Saying of *Hippolytus* in *Euripides*[f], which *Tully* ſo much commends, ἡ γλῶσσ' ὀμώμοχ', ἡ δὲ φρὴν ἀνώμοτος, *My Tongue hath ſworn, my Mind unſworn remains.* For it ſeems he had ſworn to the Nurſe, that he would keep ſecret whatever ſhe diſcover'd to him. But when ſhe made a Propoſal of Adultery and Inceſt with his Mother in Law *Phædra*, he denies that his Oath oblig'd him to conceal ſo foul a Villany. Though the *Poet* makes him ſo ſcrupulous as to recede from this Judgment, and to keep cloſe the Matter in regard to his Oath. *Nicomachus* in *Quintus Curtius*[g] makes the ſame Exception, *reſolutely denying that he had given his Oath in confirmation of the Parricide, or that any tye of Religion ſhould be able to hinder him from declaring ſo barbarous a Treaſon*[2]. For it is indeed one Part of the Duty and Obligation of a Subject, not to hide any Deſigns that he ſhall obſerve to be carrying on againſt the Perſon or the Government of his Prince. So *Tully* (Offic. 1.) *It may ſo happen, that the performance of a Promiſe or an Engagement ſhould be prejudicial to the Party to whom it was made. For if* Neptune, *as we have it in the Story, had not made good what he promiſed to* Theſeus *upon* Oath, Theſeus *had not loſt his Son* Hippolytus. *The Death of his Son being one of the three Wiſhes, which, in his Paſſion, he put up to* Neptune. (Comp. *Euripid. Hippolyt. Coron.* ver. 315.) *Thoſe Promiſes therefore are not to be kept, which would be hurtful to the Perſons, whom in promiſing you deſign'd to ſerve.* Add. *Diod. Sic.* l. iv. c. 65. And thus too *Herod* ought not to have ſold the Head of *John the Baptiſt* to his Daughter in Law for a Dance; be-

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[a] *Plutarch. Demet.*

[b] *Jul.* c. 74.

[c] Verſ. 36, &c.

[d] Stratag. l. v. c. 12. n. 3.

[e] *Ovid.* Metamorph. l. ii. v. 101, 102.

[f] *Hippolyt.* v. 612.

[g] Lib. vi. c. 7. n. 7.

Mr. Barb. *NOTES* on §. xiii, xiv.

[9] This Expedient was ſuperfluous, and could not have preſerved *Demetrius* from Perjury, if the Oath had been valid. But every one is indiſpenſibly obliged, as much as in him lies, to avert the Evil from others with which they are threat'ned unjuſtly. So that *Demetrius* might without any Evaſion have delivered *Mithridates* from the Danger he was in. All that Mr. *de Sacy* has ſpoken in his Treatiſe of Friendſhip, p. 110, &c. upon the Queſtion, *Whether a Man may break his Oath to diſcover to his Friend a Secret of that Nature, that he hazards his Life if he hides it from him?* All, I ſay, that this ingenious Author has ſaid upon this Subject, taking the Negative part, is void and of no Force. The Reaſons which he himſelf alledges for the Affirmative are ſufficient to ſhew that his Determination is extremely wrong.

[1] Our Author cites this Paſſage out of *Ovid's Metamorphoſes*, lib. ii. v. 101, 102. but it is ſo far from eſtabliſhing, that it contradicts our Author's Principles. *Phœbus* ſuppoſes here, and the Sequel of the Story proves it plain enough, That an Oath made by the Waters of *Styx* was inviolable, although the performance of it was fatal to him, for whoſe ſake it was made. This is contrary to both Reaſon, and the Syſtem of the Author.

[2] *Curtius*'s Words are, *Quibus juvenis* [Nicomachus] *auditis, ſe vero fidem in parricidio dediſſe conſtanter abnuit, nec ulla religione, ſcelus tegat, poſſe conſtringi.*

cauſe, ſince there can lie no Obligation to what is unlawful; in ſuch a general Promiſe this Condition ought to have been underſtood, If ſhe deſir'd any thing which he might lawfully perform[a]. We find King *Solomon* not adhering to his indefinite Grant, when his Mother aſk'd a Favour which was likely to turn to the prejudice of his Government[4], 1 *Kings* ii. 20, *&c.* There is a very remarkable Story in *Diodorus Siculus*[b], which bears ſome relation to the Point now under Debate: "*Xerxes* being warmly engag'd in proſecuting a new Expedition againſt *Greece*, deſired *Themiſtocles*, who was then in his Court, to be his Guide and Director in the War. *Themiſtocles* conſented, upon condition the King would ſwear, *never to attack the* Grecians *without him*. A Bull being ſacrific'd, and the Oath taken with the uſual Solemnity, *Themiſtocles* took a Cup of the Blood, and drinking it off, immediately expired." And by this means diverted *Xerxes* from his Reſolution. But here, if *Xerxes* had no other Reaſon to alter his Purpoſe, he need not have been deterr'd by his Oath, in which *Themiſtocles*'s Life was a Condition ſuppos'd; it being no more than if he had promis'd that *Grecian* Captain never to undertake any thing againſt his Countrymen, whilſt he liv'd, without his Counſel and Aſſiſtance. So that upon his Death the force and virtue of the Oath died with him[5].

XV. Although the Invocation of the Divine Name in Oaths is to be adjuſted according to the Perſuaſion of the Perſon who ſwears, yet the whole Propoſition ſhall bear that Senſe which he who requires the *Oath* proteſteth to underſtand it in[c]. For 'tis on his account chiefly that the *Oath* is taken, and not on the Swearer's: And therefore it belongs to him too, to ſettle the Form of Words; and he ought to do this ſo plainly and clearly, as both to ſignify how he underſtands them himſelf, and to bring the Swearer to acknowledge that he apprehends his Meaning. And to conclude the Buſineſs, the Swearer is to pronounce the ſame Words openly and diſtinctly, ſo as to leave no poſſible room for Cavil or Evaſion. Therefore, thoſe Wretches whom *Tacitus* ſpeaks of[d], in vain declined to attempt the Guilt of Perjury, when *being conſcious to themſelves of the Wickedneſs with which they were charg'd, they trembled and faulter'd in their Oath, changing the Words with much Artifice and Slight.* So *Ulyſſes* and *Diomedes* in *Dictis Cretenſis*[e], like true Maſters of Sophiſtry and Guile, ſware to the *Trojans*, That *they would ſtand by the Agreement they had ſettled with* Antenor: By which Agreement they meant the Articles for betraying the City, which *Antenor* and they had adjuſted. As for that Form us'd in adminiſtring Oaths amongſt the *Romans*, *ex animi ſui ſententia, according to their Judgment and Opinion*, it is not ſo to be expounded, as if Oaths receiv'd all their Force and Validity from the Notion which Men form'd of them in their Mind; but to ſhew, that thoſe who ſwore ought to perform ſo ſolemn an Act in the moſt ſerious Manner, and with the moſt real Intentions[1], not in the way of Diſſimulation, of Fiction, or of Sport. This too was an uſual Form of the Queſtions put by the *Cenſors*; as for Inſtance, *Ex animi tui ſententia habes uxorem? Have you a Wife according to your real Mind?* Which a *Roman* Knight once anſwering with this cavilling Jeſt, *I have a Wife, according to my Mind, not according to your Mind*, incurr'd the Penalty of a Fine for his indiſcreet Wit. *Cicero*, in his *Academical*[f] *Queſtions*, endeavouring to prove that human Knowledge can reach no higher than Probabilities, in a very elegant manner alledgeth this and other the like Cuſtoms as Proofs of what he aſſerts. *This is evident*, ſays he, *in the diligent Caution of our Anceſtors, who firſt required Men to ſwear only according* to the beſt of their Judgment; *and then told to the Party who took the Oath, that he ſhould be rendred guilty by it, only*, if he knowingly deceiv'd. *As likewiſe, when they order'd a Witneſs to ſay no more than that he thought ſuch or ſuch a Matter, though perhaps he had ſeen it with his Eyes; and pronounc'd a Fact which the ſworn Judges had examin'd and determin'd, not* to be, *but only* to ſeem, *or* to appear *thus or thus.* 'Tis Remark of the ſame Author[2], That *what is ſworn agreeable to the Mind and Intention of him who requires the Oath, ought ſtrictly to be perform'd; but what is not, may without Perjury be omitted*; that

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[a] *Matth.* xiv. 6, *&c.*

[b] Lib. xi. c. 58. p. 44. A. Edit. *Rhodom.*

[c] See *Grot.* l. ii. c. 13. ſ. 3. n. 2.

[d] Hiſt. 4. c. 41.

[e] Lib. v. c. 10.

[f] Lib. iv. c. 47. *ſub fin. &* l. iii. c. 29. *de Offic.*

Mr. Barb. *NOTES* on §. xiv, xv.

[4] The Promiſe was not granted with an Oath. *Solomon* did not ſwear, till having refuſed his Mother's Petition; he on the contrary declared, that what *Bathſheba* came to do, ſhould coſt *Adonijah* his Life. The Rigour of this Prince is very hard to be excuſed, being againſt his Brother, whoſe evil Deſigns he might have prevented another way. See Mr. *Le Clerc* upon 1 *Kings* ii. 24.

[5] The *Roman* Lawyers ſay, That if a Man has promiſed with an Oath to appear before a Judgment Seat, and is prevented by ſome lawful Reaſon, he is not perjur'd. *Qui jurato promiſit judicio ſiſti, non videtur pejeraſſe, ſi ex conceſſa cauſa hoc deſeruerit*, Digeſt. l. ii. tit. 8. *Qui ſatis dare cogantur*, &c. Our Author here criticizeth upon the Reflection which *Homer* makes upon the Oath of *Hector*, by which that *Trojan* Hero had promiſed to *Dolon* to give him the Horſes and Chariot of *Achilles*. Καὶ ἐπίορκον ἀπώμοσε, &c. *He ſwore and was perjur'd*, ſays the Poet. But our Author ſays, *Hector* ſwore only under this tacit Condition, "If we take the Horſes and Chariot, and if you return from the Battle ſafe and ſound. So that he underſtands by the Word ἐπίορκος, *perjur'd*, an Oath that did not take effect.

[1] Our Author quotes this from his Memory, and does not tell us where he had it. He has it from *Aulus Gellius*, where he of whom he ſpeaks was not a *Roman* Knight, but a captious Fellow. Moreover, the laſt Edition of Mr. *Gronovius* reviewed by the MSS. relates the Jeſt after a different manner, ſo that it had nothing offenſive for the Cenſor to puniſh; for he that made this unſeaſonable Jeſt, ſaid only, that he had a good Wife, but not to his Humour; for his Anſwer was, *Habeo equidem, inquit, uxorem, ſed non hercle ex animi mei ſententia.* Vid. *Cicero* de Orat. l. ii. c. 64. *& Juſt. Lipſius* Var. Lect. l. i. c. 1. In fine, a famous Lawyer very unfitly concludes from this Paſſage of *A. Gellius*, That Women were ſubject to the Reproof of the Cenſors. See Mr. *Thomaſius*'s Diſcourſe, *De Judicio ſeu Cenſura morum*, c. 2. §. 12, *&c.*

[2] *Cicero*'s Latin is, *Quod enim ita juratum eſt, ut mens conciperet fieri oportere, id ſervandum eſt; quod aliter, id ſi non feceris, nullum eſt perjurium. —— Non enim falſum jurare, perjurare eſt: ſed quod ex animi tui ſententia juraris, ſicut verbis concipitur more noſtro, id non facere perjurium eſt.* *Grotius*, and our Author have followed the ordinary Editions in the firſt Words, which import, *ut mens* deferentis *conciperet fieri oportere*. But ſeeing the Manuſcripts acknowledge the Word *deferentis*, which is not there, as *Aldus Manucius* teſtifies, the ſequel of the Diſcourſe ſhews plain enough, as I think, that it is a Gloſs which has been thruſt into the Text by ſome body that did not attend to *Cicero*'s Reaſoning. The Example which is found in the following Words, will not permit us to doubt but that he treats of him that ſwears, and not of him that impoſeth the Oath. A *Corſaire* without doubt intends to pay what he has promiſed with an Oath, or why doth he ſwear? 'Tis then *mens jurantis*, and not *mens deferentis*, in this place.

is, if a Man happens to miſunderſtand the Party who puts him to his Oath, ſo as to ſwear in a different Senſe from what the other conceives, he is not perjur'd by Non-performance. For ſince the other Perſon had a contrary Meaning, he muſt be ſuppos'd not to have accepted of this Propoſal made upon Oath by the Juror; and without Acceptance there ariſeth no Obligation from a Promiſe. *For it is not*, as *Tully* goes on, *always Perjury to ſwear what is falſe*; that is, to aſſert by Oath thro' ſome Miſtake what is really otherwiſe; *but you are then perjur'd, when you fail in making good what you ſwore*, ex animi tui ſententia (*as the Form is in our common Practice) according to your real Sentiments and Perſuaſion.*

XVI. It hath been a Diſpute amongſt ſome of our modern Caſuiſts, whether an Oath could be taken by Proxy [1]; that is, whether one Man could in the Place and in the Name of another take an Oath which ſhould bind the abſent Party? On which Point our Judgment is this: As a Perſon may in his Abſence contract an Obligation, ſince Conſent may as well be ſignify'd in Writing, as *viva voce*; ſo there ſeems no Reaſon why an Oath likewiſe may not be expreſs'd in the ſame manner. Which, after it hath been once ſolemnly recited, ſhall as fully oblige, as if the Party were there preſent, and had taken it by word of Mouth. Yet before it hath been rehears'd in this ſolemn Manner, it ſeems allowable to revoke it; ſo that a Perſon who retracts an Atteſtation which he made upon Oath at a Diſtance, before it be convey'd to the Place for which it was deſign'd, ought not to be look'd on as perjur'd. But in the common Proceedings of Courts in this Affair, there ſeems to be ſomewhat not very proper or convenient, as that the Proctors who read the Inſtrument, uſe ſuch a Poſture and Ceremony, as if they were to ſwear in their own Name, and that, for fear they ſhould ſeem to be themſelves obliged, they change the concluding Clauſe of the Oath after this manner, *So help him God.* Whereas it might be ſufficient barely to recite the Oath of the abſent Party, as it lies in the Writing. However, ſince it hath been with good Reaſon, the receiv'd Cuſtom of moſt Nations to render Oaths more ſacred and auguſt by the Ceremonies of Religion, and by ſome Sign of Devotion, to ſet the Awe and Reverence of the Divine Majeſty more ſenſibly before the Eyes of the Juror, as by Sacrifice, by approaching to the Altar, and the like Acts of Worſhip; therefore we are of Opinion, that if the Matter be of very important Concern, the abſent Party ought to be put to his Oath with the uſual Solemnity, in the place where he lives; eſpecially ſince the Caſe requires a *corporal Oath* [2]; which Name we cannot give to an Oath expreſs'd and convey'd in the manner we before deſcrib'd. For it is much more to invoke God as a Witneſs, in the midſt of thoſe ſacred Rites; which, not without ſome kind of pious Horror, ſignify the Divine Preſence; than to write ſo many Words on Paper, which never *bluſheth*. And 'tis a material Conſideration, that Evidences thus given in Writing at a diſtance, are by the Lawyers themſelves term'd *Teſtimonia cæca* [a], *Blind Teſtimonies.*

XVII. Laſtly, It is a *Queſtion* uſually diſcuſs'd on this Head, Whether or no, and how far an Heir is bound by the Oaths of the Perſon to whom he ſucceeds? In which Caſe this is certain, that if by ſuch an Oath ſome other Party obtain'd a perfect Right, which ought to be ſatisfy'd either in whole or in part out of the Goods of the deceas'd; then the Heir is oblig'd to ſee it fulfil'd: Since this Burthen or Debt inhering in the Poſſeſſion, paſſeth to him with it. But when the Oath hath given no one a perfect Right, and the Obligation itſelf was founded barely in the Piety, Fidelity, or Conſtancy of the Juror, then it's plain that the Heir doth not ſtand bound, inaſmuch as he doth not repreſent another, as to thoſe Obligations which terminate ultimately and ſolely in the Perſon deceas'd. Thus, for Inſtance, if a Man hath ſworn or vow'd with an *Oath*, That *he will faſt once every Week*; that *he will continue in Celibacy five Years*; or, that *he will undertake a Pilgrimage to the Holy Land*; if he die before he hath fulfill'd his Engagement, his Heir ſhall by no means be tied to perform it. But the Caſe is different, if a Perſon hath been Heir expreſly under ſuch a Condition. So likewiſe, if a Man hath ſworn to *give an Hundred Pounds yearly to the Poor for Ten Years to come*; and dies before the time is expir'd, his Heir ſhall be free from the Obligation; unleſs the former Grant conferr'd on certain Perſons a Right of demanding the ſaid Sum. For he who makes a Promiſe, and doth not withal give the Party a Right of challenging it as his Due, intends to engage his own Word only, and not his Eſtate; and therefore upon his Deceaſe the Obligation ſhall not in the leaſt affect his Poſſeſſions, or his Heir, unleſs an eſpecial Injunction to that Purpoſe were added in the Will. *Grotius* [b] obſerves farther, That *if ſuch a Promiſe confirm'd by Oath was in ſome reſpect faulty, ſo as to produce a Right, not in regard of Man, but of God only, then the Heir ſhall not be charg'd with the Performance.* Which we allow, if it be ſuppos'd that the Party who ſwore, reſolv'd either out of a Point of Honour, or a Scruple of Conſcience, to fulfil ſuch a defective Oath, which he might, if he pleas'd, have utterly evacuated, by alledging ſome Deceit, or ſome Fear unlawfully caus'd. For otherwiſe the Queſtion is inſignificant; we having above ſhewn that the Ju-

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[a] Vid. leg. *Wiſogoth.* l. ii. tit. 4. c. 5.

[b] Lib. ii. c. 13. ſ. 17.

Mr. Barb. *NOTES on* §. xvi.

[1] Our Modern Law calls it, *Jurare in animam alterius.* Mr. *Hertius* recites here a Paſſage out of a Letter of *William the Good* King of *Sicily* to *Henry* II. King of *England*, written *A. D.* 1176, where that Prince ſays, That all his Time it has been a Cuſtom in his Realm and among his Anceſtors, not to ſwear himſelf, but it is all one to lift up our Hand, or cauſe another to lift up his Hand for us in our preſence. *Quum unum & idem putemus Sacramentum, quod vel manu propria fit, vel in anima jubentis & præſentis juratur.* That the Antient *Romans* ſometimes ſwore after this manner, appears by an Example which Mr. *Hertius* alledges of an Oath which *Anthony* made to *Pompey* by the Ambaſſadors he ſent to him. *Dion.* Hiſt. Lib. xlix. *Tit. Livius* alſo tells us, That *C. Valerius Flaccus* not being able to ſwear himſelf, his Brother *L. Valerius Flaccus* ſwore for him by the allowance of the Senate and People, who eſteem'd ſuch an Oath good, and for the advantage of him for whom it was made. *Plebeſq; ſcivit, ut perinde eſſet, ac ſi ipſe Ædilis juraſſet,* Lib. xxxi. c. 50. *& ult.* See what the Expoſitors of the Civil and Canon Laws ſay about Oaths taken by a Proxy.

[2] *Juramentum Corporale*, or, as it is called in the *Code*, *Juramentum corporaliter præſtitutum.* See the Law cited about this Matter, § 11. n. 3. and l. ii. tit. 43. *Si minor ſe majorem*, &c. leg. 3. *in fin.* 'Tis an Oath that a Man takes himſelf with the ordinary Formalities.

ror himſelf is not in this Caſe effectually oblig'd. But what if the Heir neglects to perform a Promiſe or Covenant under Oath made by the deceaſed, doth he hereby contract the Guilt of Perjury? It ſeems reaſonable to anſwer in the Negative. For that which in ſtrict Speech we call an Oath, or the Invocation of the Divine Vengeance ſuperadded to a common Engagement, paſſeth no farther than the Perſon of him who ſwears [1]. Since we cannot ſay that the Heir put a Slight on the Reverence due to the Divine Majeſty, becauſe it was not he who call'd God to Witneſs: And therefore he ſhall be chargeable only with breach of Truſt. It alters the Matter, if the Oath were taken by a whole People: It being the Judgment of many, that a People, whilſt they remain ſuch, are by their publick Oaths put under perpetual Obligation. Which Opinion nevertheleſs ſeems to us not altogether clear and deciſive: For an Oath and the breach of it affects only the natural Will, or the Will of particular Men, and reacheth the compound Body, or *moral Perſon*, only by Communication from each Individual. The People therefore, as a *moral Perſon*, cannot invoke the Wrath of God upon themſelves; but this is done by thoſe ſingle natural Perſons, of whom the Community was made up. And conſequently upon the violation of a Promiſe or Pact made by Oath in the Name of the State, thoſe Perſons only ſhall be guilty of Perjury, who corporally ſwore to the Buſineſs, if they are now conſenting to the Omiſſion of it; but the reſt ſhall be only branded with the Mark of ordinary Perfidiouſneſs [2]. And for this Reaſon we ſhould be unwilling to accuſe the *Spartans* of Perjury, in receding, after ſo many Ages, from *Lycurgus*'s Inſtitutions: Or, the *Romans*, in caſe they had inveſted the *Ceſars* with the Title of Kings, notwithſtanding the Oath which *Brutus* of old impos'd on the People to the contrary. Which will appear yet more evidently, if we conſider, that this Oath conferr'd a Right on no Perſon; but the Deſign of the *Romans* in it was only to lay a Reſtraint on the Liberty of their Will, that they might not think of reſtoring that Form of Government, which had prov'd ſo unfortunate to them. By which means they might indeed bind *themſelves*, never to ſet up a *Monarchy* in *Rome*; at leaſt, ſo long as the publick Safety could be preſerv'd without it. For in this caſe the very Perſons, who took the Oath, muſt be ſuppoſed to be releas'd from it; becauſe then the Neceſſities of the State, which is conceiv'd incapable of ſubſiſting without a ſingle Governour, render the Matter or Subject of the Oath unlawful. But their Poſterity, unleſs they repeated the Oath, could not be tied by it; as well becauſe their Anceſtors had no Authority thus to impoſe arbitrarily upon them, as becauſe the Conſent of Poſterity was wanting, as at preſent we ſuppoſe. Nor is it any Argument to the contrary to urge, that a Nation is reckon'd the ſame, tho' the particular Members who compos'd it are all chang'd: And that therefore the Acts of paſt Generations ſeem juſtly enough to be attributed to the preſent. For the Acts of former Ages can then only be imputed to the latter, when ſome other Party obtain'd any Right as the neceſſary Conſequence of thoſe Acts. But in ſuch things as reſult to the whole Body from the Actions of particular Members, the Deſcendents in a People do not always repreſent the Progenitors. As, tho' a People have been heretofore eminent for martial Glory, yet their lazy and degenerate Race can claim no Share in their Triumph, or in their Fame. Yet ſtill the

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Mr. Barb. *NOTES on* §. xvii.

[1] *Bodin*, *De Republ.* l. v. c. *ult.* concludes hence very unfitly, That Princes are not obliged to ſtand to the Treaties made by their Predeceſſors, though confirmed by Oaths, as *Grotius* has obſerved, *De Jur. Bel. & Pac.* l. ii. c. 16. §. 16. n. 4. "For, "*ſays he very well*, Nothing hinders but that the Promiſe may oblige the Heir, though the Obligation of an Oath be purely Perſonal." Upon which *Gronovius* affirms, "That a Prince and his Succeſſor being one Perſon, becauſe they both repreſent the "People, an Oath binds the Succeſſor." But what I ſhall ſay with our Author in the following Note, will make it appear that the Repreſentation falls only upon the Engagement, and not upon the Oath that attends it.

[2] Mr. *Hertius* declares here againſt the Notion of our Author, and much depends upon the Authority of *Grotius*, which yet ſeems to make nothing for him. For this great Man, treating upon the Agreements made with rebellious Subjects, ſays, Lib. iii. c. 19. §. 8. n. 1. "That they may be confirmed by Oath, not only by the King and Senate, but alſo by the Body of the State, as "*Lycurgus* and *Solon* made, the one the *Lacedemonians*, the other the *Athenians*, to ſwear to obſerve their Laws; and, THAT "THEIR OATH MIGHT NOT LOSE ITS FORCE BY ANY CHANGE OF PERSONS, they order'd it to be renew'd "every Year. In this Caſe, ſays *Grotius*, we can't break our Word, when the Publick Good requires it; for the Eſtate may re"cede from its Right, and the Terms of the Treaty may be ſo clear as to admit of no Exception." Either I am much miſtaken, or theſe Words ſuppoſe the clear contrary to what Mr. *Hertius* infers from them, as appears from thoſe Words which I have written in Capital Letters, eſpecially if we compare them with the following Places of the ſame Author, *viz. Grot.* l. ii. c. 13. §. 17. & l. iii. c. 19. §. 5. In ſhort, *Grotius* does not ſpeak at all of the Poſterity of them with whom the Treaty was concluded, at leaſt, he will have us know, that the Obligation of an Oath has as much force upon Poſterity, as the Promiſe to it annexed. The Reaſon of Mr. *Hertius* is no whit ſtronger. He ſays, "A People may be ſworn, as a People." Be it ſo, yet the People which is to day, is not the ſame it was an hundred Years ago; it is only thought ſo, by reaſon of the perpetual Succeſſion of New Citizens, who fill up the Place of thoſe who are dead, or have left their Country, and the Continuation of the Government. So that he comes under the real Engagements of his Anceſtors, by which he hath acquired a true Right, and which are by Nature perpetual, and not into that which muſt be looked upon as purely Perſonal. Now ſuch is the Oath here. In a word, the People that are to day have no other relation to the People that liv'd an hundred Years ago, than an Heir has to a dead Perſon, whoſe Promiſes, confirmed by an Oath (as Mr. *Hertius* holds) are to be performed, not upon account of the Oath, but upon the account of the Promiſe. For an Oath is only a thing accidental, a ſimple Confirmation of an Engagement, which were not leſs valid without a kind of a religious Formality, which hath no other effect, than to aſſure him more of our Fidelity, with whom we reſolve to keep our Word. The Example which Mr. *Hertius* brings of the *Iſraelites*, who about 150 Years after the Death of *Joſeph* made good what that Patriarch had made their Anceſtors to ſwear, *viz.* to carry his Bones out of *Egypt* into the Land of Promiſe: This Example, I ſay, proves only, that the *Iſraelites* did think themſelves obliged to perform the Promiſe of their Anceſtors; but there is nothing that inſinuates, that if they had not done it, they had been guilty of Perjury. We may ſay the ſame of the Murther of the *Gibeonites*, ſuppoſing that *Saul* did it under a pretence that the Oath of *Joſhua* was null. But Mr. *Le Clerc* has well obſerv'd, that that Prince had another Pretence. See *Joſ.* xxi, 1, 2. As to Oaths which give no Right to a Perſon, as when a People having made a Law, ſwear ever after to obſerve it, it is clear that theſe are Vows which have no Force any farther than as we may preſume that God accepts them, ſo that as no Perſon can oblige himſelf, but as he judges it for his Advantage, nothing hinders, but that not only Poſterity, but the People themſelves, who have engaged themſelves by Oath to obſerve a Law, may afterward abrogate it, if they find it prejudicial to the End for which it was eſtabliſhed; for that exception is included in all Engagements which concern them only that enter into them, and we may believe that God no farther requires the conſtant performance of Vows. See Lib. i. c. 6. §. 6. and Lib. iii. c. 6. §. 15. aforegoing.

Caſe would be quite otherwiſe, if ſuch an Oath as we are ſpeaking of, hath been ſolemnly renewed by Poſterity, each particular Man engaging for himſelf. But in regard to theſe publick Obligations, *Sophocles*'s Advice [3] might paſs for a general Rule;

> *Let nothing thus be ſworn beyond recall;*
> *For Men are frail, and human Thoughts will change.*
> Antigon. ver. 394.

And 'tis no trivial Remark which *Joan. Labardée* makes in his Hiſtory of *France* [a], *That the Leagues of Monarchs are more firm and ſacred, than thoſe made by Republicks, or popular Governments: Becauſe when one Perſon only engageth his Faith, he is ſtruck with a more religious Concern for the Obſervation of it, than can affect each Man in a Multitude, where every one conſiders, that but a little of the publick Faith, if any at all, comes to his ſhare; by which Means all are eaſily induc'd to recede from the common Engagement.*

XVIII. The two principal Ends to which Oaths may be, and commonly are applied, are, either to ſtrengthen and confirm a Promiſe by ſuch a ſolemn Act of Religion; or to open a way to the clearing ſome Fact, which is at preſent doubtful, and cannot be conveniently made out any other way. And 'tis in this Senſe we ought to interpret *Ariſtotle*'s Definition of an Oath, when he ſtiles it [1], *an undemonſtrable Aſſertion made with an Appeal to the Divinity*; that is, an Aſſeveration, not demonſtrated by any Arguments, but credited purely on account of the Piety and Religion of the Swearer. For when the matter may be prov'd by evident and convincing Reaſons, 'tis not fair or regular to have recourſe to Oaths. On the other hand, when Oaths are to decide a Cauſe, no ſearch is made after other Proofs [2]. Why Oaths are admitted only in determining matters of Fact, not matters of Law or Right, is very obvious. For we cannot ſwear whether a Thing be done well, or ill, but barely whether it were done, or not done. Which being once known, the Court may proceed upon the Points of Right and Law, by infallible Evidences and Rules. As for the Oath which the Judges themſelves take, it is not aſſertory, but promiſſory; for they engage by it, *That they will give Sentence in the Caſe before them, as Juſtice and Equity ſhall direct.* And this Diviſion of Oaths into promiſſory and aſſertory, may comprehend them all, with regard to the two Ends or Uſes but now mention'd.

XIX. It hath been generally the Cuſtom to make uſe of promiſſory Oaths in publick, as well as in private Cauſes, and perhaps more frequently than was neceſſary [1]. Concerning which Authors have obſerv'd, That ſome of them are taken to introduce an Obligation, and are call'd *Promiſſory in Specie*: Others are added to confirm ſome Act already in Being. Which Diſtinction is not to be underſtood, as if every Oath were not acceſſory to another Obligation; but becauſe ſome Promiſes include an Oath in the Compaſs of the ſame Propoſition; as when one ſays, *I ſwear to do ſo or ſo on your Account*: Whereas many times the principal Buſineſs is expreſs'd in a different Sentence from the Oath which confirms it. Now 'tis rightly obſerv'd by the Expoſitors of the *Roman* Law, and 'tis no more than we have already prov'd, That all Oaths are void which Men apply to ſtrengthen any Buſineſs in itſelf unlawful or vicious [2], and which tends either to the impairing of the publick Good, or to the Prejudice of a third Perſon, tho' at the ſame time there are ſome ſort of Tranſactions which are of themſelves, in civil Cogniſance, invalid, and yet are rendred good and effectual by the Addition of an Oath [3]. The reaſon of which is, becauſe they are not defective in their own Nature, but only capable of being eaſily turn'd to the harm of the Party, who thus by ſwearing to them ſhews his full Conſent and Approbation. For ſince any Man may wave a Privilege or Favour not deſign'd for his Benefit, he who thus refuſeth to lay hold on the Invalidity of the Affair, and peremptorily proceeds to the confirming it by an Oath, is preſum'd to have conſider'd very ſeriouſly whether it makes for his Intereſt, or not.

XX. Aſſertory Oaths, or ſuch as are applied to the Deciſion of Controverſies not to be terminated by other Proofs, are taken either by the Party concern'd in the Buſineſs, or by a third Man: Thoſe, who ſwear to the Facts of others, are term'd Witneſſes [1]; whoſe Honeſty and Fidelity, unleſs by ſome probable Token rendered ſuſpicious, are with Juſtice allowed a very great Weight and Sway; it being well ſuppos'd, that no Man of any Religion or Goodneſs will expoſe himſelf to the Divine Vengeance, for the Affair of another Perſon: Yet is it a wiſe Conſtitution in moſt civil Governments, not lightly to admit Perſons to give Evidence in the Cauſe of others, engag'd to them by nearneſs of Birth; which

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[a] Lib. vi. p. 329. Comp. *Anton. Matth.* de Crimin. tit. *De Perjurio*, n. 15.

Mr. Barb. *NOTES on* §. xvii, xviii, xix, xx.

[3] The Greek is, Ἄναξ, βροτοῖσιν ȣ̓δὲν ἐϛ' ἀπώματον.
Ψεύδει γὰρ ἡ 'πίνοια τὴν γνώμην.

[1] The Greek is, Ὅρκός ἐϛι μετὰ θείας παραλήψεως φάσις ἀναπόδεικτος· *Rhet.* c. 18.

[2] See §. 21, 22. following.

[1] Theſe ſorts of Oaths are either unjuſt or raſh for the moſt part. To make them innocent, we ought moſt certainly to know, that the Deed or Omiſſion to which we are obliged, is allowable or innocent; whether it be a thing that depends on us, and is in our Power; and we ought to examine whether it will not bring us into ſome Danger, though inconſiderable, of offending God, and breaking his Law, and if there be a neceſſity of Swearing. See the Treatiſe of Mr. *Placette*, l. ii. c. 4. & 25.

[2] The Words of the Law are, *Secundum itaque prædictam regulam, qua ubicunque non ſervari factum lege probibente cenſuimus, certum eſt nec ſtipulationem hujuſmodi tenere, nec mandatum ullius eſſe momenti,* NEC SACRAMENTUM ADMITTI, *Cod.* l. i. tit. 14. *De Legibus,* &c. leg. 5. §. 1. See alſo the *Digeſts*, l. ii. c. 14. *De Pactis*, leg. 7. §. 16. & l. 30. tit. 1. *De Legat.* leg. 112. §. 4.

[3] 'Tis a Maxim of the Canon Law, That every Oath ought to be performed, which can be kept without any Prejudice to our Eternal Salvation. On this account the Engagements of a Woman, the Promiſes of a Minor, and other Acts which are null by the Civil Law, are valid by the Pope's Sentence, upon the account of the Oath which is join'd with them. See the *Decretals*, l. ii. tit. 24. *De Jurejurando*, c. 9. 28. & §. 11. n. 3, 4. above. But Mr. *Thomaſius* obſerves with reaſon in his *Fundam. Jur. Nat. & Gent.* l. ii. c. 9. §. 9, *&c.* That it is contrary to the Nature of an Oath, which, as our Author ſufficiently proves, is only an Acceſſary to our Engagements, and that the *Roman* Clergy would by it uſurp a Power to correct the Civil Law, and the Sentences of the Judges; as alſo hinder, that the Promiſes and Donations made to the Church, ſhould not be weaken'd by ſuch juſt Exceptions.

[1] See l. v. c. 13. §. 9. following.

is ſo ſtrong a Motive to Affection and Love: It being conſider'd that ſuch Perſons might eaſily ſuffer their Paſſion to gain the Aſcendant of their Religion [2]. Nor was it altogether without Reaſon, that the *Romans* of old requir'd Witneſſes of Wealth and Subſtance, eſpecially in difficult and important Cauſes [3].

XXI. But a Man may likewiſe in his own Buſineſs, when 'tis his Intereſt to do ſo, ſolve the Diſpute by Oath, and this either by Agreement of the Parties [1], or by order of the Judge. For when a Controverſy ariſeth concerning ſome Due demanded by one Man, and denied by another, the Claimant may challenge the other Party to his Oath, promiſing to let fall the Suit, if he ſwears the thing not to be owing which is requir'd: And if the Perſon thus challeng'd be doubtful whether he can ſwear clearly and peremptorily to the Matter, as ſuppoſe the Debt was transferred to him from another, then he may return the Oath to the Claimant, engaging to pay, if he ſhall ſwear it is his Due [2]. And this giving and returning of the Oath between the Parties may be made either in Court, or out of Court; yet with this difference, that out of Court I am not neceſſarily oblig'd to take the Oath when offer'd me, becauſe it implies a Contract [3]; by means of which I ſhall, upon my refuſing, become a Debtor. But now no Perſon, who is not inveſted with an Authority over me, can compel me to a Contract or Agreement which ſhall be burthenſome to me [4]. Whereas, in Court, when the Oath is offer'd by one Party, the other ſhall not decline it, unleſs upon very weighty Reaſons; but ſhall either take it himſelf, or return it to his Adverſary; that is, when the Judge conceives the Claim not to be groundleſs, and yet there is no full Evidence of the Matter ready at hand; then if one of the Parties thinks fit to refer the Buſineſs to the Conſcience of the other, the Judge may fairly look on him as Convict, who neither dares in this religious manner to deny the Debt, nor yet, in Return, challenge the other to affirm it with the like Solemnity. For this ſtarting and boggling can be attributed to nothing but to his inward Conſciouſneſs of the Debt; becauſe, if he pretend to fear that Men ſhould think he ſwears only on the account of Gain, 'tis eaſy for him to avoid this Suſpicion, by returning the Oath to the Claimant [5]. If he is afraid that the other will be perjur'd [6], why doth not he ſwear himſelf? Yet *Plato* in his Laws [a] admits of an Oath, only *in ſuch Caſes, where, according to the Judgment of Men, no Advantage can be got by forſwearing; but where any profit may be reap'd from the Perjury, there he orders that the Proceſs ſhall be manag'd without Oaths.*

XXII. And laſtly, In ſome Caſes, when other Proofs are not ſufficient [1], the Judge may put the Party to his *Oath*, though he do not deſire it; and

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[a] Lib. xii. p. 987. *C.* Edit. *Francof.*

Mr. BARB. *NOTES on* §. XX, XXI, XXII.

[2] The Latin of the *Digeſts* is, *Teſtium fides diligenter examinanda eſt* ——— *an amicus ei ſit, pro quo teſtimonium dat.* Dig. l. xxii. tit. 5. *De teſtibus*, leg. 3. See the following Law.

[3] *An locuples, vel egens ſit, ut lucri cauſa quid facile admittat*, ibid.

[1] So the Roman Law directs, *Maximum remedium expediendarum litium in uſum venit jurisjurandi religio: qua vel ex pactione ipſorum litigatorum, vel ex auctoritate Judicis deciduntur controverſiæ*, Digeſt, Lib. xii. tit. 2. *De Jurejurando*, &c. See *Daumat*'s Civil Laws in their natural Order, Part I. l. iii. tit. 6. Sect. 6.

[2] The Roman Law ſpeaks thus, *Alterum itaque eligat reus, aut ſolvat, aut juret* ——— *Datur autem & alia facultas reo, ut, ſi malit, referat jusjurandum; & ſi is, qui petet, conditione jurisjurandi non utetur, judicium ei Prætor non dabit: æquiſſime enim hoc facit, cum non deberet diſplicere conditio jurisjurandi ei, qui detulit*, Digeſt. ibid. leg. 34. § 6, 7. *Manifeſtæ turpitudinis & confeſſionis eſt, nolle nec jurare, nec jusjurandum referre*, ibid. leg. 38.

[3] 'Tis a kind of Tranſactation ſay the Roman Lawyers, very well. *Jusjurandum ſpeciem tranſactionis continet*, Digeſt. *ubi ſupra*, leg. 2.

[4] But when we have once accepted an Oath, we can't refer it. *Jusjurandum, quod ex conventione extra judicium defertur, referri non poteſt*, Ibid. leg. 17. And in the very Moment that the Oath is taken, the Controverſy is at an end, ſo that either of the Parties cannot retort; whereas, when an Oath is taken by the order of the Judge, we may require a Review of the former Proceedings, averring, that he hath new Matter to produce, and that he will only inſiſt upon that. *Admonendi ſumus, interdum etiam poſt jusjurandum exactum permitti conſtitutionibus principum, ex integro cauſam agere, ſi quis nova inſtrumenta ſe inveniſſe dicat, quibus nunc ſolis uſurus ſit* ——— *Quod ſi alias inter ipſos jurejurando tranſactum ſit negotium, non conceditur eandem cauſam retractare*, Ibid. leg. 31. See Mr. *Titius*'s Obſervation on *Lauterb.* 338.

[5] Nevertheleſs, *Plato*, as our Author obſerves here, allows not an Oath in all affairs of Intereſt, and where Perjury may be an advantage in the Judgment of Men. See l. xii. of the Laws of this Philoſopher, p. 948. *Edit Steph.*

[6] This is a nice queſtion, Whether an Oath may be required of a Perſon, when we have reaſon to believe that he will ſwear falſly? We ſpeak not here of a Judge; for as Mr. *La Placette* ſpeaks very well in his Treatiſe of an Oath, l. i. c. 13. "The "Laws in certain Caſes order an Oath to be adminiſter'd, and he muſt conform himſelf to them without troubling himſelf about "the manner how they who take the Oath, can do it. They alſo ſuppoſe, without doubt, that ſome conſiderable Intereſt is con- "cerned" This being allow'd, I am of Mr. *Thomaſius*'s Opinion, who ſays, "That this Queſtion is more curious than profitable, *In- "ſtit. Juriſpr. Divin.* l. ii. c. 9. For we cannot be certain that any one reſolves to forſwear himſelf; for though he have often "ſworn falſly, he may have repented, and may reſolve never again to commit ſuch a foul Crime deliberately; but if he threatens "to do it, we may believe, that he does it that we may not put him upon ſwearing". I may add, That there are Men who are inclinable enough to do great Wickedneſſes, and yet dare not ſwear, either through ſome ſcruple of Conſcience, or through I know not what monſtrous pretence of Piety, which they make after their way, tho' they are free, as they think, to accommodate themſelves to another's Intereſt as far as they can without falling into ſuch enormous Crimes as incenſe the Deity. Further, ſuppoſing we may preſume, That he, for example, who denies a Debt, or thing truſted, can't be convicted judicially; and he is willing to clear himſelf by Oath, is it not almoſt the ſame thing, as if he had ſworn falſly; ſince he is willing to do it? Mr. *La Placette* owns, that what ſuch a Perſon adds to his horrible diſpoſition by actually ſwearing falſly, is ſo ſmall a thing as is not to be regarded, yet he determines, that an Oath ought not to be adminiſter'd in ſuch a Caſe, for fear of provoking God's Anger, and offending our weak Brethren. But the fear of Scandal does not indiſpenſibly require that a Man ſhould loſe his Goods without trying all ways poſſible to recover them, if it be a thing of Conſequence, as we ſuppoſe here it is. Beſides, the Scandal is leſs, if we declare the Reaſon why we will have the Party ſworn. As to God's Anger, that is not ſo much excited by the outward Act, as by the inward Diſpoſition, which in this Caſe is ſuppoſed full and entire, and is looked upon as the Act.

[1] *In bonæ fidei contractibus, necnon* [*etiam*] *in cæteris cauſis, inopia probationum, per Judicem jurejurando cauſa cognita res decidi oportet.* C. Lib. iv. l. 1. *De rebus creditis & jurejurando*, Leg. 3. This Law is ordinarily quoted, as if it meant that a Judge may adminiſter an Oath when there is an half proof on the ſide of one of the Parties, as for Example, but one Witneſs, who may not be credited, though he be a Senator. But Mr. *Noodt* has well ſhewed in his *Probabilia Juris*, l. iii. c. 6. that *inopia probationum*, (i. e.) want of Proofs, is when there are ſuch Proofs on both ſides, that the Judges know not how to determine. For when a little matter would weigh down the Balance, we ought not raſhly to adminiſter an Oath. See *Digeſt.* l. xii. tit. 2. leg. 31. where is, *in dubiis cauſis.*

this either that he may poſſeſs himſelf of ſome Right, or clear himſelf from the Suſpicion of ſome Fact. But here it muſt be obſerv'd, that 'tis never the Cuſtom to offer theſe *Oaths*, when either capital Puniſhment, or any grievous Inconvenience, muſt be the conſequence of confeſſing the Truth. For, beſides, that it looks very hard to bring a Man into ſo dangerous a Neceſſity on the account of an uncertain Fact, as that he muſt either deeply wound his Conſcience, or incur ſome very conſiderable Damage; little Truſt is to be given to an *Oath* thus exacted, the Minds of Men being always ready to entertain this Hope, That God Almighty may again be appeas'd, whoſe Mercy even the Perjur'd Sinner is not forbidden to implore. 'Tis a good Remark of *Libanius*[2], *He who deſpairs of all other Means, and hath but one Remedy left, which is not to be obtain'd otherwiſe than by Lying, will certainly dare to change one Danger for another, knowing the preſent Miſchief which is before his Eyes to be unavoidable; but, as for the future Evil, often flattering himſelf that he ſhall be able, by Worſhip, Sacrifices, Gifts and Oblations, to bribe Heaven into a Pardon.* But for an account of theſe ſeveral kinds of *Oaths*, the Writers on the Civil Laws are to be conſulted at large[3].

XXIII. In relation to the Breach of *Oaths*, this Queſtion ſtill remains to be reſolv'd, ſince it is uſual in civil Governments to bind Men by *Oaths* to the faithful diſcharge of their reſpective Truſts and Employments, whether he is always to be deem'd guilty of Perjury, who hath neglected any one part of this Duty? Where the Controverſy is not about thoſe *Oaths* which regard ſome peculiar Act; as, when a Man gives his Evidence, denies a Truſt, forſakes a particular Promiſe, and the like (for he who violates theſe ought, no doubt, to be branded as forſworn) but about ſuch in which the Party binds himſelf to many Things together: As when Perſons are admitted to any Office, to be diſcharg'd by different Performances. And here there ſeems to be no reaſon why we ſhould ſcruple to take the Affirmative ſide, in caſe the Breach was made againſt Knowledge, and with deliberate Wickedneſs. Only, that there are different degrees of Perjury, as well as of other Crimes. For as he is reckon'd leſs guilty, who hath tranſgreſs'd a Law or two, than he who hath at once renounc'd all civil Government, or hath committed Treaſon againſt his Prince; ſo he who hath violated the whole ſum of his Duty, contracts a more heinous and aggravating Perjury, than he who hath broken only a part[a]. Nor ought we to give any heed to thoſe Authors, who are of opinion, that Perſons in theſe Circumſtances may be abſolv'd from the Sin of Perjury, by ſubmitting to the Penalty of the Law. For unleſs, when the Obligation was firſt entred upon, it was expreſly left to the choice of the Perſon, either to perform what he promis'd, or at a certain Price to purchaſe the liberty of doing the contrary[b], the Puniſhment ſhall by no means render him clear from the Crime[1]; as we ſhall make out more at large hereafter. Thus he who hath ſuffer'd a Whipping for Thievery, is no leſs a Rogue[2], than if he had never felt the Laſh.

XXIV. What is uſually canvaſs'd amongſt Authors about the Diſpenſations, and relaxations of *Oaths* and of *Vows*, may be wholly determin'd by the fixing two Principles, or Rules. The firſt, That a Perſon, who in regard both to his Actions and his Poſſeſſions is under the Government of another, can diſpoſe of nothing to his Governour's Prejudice; and if any ſuch diſpoſal be made, it ſhall be lawful for the Governour to revoke it. The other is, That he who is inveſted with ſuch Authority over any Perſon, may, as he ſhall think convenient, retrench and confine any Rights, which the Party under his Direction hath already obtain'd; and much more thoſe which he ſhall obtain hereafter. Whence it appears, that the Acts of Superiors are not of ſufficient force to hinder the Performance of an *Oath*, ſo far as it was truly obligatory; that is, an *Oath* not defective in it ſelf, and made about a thing which the Juror may diſpoſe of at his Pleaſure, cannot be diſannull'd by a Superior. Thus the *Roman*[c] Senate could not revoke the *Oath* which *Regulus* made to the *Carthaginians*, engaging him to return: Though indeed in this particular Caſe there was another Reaſon; inaſmuch as *Regulus* was now in a Condition of Slavery under his Conquerors, and therefore the *Romans* had loſt all their Power and Authority over him. But when the Subject of the *Oath* is any Thing or Action falling under the Direction of the Superior, it ſhall then borrow all its force from the Superior's Conſent, either tacit or expreſs; and he may, if it diſpleaſe him, declare it null and void. Nor is there the leaſt danger of Perjury to be fear'd, when an *Oath* is thus revers'd. Since the Perſon under Government ought to have preſuppoſed his Governour's Approbation as a neceſſary Condition. Nor doth the Superior ſin in thus cancelling what the other hath ſworn: becauſe he only exerciſeth his Right in hindring the Inferior from acting in Prejudice of his

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[a] Yet add *Sanderſon* de Oblig. *Jurament.* prælect. iii. ſ. 18.

[b] See the Articles of Marriage between *Charles* Prince of *Wales* and *Henrietta*, in *Gramond.* Hiſt. *France*, B. xvi. Artic. 23.

[c] See *Grot.* l. ii. c. 13. ſ. 20. n. 1, 2.

Mr. Barb. *NOTES* on §. xxii, xxiii.

[2] *Libanius*'s Greek is, Ὅτῳ δὲ τὰ μὲν ἄλλα ἀπέγνωσται, εἷς δὲ ὑπολείπεται πόρος, ὃν οὐκ ἔστι μὴ ψευσάμενον ἔχειν. ὁ δὲ τοιοῦτος τολμᾷ κίνδυνον ἀνταλλαττόμενος κινδύνου· τὸν μὲν ἐν ὀφθαλμοῖς ἄφυκτον εἰδὼς, ὑπὲρ δὲ ἐκείνου πολλάκις αὐτὸν ἀπατῶν· ὡς καὶ θυσίαις, καὶ θεραπείαις, καὶ εὐχαῖς, καὶ ἱερείοις, καὶ κάλλει ἀναθημάτων, συγγνώμονας ἂν κατασκευάσαι τοὺς θεούς· ἔπειτα τοῦ μὲν τὴν δίκην μέλλειν ἡγεῖται, τοῦ δὲ τὸ δεινὸν εὐθὺς ἐφεστάναι· ἐλάττω δὲ τῆς ἐπικειμένης, τὴν οὔπω παροῦσαν κρίνει, κατ᾽ αὐτὸν τὸν χρόνον.

[3] Such is the Oath called *Juramentum calumniæ*, or *de Calumnia*; which conſiſts in this, according to the *Roman* Law, that both Parties ſwear when they enter their Action, that they act honeſtly, *i. e.* the one, that he believes his Demand well grounded, and the other, that his Defence is juſt, and that neither of them deſign to find out Tricks and Evaſions to hinder or delay an equitable Determination. See *Cod.* l. ii. tit. 59. *De Jurejurando propter calumniam dando*, and the *Novel* xlix. c. 3. §. 1. But ſince this Oath is often an occaſion of Perjury either to the Plaintiff or Defendant, and ſometimes to both, it is with much reaſon baniſh'd moſt Courts. Another ſort of Oath famous in the *Roman* Law is *Juramentum in litem*, when the value of a Debt is referred to the Oath of the Creditor, and the Debtor is not allowed the ſame privilege, becauſe he is a perſon not to be credited, or is guilty of ſome groſs fault. See *Digeſt.* l. xii. tit. 3. *De in litem jurando*, & *Cod.* l. v. tit. 53. Mr. *Thomaſius* in his Diſſertation, *De pretio affectionis in res fungibiles non cadente*, reprinted at *Hall* in 1707, ſpeaks many curious things on this Subject, and which may rectify the Notions of our Modern Lawyers.

[1] See Lib. viii. c. 3. §. 4. at the end.

[2] See Lib. i. c. 9. §. 6. above.

juſt Prerogative. And 'tis the ſame thing as to the Nullity of the *Oath*, whether the Superior prohibits all *Oaths* on ſuch certain Subjects beforehand, or whether, when they have been already made, he forbids their Performance. Though, in the former Caſe, the Inferior incurs a very heinous Guilt, in thus raſhly preſuming to ſwear againſt the Prohibition. The Father, by the *Jewiſh* Law, *Numb.* xxx. 4, *&c.* was allow'd to revoke the ſworn Vows of his Daughter, whilſt under his Direction; the Husband of his Wife, the Maſter of his Servant, if they thought convenient: For otherwiſe, the Parties here, who were to live in Obedience, might by ſwearing and vowing have render'd the Power of their Governours wholly uſeleſs. Nay, *Leo Mutinenſis* [a] reports, *That if any Perſon had entred on an Oath or Vow of what kind ſoever, and afterwards upon good Reaſons repented of it; and if it did not lead to the Prejudice of a third Party, the Reaſon of his retracting having been produc'd and approv'd, he might by one* Rabbin, *or three other Men, be abſolv'd.* Another way there is, by which the effect of an Inferior's *Oath* may be made to depend on the Pleaſure of his Superior; namely, if the Superior ſo conſtitute and ordain, that what the Inferior ſhall ſwear in ſuch a particular Caſe, ſhall not be valid 'till it hath receiv'd his Approbation. And thus in the *Civil Law*, under the Head of *Oaths*, it [b] is inſerted as a neceſſary Caution, That *the Right of Superiors is always excepted in the Caſe of Swearing:* Or, that all *Oaths* are to be conſtrued with a Salvo to that right. Now it is evident in all theſe Inſtances, that the relaxation of an *Oath* can only be made by him who is inveſted with Authority over the Swearer, and with ſuch Authority, as implies in it this degree of Power. And therefore it was of old very properly claim'd and executed by the *Roman* Emperors: As appears from *l. ult. D. ad municipalem* [2], where *Antoninus* and *Verus* diſpenſe with a certain Perſon's *Oath*, who having ſworn never to come into the Aſſemblies of his Order, was afterwards created *Duumvir:* Becauſe a Subject cannot by any *Oath* of his withhold his Service, when requir'd by the Commonwealth. And ſo *Tiberius*, in *Sueton* [c], granted a *Roman* Knight the Power of being divorced from his Lady, whom he had taken in Adultery with his Son in law, though he had before ſworn never to put her away: The Emperor declaring, *That the Oath could not be ſo far extended, as to reach the preſent Caſe, where the Wife by ſo infamous a Crime had rendred her ſelf unworthy of cohabiting any longer with her Husband.* Afterwards the Chriſtian Emperors very frequently delegated the Biſhops to preſide and to determine in the Affair of Diſpenſations; that if any Scruple ſhould happen to ariſe, the Opinion of their Sanctity and Goodneſs might ſatisfy the Minds of leſs intelligent Judges. Yet it is too notorious how extravagantly ſome Eccleſiaſticks, and eſpecially he who pretends to be the chief of that Order, the Biſhop of *Rome* [3], have ſtretch'd this Privilege, and what a Flood of Miſchiefs hath over-ſpread the Chriſtian World from its Abuſe. And indeed, ſince we are to proceed by the Principles of Law in determining what kinds of *Oaths* may be releas'd, and for what Reaſons, I know not why the Clergy ſhould aſſume more Authority in this Point, than the Men of the other Profeſſion.

And farther, ſometimes when an *Oath* cannot be made void on the ſide of the Swearer, the force and efficacy of it may yet be ſtopp'd by the Superiority of the Party towards whom the *Oath* is directed, and who obtains a Right upon it; either by taking this Right from him, or by forbidding him to make uſe of it, in receiving what the other hath ſworn to pay. And this may be done either in the way of Puniſhment, or on account of the publick Advantage, by virtue of the Superior's Prerogative. In which caſe the Swearer is free from all danger of Perjury, becauſe he is not the occaſion of the Non-performance; and he is releas'd from all neceſſity of fulfilling his *Oath* by the Party, who either in a direct, or in a more eminent and extraordinary Manner, acquir'd a Right by virtue of it [d]. To conclude, a Prince, who upon juſt Reaſons diſpenſeth with an *Oath*, doth not commit the leaſt Sin, in thus hindring an Act which was ſolemnly undertaken with the Invocation of the Divine Majeſty, from producing its regular Effect: Though the Subject may ſometimes incur a Guilt, by raſhly uſing the Name of God to confirm an Act, which he ought to have known was prejudicial to the Right of his Superior.

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[a] *De ritibus Hebræorum*, Par. II. c. 4. ſ. 4.

[b] Vid. *Jus. Can.* c. 19. Add. tit. 55. l. ii. *Feudorum.*

[c] *Tiber.* 35.

[d] Comp. *Grot.* loc. cit. Sect. 20. n. 3. & ad *Matt.* v. 37.

Mr. Barb. *NOTES* on §. xxiv.

[2] The Latin is, *Imperatores* Antoninus *&* Verus *reſcripſerunt, gratiam ſe facere jurisjurandi ei qui juraverat, ſe ordini non interfuturum, & poſtea Duumvir creatus eſſet,* Digeſt. l. 50. tit. 1. *Ad municipalem, & de incolis*, leg. 38.

[3] See Mr. *La Placette*'s Treatiſe of an Oath, l. ii. c. 24. It is evident, that an Oath is one of thoſe things by which the Clergy have moſt effectually advanced their temporal Intereſts, and encroached upon the Rights of the Magiſtrate. Before the Emperors were Chriſtian, an Oath was never required of Witneſſes. 'Twas *Conſtantine* that made the Formality neceſſary. See Mr. *Thomaſius*'s Diſcourſe, *De Fide Juridica*, c. 2. §. 61, *&c.* and in his *Fundam. Jur. Nat. & Gent.* l. ii. c. 9. §. 3. After the Uſe of Oaths was introduced into the greateſt part of the Affairs of Life; and as the Clergy took upon them the right of judging of the Validity of Oaths, they by that means took upon them the Cognizance of almoſt all Civil Cauſes. We know that the Pope has aſſumed the Authority of diſannulling Treaties moſt ſolemnly ſworn to, as *Eugenius* IV. did in favour of *Ladiſlaus* King of *Hungary*, to Sultan *Amurath* II. and to abſolve all Subjects from the Oath of Allegiance made to their lawful Sovereigns. In a word, the Clergy have omitted nothing in this reſpect, no more than in other things, to ſtrengthen and increaſe their Power under the Name of Spiritual, which they have extended to the utmoſt, and accordingly have leſſen'd the Temporal, which they have left with regret to Magiſtrates and Princes.

CHAP. III.

Of the Power of Mankind over the Things of the World.

I. *The greateſt part of the Law is employed about worldly Things.*
II. *Man uſes other Creatures by God's Ordination.*
III. *Man does no Injury by deſtroying Vegetables.*
IV. *Some doubts about killing and eating living Creatures.*
V. *Which yet is proved to be lawful.*
VI. *The abuſe of our Right over living Creatures is to be reproved.*

SUCH is the Conſtitution of Man, that it cannot be preſerved by its own internal Subſtance, but needs continually to take in the aſſiſtance of certain Things from without, as well for its Nouriſhment and Support, as for its defence againſt thoſe many Enemies which ſeek to ruin and diſſolve its Frame. Again, a great part of what the World affords, turns another way to the Service of Mankind, in rendering Life more commodious and more eaſy. *Heſiod.* Op. & Dier. ver. 684. *For Riches are the Soul of feeble Men* [1]. Now with regard to theſe Matters, a multitude of Buſineſs and Tranſactions paſs betwixt Men, and large Occaſion is adminiſtred to Controverſies and Strifes: And leſt the common Peace of Mankind ſhould be diſturb'd by ſuch Diſputes, as the Law of Nature hath with due Caution provided, ſo the civil Ordinances of moſt Nations are in this reſpect found moſt careful and ſolicitous. For the full illuſtration of which Subject, we ought firſt of all to enquire, by what Right it is that human Race claims the diſpoſal of other Creatures, whether animate, or inanimate; for their Uſe, their Conveniency, or their Pleaſure; as likewiſe on what Principle this Power is founded, in reſpect both of the Creator, and of the Creatures themſelves, which Man not only uſeth, but very often perverts, embezzles, and deſtroys.

II. It is therefore beyond Diſpute, that Almighty God, inaſmuch as he is the Maker and the Preſerver of all Things, doth likewiſe hold, as it were, an originary and ſuper-eminent Property over all, and they belong ſo ſtrictly to him, as that no one can pretend to the leaſt Right in them, without his Permiſſion or Conſent. Concerning which Dominion or Property of Almighty God, *Philo* the *Jew* (lib. de *Cherubim*) p. 97. Ed. *Genev.* treats at large, and with regard to that ſuperior Right, called the Right which Men hold over things [1] *Uſufructuary* only. Yet becauſe he himſelf ſtands in need of no foreign Succour, and becauſe it is not poſſible for any thing beſides to make an Addition to his Happineſs; therefore his Goodneſs inclin'd him to be bountiful and gracious to his Creatures, and to give them the Privilege of uſing each other for their mutual Benefit. But Man eſpecially hath in ſo extraordinary a manner taſted of the Divine Favour, that all other Creatures are by a common ſtrain of Speech ſaid to have been at firſt made for his Uſe and Service. Though this Right of God over all things is very different from the Right of Men to the ſame Poſſeſſions. So that the Reaſoning of *Diogenes* the *Cynick* [a] was falſe and vain, when he thus argued, *All Things belong to the Gods; wiſe Men are the Friends of the Gods; all Things are common amongſt Friends; therefore all Things belong to wiſe Men.* Yet it is too bold and arrogant a Pretenſion in ſome Authors, whilſt they tell us, That ſhould any thing fail of turning to the Advantage of Mankind, it muſt follow, that ſuch a thing was created in vain; and that 'tis hence apparent, that the whole World is the common Poſſeſſion of human Race, and what they may (if thus taken as a general Body) not unjuſtly term *their own.* This was *Ariſtotle*'s Miſtake; *If then,* ſays he, *Nature* [b] *makes nothing imperfectly, and nothing in vain, ſhe muſt of neceſſity have made all theſe things for the ſake of Men. Lucian* [c] delivers himſelf to the ſame Purpoſe; *Had not Men been created, the Conſequence of the Omiſſion had been no leſs than this, That all the Grace and Beauty of the reſt of the World had ſhone without a Witneſs, or Beholder; and that the Gods themſelves had deſpis'd their own Wealth, as not worth the enjoying* [2]. But certainly the great Frame of the Univerſe might, in all appearance, have been more compendiouſly erected and adorn'd, had it been the Intention of its Author to make nothing but what ſhould in ſome reſpect or other ſerve the Occaſions of Men [d] [3]. And it was not ill ſaid of *Seneca, Nimis nos* [e] *ſuſpicimus, ſi digni nobis videmur, propter quos tanta moveantur: We are too much taken*

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[a] Apud *Diogen. Laert.* l. vi. ſ. 37. ubi vid. *Menag.*

[b] *Politic.* l. i. c. 8. p. 304. C. Edit. *Pariſ.*

[c] *Prometh.* p. 181. tom. 1. Edit. *Amſt.*

[d] See the Honourable Mr. *Boyle*'s Diſſertation concerning the final Cauſes of Natural Things. See Archbiſhop *King*'s Treatiſe *De Origine Mali,* c. iv. ſ. 2. §. 5.

[e] De Ira, l. ii. c. 27. Add *Charron* de la Sageſſe, l. i. c. 40. n. 3, 4, 5.

Mr. BARB. *NOTES on* Chap. III. §. I, II.

[1] See *Gronovius*'s firſt Note on *Grotius* l. ii. c. 1. §. 11.
The Greek of *Heſiod* is, Χρήματα γὰρ ψυχὴ πέλεται δειλοῖσι βροτοῖσι.

[1] *Seneca* uſes the ſame Expreſſion, as Mr. *Hertius* has obſerved, *Uſusfructus noſter eſt, cujus tempus ille arbiter muneris ſui temperat,* Conſol. ad Marc. c. 10. As for that Paſſage of *Euripides* which M. *Hertius* joins to it, beſides that the Notion is much the ſame, our Author quotes it in the next Chapter, §. 1.

[2] See an *Engliſh* Treatiſe written by Mr. *Boyle,* call'd *A Diſcourſe concerning the final Cauſes of natural Things,* the Extract of which may be found in the univerſal Library, Tom. ix. p. 63. And alſo a Treatiſe, *De Origine Mali,* written by Dr. *King,* Biſhop of *Londonderry,* and ſince Archbiſhop of *Dublin.*

[3] *Montaigne* in his Eſſays ſpeaks ſomething like this, l. ii. c. 12. He makes me to underſtand by his Diſcourſe upon what Foundations theſe great Advantages are built, which he prides himſelf to have over the Creatures. He perſuades himſelf that this admirable Architecture of the World, conſiſting of the Celeſtial Arch, bedeck'd with the inextinguiſhable Lights of the Sun and Stars moving ſo ſwiftly above our Heads, the prodigious Fluxes and Refluxes of the vaſt Ocean, were at firſt created, and have continued ſo many Ages for our Convenience and Service. Mr. *Bayle* alſo in his Thoughts about a Comet, p. 226. cites another Paſſage of *Seneca,* where the Philoſopher ſays, that the Cares of Providence do indeed extend to us, and we have a Part in it, but their end is more conſiderable than our Preſervation. *Et quanquam majus illis [Soli, Lunæ, & cæteris Cœleſtibus] propoſitum ſit majorque actus ſui fructus, quàm ſervare mortalia; tamen in noſtras quoque utilitates à principio rerum præmiſſa mens eſt, & is ordo mundo datus, ut appareat curam noſtri non inter ultima eſſe habitam.* De Benefic. l. vi. c. 23.

with the admiration of our own Nature, if we fanſy our ſelves worthy to have all theſe glorious Works move only on our Account. Yet let this be as it will, thus much is evident; that Man makes his advantage of other Creatures, by the Grant and Licence of Heaven: As we may apprehend from this eaſy Argument, That without the uſe of thoſe things human Life could not be preſerv'd, for which Service ſome of them do, as it were, freely deliver themſelves up into our Hands. Since then God Almighty hath conferr'd on Man the Privilege of Life, he is at the ſame time ſuppos'd to have allow'd him the Uſe of every thing neceſſary for the keeping and maintaining of that his Gift[a]. The ſame Truth is confirmed by the Authority of the Holy Scriptures, which expreſly mention God's inveſting Man with Power and Dominion, not only over Vegetables, but over every living Thing, produced either in the Air, in the Earth, or in the Sea[b][c]. Yet this Conceſſion hath not the Force of a Command, but only the Allowance and Indulgence of a Privilege; which any Perſon may uſe ſo far as he thinks fit, but is not bound to exerciſe it at all times, and upon all Occaſions. For otherwiſe Man would offend againſt the Divine Law, ſhould he let any Animal go free, or ſhould he neglect any Opportunity of bringing the ſame Creature again under his Subjection; which no Man in his Wits will affirm[4]. But ſtill this Power of Man over Brute Creatures is of a different Nature from that Dominion or Sovereignty which is exerciſ'd over Men: Becauſe Brutes are not capable of any correſpondent Obedience ariſing from the Obligation; and becauſe this is a much more abſolute Sway, than that with which Men govern each other. The Divine Prohibition to the *Jews* from feeding on ſome certain Animals, doth by no means retrench or impair the Right of Men over Beaſts; the Reaſon of that Injunction ſeeming to have been taken from Phyſick[5]. Mr. *Selden*[d] reports it, as the Opinion of the antient *Rabbins*, That *Adam* was forbidden to eat any manner of Fleſh (God having commanded him to feed on the Herbs of the Field[e]) but that *Noah* afterwards was diſpens'd with in this Particular, by the Grant in *Gen.* ix. 3. Yet ſo as to be ſtill under an Obligation to abſtain from Blood, and from any Joint or Limb of any Creature taken from it whilſt alive[f]. The ſame Author adds, That the Blood of Fiſhes was excepted from the Prohibition: Nay, That they might eat theſe Creatures alive, as Oyſters, *&c.* or ſuch of them as died by Chance; neither of which it was lawful for them to do, with regard to terreſtrial Animals.

III. If, in the next place, we conſider this Power of Mankind, with reſpect to the things themſelves, whether animate or inanimate, which Men uſe, and waſte, and deſtroy; that no Injury is hereby offer'd to thoſe Creatures, may clearly be evinc'd, as well from the Nature of Man, as from the Grant and Allowance of God. For it can on no account ſeem probable, that a Maker of infinite Goodneſs, and of infinite Wiſdom, would impoſe ſuch a Neceſſity on Man, the principal of earthly Creatures, as that he ſhould not be able to preſerve himſelf without injuring others, and conſequently without the perpetual Commiſſion of Sin[1]. To which, if we add the expreſs Licence of God, that muſt remove all Doubt and Scruple, which might otherwiſe have riſen, eſpecially about the Slaughter of Animals. And if there appear any Cruelty or Barbarity in ſuch a Practice, it is ſufficiently taken off by this one Conſideration, That their Divine Author hath appointed theſe his Creatures to ſuch a Condition, and to ſuch a Service in the World, and hath granted to Men ſuch an Authority over them, which if they exerciſe (whether by the Deputation, or only by the Permiſſion of God) they certainly do no Injury. Now, as for Vegetables, and other things deſtitute of Senſe, there ſeems, with regard to them, to be no more of Difficulty in this Point; it being impoſſible to diſcover that they ſuffer any hard Treatment, or unjuſt Hurt, when they are conſum'd by Men; eſpecially, ſince they muſt neceſſarily periſh, and be deſtroy'd, either by Beaſts[2], or by the ſpeedy turn of the Year, and the Change of the Seaſons; and farther, ſince many of them had never been produc'd without human Pains and Endeavours. The Superſtition of the *Egyptians* in abſtaining from certain Pot-herbs, is not of weight enough to give us any ſtop in the preſent Determination[g].

IV. But then, as to living Creatures, which are endued with a Senſe of their own Being, and cannot leave it without Pain and Trouble, the point appears in ſome meaſure dubious to many, who have conſider'd the Liberty of Men againſt Brutes, only on the Principles of Reaſon. For, from God's allowing the firſt Man to have Dominion over other Animals, it doth not preſently flow as an evident Conſequence, that he was at the ſame time inveſted with ſo wide a Commiſſion, ſo infinite a Licence, that he might ſlay them even for unneceſſary Uſes[h]: For Man hath Dominion too over Man, and yet cannot in the leaſt pretend to any ſuch Licence as this againſt his Fellows. Nor could Men have complain'd, that the Divine Goodneſs was ſparing towards them, or had made an ill Pro-

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[a] Add. *Arrian. Epictet.* l. i. c. 16. initio.

[b] *Gen.* i. 28, 29.

[c] See *Pſalm.* cxv. 16.

[d] De Jur. Nat. & Gen. ſec. Heb. l. vii. c. 1.

[e] See *Gen.* i. 29.

[f] Add *Deuteron.* xii. 20.

[g] Vid. *Diodor. Sic.* l. i. c. 89.

[h] Add *Grot.* ad *Gen.* ix. 3. *Selden* de Jur. Nat. & Gen. ſec. Heb. l. vii. c. 1.

Mr. BARB. *NOTES on* §. II, III.

[4] This Remark of our Author's ought to be placed at the end of this Paragraph, where it will much better agree with the Senſe.

[5] This is not to be doubted, although our Authors, and particularly Mr. *Fleury*, in his Treatiſe of the Manners of the *Iſraelites*, ſpeaks of it. The *Iſraelites* had not a better Conſtitution, nor a more vigorous Health than the other Nations, who eat of ſuch ſorts of Food as they abſtained from. It ſeems that the Prohibitions of the Law were grounded upon mere politick Reaſons, ſo far as concerned their particular Notions, Opinions, and the Conſtitution of their Commonwealth. See Mr. *Le Clerc*'s Note upon *Levit.* xi. 2. and *Grotius*, *De Verit. Relig. Chriſt.* l. v. §. 9. But be that how it will, whatever Motive we attribute to the Legiſlator, as this Law was only poſitive, it in no wiſe deſtroys the Natural Right which Man has over the Beaſts and all other earthly Creatures.

[1] Here is a great Diſorder in this Part of our Author's Diſcourſe, and therefore I have tranſpos'd ſome Sentences, and put them in a more natural Order, treating firſt of Vegetables, and then of Beaſts.

[2] Our Author ſpeaks very pleaſantly here in all his Editions, *By other Beaſts*, as if the Beaſt Man did not ſpend and deſtroy the Vegetables, the other Beaſts would. And Mr. *Hertius* has overlook'd this great Miſtake in his Edition of 1706.

viſion for their Neceſſities, tho' they ſhould have been denied a Power over the Life of Animals; at leaſt of ſuch as did not threaten any Hurt or Danger to the Life of Men: Inaſmuch as the Work of thoſe Creatures in cultivating the Earth, together with what comes from them otherwiſe, as Milk, Eggs (ſuch as are not neceſſary for the Propagation of the Species) Wooll, and the like, might have been ſufficient to ſuſtain Men in a tolerable way of Living. Nor did God by commanding Men to ſacrifice them, as a Token of Divine Worſhip, confer any Power or Privilege of turning them at pleaſure into Food. For ſuch things as are lawful to Mankind, only by ſome peculiar Command of God, may ſtill remain unlawful, except in that particular Caſe. Hence it was, that many of the antient Philoſophers utterly diſapprov'd of this Practice. For why ſhould Man, on the bare account of ſuperfluous Pleaſure, rob an harmleſs Animal of that Life which it enjoys by the Gift of the ſame common Creator? Eſpecially, ſince even the Examples of the fierceſt Wild-beaſts, of Lions, Wolves, and other Devourers of Fleſh, will do them no Service, if urg'd in their Excuſe. For theſe are ſo fram'd by Nature, as not to be able to ſupport Life, without feaſting on Blood, and to loath and reject that common Proviſion afforded by the Earth. Whereas Men are not under the like caſe of Neceſſity; receiving very commodious Nouriſhment from other Food, and being obliged to prepare Fleſh by dreſſing or ſeaſoning it, before they can make it agreeable to their Digeſtion. We hear indeed of ſome barbarous Nations, which make uſe of no Fleſh or Fiſh but what is raw, and ſupport themſelves with that; as *Rochefort* [a] reports of the Coaſts on *Davis*'s Streights. But the ſame Author tells us [b] of the Inhabitants of the Province of *Paſto* in *Peru*, That *they eat no manner of Fleſh; and that if deſired but only to taſte any*, their Anſwer is, *They are not Dogs.*

Others have obſerv'd, in relation to the preſent Enquiry, that whereas thoſe Animals, which naturally feed on Fleſh, have their Fore-teeth oblong, ſharp, and divided from each other, that ſo by cloſing them with a deeper ſtroke they may grind and ſeparate the Prey; Man's Teeth are ſhort, join'd one to the other, and ſpreading round, after the manner of thoſe Animals, which live on Herbs and Fruits: And that on this account we are neceſſitated to make uſe of Knives for dividing the Fleſh we eat; whilſt the Creatures, which eat this as their natural Food, ſtand in no need of ſuch Aſſiſtances or Inventions: That thus we ſee Children by the bare impulſe of Nature loving Fruit beyond all other Proviſions, and preferring Apples, Cherries, and Nuts, to the moſt exquiſite Dainties of Fleſh; becauſe in them Nature is not yet corrupted, nor their Appetites debauch'd by ill Cuſtoms of Eating [c]. It is farther evident, that the fierceneſs and cruelty of Men, having been firſt excited, encourag'd, and harden'd by the Slaughters of Beaſts, afterwards broke out againſt their own Kind; and thoſe, who had taken a delight in deſtroying the harmleſs Race of dumb Creatures, made it their next ſtep to murther weak and defenceleſs Men. *Diogenes Laertius*, in his Life of *Pythagoras* [d], reports that Philoſopher to have forbid the killing of Animals [1], κοινὸν δίκαιον ἡμῖν ἐχόντων ψυχῆς, *As enjoying the ſame common Right of Life and Soul with our ſelves. This indeed* (as the Hiſtorian goes on) *was his Pretence: But the true reaſon of his commanding his Followers to abſtain from all living Creatures was, That he might exerciſe and train Men up in a more eaſy method of Food, by means of which they might always have ready at hand a large Proviſion of Meat, requiring no Fire to dreſs it; and as much Drink as they had plain Water. For this way of Suſtenance he thought moſt proper to produce Health of Body, and Quickneſs of Mind* [2]. Though *Lucian* (*in ſomnio ſeu Gallo*, Vol. II. p. 174.) bringing him in under the Shape of a Cock, makes him give this Reaſon of his Opinion: "I conſider, *ſays he*, that if the Precepts I ſet on foot were common, and ſuch as many had deliver'd before, I ſhould not be able to prevail with the World to look upon me as any extraordinary Perſon; but the more ſtrange and unuſual the Doctrine ſhould be which I offer'd, the more new and ſurprizing I ſhould appear, and gain the more Admiration. *Add.* Jo. Scheffer. *de Philoſoph. Ital.* c. 14.

Plutarch. in *Grill.* "Man, with a craving Appetite, drawing all things to himſelf, trying all things, taſting all things, as being ſtill ignorant of his own Nature, or what is agreeable to it, is the only Creature in the World that lives in general upon every thing which comes to his hands. *Firſt*, He uſeth Fleſh, without the excuſe of Want or Neceſſity, when he might at any time gather other Food from the Seeds and Plants, with an inexhauſtible and never failing Store. But thro' Luxury, and Diſdain of his proper and neceſſary Proviſion, he follows ſtrange and polluted Diet in the ſlaughter of Beaſts, exceeding the moſt ſavage Creatures in Fierceneſs and Cruelty: For Blood, and Slaughter, and Fleſh are the proper ſuſtenance of the Kite, the Wolf, and the Dragon, as Fiſh and Spoon-meat are of Men. The ſame Author, in his ſecond Oration *about the eating of Fleſh*, among many other things, offers what follows: "At firſt they fed perhaps on ſome wild or hurtful Animal; then on Birds and Fiſh; 'till their Appetite, thus taught and accuſtom'd, proceeded to the Ox that labours in our Service; to the Sheep that cloaths and adorns us; to the watchful Cock that guards our Houſe. Hence, by degrees, adding Strength and Force to their inſatiable Deſires, they broke out into the Murther of their Brethren, and the Miſeries of Blood and War.

Aratus Phænom.

" The faithful Ox, accuſtom'd to the Plough,
" Defil'd the Table.———

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[a] Deſcript. *Antillar.* Par. I. c. 18. [b] Part II. c. 11. [c] Vid. *Anton. le Grand.* Inſtit. Philoſ. *Carteſ.* Part VI. Art. 3. [d] Lib. viii. Sect. 13.

Mr. BARB. *NOTES on* §. IV.

[1] The original Greek is this, Τοῦτον γὰρ καὶ τὸ φονεύειν ἀπαγορεύειν, μὴ ὅτι γε ἅπτεσθαι τῶν ζώων κοινὸν δίκαιον ἡμῖν ἐχόντων ψυχῆς, καὶ τόδε μεν ἦν τὸ πρόσχημα· τὸ δ' ἀληθὲς, τῶν ἐμψύχων ἀπεγόρευεν ἅπτεσθαι, συνασκῶν καὶ συνεθίζων εἰς εὐκαλίαν βίου τοὺς ἀνθρώπους, ὥστε εὐπορίστους αὐτοῖς εἶναι τὰς τροφὰς, ἄπυρα προσφερομένοις, καὶ λιτὸν ὕδωρ πίνουσιν, ἐντεῦθεν γὰρ καὶ σώματος ὑγίειαν, καὶ ψυχῆς ὀξύτητα περιγίνεσθαι. See alſo *Pythagoras*'s Speech in *Ovid*'s Metam. xv. Fab. 2. v. 75, *&c.* *Grot.* ad *Gen.* xlvi. 34. *Plato Timæo* circ. fin.

[2] Here is an heap of very needleſs Quotations, which teach us only what divers Perſons and People have thought of the uſe of Meats. As the Author quotes them all at length, they make a large Page in the Original, and form a confus'd Chaos, which I would not fill my Tranſlation with.

“ Add. *Plin.* l. vii. c. 45. & *Val. Max.* l. viii. c. 1. *inter damnatos*, n. 8.

“ *Sueton. Domitian.* cap. 9. *Ælian.* V. H. lib. v. cap. 14. *Dio Chryſoſt.* Orat. 64. p. 592. Edit. *Morell. Cicero de nat. Deor.* lib. ii. c. 60.

“ *Nicol. Damaſcenus* reports of the *Phrygians*, That it was a capital Crime amongſt them to kill a labouring Ox, or to ſteal any Inſtrument of Agriculture. So *Aloys Cadamuſt* in his Voyages, c. 57, 60. tells us, That the People of the Kingdom of *Calecut* ſhew the like ſacred Veneration to Oxen. And the *Nomades*, as *Diodor. Sic.* relates, l. iii. c. 32. p. 165. Ed. *Rhodom.* gave the Bull and the Cow, as likewiſe the Ram and the Ewe, the Name of *Parents*, as affording the daily Support of Life. *Strabo*, l. xv. p. 490. obſerves of the *Brachmans*, that they eat the Fleſh of thoſe Creatures only, which do not aſſiſt Mankind in their Works. *Varenius*, Deſcript. *Japon.* c. 23. reports much the ſame of the *Japoneſe*; who are ſaid likewiſe to profeſs an Averſion to Blood, and no leſs to Milk, which they take to be nothing elſe but white Blood.

“ We may here likewiſe, by the way, remark what is in *Plutarch*'s *Sympoſiac.* lib. iv. c. 4. to prove that Fiſh are the moſt proper Diet. For, ſays he, as to the Creatures which live with us upon the Earth, ſuppoſing them to have no other common Rights with Mankind, yet at leaſt they receive the ſame Nouriſhment, they breathe, and waſh, and drink as we do; and when we kill them, their piteous Cries make us bluſh for our Cruelty: Beſides, that the greateſt part of them are made familiar to us, by dwelling and feeding ſo near. Whereas on the contrary, the Race of Sea Animals is utterly ſtrange to us, is born and bred, and lives as 'twere in another World; nor are we reſtrain'd from killing thoſe Creatures by their Cry, by their Aſpect, or by any Service that they can do us. For they can indeed be no way uſeful in our Buſineſs, not being able ſo much as to live in our Element. Our Earth is a kind of Hell to them; they die almoſt as ſoon as they touch it. On the other ſide, the *Pythagoreans* were more averſe to eating Fiſh than any other Animals; the grounds of which Opinion are examin'd at large by the ſame Author, *Sympoſ.* l. viii. c. 8. So likewiſe *Xiphilin.* reports, That the *Caledonians* never taſted Fiſh; nay, though they had them in great Plenty, *Epit. Dion.* in *Sever.* One of the Reaſons there given is this, That other Animals deſerve their Death at our Hands, by ſome way or other doing us Miſchief; whereas the Fiſh neither hurt us, nor are able to hurt us. That amongſt other Animals ſome ought neceſſarily to be kill'd, leſt by multiplying too faſt they ſhould rob Men of their Suſtenance, as Cunnies and Hens. Whereas (again) the Fiſh, being born as it were in another World, give us no Occaſion to hurt them: But we are ſet againſt them only becauſe our extravagant Greedineſs and Luxury is ſupplied by their Deſtruction.”

Porphyry[a] is very prolix in attempting to ſhew, that abſtinence from Fleſh is in the higheſt manner the Duty of Philoſophers, who place all their Happineſs in God, and in the Imitation of the Divine Nature. Amongſt a great number of Arguments, the Subſtance of which hath been for the moſt part already deliver'd, he endeavours to demonſtrate, That all Souls, endued with Senſe and Memory, are likewiſe Partakers of Reaſon; and that ſince we may diſcover thus much in other Animals, we ought to extend our Juſtice to them, which conſiſts principally in offering no hurt without due Cauſe: And that we have a convincing Evidence of the Reaſon of Brutes, in their being capable of Madneſs and Diſtraction. To this time the *Benjans* in *Cambay*, believing the Souls of Men to remove at Death into the Bodies of Beaſts, never harm any living Creature, nor dare to turn them into Food: Nay, they have Hoſpitals erected on purpoſe, for the reception of diſeaſed and maimed Birds[b]. *Phill. Baldæus* in his deſcription of the Iſland *Ceilon*[c] reports, *That the* Bramines, *even when converted to Chriſtianity, keep their old Method of Living*; *and that if they be encounter'd with that Text of Scripture*, To the Clean all things are clean; *they reply in another, that*, The Kingdom of God is not in Meat and Drink: *That they have been ever accuſtom'd to their light and eaſy Diet, and find themſelves very well upon it.* Thus the whole Nation of the *Apalchitæ*, of old, never taſted Fleſh or Fiſh, 'till they learnt this Cuſtom from the *Europeans*[d].

V. But, though in theſe Arguments and Authorities ſo much ought juſtly to be commended, as makes for the Encouragement of Temperance and Frugality, and for the hindering the finer Spirits from being obſtructed, and as it were mir'd up with too groſs Feeding; yet, that the killing and the eating of animate Creatures is really not ſinful, may be ſufficiently made out on the bare ſtrength of Reaſon: And the main Evidence ſeems to be this, That no mutual Right or Obligation paſſeth [1] between Men and Brutes, nor ought to paſs by the direction of Nature[e]. For we neither find that the Law of Nature, by virtue of its abſolute Authority, commands us to maintain Friendſhip and Society with Brutes; nor are they capable of ſuſtaining any Obligation towards Men ariſing from Covenants. From which Defect of all common Right there follows, as it were, a State of War betwixt thoſe who both are able to hurt each other, and are upon very probable grounds ſuppos'd to be willing. And in this State each Party hath liberty to do to the other, with whom he is thus engag'd in Hoſtility, whatſoever he thinks conducive to his own Intereſt and Convenience. Yet ſuch a ſtate of War, in which Men ſtand towards Brutes, is very different from that which ſometimes ariſeth from Men's Claſhing amongſt themſelves:

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[a] Lib. iv. περὶ ἀποχῆς.

[b] Add *Abrah. Roger.* de *Bramin.* Par. I. c. 1. & 18.

[c] C. 47.

[d] *Rochefort* deſcript. *Antillar.* P. II. c. 8.

[e] Cicero *de Finib. bonorum & malorum.* l. iii. c. 20.

Mr. BARB. *NOTES on* §. v.

[1] See l. ii. c. 3. §. 2. before-going, and *Grotius*, l. i. c. 1. §. 11. *Cicero* has a Paſſage alſo from whence this Conſequence ſeems to be drawn, *Homini nihil juris eſſe cum beſtiis. Præclare enim Chryſippus, cætera nata eſſe hominum cauſa & Deorum, eos autem communitatis & ſocietatis ſuæ, ut beſtiis homines uti ad utilitatem ſuam poſſint ſine injuriâ.* The ſame Author alſo has another Paſſage, ſhewing the Right that Man has over Beaſts and other Creatures: *Itaque ad hominum commoditates & uſus tanta rerum ubertatem natura largita eſt, ut ea, quæ gignuntur, donata conſulto nobis, non fortuito nata videantur*; *nec ſolum ea quæ frugibus atque baccis terræ fœtu profunduntur, ſed etiam pecudes*; *quod perſpicuum ſit, partim eſſe ad uſum hominum, partim ad fructum, partim ad veſcendum procreatas.* De Legibus, l. i. c. 8.

Inaſmuch as the latter is neither univerſal, nor perpetual, nor extends itſelf promiſcuouſly to all manner of Licenſe againſt each other [2]. As for the fiercer Animals, they give evident Proofs of their being placed in this hoſtile State, whilſt upon every Advantage and Opportunity they are ready to exerciſe their Violence againſt Men; and he that would have us ſpare theſe, doth at the ſame time require us to put them under fiercer Circumſtances, and a more ſecure Condition than our ſelves. And then the more mild and gentle Creatures do not offer themſelves to the Service of Men, by virtue of any Obligation, but as they are either bribed by Food, or conſtrained by Force; upon Removal of which Inducements they will return to their natural Liberty, and ſome of them will be ſo hardy as to aſſault and encounter Man. Again, others increaſe ſo prodigiouſly, that 'tis neceſſary for us to retrench their Number, leſt we ſhould be our ſelves reduced to a narrow and inconvenient Dwelling [a]. 'Tis to no purpoſe denied by ſome, that the lawfulneſs of hurting and of eating Brute Creatures may be inferr'd from this Defect of common Right between them and Men: *Becauſe* (ſay theſe Authors) *though no Injury be done to the Brutes, yet we injure the Creator of them* (*unleſs we are ſure of his Conſent*) *as likewiſe their Owners or Proprietors.* But this Objection is vain and idle: For that very Conſideration, that the Divine Creator hath not eſtabliſh'd a Right common to Men with Brutes, is a ſufficient Evidence that he ſuſtains no Injury, when they are hurt by Men; becauſe he himſelf was pleas'd to ordain this State and Condition between the former and the latter. And, as to the other Part of the Objection, 'tis a different Queſtion, Whether Man can do any Injury to a Brute? And whether by the Intervention or Occaſion of a Brute, he may injure another Man? The firſt is only denied by what we are now aſſerting, and not the ſecond: Nor will it be impertinent to the Argument in hand, to add this farther Remark, That ſince the tame and harmleſs Beaſts would be otherwiſe expoſed an eaſy Prey to the Violence and to the Hunger of the wild and ravenous, their Condition is rather better'd than impair'd by that high degree of Power which Men exerciſe over them; which, in affording them a conſtant Proviſion of Food, doth, as it were, pay them the Price of their Life, and likewiſe protects them againſt the Aſſaults of their ſavage Enemies [3]. Now, what hath been here ſuppos'd, That there is no common Right uniting and equally affecting Men and Brutes, others have long ſince demonſtrated [b]. Which too is the Reaſon (as we may here add by the way) why Property obtains its Force and Effect only againſt other Men, and not in like manner againſt Brutes; inaſmuch as they, when they devour what we poſſeſs, cannot be ſaid to do us an *Injury*. Thus God, in the Language of Scripture, [c] *feeds the Birds* [4], even when they conſume the Corn produc'd by our Toil and Labour. Yet the Owner of Beaſts may ſometimes do us Injury or Damage, when they break in and deſtroy our Harveſt; for not keeping them with a ſtricter Care. In one reſpect indeed, and in a very wide Senſe, the Beaſts themſelves may be ſaid to have the ſame Right with us; when, by the ſame Right (as it were) by which they invade our Poſſeſſions, by the ſame we drive them from thence.

VI. Yet that the Abuſe of this Power, and eſpecially ſuch as is attended with fooliſh Cruelty and Barbarity, deſerves to come under Cenſure [1], is beyond Diſpute. For, as it is the Intereſt of particular States, that no Perſon ſquander away, or waſte and ſpoil his Poſſeſſions; ſo it turns to the prejudice of the univerſal Society of Mankind, and to the diſhonour of God, the giver of ſo great Gifts, to conſume them idly and wantonly, without promoting any Benefit or Advantage of Life. Thus God was pleas'd eſpecially to command the *Jews*, to allow their Cattle a Reſt from all Work on the Seventh Day [d]. *Plutarch* [e] tells us, *The* Athenians *inflicted a Penalty on a certain Perſon who had*

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[a] See *Exod.* xxiii. 29. *Deut.* vii. 22. Add *Gaſſend.* Syntagm. Philoſoph. *Epicur.* Part III. c. 27.

[b] See Lib. ii. c. 3. ſ. 2. & *Grot.* l. i. c. 1. ſ. 11.

[c] *Matt.* vi. 26.

[d] *Exod.* xx. 10. xxiii. 12. *Deut.* v. 14. xxv. 4. 1 *Cor.* ix. 9. *Num.* xxii. 28, 32. *Prov.* xii. 10. Comp. *Deut.* xx. 19. *Rom.* viii. 19, *&c.*

[e] Orat. 1. De Uſu Carn.

Mr. Barb. *NOTES* on §. v, vi.

[2] From this Place to the end of this Paragraph I have been obliged to tranſpoſe almoſt all the Sentences of the Original, upon the account of the extreme Careleſſneſs of the Author in putting in ſome Additions.

[3] 'Twill be proper here to put in two Reflections made by Mr. *Le Clerc* in his Phyſicks, l. iv. c. 12. §. 15. "1. The Beaſts which "we kill would die of themſelves in a few Years; and when they die, their Souls die as well as their Bodies; ſo that they loſe nothing by Death. It is certainly a piece of Cruelty to deprive thoſe Beings, that have Senſe, of a thing which they are ſenſible "they have a Loſs of, and which may be a Grief to them, but not to deſtroy a Being which has no Senſe after its Deſtruction. So "that the Man that kills another ought to be puniſh'd for his Cruelty, becauſe Mens Souls ſurvive their Bodies, and paſs into an "Eſtate, where they lament their Deprivation of Life. But Beaſts, being once dead, feel nothing; becauſe their Soul periſhes at "the ſame time, in what manner ſoever it be done. 2. It is Cruelty to ſeparate from the Body of a living Creature a Nature that "hath Senſe, and is profitable to another ſo long as it is united to the Body, as it happens when a Man is ſlain, whoſe Loſs is an "Injury to the Society of which he was a Member. But 'tis no Cruelty to ſlay a living Creature, which is of no Uſe to another "but when 'tis dead, and would do Miſchief while it lives. For 'tis evident, that if no Beaſts were ſlain, their great Number would "be noxious to Man." All theſe Reaſons prove beyond contradiction, that Man doth Beaſts no Injury by ſlaying and eating them. But it may not be alſo unprofitable to ſhew, after Archbiſhop *King*, *De Origine Mali*, c. 4. Sect. 5. §. 5. That Beaſts can't complain, that they were appointed by the Creator to be Food for Men. God gave them Life upon that Condition, and they had never been, had it not been for that. Wherefore they ought, if they had Senſe enough, to praiſe their Creator of whom they hold it, becauſe it is better to enjoy Life and Senſe for ſome time, than to be always a Lump of Matter, and void of all Perception. Beſides, Beaſts enjoy preſent Satisfaction always, without remembring what is paſt, or diſquieting themſelves with what's to come; and after all they ſuffer leſs by being kill'd, than they would if they died of a Diſeaſe or old Age.

[4] See Note 1. on Section iv. of the following Chapter.

[1] *Marcus Antoninus* ſpeaks to this purpoſe in this fine Paſſage of his Reflections, Τοῖς μὲν ἀλόγοις ζώοις καὶ καθόλȣ πράγμασι, καὶ ὑποκειμένοις, ὡς λόγον ἔχων, λόγον μὴ ἔχȣσι, χρῶ μεγαλοφρόνως, καὶ ἐλευθέρως· τοῖς δὲ ἀνθρώποις, ὡς λόγον ἔχȣσι χρῶ κοινωνικῶς, l. vi. c. 23. *i. e.* uſe all Creatures and all other things nobly and freely, as a Man who hath Reaſon ought to uſe ſuch things as have none. As for Men, uſe them according to the Laws of Society, as Men of Reaſon ought to be uſed. See alſo *Sad-der* in the Religion of the antient *Perſians* put out by Mr. *Hyde*, Port. 38. In ſhort, the Abuſe of that Power, which Men have over Beaſts, is the more criminal, becauſe it often tends to the Prejudice of Men. Hence it is, that the Laws of *Triptolemus* forbid the killing of any Creatures, whoſe Labour we make uſe of. *Porphyr. De Abſtinen.* l. iv, §. 22. And it was a Capital Crime among the *Phrygians*, as *Nicolas Damaſcenus* teſtifies.

ſtrip'd a Ram of his Skin whilſt alive [2]. And the Followers of *Pythagoras*, as *Porphyry* obſerves, made Gentleneſs and Mercy towards Beaſts the Introduction to Love and Pity towards Men, l. iii. c. 20. p. 125. Ed. *Cantab. de Abſtinentia.* Nor was the Advice of the *Chineſe* Philoſopher, *Mentius*, altogether amiſs, *That the King ſhould give no Perſons leave to uſe Nets with ſmall Maſhes; that by this means the greater Fiſh only ſhould be taken, and the leſſer have power to eſcape; which ſufficiently growing up in the following Years, would afford a ſupply at all times, and for all Perſons.* As likewiſe, *that none ſhould be allow'd to kill* Hens, Porkers, *or other Animals, before they were come to their full growth; that they might the more eaſily give a full and conſtant Proviſion of Fleſh. Whence it became a Cuſtom amongſt the* Chineſe, *never to kill any living Creatures, till they had attain'd that pitch and maturity, which Nature had aſſign'd them.* Comp. *Deut.* xxii. 6, 7. agreeable to which is that of *Phocylides*,

> The Neſt's whole Family you muſt not ſeize,
> But leave the Dam a future Brood to raiſe.

The Action of *Alexander Severus* [3] (recorded by *Lampridius*, c. 22.) is likewiſe worthy to be mention'd on this occaſion. When the People of *Rome*, complain'd to him of a great Dearth and Scarcity, he ask'd them, by a publick Officer, what kind of Meat was dear; and finding by the common Cry that *Beef* and *Pork* were the Subject of the Complaint, he did not lower the Price, but order'd that none ſhould kill a *Cow* or *Heifer*, a *Sow* or Sucking *Pig:* And by this means within a Year, or leſs than two Years, there was ſuch Plenty of both Sorts, that from Eight-pence the Pound, they came to Three-pence.

Mr. Barb. *NOTES on* §. vii.

[2] The Greek is, Οἱ δὲ Πυθαγόρειοι τὴν πρὸς τὰ θηρία πραότητα μελέτην ἐποιήσαντο τοῦ φιλανθρώπου καὶ φιλοικτίρμονος, *Porphyr. de abſtinen.* l. iii. c. 20. See Mr. *Le Clerc*'s Comment. on *Gen.* ix. 4. and what I have ſaid in my Treatiſe of Gaming, l. iii. c. 5. §. 7.

[3] This Example is not much to the purpoſe, becauſe it reſpects an Expedient which *Alexander Severus* made uſe of upon a particular occaſion, wherein it does not appear that there was any abuſe.

CHAP. IV.

Of the Origin of Dominion or Property.

I. *Property and Community are moral Qualities.*
II. *What is Property and Community.*
III. *That it has no place, but where there are more Men than one.*
IV. *It proceeds immediately from an Agreement among Men.*
V. *Of the Antient Community of Goods.*
VI. *By what degrees Men departed from it.*
VII. *That it was profitable to Mankind.*
VIII. *The Opinion of the Antients about the Original of Dominion or Property.*
IX. Grotius*'s Judgment conſider'd.*
X. XI, XII, XIII. *The Arguments of thoſe who deny the Community of Goods uſed among the Antients.*
XIV. *In what Senſe Dominion is ſaid to be by natural Right.*
XV. *How far Infants are capable of Property.*

THAT this Power of Mankind over Things ever began to take effect in relation to other Men (for no human Property ought to be oppos'd to the tranſcendent Right of GOD)[a] [1] or, that this indefinite Right was converted into *Dominion* [2], by virtue of which ſuch or ſuch a Thing belongs to one Perſon, and to none elſe, is all owing to another Principle: Of, which, before we proceed to treat, it ſeems neceſſary to premiſe, that *Property* and *Communion* are moral Qualities, which do not affect the Things themſelves, as to their intrinſick Nature, but only produce a moral Effect with regard to other Perſons: And that theſe Qualities, as all others of the ſame Kind, derive their

[a] Vid. *Euripid.* Phœniſſ. v. 558, *&c.*

Mr. Barb. *NOTES on* Chap. IV. §. i.

[1] *Euripides*'s Words are,

> Οὔτοι τὰ χρήματ' ἴδια κέκτηνται βροτοί,
> Τὰ τῶν Θεῶν δ' ἔχοντες ἐπιμελούμεθα·
> Ὅταν δὲ χρῄζωσ', αὐτὰ ἀφαιροῦνται πάλιν.

> Men poſſeſs nothing of their own, but are
> The Stewards of the Goods, which to their Care
> The Gods commit, and take away when they ſee fit.

See *Lev.* xxv. 23. *Pſal.* xxiv. 1.

[2] Men by the Conceſſion of the Creator and Supreme Sovereign of the Univerſe have naturally a full power to make uſe of the Creatures, as they ſee fit, according to the ſtrength of their Reaſon. If there had never been but one Man in the World, as *Adam* was alone for a little time, the effect of his Power had been reduc'd to this, That nothing had been done contrary to the Will of the Creator, by diſpoſing of what had been preſented to him according to his Humour. But Mankind began to frame and perpetuate themſelves from Generation to Generation, from the moment that they became more than one Man, ſince by Nature one had not more power than another over the Beaſts and inanimate Creatures. Every one acquir'd a Right, by virtue of which another ought to permit him to enjoy, as well as himſelf, all thoſe things which their Creator had granted them the uſe of in common. When any one finds a thing to pleaſe him, from the time he had got the Poſſeſſion of it, no other Man ought to take it from him, but ſuppoſing it to be of that Nature, as not to be conſumed by the uſage, he may appropriate it to himſelf ſo long as he has occaſion for it; and others do him an Injury, if they would make uſe of it in their turn. So long as there were but few Men, and they contented themſelves with ſuch Fruits of the Earth as grew up without Tillage, they needed to poſſeſs themſelves of nothing but what was for preſent uſe, and here we may believe that all their Cares and Claims were bounded, and ſo all things were common. But when Mankind was conſiderably multiply'd, and they contriv'd to till the Ground, and ſeek out ways to render their Lives more commodious and agreeable, there was no way left to live in that Community; but Men muſt fix upon ſomething, and 'twas juſt, that what was gotten by Labour and Induſtry ſhould be made ſuch a Property, that no

their Birth from Indiſpoſition. And therefore 'tis an idle Queſtion, Whether the Property of things ariſe from Nature, or from Inſtitution? Since we have plain evidence, that it proceeds from the Impoſition of Men; and that the natural Subſtance of things ſuffers no Alteration, whether Property be added to them, or taken from them.

II. In the next place, we ought with due accuracy to weigh and examine what *Communion* is, and what *Property*, or *Dominion*. The Term *Communion* is taken either negatively, or poſitively. In the former manner things are ſaid to be common, as conſider'd before any human Act or Agreement had declared them to belong to one rather than to another. In the ſame ſenſe, things thus conſider'd are ſaid to be *No Body*'s, rather negatively, than privatively, *i.e.* that they are not yet aſſign'd to any particular Perſon, not that they are incapable of being ſo aſſign'd. They are likewiſe term'd *res in medio quibuſvis expoſitæ*, Things that lie free for any Taker. But in the poſitive Signification of the Word, common Things differ from appropriate only in this Reſpect, That the latter belong to one perſon only, the former to many Perſons together, though in the very ſame manner. To proceed, *Property* or *Dominion*, is *a Right, by which the very Subſtance* [1], *as it were, of a Thing, ſo belongs to one Perſon, that it doth not in whole belong, after the ſame manner, to any other.* For we take *Dominion* and *Property* to be the very ſame. Though ſome affirm the *Right*, as ſeparated from the *Uſe* and *Profit*, to be *Property*, and as join'd with the *Uſe* and *Profit*, to be *Dominion*; which nevertheleſs is a difference that doth not perpetually hold. Some again are over-nice, whilſt by *Property* they underſtand the Thing it ſelf under that Quality, by which it belongs to me, and to none beſides; and by *Dominion* a Right to diſpoſe of the ſaid Thing, as I pleaſe, which flows from *Property* in the manner of an Effect; ſo that the *Dominion* ſhall be lodg'd in the Perſon, but the *Property* ſhall ſeem rather to inhere in the Thing [a]. In which Diſtinction it is falſly ſuppos'd, that *Dominion* is as it were the Effect of *Property*; whereas if a Man thinks it at all neceſſary thus to divide them, the reverſe of this is rather true. For the *Right*, ſtrictly ſpeaking, inheres in the Perſon, from which the things themſelves derive ſome kind of extrinſical Denomination. And this appears ſufficiently evident from hence, That the *Right* dying with the Perſon, the things ceaſe to be appropriated, without any change in their Subſtance, or in other natural Qualities and Affections.

Now the force of *Property* is ſuch, that we may at our pleaſure diſpoſe [2] of the things which we hold by this Right, and may keep any other Perſon from the uſe of them; unleſs he hath obtain'd from us, by Covenant, a particular Right to this purpoſe: And that therefore whilſt they continue ours, they cannot after the ſame manner, and in whole [3], be another's. I ſay, *after the ſame manner*; for neither as there is no reaſon to the contrary, ſo Cuſtom informs us, that the ſame thing may belong to ſeveral Perſons at once, according to their different ways of holding or owning it. Thus the Commonwealth, the Landlord, and the Tenant, by Copy or Leaſe, may be ſaid each of them to have the Property of the ſame piece of Ground; the firſt an *eminent Property* [4]; the ſecond a *direct* [5], and the laſt an *uſeful* [6]. It was added likewiſe, *in whole* [b]; for many Perſons may, even in the ſame way, hold the ſame thing, yet not in whole, but each according to his determinate Share. As is the caſe in thoſe Goods which are, without Diviſion [7], poſſeſs'd by many together, who all happen to have the ſame kind of *Property* with regard to the ſame thing.

Sometimes we conceive *Property* to be divided into ſeveral Parts; or (if any one likes this Expreſſion better) to admit of ſeveral Degrees. For thus 'tis frequently diſtinguiſh'd into *plenary*, and *diminutive*. The former is either join'd with what they call *eminent Property*, in which manner civil States, or the Heads and Governours of them, poſſeſs their Goods; or elſe disjoin'd from it, and term'd *vulgar*; by which a private Man enjoys a full power of diſpoſing of his Goods, except ſo far that the Uſe of them be not under the Direction of the municipal Laws. *Diminution* of *Property* may be made ſeveral ways, as that the bare Exerciſe or Adminiſtration of it ſhall be reſtrain'd; or that the Profit and Advantage of it ſhall be leſſen'd; or laſtly, that ſomewhat ſhall be cut off from the very Property it ſelf. The firſt happens [8], when by Covenant,

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[a] Vid. *Ziegler* ad *Grot.* l ii. c. 2. ſ. 1.

[b] *Plures eandem rem in ſolidum poſſidere non poſſunt*, D. l. iv. tit. 2. *De acquirenda vel amittenda poſſeſſione*, leg. 3. ſ. 5.

Mr. Barb. NOTES on §. I, II.

no other might have to do with it without his Permiſſion. Wherefore every one poſſeſſed himſelf of certain things with a deſign to keep them always, and not to part with them unleſs it be by diſpoſing of them to whom they think fit, either alive or dying, at leaſt declaring openly not to abandon them, and leave them to the firſt Occupant. Thus the property of Goods was firſt eſtabliſh'd, of which the Mark of Diſtinction is, That others are always excluded, whereas when all things were common, others were not excluded from the things of which every one was poſſeſſed but for a little time, *i. e.* as long as they were actually in uſe. Then were civil Societies formed, the Rights of Property were ſettled, and order'd divers ways according to the Laws agreed on. Thus have I given, as I think, in a few Words, a clear and exact notion of this Matter, about which our Author enlarges much, and yet reaſons obſcurely; and which has long been perplex'd with vain Subtilties. If we joyn this with Note 4. of Paragraph 4. we ſhall have Principles ſufficient to judge well of it, and to rectify the Notions of other Authors, who have written about it. See alſo chap. vi. §. 1. Note 1.

[1] See Note 2. of the precedent Section, where you'll find a more natural and exact Definition. Our Author gives us a Notion of a particular property, rather than a general one, conſider'd in oppoſition to an univerſal Community of Goods.

[2] So ſays the Civil Law, *Nam ſuæ quidem quiſque rei moderator, atque arbiter, &c. Cod.* l. iv. tit. 35. *Mandati*, &c. leg. 21.

[3] So the Civil Law ſpeaks, *Et ait Celſus filius, duorum quidem in ſolidum dominium, vel poſſeſſionem eſſe non poſſe*, Digeſt. l. xiii. tit. 6. *Commodati vel contra*, leg. 5. §. 15.

[4] See Lib. viii. c. 5. ſ. 7.

[5] Our Author explains in the next Line, what is meant by direct and uſeful Property, as the Modern Lawyers diſtinguiſh. In ſhort, Uſeful Property imports a greater Right than direct Property, and is rather a Right Perſonal than Real, as Mr. *Titius* obſerves in his *Jus Privatum Romano German.* &c. which was publiſh'd in 1709. Lib. iii. c. 11. §. 3.

[6] See Chap. viii. §. 3. following.

[7] So the Civil Law ſpeaks, *Nec quenquam partis corporis dominum eſſe, ſed totius corporis pro indiviſo pro parte dominium habere*. Digeſt. l. xiii. tit. 6. *Commod. vel contra*, leg. 5. §. 15.

[8] See the *Inſtitutes*, l. ii. tit. 8. *Quibus alienare licet, vel non licet.*

or by Teſtament, or by the Command and Authority of Law, on account either of the Condition of the Perſons, or of the Quality of the Things, or for ſome other juſt Cauſes, the Alienation of Poſſeſſions is either prohibited, or confin'd within certain Limits [9], yet ſo as that no Right to the ſaid Poſſeſſions is hereby derived upon others. Add *Theophraſtus*'s Will in *Diog. Laert.* l. v. ſ. 53. The Advantage of Property is leſſen'd, if either the full Uſe and Enjoyment of my Goods is in the Hands of another, without Loan or Hire; or otherwiſe, if I am bound to allow another ſome particular Uſe of them, by way of *Service.* Laſtly, the Property it ſelf is then retrench'd, when we grant to another, beſides the full Right of uſing and enjoying what is ours, a Right likewiſe of alienating it after a certain manner; and ſuch a Right too, as is in ſome ſort perpetual. In which caſe, he who retains the Property, though thus abridg'd, and holds a ſuperior Power over the Poſſeſſion, is ſaid to have a *direct Property*; and he who, together with the Right of uſing and enjoying, partakes likewiſe of the Property in the manner before deſcrib'd, is ſaid to have an uſeful *Property* in the Poſſeſſion thus granted to him [a]. Where we may obſerve, by the way, what Limitation ought to be added to that common Rule with the Lawyers, *What is already a Man's own, can't become more his own* [10]. Whence they conclude, that no Pawn [11], no Charge, no Bargain of Buying, or of letting to Hire, can poſſibly ſtand, when made to him who is already the Proprietor of the thing thus diſpos'd of. As likewiſe if a Teſtator happens to bequeath to the *Legatee* what was his own before, the Act is void and fruitleſs [12]. And ſo too, that no one can [13], to any purpoſe, ſtipulate or bargain for a thing that will be his own without any ſuch Conditions; with other the like Caſes. All which are true, unleſs it ſo happen, that a *diminutive Property* ſhould, by any of theſe means, be advanc'd to a greater degree of *Plenitude* [b].

Farther, ſince the ſame thing may be poſſeſs'd either in whole by one, or elſe by many [14], without falling under a Diviſion; ſo that each Perſon, according to his determinate Share, ſhall have an equal Right in it; hence it comes to paſs that things are, in this reſpect, diſtinguiſh'd into *proper*, and *common*, as the word *common* is taken in its latter Signification; implying that the ſame thing is by the ſame kind of *Dominion* held by ſeveral Men, without being divided, or parcell'd out amongſt them. And this *Communion* differs from *Property*, ſtrictly ſo called, only with regard to the Subject in which it is terminated and lodg'd; a *proper* or appropriated thing belonging to one Perſon alone, a *common* thing to ſeveral, but not with regard to the manner or the virtue of the *Dominion*; for many Perſons have the ſame Right over a *common* thing, as a ſingle Perſon hath over a *proper* thing: And as the Propriety of a thing appertaining to one only excludes all others from an equal Right in the ſame thing; ſo a *common* thing excludes all others but thoſe to whom it is ſaid to be *common.* Now ſince neither of theſe Commoners hath a Right extending it ſelf to the whole thing, but only to a part of it, though ſuppos'd to remain undivided; it is manifeſt that no one Perſon can, by his own Right, diſpoſe of the thing entirely, but only according to his fix'd Proportion [15]: And that if any Reſolution is to be taken, any Bargain to be made about the whole, the Conſent and Act of each Commoner is neceſſarily required. *Ziegler* [c], *Felden* [d], and *Bœcler* [e], in their Obſervations on *Grotius*, have all confounded *negative* Communion with *poſitive*: On account of which Miſtake many Arguments have been thrown away to no purpoſe, in diſcuſſing this Point; as will appear hereafter. What *Seneca* hath deliver'd about the ſeveral kinds of Communion, may not be impertinent to our preſent Subject [f]: *I hold all things*, ſays he, *in common with a Friend* [16], *not as I do with a Sharer, ſo that one part ſhould be mine, and another part his; but as Children are common to their Father and Mother, who, ſuppoſing the Children to be two, are not ſaid to have each one, but each both. The Knights Seats belong to all of that Order, yet in them, by taking Poſſeſſion of a place, I appropriate it to my ſelf. And if I reſign this place to another Perſon, though he had an equal Right to it, yet it ſeems to be my Gift. Some things belong to ſome Men under a certain Condition. Thus, again, I have a place in the Knights Seats, not to ſell, not to let out, not to make my Home, but barely to ſit in whilſt I am a Spectator.*

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[a] Comp. *Struvi.* Syntagm. Exerc. 11. Th. 55, *&c.* Seneca *de Beneficiis*, l. vii. c. 12. It's no Argument that a thing is not your own, becauſe you cannot ſell or ſpend it, becauſe you cannot change it for better or for worſe. For that likewiſe may be truly call'd your own, which is your own under certain Terms and Conditions.

[b] As *Lucilius* in the *Anthologia*, l. ii. jeſts ſmartly on the old Miſer *Hermocrates*, in feigning that he had ſet down himſelf in his Will as Heir to his own Goods.

[c] Add *Grot.* l. ii. c. 2. ſ. 1. *init.*

[d] d. l. ſ. 2.

[e] d. l. p. 47.

[f] *De Benef.* l. vii. c. 12.

Mr. Barb. *NOTES* on §. ii.

[9] *Seneca*'s Words are, *Non eſt argumentum, ideo aliquid tuum non eſſe, quia vendere non potes, quia conſumere, quia mutare in deterius aut melius. Tuum enim eſt etiam, quod ſub lege certa tuum eſt.*

[10] *Quod proprium eſt ipſius* [*Legatarii*] *amplius ejus fieri non poteſt*, Inſtit. l. ii. tit. 20. *de Legatis*, ſ. 10. See alſo l. iv. tit. 6. *de Actionibus*, §. 14. & *Digeſt.* l. xliv. tit. 2. *de exceptione rei judicatæ*, leg. 14. §. 2.

[11] *Neque pignus, neque depoſitum, neque precarium, neque emptio, neque locatio rei ſuæ conſiſtere poteſt*, Digeſt. L. l. tit. 17. *De Diverſ. Reg. Juris*, l. xlv.

[12] *Sed ſi quis rem Legatarii ei legaverit, inutile eſt legatum*, Inſtit. l. ii. tit. 20. ſ. 10. See alſo *Cod.* l. vi. tit. 37. *de Legatis*, leg. 13. And Mr. *Daumat*'s Civil Laws in their Natural Order, Part. II. l. iv. tit. 2. Sect. 3. §. 8, *&c.*

[13] *Nemo rem ſuam futuram, in eum caſum, quo ſua ſit, utiliter ſtipulatur*, Inſtit. l. iii. tit. 20. *De inutilib. Stipulat.* ſ. 21.

[14] So the Civil Law ſpeaks, *Servus communis ſic omnium eſt, non quaſi ſingulorum totus, ſed pro partibus utique indiviſis, ut intellectu magis partes habeant, quam corpore*, Digeſt. 45. tit. 3. *De Stipulat. Servorum*, leg. 5. See alſo Lib. xxxi *de Legatis & Fideicom.* 2. leg. 66. §. 2.

[15] Thus the Civil Law commands, *Nemo ex ſociis plus parte ſua poteſt alienare, etſi totorum bonorum ſocii ſint*, Digeſt. l. xvii. tit. 2. *Pro Socio.* leg. 68. *prin.* See *Cod.* Lib. iii. tit. 37. *Communi dividendo.*

[16] *Seneca*'s Latin is, *Non enim mihi ſic cum amico communia omnia ſunt, quomodo cum ſocio, ut pars mea ſit, pars illius; ſed quomodo Patri Matrique communes Liberi ſunt; quibus cum duo ſunt, non ſinguli ſingulos habent, ſed ſinguli binos——Deinde pluribus modis communia ſunt: Equeſtria omnium Equitum Romanorum ſunt: in illis tamen locus meus ſit proprius, quem occupavi. Hoc ſi cui ceſſi, quamvis illi communi receſſerim, tamen aliquid dediſſe videor. Quædam quorundam ſub certa conditione ſunt. Habeo in Equeſtribus locum, non ut vendam, non ut locem, non ut habitem; in hoc tantum, ut ſpectem. Propterea non mentiar, ſi dicam me habere in Equeſtribus locum, ſed cum in theatrum veni, ſi plena ſunt Equeſtria & jure habeo locum illic, quia ſedere mihi licet; & non habeo, quia ab his, cum quibus jus mihi loci commune eſt, occupatus eſt.*

ctator. It will be no Falſity then, if I ſhould ſay, I have a place in the Knights Seats; yet if they happen to be full when I come into the Theatre, I both have a place there by Right, becauſe I am allow'd to uſe them; and I have not a place, becauſe it is already poſſeſs'd by thoſe who had a common Right to it with my ſelf.

III. From what hath been offer'd, 'tis evident that as well poſitive Communion, as Propriety, doth imply the Excluſion of others from the thing thus ſaid to be either *common*, or *proper*, and conſequently doth preſuppoſe more Perſons in the World than one. As then, if there were but a ſingle Man upon Earth, it could by no means be ſaid, that things were appropriated to him; ſo thoſe things, from the uſe of which no Perſon is excluded, or which belong no more to any one, than to another, are to be ſtiled *common* in the former, not in the latter ſenſe of the Word. And thus it appears in what reſpect we may attribute the Dominion of things to *Adam*, whilſt he yet ſtood alone in the World. Namely, although by reaſon of the vaſt Extent of the Earth, and his ſmall Occaſions, he needed to apply to his Service but a very inconſiderable Portion of things; yet ſuppoſing him to have had Inclination, and likewiſe Ability and Convenience to turn all that God had given him to his own uſe, there was no Right of others to oppoſe or hinder him. Therefore the Right of *Adam* over things was of a different kind from that Dominion, which is now ſettled amongſt Men: We may call it an indefinite Dominion [1], not formally poſſeſs'd, but abſolutely allow'd; not actual, but potential. It had indeed the ſame Effect which Dominion now obtains; that is, the uſing things at Pleaſure; yet was it not Dominion, ſtrictly ſpeaking, by reaſon that there was no other Perſon againſt whom this Effect might prevail; but 'twas capable of paſſing into Dominion, when the number of Mankind ſhould afterwards increaſe. And thus on the whole, whilſt *Adam* was the only Man, things in reſpect of him were neither *proper*, nor *common*. For Community ſuppoſeth a Partner in the Poſſeſſion; and Propriety denotes an Excluſion of the Right of others to the thing enjoy'd: So that neither of them can be underſtood, 'till the World was furniſh'd with more than one Inhabitant.

IV. But farther, it ought no leſs carefully to be obſerv'd, that the Grant of Almighty God, by which he gave Mankind the uſe of earthly Proviſions, was not the immediate Cauſe of Dominion, as this is directed towards other Men, and with relation to them takes Effect (which is evident likewiſe from hence, that even Brutes [1], by the Divine Permiſſion, uſe and conſume the Fruits of the Earth, and yet they are certainly incapable of Dominion) but that Dominion neceſſarily preſuppoſeth ſome human Act [2], and ſome Covenant either tacit or expreſs. GOD indeed authoriz'd Mankind to apply to their Service and Convenience the Earth, with the Product of it, and the living Creatures upon it; or, he gave Man an indefinite Right to all theſe Poſſeſſions; but ſtill it was left to their own Choice and Diſpoſal, what Manner, what Degree, what Extent they would fix to this Power; that is, whether they would circumſcribe it with certain Bounds, or leave it unconfin'd; as likewiſe whether they would allow each Perſon a Right to all things, or only to one and the ſame determinate part of things; or whether they would aſſign to every particular Man his own Portion, with which he ſhould reſt contented, and pretend no Right or Claim to any thing beſides. *Ambroſ.* Off. L. i. c. 28. Nature pour'd out all things in common to all Men: For ſo God commanded the whole Stock of things to be produc'd, that Men ſhould have a general Supply of Suſtenance, and ſhould hold the Earth as a general Seat. Common Right therefore was the Work of Nature; private and peculiar Right the Work of long Uſe and Poſſeſſion. *Add.* Selden. *de J. N. & G. ſec. Hebr.* l. vi. c. 1. 'Tis in vain therefore to diſpute whether God conferr'd the Dominion over things on our firſt Parents, as the Repreſentatives of all human Race; or whether he gave it them as their own Peculiar [3], and ſo as to terminate in their ſingle Perſons; that they, by their own proper Right, ſhould hold the Lordſhip of the whole World, and that all other Mortals ſhould owe their private Dominion to their Bounty and Favour. For that Divine Grant only confirm'd Men in a fuller Aſſurance of the Goodneſs of their Maker towards them, and ſatisfy'd them that 'twas his pleaſure they ſhould diſpoſe of other Creatures for their own Uſe and Service. But it was left to the Reaſon of Men

Mr. Barb. *NOTES on* §. iii, iv.

[1] The Author expreſſes himſelf very ſcholaſtickly here, ſaying, *Quod quis vocare poſſit dominium indefinitum, non formaliter, ſed conceſſive; non actu, ſed potentia*; which I think may be thus better expreſs'd: A ſhadow of Property, or a power of poſſeſſing with Property, rather than a true and actual Property.

[1] I wonder our Author ſhould in this place make uſe of ſo weak a Reaſon. For he himſelf obſerves in more than one place, that Beaſts are not capable of any Right or Obligation, neither among themſelves nor with others, nor is there any Law for them, properly ſo call'd; ſo that tho' in one ſenſe God permits the Beaſts to uſe what is for their Convenience, yet 'tis not ſuch a real Grant, as has the Nature of Right; and in that reſpect we can no more ſay, that God wills (for example) that the Birds ſhould eat the Fruits and Corn where-ever they find it, than that God would have a Bear or a Lion to pull that Man in pieces, who has the Misfortune to fall into their Paws.

[2] An human Right: I grant, that is to ſay, taking poſſeſſion, by virtue of which every one acquires a particular Right over that which before he had only a common one. But Contracts are neceſſary, when a thing is to be parted, of which ſeveral have poſeſſion at the ſame time.

[3] An Engliſh Knight, named *Robert Filmer*, maintains it with a great deal of Heat, and makes uſe of it to prove the abſolute Power which he attributes to Sovereigns, and which, as he pretends, has come down by Succeſſion from the Authority of *Adam*, whom he makes the firſt Sovereign. He chiefly inſiſts on this Text, *Gen.* i. 28. where God ſays to our firſt Parents, *Increaſe and multiply, and replenish the Earth, and ſubdue it: and have Dominion over the Fiſh of the Sea, over the Fowls of the Air, and over every Beaſt that moveth upon the Earth.* But Mr. *Lock*, who has confuted that Book in an *Engliſh* Work, of which we may find an Extract in the Univerſal Library, Tom. 19. anſwers judiciouſly, 1. That in theſe Words God gives *Adam* no Power but over the Beaſts. 2. That he gave him no property over theſe living Creatures to poſſeſs them as his own, but as in a common Right with all Mankind. This the Author proves at large from diverſe parallel Paſſages of the Holy Scripture, and particularly by the very Grant that God repeated to *Noah* and his Sons. The Text in *Pſalm* cxv. 16. is not anſwer'd. *God*, ſaith the Pſalmiſt, *hath given the Earth to the Children of Men*; which, according to the *Hebrew* Stile, is to Men in general, or to Mankind. Treatiſe of Government, l. i. c. 4.

to determine what meaſures ſhould be taken to prevent any Diſcord that might ariſe amongſt them from the Exerciſe of this Right. But we can by no means ſay, That there was any univerſal Rule and Manner of Poſſeſſing preſcrib'd by God himſelf, which all Men ſhould be obliged to obſerve. Therefore things were rendred neither *proper*, nor *common* (that is, in a *poſitive* Communion) by the expreſs Command of God: But this matter was afterwards adjuſted by the Diſpoſal of Men, according as the Peace of human Society ſeem'd to require. Whence, thoſe Authors muſt needs be under a Miſtake, who deliver themſelves in ſo groſs Terms as theſe: *The Diviſion of Things belongs to the Law of Nature; that is, it doth not only receive its Riſe and Foundation from Nature, ſo as afterwards to be turn'd into Law by the Conſent of Mankind; but Nature herſelf frames and compleats this Law by her own Act and Authority.* And again, *The Diviſion of Things is one Command of the Decalogue; that is, one Head of the Law of Nature. For he that ſaid,* Thou ſhalt not ſteal, *in effect ſaid, Let there be a Property and Diſtinction of Things; let every one hold what is his own, and not covet what is another's*[a]. For there is no Precept of natural Law to be diſcover'd, by which Men are enjoin'd to make ſuch an Appropriation of things, as that each Man ſhould be allotted his particular Portion, divided from the ſhares of others. Though the Law of Nature doth indeed ſufficiently adviſe the introducing of ſeparate Aſſignments, as Men ſhould appoint, according to the Uſe and Exigencies of human Society; yet ſo as to refer it to their Judgment, whether they would appropriate only ſome particular things, or whether they would poſſeſs ſome things without bringing them to a Diviſion, and leave the reſt as they found them, only forbidding any particular Man to challenge them to himſelf alone. Hence too, the Law of Nature is ſuppos'd to approve and confirm all Agreements made by Men about the Poſſeſſion of things, provided they neither imply a Contradiction, nor tend to the Diſturbance of Society. Therefore the *Property* of things flow'd immediately from the compact of Men, whether *tacit*, or *expreſs*. For although after the Donation of God nothing was wanting but for Men to take poſſeſſion; yet that one Man's ſeizing on a thing ſhould be underſtood to exclude the Right of all others to the ſame thing[4], could not proceed but from mutual Agreement. And though right Reaſon mov'd and perſuaded Men to intro-

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[a] Vid. *Bœcler.* ad *Grot.* in præfat. p. 9.

Mr. Barb. *NOTES on* §. iv.

[4] No, in no wiſe. It is certain on the contrary, that the immediate Foundation of all particular Right, which any Man has to a thing which was before common, is the firſt Poſſeſſion. This was the moſt antient way of Acquirement. And indeed, when ſeveral things are given in general to a number of Men which exiſt not at the ſame time, and who neither can nor will poſſeſs all things in common, and ſuch are Men of all Times and Places, the Intention of the Donor doubtleſs is, That thoſe who come firſt ſhall gain a perſonal Right to thoſe things that they have gotten, excluſive of the Pretenſions of all others, without any Conſent of theirs needful to be given. All taking poſſeſſion, according to the Will of the Donor, hath in it an effectual Virtue to make the firſt Occupant appropriate to himſelf lawfully any thing before held in common, provided he takes no more than he needs, and leaves enough for others. This is what Mr. *Titius* ſays judiciouſly, *Obſerv.* 278. n. 2. in which he was prevented by Mr. *Lock*, who, in his excellent Treatiſe of Civil Government, has among other things ſearched to the Bottom with much Curioſity and Solidity into the manner how the Property of Goods is acquired. Take, in ſhort, his Judgment, how Men may poſſeſs in divers parts what God gave them in common, and enjoy it without any Agreement made between them, who have the ſame Natural Right. God, who gave Man the Earth, and all things in it for his Subſiſtence and Convenience, intended, without doubt, that they ſhould put them to ſuch an Uſe, as would be moſt advantageous to their Life, and moſt conformable to the Reaſon of him that holds them of him. Now no Man can receive any Benefit from the Fruits which are produced of themſelves, and the Beaſts which are brought up by the Care of Nature only, unleſs he appropriate to himſelf, ſome way or other, ſome of theſe Fruits and Animals. If it were a Crime to take the leaſt thing which is given in common, before we had the Conſent of all others who had any Right, we might periſh a thouſand times with Hunger in the midſt of Plenty. When a Maſter of a Family provides a Diſh of Meat for his Children or Servants, he does not divide to each of them a Part; but what each of them fairly takes, belongs to him, although before none of them had more Right than others, and although none of them had an allowance given them to take this or that Portion. Farther, ſeeing every one is the only Maſter of his Perſon and Actions, the Labour of his Body and Work of his Hands entirely and ſolely belong to him, as his own proper Goods. So that all that he has derived from the ſtate of Nature by his Labour and Induſtry, what he has gotten by his Pains, belongs to him only, and others can't pretend to them, unleſs there does not remain enough of the ſame things, or as good, among thoſe that are common. A Man who feeds on the Acorns he has gather'd under an Oak, or wild Apples which he has gather'd in a Wood, certainly makes them his own. But when is it that theſe Acorns and Apples come to be his Property? when he eats them, or when he dreſſes them, or when he carries them home, or when he lays them up? 'Tis plain, that nothing but his Labour in gathering them can make them his own. *Quod omnibus naſcitur, induſtriæ præmium eſt*, Quintil. Declam. 13. 'Tis our Labour that diſtinguiſhes theſe Fruits of the Earth from other common Goods, and which adds ſomething more than the common Mother of all Men, I mean Nature, hath beſtow'd. See *Plautus* in his *Rudens*, or *Fortunate Shipwreck*, Act iv. Scen. 3. v. 33, *&c.* By the ſame Reaſon, the Graſs that a Man's Horſe hath eaten, the Turf which his Servant hath cut, the Ditch he hath digged, and the Water which he hath drawn, become his own Goods and Inheritance, without the Conſent of any other. 'Tis the ſame at this day with the Stag which we have kill'd, the Fiſh we have taken, the Ambergreaſe or Pearls which we have fiſh'd up, and the Hare which we have hunted down, in the Places where Hunting and Fiſhing are allow'd to every body, or in them that belong to no body, as the vaſt Ocean. So that ſo many Acres of Ground as a Man can till and ſow, and whoſe Fruits he can ſpend for his Maintenance, belong properly to him, and he hath a Right to incloſe that Space with Hedges, Ditches, Walls, or after any other manner, without any Man's Permiſſion. And this is the rather true, becauſe the Creator himſelf, in giving the Earth to Men in common, hath commanded them to labour, and has put them into ſuch a natural State, that they are neceſſitated not to be idle. But it doth not hence follow, that we may gather as many Fruits, take as many Beaſts, or poſſeſs our ſelves of as many Acres of Land; or, in a word, appropriate to our ſelves as many Goods as we pleaſe. For the ſame Law of Nature which hath given every one a particular Right to the things ſhe hath beſtow'd, by his Labour and Induſtry, ſeparate from the State of Community wherein they were; the ſame Law, I ſay, has ſet certain Bounds to our Right. *God hath given all things abundantly*, 1 *Tim.* vi. 17. Why? to enjoy them. This is the Voice of Reaſon confirm'd by Revelation. Wherefore the Property of Goods acquir'd by Labour muſt be regulated by the good Uſage which may be made of them for the Neceſſity and Convenience of Life. See what our Author ſays, c. vi. §. 3. following. If we paſs the Bounds of Moderation, and take what others have occaſion for, without doubt we ſeize on that which belongs to others; eſpecially, if having got any thing ſuperfluous, we leave not ſufficient to relieve their Neceſſities, and ſupply them with things convenient and uſeful. We muſt not ſuffer any thing which God hath created for the Service of Man, to periſh or become uſeleſs. If we conſider with attention the abundance of natural Proviſions which have been a long time in the World, the ſmall Number of thoſe who can uſe them, and for whom they are appointed, and how litttle a Man can appropriate to himſelf with the excluſion of others, eſpecially if he keep himſelf in the juſt Bounds preſcribed by Reaſon, we muſt be obliged to acknowledge, that the Propriety of Goods ſo eſtabliſh'd would not produce the leaſt Diſputes and Quarrels. We may ſee this diſcourſed at large in the Work of Mr. *Lock*, Lib. ii. c. 4. Moreover, Mr. *Vander Muelen* hath alſo confuted our Author in his Comment upon *Grotius*, l. ii. §. 1. p. 56.

duce diſtinct Properties, yet this doth not hinder but that they might derive their Riſe and Original from human Covenant.

V. Thus much being premiſ'd, it is manifeſt, that, antecedently to any Act or Agreement of Men, there was a Communion of all things in the World; not ſuch as we have before term'd a poſitive, but a negative Communion; that is, all things lay free to any that would uſe them, and did not belong to one more than to another. But ſince things could afford no Service to Men, were we not allow'd to lay hands at leaſt on Fruits and Products of them, and ſince this would be to no purpoſe, if others might lawfully take from us what we had before actually mark'd out for our own Uſe: Hence we apprehend the firſt Agreement, that Men made about this Point, to have been, that what any Perſon had ſeiz'd out of the common ſtore of things, or out of the Fruits of them, with deſign to apply to his private Occaſions [1], none elſe ſhould rob him of. This[a] may be illuſtrated by the Caſe of Beaſts, amongſt which none can claim a peculiar Right to any thing above others [2]; but each ſatisfies his Appetite with what he firſt meets with in his way: And if any of them hath been ſo provident as to lay up a Stock for future Uſe, the reſt are under no Obligation to forbear invading and plundering it: Inaſmuch as no Agreement can have paſs'd amongſt them, which might lodge the chief Right to any thing in the firſt Taker.

The Author of the Treatiſe *De Principiis juſti & decori* [b] hath advanc'd ſomewhat on this Subject, which may ſerve to ſet it in a fuller Light. *He ſuppoſeth beforehand, that Man may lawfully poſſeſs and uſe Creatures void of Reaſon; and thence infers, that ſince Men are by Nature equal, all muſt have an equal Right to the Creatures* [3]*; there being in reſpect of the Creatures themſelves no Rule aſſigning one Part to me, and another to my Neighbour: What remains then, but that the Diſtinction and Diviſion of Goods muſt be deduc'd from Compact? But foraſmuch as all human Inſtitutions and Ordinances are made with the exception of extreme Neceſſity, therefore when ſo deſperate a Caſe happens, the primitive Right to all things revives: Becauſe, in the common Agreement for the Diviſion of Things, every one is ſuppos'd to have renounc'd his Right to thoſe Things which were allotted to others with this Reſerve and Reſtriction,* Unleſs I am unable otherwiſe to compaſs my own Preſervation. *My Calamity doth not give me a Right to thoſe things, to which I had none before; but the extremity of my Danger makes that Condition ceaſe, under which I gave up my firſt Right. For the ſame Reaſon it is lawful in War to ſeize the Goods of the Enemy: Becauſe all Compacts being diſſolv'd* [4]*, the original Right returns.* He adds, p. 110. *That, before the ſettling of Covenants, firſt Occupancy did not by its own force confer any Right. Becauſe firſt, in whatever neceſſitous Condition I was plac'd, I could then have no Right to recall theſe Goods to my own Uſe; this Privilege taking place only in Goods which I voluntarily reſign'd to my Neighbour: But there are not many Perſons to be met with, who would allow ſuch a Prerogative to Things thus acquired.*

Which Reaſon might be thus propoſed in clearer Terms.

If firſt Occupancy of itſelf conferr'd a Right excluſive of all others, it would follow, that, even in a caſe of Neceſſity, Goods thus attain'd could not be made uſe of by any other Perſon than the Poſſeſſor: Becauſe the Right of Neceſſity follows from an Exception added to the firſt Compact about the Diviſion of Goods; but we before ſuppoſed, that no ſuch Compact had paſs'd about Things which came into Mens Poſſeſſion by theſe Means. It being then abſurd and unreaſonable, that a Perſon reduc'd to Extremity ſhould not be allowed to uſe what another hath by Occupancy made his own; it follows, that the Right, by virtue of which Occupancy fixeth a Property, is likewiſe owing to Covenant. Though this Argument is at the beſt but very feeble [5].

He proceeds *Secondly* to affirm, *That there is in Nature no more Reaſon why Men ſhould deſire a Right from the firſt Occupancy of things* [6]*, than from the firſt diſcovery of them with the Eye. Therefore the Difference muſt ariſe from the Inſtitution of Men, ordaining, that the Right to a Piece of Land, for Inſtance, ſhould be in him who firſt took poſſeſſion of it, not in him who ſaw it before others.* Thirdly, he ſays, *Let us ſuppoſe two Men, one ſwift, and one ſlow of Foot, 'tis evident what an ill match'd Couple we have here, as to the Buſineſs of acquiring Property; and by conſequence, that the Right by which he who firſt ſeizeth the thing, in this Caſe, ſhould be the true Owner of it, is not borrow'd from Nature, but from implicit*

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[a] To this belongs l. xli. t. 2. *D. De acquir. vel admittenda poſſ.* l. i.

[b] *Velthuyſen*, p. 100, &c. Ed. in 12°.

Mr. Barb. *NOTES* on §. v.

[1] This Agreement is in no wiſe neceſſary, as may appear from what has been ſaid in the preceding Note. The *Roman* Lawyers do not ſuppoſe any, even in that Law to which our Author refers them; and whereas to ſhew, that Property of Goods did begin by taking Poſſeſſion, they ſay, there remains to this day ſome footſteps of it in things which yet remain common, which belong to the firſt Occupant. *Dominiumque rerum ex naturali poſſeſſione cœpiſſe Nerva filius ait, ejuſque rei veſtigium remanere, de his, quæ terra, mari, cœlo capiuntur; nam hæc protinus eorum fiunt, qui primi poſſeſſionem eorum apprehenderint*, Digeſt. l. xli. tit. 2. *De acquirenda aut amittenda poſſeſſione*, leg. 1. There is alſo a Place in the *Inſtitutes*, which I ſhall quote, c. ix. §. 9. n. 9. from whence it will appear, that, according to the Notion of the *Roman* Lawyers, Poſſeſſion is all that transfers Property by virtue of the Intention of him who gives any thing to many in common.

[2] See §. iv. Note 1. aforegoing.

[3] This is true, but they have it only for their Uſe. All that follows from this Equality of Right is, that no Man ought to poſſeſs himſelf of ſuch a great quantity of Goods, that there remain not ſufficient for others. See Note 4. upon §. iv. aforegoing.

[4] This is not ſo; but the true Reaſon is the ſtate of War, where two are Enemies the one to the other. And indeed ſuppoſing that they, who have had each their Goods in Property, ſhould come of a ſudden to ſuffer them to be common by an unanimous Conſent, and without ceaſing to be Friends, every one may after this take what is convenient, and none have right to deprive others of what they are poſſeſſed of for their Uſe. Thus *Velthuyſen* argues upon the falſe Principles of *Hobbes*.

[5] The Rights and Privileges of Neceſſity are not ſo bounded as to diſpenſe with ſuch Duties, as ſuppoſe an Agreement in certain Caſes. They alſo make Exceptions to ſeveral natural Laws, which in no wiſe depend upon human Agreements.

[6] The Reaſon of it is very clear, and 'tis this, That he declares thereby an intention to ſet apart ſuch a thing for his Uſe, or to appropriate it to himſelf, as he may by virtue of his common Right to uſe it, which without that would become uſeleſs to any Man. The meer ſight of a thing can't have the ſame Effect, becauſe we ſee many things without any deſign of taking them to our ſelves only. But if at the ſame time we perceive a thing firſt, and we diſcover any ways an Intention of reſerving it to ourſelves, others may no more pretend to it, than if we were actually ſeized of it. See what is ſaid on c. vi. So that 'tis not neceſſary to ſtay to prove, that the third and laſt Reaſons of *Velthuyſen* are of no force.

Covenant or Agreement: He might have ſaid more briefly, upon Suppoſition that all Men had originally an equal power over things, we cannot apprehend how a bare corporal Act[7], ſuch as Seizure is, ſhould be able to prejudice the Right and Power of others, unleſs their Conſent be added to confirm it; that is, unleſs a Covenant intervene. What the ſame Author diſputes farther; *That* [a] *in the primitive State one Man might have brought the whole World under his Subjection*, is vain and idle, and is confuted by Mr. *Hobbes* himſelf [b].

VI. To proceed, Men left this original negative Communion, and by Covenant ſettled diſtinct Properties, not at the ſame time, and by one ſingle Act, but by ſucceſſive Degrees; according as either the Condition of Things, or the Number and the Genius of Men ſeem'd to require. Thus the *Scythians* of old appropriated only their Cattle, and the Furniture of their Houſes; leaving their Land in its primitive Communion [c]. Indeed the Peace and Tranquillity of Mankind, for which the Law of Nature appears eſpecially concern'd, gave no obſcure Intimation, what would be moſt convenient for Men to appoint in this Affair. For that each Man ſhould retain an equal Power over all Things, or that the univerſal Proviſion ſhould be laid in Common, ready for the promiſcuous uſe of every Perſon, was not conſiſtent with the ſafety and quiet of human Race; eſpecially after they were multiplied into conſiderable Numbers, and had cultivated and improv'd the Method of living. Becauſe [d] there could not but ariſe almoſt infinite Claſhings, from [e] the deſire of many Perſons to the ſame Thing, which was not able to ſatisfy them all at once; it being the Nature of the greateſt part of what the World affords, to be incapable of ſerving more than one Man at the ſame time. As for the preciſe Order, and the particular Cauſes of Things paſſing into Properties, I conceive we may thus come to an apprehenſion of them: Moſt things of immediate uſe to Men, and which are applied to the ends of Nouriſhment and Cloathing, are not by bare unaſſiſted Nature produc'd every where in ſo great abundance, as to yield a plentiful ſupply to all. As often therefore as two or more ſhould want the ſame thing, which could not content them all together, and ſhould endeavour to ſeize and ſecure it for themſelves; ſo often there muſt ariſe a moſt probable occaſion of Quarrels and Hoſtilities. Again, many things ſtand in need of human Labour and Culture, either for their Production, or to fit and prepare them for Uſe. But here it was very inconvenient that a Perſon, who had taken no pains about a thing, ſhould have an equal Right to it with another, by whoſe Induſtry it was either firſt rais'd, or exactly wrought and fram'd, to render it of farther Service. It was highly conducive then to the common Peace, that immediately upon the Multiplication of Mankind, Properties ſhould be appointed in moveable Things, eſpecially ſuch as require the Labour and Improvement of Men; and in thoſe Immoveables which are of immediate and neceſſary Uſe, as Houſes, for Inſtance; ſo that the Subſtance of them ſhould belong either ſeparately to particular Perſons, or to ſuch a number of Men as had by peculiar Covenant agreed to hold them in the way of *poſitive Communion*. Farther, although there appears ſome reaſon in theſe Things, why they ſhould rather belong to ſome than to others; yet the Dominion or Property of them, ſuch as implies the excluſion of all Perſons beſides, was to be confirm'd at leaſt by tacit Compact[1]: And this tacit Compact involv'd a tacit Ceſſion of the reſt of Mankind; intimating, that whatever had been aſſign'd for any one's private Share, they would never challenge any Right or Title to, upon pretence of its receiving its Matter, or its Nouriſhment, from the Earth, the common Habitation of Men. As for thoſe Immoveables which Nature produc'd, without the concurrence of human Induſtry, that is, Lands, ſince they were ſo widely extended, as abundantly to ſatisfy the ſmall number of the firſt Men; ſo much of them was from the beginning taken into Poſſeſſion, as Men thought convenient for their preſent Occaſions; the reſt being left in its natural and negative Communion, to be poſſeſs'd by any Perſon that ſhould afterwards think fit to uſe it. Here therefore [2] we muſt conceive a Covenant to have paſs'd to this Effect: That thoſe Lands which had been aſſign'd to particular Men by the expreſs Agreement of the reſt, or ſuch as the reſt were ſuppos'd to have reſign'd all their Title to, by permitting a ſingle Perſon quietly to enjoy, and by taking to themſelves other Lands in the ſame manner, ſhould belong to the Manurers and Improvers of them: And that what remain'd ſhould paſs into the Property of thoſe who would afterwards fix upon it.

VII. That the ſettling diſtinct Properties turn'd to the real Benefit and Advantage of Men, when grown more Numerous, may be illuſtrated from the ſame Arguments which *Ariſtotle* [f] brings to overthrow the *Platonick* Communion of Goods. Though indeed his Deſign was to refute a *poſitive* Communion; whereas our Enquiry proceeds about the Reaſons inclining Men to quit that Communion which

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[a] Ibid. & 103. 266.
[b] *De Cive*, c. 1. ſ. 11.
[c] *Juſtin*. l. ii. c. 2.
[d] Vid. *Digeſt*. l. viii. tit. 2. *De ſervitut. prædior. urbanor.* leg. 26.
[e] Vid. *Hobbes de Cive*, c. 1. ſ. 6.
[f] *Polit*. l. ii. c. 5. p. 316. *Ed. Pariſ.*

Mr. Barb. *NOTES on* §. v, vi.

[7] It is available by virtue of the Intention of the Creator, who has given Men this common Right, that they may make uſe of it. And every one ought to think, that it belongs to him to do no prejudice to the Rights of any other, who in their turn may one way or another plead the privilege of the firſt Occupant.

[1] By what I have ſaid in the foregoing Notes, we may ſee that there is no need of any Renunciation, either expreſs or tacit. This may ſuffice to rectify the attentive Reader in underſtanding all that our Author in the following part of this Work builds upon that falſe Principle, without which I ſhould be obliged to enlarge my Notes to no purpoſe every moment to correct it.

[2] Our Author doth here by the by criticize upon an Expreſſion of the *Jewiſh* Hiſtorian *Joſephus*, l. i. c. 3. where he ſays, That *Cain* was the firſt that ſet bounds to Lands, Ὅρους τε γῆς πρῶτος ἔθετο, p. 7. in which he deſerves, ſays our Author, not to be believed more, than in what he ſays in the ſame place, That *Cain* barbarouſly uſed and inſolently treated all thoſe that dwelt with him; that he gather'd great Wealth by Rapine and Violence, and that he cheriſh'd Companies of Thieves. For how can ſuch things be attributed to the eldeſt Son of the firſt Man and firſt Woman, from whence all Mankind are deſcended? See *Bœcler*'s Diſſertation, entitled, An Exercitation upon *Fl. Joſephus*'s *Antiq. Jud.* Lib. i. c. 2. printed in 1701. and what is ſaid, §. 10. &c. about the Primitive Community of Goods.

we have already ſhewn to be negative [a] [1]. *If*, ſays he, *Men labour'd in common, and laid up all they got in one Heap, out of which they were freely to take for their ſupport; 'tis impoſſible but that Heats and Quarrels ſhould ariſe from the Inequality which muſt be obſerv'd between ſome Mens Getting and Spending* [2]. *In general* (as he well remarks) *the living together, and upon the ſame Stock and Maintenance, is grievous and uneaſy. Which is the Reaſon that we are never ſo highly diſpleas'd with other Perſons, as with our Servants and Family-Dependents, who are continually under our Eye. But now upon the introducing of Property, all theſe Complaints are ſilenc'd* [3], *every one grows more Induſtrious in improving his peculiar Portion; and Matter and Occaſion is ſupplied for the Exerciſe of Liberality and Beneficence towards others. It were better therefore that Goods ſhould be made proper as to the Poſſeſſion* [4], *and ſhould be common only in the Uſe*. Again, *To conſider a thing as our own, raiſeth the Pleaſure we take in enjoying it* [b]. *To gratify and aſſiſt a Friend, a Gueſt, or a Companion, fills us with ſenſible Satisfaction and Delight; and this we cannot do, unleſs we have a ſeparate Share of Good things to our ſelves. Beſides, ſince there are few things which can be made uſe of by all Men at once, when many Perſons ſhould happen to ſet their Mind on the ſame Object, which could not ſuffice them together; they muſt of Neceſſity fall out, were not the deſired Object already aſſign'd to a particular Owner.* It muſt be confeſs'd theſe Reaſons did not weigh ſo much with Sir *Thomas Moor* and *Campanella*, as to hinder them from ſetting up a Communion of Goods, the former in his *Utopia*; the latter in his *Realm of the Sun*: It being much more eaſy to fanſy perfect Men, than to find them [5]. But farther, we may hence too diſcover the Falſity of that vulgar Saying [6], Meum *and* Tuum *are the cauſe of all the Wars and Quarrels in the World*. For on the contrary the Diſtinction of *Meum* and *Tuum* was rather introduc'd to prevent all Contention. Hence *Plato*, LL. l. viii. p. 214. Ed. *Wech.* calls the *Meer-ſtone* [7], *the Boundary of Friendſhip and Enmity, confirm'd by Oath, and approv'd of by the Gods*. Of the Sacredneſs of the Landmark, ſee likewiſe *Deut.* xix. 14. *Job* xxiv. 2. L. xxvii. t. 21. *D. de Termino moto. Collat.* leg. *Moſaicarum cum Rom.* tit. 13. *Paul. Sentent.* i. 16. v. 22. *Frontinus de re agrar. Let every one keep his own Bounds and not diſturb thoſe of other Men: for therefore was the Mark-ſtone ſet up*, litem ut diſcerneret agris,—— *to end the Quarrels of the Field.* But that infinite Field of Hoſtilities and Strifes ariſeth only from hence [8], That the Avarice of Men is ever aiming to break through thoſe Bounds of *Meum* and *Tuum*, which have been by Law or Covenant eſtabliſh'd [c].

VIII. Though what hath been here deliver'd ſeems plain and evident, yet we think it not impertinent to examine more largely the Opinions of ſome antient and ſome modern Writers on this Subject. Amongſt the former, *Diodorus Siculus* [d] reports, *That the firſt Earth-born Men led a wild and irregular Life, went out in Herds to ſeek their Food, which conſiſted of the moſt juicy Herbs, together with ſuch Fruits as the Trees ſpontaneouſly produc'd: But not knowing how to bring their Proviſion together, and to lay up a Store for future uſe, many periſh'd during the Winter, partly through the Inclemency of the Air, and partly through want of Suſtenance; 'till by degrees gaining Instruction from Experience, they began to retire into Caves in the cold Seaſon, and to reſerve*

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[a] To which add *Ariſtophan.* Concionatr. ver. 586.

Eſt aliquid quocunque loco, quocunque receſſu,
Unius ſeſe Dominum feciſſe lacertæ.

[b] *Juvenal* Sat. 3. ver. 230.

'Tis ſomewhat to be Lord of ſome ſmall Ground,
In which a Lizard may at leaſt turn round.

Mr. *Dryden.*

[c] *Lyſias* Orat. 17. *De Niciæ bonis publicatis*, chap. iv. *The main Cauſes of Diſſentions among Subjects are, that ſome covet other Mens Poſſeſſions, whilſt ſome again, are robb'd of their own.*

[d] Lib. i.

M. Babr. *NOTES* on §. VII.

[1] The Greek is, Καὶ γὰρ ἐν ταῖς ἀπολαύσεσι, καὶ ἐν τοῖς ἔργοις μὴ γινομένων ἴσων, ἀλλ᾽ ἀνίσων, ἀναγκαῖον ἐγκλήματα γίνεσθαι πρὸς τοὺς ἀπολαύοντας μὲν ἢ λαμβάνοντας πολλὰ, ὀλίγα δὲ πονοῦντας τοῖς ἐλάττω μὲν λαμβάνουσι πλείω δὲ πονοῦσιν.

[2] The Greek is, Ὅλως δὲ τὸ συζῆν καὶ κοινωνεῖν τῶν ἀνθρωπικῶν πάντων χαλεπὸν, καὶ μάλιστα τῶν τοιούτων· δηλοῦσι δ᾽ αἱ τῶν συναποδήμων κοινωνίαι· σχεδὸν γὰρ οἱ πλεῖστοι διαφερόμενοι ἐκ τῶν ἐν ποσὶ, καὶ ἐκ μικρῶν προσκρούοντες ἀλλήλοις. ἔτι δὲ θεραπόντων τούτοις μάλιστα προσκρούομεν, οἷς πλεῖστα προσχρώμεθα πρὸς τὰς διακονίας τὰς ἐγκυκλίους.

[3] So *Ariſtotle* expreſſes it, Αἱ μὲν γὰρ ἐπιμέλειαι διῃρημέναι, τὰ ἐγκλήματα πρὸς ἀλλήλους οὐ ποιήσουσι· μᾶλλον δὲ ἐπιδώσουσιν, ὡς πρὸς ἴδιον ἑκάστου προσεδρεύοντος. This is well expreſs'd in a Law of the *Code*, *Naturale quippe vitium, negligi quod communiter poſſidetur; utque ſe nihil habere, qui non totum habeat, arbitretur: denique ſuam quoque partem corrumpi patiatur, dum invidet alienæ*, Lib. x. tit. 34. *Quando & quibus quarta pars, &c.* leg. 2. *in princip.*

[4] And again, Φανερὸν τοίνυν ὅτι βέλτιον εἶναι μὲν ἰδίας τὰς κτήσεις, τῇ δὲ χρήσει ποιεῖν κοινὰς —— ἔτι δὲ καὶ πρὸς ἡδονὴν ἀμύθητον ὅσον διαφέρει τὸ νομίζειν ἴδιόν τι —— ἀλλὰ μὴν καὶ τὸ χαρίσαθαι, καὶ βοηθῆσαι φίλοις, καὶ ξένοις, ἢ ἑτέροις ἥδιστον ὃ γίνεται τῆς κτήσεως ἰδίας οὔσης. *Epicurus* (to uſe Mr. *Bayle*'s Words in *Hiſt. Diction.*) would not imitate *Pythagoras*, who taught, that among Friends Goods ought to be common. (*Diog. Laert.* l. x. §. 11.) He found it out, that ſuch an Eſtabliſhment betray'd Diffidence; he lik'd better that things ſhould remain on the ſame foot, that every one might voluntarily contribute to the Wants of others when there was a neceſſity. He aſſures himſelf, that this Notion comes nearer Perfection, than to maintain a Community of Goods, and we can't ſufficiently admire the Union of *Epicurus*'s Followers, and the Goodneſs by which they aſſiſted one another, while every one remain'd Maſter of his own Eſtate. See *Cicero de finib. bonorum & malorum*, l. i. c. 20.

[5] An univerſal Community of Goods, which might have place among Men perfectly juſt and free from all irregular Paſſions, can't but be unjuſt, chimerical, and full of Inconveniences among Men ſo diſpoſs'd as we are. For the Agreement which is obſervable ſometimes among the Members of certain particular Communities, can't be drawn into a Conſequence for an univerſal Society of all Nations and Pleople; nay, not ſo much as of a Village, or ſome other place, which contains ſeveral Families of different Conditions, and makes up a number of unequal Perſons. See Mr. *Daumat*'s Civil Laws in their Natural Order, Part II. in the Preface, §. ii. and the Diſcourſe of *Ulric Obrecht*, *De Communione*, which is the firſt of the Collection publiſh'd in 1704. at *Strasburg*. To this we may add that Mr. *Bruyere* (in *Charact. penult. du dern* chap.) ſays, That if Men abound with Goods, and no body in this Caſe live by his Labour —— we ſhall want Neceſſaries and Conveniences. If there be no Wants, there will be no Arts, Sciences, Invention, nor Mechanick Trades. Farther, an equality of Poſſeſſions and Riches would ſettle all in like Condition, baniſh all Subordination, reduce Men to a ſtate of ſerving themſelves and not helping one another, render Laws frivolous and uſeleſs, introduce an univerſal Anarchy, and bring in Violence, Injuries, Maſſacres and Impunity. The reſt of the Character is pleaſant to read, but too long to be inſerted whole in this place. See alſo *Quintil.* Declam. 261.

[6] *Quieta vita iis qui tollunt, Meum, Tuum.* Publ. Syr. *Sentent.* v. 620.

[7] *Plato*'s Words are, Σμικρὸν λίθον ὁρίζοντα φιλίαν, καὶ ἔχθραν.

[8] *Lyſias*'s Words are, Διαφέρεσθαι δὲ πρὸς ἀλλήλους ἐκ τῶν τοιούτων μάλιστ᾽, ἂν οἱ μὲν τῶν ἀλλοτρίων ἐπιθυμῶσιν, οἱ δὲ ἐκ τῶν ὄντων ἐκπίπτωσι.

a ſufficient Stock of ſuch Fruits as were fit for keeping: Some new Advantage or Improvement being every day added to Life[a]. This Hypotheſis concerning the Origin of Mankind, though falſe, being taken for granted, it follows, that Men in the beginning liv'd upon the Supplies of Nature in common; afterwards ſettling by Covenant the Property of Houſes, and of Fruits treaſur'd up for future Service, 'till by ſlow Advances the Appropriation of Land was introduc'd. To the ſame purpoſe is frequently alledg'd what *Juſtin*[b] relates of *Saturn*[1], King of the *Aborigines*, who, he tells us, was ſo remarkable for exact Juſtice, *As that no Perſon under his Reign liv'd in a Condition of Slavery, or held any private Poſſeſſions; but all things, like one univerſal Patrimony, lay undivided, and in common to all.* The Authorities of the *Poets* are likewiſe produc'd in great Numbers, where they deſcribe the happy State of their golden Age, *Virgil.* Georg. I. 125, *&c.*

Ante Jovem nulli ſubigebant arva coloni;
Nec ſignare quidem, aut partiri limite campum
Fas erat: in medium quærebant; ipſaque tellus
Omnia liberius, nullo poſcente, ferebat[c].

Before *Jove*'s Reign none vext the peaceful Ground,
Which only Turfs and Greens for Altars found.
No Fences parted Fields; nor Marks, nor Bounds
Diſtinguiſh'd Acres of *litigious* Grounds:
But all was common, and the fruitful Earth
Was free to give her unexpected Birth.
Mr. *Dryden.*

Tibull. Eleg. 3. B. I. ver. 41, *&c.*

Illo non validus ſubiit juga tempore taurus,
Non domito frænos ore momordit equus:
Non domus ulla fores habuit; non fixus in agris,
Qui regeret certis finibus arva, lapis.

No ſturdy Ox did to the Yoke ſubmit,
No broken Courſer champ'd the galling Bit:
No Door the fearleſs Cottager conceal'd,
And the wide Earth was but a common Field.

Senec. Octav. ver. 402, *&c.* Act. ii.

—— Cingere aſſuerant ſuas
Muris nec urbes; pervium cunctis iter.
Communis uſus omnium rerum fuit:
Et ipſa tellus læta fœcundos ſinus
Pandebat ultro.

—— Nor had they yet begun [Scene
To fence their Towns with Walls, but Nature's
Lay a free Road: The univerſal Store
Supply'd Mankind; at large they liv'd and fed.
The willing Earth her fruitful Boſom ſhook,
Rich with diffuſive Plenty ——

Again in his *Hippolytus*, Act. ii. ver. 525, *&c.*

—— Prima quos mixtos deis
Profudit ætas, nullus his auri fuit
Cœcus cupido; nullus in campo ſacer
Diviſit agros arbiter populis lapis.

—— —— The firſt good Race of Men,
Companions of the Gods and mixt with Heaven,
Not blindly led by Avarice and Gold,
Forbore to fix the conſecrated Stone
To bound the Fields, and judge between the Swains.

Thus 'tis one of the *Alterations* which *Ovid*, *Met.* i. ver. 135, *&c.* deſcribes in the Iron Age,

Communemque prius, ceu lumina ſolis, & auras,
Cautus humum longo ſignavit limite menſor[d].

Then firſt the wary Swain inclos'd his own;
All common was before, as Air, or Sun.

Theſe[2], and the like poetical Relations, *Lactantius*[e] interprets in the following manner:

" *Nec ſignare quidem aut partiri limite campum*
" *Fas erat: in medium quærebant.*

That is, God Almighty gave the World in common to Men, that they ſhould live freely together, not that furious Avarice ſhould claim the whole Store to itſelf, or that any one ſhould want what was produc'd for the ſake of all. This Saying of the Poet we ought not to take ſo ſtrictly, as to imagine that in thoſe Times there was no private Poſſeſſion; but in a figurative Senſe, ſo uſual in thoſe Compoſitions; giving us to underſtand, that Men were ſo generous and liberal, as not to ſhut up to themſelves the Fruits of the Earth, or to lie hovering over a conceal'd and ſeparate Store; but that they admitted their poorer Neighbours to the common Enjoyment of what they had gotten by their own Pains. But indeed as no ſenſible Perſon will let the Poet perſuade him, that theſe primitive Mortals had *omnia in medium quæſita*, or a poſitive Communion of Goods; ſo the Reaſon which *Lactantius* aſſigns to thoſe Expreſſions, doth not in our Judgment appear ſatisfactory: For as on the one

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[a] *Plin.* Nat. Hiſt. l. xxiii. Procem. de Arborib. *Pomona* urgeth this in her own Honour and Defence, " That the firſt Food of " Men was owing to Trees; and that this taught them to look upright towards Heaven: Nay, that they might ſtill find a Suſte" nance from the ſame Stores, without Corn and other Products of the Earth.

[b] Lib. xliii. c. 1.

[c] See this Place illuſtrated by *Seneca*, Epiſt. 90.

[d] *Macrob. Saturn.* i. c. 8. " The *Romans* appointed the Temple of *Saturn* to be their Trea" ſury, for this Reaſon, becauſe during the time of his Reign in *Italy* no Robbery was committed: Or, becauſe under him there " were no diſtinct Poſſeſſions or private Eſtates,

Nec ſignare *quidem aut partiri limite campum*
Fas erat: in medium quærebant.

" therefore it was thought convenient to lodge the common Treaſure under his Protection, in whoſe Reign all things had been common to all Men.

[e] Inſtitut. l. v. c. 5.

Mr. Barb. *NOTES* on §. viii.

[1] *Juſtin*'s Words are, *Italiæ cultores primi Aborigines fuere, quorum rex Saturnus tantæ juſtitiæ fuiſſe traditur, ut neque ſervierit ſub illo quiſquam, neque quicquam privatæ rei habuerit; ſed omnia communia & indiviſa omnibus fuerint, veluti unum cunctis patrimonium eſſet.*

[2] *Lactantius*'s Words are, *Quippe cum Deus communem omnibus terram dediſſet, ut communem degerent vitam, non ut rabida, & furens avaritia ſibi omnia vindicaret, nec ulli deeſſet, quod omnibus naſceretur. Quod Poetæ dictum* [viz. *Virgilii in his verſibus*, nec ſignare, &c. *ſupra memoratis*] *ſic accipi oportet, non ut exiſtimemus nihil omnino tum fuiſſe privati, ſed more Poëtico figuratum, ut intelligamus tam liberales fuiſſe homines, ut natas ſibi fruges non includerent, nec ſoli abſconditis incubarent, ſed pauperes ad communionem proprii laboris admitterent.*

ſide Men were not then perhaps greatly inclin'd to Covetouſneſs, being yet ignorant of Wealth, and finding an eaſy Supply of Food from Nature's Store, whilſt they remain'd Strangers to Delicacies and Exceſs; ſo, on the other ſide, we do not ſee what matter they could have for Bounty, when there was no occaſion to ſcrape up Treaſure. 'Tis a good Conſideration that ſome recommend to us, in order to a right underſtanding of the whole Fable of the golden Age; that the diſpoſitions of ruſtick and barbarous People make them almoſt natural Friends to Eaſe and Lazineſs, and Enemies to Labour; that the more rude and ſimple way of Life any Perſons are engag'd in, the leſs inclinable they would be to Plenty and Luxury, to Magnificence and Splendor, which commonly require much Induſtry and Pains [a]. And that, laſtly, 'tis the general Vice of old Perſons to commend the Times of their young and flouriſhing Days, to deſpiſe for the moſt part preſent things, and what they ſee before them; extolling whatever comes mark'd with the Advantages of Age; and that therefore it ſeems very probable, thoſe rude and ignorant Men, when the Legiſlators compell'd them to a Life of Manners and of Induſtry [3], might be very uneaſy under the Change, and frequently ſend out a Wiſh for their Acorns and their Idleneſs. From which Complaints of their old *Sires* Poſterity might frame their Dreams about the golden Age. This Conjecture is ſtrengthen'd by the Character which *Saluſt* [b] [4] gives of the *Aborigines*, the People of thoſe primitive Times; *They were*, ſays he, *a clowniſh Race of Men, without Laws or Government, tied up to no Order or Rule.* And *Ovid* [5] himſelf placeth the Happineſs of the golden Days chiefly in this; that Men obeyed Faith and Honeſty *without Law*, and fear'd no Puniſhment, becauſe no civil Societies were yet eſtabliſh'd.

Contentique cibis nullo cogente creatis,
Arbuteos fœtus, montanaque fraga legebant,
Cornaque, & in duris hærentia mora rubetis,
Et quæ deciderant patulâ Jovis arbore glandes [c].

Content with Food which Nature freely bred,
On *Wildings* and on *Strawberries* they fed;
Cornels and *Bramble-berries* gave the reſt,
And falling *Acorns* furniſh'd out a Feaſt.
Mr. *Dryden.*

There's a famous Place produc'd on this Head from *Tully*'s firſt Book of *Offices*, c. 7. [6] *'Tis the part of Juſtice to diſtinguiſh between Things common and peculiar, and to uſe them accordingly. Now nothing is private by Nature, but as it becomes ſo, either by antient Poſſeſſion, as appropriated by the firſt Occupant, or by Conqueſt, upon the Right of Arms*; or elſe *by Law, Agreement, Condition, or Lot. Hence come the Names of the* Arpinate *and the* Tuſculan Lands. *And in like manner are private Poſſeſſions ſettled and deſcrib'd. Since therefore the Things which Nature made common, have by this means been turn'd into Property, let every Man quietly enjoy his Lot: Whoever covets more than this, ſhall be deem'd to have violated the Law of human Society.*

Horace is ſometimes brought in, giving his Judgment amongſt the reſt.

Nam propriæ telluris herum natura, neque illum,
Nec me, nec quenquam ſtatuit: nos expulit ille;
Illum aut nequities, aut vafri inſcitia juris;
Poſtremum expellet certè vivacior hæres.
Nunc ager Umbreni ſub nomine, nuper Ofelli
Dictus erat; nulli proprius; ſed cedet in uſum
Nunc mihi, nunc alii.
Lib. ii. Sat. 2. ver. 129, &c.

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[a] Add *Montaign*'s Eſſays, lib. i. c. 30.

[b] *Catilinar. Bell. init.* Add the Character given of the ſame People by *Dion. Halicarn.* l. i. p. 8, &c. Edit. *Oxon.*

[c] *Met.* i. ver. 103, &c. As for what follows about the perpetual Spring, the ſpontaneous Production of the choiceſt Fruits, and the Rivers overflowing with Milk and Nectar, 'tis no truer than that extravagant Rant of *Pherecrates*;

Ποταμοὶ μὲν ἀθάρης, καὶ μέλανος ζωμȣ̃ πλέοι,
Διὰ τῶν ςενωπῶν τονθολυγȣ̃ντες ἔῤῥεον
Αὐταῖσι μυςίλεσι καὶ ναςῶν τρύφη·
Φύσκαι δὲ καὶ ζέοντες, ἀλλάντων τόμοι παρὰ
Τοῖς ποταμοῖς σίζοντες ἐκεχυντ' ἄντ' ὀςράκων·
Ὀπταὶ κιχλαὶ γὰρ ἀνάβρας ἠρτυμέναι περὶ τὸ ςόμα
Ἐπετόντ' ἀντιβολȣ̃σαι καταπιεῖν.

The Rivers run with Oatmeal and black Broth,
Murmuring, when new-bak'd Biskets ſtopp'd their Speed.
Links and hot Sauſages in Fiſh-pools ſtood,
And fatted Oyſters ſkimm'd the wealthy Stream.
Fowls nicely dreſs'd ſerv'd up themſelves, and flew
About Mens Mouths, ſtill courting them to feaſt.
See *Athenæus*, l. vi. c. 19. and *Pollux*'s *Onomaſticon*, l. vi. §. 58.

Mr. Barb. *NOTES* on §. VIII.

[3] Mr. *Le Clerc* has throughly proved, that the Men, that lived in the Times when the golden and ſilver Ages were ſaid to have been, were not a whit better than thoſe of the following Ages. See his Notes upon *Heſiod*'s *Theogonia*, ver. 211, and what he has extracted out of it himſelf in an Article added to his Memoirs, *De Trevoux* in *March* and *April* 1701, Tom. i.

[4] *Saluſt*'s Words are, *Cumque his* [*Trojanis*] *Aborigines, genus hominum agreſte, ſine legibus, ſine imperio, liberum atque ſolutum.*

[5] This Poet makes the Felicity of the golden Age partly to conſiſt in this, That they had neither Laws nor Puniſhments, but every one was free, in theſe Lines;

Aurea prima ſata eſt ætas, quæ, vindice nullo,
Sponte ſua ſine lege fidem rectumque colebat.
Pœna metuſque aberant. ———

becauſe they had no Cities.

[6] *Tully*'s Words are, *Deinde juſtitiæ munus eſt, ut communibus utatur quis pro communibus, privatis ut ſuis. Sunt autem privata nulla natura, ſed aut veteri occupatione, ut qui quondam in vacua venerunt, aut victoria, ut qui bello poſiti ſunt, aut lege, pactione, conditione, ſorte. Ex quo fit, ut ager Arpinas Arpinatum dicatur, Tuſculanus Tuſculanorum, ſimiliſque eſt privatarum poſſeſſionum deſcriptio. Ex quo, quia ſuum cujuſque ſit, eorum quæ fuerant natura communia, quod cuique obtigit, id quiſque teneat, ex quo ſi quis ſibi appetet, violabit jus humanæ ſocietatis.* But Mr. *de Bynkerſhoek*, in his Treatiſe *De Dominio Maris*, printed in 1703, Chap. i. believes, that about the middle of this Paſſage there is a Corruption, which he thus amends, *aut lege, PACTIONE, CONDITIONE, ex quo fit, ut ager FORTE Arpinas Arpinatum dicatur.* Upon this Suppoſition the Tranſlation muſt be, *Or Laws and Compacts,* whence it is that the Country of *Arpinas*, for Example, belongs to that City, &c. The Reaſon why this Author changes *ſorte* into *forte*, and puts it in another Place, is, becauſe the parting of Goods made by Lot always ſuppoſes an Agreement publick or private. He might likewiſe have ſaid, that *Cicero*, who often uſes Words ſynonymous, and is not very exact in his Diviſions, would, after he had ſpoken of Covenants in general, add ſome particular kind, as he knew is very common in the beſt *Latin* Authors. But then ſtill there will a Doubt remain, whether in *Cicero*'s Days the Word *FORTE* was uſed in the Senſe, for Example, as the *Roman* Lawyers uſe it now. Nor is the Law which Mr. *Bynkerſhoek* quotes here very ſuitable in my Opinion to eſtabliſh that Senſe, for there 'tis *niſi forte*, an Expreſſion very common, in which the laſt Word is not likely to ſignify, *verbi gratia*, Digeſt. l. vii. tit. 1. *De uſufructu*, &c. leg. 9. §. 7.

Nature, nor him, nor me, nor any made
The proper Maſter of the Stage we tread.
He turns out me; and him ſome vile Deceit,
Or a dull Head at Law ſhall ſend to ſhare my Fate.
At leaſt he one day muſt, with all his care,
Yield to the ſtronger Vitals of his Heir.
Oſellus lately gave the Farm its Name,
And now *Umbrenus*: None of Right may claim
The *Property*; the *Uſe* is paſſing ſtill;
And all are Fortune's *Tenants at* her *Will*.

——— *Tanquam*
Sit proprium cuiquam, puncto quod mobilis horæ
Nunc prece, nunc pretio, nunc vi, nunc ſorte ſupremâ
Permutet dominos, & cedat in altera jura.
Sic quia perpetuus nulli datur uſus, & hæres
Hæredem alterius, velut unda ſupervenit undam,
Quid vici proſunt, aut horrea? L. ii. Ep. 2. v. 171, &c.

As if the Treach'rous World had ever ſhown
A thing we might preſume to call *our own!*
Since in one fleeting point of Time, convey'd
By Grant or Sale, to Force or Fate betray'd,
New Lords it may enrich, new Titles wear:
And thus, ſince none are fix'd, but Heir to Heir
Succeeds, as Wave to Wave; in vain we learn
To lengthen out a Street, or croud a uſeleſs Barn.

We have an Epigram of *Lucian*, Tom. ii. p. 838. which is alſo recited in the *Anthologia*, much to the ſame purpoſe: 'Tis a Farm that ſpeaks [9].

Once *Achemenides* I ſerv'd, and now
Menippus, and to thouſands more ſhall go:
Each vain Poſſeſſor cheats himſelf a while,
But Fortune is the *Miſtreſs* of the Soil.

The ſame Author hath told us as much in Proſe. *Nature* [10], ſaith he, *hath made us Lords and Proprietors of nothing; but obtaining by Law and Succeſſion the uſe of things, for an uncertain Period, we paſs for the* ὀλιγοχρόνιοι δεσπόται, *the temporary Maſters or Poſſeſſors of them; and when the appointed Term is over, then another receives them from our Hands, and enjoys the ſame Name and Title.* But indeed theſe kind of Speeches refer rather to the Inſtability of Fortune and of human Poſſeſſions, than to the Original of Property [a].

IX. We proceed to examine *Grotius*'s Opinion; [b] in which we ſhall paſs over what he delivers contrary to the receiv'd Doctrine of the Church, as ſufficiently refuted by other Hands. He tells us then, That *God conferr'd on Mankind a Right in General to things of this inferior Nature, both immediately upon the Creation of the World, and again upon the repairing of it after the Flood.* This we allow in the following Senſe, that God impower'd Mankind to uſe theſe earthly Things, *in a General Manner*; that is, without determining whether they ought to poſſeſs, either under Diviſion, or in Common, all, or only ſome things; but leaving this whole Matter to the Judgment and the Choice of Men, to ſettle it according as they ſhould think moſt convenient for the publick Peace and Welfare. But we ought by no means to ſuppoſe, that any poſitive Communion was at the beginning inſtituted by divine Appointment; from which Men afterwards departed by their own Decree; for, on the contrary, with regard to Almighty God, things were rather laid, as a Free-Stock, to be us'd in any Service that Men ſhould apply them to. Amongſt whom, ſo long as the very Subſtances of things were not aſſign'd to particular Perſons, we muſt conceive this tacit Compact to have prevailed, That every Man ſhould take for his Occaſions whatever he pleas'd, eſpecially of the Fruits, and ſhould conſume what was in its Nature conſumeable. And ſuch a univerſal uſe of things ſupplied, in ſome ſort, the room of Property; and what any Perſon had thus taken for himſelf, none could deprive him of, without Injuſtice. Now as the Simile borrow'd from the Theatre, which *Grotius* produceth, fitly enough illuſtrates this Matter [c] [1], ſo his other Inſtance of the *Aborigines* is not applicable, as *Juſtin* deſcribes them [d]. For the Hiſtorian's Words repreſent ſome poſitive Communion, quite different from the primitive; as if the whole Country was indeed the Poſſeſſion of the People, but not yet divided into private Eſtates; whilſt Men reſted ſatisfied with the Fruits produced without their Aſſiſtance, ſuch as the vaſt extent of the Lands and Woods afforded them in great abundance, their Number being as yet inconſiderable: But that they gathered theſe Fruits into a common Store doth not ſeem probable. Thus far *Grotius* [e] is in the right, that were the firſt negative Communion to continue, without diſturbing the general Peace, Men muſt live with great plainneſs and ſimplicity, contented to feed on what they found, to dwell in Caves, and either to go naked,

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[a] As *Tully*, for the ſame reaſon, affirms, *prædiorum nullam eſſe gentem*, That Eſtates are not enſured to Families and Kindred, pro *Balb.* c. 25. in fin. [b] Lib. ii. c. 2. ſ. 2. [c] Vid. *Arrian. Epictet.* l. ii. c. 4. [d] Lib. xliii. c. 1. [e] Lib. ii. c. 2. ſ. 1. n. 4.

Mr. Barb. *NOTES on* §. viii, ix.

[9] The Greek is thus,

Ἀγρὸς Ἀχαιμενίδου γενόμην ποτὲ, νῦν δὲ Μενίππου,
Καὶ πάλιν ἐξ ἑτέρου βήσομαι εἰς ἕτερον.
Καὶ γὰρ ἐκεῖνος ἔχειν με ποτ' ᾤετο, καὶ πάλιν οὗτος
Οἴεται, εἰμὶ δ' ὅλως οὐδενὸς, ἀλλὰ τύχης.

[10] *In Nigrino. Natura quidem nullius rei Domini ſumus, lege autem, & per ſucceſſionem uſum earum in tempus incertum adquirentes,* ὀλιγοχρόνιοι δεσπόται, *temporarii poſſeſſores habemus; ac poſtea quam terminus ille conſtitutus præterierit, tunc rurſus alius eadem accipiens nomine illo fruitur,*

[1] The Compariſon is taken out of *Cicero de finib. bonorum & malorum*, l. iii. c. 20. *Sed quemadmodum theatrum, quum commune ſit, recte tamen dici poteſt, ejus eſſe eum locum, quem quiſque occuparit; ſic in urbe mundove communi non adverſatur jus, quo minus ſuum quodque cujuſque ſit.* And in the Note he quotes a part of a Paſſage in *Seneca*, which we may ſee at length, §. ii. n. 16. Our Author alſo refers us to a Paſſage in *Arrian*'s Diſcourſe on *Epictetus*, where we find the ſame Thought, upon the occaſion of that Philoſopher's Saying, That all Women by Nature were common, till the Laws aſſigned to every Man his own. Ἄγε, τὸ δὲ θέατρον οὐκ ἐστὶ κοινὸν τῶν πολιτῶν; ὅτε οὖν καθίσωσιν, ἐλθὼν, ἄν σοι φανῇ, ἔκβαλέ τινα αὐτῶν· οὕτω καὶ αἱ γυναῖκες φύσει κοιναὶ, ὅταν δὲ ὁ νομοθέτης, ὡς ἑστιάτωρ, διέλῃ αὐτὰς, οὐ θέλεις καὶ αὐτὸς ἴδιον μέρος ζητεῖν, ἀλλὰ τὸ ἀλλότριον ὑφαρπάζεις καὶ λιχνεύεις; l. ii. c. 4. in the end. This Example might prove to our Author, that there is no need of any Agreement to acquire a particular Right in that which is otherwiſe common, ſince every one ſeats himſelf in a Theatre, where he can, without the conſent of others, who have a Right as well as he to take the firſt vacant place. But of this I have ſpoken enough in the Notes before-going.

or to cover their Bodies with the Barks of Trees, and the Skins of Beaſts: Whereas, if they grew more inclined to a Life of Elegance and Refinement, the Conveniences of which muſt be acquir'd by Diligence; there was a neceſſity of introducing diſtinct Properties. But when he adds, *That this Communion might have laſted, had Men liv'd under the Influence of an eminent Charity and Friendſhip towards each other*; he confounds negative Communion with poſitive; ſuch as was obſerved by the *Eſſenes* of old, [a] by the primitive Chriſtians inhabiting *Jeruſalem*, and by thoſe who now follow an Aſcetick Life [b]: For this can never be conſtituted nor kept up, except amongſt a few Perſons, and thoſe endued with ſingular Modeſty and Goodneſs. When Men are ſcattered into different places, and fixed at a diſtance from each other, 'twould be a fooliſh Labour to gather all the Proviſion into one Heap, and to diſtribute it out of the common Maſs. And where ever there is a great Multitude of People, many muſt of neceſſity be found, who through Injuſtice and Avarice, will refuſe to maintain a due Equality, either in the Labour required for the getting of the Fruit, or afterwards in the Conſumption of them. *Plato* inſinuates as much as this [c], when he makes only Deities, and the Sons of Deities, Members of the Republick where he would have this Communion abſolutely obtain. But 'tis idle to believe, that when Men were divided into numerous Families, they neither actually eſtabliſh'd, or had any deſign to eſtabliſh ſuch a Communion [d]. Laſtly, it's a true Remark of *Grotius*, [e] *That things were at firſt turn'd into Property, not by the bare Act of the Mind, or by Thought and inward inclination.* For neither could others know what any Perſon intended to keep for his own, to direct them in abſtaining from it; and beſides, 'twas very poſſible that many ſhould be Competitors for the ſame thing. There was need therefore of ſome external Act [2], or of formal *Seiſin*, which, that it might be capable of producing a Moral Effect, or an Obligation in others to forbear what each Man had thus taken for his peculiar, muſt neceſſarily have depended on the force of ſome precedent Covenant: When things which lay together in Common were to be parted amongſt many, then the Buſineſs was tranſacted by *expreſs* Covenant. But a *tacit* Covenant was ſufficient, when Men fix'd a Property in things which the firſt Dividers had left for waſte [3]. For we muſt ſuppoſe them to have agreed, that whatever in the primary Partition had not been aſſign'd to any particular Owner, ſhould belong to him who firſt took poſſeſſion of it.

X. Amongſt the other Moderns, many, as to the Origin of *Property*, eſtabliſh a quite contrary Notion. Let us take the pains to ſee what ſtrength their Arguments afford. They acknowledge then a double Senſe of the Term *Communion*, ſo as to import either that which being undivided, and having its Property fix'd in many together, affords a common Service to each Perſon; or that which being in no manner appropriated, lies free for the promiſcuous Uſe of all. But then they exclude from the primitive State of things, not only the former Communion (which is no more than we have done) but likewiſe the latter; and ſo deny that things were in the beginning expoſed as a general Store, void of Property in every kind; and therefore (which is the conſequence of this) that Properties ſprung originally from Diviſion, and from firſt Poſſeſſion. The Reaſon they lay down is to this purpoſe; *Whatever Right that was, which either in Kind or Degree the firſt Man enjoy'd over other Creatures, he receiv'd it all in that very manner from his Creator. If therefore he receiv'd a bare Power of uſing, without any ſettled Property, his Deſcendents could not afterwards uſurp a Property, without incurring the Guilt of unlawful and covetous Deſire, and of arrogating that to themſelves, which their Maker had forbidden them to aſſume.* The Anſwer to this is eaſy, from what hath been formerly advanced: Man receiv'd indeed, by the Divine Donation, a Right to things: but ſuch a Right as was indefinite, general, and indifferent, neither reſtrain'd to Property, nor to Communion; and ſuch as Men might reduce, as it were, into any particular Form, according as Reaſon or Neceſſity ſhould adviſe. Whence it is alſo clear, that the primitive Communion did not denote a bare *Uſus fructus*, but Men were at their liberty to quit it by Agreement, and to eſtabliſh either Property or poſitive Communion in its ſtead. Nor is this any Conſequence; the firſt Man did not receive or aſſume a Right to things in the formal Nature of Property, therefore his Poſterity could not exerciſe it under that Formality. Neither doth that Divine Grant expreſs'd in holy Scripture, deſcribe any determinate manner of Property, but only and indefinite Right of applying things to ſuch Uſes as ſhould be agreeable to the Wiſdom, and to the Occaſions of Men; which Right may be exercis'd full as well in a negative Communion, as in a poſitive. Beſides, 'tis not fair thus to conclude; *Men receiv'd a Right to things from the Donation of God, therefore Property did not firſt ariſe from Occupancy and Diviſion.* For this Donation of God only gave Men full Security and Satisfaction, that 'twas conſiſtent with the Divine Will they ſhould conſume on their Neceſſities, the Works of their common Maker. But Property, ſtrictly ſo called, ought to have produc'd this Effect, in relation to other Men, that none elſe ſhould invade what had been adjudg'd to one particular Poſſeſſor. And here certainly there was need of ſome human Act and Agreement, that others might know what belong'd to every diſtinct Perſon, ſo as to quit all Pretenſions to it, when thus

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[a] Of whom amongſt other Authors, ſee *Phil. Jud.* in his Book inſcrib'd, *that every good Man is free.*

[b] Add *Martin.* Hiſt. *Sin.* l. v. c. 34.

[c] LL. l. v. p. 847. Edit. *Wech.*

[d] Add *Jo. Strauch.* diſſert. de *Imper. Maris*, c. 1. ſ. 8.

[e] *Ubi ſupra*, n. 5.

Mr. BARB. *NOTES on* §. IV.

[2] An External, I grant, but not always an Actual and Corporal Poſſeſſion, properly ſo call'd, as ſhall appear by what is ſaid c. 6. much leſs an Antecedent Agreement, as I have ſhewed above.

[3] This firſt Parting or Diviſion of Goods, which our Author ſuppoſes, is a meer Chimera. Mankind never met together to regulate and order, what every one for the future ſhould poſſeſs as his own, out of thoſe Goods, which were before common. They poſſeſſed themſelves of them by inſenſible degrees, one got one thing, another another; ſome to day, others to morrow; one after this manner, another after that. All that can be ſaid is, that thoſe who invaded a Country all at the ſame time, or were inclined to poſſeſs themſelves of it, for example, did agree ſometimes to part it among them for Peace-ſake, and to ſecure themſelves a peaceable poſſeſſion of what fell to them. Sometimes alſo ſeveral perſons agreed together, that one ſhould go and ſearch one Coaſt and another another, where to provide for and ſettle themſelves.

appropriated before. A Theatre is erected by the State for the common Uſe of the Subjects: But that in the time of the Show, this or that Perſon ſhould obtain a particular Seat, of which others ought not to deprive him, is owing to ſome corporal Act, that is, to his firſt ſeizing upon it. Nay, each Perſon may, with the conſent of the Publick, acquire a Seat which he ſhall hold by a perpetual Right. Thus, before any human Act had paſs'd capable of introducing Property, every thing muſt be conceiv'd to have lain free and *common* (in a negative Senſe) to all; that is, not to have appertained to one rather than to another. But when Diviſions were eſtabliſh'd by expreſs, or Poſſeſſions confirm'd by *tacit* Covenant, then things paſſed out of this negative Communion, into ſettled Properties.

If any will come ſo low as to aſſert, *That by the Dominion which God conferr'd on Men antecedently to any Acts of theirs, is meant only a potential Dominion, or a Power of taking and poſſeſſing; and conſequently no more than a Dominion* in actu primo; *from which they paſs'd on to Poſſeſſion, and from Poſſeſſion to Dominion* in actu ſecundo: Theſe Men differ from our Opinion in Words only, not in Senſe. Yet in this reſpect they are not ſufficiently accurate, that call the Power of entring upon things, Dominion *in actu primo*; and the Right which follows Poſſeſſion, Dominion *in actu ſecundo*. For the Power of acquiring any Right, and the Right it ſelf now habitually inhering, yet without Operation or Exerciſe, are different things. As 'tis quite another caſe to be a Muſician *potentially*, and not to uſe the Art, when the Habit of it hath been fully attain'd. Nor is their potential Dominion very aptly illuſtrated by the Example, they bring of Inheritances; *the Dominion of which, upon the Teſtator's Death, paſſeth out of the Habit, or Power, directly and immediately upon the Heir, without the Formality of taking poſſeſſion.* For, beſides that to paſs *out of a Habit*, or, *out of Power*, is by no means the ſame thing; there is always a Fiction of Civil Law conceiv'd to interpoſe in the Caſe which they alledge. 'Tis the Rule of Nature, that in the transferring of Dominion from one to another, it ſhall be requiſite for the former Perſon to tender what is thus convey'd, and for the latter to accept and receive it. But inaſmuch as the Laws have conſented, that the Will of the Teſtator ſhall remain uncertain and changeable 'till his laſt Breath, and ſhall be accounted ſecret 'till after his Deceaſe; they therefore hold, as 'twere, in ſuſpence, the Will of the deceas'd Perſon importing the conveyance of Goods on his Heir, 'till ſuch time as the Heir ſhall have ſignified his *Acceptance*; or (as ſome may chooſe to expreſs it) they bring back the Heir's Acceptance to the Moment in which the Teſtator expired, his Will being then properly fix'd and ſettled; ſo that from that time the Goods are conceiv'd to paſs immediately to the Heir, as deliver'd to him. This Fiction produceth ſo far the Effect of Dominion in the Heir, as that he may challenge the Inheritance, even before he is actually poſſeſſed of it. And without ſuch a *Fiction* [1], the Dominion would no more belong to a Man in an Inheritance before actual *Entrance*, than it doth in a Donation before *Acceptance*. And hence too, amongſt Perſons who live only under the direction of the Law of Nature, which is for the moſt part unacquainted with theſe *Fictions* introduced by civil Conſtitutions, there will be no admittance given to any *poteſtative Poſſeſſion* as oppoſed to *actual*; nor will the bare Right and Power of acquiring Poſſeſſion obtain the Name of Poſſeſſion it ſelf [a].

XI. Many have thought fit to appeal to the Authority of Scripture in this Point; whence they have ſuppos'd that it may be made evident, that there never was any ſuch *Communion* as we have aſſerted, in the World: They tell us, *That the univerſal Maſs of things paſs'd immediately to* Adam, *by virtue of the Divine Donation; ſo that he held it as his own proper and entire Poſſeſſion. The force of which Propriety was ſuch, that it not only excluded all others from the univerſal Poſſeſſion which he enjoy'd, but likewiſe from the Right of taking to themſelves any one particular thing: Inſomuch that even his Children could claim no Property, ſo long as they continued in the Family of their Father, unleſs he convey'd ſomewhat to them in the manner of a* peculium, *or ſeparate Stock: That they became Proprietors, firſt, by poſſeſſing that ſhare which he aſſigned them, when diſmiſs'd from under his Tuition; and afterwards, upon his Death, by dividing his Store amongſt themſelves* [b]. They explain their Notion in this manner: *The Form of God's Grant conferr'd a Right only on the primitive Pair, before they had Children. Therefore either the Property of things was given to* Adam *and* Eve *originally, ſo that their Deſcendents were to derive from them all their Title to any Poſſeſſion; or elſe the whole World was, in the Perſon of* Adam, *beſtow'd in common on all Mankind. The latter of theſe as it implies ſeveral Difficulties, ſo it is particularly repugnant to the Right of* Occupancy, *which obtains only in things void of a Poſſeſſor. For if the entire Maſs was given to all Mankind, it doth not appear, how a particular perſon could by ſeizing any thing to himſelf, convert it into his diſtinct Property, excluſive of human Race in general, or, ſo as to hinder Men from making any Pretenſions to it by virtue of their common Right. For ſuch is the Nature of things which lie in common, and which admit only of undivided Shares, that every ſingle Atom of their Subſtance is no leſs common, and no leſs undivided, than the whole; ſo that if any private Man apply it to himſelf alone, he is an injurious Robber of the Community. But now, they who defend a primitive Communion, confeſs that the firſt Occupants of things did by that Act acquire ſuch a diſtinct Right over thoſe things, as excluded the Right of all others to the ſame.* What Reply may be made to all this, is evident from the Aſſertions already confirm'd [1]. The divine Donation conferred on Man a Right of applying other Creatures to his uſe; which Right was indifferent to poſitive

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[a] Vid. *Strauch. de imp. mar. c.* 1.

[b] Comp. *Ziegler.* ad *Grot.* l. ii. c. 2. ſ. 2.

Mr. Barb. *NOTES* on §. x, xi.

[1] So the Civil Law ſpeaks, *Omnis hæreditas, quamvis poſtea adeatur, tamen cum tempore mortis continuatur*, Digeſt. L. l. tit. 18. *De diverſ. Regul. Juris*, leg. 138. See c. 9. §. 2. following.

[1] Mr. *Hertius* obſerves here, that this permiſſion which was given to *Adam*, and renewed to *Noah*, does make no mention of any thing but living Creatures, as I have already obſerved above, §. 4. Note 3. out of Mr. *Lock*, of whom it appears from other places, that Mr. *Hertius* had ſeen the Treatiſe of Civil Government in the *French* Tranſlation which was printed in 1691.

Communion, or to Property; being of neceſſity to be turn'd into one of theſe, before it could take any Effect with relation to other Men. And therefore when others add further, *That the common or publick Dominion of Mankind over things was given by God, under Condition, that they ſhou'd parcel it out, and conſtitute it private; for which reaſon, it neither can, nor ought to be conceived without a reſpect and tendency towards private Dominion, ſo to be eſtabliſhed as was agreeable to a rational and a ſocial Nature:* This we may without any inconvenience interpret on our ſide. That is, God by his firſt Grant plac'd things in a negative Communion: But ſince that was unable to procure the ſafety and peace of Society, when human Race was multiplied, and Life began, by the Arts of Induſtry, to be poliſh'd and improv'd, Men eaſily apprehended that 'twas the divine Pleaſure they ſhould introduce diſtinct Properties. In order to the actual Settlement of which, it was requiſite that ſome Tranſactions and Agreements of Men ſhould precede. For that a thing ſhould be appointed by the Will of God, and yet ſhould not be introduced but by ſome antecedent Compact of Men, ought not to be look'd on as an inconſiſtency: As it is certainly none, that God would have Mankind propagated by Marriage, not by uncertain Luſt; and yet Marriage is not actually contracted between particular Perſons without ſome Covenant paſſing before. Farther, ſince poſitive Communion and Property both imply a relation to other Men, it can with no manner of accuracy be ſaid, That all created things were proper to *Adam*; but only thus, That he held the Dominion of all things, not *formally*, but *permiſſively*; inaſmuch as there was then no Right of any Perſon elſe to interfere with his, and to hinder him from converting every thing to his own Uſe, had there been occaſion. When God was pleaſed to give him a dear Partner and Companion, they agreed to hold this indefinite Right over things without dividing it: as being united to each other in the ſtricteſt Band of Society: For which Reaſon many Nations at this Day obſerve a Communion of Goods between the Huſband and the Wife. Nor was there any need of ſeparate Properties, ſo long as *Adam*'s Children, being yet in their Minority, were to be maintain'd by their Father, and made but one Houſe. For though in the uſe of things, they were at that time obliged to conform to their Father's Pleaſure, yet this proceeded not from his *Dominion* (ſtrictly ſpeaking) over the *Things*, but from his paternal *Power* and *Authority* over the *Perſons*. Therefore the *Property* of things came then to be diſtinct, when by Conſent of the Father the Sons fell into ſeparate Families; which Separation was undoubtedly owing to the Emulation between Brothers; and to another good Reaſon, that every one's own Induſtry might be his own Advantage; as the Idleneſs of others might be a Puniſhment only to themſelves. Nor muſt we believe that the whole World was preſently ſhar'd out amongſt that ſmall Number of Perſons; or that all things were turn'd into *Property* by one Act, and at one time. But it was ſufficient at firſt to fix a *Property* in thoſe things, which either afford an immediate uſe, not capable of being divided amongſt many; as Cloaths, Cottages, and Stores of Proviſion already gather'd by particular Men; or which require Induſtry and Improvement to make them fit for Service; as Houſhold Goods, and Inſtruments, Cattle and Fields [2]. By degrees, what remain'd was brought under the ſame Condition; according as either the Inclination, or the Number of Men directed and adviſed. Thus the Paſturage continued a great while in its firſt and common State; till upon the abundant Increaſe of Cattle, Quarrels ariſing, the Diviſion of this likewiſe was made neceſſary to Peace and Concord. As for that part of the Argument, *That the Right of Occupancy cannot be admitted, where Poſſeſſion belongs to a general Body*; this will hold good againſt thoſe who pretend any poſitive Communion to have been the primitive State of Things; in which indeed no private Perſon can take any thing to himſelf, excluſive of the whole Society. But the primitive Condition in which we have plac'd things, is equally diſtant from poſitive Communion, and from Propriety in the ſtrict ſenſe of the Word: And we aſſert, that before Occupancy can produce Dominion, it is neceſſary that ſome Compact (a tacit one at leaſt) ſhould have been firſt ſettled to that Effect.

XII. Others form their Scripture Account of the Origin of Dominion in this manner: *That God gave our firſt Parents that common Dominion which he deſign'd for all Men in general, to be held undivided; inaſmuch as the primitive Pair repreſented the Perſon of all human Race: In which ſenſe it may ſtill rightly enough be ſaid, That the Dominion of the World, or of the things in the World, as they are capable of paſſing into Property, belongs to Mankind. But this common Dominion doth not exclude private; ſince we neither can, nor ought to conceive it without a reſpect and tendency to private Dominion, ſo to be conſtituted as ſhould be agreeable to a rational and a ſocial Nature. But in* Adam *the latter of theſe Dominions met in Conjunction with the former, excluding his Children without any previous Ceſſion or Surrendry* [a]. Now, as to this Account, we will make no Quarrel about words; that is, we allow the Name of *common* Dominion to what we ourſelves have rather choſe to call a Right of uſing the Creatures, inherent in Men by virtue of the Divine Conceſſion; provided this *common* Dominion, conſider'd by itſelf, be ſuppos'd to obtain no Effect between Man and Man. On which Point we have before affirm'd, that Men might have reſted ſatisfy'd with that Right of uſing things as they lay in common; and that 'twas not neceſſary ſeparate Dominions ſhould immediately be introduc'd, ſo long as Men were yet few in number, and follow'd a ſimple unimprov'd way of living; but when their Race was conſiderably multiplied, and when Induſtry had advanc'd the Conveniences of Life, then the neceſſary Regard to the Preſervation of Society recommended the Diſtinction of Properties; yet ſo as that things did not paſs all at once into this Condition, but ſucceſſively, according as the occaſional Methods of Peace and Agreement ſeem'd to demand. But that *Adam* held a *private* Dominion over all things, before his Sons had left him, to ſet up Families of their own, is a very negligent Aſſertion.

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[a] Vid. *Bœcler.* ad *Grot.* d. l.

Mr. BARB. *NOTES on* §. XI.

[2] It appears from the Sacred Hiſtory, that in *Abraham*'s Time Men went from one Place to another with their Families, Servants, and Flocks, which were their Riches. We alſo ſee that Patriarch followed that Cuſtom in the Land, wherein he was a Stranger. So that at that time great part of that Country was common, and when there was not room enough in one place to feed the Flocks of divers perſons, they parted by common Agreement, as *Abraham* and *Lot* did. 'Tis alſo obſerv'd, that the moſt antient Inhabitants of *Greece* lead ſuch a wandering Life, about which conſult the Hiſtorical Explication of the Fable of *Ceres* by Mr. *Le Clerc* in the *Bibliothec. Univerſal.* Tom. 6. p. 104, 105.

For firſt, private Dominion always takes its Riſe from ſome human Act; therefore *Adam* could not have ſuch a Dominion over thoſe things, which he was ſo far from having taken Poſſeſſion of, that they did not ſo much as fall under his Knowledge.

That Place of the *Civil Law* [1], L. iii. §. 1. *D. De adquir. poſſeſs.* [a] is very unfitly applied to the preſent Buſineſs; as if *Adam*, by ſetting his Feet on one part of the Earth, ſhould be ſuppos'd to have taken Poſſeſſion of the whole World. If any one perſiſts in giving the Name of Property to that Right of uſing things which Men receiv'd by the Grant of their Creator, then we might admit what theſe Authors lay down, *That Property was the Cauſe of Occupancy and Diviſion*; or that it was therefore lawful for Men to challenge things to themſelves by laying hands upon them, and by parting them into ſeparate Shares, becauſe God had given them a general Commiſſion to apply other Creatures to their own Uſe. But if we take the Word *Property* in its ſtrict and general Senſe, as it denotes the Excluſion of all others from a particular thing already aſſign'd to one; then 'tis altogether true, that *Diviſion* and *Occupancy* are the Cauſes of *Property*. Farther, *Adam*'s Children, whilſt they yet continued part of their Father's Family, were bound indeed to obey his Pleaſure in regard to their uſe of things; yet this, as was before obſerv'd, proceeded not from the Force of any private Dominion in *Adam*, but from the Force of his paternal Power. For whilſt they were young and helpleſs, he was oblig'd to maintain them. And when they were capable of doing ſome Service, ſtill the ſame paternal Authority required both that in uſing the common Store they ſhould be guided by their Father's Directions, leſt they ſhould incur any Miſchief by Intemperance; and likewiſe that ſuch things as they had either gather'd from a ſpontaneous Growth, or had produc'd by their own Induſtry, they ſhould deliver into the Hands of their Father, to be given out as he ſhould think fit: And he, ſo long as he enjoy'd this Right, was bound to provide Neceſſaries for his Children, even after they were arriv'd at Maturity, as Time and Occaſion ſhould require. And hence, if any one of his Sons ſhould, for inſtance, contrary to his Prohibition have privately feaſted with too much Greedineſs on ſome particular Fruit, the Youth had been by no means guilty of Theft, but of Diſobedience to his Father's Command. Or, if *Adam* had order'd one that was grown up to gather Proviſion for the Suſtenance of a young Brother, and the Party thus employ'd had either devour'd it himſelf, or laid it up ſecretly for his future Uſe, he deſerv'd Correction, not for Theft, but for violating the Charge which his Father laid upon him. During this Period therefore, neither *Adam* nor his Children had any *private* Dominion: The Right of *primitive* Communion was ſufficient for *his* Turn; and as for *them*, they in the Exerciſe of the ſame Right depended on his Care and Guidance. So that *Adam*'s private Dominion then began, when he diſmiſſed his Sons from under his Tuition, and gave them leave to erect ſeparate Families for themſelves.

XIII. Let us conſider too the Arguments of thoſe who maintain that this *primitive Communion* was impoſſible [b]. They ſay, That *ſuch a Communion neither could have been, nor ought to have been, in the State of Innocence; becauſe as every Order and Method is conformable to right Reaſon; ſo the moſt comely Order of poſſeſſing thoſe things, the Dominion of which God had granted to Mankind, agreed in an eſpecial manner to that State, in which the Virtue of abſtaining from what was another's deſerv'd to bear an honourable Name. Whence the Decalogue, as it eſtabliſheth the Duty of forbearing the Gooods of others, ſo it ſecures every one in the Enjoyment of a certain and ſeparate Poſſeſſion.* To this we anſwer,

Firſt, That we can have no ſuch clear Evidence what kind of Life (with reſpect to theſe external things) Men would have led, had they continued in their firſt ſinleſs Condition; and conſequently whether the Community, or the Propriety, of things would have been moſt ſuitable to that State.

But farther; we may venture to make it a Queſtion, whether it be not a higher Degree, a greater Perfection of Virtue to enjoy quietly a common Proviſion, and to deſire no particular Advantage above the reſt who have the ſame Title to it, than to abſtain from the diſtinct Portion of others?

Laſtly, Whatever we are to ſay as to the Eternity of the Law of Nature, thus much is certain; That there's no Neceſſity every Object of that Law ſhould have always exiſted [1], many of them proceeding, in the courſe of Time, from the Agreements and Inſtitution of Men: Thus the Law againſt Murther had no Object, whilſt *Adam* was the only Perſon in the World; nor the Law againſt Adultery, whilſt none of his Sons were arriv'd to Man's Eſtate; nor the Law againſt Theft, before the Diviſion of Things; nor the Law againſt bearing Falſe-witneſs, before the judicial Proceſſes were introduc'd; nor the Law againſt coveting the Houſe, the Man-ſervant, or Maid-ſervant, of others, whilſt they lodg'd in Caves, and e're Servitude was eſtabliſh'd; nor laſtly, the Law of honouring Parents, before *Eve* was a Mother [c]. They proceed to tell us, That *neither was ſuch a Community poſſible in the State of Men after the Fall:* Firſt, *Becauſe we can't ſo much as form any Notion of it in our Mind: For* Grotius *ſo deſcribes its Laws and Rules, as that every Perſon might immediately ſeize for his Uſe what he pleas'd, and might conſume any thing that was conſumable. But ſuch an Exerciſe of the general Right ſerv'd then inſtead of Property: for what any one had thus ſeized, none elſe could take from him without Injury. Therefore this Notion eſtabliſheth a Property in Community, and conſequently implies a Contradiction; the only End and Effect of Property being this, That one Perſon ſhould not rob and plunder*

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[a] Vid. l. xli. tit. 2. *D. De acquirend. vel admittend. poſſeſſ.*

[b] *Nid.* Bœcler. *ubi ſupra.*

[c] See above, l. ii. c. 3. ſ. 22.

Mr. BARB. *NOTES* on §. XII, XIII.

[1] This Law will be quoted, c. ix. §. 7. n. 7. following.

[1] See l. ii. c. 3. aforegoing §. 22, 24. and the Author's Preface of his Abridgment of the Duties of a Man and Citizen, §. 8, 9. in the *French* Translation printed at *Amſterdam* in 1707.

another. But here they vainly pretend a Difficulty where there is none: For antecedently to any human Act, and to the uſe of any thing in the World, when the bare Caſe is thus, That each thing belongs no more to one Man than to another, and conſequently belongs alike to neither; the primitive Communion bears a different Aſpect from what it hath, after Men begin to lay hands upon the general Store, and to imploy it in their Service; Since in the latter Caſe, by virtue of a previous Covenant, whatever any Man hath ſeized for his private Uſe, becomes his Property. Otherwiſe Men muſt altogether abſtain from the Uſe of things. Hence in this *qualified Communion*, as we may call it, the Subſtances of things belong to none, but their Fruits become matter of *Property*, when gather'd. This Notion of *Community*, temper'd with ſuch a degree of *Property*, may, we think, be eaſily apprehended by Perſons of no very nice or philoſophical Heads. To give a plain Inſtance: The Acorns were his that took the pains of getting them, but the Oak had no particular Owner. Thus much being laid down, the way is the better clear'd towards anſwering what they farther object. They pretend, that *ſuch a Communion could not poſſibly laſt one Moment of Time, that it was contrary to the human or rational Nature, ſavage, and unſociable; and conſequently is capable of affording no other Uſe, than that from it, as a feign'd Hypotheſis, may be ſhewn the Neceſſity of a diſtinct or private Dominion in a civil State.*

It's true, this *Communion* conſider'd preciſely in itſelf, and before any Application and Exerciſe of it, could not ſubſiſt, unleſs Men could have always walk'd naked, and liv'd without eating. Yet why it ſhould not ſubſiſt, when thus qualified with a mixture of *Property*, there was nothing to hinder whilſt the number of Men was yet few, and their Life plain and unrefined. It is certain however, that the more Mankind was multiplied, and the more Life was improv'd, the greater Neceſſity there was of appropriating more things than before. Hence thoſe People lead but a rude and barbarous Life, who make the neareſt Approach to the primitive Communion; thoſe, ſuppoſe, who live on Herbs, Roots, Fruits of chance growth, and what they take in hunting and in fiſhing, and who claim no other Eſtate and Wealth than a Cave with its wretched Furniture. Farther, when we aſſert that all things were by Nature negatively common, we don't mean that the Law of Nature commands Men perpetually to preſerve ſuch a State; but that things, if conſider'd antecedently to any act of Men, were ſo diſpoſed, as that no one Perſon ſhould claim them rather than another. On the other ſide, in affirming that Men left this Communion upon the advice and direction of Reaſon, we pretend not that it was neceſſary all things ſhould be appropriated in the ſame Moment; but according as the Temper or Condition of Men, the Nature of the things themſelves, and the difference of Place required; and as was judg'd moſt convenient for the cutting off all manner of Quarrel or Diſſenſion. And therefore, neither are we, who are utterly baniſh'd the primitive Communion, nor thoſe barbarous Nations which ſtill retain many Foot-ſteps of it, guilty in this reſpect of a Breach of the Law of Nature. Thus too, what they add hath little Difficulty: *After the Fall,* ſay they, *Men could not live without Law, and yet maintain a ſocial Life; therefore, neither without the diſtinction of Properties; ſince the Communion of things is inconſiſtent with Law, which is wont to aſſign and diſtribute particular Poſſeſſions.* But ſince all Laws do not preſuppoſe ſeparate Dominion, why might not thoſe others be obſerv'd ſo as to keep up a Life of Society under that *qualified Communion?* Tho' it muſt be confeſs'd, that before the Diviſion of Properties a very few Heads of Law might have been ſufficient for the Government of Mankind. Therefore when *Servius*, in his Obſervations on *Virgil* [a], reports it as the Reaſon why *Ceres* was by the Antients called *Legifera* [2], and her Rites *Theſmophoria, becauſe ſhe is ſaid to have been the Foundreſs of Laws; inaſmuch as before the Invention of Corn Men wander'd about without Law or Government; which wild Condition was taken off, after Corn came into uſe, and after Laws had been inſtituted upon the Diviſion of Land.* This Account ought not to be admitted without ſome Limitation. Indeed a more pompous Train of Laws became needful after Proprieties were fixed, Men being ruled before by a ſmall number of Ordinances; yet Communion conſider'd by itſelf, doth not render Life altogether lawleſs and unſociable, but only more ſimple and unpoliſh'd; and, as it were, not well ſettled and compacted. As for *Platonical* Community, it hath nothing to do with the Caſe before us; it being profeſſedly poſitive, and extended not only to Goods, but to Wives and Children.

XIV. We may hence diſcover in what Senſe we are to take that Aſſertion laid down by ſome Authors, *That Property and Dominion belong to the Law of Nature, ſtrictly ſo called, and which is written in the Minds of Men.* Where 'tis to be obſerv'd, that this Expreſſion, ſuch or ſuch a thing *belongs to*, or *is of the Law of Nature*, hath a different Meaning, according as 'tis ſpoke either of any expreſs or immediate Command, or elſe of ſome Cuſtom or Inſtitution eſtabliſh'd in human Life. In the firſt Senſe it imports, that the Law of Nature enjoins the doing, or the not doing of ſuch a Matter: In the ſecond, that ſound Reaſon adviſeth the Reception and Settlement of ſuch a thing amongſt Men, from the general Conſideration of a ſocial Life. For as for thoſe Cuſtoms or Regulations which are introduc'd for the particular Advantage of ſeparate Commonwealths, ſuch are ſaid to proceed from *civil* or *poſitive* Law. When therefore 'tis demanded whether or no *Property* owes its Original to the Law of Nature, the latter Senſe of the Word is to be regarded, and not the former: That is, inaſmuch as a ſocial Life is the very Foundation of a natural Law, and ſince it is at the ſame time ſufficiently evident from the Temper and Genius of Mankind, that in a great Multitude, where all join their Endeavours

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[a] *Æn.* iv. ver. 58.

Mr. Barb. *NOTES* on §. XIII.

[2] *Legiferæ Cereri.*] *Leges enim ipſa dicitur inveniſſe. Nam & ſacra ipſius Theſmophoria,* i. e. *legum latio, vocantur. Sed hoc ideo fingitur, quia ante inventum frumentum à Cerere paſſim homines ſine lege vagabantur, quæ feritas interrupta eſt, invento uſu frumentorum, poſtquam ex agrorum diſcretione nata ſunt jura. Servius ad Æneid.* iv. ver. 58. See alſo *Callimachus*'s *Hymn. in Cerer.* ver. 19. and Baron *Spanhemius*'s Comment on it, as alſo the hiſtorical Explication of the Fable of *Ceres* by Mr. *Le Clerc* in Tom. vi. of his *Bibliothec. Univerſal.* p. 106.

towards improving Life with various Inventions, the Peace and Beauty of Society could not be kept up without diſtinct Dominions of things; ſuch Dominions were therefore ſettled; and this very rightly and agreeable to the Aim of nature's Laws, human Affairs plainly requiring it to be done. And after this Eſtabliſhment, the ſame Law commands the obſervance of every thing that may conduce to the End for which theſe private Dominions were erected: Yet was there no expreſs and determinate Command of the Law of Nature, by virtue of which all things ought to be brought under *Property*, immediately upon the Origin of Mankind, or in all Places alike; but *Property* was gradually introduced, according as it appear'd requiſite to the common Peace. But the Precept of Nature about abſtaining from what is another's then firſt began to exert its Force, when at length Men, by mutual Agreement, had mark'd out and appointed what ſhould belong to others, and what each Perſon ſhould claim as his own. Before this time it lay conceal'd (as it were virtually or potentially) in that general Precept which enjoins us to ſtand to our Covenants, and not to injure the Right of our Neighbour. Nor is it any Abſurdity to affirm, that the Obligation we lie under, not to invade the Goods of others, is coeval with human Race. And yet that Diſtinction of *meum* and *tuum* was afterwards ordained. Thus we are often bound to yield Obedience, before we know what will be enjoin'd: As when we have an Obligation in general to follow the Directions of ſome certain Perſon in all things that he ſhall hereafter require us to perform; or when we may ſuppoſe ſeveral particular Commands to be implied in ſome general Rule [1].

XV. 'Tis needful in this place to add a word or two concerning the Subject of Property; on which Head the principal Queſtion is, Whether thoſe are capable of being Proprietors, who have not the uſe of Reaſon, as Infants and delirious Perſons? Now here it is certain, that neither of theſe can originally acquire the Property of any thing, or make it their own by taking immediate Poſſeſſion of it. The Reaſon is, becauſe in this Method of acquiring Property the Intention of the Acquiſitor is neceſſary, ſignifying that he will for the future hold ſuch a thing as his own; and he ſhould at the ſame time be able to underſtand, that ſuch an Act is effectual towards the creating a Right in him. But this cannot be ſuppoſed in the Perſons of whom we ſpeak. Yet, as to the obtaining the Property of ſuch things as are deriv'd upon them from others, the Caſe is different. For tho' here likewiſe, to make a thing paſs to me from another, 'tis in the common and regular courſe requir'd, that I have an Underſtanding able to judge of what is done [1], and to ſhew by Signs proceeding from real Intention, that I am willing to receive ſuch a thing, and to keep it to my ſelf; yet 'tis the receiv'd Practice of all civiliz'd Nations to permit Children in their moſt tender Age, and even before their Birth [a], to receive and to retain a Property deſcending to them. And this is no more than what natural Reaſon and Equity adviſed; inaſmuch as the things which Men uſually appropriate, belong to the Uſe and Service of Life, and are no leſs neceſſary for Infants than for grown Perſons; nay indeed ſomewhat more neceſſary for the former; who, by reaſon of their Weakneſs in Body and Mind, cannot ſo well provide for their own Occaſions. In Infants therefore a preſumed Conſent is judg'd equivalent to a formal Acceptance; it being taken for granted, that no one will refuſe what conduceth to his Benefit: Yet on Account of their Immaturity of Judgment, the Poſſeſſion only, and not the Exerciſe, of this Right could be conferr'd upon them. The general Cuſtoms of Nations in their Favour might allow them to hold, but not to uſe any thing by their own Diſpoſal [b]. However, leſt their Right ſhould by this means come to nothing, Humanity farther requir'd, that Perſons of Years and Diſcretion ſhould act as their Repreſentatives, in the Management of their Goods, till they are capable of underſtanding it themſelves. This Management is either committed to a certain Perſon by him who transfers the Goods upon them; or, in civil States, the Matter is ſettled by Direction of the Laws, and of the Magiſtrates; or, where both theſe Proviſions are wanting, nearneſs of Blood, or of Habitation, or the bare Law of general Kindneſs, recommends the good Office to fit Hands [2]. But all Perſons who have engag'd themſelves in this Caſe, by what means ſoever they came to be entruſted with it, are oblig'd to diſcharge it with the utmoſt Fidelity; in regard to that tender Age, inſufficient for its own Guidance and Defence. Therefore *Heſiod* ranks in the ſame Claſs of Sinners him that hath hurt a Stranger, or one that ſued to him for Protection; him that hath defil'd his Brother's Bed; him that hath uſed rigorous Treatment toward an antient Parent;

> Ὅς τέ τευ ἀφραδίῃς ἀλιταίνεται ὀρφανὰ τέκνα.
> *Op. & Dier.* l. i. ver. 330. Edit. *Cleric.*

And him whoſe Fraud the Orphan's Hope beguiles;

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[a] Vid. l. vii. c. 26. *D. De Statu hominum*, l. iii. *D. Si pars hæred. petatur.*

[b] *Gal.* iv. 1.

MR. BARB. *NOTES* on §. XIV, XV.

[1] See l. i. c. 6. §. 2. aforegoing.

[1] See l. i. c. 1. §. 7. aforegoing, and l. iv. c. 12. following §. 10.

[2] On this occaſion we may mention the Law of *Charondas* (recorded by *Diodor. Sic.* l. xii. c. 15. p. 81. Edit. *Rhodom.*) which aſſigns the Goods of Minors to the Care of the Kindred by the Father's Side, but their Perſons and the Buſineſs of their Education to the Kindred by the Mother. Judging it probable, that the latter, to whom the Inheritance could not deſcend, would make no Attempt on the Life and Safety of their Wards; and that the former would have no opportunity for any Deſign againſt their Perſons; and yet at the ſame time would be very diligent in managing their Fortunes, becauſe after their Death, whether natural or caſual, the Eſtate would fall to themſelves.

So alſo *Publius Syrus*,
Male ſecum agit æger, medicum qui hæredem facit.
He that makes an Heir of his Phyſician,
Is a good Patient, but a bad Politician.

Diogenes Laert. (in *Solon*) gives us a Law of *Solon*'s much to the ſame purpoſe; ordaining, That no Guardian ſhould cohabit with the Mother of his Ward, and that he ſhould be incapable of the Guardianſhip, to whom the Eſtate fell upon the Minor's Deceaſe. See alſo *Menage* upon this Paſſage of *Diog. Laert.*

Plato [3] in his Books of Laws (lib. xi. p. 972. *Edit. Wechel.*) calls Orphans, *The greateſt and moſt ſacred Charge:* Where he likewiſe offers many Conſiderations about the Duty of Guardians. Yet that a Man ſhould ſuſtain this Office and Truſt without Reward, or with Expence, Humanity and Equity do not always require. *Grotius* and his Commentators, *viz.* *Bœcler*, *Ziegler*, and *Felden* may be conſulted farther on this Subject, in their Obſervations upon *Grotius*, B. II. l. iii. c. 6. where they endeavour to prove, contrary to his Judgment, that Infants have a Propriety in their own Goods, not only in reſpect of the firſt Act, or Right of poſſeſſing, but alſo in reſpect of the ſecond Act, or adminiſtration of their Goods by themſelves; for ſay they, "The Guardians have only the bare Management of the Right and Goods of another." In all appearance this conteſt is about words only.

Mr. BARB. *NOTES on* §. XV.

[3] His Words are Παρακαταθήκη μεγίστη, καὶ ἱεροτάτη, where are alſo divers other things of the Duties of Guardians. See alſo Mr. *Daumat*'s Civil Laws in their Natural Order, Part I. l. ii. tit. 1. and the Interpreters of the *Digeſts*, l. xxvi. tit. 1, *&c.* By the Civil Law a Guardian, who was convicted of unjuſt Dealing, was expos'd to Diſgrace, if he was guilty of wilful Knavery; but if it appear'd that his Fault proceeded from Negligence only, though groſs, he was not; as Mr. *Noodt* very well proves in his *Probabilia Juris*, l. i. c. 13. againſt the common Opinion of the Doctors, who affirm'd, that the Puniſhment was to be inflicted in both Caſes alike.

CHAP. V.

Of the Object of Dominion or Property.

- I. *What is requir'd to make things our own.*
- II. *Things conſumed in their uſe are in vain made our own.*
- III. *A thing become our own ſhould be capable of keeping.*
- IV. *The uſe of ſome things made our own is common to all.*
- V. *The divine Grant is not contrary to our Dominion over the Sea.*
- VI. *Reaſons againſt all Property of the Sea.*
- VII. *What the uſe of the Sea is.*
- VIII. *What Parts of the Sea are made a Poſſeſſion.*
- IX. *The main Ocean can't be in any Man's Dominions.*
- X. *How far Navigation and Commerce on the Sea is free.*

WE are in the next place to enquire into the Object of *Property*, or to examine what things are capable of coming under that Condition. Now to give a thing this Capacity, we judge theſe two Qualifications to be neceſſary [1]: *Firſt*, That it be able to afford ſome uſe to Men, mediately or immediately; by itſelf, or by its connexion with ſomewhat elſe: And *Secondly*, That it be ſome way or other ſo far under the Power of Men, as that they may faſten on it, and keep it for their Occaſions. And farther, ſince *Property* implies a Right of excluding others from your Poſſeſſion, without which Right would be altogether inſignificant, if it could not be effectually exerciſed; 'twould be in vain for you to claim that as your own, which you can by no means hinder others from ſharing with you.

II. Yet ſome things there are, which, tho' very beneficial to Mankind, yet by reaſon of their vaſt Extent, are inexhauſtible, ſo that all may enjoy them together, and yet no Man ſuffer in his particular uſe. To appropriate things of this Nature, would be malicious and inhuman: And on this account 'tis uſual to attribute an exemption from Property [1] to the Light and Heat of the Sun [2], to the Air, to the running Water, and the like [a] [3]. Although ſince Nature, by denying Men Wings,

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[a] *Petron.* " Is there any one of the moſt excellent Works of Nature, which ſhe hath not made common to all the World? The " Sun ſhines with an univerſal Influence. The Moon, attended with her numberleſs train of Stars, lights the very Beaſts to their " Food. What is there in Nature more bright and beautiful than the Waters? Yet they flow for publick Uſe.
Latona thus pleads in *Ovid*, Metam. l. vi. ver. 349.

Quid prohibetis aquas? uſus communis aquarum eſt;
Nec ſolem proprium natura, nec aera fecit,
Nec tenues undas; ad publica munera veni.

What Rudeneſs Water for my Uſe denies,
Whoſe endleſs Store the common World ſupplies?
Nor Light nor Air did Heaven create for *One*,
Nor gentle Streams: I crave a publick *Boon*.

Mr. BARB. *NOTES on* Chap. V. §. I, II.

[1] It is very hard to bring an Example of any thing altogether uſeleſs, as Mr. *Thomaſius* obſerves in his *Juriſprud. Divin.* l. ii. c. 10. §. 123. It is ſufficient, in my Opinion, that we find ſome pleaſure in poſſeſſing, and ſo all that we enjoy is in ſome meaſure uſeful. I think then, that this Condition ought to be omitted as ſuperfluous.

[1] *Cujacius* in his Obſervations, l. x. c. 7. brings two Examples; the one of the ſhadow of the Plane-tree, the other of the Air; upon which a Tax was laid. The one is found in *Pliny*, l. xii. c. 1. The other is in *Cedrenus*, who relates it of *Michael Palæologus*. See Mr. *Selden*'s *Mare Clauſum*, c. 21.

[2] Nothing hinders nevertheleſs but we may appropriate theſe things to ourſelves in ſome manner, as to ſuch an extent as is contained within our own Lands. Our Author himſelf falls voluntarily upon the Subject of running Waters, l. iii. c. 3. §. 4. But we muſt ſay, that by the Laws of Humanity we are obliged not to deny any Man the lawful uſe of theſe Things, *Titius Obſerv.* 287. See alſo Mr. *Thomaſius*'s *Inſtit. Juriſprud. Divin.* l. ii. c. 10. §. 127. I obſerve alſo, that our Author follows that Notion in his *Elements Juriſprud. Univerſal.* p. 84. See alſo §. 4. following.

[3] *Petronius*'s Words are, *Quid autem non commune eſt, quod natura optimum fecit? Sol omnibus lucet. Luna innumerabilibus comitata ſideribus etiam feras ducit ad pabulum. Quid aquis dici formoſius poteſt? in publico tamen manant*, c. 100. See *Ovid Metamorph.* vi. 349. The *Roman* Lawyers ſay poſitively, that theſe ſorts of things are common by natural Right. *Naturali jure communia ſunt omnium hæc; aer, aqua profluens, & mare, & per hoc littora maris*, Inſtit. l. ii. tit. 1. *De rerum diviſ.* &c. §. 1. They alſo call them publick, in the ſame ſenſe, tho' they ordinarily make a diſtinct kind of them. See Mr. *Noodt*'s *Probabilia Juris*, l. i. c. 7, 8.

hath made the uſe of the Earth neceſſary to their uſing the Light; hence it comes to paſs, that ſome Perſons may be utterly debarr'd from the latter; as Criminals, for inſtance, in their Dungeon. In like manner, ſince the Air is in ſome places more clear and pure than in others, in this reſpect the value of a place may be inhanced. As we ſee Men who allow pleaſure any ſhare in their choice, very highly regard the proſpect of Buildings, or of Lands, and eſpecially of the former: For which reaſon thoſe *Services* [4] have been introduc'd [a], of not raiſing a Building higher; of Lights, and of not hindring Lights; of Proſpects, and of not hindring Proſpects. So though on other accounts no one will pretend to fix a Property in the Wind [5], yet we may appoint a *Service* or Duty of not intercepting the Wind to the prejudice of our Mills [6].

III. We are likewiſe to obſerve, That as the Subſtances of thoſe things which Men have Dominion over, are compos'd of different kinds of Matter; ſo each thing is taken and poſſeſs'd in that way which the condition of its Nature admits: For the more cloſely any thing can be confin'd, and as it were ſhut up, the more eaſily will it produce the effects of *Property* againſt the Claims of others. And conſequently, the more capable a thing is of being guarded from unjuſt Invaders, the greater Security we promiſe our ſelves in the Property of it. Yet, as we are not immediately to conclude a thing exempt from Property, becauſe it cannot without ſome trouble be kept from other Hands; ſo in caſe a thing be in ſo wide a manner ſpread and diffus'd, as that either 'tis morally impoſſible it ſhould fall under any method of keeping, or that it cannot be kept without much greater charges than the Fruits and Advantages of it would countervail, it is not to be ſuppoſed, that any Perſon deſires to fix a Property which can bring him nothing but Burthen and Expence in defending it [1]. Though, to render a thing capable of being appropriated, it is not ſtrictly neceſſary that we ſhould incloſe it, or be able to incloſe it within artificial Bounds [2], or ſuch as are different from its own Subſtance; 'tis ſufficient if the compaſs and extent of it can be any way determin'd. And therefore *Grotius* hath given himſelf a needleſs Trouble, when to prove Rivers capable of *Property*, he uſeth this Argument, [b] *That although they are bounded by the Land at neither end, but united to other Rivers, or the Sea, yet 'tis enough that the greater part of them, that is, their Sides, are incloſed.*

IV. Laſtly, we farther diſcover, that the uſe of ſome things is confin'd, as it were, within narrow Limits, and cannot admit of Shares; the appropriation of which was highly expedient to the peace of Mankind.

Again, There are things, which as they afford us different Uſes, may in regard to ſome Uſes be ſpent and exhauſted, and yet in regard to other Uſes yield a never-failing abundance. Now, as on the one ſide, there is no reaſon why ſuch things as thoſe ſhould not be brought under *Property*; ſo, on the other ſide, the Law of Kindneſs and Humanity forbids us to deny the inexhauſtible *Uſe* of them to any Perſon that in a friendly and peaceable manner deſires it. But if any thing could be found inexhauſtible in all its Uſes, 'twould be abſurd not to leave that in its primitive Community. Indeed in a poſitive Communion, if the Object be ſufficient to ſerve all, when divided, nothing hinders but that we may divide it; if it would not be thus ſufficient, 'tis beſt to poſſeſs it ſtill without Diviſion: But that a thing lying in common to Mankind, and ſufficient for the promiſcuous Uſe of all [1], ſhould be ſhared out into diſtinct Parts, is certainly repugnant to Reaſon. The Earth is of ſuch a magnitude, as to ſerve the Occaſions of all People in all Uſes to which they can apply it; yet it would not thus ſerve them, were it poſſeſs'd, without Diviſion, by ſo vaſt Bodies of Inhabitants as it now contains: Becauſe it could never afford them Suſtenance, unleſs manur'd and improv'd. Therefore there is plainly this particular Reaſon, why the extent of the Earth ſhould not hinder its being divided; and yet the ſame Reaſon would make the diviſion of the Ocean appear a ridiculous Abſurdity [c].

V. Indeed all other things have little difficulty in this Point; but as to the Sea, whether or no that be capable of *Property*, hath been diſputed by the greateſt Genius's of the preſent Age. On which controverſy 'tis eaſy to remark, that many of the *Writers* engaged in it were more guided by their Affection to their Country, than by their regard to Truth. Yet by theſe, and by others who have ſhewn themſelves more diſ-intereſted and impartial, the whole Subject hath been ſo fully diſcuſs'd, that 'tis hard to ſay any thing that others have not already offer'd. We may therefore be allow'd to uſe more Brevity on the Queſtion before us; the *Authors* [1], who have throughly canvaſs'd it, being ſo univerſally read. This then is manifeſt, that the ſame Divine Grant which firſt gave Man a Right of aſſuming the Sovereignty of the Earth, included likewiſe the Sea. The Commiſſion as well runs, *have Dominion over the Fiſhes of the Sea*, as *over the Beaſts of the Land*. And we cannot conceive any Supremacy and Rule over Animals, without a Right of uſing the Element which they inhabit, according as the Nature of it will allow. Indeed mention is likewiſe made of the Fowls of the Air, yet ſince we cannot move and ſupport our ſelves in that Element alone, therefore we are unable to exerciſe Dominion over the Air any farther than we can reach while we ſtand upon the Earth. But on the Sea we ſtretch our Empire much farther, by the means of Ships, now brought to their higheſt Perfection; which are not only ſerviceable in tranſporting Burthens, but likewiſe carry *Mars* through the Kingdoms of *Neptune* in a far more dreadful Array, than he is attended with when he rageth by Land. No one is now ſo ſuperſtitious as to join in the *Poet*'s Scruple;

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[a] See hereafter, c. 8. ſ. 6.

[b] Lib. ii. c. 3. ſ. 7.

[c] Comp. *Zeigler* ad *Grot.* l. ii. c. 2. ſ. 3.

Mr. Barb. *NOTES* on §. II, III, IV, V.

[4] The Author will treat of this, c. 8. §. 6. following.

[5] See l. v. c. 1. §. 5. following.

[6] See Mr. *Thomaſius's* Diſcourſe, entitled, *Non ens Actionis forenſis contra ædificantem ex æmulatione*, §. 28. Mr. *Titius* treats in general of the Right of Mills, in his *Jus Privatum Romano-German.* l. viii. c. 16.

[1] We cannot when we will. The Will alone doth not ſuffice here; we muſt beſides this be inclinable to get the poſſeſſion of the thing, and moreover, the thing it ſelf muſt be of ſuch a Nature, as to be poſſeſs'd in ſome manner or other. We ſeize upon a thing, that we may poſſeſs it; and nothing is more ridiculous, than to pretend to poſſeſs what we can't either hold, nor preſerve in any ſort.

[2] The Bounds of a thing made our Property, are the ſame with thoſe of Poſſeſſion. Whatever a Man is ſeiz'd of, it belongs to him ſo far as he hath poſſeſſion of it; and how far he is actually poſſeſſed of it, is eaſy to determine. See Mr. *Bynkerſhoek, De Dominio Maris*, c. 9. p. 69, 70.

[1] This Reaſon is of force only when a thing is joined with an impoſſibility of poſſeſſing it. For on this account alone, that a thing is in ſo great an abundance, that whatever quantity we take of it, others have enough ſtill remaining, it follows on the other ſide, that we may appropriate as much as we will, or can poſſeſs, ſince every one may do the ſame in their turn, and no Man loſeth any thing. I am ſurpriz'd that our Author made not this Remark.

[1] The moſt conſiderable are *Grotius* in his Book, entitled, *Mare Clauſum*, and *Selden* in his Book, entitled, *Mare Liberum*. A few Years ſince Mr. *Bynkerſhoek* publiſh'd a Diſcourſe, which I have quoted ſeveral times before; in which, tho' 'tis ſhort, this Matter is treated of, in my judgment, more exactly, and with more Elegancy than it was ever yet. It was printed in 1703, join'd to a Commentary upon the Law of *Rhodes, De Jactu*.

Nequicquam Deus abſcidit
Prudens Oceano diſſociabili
Terras, ſi tamen impiæ
Non tangenda rates tranſiliunt vada.

In vain did Nature's wiſe Command
Divide the Waters from the Land,
If daring Ships, and Men profane
Invade th' inviolable Main. *L.* i. *Od.* 3. 21, *&c.*
Mr. *Dryden.*

Nor doth the Sea appear to have any Privilege above the Earth, by virtue of which Men ought leſs to apply it to their Occaſions and Uſe. However, ſince the Donation of God doth not immediately conſtitute ſuch Dominion as ſhall take effect againſt the Claims of others; therefore it was left to the choice of Men, whether they would appropriate the Sea likewiſe, as they had done the greateſt part of the Land; or whether they would let it remain in its primitive State, belonging no more to one Perſon than to any beſides.

VI. The Queſtion is, therefore, Whether any thing particular may be diſcover'd in the Sea, which ſhould hinder it from being an Object of *Property?* This ſome have undertaken to affirm, partly upon natural, and partly upon moral Reaſons. Amongſt the former they have alledg'd the Fluidity of the Sea; that [1], according to the common Nature of all liquid Bodies, the parts of it are held together by no proper Bands; whereas Poſſeſſion can take place only in things that are fix'd and terminated. To which others make anſwer, That Fluidity conſidered in it ſelf is no Bar againſt Property: And beſides, that the Sea is not without its Limits [2], being ſurrounded by the Shore; and that it is a Work of no ſuch great difficulty to confine the ſeveral parts and tracts of it within ſtricter Bounds. It may be added, that as Rivers are not the leſs capable of *Property*, becauſe they paſs away in a perpetual Stream; ſo neither is the Sea, on account of its being driven about by the force of the Winds and Tide. The River is one thing, and the Stream or Current another: And in the ſame manner the Sea is conſider'd diſtinctly from the Waters which it contains. The vaſt extent of the Sea doth by no means render it impoſſible to be kept, and therefore doth not altogether hinder it from coming under *Property*. For we may abridge others of the uſe of the Sea, either by Forts upon the Shore, where it toucheth our Territories in narrow Creeks, and Streights; or by Ships of War, which are able to perform the ſame Service on the Water, as Caſtles and Forts on the Land. Though it cannot be denied, but that for one People to keep the whole Ocean, is morally impoſſible: Nor would it be worth their while to maintain Fleets in all Parts, for the defence of it againſt all others who ſhould deſire to ſhare with them in the Uſe. Now 'tis great folly to covet what one can't keep; eſpecially when by ſuch a purſuit we do not aim at the Neceſſities of Life, but at the Gratification of vain Ambition, and of needleſs Avarice. For though otherwiſe the Defect of natural Ability doth not preſently extinguiſh a moral Capacity, yet inaſmuch as the latter, by reaſon of the Corruption of Mankind, is almoſt inſignificant, Prudence adviſeth us to graſp at no more than we can well ſecure our ſelves in the enjoyment of. *Grotius*'s Limitation on this point ſeems ſuperfluous, when he remarks [a], *That Rivers or part of the Sea may be appropriated, upon ſuppoſition that either the former or the latter are but inconſiderable in reſpect of the Land, or however, are not ſo large; but that when compared with the Land, they may only ſeem to have the proportion of a part to the whole.* For let us conſider a People ſeating themſelves on the ſide of a vaſt River, on a long and narrow Slip of Land; here the River will by no means be inconſiderable in compariſon with the Land; and yet we don't imagine that this would hinder it from a capacity of Appropriation. Thus there are Kingdoms, which in extent are far exceeded by their Provinces and Appendages.

The moral Reaſon which theſe Authors urge to prove the Sea incapable of becoming Property, is taken from this Conſideration, that the uſe of it is inexhauſtible [3], and therefore ſufficient for the promiſcuous Service of all. So that 'twould be vain and impertinent to attempt the Diviſion of it into ſeparate Portions and Shares. Which Argument we would indeed acknowledge to be the ſtrongeſt that can be produced in the preſent Caſe, were it once made appear that the Sea is, with reſpect to all its Uſes, ſufficient for all Men in all Parts. Becauſe the appropriation of things was introduced on no other account but to preſerve the Peace of human Society. And ſince one effect of it is this, That he who againſt my Will invades and uſurps my Peculiar, really doth an Injury to me, which I might juſtly revenge in an hoſtile manner; therefore thoſe, who ſhould have deſired to turn a thing into *Property*, which, whilſt expoſ'd to common Uſe, was not likely to breed any Quarrel amongſt Men, ought to have been look'd upon not as promoters of the Peace

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[a] Lib. ii. c. 3. ſ. 7, 8.

Mr. Barb. *NOTES* on §. vi.

[1] See Mr. *Selden*'s *Mare Clauſum*, c. 21, 22.

[2] As for Example, the Rocks which appear above Water, the Banks of Sand, the Capes which are one over againſt the other, the Iſles ſcattered up and down in diverſe Places.

[3] See §. 4. n. 2. aforegoing, and Mr. *Bynkerſhoek*'s Treatiſe, c. 9. p. 68.

of Mankind, but as Perſons who brought in new occaſions of breaking and diſturbing it. But whether the Sea be thus inexhauſtible in all its Parts, with reſpect to every Uſe, will be made more evident, if we examine more diſtinctly the particular Services which it affords.

VII. The uſe of Bathing and of drawing Water is indeed inexhauſtible; but then this is of no great Conſequence, and extends no farther than to the Inhabitants of the Shore. The Sea-water is likewiſe ſerviceable for the making of Salt: But this Advantage as well as the former is confin'd to thoſe who dwell on the Coaſts. Farther, as to the convenience of Navigation, the Sea is inexhauſtible, and ſuffers no damage from being thus imploy'd [a] [b]. But then, beſides theſe, there are other Uſes, part of which are not altogether inexhauſtible; and part may prove an occaſion of damage to maritime Countries, whoſe Intereſt will not admit that the Sea ſhould every where lie promiſcuouſly free to all. Of the former kind is Fiſhing, as likewiſe the gathering of any thing which grows in the Water. As for Fiſhing, though it be much more abundant in the Sea, than in Lakes or Rivers; yet 'tis manifeſt that it may in part be exhauſted; and that if all Nations ſhould deſire ſuch a Right and Liberty near the Coaſts of any particular Country, that Country muſt be very much prejudic'd in this reſpect; eſpecially ſince 'tis very uſual, that ſome particular kind of Fiſh, or perhaps ſome more precious Commodity, as Pearls, Coral, Amber, or the like, are to be found only in one part of the Sea, and that of no conſiderable extent. In this Caſe there is no reaſon why the Borderers ſhould not rather challenge to themſelves this Happineſs of a wealthy Shore or Sea, than thoſe who are ſeated at a diſtance from it: And other Nations can with no more Juſtice grudge or envy them ſuch an Advantage, than they can be angry that,

———*Non omnis fert omnia tellus.*
India mittit ebur, molles ſua thura Sabæi, &c. [c] [d]

All ſorts of *Goods* their ſeveral Countries know,
Black Ebon only will in *India* grow,
And odorous Frankincenſe on the *Sabean* Bough.
Mr. *Dryden*.

An Uſe of the latter kind it is, that the maritime Countries are guarded and defended by the Sea, as a Rampart. Hence the Duke of *Somerſet*, *Protector of England* under *Edward* VI. in an Epiſtle to the *Scots*, which we find in *Sleidan*'s Commentaries [e], tells them, *Oceano claudimur undique, tanquam mœnibus & vallo firmiſſimo: We are on all ſides encloſed with the Ocean, as with the ſtrongeſt Wall and Bulwark.* And we may with much more Juſtice beſtow on the Sea that Name of ἀθάνατον τεῖχος [1], *an Immortal Wall*, than *Iſocrates* [f] complemented the River *Nile* with it. Yet this Defence is not altogether certain and ſecure. It hinders indeed any Expedition on Foot, but lies open to the Approach of Veſſels. For which Reaſon it muſt needs be a Diſadvantage to any People thus ſeated, that other Nations ſhould have free acceſs to their Shore with Ships of War, without asking their leave, or without giving ſecurity for their peaceful and inoffenſive Paſſage. But we cannot, with any Accuracy [2], determine in general how large a Space of the Sea ought to be allow'd for ſuch a Defence, in reſpect of which it may be for the Safety and Intereſt of the Borderers to claim a diſtinct Dominion over it. Yet certainly it would argue a very unreaſonable Fear and Jealouſy, ſhould any Kingdom barely on this account deſire to extend their Sovereignty over the Sea for ſome hundreds of Leagues together. What *Cæſar* reports of the *Germans* may ſerve to illuſtrate this: *The particular Communities look on it as the higheſt Honour to make a vaſt Extent of Deſert round about them, waſting all the Confines of their Neighbours; this they reckon the ſureſt Mark of an extraordinary Valour, that the former Borderers have retired, and been driven to a greater diſtance, and that none dare ſeat themſelves in ſo formidable a Neighbourhood. And then, beſides, they thought themſelves the ſafer by this Policy, having taken away all Fear of ſudden Incurſions*, De Bell. Gall. l. vi. c. 23. However we ſee by what hath been offer'd, that there may be very weighty Reaſons for a People ſo far to appropriate to themſelves ſome part of the Sea, as to oblige all others to acknowledge the Uſe of the ſame Part, as a Permiſſion from them, and an Act of Bounty and Favour.

VIII. But ſince all Dominion, capable of producing any Effect againſt the Claims of others, takes its Riſe from ſome Act of Men; therefore how far the Bounds of any People ought to reach on the Sea, is to be diſcover'd either from their own right of Poſſeſſion, or from their Treaties with their Neighbours. Thus *Iſocrates* (in his Panegyr. p. 111. Ed. *Pariſ.*) boaſts that the *Athenians*, by their Articles of Peace with the King of *Perſia*, had obliged him not to come beyond *Phaſelis* with his Ships of War. Yet ſuppoſing the Matter to be dubious, and that there are no clear Memorials to be found of ſuch Acts as might prove the Occupancy to be real, which is alledg'd; what Preſumptions are to be made in this Caſe, we may underſtand from the following Remarks. In the Beginning then, whilſt we were yet ignorant of Navigation, it is not probable that the People, which had taken poſſeſſion of any Territories, extended their Dominion farther than to the neighbouring Shore. For, inaſmuch as the Fiſhing-Trade was yet but poor and barren for want of Boats, and the utmoſt Advantage they could make was to pick up the Shell-Fiſh which were left by the Tide, or to angle from the Rocks; there was no Fear that they ſhould in this reſpect ſuffer from their Neighbours; who, being neceſſitated to make their Approaches by Land, might be repuls'd with little Difficulty. Nay, after the Invention of Shipping, moſt Nations, for a conſiderable time, left each other at full liberty to fiſh where they pleas'd: Becauſe they imagin'd that an Imployment of ſo great Labour and Hardſhip would

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[a] Vid. l. xxiii. ſ. 1. *D. De Servitut. præd. ruſtic.* [b] Vid. l. viii. t. 3. *D. De Servit. præd. ruſtic.* [c] See *Pliny*, l. ix. c. 15. of the happy Shore about *Byzantium.* [d] Vid. *Virgil.* Georg. l. i. ver. 57, &c. [e] Lib. xx. [f] Encom. *Buſir.*

Mr. BARB. *NOTES on* §. VII.

[1] A firm and everlaſting Wall.

[2] Mr. *de Bynkerſhoek*, in his Diſſertation, c. 2. ſays, "That ſo much of the Sea may be thought to be ſeized from the Land, as "can be defended by our Arms, *i. e.* according as we expreſs it, ſo far as is within Canon-ſhot." He thereupon ſets down an Order which the States-General of the United Provinces gave the Captains of their Ships in 1671. to ſalute as they paſs'd the Coaſts of any Foreign Prince, that they might know that they were within Canon-ſhot, near the Places of that Country.

not engage ſuch a numerous Train of Followers, as that any publick Diſturbance ſhould be apprehended from their Diſputes and Contentions. And whilſt hoſtile Heats were yet unknown, the Sea was a ſufficient Defence without other Aſſiſtances. And afterwards when they began to build Ships of War, Men were contented a long while to appropriate only the Havens and Bays, leaving the other Parts of the Sea in their primitive Community. This Moderation embolden'd the Pirates to carry on their Profeſſion with greater Liberty; whilſt they were of Opinion, that 'twas a leſs heinous breach of the general Peace to commit theſe Outrages in places ſubject to no Juriſdiction. At length, when they had found out the benefit of Merchandiſe, and the conveniency of ſo ſhort a Paſſage by Water for Goods and Traffick, ſome Governments ſeated near the Streights, or narrow Seas, challeng'd to themſelves a Property in them; that, by requiring Toll and Cuſtom [1], they might come in for a ſhare in the Gain, or that their Towns might be frequented by the Trading Part of the World. After this, other parts of the Sea were likewiſe brought under Subjection, either on account of their great Plenty of Fiſh, or becauſe this was a neceſſary Expedient for the Security of the bordering Provinces.

Yet in theſe times they ſcarce exerciſed any other Right of Sovereignty beſides the giving out Injunctions, that all who paſs'd within ſuch Bounds ſhould abſtain from all Harm and Violence; that no Piracies ſhould be there committed, and no Veſſels of War enter without Permiſſion. Thus when the *Lacedemonians*, in *Thucydides* [a], had convey'd ſome Forces to *Epidaurus* by Sea, the *Argives* in an Embaſſy to the *Athenians* complain'd, that they, having promis'd by League not to grant the Enemies of *Argos* Paſſage thro' their Dominions, had nevertheleſs ſuffer'd them to ſail by unmoleſted. And accordingly the *Athenians* interpreted this Act of the *Lacedemonians* as a breach of Peace. We ſee it is now the receiv'd Cuſtom, in order to the acknowledgment of this Sovereignty, that foreign Veſſels, as they paſs by any Fort on the Shore, or any Ship of War belonging to the Prince, who at preſent carries himſelf as Lord of the [2] Sea, ſhall pay ſome mark of Reſpect.

It doth not ſeem neceſſary that particular Nations ſhould make out the preciſe time when they obtain'd the Dominions of ſuch or ſuch parts of the Sea, by taking Poſſeſſion of it: But, inaſmuch as the Exerciſe of this Dominion may not at all times be of Uſe and Advantage, 'tis enough if they then perform'd any Act of Sovereignty, when the Intereſt of the Commonwealth ſeem'd to require it: Nay, in our Judgment, it might be no Abſurdity to affirm, that when Naval Forces are once brought into common Uſe, the parts of the Sea, ſo far as they ſerve only for a Defence or an Appendage, do without any ſpecial corporal Act paſs immediately under the Dominion of that People whoſe Shores they waſh [b]. For in this reſpect the Sea is to be look'd on as an Increment of the Land, as the adjoining Moors and Fens are reckon'd the Increment of a City. Now, as in the Occupancy, or the taking poſſeſſion of Immoveables, it is not neceſſary that our Body ſhould touch each Part, but the touching of one part only is conceiv'd to create a Property over the whole; ſo when a People have ſeiz'd on one particular Region incloſed within ſettled Bounds, ſtill under the Notion of taking all the void Space about that they ſhall afterwards have occaſion for, tho' at firſt they have no Deſign to enlarge, or exerciſe their Dominion farther than thoſe Bounds, as not thinking what lies beyond to be of Uſe or Service to them; yet when they come at length to find, that there is a neceſſity of adding ſuch a void Space to their preſent Poſſeſſions, their bare Intention and Reſolution ſhould ſeem ſufficient to extend their Sovereignty over it, as a Part or Appendage of their Empire. Eſpecially when it once appear'd, that other Nations had thus ſtretched their Command over the void Sea: Whence 'tis a fair Preſumption, that the reſt of the World pretend not that they ſhould be behind with them in this Advantage [*] [3]. From which Conſiderations it is manifeſt, that in theſe times, when Shipping is brought to its higheſt Perfection, it is preſum'd, that every maritime People, at all acquainted with Navigation [4], are Lords of the Sea, where it toucheth their own Shore, ſo far as it may be counted a Defence, eſpecially in Ports and other

Places

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[a] Lib. v. c. 56. Edit. *Oxon.*

[b] Comp. *Ziegler* ad *Grot.* l. ii. c. 3. ſ. 11.

[*] In all the Editions of the Original the Word *eum* is wanting, which makes our Author very difficult to be underſtood.

Mr. BARB. *NOTES* on §. VIII.

[1] See *Grotius*, l. ii. c. 3. §. 15.

[2] Mr. *Bynkerſhoek* in his Diſcourſe, c. 5. near the End, maintains, That that is not always an acknowledgment of the Sovereignty of that Perſon, to whom that Reſpect is paid, over that Part of the Sea where it is done. As for Example, ſays he, "The States-General in their Treaties of Peace made in the Years 1654, 1662, 1674, and 1684, obliged themſelves to lower "their Topſails to the Ships of the King of *England* in all the Northern Seas as far as Cape *Finiſter*; but that was only, becauſe, "according to the Law of Nations, all Republicks ought to give place to a crown'd Head, and to thoſe that repreſent him." In ſhort, the Cuſtom of ſaluting the Veſſels of ſuch Nations to whom they are inferior, in one manner or other, is not ſo new as our Author would inſinuate; for we find in *Appian*, as *Juſtus Lipſius* has long ſince obſerved, *Elect.* i. 23. p. 729. that *Mark Anthony* and *Domitius Ænobarbus* meeting one another, the firſt Serjeant of *Anthony*, thinking himſelf obliged according to the Cuſtom, cry'd out, that he ſhould lower his Standard, which was then us'd inſtead of a Maſt (καθελεῖν τὸ σημεῖον) to pay his Homage to his Maſter. *De Bell. Civil.* l. v. p. 1118. *Edit. Tollii.*

[3] When our Author ſays, That they may, without taking a new Poſſeſſion, ſeize on a thing which they had before neglected, as a thing of no Profit, it is not to be underſtood, that they have called to mind ſome new Reaſon, which of itſelf renders it neceſſary to acquire that which before they had not troubled themſelves to make a Property of. Thus, ſince the Invention of Canon, the Sea, which adjoins to a Country, hath upon that account been thought to belong to the Lord of the Country, as far as a Canon can ſhoot. But yet there muſt be a formal Act of taking Poſſeſſion neceſſary, without which every one may look upon thoſe Seas and Lands to be common, becauſe they do not appear poſſeſſed by any; for why may not he, who finds them convenient for him, ſeize on them?

[4] See §. vii. Note 2. above, As for all that Space of the Sea which can't be defended from the Land, Mr. *Bynkerſhoek* thinks none can make themſelves Maſters of it farther than they ſail, with a deſign to appropriate it to themſelves, and he adds, That they can't preſerve the Property of what they have ſeized on, but by conſtant ſailing, and having always a Fleet abroad. Hence it was, that the *Romans* heretofore, when their Empire extended through *Europe*, *Africa*, and *Aſia*, were Maſters of the Mediterranean Sea, becauſe they always kept four Fleets a-foot; the firſt at the Port of *Milene*, the ſecond at *Ravenna*, the third at *Frejus*, and the fourth at *Byzantium* or *Conſtantinople*. They commanded alſo that part of the Ocean that is between *England* and the Continent, as well becauſe they poſſeſs'd the Lands on both ſides, as becauſe they had a Fleet in the *Engliſh* Chanel. But now,

according

places where there is Convenience of Landing [7]. In like manner the Gulphs and Channels, or Arms of the Sea, are, according to the regular Courſe, ſuppoſed to belong to the People with whoſe Lands they are encompaſſed. But in caſe different Nations border on the ſame Channel, the Sovereignty of each ſhall be conceiv'd to reach into the middle of the Water, from every part of their reſpective Shore; unleſs either all the States have agreed by Covenant to uſe the whole Water promiſcuouſly amongſt themſelves, and to exerciſe a general undivided Sovereignty over it, againſt Foreigners: Or elſe, if one particular People has obtain'd a Dominion over the whole by Pact, or by the tacit Conceſſion of the reſt, or by the Right of Conqueſt, or becauſe they firſt fix'd their Station near it, and immediately took it into full Poſſeſſion, exerciſing Acts of Sovereignty againſt the People of the oppoſite Shore. In which latter Caſe, nevertheleſs, the other neighbouring States, their Fellow Borderers, ſhall be ſuppoſed to be Lords of each of their particular Ports, and of ſo much of the Sea as the convenient acceſs to the Shore requires. Of the Effects of the Sovereignty (if it may be ſo term'd) over the Sea, *vid. Alberic. Gentil. Advocat. Hiſpan.* l. i. c. 8, *&* 14. and *Selden Mar. Clauſ.* l. ii. c. 20, 21, 22. To which we may add by the way what Dr. *Chamberlain* takes notice of in his *Preſent State of England*, Part I. c. 4. *That Perſons born on Shipboard upon thoſe Seas which are ſubject to the* Engliſh *Dominion, are accounted Natives of* England, *and have no need of Naturalization, as others born without the Realm.*

IX. But what ſhall we ſay of the main Ocean, which ſpreads itſelf between thoſe vaſt Continents of *Europe*, *Africa*, *America*, and the unknown Southern Coaſts? Was this ever brought under *Property*, or doth it ſtill remain in its primitive ſtate, free and common to all the World? As for the prodigious extent of it, this however doth not abſolutely render it incapable of being appropriated. Yet we muſt confeſs, the Dominion of it would not be only unprofitable, but unjuſt; ſhould either any one Nation challenge it all to themſelves, or ſeveral States divide it into ſo many Shares, excluding all the reſt of Mankind. Navigation, or the convenience of Water-paſſage, is a thing which ſuffers no Damage by being enjoy'd; on the bare account of which the Appropriation of the Sea is needleſs and ſuperfluous; ſince Men may ſail no leſs commodiouſly, were the Sea common to all Nations, than if it were peculiarly ſubject to one. The Fiſhing-Trade is of no very great Conſequence in the main Ocean; and ſince you do but vainly call a thing your own, when 'tis morally impoſſible to hinder others from uſing it promiſcuouſly with your ſelf; we cannot think any State would find it tantamount to maintain Fleets in all parts of the Sea, only to ſecure the Fiſhing againſt Interlopers. But what if a particular Nation, either through Ambition and the Vanity of being ſtiled Lords of the Ocean; or prompted by Avarice, and the hopes of drawing to themſelves all the Advantages of Navigation and Trade, ſhould claim the Ocean as their peculiar Poſſeſſion? Eſpecially if they urged by way of Title, That they were the firſt who entred upon the Uſe of it with Sails and Shipping, and that they poſſeſs Lands in every Continent round it: And that, ſince the Sea was originally a void Space, he, who before the reſt attempted to fix a Uſe and Occupancy in it, might thereby acquire a *Property* excluſive of all others. To this we anſwer, That Men have indeed a Privilege of making waſte Places their own, by firſt ſeizing upon them: But then they are always to remember, that God gave the World not to this nor to that Man, but to human Race in general; as likewiſe, that all Men are by Nature equal. Wherefore, that tacit Covenant between the firſt Introducers of *Property*, aſſigning the Right of thoſe things which did not fall under their prime Diviſion [1], to the Perſons who ſhould firſt take Poſſeſſion of them, can by no means be extended to ſuch an Object, which if one ſhould hold alone, he might oppreſs all others with moſt unjuſt Slavery, or might intercept ſome moſt important Advantages, which would otherwiſe accrue to all Nations in common. Inaſmuch as ſuch a Caſe as this could not enter into the Imagination of thoſe primitive Diviſors. As then no one would deſerve Cenſure for taking out of a common Store whatever is neceſſary for his own Occaſions, tho' in order to future Uſe; ſo *he* is not to be endur'd, who out of a vain and ſenſeleſs Greedineſs ſhould lay claim to more than he could ever ſpend; and ſhould deſire infinitely to enlarge his own Dominion, for no other Reaſon, but to debar others from the uſe of thoſe good things which Nature affords. There can then no probable Ground or Colour be alledged, why any one People ſhould pretend to

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Mr. Barb. *NOTES on* §. viii, ix.

according to Mr. *Bynkerſhoek*, there is no part of the main Ocean, nor of any Sea inclos'd with Land, that belongs to any Power farther than he can command it from the Shore, becauſe there is no Power in actual Poſſeſſion after the manner we have before mentioned. As to the Queſtion of Fact, I will not meddle with it. Our Author may be conſulted about that. As for the matter of Right, altho', as I ſhall ſhew hereafter, I do not reſt altogether in the Opinion of that learned and judicious Lawyer, who lays it down for a general Maxim, That, without regard had to the Laws of Kingdoms, Property is always extinguiſh'd with the actual Poſſeſſion; yet I think he hath reaſon to maintain it in reſpect to the Sea, and other things of like Nature, which remain ſuch as Nature has produced them. As the Induſtry of Man has added nothing but the bare Poſſeſſion, it follows, that from the very Moment that Poſſeſſion is left in any manner, the things are and may be look'd upon as quite abandoned. As for Example, ſuppoſe there be a great Extent of Land unoccupied, which is not encompaſſed on any ſide with the Lands of any State, tho' they are near, if the Maſter of the Country takes no care to till them, or ſecure them; or if he has ſometimes done it, and does diſcontinue it, any Man may ſeize it as well as he, eſpecially if the Neighbours have reſigned all their Right to him; and in this caſe alſo the Renunciation of theſe laſt can't be drawn into conſequence for others who would ſettle there, ſo long as they are not actually poſſeſſed. By a much ſtronger Reaſon we muſt acknowledge the neceſſity of a continual Poſſeſſion in reſpect of the Sea, which, excepting a little Diſtance from the Shore, is much leſs in uſe both in itſelf, and by all the Care that any Man can take to make it profitable in any Manner; wherefore nothing but inſatiable Avarice, and a prodigious Diſregard to the Equality of all Men by Nature, can ſuggeſt ſuch vaſt Pretenſions, and ſo difficult, not to ſay impoſſible, to maintain. See §. following.

[7] *Bodinus de Republ.* l. i. c. ult. on the Authority of *Baldus* affirms, That by a kind of common Right enjoy'd by all Princes of Maritime Countries, the particular Sovereign may command and controul thoſe who approach within ſixty Miles of his Shore.

[1] It is not neceſſary to have recourſe to the intent of the Agreement, which, as I have ſhewed above, is a meer Chimera. The impoſſibility of ſeizing upon the main Ocean, and preſerving a non-interrupted Poſſeſſion, is ſufficient to prove the Ridiculouſneſs and Injuſtice of theſe proud Pretenſions. See §. viii. n. 6. before-going. And Mr. *de Bynkerſhoek*'s Diſcourſe, c. 7.

the Dominion of the whole Ocean, ſo as by virtue of this Right to aim at excluding all others from ſailing there. Not one of thoſe Reaſons, which firſt moved Men to the Settlement of *Property*, doth affect the main Sea. To make it fit for Navigation, there is no need (in regard to the Sea itſelf) of the Pains and Induſtry of Men. The Winds labour no more to drive all the Fleets in the World, than a ſingle Veſſel. Nor do thoſe Tracts, which the Keels plough up, make the way rougher to thoſe that follow them. As for the Paſſage to the other Continent, this is not rendered leſs convenient to one Nation, though another uſeth the ſame Road. And to have been the firſt Travellers through any Place doth by no means give a People the Dominion of it, or prohibit others from turning it to the ſame Advantage. It is a moſt imprudent Plea to urge, *That any one State, by intercepting the naval Affairs of all others, may be able to draw to it ſelf the whole Profit of a Sea Trade, which Intereſt all Perſons ought induſtriouſly to purſue.* As if all the reſt of Mankind ought to be oppreſs'd by a moſt unjuſt Monopoly, to gratify the inſatiable Avarice of a ſingle Government: Or, as if all others muſt voluntarily turn Slaves, becauſe the wicked Ambition of one Prince or State luſts after the Sovereignty of the whole World. Such hath been the Bounty of Providence towards Mankind, as to give an abundant Supply of all things uſeful to their Neceſſities. But as to the manner of poſſeſſing theſe things, Reaſon enjoins Men to uſe ſuch Moderation in it, as to reſt contented with the Acquiſition of ſo much as is likely to ſuffice for the Service of themſelves and of their Dependents. Nor doth the ſame Principle forbid them to be concern'd for the future, provided they do not, either by Envy or Avarice, hinder others from gaining a needful Maintenance and Relief. If any one carries his Purſuits further, and ſcrapes up ſuperfluous Stores, to the Injury and Oppreſſion of others, it can be no Fault in the reſt, if, when Opportunity ſerves, they engage in a timely Enterprize of reducing him to Reaſon.

X. From what we have obſerv'd, it is clear, that to ſail the Ocean in a peaceful manner both is and ought to be the free Privilege of all Nations: *It is*, becauſe no one People have attain'd ſuch a Right over the Ocean, as will juſtify them in ſhutting out all others from the ſame Benefit: And *it ought to be*, becauſe the Law of general Kindneſs and Humanity requires it. Whence it follows, that no Sovereign can hinder the Nations which border on the main Sea, and are not under his Government, from maintaining a Trade with each other; unleſs he have by Covenant obtain'd ſuch a Right, as either that ſome particular State is bound, on his account, to exclude ſome certain People from all Commerce with them (of which kind was the Contract between the *Dutch Eaſt-India* Company, and the Emperor of *Ceylan* [a]) or that ſome whole Nation have ſurrendred up to him their right of ſailing to another [1]. For ſince I may, at my pleaſure, either retain or alienate my Goods, eſpecially ſuch as regard rather the Superfluities of Pleaſure than the Neceſſities of Life; there is no reaſon but that I may, on ſome certain Conſiderations, oblige my ſelf to diſpoſe of them to one Perſon, and to none beſides. And this indeed is one proper effect of Liberty, that Men may by Covenant give up their Rights between themſelves; though no ſuch Covenant ſhall be allowed, if really prejudicial to a third Perſon. Hence likewiſe, as a Prince may juſtly ordain, that no Goods, of the Growth or the Manufacture of his Dominions, ſhall be exported by Foreigners, unleſs by ſuch as have obtain'd this Privilege, either upon Covenant, or by free Grant (tho' the Law of Nature doth not at all oblige him to ſtrike ſuch a Covenant, or to make ſuch a Grant, unleſs ſome Nation abroad be reduced to ſuch Extremity, as that without this Liberty of Commerce they muſt neceſſarily periſh) ſo if a People of *Europe*, for Inſtance, have appropriated any Country in *Africk*, or the *Indies*, by ſuch means, and in ſuch manner as the Cuſtom of Nations makes effectual towards the acquiring *Dominion*; they may with like Juſtice, if they think fit, cut off from others all Paſſage thither on account of Traffick, or not allow it, but under certain Conditions, or ſome ſettled Burthens and Duties. And this we now ſee in every Day's Practice: Nor doth it appear to be in any reſpect repugnant to natural Reaſon. For that Liberty of Commerce, on which ſome ground ſuch high Pretenſions, doth not hinder but that a State may allow more Favour to its own Subjects, than to Strangers.

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[a] Vid. *Philipp. Baldæ.* Deſcript. Oræ *Malabar.* & *Coromandel.* c. 10. & 12.

Mr. BARB. *NOTE on* §. x.

[1] See lib. iii. c. 3. §. 6, 9, 11. above.

CHAP.

CHAP. VI.

Of Occupancy.

- I. *The ſeveral ways of acquiring Dominion.*
- II. *The Original Methods of acquiring it.*
- III. *Occupancy is gain'd in whole, or by Parcels.*
- IV. *The Poſſeſſion of Moveables depends on the Diſpoſal of the chief Governour.*
- V. *In ſome Places the catching of wild Beaſts is allowed to every one.*
- VI. *In other Places 'tis the privilege of great Men only.*
- VII. *Whether he that hunts contrary to the Law, has a Property in the Beaſt he takes.*
- VIII. *When things occupied are underſtood to be immoveable.*
- IX. *When they are moveable.*
- X. *Whether a wild Beaſt becomes mine as ſoon as I have wounded it.*
- XI. *Whether the Fiſh are ours, that are in our Ponds.*
- XII. *Things left become immediately the firſt Occupant's.*
- XIII. *Of Treaſures.*
- XIV. *Of Poſſeſſions obtain'd by War.*

It follows in courſe, that we conſider the ſeveral ways of acquiring *Dominion* [1], which, after *Grotius*'s Judgment [a], may conveniently be divided into *originary* and *derivative*. The former are thoſe by which the *Property* of any thing was firſt introduced: The latter thoſe by which a *Property* already ſettled paſſeth from one Man to another.

Again, the *originary* way of acquiring *Property* [2] is either *ſimple* and *abſolute*, as when we obtain *Dominion* over the Subſtance and Body of a thing: Or only *primitive* and *with reſpect*, as when we add to a Thing already our own ſome further Improvement and Increaſe.

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[a] Lib. ii. c. 3. ſ. 1.

Mr. Barb. *NOTES on* Chap. VI. §. 1.

[1] Before we proceed farther, we muſt here determine a Queſtion which Mr. *Bynkerſhoek* has given us an Occaſion to examine. That able Lawyer maintains, " That by the Law of Nature, Property, which begins with a corporal Poſſeſſion, ends with it alſo." According to him, that ſame Moment that a thing is out of our Power it becomes common. And if for a long time there has been an Uſage that every one remains a Proprietor of his own Goods, although he keeps not the corporal Poſſeſſion of them, this is the Effect of civil Laws, and of the Agreement of the Members of every State. " Inſomuch, *adds he*, that if a thing belonging to " any Man be found in a ſtrange Country, he being abſent, and not ſecuring it, it belongs to the firſt Occupant, provided there " be not ſome particular Treaty between the two States, by virtue of which they ought to be look'd upon as Friends; for if " they are only engaged not to make War upon one another, this Agreement leaves every one's natural Right entire to ſeize upon " that which is not in the poſſeſſion of the former Owner. " Mr. *Bynkerſhoek* alledges here the Authority of the *Roman* Law, and a Paſſage of St. *Auſtin* quoted in the Canon-Law; but ſince he treats there only of the Light of Reaſon, I will not ſtay to examine whether thoſe Paſſages are well applied, or no, as a *German* Lawyer affirms, who endeavours to confute the firſt Chapter of a *Dutch* Lawyer, *De Dominio Maris*. It was Mr. *Titius*, who in 1704, the Year after Mr. *Bynkerſhoek*'s Book was publiſh'd, maintain'd a publick Diſputation at *Leipſick*, *De Dominio in rebus occupatis ultra poſſeſſionem durante*, a Diſcourſe which I never ſaw; but the Author himſelf gives us the Abridgment of it in his *Jus Privatum Romano-Germanicum*, &c. l. iii. c. 6. As to the Quotations of the Civil Law, I ſhall only obſerve, that the *Roman* Lawyers did not agree perfectly among themſelves about the continuance of the Right of Property, as Mr. *Noodt* has proved; that they differed in the manner of getting Poſſeſſion, *Probabilia Juris*, l. ii. c. 6. As for the Proofs taken from the thing it ſelf, Mr. *Titius*, as above, delivers himſelf briefly thus: " 1. That the Hypotheſis of Mr. *Bynkerſhoek* deſtroys all ſorts of Right, and particularly reduces Property to nothing. For of what Uſe can " that Right be which is extinguiſh'd by the Act with which it is acquired? 2. That there is no plauſible Reaſon to be given why " ſuch great Force ſhould be attributed to Poſſeſſion, if the continuance of Right and Property depends fully and abſolutely upon " it. 3. Laſtly, As to human Right, perpetual Poſſeſſion is impoſſible, and ſo we ought not to believe that it is neceſſary to " preſerve them. *From whence he concludes*, That to follow the Maxims of the Law of Nature, we muſt on the contrary ſay, " That Property being once admitted continues always, tho' there be no Poſſeſſion; eſpecially if the Conſent of the Proprietor " himſelf, or the civil Laws do not order it otherwiſe. " Theſe Reaſons, in my Judgment, prove ſufficiently what they were intended for, but we muſt explain them a little, and add what is wanting to them. I ſay then, that ſince Property has its Original from taking Poſſeſſion, it doth not follow that the Right ſo acquir'd ceaſes, when there is no Poſſeſſion. The intention of Nature in making all things common to Man is, that every one ſhould uſe and diſpoſe of what he has gotten according to his own Pleaſure, 'till he leaves it, and permits it a-new to be ſeized by the firſt Occupant, without which this Right will be of little Uſe. So that Poſſeſſion is nothing elſe but an indiſputable Mark of the Will to retain what a Man has ſeized. To authorize us then to look upon a thing as abandon'd by him to whom it belong'd, becauſe he is not in Poſſeſſion, we ought to have ſome other Reaſons to believe that he has renounced his perſonal Right to it. Now, as I have obſerv'd in Note 6. §. 8. of the foregoing Chapter, we may preſume this in reſpect to thoſe things which remain ſuch as Nature has produced them, eſpecially ſuch as are very numerous, or are of a vaſt Extent; tho' Mr. *Titius* does not make that Diſtinction, and maintains, that one may be Maſter of the Sea, altho' he be not in Poſſeſſion. But as for other things, which are the Fruits of human Induſtry, and are either produced by Nature, or are put into a new Form, or are tamed, or are hunted out of their Holes; all this is done with great Labour and Contrivance uſually; and it can't be doubted but every one would preſerve his Right to them, 'till he makes an open Renunciation; and ſo they ought to be looked upon as his, tho' he does not keep them ever after, or he loſes the Poſſeſſion by ſome Accident, which may eaſily happen, and is almoſt unavoidable. In the main there is nothing but what is juſt in this Claim, as may appear from what is ſaid, c. iv. §. 4. n. 4. of this Book. And Mr. *Bynkerſhoek* owns, that the firſt Men left nothing common but what they could not diſtinctly poſſeſs. Their Covetouſneſs and Deſire of having was ſo great, that to expreſs it, the Fable of Clambering up into Heaven was invented, c. 2. p. 10. Can we then believe, that Men of this Temper would conſent that the Right of Property ſhould be always extinguiſhed with corporal Poſſeſſion, which can never be without Interruption? Having thus taken liberty to ſpeak my Thoughts about Mr. *Bynkerſhoek*'s Principle, I ſhall declare my Indignation againſt what Mr. *Titius* (as above, §. 2, 5.) has diſcourſed ſo boldly. He ought in his firſt Lecture of that Diſcourſe to have conſider'd the Worth of the Author, and not to have accuſed him of favouring *Hobbes*'s Opinions, if he had been cautious, at the End of Chap. iii.

[2] This Diviſion may alſo agree with Acquiſitions derivative. See what is ſaid upon the following Chapter, §. 1. Farther, we muſt diſtinguiſh alſo the manner of acquiring Property, into natural and civil. Natural Acquiſition is that which is made either by the Will alone of the Acquirer, in relation to ſuch things as belong not to any Perſon, or by the mutual Conſent of him that transfers the Property, and of him that obtains it, as to ſuch things as belong to any Perſon. Civil Acquiſition is that which either transfers a Property with the Conſent of the particular Owner, or requires ſomething more than the mutual Conſent of Parties. *Titius*'s Obſerv. 290. We find the like Diviſion in the *Inſtitutes*: *Quarundam enim rerum Dominium nanciſcimur jure naturali——quarundam vero jure civili*, l. 2. tit. 1. §. 11. See Chap. 10. §. 1. n. 1. and c. 12. §. 1. n. 1. following.

II. We have ſufficiently made it appear in our former Remarks [a], that after Men came to a Reſolution of quitting the primitive Communion [1], upon the Strength of a previous Contract they aſſign'd to each Perſon his Share out of the general Stock, either by the Authority of Parents, or by univerſal Conſent, or by Lot, or ſometimes by the free Choice and Option of the Party receiving. Now 'twas at the ſame time agreed, that whatever did not come under this grand Diviſion, ſhould paſs to the firſt Occupant [b]; that is, to him who, before others, took bodily Poſſeſſion of it [2], with Intention to keep it as his own. Hence, when *Grotius* [c] affirms, That *original Acquiſition antiently, whilſt 'twas poſſible for all Mankind to meet in one place, might be made by Diviſion alſo, whereas now it can be made only by Occupancy:* The words ought to be explain'd in the following Senſe. When Mankind firſt began to ſeparate into many Families, diſtinct *Dominions* were ſettled by Diviſion: After this Diviſion, he is ſaid originally to acquire a thing lying void and without a Poſſeſſor, who happens to be the moſt early *Occupant* of it; *i. e.* he who lays hold on ſuch a thing before others, or gets the ſtart of them in putting in his Claim to it. Thus the word is uſed in [3] *Seneca Thyeſt.* ver. 202, & 203.

In medio eſt ſcelus poſitum occupanti.

In *Tacitus*, H. l. v. c. 1. *in fin. Multi quos urbe atq; Italia ſua quemq; ſpes acciverat occupandi principem adhuc vacuum.*

In *Pliny*, l. iv. Epiſt. 15. *In ea civitate, in qua omnia quaſi ab occupantibus aguntur, quæ legitimum tempus expectant, non matura, ſed fera ſunt.*

III. In Relation to the Occupancy of [1] Immoveables, eſpecially of Lands, we are carefully to obſerve and diſtinguiſh, whether it be made by one Perſon only, or by many in Conjunction. One Man is then adjudg'd to be the Occupant of Land, when he tills and manures it, or when he encloſeth it with ſettled Boundaries and Limits: Yet ſtill with this Proviſo, That he graſp at no more than what, upon a fair account, ſeems tenable by one Family, however enlarg'd and multiplied. Should one Man, for Inſtance, be, with his Wiſe, caſt upon a deſert Iſland, ſufficient to maintain Myriads of People; he could not without intolerable Arrogance challenge the whole Iſland to himſelf upon the Right of Occupancy, and endeavour to repulſe thoſe who ſhould land on a different part of the Shore.

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[a] Chap. iv. ſ. 4.

[d] *Quod enim nullius eſt, id ratione naturali occupanti conceditur,* Digeſt. l. xli. t. 1. leg. 3. princip.

[c] *Ubi ſupra.*

Mr. Barb. *NOTES on* §. II, III.

[1] We have ſhewn in c. 4. §. 4. n. 4. That the firſt Occupyer makes himſelf a Property by that only, without ſuppoſing any Agreement either perſonal or common, ſo that taking Poſſeſſion was in it ſelf the only way of getting an original Property, as well from the Beginning as at this Day. *Quod enim nullius eſt, id ratione naturali occupanti conceditur,* ſay the Lawyers, Digeſt. l. xli. tit. 1. leg. 3. princip. But if ſeveral perſons ſeize upon one thing in common without an Owner, and part it alike, that Diviſion will then be, in relation to every one of thoſe who make up that Multitude, the original Title of their Acquiſition, *i. e.* the immediate Foundation of that particular Right, which he hath acquired by what hath happen'd to him, and to which he had before only a common Right. Mr. *Titius*'s Obſerv. 291. on *Pufend.*

[2] What our Author means by, *Qui primus eadem corporaliter apprehendiſſet animo,* &c. he will explain himſelf in §. 8, 9. Yet we may obſerve with Mr. *Titius,* that taking Poſſeſſion actually (*Occupatio*) is not always abſolutely neceſſary to acquire a thing that belongs to no body. 'Tis only a means to let all others know, that we have an Intention to appropriate ſuch a thing. Indeed, that which properly makes the Right of the firſt Occupyer is, that he makes known to others his deſign to ſeize upon a thing. If then he declares his Will by ſome other Act, as ſignificative, or if others have openly renounced with reſpect to him the Right which they had to any thing which belong'd no more to him than to them, he may then acquire the original Property without any actual poſſeſſion. *Obſerv.* on *Pufend.* 292 and in *Lauterb.* 110. We may alſo add, that he muſt be inclined to take what he declares his deſign to ſeize on, otherwiſe the boundleſs Covetouſneſs of moſt Men will render his Right unprofitable to others, and be a Foundation for perpetual Diſputes and Quarrels. In fine, the Notion which I have laid down concerning the exterior Act, which is neceſſary to ſeize on a thing, ſo that we may acquire ſuch a Right to it as may exclude the Claims of all others; this Notion, I ſay, is not altogether new. I learn from Mr. *Noodt, Probabilia Juris,* l. ii. c. 6. That among the Antients, as alſo the old *Roman* Lawyers, there were ſeveral of the moſt famous who were exactly of the ſame Opinion, tho' none took notice of it before this judicious and quick ſighted Lawyer.

[3] This Grammatical Remark, that the Latin word *occupare, i. e.* to occupy or poſſeſs, often ſignifies *prævenire* or to prevent others, might have been ſpared by our Author.

[1] We muſt put among Immoveables, firſt of all, Space, which is in its own Nature altogether immoveable. We may divide it into Common and Particular. The firſt is publick places, as Markets, Temples, Theatres, great Roads, *&c.* The other is that which is perpendicular under the Sun, from a particular Poſſeſſion of Lines drawn, as well from the Center of the Earth to the Surface, as from the Surface to the Heaven. Every one hath a Right to raiſe a Building under the Sun, as high as he will, and nothing may hinder him but that he may carry it in a direct Line as far as the Orb of the Moon; and likewiſe as much from thence, if we may ſuppoſe that Planet habitable. But if we may dig as deep as we will, we muſt not go farther than the Center of the Earth, becauſe what is beyond, in reſpect of us, belongs to the *Antipodes,* although the Civil Laws of ſome Countries give to the King's Treaſury whatever is found in the Lands of private Men, at any Depth greater than the Plough-ſhare reaches. We muſt alſo farther obſerve always, that perpendicular Lines may be drawn from the Surface of the Sun as well upwards as downwards, and ſo as my Neighbour may not lawfully raiſe a Building which by any way may anſwer directly to my Sun, although it be not at all ſupported, but born upon Beams laid in an Horizontal Line; ſo likewiſe neither can I in my turn raiſe a Pyramid whoſe Sides and Foundation extend beyond my Space, eſpecially if there be no Agreement about it between my Neighbour and my ſelf. After Space comes the Subſtance of the Earth, which we call the Ground, ſuch as the places for Building, Meadows, Fields, and Vineyards. We may next account for things immoveable, whatever ſticks faſt to the Surface of the Earth; either by Nature, as the Trees; or by Man's Labour, as Houſes and other Buildings; although theſe ſort of things may be ſever'd and become Moveables. Such are alſo not only Wind-mills, whoſe Foundation is faſten'd to the Earth, but alſo Water-mills; for tho' they may be carried about, they can't be made uſe of without ſome Anchor or Stake, which is firſt fixed in the Ground. Whatever alſo is faſtened to Houſes or other Buildings, as what is joined together with Iron, Lead, Plaiſter, or otherwiſe for a perpetual Continuance, is alſo reputed immoveable. Things moveable are conſequently all things that are ſeparated from the Earth and Water; whether they have been looſened from it, as Trees fall'n or cut down, Fruits fall'n or gather'd, Stones dug out of the Quarries; or are naturally ſeparated as living Creatures. There are two ſorts of things Moveable; the one ſuch as live and move of themſelves, and they are call'd living Moveables, or living Creatures; others are inanimate, and may be called dead Moveables. I have taken all this partly out of the Elements of *Juriſpr. Univerſal.* of this Author, p. 87, 88. and partly out of the Civil Laws of Mr. *Daumat. Prælim.* tit. 3. Sect. 1. §. 4, *&c.* The Roman Lawyers often call Immoveables, *Res, quæ ſoli ſunt. Labeo ſcribit, edictum ædilium Curulium de venditionibus rerum eſſe, tam earum, quæ ſoli ſunt, quam earum, quæ mobiles, aut ſe moventes,* Digeſt. l. xxi. tit. 1. *De Ædilitio Edicto,* &c. leg. 1. §. 1. It would be too long for me to recite here the other Paſſages of Lawyers to ſhew particularly what things they comprehend under the Name of Immoveables.

But when any number of Men jointly poſſeſs themſelves of a Tract of Land, this Occupancy is wont to be made either *by the Whole*, or *by Parcels* [a].

The former happens, when Men in an united Body ſeize on ſome deſolate Region, encompaſs'd with certain Bounds, either by Nature, or by human Appointment. The ſeveral Parcels of which Region are either granted to the particular Members of the Community, to take and to hold as each ſhall think fit (a Method but rarely practiſed) or what ſeems more convenient for the Prevention of Quarrels and Diſputes, are allotted to every Perſon by publick Deſignation. For that a promiſcuous Occupancy is apt to breed Confuſion, we may obſerve from that Deſcription which [b] *Livy* gives us of *Rome*, *Forma urbis erat occupatæ magis quam diviſæ ſimilis; Such was the Appearance of the City, as if it had been firſt poſſeſs'd rather by Occupancy than by a regular Diviſion.* *Tacitus* and *Cæſar* will furniſh us with Inſtances. The former reports of the antient *Germans* to this Purpoſe [c]; *Such a number of Men dwelling together* (for *Grotius* reads *Vicos*, not *Vices*) *occupy or poſſeſs ſuch a Portion of Land, which they afterwards parcel out into private Shares, according to the Worth and Eſteem of particular Perſons; the vaſt extent of the Country making theſe Partitions eaſy and practicable. They change their arable Ground every Year, and are never at a loſs on this account.* So likewiſe *Cæſar* tells us of the *Suevi* [d], *They have an hundred Cantons, from each of which they draw every Year a thouſand Men for the Camp-ſervice; the reſt keep at home, and till the Ground for themſelves, and for their abſent Friends. The next Year they relieve each other; thoſe who ſerv'd in the Army return to take care of the Land; and thoſe who tarried behind liſt themſelves for the Wars. Thus they never interrupt either the Buſineſs of Husbandry, or the Uſe and Diſcipline of Arms. But there is no ſuch thing as ſeparate or private Fields known among them; nor are they allowed to inhabit any one Place longer than the Space of a Year.* And again [e] ſpeaking of the *German* Nations in common; *No Perſon*, ſays he, *hath any certain Quantity of Land, any ſettled or proper Boundaries. But the Princes and Magiſtrates every Year aſſign the ſeveral Tribes their Reſidence, in what Place, and to what Extent they judge convenient; and, the Year after, force them to remove to a new Seat.* The Deſign of which Inſtitution was, no doubt, to preſerve the antient Simplicity of Life, ſo unacquainted with Avarice and with Luxury. We find *Horace* alluding to this Cuſtom in *Lib.* III. *Od.* xxiv. *ver.* 9, *&c.*

Campeſtres melius Scythæ
(Quorum plauſtra vagas rite trahunt domos)
Vivunt, & rigidi Getæ:
Immetata quibus jugera liberas
Fruges & Cererem ferunt,
Nec cultura placet longior annua;
Defunctumque laboribus
Æquali recreat ſorte vicarius [f].

The Rovers of the *Scythian* Plains,
Whom peaceful Want inur'd of old
To wheel their Houſes in their Wains,
And *Getans* ſtiff with native Cold,
In ſolid Happineſs outvy
The Pomp and Pride of *Italy*.
Unmeaſur'd Lands free Plenty yield,
And *Ceres* loves to ſhift the Scene,
A ſingle Harveſt loads the Field,
A ſingle Year confines her Reign:
And if the Farmer weary grow,
His honeſt Second takes the Plough.

IV. As for this Occupancy in *general*, or *by the whole*, we are farther to obſerve, that it confers on the Community, as ſuch, a Dominion over all things contain'd within the Tract which they thus poſſeſs, not only immoveable, but likewiſe moveable Goods and Animals; at leaſt, it gives them ſuch a Right of taking the latter kind, as excludes all others from the ſame Privilege. And ſuch an *univerſal Dominion*, as is here deſcrib'd, is ſo very different from the *Dominion* of private Men, that the latter may be transferr'd to a Stranger or Alien, whilſt the former remains ſafe in the Hands of the Community [g] [1]. Nor is it neceſſary that all things which are firſt occupied in this general way, ſhould be afterwards divided amongſt particular and diſtinct Proprietors. Therefore, if in a Region thus poſſeſſed, any thing ſhould be found which is not aſcertain'd to a private Owner, it muſt not preſently be look'd on as *void* and *waſte*, ſo that any one Perſon may ſeize it as his *Peculiar*; but we muſt ſuppoſe it to belong to the whole People [h]. And the ſame Rule may, in our Judgment, be extended to ſuch deſolate Iſlands as lie in any Sea under the dominion of a particular Commonwealth [i]; or ſuch as, tho' they do not now appear, yet happen to riſe afterwards in the ſame place; of which we find ſeveral Examples recorded by *Pliny*. Now in the diſpoſal of ſuch things as theſe, the People take different Methods: Sometimes the Profits of them are laid up in a publick Stock, to be taken out again for publick Uſes; ſometimes all the Subjects, ſometimes thoſe only of a certain Order or Degree; and ſometimes Foreigners too are allow'd to hold and enjoy them, as Tenants of the State. Yet in all Caſes, whatever Right private Perſons obtain over theſe things, depends on the Appointment of the whole Community. But there is ſome Difference, as to this point, between Immoveables and Movea-

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[a] See *Grot.* l. ii. c. 2. ſ. 4. [b] Lib. v. in fin. [c] *German.* c. 26. [d] De Bell. Gall. l. iv. c. 1. [e] Lib. vi. c. 22.
[f] Of the Inhabitants of the Iſland *Lipare*, ſee *Diodor. Sic.* l. v. c. 9. p. 292. B. Edit. *Rhodom.* The ſame Author, l. v. c. 34. p. 310, 311. attributes to the *Vaccæans* a more ſtrict kind of Communion, "The Nation of the *Vaccæans, ſays he,* divide their Land yearly "into ſo many Partitions, in order to the tilling it: The Fruit and Product they bring into a common Stock, out of which they "aſſign every Man his Share. If the Countrymen imbezzle any Part, it is a capital Crime. See likewiſe l. v. c. 45. Ibid. c. 45. p. 320. *D.* Of the Commonwealth of the *Panchæans.* So too the *Apalchitæ* labour for the common, and each Houſholder, according to the Number of his Family, received every full Moon his Proportion out of the publick Store-houſe. Vid. *Rochefort.* Deſcript. *Antillar.* Part II. c. 8. n. 8. Comp. *Grot.* l. ii. c. 3. ſ. 4. [g] *Dio Chryſoſtom.* Orat. 31. in *Rhodiac.* "The whole "Country belongs to the civil State; yet this doth not in the leaſt hinder, but that every Man is Lord of his own Poſſeſſions.
[h] Vid. *Grot.* l. ii. c. 2. ſ. 4. [i] Vid. *Plin.* Nat. Hiſt. l. iv. c. 12.

Mr. BARB. *NOTES on* §. IV.

[1] *Dio*'s Greek is, Ἡ χώρα τῆς πόλεως, ἀλλ' οὐδὲν ἧττον τῶν κεκτημένων ἕκαστος κύριός ἐστι τῶν ἑαυτοῦ. See alſo l. viii. c. 5. §. following.

bles. The former, in regard that they lie in open View, and cannot be forced out of their Place, are by virtue of that univerſal or general Occupancy immediately ſuppos'd to belong to the People, ſo far as concerns the Body and Subſtance of them. But now, as to moveable things [2], ſome of theſe are ſo framed or diſpoſed, as that the Region may indeed be the Seat of their Production; and yet there is need either of Labour in finding or gathering them, as Metals in the Bowels of the Earth, Jewels, Pearls, and the like, ſcatter'd about the Shores and other Places: Or elſe of particular Care in taking and ſecuring them, that they may not afterwards get out of our Hands; as Beaſts, Fiſh, and Fowl, Men having no Power over theſe things, ſo as to uſe them at their Pleaſure, before they are found or taken; it follows, that a People by poſſeſſing themſelves in this general manner of the Seat where they are to be met with, do not properly acquire a *Dominion* over them, but only a Right of obtaining ſuch a *Dominion* hereafter, by particularly taking and ſecuring them. Hence, for Inſtance, we cannot rightly ſay, that the wild Beaſts of any Country, which ſtill remain in their natural Freedom, are the property of the Prince: But the Prince alone hath the Right of taking them, inaſmuch as he is Lord of the Soil where they run; and he may communicate this Right to others, in what Degree, and under what Reſtraints he pleaſeth. Therefore he, who is Sovereign of the reſpective Lands or Waters, may grant a Right of taking and appropriating things of this Nature, either promiſcuouſly to all Perſons, or to none but his own Subjects, or ſtill only to his Subjects of ſuch a Quality: Or, laſtly, he may, if he thinks fit, reſerve the Privilege wholly to himſelf. For tho' the things themſelves be not yet, in ſtrict Speech, under Dominion, yet foraſmuch as the Act of appropriating them cannot be accompliſhed without uſing ſome other things which are ſubject to Dominion; as ſuppoſe the Earth, or the Water; it follows, that he who hath the Sovereignty of the latter things, may, by a Decree to this Purpoſe, prohibit others from uſing them, as means of acquiring the former [a].

V. Hence it is apparent, that it depends on the Will of the Sovereign, and not on any natural and neceſſary Law, what Right the private Members of a State ſhall enjoy, as to the gathering of Moveables not yet poſſeſs'd, as Hunting, Hawking, Fiſhing, and the like: Nay, and as to the Occupancy of deſolate Regions; which the ſupreme Governours may hinder any of their Subjects from entring upon. Such a Prohibition cannot indeed prejudice Foreigners [1], who by taking poſſeſſion of thoſe Regions may make them their own: But it will be a ſtop to the Subjects of the reſpective Governours, ſo that none of them ſhall acquire the ſaid things, but thoſe only who have obtain'd a Grant and Commiſſion ſo to do. For in ſome Places private Men are allow'd more of theſe Advantages, and in ſome leſs, according as the Rulers in every State have judg'd convenient. By the *Jewiſh* Cuſtom, as Mr. *Selden* [b] informs us, *Whatever was found in deſolate Places, or in ſuch as were void of the Dominion and Culture of private Perſons, became the Property of the Occupant; as Graſs, Fruit, Wood, and the like. Alſo the Fiſh, whether in ſalt or freſh Water, and the wild Beaſts and Birds: Yet no one was permitted to hunt or to hawk in another Man's Ground; tho' even there, if he had once taken any Game, it was his own. But to rob the Parks and Ponds was utterly unlawful.* The *Roman* Lawyers talk much to the ſame purpoſe. For thus *Gaius* [2]; *All Animals taken on the Land, on the Sea, or in the Air, that is, wild Beaſts, Birds, and Fiſh, belong to thoſe who take them: For what is yet no Body's, natural Reaſon aſſigns to the firſt Occupant.* On theſe and the like Places the Expoſitors of the Civil Law obſerve, that under the Term *Feræ* are comprehended all living Creatures, which Nature hath endued with an unlimited Power of ſtraying up and down about their proper Elements; ſo as to take in thoſe likewiſe which have been tamed by the Uſe and Company of Men. Though perhaps the Diſtinction between wild and tame Creatures might be thus better expreſs'd; that the former are more averſe to human Society, take greater delight in enjoying their boundleſs Liberty, and cannot, without great Difficulty, be accuſtomed to live with us; nor may we, after all, depend very ſafely on their Fidelity: Whereas the latter are quite different in each of theſe reſpects. Yet 'tis a Saying of *Grotius* [c], *That the Reaſon why ſome Creatures fly and avoid us, is not the want of Gentleneſs and Mildneſs on their Side, but on ours:* Which he grounds on the Obſervation of Travellers; that in the moſt remote Parts, where Men had ſcarce ever or very rarely came before, Birds have been found, which offer'd themſelves freely to be taken. Some may rather chooſe to form the Diſtinction by ſaying, That wild Crea-

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[a] Comp. *Grot.* l. ii. c. 2. ſ. 5. & c. 3. ſ. 5, & 19.

[b] De Jur. Nat. & Gen. ſec. *Hebr.* l. vi. c. 4.

[c] Hiſt. *Belg.* l. v.

Mr. Barb. *NOTES* on §. iv, v.

[2] This Diſtinction is founded upon a falſe Notion of taking poſſeſſion. See §. 2. n. 2. above. The Truth is, we may make our ſelves a Property in things moveable, as much as immoveable, becauſe they are often additional to them. See Mr. *Thomaſius*'s *Juriſprud. Divin.* l. ii. c. 10. §. 147, *&c.* Our Author to maintain his Principles runs himſelf into manifeſt Abſurdities. See §. 7. n. 3. following.

[1] Our Author doubtleſs means a deſert Country, bordering upon a Kingdom, but taken into it. For every thing that is encompaſſed with ſomething already occupied, muſt alſo be ſo eſteemed, and conſequently others cannot pretend to it. So that I can't ſee why Mr. *Hertius*, an exact Author, ſhould ſuppoſe the contrary. 'Tis not a Sequel of Mr. *Puſendorf*'s falſe Hypotheſis concerning the Foundations of the Right of Property. For the Agreement which he ſuppoſes neceſſary to make one Maſter of a thing, extends itſelf in his Judgment to every thing that has a neceſſary dependence on it, which appears plainly by what I have ſaid above about the Sea, c. 5. §. 8. But as it may be the Intereſt of a State to keep its Members from ſeizing any deſert Lands without its Juriſdiction, by their own Authority, the Author here obſerves upon this Occaſion, and expreſſeth it in this manner; *Sovereigns may likewiſe,* &c. which makes it plain enough to underſtand. It is certainly a thing much more conſiderable to ſeize upon a large Extent of Ground, than to take a few Deer or Fiſh; ſo that this is ill placed, if he treats of any thing which belongs already to the State in general.

[2] The Words of the Civil Law are, *Feræ igitur beſtiæ, & volucres, & piſces, & omnia animalia, quæ mari, cælo, & terra naſcuntur, ſimul atque ab aliquo capta fuerint, jure gentium ſtatim illius eſſe incipiunt. Quod enim ante nullius eſt, id naturali ratione occupanti conceditur.* Inſtit. l. ii. tit. 1. *De rerum diviſione, & adquirendo ipſarum Dominio,* §. 12. Concerning Fiſh there is an elegant Paſſage in *Plautus*'s *Rudens,* Act iv. Scen. 3. ver. 32, *&c. Ecquem eſſe dices,* &c. "Can you ſay that any one of the Fiſh belongs to me, whilſt in its own Element? Yet thoſe which I catch are my own, and I reckon them amongſt my proper Goods. "No one lays hands on them to challenge them from me; no one claims a ſhare in the Booty. I ſell them all fairly in the open "Market as my honeſt Store." Tho' the Fiſherman was ſomewhat out when he applied this Argument to the Bag of Money.

tures have naturally a more intractable, a more rough and ſtubborn Diſpoſition than the tame.

We may here remark by the way, that in one place of the *Inſtitutions*, [a] and another of the *Digeſts*, Pigeons and Peacocks are falſly reckon'd amongſt thoſe Fowls which we term Wild [3]. The Miſtake about the Peacocks hath been already noted by *Gothofredus*, on that Paſſage of the *Inſtitutions*: And as for Pigeons, the Reaſon which in the very next Section is there given to prove Hens and Geeſe to be tame [4], will reach them likewiſe, there being other Pigeons expreſly denominated Wild. And therefore, by the *Jewiſh* Cuſtoms, none might take them, unleſs at thirty Furlongs diſtance from the Dove-houſe [b].

Yet Bees are no doubt wild by Nature [5], ſince their Cuſtom of returning to their Hive doth not proceed from their familiarity with Mankind, but from their own ſecret Inſtinct: They being in all other reſpects utterly unteachable. It is nevertheleſs one of *Plato*'s Laws, [c] *Whoever ſhall purſue the Swarms which belong to others, and by ſtriking on the Braſs ſhall draw them with the delightful Sound to fix near himſelf, let him make Reſtitution for the Damage.* Where he ſeems to preſuppoſe, that the Owner of the Bees did not follow them, when they left his Hives [d]. *Pliny* [e] will have the Bees to be neither *wild* nor *tame*: Others divide them into both thoſe kinds. [f] But that, ſo long as they return to our Hives, they are properly our own, and cannot be hurt without our Loſs and Damage, is very laboriouſly proved in that Declamation of *Quinctilian*, entituled, *The poor Man's Bees* [g].

According to the *Roman* Laws, 'tis the ſame thing whether a Man take Game in his own Land [6], or in thoſe of others: Becauſe wild Creatures, in whatſoever place they are found, are no Body's Property, whilſt they retain their natural Freedom. Yet the Owner of Land may hinder others from coming there to follow their Sport [7]. But ſtill what another hath taken with his Dogs or his Hawks, though againſt the expreſs prohibition of the Lord of the Soil, he thereby makes his own. Indeed, as to this laſt Particular, *Cujacius* [h] is of a different Opinion; grounding his Exception on a Law of the *Digeſts* [i].

VI. But in moſt Places the privilege of Hunting is left wholly to the Governours of the Commonwealths; who in ſome Countries admit their principal Subjects to be Sharers with them: Only Beaſts of Prey are almoſt every where allow'd to be kill'd by all Perſons without Diſtinction. Many Reaſons may be aſſign'd for this general Cuſtom. It did not ſeem convenient that Country-men and Labourers ſhould be permitted to quit their Work, that they might ramble about the Woods; which Indulgence might have drawn them on by degrees to the practice of Robbery and Plunder [k]. Sometimes too it is reckon'd unſafe to truſt the common People with Arms. *Tully* [l] mentions one *Lucius Domitius*, who executed a Slave only for ſtriking a large Boar with a hunting Spear, when after the *Servile War* in *Sicily* an Order had paſs'd, forbidding any Slave to appear with a Weapon. On the other ſide, for the Princes and Nobles, on whoſe Arms the Safety of the Commonwealth was to depend, Hunting was eſteem'd a moſt agreeable Exerciſe, as a Repreſentation of War, and very proper to inure them in bearing the Hardſhips and Labours of the Field. On which account what a high Value the *Parthians*, *Medes*, and *Perſians* ſet on this manly Sport, we may learn from *Xenophon* [m] and other Authors [n]. *Bajazet* the *Turk* is ſaid to have maintain'd ſeven thouſand Men only for the care and management of his Hawks; and to have had ſix thouſand Dogs for the Chaſe. When he was taken Priſoner by *Tamerlane*, and upbraided with this Fanſy by a Preſent of Hawks and Dogs from the Conqueror, he fiercely replied, *For me who owe my Birth and Education to* Amurath *the Son of* Orchan, *both Sovereign Princes, Hounds and Hawks are proper Diverſion: Not for you a rambling Free-booter of* Scythia, *bred up to Thieving and Rapine* [o]. And indeed it was but equitable to allow this manly Recreation to Princes and Chief Men, by whoſe Toils and Cares the publick Welfare is ſecur'd. But ſhould the ſame Favour, in great and flouriſhing Countries, be granted promiſcuouſly to all Perſons, it would be of very little Benefit and Advantage to any one in particular [p]. For theſe, therefore, and the like Reaſons, a Sovereign, if he thinks it for the Intereſt of the Kingdom, may againſt the conſent of the common People abridge them of the Liberty of Hunting, without any Injuſtice. For he doth not hereby take from them what was their own, but barely forbids them to uſe certain means of acquiring things, which the meer Law of Nature, if it obtain'd without any civil Conſtitutions, would allow them. For as to what ſome ignorant Perſons have urged, that the prohibition of Hunting is therefore unlawful, becauſe God Almighty inveſted Men in general with the Dominion over Beaſts, the pooreſt Subjects being no leſs Men than their Superiors: Or, as to that common Aſſertion of the *Roman* Lawyers, that Hunting is free to all by the Law of Nature and of Nations; learned Men have long ſince put an end to theſs Doubts, by diſtinguiſhing between the *preceptive* and *permiſſive* Law of Nature, and by explain-

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[a] Sect. 15. *De rer. diviſ.* [b] Vid. *Conſtantin. l'Empereur Baba Kama*, c. 7. ſ. 7. Add *Selden* de *J. N. & G.* ſec. Heb. l. vi. c. 11. [c] De L. L. l. viii. p. 915. C. Edit. *Wech.* [d] Comp. ſ. 14. *Inſtit.* dict. Tit. [e] Lib. xi. c. 5. [f] Vid. l. xlvii. t. 2. *Digeſt. De Furtis*, l. xxvi. & lib. xl. t. 1. l. v. ſ. 3. [g] Lib. viii. ſ. 1. *D. Famil. erciſcundæ.* [h] Obſerv. 4, 2. [i] Leg. 55. t. 1. Lib. xli. *D.* de *A. R. D.* [k] Vid. *Conſtitut. Frederic.* II. l. ii. feud. t. 27. ſ. 5. *Si quis ruſticus.* [l] Lib. v. c. 3. *in Verr.* [m] *Cyropæd.* l. i. *initio.* [n] *Cornel. Nep.* Alcibiad. c. 11. *Juſtin*, l. xli. c. 3. *Tacit.* Annal. l. ii. c. 2. *Sueton. Caligul.* 5. [o] Laconick *Chalcondyl.* l. iii. [p] *Plin.* Panegyr. " Theſe were the Arts and Exerciſes in which their future Generals were train'd for " their Country's Service; to contend with the ſwifter Beaſts in Speed, with the bolder in Strength, with the more cunning in " Policy and Craft: Nor was it look'd on as an inconſiderable Ornament and Triumph of Peace, to remove from the Field the " Inroads of the ſavage Herd, and to deliver, as it were, from a Siege the Labours of the Countrymen.

Mr. BARB. *NOTES* on §. v.

[3] The Words of the Digeſts are, *Pavonum quoque & columbarum fera natura eſt.* See alſo *Digeſt.* l. xli. t. 1. leg. 5. §. 5. & *Dion. Gothofred.* upon that place of the *Inſtitutes*.

[4] *Gallinarnm & anſerum non eſt fera natura, idque ex eo poſſumus intelligere, quod aliæ ſunt gallinæ, quas feras vocamus, item alii ſunt anſeres, quos feros appellamus*, Ibid. §. 16.

[5] *Apium quoque fera natura eſt. Itaque, quæ in arbore tua conſederint, antequam à te alveo includantur, non magis tua intelliguntur eſſe, quum volucres, quæ in arbore tua nidum fecerint*, Ibid. §. 14. See *Hieron. Magii Miſcell.* l. i. c. 3.

[6] The Law is, *Nec intereſt, feras beſtias & volucres utrum in ſuo fundo quis capiat, an in alieno.* Ibid, §. 12.

[7] *Plane qui alienum fundum ingreditur venandi aut occupandi gratia, poteſt à Domino, ſi is præviderit, prohiberi ne ingrediatur*, Ibid.

ing the different acceptations of thoſe Terms *Jus Gentium*, or *the Law of Nations* [a].

But farther, it is very probable, that in many places this Right was conferr'd on Princes by the voluntary Motion and Act of the People [b]. For ſince there was a Neceſſity of aſſigning them ſome Advantages for the ſupporting their Dignity with a ſufficient Train and Splendor; it was wiſely conſider'd, that 'twould be moſt convenient to allot them ſuch things as might be given without the Damage or Prejudice of any Man: And of this kind are all thoſe in which no other Perſon can yet claim a Property [c].

VII. But ſuch Laws as theſe did not, ſtrictly ſpeaking, confer on Princes the Dominion over wild Beaſts, but only a Right, by virtue of which they alone ſhould afterwards make them their Property, by ſeizing and poſſeſſing them. Which Right, nevertheleſs, had this effect in common with Dominion, that in caſe any other Perſon had illegally taken the ſaid Beaſts, they might be challeng'd at his Hands. For it doth not ſeem reaſonable to admit the Opinion of ſome, who tell us, that even before actual Occupancy the Law might fix the Dominion of theſe things, nothing more being required towards the producing of Dominion than a legal Appointment. Thus much indeed the Law of any Country may effect, that a Dominion already eſtabliſhed over things ſhall paſs from one Subject to another, without any antecedent Act of the Parties. But the Law alone is not ſufficient to introduce originally a Dominion over ſuch things as have not yet been actually brought under the Power of Men: But there is requir'd farther ſome corporal Action; eſpecially as to the Poſſeſſion of living Creatures. But now the firſt conſtituting Dominion, and the preſerving it after it hath been once conſtituted, are different things.

Some again there are who aſſert, that Prohibitions of this Nature by civil Ordinances only ſtop the Right of taking Game, not of keeping what hath been already taken. *For two things*, they ſay, *there were which the Law of Nations allowed with reference to wild Beaſts:* Firſt, *That all Men ſhould enjoy the liberty of Hunting: And* Secondly, *That the Dominion of theſe Beaſts ſhould be acquired by the way of Occupancy. The former of which Privileges ſeems in this caſe to be reſtrain'd, but by no means the latter. Whence if a Perſon, who was forbidden to hunt, ſhall nevertheleſs have follow'd the Chaſe, and ſucceeded in it, any Game found upon him may be forced away; not becauſe he had not made it his own, but in way of Puniſhment he was unworthy to poſſeſs it. In the ſame manner altogether, as Nets, Spears, and other hunting Inſtruments are ſeized in ſuch Mens Hands; tho' none can deny theſe to be their real Property. For which Reaſon, if Game, thus taken contrary to Law, be given in charge to another as a matter of honeſt Truſt, it may not be forcibly challeng'd from him by the Magiſtrate: As it might be, were it indeed ſtolen, ſome other Perſon being the juſt Owner of it. But the Prince cannot be call'd the Owner of theſe Beaſts, before he hath actually caught them; and therefore he, who hunts contrary to the Royal Prohibition, doth not commit Theft, nor take away the Goods of another; but only acquires a thing which another had a privative or excluſive Right of acquiring; and therefore he may be puniſh'd; but as for the thing which he thus got into his Poſſeſſion, it ought not to be look'd on as matter of Theft, or to be challenged accordingly* [d] [e]. But indeed 'tis very ſimple to imagine, that a Man is by any natural Neceſſity made Proprietor of the things which he firſt lays his Hands on; we having already ſhewn, that this Right is grounded on the Strength of a previous Covenant [1]. Therefore if a Prince ſhall forbid his Subjects to uſe this Method of Acquiſition, in regard to ſome particular things; their being the firſt Takers ſhall avail them nothing in order to the obtaining of Dominion over them. And that Law of the Prince hath ſo far the Effect of Property, as that after it the Subject ought not to lay hands on the ſaid Beaſts; or if he doth ſo, he cannot thereby make them his own. Nor doth it follow, that becauſe 'tis not uſual in theſe Caſes to challenge the Fleſh, eſpecially from a third Perſon, when perhaps it is ready to corrupt; therefore the unlawful Hunter was the juſt Proprietor of it. Again, *taking* muſt not preſently be conſtrued *acquiring*: The former bing a bare natural Action, whereas the latter includes a moral Effect. It may rather be ſaid, that the Poſition of theſe Men is a plain Contradiction; for thus it runs, *The Right of Hunting belongs to Princes alone, and if any private Perſon takes Game, he thereby acquires the Dominion of it*; that is, Princes alone may uſe that means by which the lawful Dominion over wild Beaſts is gain'd and eſtabliſh'd; and yet another Perſon may acquire the ſame Dominion, whilſt he cannot lawfully apply the ſame means.

But what if it ſhould be demanded, Who then is the Proprietor of Game thus taken contrary to Law? We have abſolutely denied the Taker himſelf to be ſo [2]; and as for the Prince, how could he fix a Property in the Game, when he was not concern'd in the Sport? It ſeems reaſonable in this Caſe to affirm, that here the Hunter, tho' in a very unacceptable way of Service, labours for the Prince; and conſequently, by taking the Game, he makes it the Prince's, in the ſame manner as other Huntſmen, who act by a Royal Commiſſion and Deputation.

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[a] Vid. *Grot.* l. ii. c. 3. ſ. 5.

[b] Vid. *Grot.* l. ii. c. 8. ſ. 5.

[c] Of the Hunting allowed the *Peruvians* under their *Yncas*, conſult at your Pleaſure *Garcilaſſo de la Vega*, Comm. Reg. l. vi. c. 6.

[d] Vid. *Gudelin.* de jure noviſſimo, l. ii. c. 2. and from him *Arnold. Vinn.* ad Sect. 13. Inſtit. *De rer. diviſ.* *Ziegler* upon *Grotius* (l. ii. c. 2. ſ. 5.) ſpeaks much to the ſame Purpoſe; " That a Law may indeed hinder the taking of Game, but that no Law can hinder it, when taken, from immediately " paſſing into Property, as acquired. For that the Right of prohibiting is conſiſtent enough with this Right of *Acquiſition*. That, " whether a Man by taking Game acquires it as his Property, and whether a Man ought to make uſe of this way of *acquiring*, are " two different Queſtions. That, as to the former, the Sovereign hath no Authority to interpoſe: Becauſe, as he cannot make " thoſe things become ſome body's, which are no body's, or theſe to be poſſeſſed which are not poſſeſſed (l. iii. ſ. 14. *D. De* " *adquir. poſſ.*) ſo neither can he hinder *Acquiſition*, or cauſe that thoſe things which are already *acquired*, ſhall not be *acquired*. " But that, as to the latter of theſe Queſtions, the Sovereign is free to enact what he pleaſeth.

[e] Vid. D. l. 41. tit. 2. *De acquirend. vel amittend. poſſeſſ.*

Mr. Barb. *NOTES on* §. VII.

[1] We have proved the contrary, c. 4. §. 4. n. 4.

[2] This Suppoſition, to which our Author is obliged to have recourſe, and which does not appear to be the leaſt ſatisfactory, is ſufficient almoſt to ſhew that he reaſons upon falſe Principles, and that he knows not how to keep himſelf from yielding to what we have ſaid in the Note before quoted.

It is, moreover, certain, that a Stranger likewiſe is bound by ſuch Conſtitutions as theſe; tho' perhaps in his own Country the Liberty of Hunting may be univerſally allow'd. Foraſmuch as this is a neceſſary Law of all States, without which their inward Peace and Tranquillity cannot be ſecured, that he, who enters upon the Territories of another Prince, tho' only for a time, ought ſo long to conform to the Cuſtoms and Orders of the Place; at leaſt to all thoſe, the Reaſon of which will hold good againſt him as well as againſt others, and from which the Legiſlator hath not peculiarly exempted Foreigners[a]. But, on the whole, 'tis the Admonition of wiſe Men, that Statutes of this kind ought with great Moderation to be put in force; unleſs ſome particular Aggravation in the Offender deſerves a greater Severity of Proceedings[b].

VIII. We are then ſaid to have *occupied* any thing, when we actually take poſſeſſion of it; and this commenceth at our joining Body to Body, either immediately, or by a proper Inſtrument. The regular Courſe therefore is, that the Occupancy of Moveables be made with the Hands; the Occupancy of Soil with the Feet, together with an Intention of manuring it, and the Action of ſetting Boundaries to it, whether exactly, or with a wider Liberty. But the bare ſeeing a thing, or the knowing where it is, is not judg'd a ſufficient Title of Poſſeſſion[1]. Thus *Ceres* ſpeaks in *Ovid, Metamorph.* l. v. ver. 518, 519.

En quæſita diu tandem mihi nata reperta eſt.
—— —— —— —— *Si*
Scire ubi ſit, reperiſſe vocas. ——

Sought for ſo long, my Maid, I've found thee now;
If we have found, when where to find, we know.

Whether Poſſeſſion of an immoveable thing may be taken by an Inſtrument, we may underſtand from the famous Story which *Plutarch*[c] relates to this Purpoſe: *The People of* Andros *and* Chalcis *made a Progreſs together into* Thrace, *to find out new Seats where they might fix and inhabit; and ſoon after their Arrival the City* Sana *was by Treachery put into their Hands: After this, being informed that the* Barbarians *had deſerted the City* Acanthus, *they ſent two Spies to diſcover the Truth of the Intelligence. Theſe, as they drew near, ſaw the Place to be really forſaken. Whereupon the* Chalcidian Spy *ran with all his Force to take poſſeſſion of it in the Name of his People; but the* Andrian *ſeeing himſelf outrun, threw the Spear which he had in his Hand at the City Gate, and as it ſtuck there, cried out,* That by this Caſt of his Spear he had taken the prior Poſſeſſion in Behalf of his Countrymen. *A Diſpute ariſing hereupon, the* Eretrians, *the* Samians, *and the* Parians *were choſen Umpires; of whom the two former gave Judgment for thoſe of* Chalcis, *and the laſt for thoſe of* Andros. *The diſappointed Party were ſo enraged at the Arbitrators, as to engage themſelves by Oath, never to make or to allow any Marriages with them.* Indeed a Spear ſeems a very improper Inſtrument for the Occupancy of Immoveables, ſince we may ſtrike many things with ſuch a Weapon which we can never approach ſo near as to touch with our Body[2].

IX. It is the general Opinion, that moving things cannot be made our own but by bodily Seizure; and this we are to uſe in ſuch manner, as to take them from the Place where they were found[1], into our Lordſhip, or at leaſt into our ſafe Cuſtody. Thus a Neſt of Birds, tho' I lay my hands upon them, yet are not my own, unleſs I carry them home. If I find a Litter of young Beaſts of Prey,

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[a] Vid. *Grot.* l. ii. c. 2. ſ. 5.

[b] Vid. *Bœcler.* ad *Grot.* ibid. Sect. 4.

[c] *Quæſt. Græc.* 30. p. 298. *Ed. Wech.*

Mr. Barb. *NOTES on* §. viii, ix.

[1] This Paſſage, tho' quoted by *Grotius*, l. ii. c. 8. §. 3. as well as our Author, upon this Occaſion, can be no farther to the Purpoſe, than as an Illuſtration, becauſe he treats here of another thing. He might much better have mention'd that Diſpute which *Plautus* feigns to have been between two Servants, one of which had fiſh'd out of the Sea a Cloak-bag, and the other claimed a Part, becauſe he ſaw him from the Shore. For thus they argue;

Grip[illegible] *Quemne* vidulum *ego excepi in mari?*
Trachal. *At ego inſpectavi è littore.* Rudens, Act. iv. Scen. 3. ver. 79.

Nothing is more impertinent than this Reaſon. For beſides that *Gripus* could not know the Intention of *Trachalion*, this laſt could not have any Thoughts of taking the Cloak-bag, 'till the other was poſſeſſed of it. The Arguings that follow are not at all convincing. I ſhall give them in Madam *Dacier*'s Tranſlation. "Should the Man to whom the Cloak-bag belongs come now, ſhall "not I that ſtood by, and beheld afar off, be counted the Thief as well as you who fiſh'd it up? How then can you prove, that I, "who muſt be an Abettor in the Theft, ſhould not alſo ſhare in the Gain?

[2] The Determination of the Arbitrators, and that of our Author, is not at all ſatisfactory. He had better have ſaid, when two Perſons at the ſame time declare their Intention to ſeize a thing that belongs to neither of them, the thing is common to both, *Titius* Obſerv. 293. Indeed, as I have already ſaid, that which properly conſtitutes the Right for the firſt Occupant is, that he has declared before ſome others, ſome way or another, his Intention to make a thing his own; inaſmuch, as ſoon as he hath ſo done, all others, who have yielded him the firſt Place, ought not to paſs over his Bounds, becauſe it would be as diſhoneſt and unjuſt as if one over-runs another's Land; but if two Perſons declare at the ſame time that they'd have a thing, and one makes known his Deſign one way, and the other another, ſuch an Agreement gives them equal Right, in ſo much that neither of them can exclude his Companion; wherefore they muſt accommodate the Matter between themſelves, and both, according to the Proverb, have a Part. See the Interpreters of the Paſſages quoted by Mr. *Noodt*, *Prob. Jur.* 2. 6. & *P. Vavaſſor, De vi & uſu quarund. locut.* p. 165. But I am amaz'd that he did not ſee, that in the Example he uſes there was a ſpecial Reaſon, why neither the Running of the *Chalcidian* Spy, nor the Dart ſhot by the *Andrian*, was of any Uſe to ſecure the Poſſeſſion of the City that they went to for their Countrymen. They were both ſent, doubtleſs, in Behalf of the whole Colony; ſo that they could not ſeize upon the City but in common, whatever Notion they might otherwiſe have of the nature of taking Poſſeſſion by the Right of the firſt Occupyer.

[1] This is always neceſſary, as is before proved. So that in the Example propounded by our Author, ſuppoſing that one finding a Neſt, and ſeeing that the young ones need to remain yet with their Dam, leaves them, with a Deſign to come again another time; they to whom he tells it, declaring to them his Intention at the ſame time, do not deal well with him, if they do as the Curate, of whom *Bourſault* ſpeaks in one of his Letters, did to a Countryman; who to revenge himſelf went to him to put a falſe Confidence in him about ſomething curious; whereupon the Curate, deſirous to know all the Particulars of the Matter, to play a like Trick with the Countryman, anſwer'd him, *A Bubble, the Birds are gone.* By the Laws of *Saxony*, if any one has found a Swarm of Bees in the Hollow of a Tree, and makes a Mark whereby it may be known that he is gone to ſeek an Hive to put them in, no Man may meddle with them; they are thought by Right to belong to him that firſt diſcover'd them, as the firſt Occupyer, becauſe he has manifeſted his Deſign to make them his own. This Account I have from Mr. *Thomaſius*'s Notes upon *Huber. De Jure Civitatis*, l. ii. Sect. 4. c. 2. p. 455. where nevertheleſs he affirms, that this Law is not agreeable to the Law of Nature and Nations, but it does not appear to me that he has ſaid any thing which deſtroys theſe Principles, upon which my Arguments are built, no

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I then fix a Property in them, when I either remove them as Priſoners to my own Quarters; or for ſome time ſet a Guard over them where they lie, to hinder their Eſcape. Now this Seizure is made not only with our Hands, but with Inſtruments; as ſuppoſe, Snares, Gins, Traps, Nets, Weels, Hooks, and the like[a]: Provided the Inſtruments be, as they term it, *in noſtra poteſtate*, under our Power; that is, ſet in a Place where we have a Right of following the Game, and not yet broken by the Prey, but holding them faſt, at leaſt till ſuch time as we might probably come up. And hence we may decide the noted Caſe of *the Boar in the Toil*, propoſed in the *Digeſts*[2]. For if the Beaſt were ſo entangled, that he could not poſſibly break thro', and the Snare were laid either in your peculiar Lordſhip, or in a publick Place where you had a right of Hunting, then he was cetainly your own; and I, if I had looſ'd him, and reſtor'd him to his natural Liberty, ſhould have been bound to make full Satisfaction, whatever Name ſuch an Action might bear at Law, or under what Head ſoever it might be ranked. But if the Snare were ſet on my Ground, as I might at firſt have hinder'd your Entrance thither, ſo if I afterwards break what you placed there without my Leave, you have no Reaſon to think your ſelf injured.

X. It hath likewiſe been diſputed, Whether by giving a Beaſt a Wound in Hunting we preſently make him our own? *Trebatius*[1] long ſince declar'd on the Affirmative ſide; but then he ſuppoſeth us to purſue the Beaſt, which if we omit to do, he ſays, *We loſe our Property, and the Right paſſeth to the firſt Occupant.* Others are of the contrary Opinion, maintaining, That we can by no other means appropriate the Beaſt, but by actually taking him, becauſe many Caſualties may hinder him from ever coming into our Hands. The Emperor *Frederick* made this Diſtinction in the Caſe[b]: *If the Beaſt were followed with the larger Dogs or Hounds, then he was the Property of the Hunter, not of the Chance-Occupant; and in like manner, if he were wounded or killed with a Lance or a Sword. But if he were followed with Beagles only, then he paſſed to the Occupant, not to the firſt Purſuer. If he was ſlain with a Dart, a Sling, or a Bow, he fell to the Hunter, provided he was ſtill in Chaſe after him, and not to the Perſon who afterwards found or ſeized him.* According to the Conſtitution of the *Lombards*[c], he who found or kill'd a Beaſt wounded before by another, was to carry off a Shoulder and the Ribs, and to leave the Reſidue as the Hunter's Right: Though this Right to the Remainder continued no longer than the Space of twenty-four Hours. We judge it may in general be affirm'd, That if the Beaſt be mortally wounded, or very greatly maim'd, he cannot fairly be intercepted by another Perſon whilſt we are in Purſuit of him, provided we had a Right of paſſing through ſuch a Place: But the contrary is to be held, in caſe the Wound were not mortal, nor ſuch as would conſiderably retard the Beaſt in his Flight[2]. Therefore when *Meleager* in *Ovid*[d] admits *Atalanta* to a Share in the Glory of killing the *Caledonian* Boar, it was not ſo much an Act of Juſtice, as of Love. But the Game which my Dogs kill, when I did not ſet them on, doth not become my Property, 'till I have actually taken hold of it[e].

XI. The *Jewiſh* Cuſtoms, as Mr. *Selden* informs us[f], decided theſe and the like Points in the manner following: *Fiſh or Beaſts were not to be taken from the Repoſitories or Places of Store: Yet it was lawful to take Fiſh out of another Man's Net, whilſt yet in the Sea, and Beaſts out of another Man's Snare, if it were laid in a deſert Place. He that ſpread a Net in another's Ground might poſſeſs the Game he had*

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[a] See *Grot.* l. ii. c. 8. ſ. 14.
[b] *Godofred.* ad iſtam leg. ex *Radevico* de geſt. *Frederic.* l. i. c. 26.
[c] Lib. i. tit. 22. l. 4, & 6.
[d] *Metam.* l. viii. ver. 427.
[e] Add. *Alberic. Gentil.* Advoc. Hiſpan. l. i. c. 4.
[f] *De Jur. Nat. & Gen. ſec. Hebr.* l. vi. c. 4.

Mr. Barb. *NOTES* on §. ix, x.

more than in the following Caſe, where he determines otherwiſe than I do. Suppoſe that one ſeizes upon a thing which he finds in a publick Place, but which he can't carry with him that Moment; whereupon he leaves it, declaring to ſome other preſent, that he intends to take it, and will come ſoon for it. In this Caſe, ſays Mr. *Thomaſius*, the firſt can't complain, if the laſt takes it, ſeeing it is out of his Poſſeſſion, and left in a publick Place; but in my Opinion the contrary muſt be underſtood, that either he that took poſſeſſion of the thing has relinquiſh'd it, or that he may reaſonably preſume it, becauſe he delays long his Return to take it, and ſo may be thought not to mind it. In fine, I can't but take notice, that in the Place which I have quoted, p. 452, *&c.* Mr. *Thomaſius* confutes the Hypotheſis of Mr. *de Bynkerſhoek*, upon which I have given my Opinion above, §. 1. n. 1. but I had not then ſeen the Note of that able and judicious Lawyer when I wrote mine, which I have not ſince changed; yet I muſt own, that I have not always the ſame Notions, tho' for the main we are agreed.

[2] The Words of the *Digeſts* are, *In laqueum, quem venandi cauſa poſueras, aper incidit; cùm eo hæreret, exemptum eum abſtuli;* —— *Reſpondit Proculus, laqueum videamus, ne interſit in publico an in privato poſuerim: & ſi in privato poſui, utrum in meo, an alieno: & ſi in alieno, utrum permiſſu ejus, cujus fundus erat, an non permiſſu ejus poſuerim? Præterea, utrùm in eo caſu ita hæſerit aper, ut expedire ſe non poſſit ipſe, an diutius luctando expediturus ſe fuerit? ſummam tamen hanc eſſe puto, ut ſi in meam poteſtatem pervenit, meus factus ſit. Sin autem aprum meum ferum in ſuam naturalem laxitatem dimiſiſſes, eo facto meus eſſe deſiiſſet, & actionem mihi in factum dari oportere, veluti reponſum, cum quidam poculum alterius ex nave ejeciſſet,* Digeſt. l. xli. tit. 1. *De acquirendo rerum Dominio,* leg. 55. This Law ought not to be underſtood as it is by the Interpreter; no, not by *Trebonianus*. Mr. *Noodt* with his uſual Sharpneſs has happily diſcover'd the true Senſe of that antient Lawyer; for he proves in his *Probab. Juris,* l. ii. c. 6. §. 3. that *Proculus* was one of thoſe who believed, that to obtain a thing by the Right of firſt Occupancy it was not always neceſſary to take a corporal Poſſeſſion; and he proves it from theſe Words, *Ut ſi in meam poteſtatem PERVENIT, meus factus ſit,* ſignifying, provided that he who laid the Nets, was inclined to ſeize it corporally, when he ſaw the Boar that he had been taken, (*i. e.*) That no other can looſe him, though he be in a publick Place, and that if it is upon another's Land, the Proprietor may not hinder him from going on it, though otherwiſe he has Right to do it. Mr. *Noodt* afterward quotes, and at the ſame time corrects another Law; from whence it appears, that *Paul* the Lawyer, reaſoning upon the ſame Principle, maintains, that one ſeizes upon a Treaſure found in his Field, as ſoon as he knows it, and will make it his own.

[1] The Words are, *Illud quæſitum eſt, an fera beſtia, quæ ita vulnerata ſit, ut capi poſſit, ſtatim noſtra eſſe intelligatur? Trebatio placuit, ſtatim noſtram eſſe, & eo uſque noſtram videri, donec eam perſequamur. Quod ſi deſierimus eam perſequi, deſinere noſtram eſſe, & rurſus fieri occupantis. Itaque ſi per hoc tempus, quo eam perſequimur, alius eam ceperit, eo animo, ut ipſe lucrifaceret, furtum eum videri nobis commiſiſſe. Plerique non aliter putaverunt eam noſtram eſſe, quàm ſi eam ceperimus, quia multa accidere poſſunt, ut eam non capiamus, quod verius eſt,* ibid. leg. 5. §. 1.

[2] This Diſtinction is not neceſſary. The Author always reaſons from a falſe Notion of the Nature of taking poſſeſſion. The Truth is, that 'till we ceaſe purſuing the Beaſt, and ſo leave it to the firſt Occupant, it belongs to us as much as can be; ſo that no Man can lawfully put in a claim to it.

caught, unleſs it were found by the Lord of the Soil, and challeng'd as his Right, by virtue of that Property. Fiſh that leapt into a Ship belong'd to the Maſter: Inaſmuch as a Ship may be eſteem'd a place of firm and ſecure Cuſtody, not of ſuch as is paſſing and uncertain; the motion it hath not proceeding from its Nature, but from the force of the Waters. It is worth while to examine that Law of *Nerva* [1] on the ſame Subject, which determines, *That we are properly the Poſſeſſors of the Fiſh in our Pond, not of thoſe in our Lake: And ſo of the Beaſts in our cloſe Park, not of thoſe in our Woods and Foreſts, though ſurrounded with a Fence.* Which Diſtinction *Grotius* [a] diſlikes, becauſe Fiſh and Beaſts are no leſs ſecured in the larger Priſons of private Lakes, and well fenc'd Woods, than in the cloſer, of Ponds and Parks. Yet *Nerva*'s Aſſertion is indeed founded on very good Reaſon. For the Propriety both of wild Beaſts and Fiſhes commenceth upon their being taken [2]. Now the Fiſh preſerv'd in our Pond, and the Beaſts in our Park, were once actually taken by us, but not the Fiſh which ſwim in our Lake, nor the Beaſts which run in our Woods, enjoying thus far their natural Liberty, though perchance they are ſo incompaſs'd, as not to be able to wander without end. For to take theſe Creatures, and to beſet them with an Incloſure for the more eaſy taking them hereafter, are different things; yet inaſmuch as I alone have a Right to take them, I may therefore both hinder others from doing the like, and may challenge what I find in their Hands; ſo that as to this Effect, it is all one as if I were ſtrictly the Proprietor. And the Beaſts thus ſurrounded at large, may ſo far only be ſaid to enjoy their natural Liberty, as that they never yet were caught by any Perſon; not as that all Perſons without Diſtinction have a Right to catch them.

XII. We likewiſe acquire by Occupancy things in which the *Dominion* they before lay under is extinct [1]: And this happens if a Perſon either openly throws aſide a certain thing, with ſufficient Indications, that he deſires it ſhould no longer be his own, but ſhould lie free for the firſt Taker, without deſigning hereby to gratify any Man elſe [2]: Or, if having at firſt loſt Poſſeſſion againſt his Will, he afterwards gives the thing over [3]; either as deſpairing to recover it, or becauſe the Recovery of it is not tantamount. For otherwiſe, a Man, though he loſeth the actual Poſſeſſion [4], yet never forfeits the Dominion and Property of a thing (unleſs it be taken from him in way of Puniſhment, or by the chance of War) but he ſtill keeps a Right of regaining it, 'till ſuch time as his Inclinations to that purpoſe have ceaſed, or may be preſum'd to have ceas'd. Wherefore the *Dominion* of ſuch things as theſe cannot be acquir'd by Occupancy, ſo long as the Right of the former Owner ſtill ſubſiſts [b]. But ſince to make a thing compleatly *abandon'd* or forſaken, Two Points are neceſſary; Firſt, That the Perſon refuſe to own it for the future; and Secondly, That he diveſt himſelf of the Poſſeſſion, by leaving the thing, or caſting it away: If either of theſe Conditions be wanting, the Property is not evacuated. Thus if I throw a thing by, yet without Intention to quit my *Right* in it, I do not prejudice my ſelf by that Action. And on the other hand, though I am reſolved utterly to quit my Title to a thing, yet unleſs I actually caſt it off, I am ſtill the Proprietor [c].

Amongſt the things which by this means are brought under *Dominion*, we may reckon wild Beaſts, or any ſort of Game, when eſcap'd out of our Hands, and repoſſeſs'd of their natural Liberty. *Grotius* is not pleas'd with this Poſition of the *Roman Laws* [5], *Becauſe*, ſays he, [d] *the loſing our Dominion over wild Beaſts, doth not immediately follow upon their Eſcape from us, but ariſeth from this probable Conjecture; That by reaſon of the great difficulty of purſuing and recovering them, we may be preſumed to have given them over.* But the ſame Laws hint as much as this; for they tell us [e], *A wild Beaſt is then ſuppos'd to recover his natural Liberty, ei-*

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[a] Lib. ii. c. 8. ſ. 2. [b] See 1 *Sam*. ix. 3. *D*. l. xli. t. 2. l. 13. & Lib. xiv. tit. 2. *princip. D. De acquir. poſſeſſ.* l. ii. *De jactu.* Sect. 8. l. 8. *D. ad leg. Rhodiam.* [c] Vid. l. xli tit. 2. l. 17. ſ. 1. *D. De acquir. poſſeſſ.* [d] Lib. ii. c. 8. ſ. 3. [e] *D. ib.* & l. v. *princip. D. de A. R. D.*

Mr. BARB. *NOTES on* §. XI, XII.

[1] The Words are, *Item Nerva filius ait, feras beſtias, quas vivariis incluſerimus, & piſces, quos in piſcinas conjecerimus, à nobis poſſideri; ſed eos piſces qui in ſtagno ſint, aut feras quæ in ſilvis circumſeptis vagantur, à nobis non poſſideri, quoniam relictæ ſint in libertate naturali. Alioquin etiamſi quis ſylvam emerit, videri eum omnes feras poſſidere, quod falſum eſt*, Digeſt. l. xli. t. 2. *De adquirenda vel amittenda poſſeſſione*, leg. 3. §. 14. But in this Sentence there is a Word omitted, which makes this antient Lawyer ſpeak what he never thought. For it ought certainly to be read, *Feras quæ in ſilvis NON circumſeptis vagantur*. And ſo *Nerva* oppoſes the wild Beaſts in a Park, whether it be great or ſmall, to thoſe in a Foreſt not incloſed, and the Fiſh in a Stew-pond, to thoſe which are in a Lake or Pool, which lies open to any one on all Sides. And he affirms, that by theſe Incloſures within certain Bounds we are in actual poſſeſſion of the Beaſts ſo incloſed. *Francis Hotman* made this Correction firſt, and Mr. *Noodt* has ſolidly confirmed it after his manner, in his Obſervations publiſh'd in 1706. l. i. c. 11. See alſo what he ſays in the foregoing Chapter, p. 54, 55.

[2] We have ſufficiently confuted this in the foregoing Notes, and conſequently the Cenſure of *Grotius* is well grounded, if the Words of *Nerva*, recited in the Law of which he ſpeaks, be not corrupted, as I have obſerved in the foregoing Note.

[1] 'Tis a Determination of the *Roman* Lawyers. *Qua ratione verius eſſe videtur, ſi rem pro derelicto à Domino habitam occupaverit quis, ſtatim eum Dominum effici. Pro derelicto autem habetur, quod dominus ea mente abjecerit, ut id in numero rerum ſuarum eſſe nolit, ideoque ſtatim Dominus ejus eſſe deſinit*, Inſtit. l. ii. t. 1. *De rerum diviſ.* &c. §. 47. Thoſe things, which are forſaken, having once belong'd to a private Perſon, can't be thought to be any part of his Eſtate; but it is natural to ſuppoſe them to belong to no body, and conſequently they become the firſt Occupant's, at leaſt, if there be no Law to hinder private Perſons from making them their own, *Titius Obſerv.* 296. In fine, things immoveable become the firſt Occupant's, when they are abandoned. Mr. *Hertius* obſerves here, that he uſes the Word *abjicere* to expreſs a Renunciation of Property to theſe ſort of things, and grounds it upon the Clauſe of a Will explain'd by *Æſop*, where that cunning Slave ſays, that the Harlot alienated the Lands which had befallen to her in Coparcenary, *Phædr.* l. iv. Fab. 4. ver. 42. but as the Interpreters expound it, *abjicere* ſignifies to ſell it to the higheſt Bidder, and not to leave it to the firſt Perſon that ſhall ſeize it.

[2] As when we caſt Money or other things to the common People, which become the Property of thoſe that firſt catch them.

[3] See what is ſaid, c. 12. §. 8. following about the Foundation of Preſcription.

[4] See §. 1. of this Chapter, and n. 1. on it, where I have examin'd the Opinion of ſuch as maintain the contrary.

[5] *Quicquid autem eorum ceperis, eo uſque tuum eſſe intelligitur, donec tua cuſtodia coercetur. Cum vero tuam evaſerit cuſtodiam, & in libertatem naturalem ſeſe receperit, tuum eſſe deſinit, & rurſus occupantis fit. Naturalem autem libertatem cepiſſe intelligitur, cum vel oculos tuos effugerit, vel ita ſit in conſpectu tuo, ut difficilis ſit ejus perſecutio*, Inſtit. l. ii. tit. 1. *De rerum diviſ. & adquir. ipſarum Dominio*, §. 12. See alſo *Digeſt.* l. xli. t. 1. leg. 3, 5.

ther when he is quite out of our ſight; or when, tho' he is within view, yet it would be very difficult to follow him. And again they determine [6], *That what the Wolf takes from us, is ſo long our Property, as there is a poſſibility of recovering it* [a][*].

By theſe Reſtrictions we muſt qualify the Argument laid down by *Zeigler* in his Remarks on *Grotius* [b]; That *ſince wild Beaſts are made ours by loſing their Liberty, therefore by regaining their Liberty they ceaſe to be ours; and, by conſequence, the Dominion of them is judg'd to conſiſt in Actual Poſſeſſion.* For a wild Beaſt is not ſuppos'd to have recover'd its Freedom, ſo long as any Perſon purſues, with probable hopes of retaking it. As a Priſoner, though he be got out of hold, yet hath not clearly made his Eſcape, ſo long as the Officers are in ſearch of him, and he remain in a place where 'tis poſſible for them to find him. As for what *Grotius* conjectures, that by means of ſome γνωρίσματα [7], ſome *Badges* or *Marks* we may retain the Property of wild Beaſts, after they have broke from our Cuſtody, ſo that they ſhall not paſs to the firſt Taker: We are of Opinion, that this ought to be confin'd to thoſe only, which by the Application of Men have been diveſted of their native Ferity, and are therefore deſervedly admitted to the ſame *Rights* as tame Creatures. Hence if *Tyrrhus*'s Deer in *Virgil* [c], was thus diſtinguiſhed by any proper Mark, *Aſcanius* offer'd a fair occaſion for the Commotions that follow'd. But thoſe which are only kept in Parks, though they ſhould happen to wear any ſuch Note in Diſtinction, yet when they get looſe into their natural Liberty, it ſeems more agreeable that they ſhould paſs to him who firſt lays hold on them. For there is need of a moſt ſtrict Guard, or a kind of perpetual Occupancy, for the retaining a Creature, which is by Nature impower'd to wander without Bounds [8], and which always ſtruggles, and is uneaſy under the Confinement of a Poſſeſſor; no Mark or Badge being in the leaſt effectual towards the bridling this natural Diſpoſition [d]. Therefore *Juvenal* makes the Informers about the Turbot argue very wrong, though very ornamentally to his Deſign;

> *Non dubitaturi fugitivum dicere piſcem,*
> *Depaſtumque diu vivaria Cæſaris; inde*
> *Elapſum veterem ad Dominum debere reverti.*
> *Si quid Palphatio, ſi credimus Armillato,*
> *Quicquid conſpicuum, pulchrumque eſt æquore toto,*
> *Res fiſci eſt, ubicunque natat.*
>
> Sat. IV. 50, &c.

> ———————— They'd ſwear,
> The Fiſh had long in *Cæſar*'s Ponds been fed,
> And from its Lord undutifully fled;
> So, juſtly ought to be again reſtor'd;
> If we may take the greateſt Lawyers word,
> Who tells us, that all fine things in the Sea
> Belong alone to *Cæſar*'s Treaſury.

As to the Caſe of fugitive Slaves, the *Roman* Laws particularly ordain'd [9], That their Maſters ſhould ſtill retain ſuch a [10] Poſſeſſion of them as is term'd *civil* (a Poſſeſſion in *Right*, though not in *Act*) in Oppoſition to the *natural* or *corporeal*; that it might not be in the Power of the Slaves to deprive the Maſters of ſo great an Advantage [e] [f].

This is certain, that if we loſe the Poſſeſſion of any thing elſe, againſt our Will; as ſuppoſe we drop a thing by the way, the Property doth not paſs from us, or accrue to the Finder [11], till it appears we abſolutely give it over for loſt; which is uſually underſtood by our forbearing to ſearch or enquire after it. Hence, if a Man find ſomewhat which 'tis not probable the Owner ſhould voluntarily reject, he ought to give fair notice, that upon

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[a] Vid. l. viii. ſ. 2. *D. Famil. erciſcund.* [b] *Dict. loc.* [c] *Æn.* vii. 483, *&c.* Add *L. Salic.* t. 35. Under this Head we may take notice of what *Pliny* N. H. l. ix. c. 59. reports of the Fiſh *Antias*, whom the Fiſhers make uſe of to betray the reſt of his Kind. "There is this advantage, ſays he, in knowing the Leader, that he may not be caught with the reſt; the Fiſherman "ſpares him, that he may deceive and miſlead another Company. It is upon Record, that a certain Fiſher, to do his Partner "an ill turn, againſt whom he had ſome Grudge or Quarrel, took this Captain of the Shoal, whom he might eaſily diſtinguiſh "from others: His Partner eſpying the Fiſh in the Market, brought an Action againſt the *Taker*, and, as *Mucianus* adds, re"cover'd ten Pounds for Damage. [d] Vid. *Zeigler* in *Grot.* ubi ſupra. [e] Lib. i. c. 14. *D. De adquir. poſſeſſ.*

[f] Vid. *D.* l. xli. tit. 2. *De adquir. vel amitt. poſſeſſ.* leg. 3. *princip.*

Mr. Barb. NOTES on §. xii.

[6] *Et ſane melius eſt dicere, & quod à lupo eripitur, noſtrum manere, quam diu recipi poſſit id, quod ereptum eſt*, Dig. Ib. leg. 44.

[*] *Conciliatorem noſſe ad hoc prodeſt, ne capiatur, parcit piſcator fugituro in reliquum gregem; ferunt diſcordem ſocium duci inſidiatum pulcre noto cepiſſe malefica voluntate, agnitum in macello à ſocio, cujus injuria erat, & dati damni formulam editam condemnatumque addidit Mucianus, æſtimata lite decem libris.*

[7] As Chains, See *Scheffer*, *De Antiquorum torquibus*, §. 13. and laſt.

[8] This Reaſon is not good. Our Author always follows his falſe Notions about taking poſſeſſion. But we muſt ſay, that the Difficulty, or rather Impoſſibility, that there uſually is to know theſe ſort of Beaſts, when they are eſcaped out of their Incloſures, is a ſufficient ground to preſume, that the Proprietor has relinquiſh'd them; but if they have any Mark by which they can be diſtinctly known, the Proprietor has no leſs right to claim them, than any other thing he has unwillingly loſt, and of which he never ſhewed any ſigns of his Neglect.

[9] The Words of the Law are, *Namque fugitivus idcirco à nobis poſſideri videtur, ne ipſe nos privet poſſeſſione*, Dig. l. xli. tit. 2. *De acquirend. vel amitt. poſſeſſione*, leg. 13. *in princip.* See alſo leg. 1. §. 14.

[10] See c. 9. §. 7. following.

[11] The *Roman* Lawyers ſay very well, that it matters not, whether we know, or not, to whom the thing we have found belongs, if we take it to our own uſe without a Deſign to reſtore it to its Owner, or endeavouring to find him out, we really commit a Robbery. *Qui alienum quid jacens, lucrifaciendi cauſa ſuſtulit, furti obſtringitur, ſive ſcit cujus ſit, ſive ignoravit; nihil enim ad furtum minuendum facit, quod cujus ſit, ignoret.* Digeſt. l. xlvii. tit. 2. *De Furtis*, leg. 43. §. 4. *Plautus* in his *Rudens*, or *Naufrag. Fæl.* brings in a Servant endeavouring to perſuade his Maſter to keep his Cloak-bag till he went a Fiſhing on the Sea, his Maſter, who was an honeſt Man, ſaid to him,

> *Egone, ut quod ad me allatum eſſe alienum ſciam,*
> *Celem? Minime iſtuc faciet noſter Dæmones.*

> Although I know to whom the thing belongs,
> And might conceal't? I will not, for ſuch Wrongs
> Our *Dæmones* will not bear.

The Roman Lawyers alſo maintain with much reaſon, that the Goods which are caſt into the Sea to lighten a Ship in a Tempeſt, when Men are in danger of being loſt, do not leſs belong to thoſe who caſt them in. So that if any one fiſh them up, or find them on the Shore, they can't keep them to themſelves without being guilty of Robbery. *Alia ſane cauſa eſt earum rerum quæ in tempeſtate levandæ navis cauſa ejiciuntur. Hæ enim dominorum permanent, quia palam eſt eas non eo animo ejici, quod quis eas habere nolit, ſed quo magis cum ipſa navi maris periculum effugiat. Qua de cauſa, ſi quis eas fluctibus expulſas, vel etiam in ipſo mari nactus, lucrandi animo abſtulerit, furtum committit*, Inſtit. l. ii. tit. 1. §. 48. See alſo *Levit.* vi. 3, with the Notes of Mr. *Le Clerc*, and what ſhall be ſaid, c. xiii. §. 4. in the end, following.

a juſt Claim it may be reaſſumed. But if the Owner can't be diſcover'd, then 'tis but right the thing ſhould be kept by him that found it. Yet *Ælian* [a] reports it as a Law of the *Stagirites*, *ἃ μὴ κατέθυ, μὴ λάμβανε*; *Take not up what you did not lay down.* And elſewhere [b] he tells us of the *Biblians*; That *if they light upon any thing in their way, they never touch it, unleſs they laid it there themſelves: To do otherwiſe*, they ſay, *is not to find, but to ſteal.* Amongſt *Solon*'s Laws there was one to the ſame purpoſe; *ἃ μὴ ἔθυ, μὴ ἀνέλε* [c]. And the *Chineſe*, in Obedience to the Doctrine of *Confucius*, exactly obſerve the like ſcrupulous Nicety [d] [14]. The antient *Jews*, as Mr. *Selden* informs us [e], held that the Law of *Deut.* xxii. 1. belong'd to thoſe of their own Religion, not to a *Gentile*; yet ſo as if ſuch a Beaſt were utterly relinquiſh'd by the Owner, it became his who found it and took it into his Poſſeſſion. They diſtinguiſh'd likewiſe between thoſe things which were mark'd, and thoſe which were unmark'd. The latter they preſumed to be given over by the Proprietor, but not the former; unleſs he made expreſs and open Declaration to that purpoſe. So again, they thought it unlawful to keep the former, till they had been twice or thrice publickly cried, but not the latter. For which uſe there was a Scaffold erected in the Suburbs of *Jeruſalem*, from which the Cryer made Proclamation of loſt Goods. But in caſe they belong'd to an Apoſtate, they did not look on themſelves as bound to reſtore them. As for things loſt by *Gentiles*, they judg'd it reaſonable to deliver them again to their Owners, only on this Conſideration, that by ſo kind and friendly a Treatment they might purchaſe a like return of Humanity and Favour. Wherefore they concluded, that the Dominion of the *Gentiles* Goods did, by the Law of Nature, immediately expire upon the loſs of them; but that the Reſtitution of the ſame Goods depended wholly upon the force of civil Conſtitutions. Which falſe Opinion, as many others, flow'd from the covetous Temper of that Nation, and from their extream Hatred and Averſion to all the reſt of the World.

XIII. Amongſt the things in which the Dominion or Property is extinct, the *Civilians* likewiſe reckon what they term *Theſaurus*, *Treaſure-Trove* [1], or Money found, the Owner of which is not known. If therefore a Man either on the Account of Fear, or for the better Defence and Security, ſhall have hid his Money in the Earth, it doth not fall under this Name of a Chance Treaſure; and he that takes it, is guilty of Theft. As the Slave in *Plautus*'s *Aulularia*, that carried off *Buclion*'s Pot of Gold. But ſuch caſual Treaſure, as we firſt mention'd, doth naturally and without the particular Interpoſition of [2] civil Ordinances paſs to the Finder; that is, to him who firſt lays hands on it and removes it out of its place. Becauſe a thing, the Proprietor of which is undiſcovered, is in moral Eſtimation judg'd the ſame as if it were under no Property, or belonging to no Body, and conſequently is the Right of the firſt Occupant. On which Point, nevertheleſs, this Queſtion will ariſe, Whether a Perſon living in a place where the Laws adjudge ſuch things to him that finds them, is bound, for the making his Title good in Conſcience, to give publick notice of what he hath found, though it ſhould appear to have lain hid a very conſiderable time? (For if it proves to have been lately hid, we doubt not but ſuch a publick Diſcovery is always neceſſary.) In the Caſe propoſed, it ſeems moſt reaſonable thus to determine: If a Man dig up Money in his own Ground, he is not in Conſcience obliged to diſcover his good Fortune, but may enjoy it in Silence, till ſuch time as another of his own accord makes Enquiry, and withal produceth probable Reaſons, both of his hiding his Money at firſt, and of his omitting to ſpeak about it till now. For here the former Owner, from whom the Land or Tenement paſs'd to the preſent (the Finder of the Treaſure) cannot be preſumed to have knowingly left a ſecret Store in a place, which he alienated and convey'd from himſelf. Again, he who hath hid any ſuch Treaſure in another's Ground, without acquainting the Lord of the Soil, is judg'd to have ſlipt his Opportunity, and neglected his means of claiming and ſecuring it; ſince there was at firſt good Reaſon for him to fear leſt it ſhould fall into other Hands, which he ought to have provided againſt. But if the Ground belong to another, then the Finder ſeems engag'd by his Conſcience to enquire, at leaſt indirectly, of him concerning the Matter: Becauſe without this it cannot certainly be known, but that the Money was laid there by the Maſter of the place, only for the greater Security, or by ſome Perſons elſe with his Privity and Conſent.

But as for *poſitive Laws*, we find them in different Countries [3], very various on this Point. [f] *Plato* orders, [g] *That neither Treaſure, nor any kind of loſt Goods ſhall belong to the Finder, but that the* Oracle *ſhall be conſulted in order to the diſpoſal of them.* Which, without doubt, was too ſcrupulous a Superſtition; ſomewhat like the Humour of *Chiungai* the *Chineſe* Philoſopher, who, as *Martinius* obſerves, [h] *held it unlawful to touch any thing that was ſuſpected, either to be in itſelf evil, or to have proceeded from evil, and unjuſt Men: For which Reaſon he refus'd to dwell in his Father's Houſe, believing the Builders to have been wicked Perſons; nor would he take his Meat from the hands of his Parents or Brethren,*

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[a] V. H. l. iii. c. 45.

[b] Lib. iv. c. 1. p. 302. Edit. *Perizon.*

[c] *Diog. Laert.* l. i. ſ. 57. Add *Platon.* de *L. L.* l. xi. *ſub init.*

[d] *Martin. Hiſt. Sin.* l. iv. c. 21. Add Edict. *Theodoric.* c. 58.

[e] *De J. N. & G. ſec. Heb.* l. vi. c. 4.

[f] Vid. *Grot.* l. ii. c. 8. ſ. 7.

[g] Lib. xi. *de L. L.*

[h] Hiſt. *Sin.* l. v.

M. Babr. *NOTES* on §. xii, xiii.

[14] Theſe Opinions of the Jewiſh Doctors had no other Foundation, than the inſatiable Avarice of that Nation, and the implacable Hatred which they bore to other people.

[1] The words of the Law are, *Theſaurus eſt vetus quædam depoſitio pecuniæ, cujus non extat memoria, ut jam dominum non habeat, ſic enim fit ejus qui invenerit, quod non alterius ſit. Alioquin ſi quis aliquid vel lucri cauſa, vel metus, vel cuſtodiæ, condiderit ſub terra, non eſt theſaurus, cujus etiam furtum fit,* Digeſt. l. xli. tit. 1. *De acquirend. rerum Dominio,* leg. 31. See alſo, l. vi. tit. 1. *De rei vindic.* leg. 67. & Lib. xli. tit. 2. *De acquir. vel amitt. poſſeſſ.* leg. 3. §. 3.

[2] Or a Workman, who is paid by an Husbandman or Maſon, for his Labour. For he acts not in his Maſter's Name, who has hired him, but in the Work that he has to do. *Nemo enim ſervorum opera theſaurum quærit, nec ea propter tunc terram fodiebat, ſed alii rei operam inſumebat, & fortuna aliud dedit,* Digeſt. l. xli. tit. 1. *De acquir. rerum Domino,* leg. 63. §. 3. See alſo Mr. *de Bynkerſhoek*'s Obſervations, l. ii. c. 4. where he confutes the contrary Opinion.

[3] See l. v. c. 3. §. 3. and Not. 1. following. *Grotius*, l. ii. c. 8. §. 7. *Philoſtrat. in vit. Sophiſt.* l. ii. and in *Herod.* §. 2. Mr. *Domat*'s Publick Right, l. i. tit. 6. Sect. 3. §. 7. and Mr. *Titius*'s *Jus Privatum. Romano-German.* l. viii. c. 13. §. 3. *&c.*

fearing it might be ill gotten. It ſeems to have been the Law of the *Jews*, That Treaſure found ſhould paſs to the Owner of the Land[a], as is gather'd from *Matt.* xiii. 44. *Spartian* in *vit. Adriani* mentions a Decree of the Emperor *Adrian* to this purpoſe; *That if a Man found Money in his own Land, he ſhould enjoy it all himſelf; if in another's, he ſhould reſtore it to the Owner of the Soil; if in a Place that belong'd to the Publick, one Moiety ſhould go to himſelf, and the other to the Treaſury.* And to the ſame purpoſe, *in Vit. Severi. Zonaras,* Tom. ii. in *Nerva*; we read a Story of *Atticus, Herod*'s Father, That lighting upon a vaſt Treaſure in his Houſe, he wrote to *Nerva*, deſiring to know his Pleaſure about diſpoſing of it; the Emperor return'd no other Direction than this, *Utere quæ inveniſti, Uſe what you have found.* And when *Atticus* in a ſecond Letter complain'd, *That the Sum was too great for his Occaſions, and quite overloaded him, Nerva* anſwered, *Abutere invento, quando tuum eſt; Why e'en abuſe it, and ſince Fortune hath made it your own, get rid of it how you can.* [b] *Philoſtratus Apollonius,* [c] in a *Contention* about this Point between the Buyer and the Seller of a Field, orders Enquiry to be made which was the beſt Man of the two; an Expedient which can never paſs into a general Rule.

XIV. The *Roman* Lawyers, to the Claſs of things acquired by Occupancy [1], add farther, the Goods of Enemies. For the right underſtanding of which we are to know, that by a State of War, as all other peaceful *Rights* are interrupted, ſo Dominion thus far loſeth its Effect, with regard to the adverſe Party, as that we are no longer oblig'd to abſtain from their Poſſeſſions, than the Rules of Humanity and Mercy adviſe us. In War therefore the Goods of one Party, in reſpect of the other, are render'd, as 'twere, void of Dominion: Not that Men do, by virtue of the *Right* of War, ceaſe to be Proprietors of what was before their own; but becauſe their Propriety is no Bar againſt the Enemy's Claim, who may ſeize and carry away all for his own Uſe. As the bare taking hold of a thing, which lay void, is a ſufficient ground for Dominion. Though indeed, in the Caſe of War, thoſe who come to make uſe of this Claim, and to take a violent Poſſeſſion, may very juſtly be reſiſted and repuls'd with equal Violence; as we ſee in daily Practice. We may therefore obſerve, that the Dominion of things taken in a War doth then at length gain its full Strength and Validity, when the Perſon, from whom they were taken, renounceth his Pretenſions to them, by conſenting to a Peace.

Farther, and what is very particular, this violent Seizure, in a hoſtile Method, may likewiſe intitle us to a Sovereignty over Men [2]: Whereas otherwiſe [3], Men do not come under the Object of Occupancy, whether ſubject to a Lord, or enjoying their natural Freedom; excepting only that one antient Caſe of *expoſed Infants* [d] [4], who belong'd to thoſe that found and preſerv'd them. For Liberty, as well as all other *Rights*, is attended with this Effect, that it cannot paſs without my Conſent, into the Power of any other Man beſides an Enemy. But now Occupancy in thoſe things which are capable of it, ſuppoſeth no Conſent; but to the completion of it theſe two Points only are required; *Firſt*, The Act of the Occupant, in ſeizing on ſuch things; and *Secondly*, The Abſence of all *Right* on the part of the Objects, which might elſe hinder them from being acquired by this means. Hence when upon the Deceaſe of a Man who hath no Heir to ſucceed him [5], either by Teſtament, or by Law, all thoſe *Rights* die with him which he held over things or Perſons, the things paſs to the next Occupant, but the Perſons recover their natural Liberty. For we can hardly imagine, that there was ever one Inſtance of a Wretch ſo baſely low-ſpirited, as that he would voluntarily deſert his Freedom, and as it were give it up to any one that would accept of the Reſignation. Should Men in this Caſe be never ſo much inclin'd to continue in a ſervile Condition, yet, at leaſt, they will reſerve to themſelves the Power of chooſing their own Maſter.

Indeed *Grotius* [e] ſeems to reckon Sovereignty amongſt the Objects of Occupancy; whilſt he tells us, *That in things which belong to no Body, there are two Rights which may be in this manner acquired, Sovereignty, and Dominion, as diſtinguiſhed from Sovereignty.* But this Aſſertion muſt be explain'd with great Caution and Dexterity. For Sovereignty in proper Speech is applied only to Men; which except in War, and in the Caſe but now mention'd, can't be obtain'd by Occupancy: Becauſe he who is not *Another's*, is not therefore *No Body's* but *his Own.* But we improperly uſe the term of Sovereignty in ſpeaking of Places or Territories; for then the Effect of it is only this, That no one can fix in ſuch a Place without the Sovereign's Conſent; and they who come to ſojourn there only for a time, are, during that Space, obliged to acknowledge his Juriſdiction.

But now this Sovereignty is really nothing elſe but the Effect of that Dominion or Property which was before eſtabliſh'd over the Place, and includes a Power and Command over *Men*, indirectly, and by Conſequence. Becauſe what is *mine*, none can take to his own Uſe, without my Leave: And he that enters a Place belonging to me, is ſo far at leaſt under my Rule and Guidance, as that I may hinder him from endamaging my Dominion, or may provide that my *Right* over the Place ſhall not ſuffer on his Account.

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[a] Add *Plaut. Trinumm.* Act. i. Scen. 2. ver. 141. & *Philoſtrat. Apollon.* l. ii. c. 15.
[b] Add Conſtitut. *Sicul.* l. iii. t. 3.
[c] Lib. ii. c. 15.
[d] Vid. *Hobbes*, De Cive, c. 9. ſ. 4.
[e] Lib. ii. c. 3. ſ. 4.

Mr. Barb. *NOTES* on §. xiv.

[1] The Law is, *Item ea, quæ ex hoſtibus capimus, jure gentium ſtatim noſtra fiunt. Bello capta —— ejus fiunt, qui primus eorum poſſeſſionem nactus eſt,* Inſtit. l. ii. tit. 1. §. 17. And Digeſt. l. xli. tit. 2. leg. 1. §. 1. See what our Author ſays, l. viii. c. 6. §. 17.

[2] *Adeo quidem ut & liberi homines in ſervitutem noſtram deducantur; qui tamen, ſi evaſerint noſtram poteſtatem, & ad ſuos reverſi fuerint, priſtinum ſtatum recipiunt.* Vid. *Inſtit.* ubi ſupra.

[3] Although the *Turks* pretend, that when a Stranger comes into their Country, they have a Right to confiſcate his Goods, and take him for their Slave, eſpecially if he belongs not to a Nation in Amity or Alliance with them. See Mr. *de Bynkerſhoek's* Diſcourſe, *De Dominio Maris,* c. 1. p. 4, 5.

[4] See what is ſaid, l. vi. c. 2. §. 3. following.

[5] I have here left out a Sentence which I met with a little higher, where it is much better placed.

CHAP. VII.

Of Additional Acquirements.

I. *How many ſorts of Additions there are.*
II. *Additions properly belong to the Owner of the thing.*
III. *How many ſorts of Fruits.*
IV. *The young one of Beaſts belong to the Owner of the Damm or Mother.*
V. *Things planted paſs with the Soil.*
VI. *How Buildings go along with the Soil.*
VII. *The Paper goes along with the Writing.*
VIII. *The Canvaſs with the Picture.*
IX. *The Purple with the Garment.*
X. *Of new Models in Things.*
XI. *Of whole Countries left by Waters.*
XII. *Of Fields belonging to private Perſons.*

MOST of thoſe things which are ſubject to the Dominion of Men, have this common Affection, That they do not always continue in the ſame State, but abound with great variety of Increaſe. Some of them ſwell their inward Subſtance to larger Dimenſions, ſome receive external Improvements; others are attended with ſeveral Fruits and Advantages of a different kind from themſelves; many riſe very conſiderably in Value, from the Faſhion and Figure which human Induſtry hath put upon them. All theſe additional Profits may be compriſed under the general Term of *Acceſſions* [1], and will for the moſt part fall under one of theſe two Claſſes: Thoſe which proceed purely from the Nature of the things, without the aſſiſtance of any human Act; and thoſe which the Labour and Diligence of Men doth either wholly, or in part, procure.

II. 'Tis a general Rule in this Caſe, That whoever is Owner of a thing, to him likewiſe belong the *Acceſſions* of it [1]: Which evidently flows from the very Nature of Property, and from the End for which it was firſt introduc'd; inaſmuch as the poſſeſſion of many things would be vain and uſeleſs, ſhould the Fruits of them accrue to others; and the common Peace of Mankind would be very little promoted, if other Perſons might challenge theſe Improvements with the ſame *Right* and *Title*, as the Proprietor of the Subſtance to which they adhere. It is needleſs therefore to derive the Dominion of *Acceſſions* from the Title of a *feigned Occupancy*, by which we ſhould ſeem, through the intervention of a thing belonging to us, to take poſſeſſion of any After-improvement; or by virtue of which, a Thing already our own, ſhould be ſuppoſed, on account of its Pre-eminence, to make ſome other inferior thing cleave to it, as an Appendage.

III. The Increments [1], Multiplication, and Profits of any kind of things are uſually ſtiled *Fruits* [2]; except that the Increaſe of Animals hath the peculiar Name of *Fœtus*, or the *Breed*. *Fruits* are moſt commonly divided into thoſe of which the thing itſelf is the proper Cauſe and Original, and thoſe of which it is only the Occaſion. The former are called *natural*: The latter *legal* or *civil* [3]. Amongſt the *natural*, ſome ariſe from the bare Operation of Nature [4], without the Culture or Labour of Men: In others, we aſſiſt Nature's Strength [5], and render her more kind and fertile by our own Pains, whether in a greater or a leſſer Proportion: On which account theſe are wont likewiſe to be termed, *The Fruits of Induſtry*. As for *civil Fruits*, we ſee Inſtances of them in *Uſury* [6], *Hire*, *Carriages*, and the like. 'Tis obſervable, that *Fruits* of the former kind, ſo long as they are not ſeparated from the thing whence they proceed, are look'd on as parts of it; but

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[1] All that our Author means by this Word *Acceſſiones*, or Acceſſions, may be look'd upon as an Acceſſory, which follows the Principal or Foundation of the thing. For to ſpeak with the *Roman* Lawyers, it ſignifies, *Quæcunque aliis adjuncta, ſive adjecta, acceſſionis loco cedunt*, Digeſt. l. vi. tit. 1. *De rei vindic.* leg. 23. §. 5. In truth, as Mr. *Titius* obſerves, *Obſerv.* 297. our Author does not well to refer additional Acquirements only to primitive Acquirements. See §. 1. of the foregoing Chapter. For it appears by the Examples there treated of, that we often acquire by the Right of acceſſory things belonging to others. There are alſo ſeveral ſorts of Acceſſories which interpoſe without producing any Acquiſition themſelves, and which only gain an Opportunity of getting ſomething, either by the Conſent of Parties, or by virtue of ſome poſitive Conſtitutions of Law.

[1] This Rule is very uncertain and imperfect, and we may better put theſe two inſtead of it. I. If the Addition made to a thing belonging to us proceed from the thing itſelf, or from any Act of our own; and if coming otherways it belongs to no body, it is naturally our Acquirement, or at leaſt we can't be deprived of it upon the account of any other. II. But if the Thing or Work which is added to our Poſſeſſion belongs wholly or in part to another, it naturally follows, that there muſt be a kind of Community in relation to the whole between us and him, ſo that one of us muſt transfer his Right to the other, tho' this does not often happen; for this Community ends, and conſequently the additional Acquirement is then made, either by the mutual Agreement of the Parties, or by the Settlement of ſome poſitive Law, which ends the Difference according to the nature of the Circumſtances and Maxims of Equity, *Titius*'s *Obſerv.* 298. See alſo his Obſervations in *Compend. Lauterbach. Obſerv.* 1018. and his *Jus Privatum Romano German.* printed in 1709, l. iii. c. 5. §. 25, *&c.*

[1] The *Roman* Lawyers underſtand by Fruits what remains over and above any recent Acts or Deeds. So they ſay, *Fructus intelliguntur deductis expenſis, quæ quærendorum, cogendorum, conſervandorumque eorum gratia fiunt*, Digeſt. l. v. tit. 3. *De hæreditatis petitione*, leg. 36. §. 5. See alſo *Cod.* l. vii. tit. 51. *de fructibus, &c.* leg. 1.

[2] This Author obſerves here, that that which is brought forth by a Beaſt has a particular Name given it, *viz.* the *Fœtus*; but this is done only in *Latin*; and we likewiſe (as every one knows) uſe the ſame Word, *Fœtus*, in ſpeaking of Plants. I may add alſo, that the Word *Fructus* is ſometimes attributed to young Beaſts, as Mr. *Noodt* ſhews us in his Obſervations, l. i. c. 10. p. 55.

[3] Or *Legitimi*, which can't be well expreſs'd in *French*, but imports, that they ariſe from a Right founded on the Law.

[4] As for Example, Food, Fruits of Trees that grow wild, Underwoods, the Oar of Mines, and Stones of Quarries.

[5] As Bread-Corn, and other ſorts of Grain, *&c.*

[6] So, according to the *Roman* Lawyers, Fruits hanging on the Boughs, which are not yet gather'd or fallen, but join'd with the Tree, are part of the Ground. *Fructus pendentes pars fundi videntur*, Digeſt. l. vi. tit. 1. *De rei vindic.* leg. 44.

when ſeparated [7], they are conſider'd as diſtinct Beings: But both kinds agree in this; That they belong to him who is Maſter of the thing from which they flow.

IV. As for the Breed of Animals [1], it hath been generally determin'd, That they ſhould follow the *Venter* [2], and ſo ſhould belong to the Owner of the Female, not of the Male; not only for this Reaſon, becauſe the Male is for the moſt part unknown, but likewiſe becauſe the young was once a part of the Female, as it never was of the Male; and becauſe what the former contributes to the Birth, is much more conſiderable than what proceeds from the latter; though we ſhould allow them to be equal, when look'd on barely as natural Cauſes: For the Queſtion here is not whether the exiſtence of the Calf is to be aſcrib'd more to the Cow, or to the Bull; but whether the Calf belongs rather to the Proprietor of the one, than of the other. Now the Male is obliged to little Trouble, ſo that his Service in this reſpect brings very little or no Damage to the Owner. But the Female, whilſt ſhe carries her Burthen, is almoſt uſeleſs to all other Purpoſes, and beſides requires, at this time, more than ordinary Care and Charge in the keeping: Therefore, at leaſt, the Owner of the Male cannot pretend to ſo much Merit as the Owner of the Female. Eſpecially, ſince one Sire is ſufficient for a great number of Breeders. Yet in caſe a Man keeps Males purely for this Uſe, 'tis but juſt he ſhould receive ſome Conſideration from others who ſhall deſire to imploy them [a].

V. It is likewiſe a common Rule [1], That things planted or ſown ſhall go with the Soil; becauſe they are not only nouriſh'd by it, but growing into a moſt ſtrict Union, are made, as it were, parts of the ſame Body. For which Reaſon it is farther required, that they ſhall have taken Root; they belonging 'till then to their firſt Owner [2]. Yet *Grotius* [b] is of Opinion, *That this Appointment proceeds only from poſitive, and not from natural Law; ſince the nouriſhment of a thing already exiſtent, being no more than a part of that thing, the Lord of the Soil can only pretend to a part in the Right over it; which, naturally ſpeaking, cannot take away the Right of him who own'd the Seed, the Plant, or the Tree: And therefore in this Caſe the thing muſt be held in common by them both.* But notwithſtanding what is thus objected, the *Roman* Laws, in giving the former Judgment, went on very good Reaſon. For they did not hereby deſign that the Owner of the Seed, the Plant, or the Tree, provided he acted with honeſt Intention, ſhould ſuffer an utter Loſs; nor do they forbid but that the two Proprietors may, if they pleaſe, hold the thing henceforth in common, according as the Uſe and Benefit of the Ground on the one ſide, and the Worth and Excellency of the Plant on the other ſide, ſhall aſſign them their fix'd Proportions. But becauſe they would compel no Man to hold on in a common Poſſeſſion againſt his Will, and becauſe ſuch things as theſe are incapable of Diviſion, therefore they take the Queſtion to be, Whether it will not be more equitable to aſſign the whole thing to one of the two Proprietors, with this Burthen, That he ſhall be obliged to pay the other the Value of what he receives from him? Now here, ſince it happens moſt frequently, that the things we ſpeak of, being cloſely knit and faſten'd to the Earth about them [3], cannot conveniently be tranſplanted, or be any way preſerved out of their Place, it was thought fit to ordain in general, that things ſet or ſown ſhould go with the Soil; yet ſo, as that the Lord of the Soil ſhall ſatisfy the other Party for his Seed, or his Plant, in caſe he acted like an

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[a] Add *Ziegler* ad *Grot.* l. ii. c. 8. ſ. 18. & *Felden*, ibid.

[b] Lib. ii. c. 8. ſ. 22.

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[7] So the Civil Law, *Prædiorum urbanorum penſiones pro fructibus accipiuntur*, Digeſt. l. xxii. tit. 1. *De uſuris & fructibus*, &c. leg. 36. *Operæ quoque ſervorum in eadem erunt cauſa, qua ſunt penſiones, item vecturæ navium & jumentorum*, l. v. tit. 3. *De hæredit. petit.* leg. 29. §. 31, 32.

[1] The *Roman* Lawyers do not reckon the Children of Slaves among Fruits; becauſe, according to the Principles of the Stoicks, it is abſurd to look upon a human Creature as a Fruit, for whoſe Uſe Nature has allotted all other Fruits which it produceth. *In pecudum fructu etiam fœtus eſt, ſicut lac, pilus, & lana. Partus vero ancillæ in fructu non eſt——— abſurdum enim videbatur, hominem in fructu eſſe, cum omnes fructus rerum natura gratia hominis comparaverit*, Inſtit. l. ii. tit. 1. *De rerum diviſ.* &c. §. 37. See c. 8. §. 7. following. Others ſay, 'tis only becauſe a Female Slave is ordinarily bought to do the Service ſhe is able, and not bring Children into the World; *Quia non temere ancillæ ejus rei cauſa comparantur, ut pariant*, Digeſt. l. v. t. 3. *De hæredit. petit.* leg. 27. *in init.* See alſo *Vinnius* upon that part of the *Inſtitutes*, which we have cited a little above.

[2] So the Law appoints, *Si equam meam equus tuus prægnantem fecerit, non eſſe tuum, ſed meum, quod natum eſt*, Digeſt. l. vi. t. 1. *De rei vindic.* leg. 5. §. 2. See the ſame Title in the *Code*, leg. 7.

[1] The *Roman* Law is, *Si Titius alienam plantam in ſolo ſuo poſuerit, ipſius erit; & ex diverſo, ſi Titius ſuam plantam in Mævii ſolo poſuerit, Mævii planta erit: Si modo utroque caſu radices egerit; ante enim quam radices egerit, ejus permanet, cujus erat——— Qua ratione autem plantæ, quæ terræ coaleſcunt, ſolo cedunt; eadem ratione frumenta quoque, quæ ſunt ſata, ſolo cedere intelliguntur*, Inſtit. l. ii. tit. 1. §. 31, 32. As for a Tree, whoſe Roots ſpread into our Neighbour's Field, ſee *Hieron. Magius Miſcell.* 4. 7. and Mr. *Titius* on *Lauterbach. Obſerv.* 1020, as alſo a curious Diſcourſe of Mr. *Thomaſius*'s, *De Pretio affectionis in res fungibiles non cadente*, c. 3. §. 63. This laſt, from §. 38. to the end of the Chapter, endeavours to ſhew that the *Roman* Lawyers are very confus'd in determining the Caſes which preſented themſelves about this Matter, becauſe they have argued upon ſubtile Principles, rather than by an attentive Conſideration of the nature and uſage of things, or upon that plain Rule which Mr. *Thomaſius* lays down, *viz.* That we ought to content ourſelves with an Equivalent in ſuch things as are capable of re-placing (*res fungibiles*) and that they ought not to be prized in this Caſe, as is done to him to whom they belong, for ſome particular Love to them.

[2] The *Roman* Lawyers add this Reſtriction about Trees and Plants, as appears from the Place of the *Inſtitutes*, which I have quoted in the foregoing Note, and better by this Law of the *Code*; *Si quis ſciens alienum agrum ſevit, vel plantas impoſuit, poſtquam hæ radicibus terram fuerint amplexæ, ſolo cedere rationis eſt*, l. iii. tit. 32. *De rei vindic.* leg. 11. And indeed, the means of gathering the Grain which was once ſown. The Law which *Vinnius* quotes, Digeſt. l. xxii. tit. 1. *De uſuris*, &c. is of no worth here.

[3] Mr. *Thomaſius*, in the Diſcourſe before quoted, ſays, that theſe ſorts of things are of that Nature, that they may be reſtor'd either by other things of the ſame kind, or their Value may be given in Money. There are but few People but will be contented to recover them in that manner; and it rarely happens, that there is any particular Reaſon which may make Men to inſiſt upon recovering what is planted or ſown in the ſame kind. We muſt add this Conſideration to thoſe of our Author.

honeſt Man[4]. Yet if a Perſon ſows my Field with a meaner Grain, when I deſign'd it for one more generous, here I don't ſeem obliged ſo much as to pay him for the Seed; it being really a Damage to me, that my Ground is like to afford ſo ignoble a Crop. But ſhould the Plants admit of being removed, eſpecially if they be more in Value than the Uſe of the Soil amounts to, it would, no doubt, be equitable that the Owner of the Plants ſhould be allow'd to take them away, only paying the other for the Uſe of his Ground. On which Point the Law of *Solon* is remarkable; *He commanded* (ſays *Plutarch*, in *Sol.* p. 91. Ed. *Wech.*) *that every Perſon, who planted the common kinds of Trees in his own Ground, ſhould ſet them at five Foot diſtance from his Neighbours. But that he who ſet a Fig-Tree, or an Olive-Tree, ſhould enlarge the Diſtance to nine Feet; becauſe theſe not only caſt a longer Root, but are very miſchievous, when they ſtand too near ſome others; either by drawing away the Nouriſhment from them, or by ſending out a Steam offenſive and hurtful to them.*

VI. Moſt of what hath been here offer'd may likewiſe be applied to the Caſe of Buildings, raiſed either on the Ground, or out of the Materials of other Men. Indeed if the Structure be moveable, 'tis certain the Lord of the Soil can claim no *Right* to it[1]; provided it be removed, and Satisfaction made him to the Value of what his Ground ſuffer'd by it. If another builds a Houſe with my Materials, it is commonly beſt for me to receive the Value rather than the things themſelves; ſince what is thus fitted to one Building will not ſerve again for the like Uſe. But if the Materials are not prejudiced by being thus applied, and I have occaſion for them, and cannot conveniently furniſh my ſelf with others of the ſame kind, then I ought in Equity to be allow'd the privilege of ſeizing them for my own Service. And tho' this is forbidden by the Law of the Twelve Tables, yet they relieve the Owner of the Materials another way, by granting him an *Action* for double their Value[2]. In Caſe a Man builds with his own Materials upon another's Ground, if he knew what he did[3], it ſeems hardly poſſible but that he muſt have had a diſhoneſt Deſign; and it being preſum'd that he purpoſed to ſteal the Ground, the Owner of it doth not ſeem obliged to pay the Price of the Materials, or the Hire of the Workmen; or to permit the other Party to pull down, and carry off what he brought thither[a]. If there was no knavery in the Deſign, and the Building cannot be removed without being utterly demoliſh'd, the *Roman* Laws enact, [4] *That it ſhall go along with the Soil; yet ſo, as that in caſe the Builder be in actual Poſſeſſion, the Lord of the Soil ſhall pay the Price of the Materials, and the Expence of the Work*[b]. For tho' the Pile which is raiſed be for the moſt part of greater Value than the Soil and Surface on which it ſtands, yet they judg'd it inconvenient, that an immoveable thing ſhould cleave as an Appendage to another, which at leaſt, if taken to pieces, is moveable. Yet ſtill, if the Owner of the Ground can conveniently be without the Spot on which the Building is erected, and cannot ſo well purchaſe the Building it ſelf, it ſeems moſt reaſonable, that upon receiving the worth of his Ground, he ſhould leave the Building to be enjoyed by the other[c].

VII. But when the *Roman* Lawyers extend this Rule, That *things built and ſown ſhall go with the Soil*, to Papers and Parchments, we cannot ſubſcribe to their Opinion[1]. As if when I with a good and honeſt

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[a] *Lex Longobard.* l. i. tit 27. Sect. 1.

[b] *Edict.* Reg. Theodoric. c. 137.

[c] Comp. l. 7. ſ. 10, 11, 12. *D. de* A. R. D.

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[4] We muſt here obſerve this. For if there was a knaviſh Deſign in him who planted or ſowed, I mean, if he knew that the Land did not belong to him, he deſerves to loſe both his Labour and Goods, becauſe he has mixed them with the other. Without this every Man would be expos'd to ſee his Land ſown or planted with Trees by ſome other, who would leave it, becauſe he can't enjoy it himſelf. See the Law of the *Code* cited above, Note 2. and *Inſtit.* l. ii. tit. 1. §. 32. We ſhall add a Remark made by *Thomaſius, Inſtit. Juriſprud. Divin.* l. ii. c. 10. §. 227. which is this, When a Perſon with a good Deſign ſows another Man's Field, if there happens a great dearneſs of Corn, Equity obligeth the Maſter of the Soil to permit the Perſon who ſow'd it to take the Crop, and be contented to accept of Satisfaction for the Uſe of the Ground.

[1] This is determined in the *Digeſts*, l. xli. tit. 1. *De acquirend. rerum Dominio*, leg. 60. *Titius horreum frumentarium novum, ex tabulis ligneis factum, mobile in Seii prædio poſuit. Quæritur, uter horrei dominus ſit? Reſpondit, ſecundum quæ proponerentur, non eſſe factum Seii.* See alſo l. vi. tit. 1. *De rei vindic.* leg. 38.

[2] This Action is call'd, *actio de tigno juncto*, underſtanding by *tignum* all ſort of Materials for Building. The Reaſon why the Twelve Tables ſo order'd it was, to hinder a Building, that was a great Ornament to the City, from being demoliſh'd ſoon after it was raiſed. *Cum in ſuo ſolo aliquis ex aliena materia ædificaverit, ipſe intelligitur dominus ædificii, quia omne quod ſolo inædificatur, ſolo cedit. Nec tamen ideo is, qui materiæ dominus fuerat, deſinit dominus ejus eſſe; ſed tantiſper neque vindicare eam poteſt, neque ad exhibendum de ea re agere, propter legem duodecim tabularum, qua cavetur, NE QUIS TIGNUM ALIENUM ÆDIBUS SUIS JUNCTUM EXIMERE COGATUR, ſed duplum pro eo præſtet per actionem, quæ vocatur de tigno juncto; appellatione autem tigni omnis materia ſignificatur, ex qua ædificia fiunt. Quod ideo proviſum eſt, ne ædificia reſcindi neceſſe ſit,* Inſtit. l. ii. tit. 1. §. 29. But if the Building was pull'd down for any other Reaſon, then he, to whom the Materials appertained, might recover, if he had not already received double Damages. *Quod ſi aliqua ex cauſa dirutum ſit ædificium, poterit materiæ dominus, ſi non fuerit duplum jam conſecutus, tunc eam vindicare, & ad exhibendum de ea re agere.* The Interpreters commonly think, and the Sequel of the Diſcourſe ſhews, that the Paragraph of the *Inſtitutes* that I have quoted a Part of, grants an Action for double Damages to the Owner of the Materials againſt the Proprietor of the Ground, provided the other had an honeſt Deſign in building, *i. e.* he made uſe of the Materials, not knowing that the Materials belong'd to another. See *Arn. Vinnius* upon this Place. But Mr. *Thomaſius*, in his Diſcourſe already quoted, *De pretio affectionis*, &c. c. 3. §. 59, &c. maintains, That *Trebonianus*, in compoſing the *Inſtitutes*, miſapprehended the antient Lawyers, and the Senſe of the twelve Tables, which ſpeak only of him who builds with an ill Deſign with another's Materials; whence it comes, that in the *Digeſts*, the Title, *De tigno juncto*, l. xlvii. tit. 3. is placed immediately after that, *De furtis*. See alſo *Jan. Vincent Gravina*'s *Orig. Jur. Civil.* l. ii. p. 356, 357.

[3] *Ex diverſo, ſi quis in alieno ſolo ex ſua materia domum ædificaverit, illius fit domus, cujus & ſolum eſt; ſed hoc caſu materiæ dominus proprietatem ejus amittit, quia voluntate ejus intelligitur eſſe alienata, utique ſi non ignorabat ſe in alieno ſolo ædificare, & ideo licet diruta ſit domus, materiam tamen vindicare non poteſt,* Inſtit. l. ii. tit. 1. §. 30.

[4] *Certe illud conſtat, ſi in poſſeſſione conſtituto ædificatore, ſoli dominus petat ſuam eſſe, nec ſolvat pretium materiæ & mercedes fabrorum, poſſe eum per exceptionem doli mali repelli, utique ſi bonæ fidei poſſeſſor fuerit qui ædificavit. Nam ſcienti alienum ſolum eſſe, poteſt objici culpa, quod ædificaverit temere in eo ſolo, quod intelligebat alienum eſſe,* Ibid. See *Digeſt.* l. xli. tit. 1. *De acquir. rerum Dominio*, leg. 7. §. 10, 11, 12.

[1] *Literæ quoque licet aureæ ſint, perinde chartis membraniſque cedunt, ac ſolo cedere ſolent ea quæ inædificantur, aut inſeruntur; ideoque ſi in chartis membraniſve tuis carmen, vel hiſtoriam, vel orationem Titius ſcripſerit; hujus corporis, non Titius, ſed tu dominus eſſe*

honeſt Intention have wrote ſomewhat on another Man's Paper, I muſt be oblig'd immediately to reſign it to him, only receiving ſome Conſideration for my Pains in writing. But rather, ſince commonly the Writing is of more Worth than the Paper, 'tis much the faireſt Method that the other ſhall reſt ſatisfy'd with being paid for his Paper [2]. Eſpecially, if we reflect on what ſome have added, and not without Reaſon, That Paper being uſed, doth, as it were, die and periſh; and that therefore Writing is of a quite different Nature from Building. For the true and proper Eſſence of Paper ſeems to remain no longer than it continues clean and fair, capable of admitting any Characters. When 'tis once fill'd, it paſſeth in the Name of a Book, a Letter, a Roll, or the like. Therefore writing Paper is, in this reſpect, loſt and dead to me, that I have no longer the Power of committing to it what I pleaſe. And hence, if I do but receive the Value of it, I have no Cauſe to complain, ſince I can furniſh my ſelf with new, which will ſerve my Occaſions as well.

VIII. They are more in the right, when they determine [1], that the *Table* ſhall go along with the *Picture* [2]; the latter being uſually of far greater Value than the former; and it being eaſy for a Man to part with ſo common a thing, upon receiving its Price. Yet this very Reaſon ſhews, that in ſome Caſes Equity will direct a contrary Deciſion. As ſuppoſe a vulgar Dawber, whoſe Skill never carried him beyond a Sign-poſt, ſhould have laid his vile Colouring upon ſome precious Wood, which we ſhould gladly reſcue, as ſoon as poſſible, from the Injury it ſuffer'd; or if ſome awkard Figures ſhould be cut in Plates of Gold or Silver, or in Pearls and Gems. As it would be an unparallel'd Impudence for a Raſcal that rubs his Bruſh upon my Walls, on that account to claim my Houſe; nay farther, ſince this Labour was perform'd purely for his own Humour, he can hardly require to be paid for the Work, unleſs perchance the Owner of the Houſe be in ſo good Circumſtances, as that we may think he would willingly have put himſelf to ſuch an Expence [a] [b].

IX. The ſame Lawyers declare [1], that *Purple* applied to, or engraffed on another's Garment, ſhall go with the Garment, however the former may exceed the Value of the latter. Now this may be underſtood two ways; either that a Perſon ſhall interweave among his own viler Thread ſome Purple Yarn belonging to another [2], or that he ſhall fit another's Purple Cloth to his own Garment. In the former Caſe there is ſcarce the leaſt Doubt, but that the Cloth thus made ought to be judg'd to the Owner of the Purple. For that without which another thing cannot exiſt [3], and which is, as it were, the natural Ground to ſupport and uphold it, is not always to be look'd on as an *Acceſſion* to that other thing [4]; but we ought by all means to take the Value of each thing into the Account; ſo that if they are equal in all other Reſpects, that which is more precious ſhall draw to it that which is leſs. Indeed if we ſpeak of the phyſical Concomitancy or Adherence of things, it is neceſſary that thing ſhould go along with another, which cannot be without the other; or that the *Adjunct* ſhall follow the *Subject*. But in aſſigning the Property of things, where we are chiefly to conſider the Price and the Uſe of them, and how eaſily a Perſon may bear the want of ſuch or ſuch a part of his Poſſeſſions; this Reaſon cannot always prevail.

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[a] Lib. xxxviii. *D. De rei vindic.*

[b] Vid. lib. vi. tit. 1. *D. De rei vindic.*

Mr. Barb. *NOTES on* §. vii, viii, ix.

eſſe videris; ſed ſi à Titio petas tuos libros, tuaſve membranas, nec impenſas ſcripturæ ſolvere paratus ſis, poterit Titius ſe defendere per exceptionem doli mali, utique ſi earum chartarum, membranarumve poſſeſſionem bona fide nactus eſt. Inſtit. l. ii. tit. 1. §. 33. See Note 22. upon §. following. " This Place, ſays Mr. *Daumat* in his civil Laws in their natural Order, Part I. l. iii. tit. 7. Sect. 2. " §. 15. ought to be underſtood of ſome other Matter more precious than the Paper, or of a Writing that is not more worth than " the matter on which the Writing is, being uſed by the Writer, as what is written upon waxed Tables, to be blotted out after- " wards. But as for writing on ſuch Paper as ours is, *he ſays*, that the Owner of the Paper does not become the Owner of the " Writing, be it ſo much only as a bare Letter; and much leſs, if they are Writings or Acts of ſome Conſequence. " This Explication ſalves in part the Abſurdity of the Deciſion of the *Roman* Lawyers; but the Misfortune is, it has no Foundation. The Text is too clear to admit of a favourable Interpretation; and nothing can better prove that the Notions, which the *Roman* Lawyers have framed of what is to be look'd upon as an Acceſſory, are falſe and very ill connected together, ſince they make a clear different Deciſion as to Painting, although they be exactly the ſame.

[2] *Francis Hotman*; and it comes to the Rule of Mr. *Thomaſius* ſpoken of before. See his Diſcourſe, *De Pretio affectionis*, &c. c. 3. §. 65, 66. and *Vinnius* upon the Paragraph of the *Inſtitutes*, which I have ſet down in the foregoing Note.

[1] *Si quis in aliena tabula pinxerit* ——— *nobis videtur melius eſſe, tabulam picturæ cedere. Ridiculum eſt enim picturam Apellis vel Parrhaſii in acceſſionem viliſſimæ tabulæ cedere,* Inſtit. l. ii. tit. 1. §. 34. See *Thomaſius*'s Diſcourſe, §. 67, and Mr. *Titius*'s *Jus Privatum Romano-German.* l. iii. c. 5. §. 55, *&c.*

[2] Moſt Lawyers pretend here, that as to what hath been ſown or built in another's Ground, a good Deſign is neceſſary to give right to recover and preſerve the Canvaſs, paying the Value of the Cloth to him to whom it belongs. And indeed, *Juſtinian* or rather *Trebonian* tells us in §. 34. before quoted, *Utique ſi bonæ fidei poſſeſſor fuit ille, qui picturam impoſuit.* See *Vinnius* above. But to me this Deciſion ſeems to deſerve Amendment. The Matter on which we paint, as well as that on which we write is uſually of a ſmall Value; ſo that we can have little Reaſon to ſuppoſe an ill Deſign, and that it can happen very rarely; and when it evidently appears, the Principle that hath produc'd it can never be ſo ill, but he muſt ſee ſo much Worth as to deſerve a much greater Value than can belong to him, and ſo not deſire that the thing which it is incorporated with ſhould be returned to its true Owner. So that unleſs ſome extraordinary Circumſtance aggravate the Fact, Equity, in my Opinion, will engage every Man to be content to recover the Value of the Paper, the Canvas, or the Board, or at leaſt, by preſerving the Picture or Writing, ſecure the Painter or Writer from loſing his Labour, or depriving him of the things, which not being poſſible to be reſtored, would be abſolutely loſt as to him, with all that depends on it.

[1] *Si alienam purpuram veſtimento ſuo quis intexuerit, licet pretioſior ſit purpura, tamen acceſſionis vice cedit veſtimento,* ib. §. 26.

[2] The *Roman* Law does not relate here the Caſe of Specification, of which our Author ſpeaks in the following Paragraph. But in both Caſes we may ſay with Mr. *Thomaſius*, that it ought to be indifferent to the Owner of the Purple, whether he reſtore the Wool, or Cloth in kind, or give him another like it, of the ſame Nature, and ſame Price. So that it is juſt, that he content himſelf with this Equivalent, knowing that the other has acted with an honeſt Intention.

[3] The Text ſpeaks the contrary expreſly, ſaying, That without which another can't exiſt, and which ſupports it, as we may ſay phyſically. The Author here thro' Inadvertence has confounded the Principal with the Acceſſory.

[4] As the *Roman* Lawyers affirm, ſaying, *In omnibus igitur iſtis, in quibus mea res, per prævalentiam, alienam rem trahit, meamque efficit, ſi eam rem vindicem,* &c. *Digeſt.* l. vi. tit. 1. *De rei vindic.* leg. 23. §. 4. There went before immediately, *Sed neceſſe eſt ei rei cedi, quod ſine illa eſſe non poteſt,* §. 3.

As for what *Grotius* [a] affirms in this Matter, *That for the greater part to ſwallow up the leſs, is natural only in Fact, not in Right*; we allow it under the following Senſe. In *Fact* what is ſtronger may draw to itſelf what is weaker; but 'tis not always *rightful* or *juſt*, that a ſtrong Man ſhould carry off the Goods of his weaker Neighbours; or that a Perſon ſhould loſe a thing of his own, which is leſs, if it happen to be join'd with ſomewhat of another's, which is greater. For he who hath but the twentieth part in a Field, is as much a Lord and Proprietor, as he who hath the other nineteen. But indeed the Queſtion we are now upon is not ſtrictly, whether he who hath the greater part in a thing, ought on that Score to gain the leſs; but what Expedient may be found out to decide the Buſineſs, in caſe two Perſons happen to be joint Proprietors of a thing, which they are unable or unwilling to hold in common, or to divide. Now here certainly the entire thing ought to be adjudged to one of the Parties, upon Condition that he ſatisfy the other to the Value of his Share. And which of the two Perſons ought, in this caſe, to carry the whole thing, is to be determin'd from the Price and Excellency of one Share above the other, and from conſidering which of the Men is in the greateſt want of that for which they conteſt. Thus ſuppoſe a Man to have us'd my Purple in a Garment for himſelf, tho' poſſibly the Purple be of much the greater Value, yet 'twill be my beſt way to leave him his Garment ſafe and whole, upon receiving Satisfaction: for ſhould the Garment be taken to Pieces, the other Party muſt needs be endamaged; and where's my Advantage in receiving my Cloth, when reduced to Rags? And as for the whole Garment, this being already fitted to the Body of another, is commonly diſproportion'd and unſerviceable for mine. So indeed in all the Compaſs of this Subject it is more eaſy to judge what's fit and equitable from the Conſideration of particular Caſes, than from any general Deciſion.

X. As for *Specification* [1], or the turning a thing into ſuch a Form or Shape, we are firſt of all to obſerve, that it cannot ſtrictly and properly be ranked amongſt the originary ways of Acquiſition: For ſince in the Courſe of Nature nothing can be made but out of ſome Matter before exiſting, we ought to enquire whoſe that Matter is. If it were our own, then upon the introducing of a new Shape, our Dominion ſtill continues. If it were no Body's, then we ſhould obtain the Dominion of it by the preſent Act of Occupancy. But if it were another's, then the Queſtion lies, Whether 'tis now to be adjudged to the Owner of the Matter; or to the Author of the Form? On which point the old Maſters of the *Roman* Law being divided [2], at length they came to this middle Reſolution; That if the Form could be reduc'd to the firſt rude Maſs, then the thing ſhould go to the Owner of the Matter; if not, to him who gave it the new Shape and Figure. Some have thought this Diſtinction to be founded on moſt evident Reaſon; *Becauſe*, ſay they, *when the Shape cannot be thus unmade, the thing ſeems to have utterly periſhed, and ſome new Being to have riſen in its Place; Wherefore it ought, in this Caſe, to be adjudged to him who cauſed it to exiſt under this new Form: Whereas, when the Figure may be reduced to the firſt Lump, then the thing is ſuppos'd ſtill to exiſt, and not to have periſh'd at the Arrival of the new Form, and conſequently not to have chang'd its Owner.* Others, on the contrary, are of Opinion, that the whole Buſineſs turns on this Iſſue, Which of the two, the Matter or the Form, is higheſt in Value [b] [3]. In our Judgment, neither of theſe Determinations can with Equity be apply'd to all Caſes; but the other particular Circumſtances ought likewiſe to come under Conſideration and Regard. Thus ſuppoſe a Man hath made Wine, Oil, or Bread out of my Grapes, Olives, and Corn, or hath taken my Honey and Wine to mix in a compound Liquor, why ſhould he have a Right to the Forms thus produced rather than I, only becauſe they cannot be reſtor'd to their original Matter? Therefore, if the things of which we are ſpeaking, will admit of Diviſion, they ought to be parted according to the Value of the Matter, or the Labour in working out the Form. Yet in caſe the Owner of the Matter hath occaſion to enjoy the thing entire, we think that his Claim ought on all accounts to be preferr'd to that of the Faſhioner. Thus, if a Man caſts or ſhapes a Work out of another's Metal, where the Form is much more precious than the Matter, 'tis but fair that however capable the thing is of being brought back to its Principles, yet it ſhould be left in the Poſſeſſion of the Faſhioner; provided he either reſtore the like Metal in Quantity and Kind, or pay the juſt Value of it. But a contrary Deciſion ſeems moſt reaſonable, if I had deſign'd that Metal for the very ſame Work, of which I ſtand in great Neceſſity, and cannot procure new Metal for that Purpoſe. For here Equity will favour the Owner of the Matter, though the Form or Make ſhould perchance far excel in Value.

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[a] *Dict. loc.* §. 21.

[b] Vid. *Connan.* Comm. Jur. Civ. l. iii. c. 6.

Mr. BARB. *NOTES on* §. x.

[1] Mr. *de Courtin* (in his *Indic.*) defines *Specification* to be the Introduction of a new Form in a Matter belonging to another.

[2] The Words are, *Quum ex aliena materia ſpecies aliqua facta ſit ab aliquo, quæri ſolet, quis eorum naturali ratione Dominus ſit? —— Et poſt multam Sabinianorum & Proculianorum ambiguitatem, placuit media ſententia exiſtimantium, ſi ea ſpecies ad priorem & rudem materiam reduci poſſit, eum videri dominum eſſe, qui materiæ Dominus fuerit; ſi non poſſit reduci, eum potius intelligi dominum qui fecerit; ut ecce vas conflatum poteſt ad rudem materiam æris, vel argenti, vel auri reduci, vinum autem, vel oleum, vel frumentum ad uvas, vel olivas, vel ſpicas reverti non poteſt, ac ne mulſum quidem ad vinum vel mel reſolvi poteſt. Quod ſi partim ex ſua materia, partim ex aliena ſpeciem aliquam fecerit quis, veluti ex ſuo vino & melle alieno mulſum miſcuerit, aut ex ſuis & alienis medicamentis emplaſtrum aut collyrium, aut ex ſua lana & aliena veſtimentum fecerit, dubitandum non eſt, hoc caſu eum eſſe dominum qui fecerit, cum non ſolum operam ſuam dederit, ſed & partem ejuſdem materiæ præſtiterit.*

[3] The moſt plain and general Rule which can be gven here is Mr. *Thomaſius*'s before-mentioned, according to which the Whole, or the Work which ariſeth from two things belonging to two Perſons, uſually appertains to him that brought it into a new Form, becauſe Matter for the moſt part is of that Nature, that it may be reſtored either in itſelf, or by its Value in Money. But if the Matter be ſomething produced by Labour, for which we have ſome particular Reaſon to prize it above its juſt Value, as if it be a Silver Cup given us by a Prince, which we have made into a Baſon, the Owner of the Cup ought to be contented with another Cup of like Weight, or with the Value of it. For if he ſhould give him the Baſon, or make it again into a Cup of the ſame Form, it will not nevertheleſs be the ſame Cup which the Prince gave him. The Sum of all is this, if he that turned the Cup into a Baſon, knew that the Cup was another Man's, the true Owner may make him pay for the Cup according to his private Eſtimation. See the Diſcourſe, *De pretio affectionis*, &c. c. 3. §. 43, &c.

Others conceive, that in the caſe before us we ought farther to enquire, whether the *Power* which the Matter had to receive a particular Form was *near*, or *remote:* If the former, they think the Owner of the Matter ought to be preferr'd; if the latter, the Faſhioner. For Inſtance, That if a Ship be thus made out of the rough Wood belonging to another, then it ſhall go to the Builder; but if the Timber were before fitted and prepared for the building a Ship, then the Ship ſhall go to him who own'd the Timber: That, if a Man works my *Wooll* into a Garment for himſelf, he ſhall keep it, when he hath done; but if he cuts a Coat out of my Cloth, I have a Right to challenge the Coat, and to refuſe any Equivalent: That a medicinal Compoſition, if the Ingredients were before perfected and prepared, ſhall go to the Owner of thoſe Ingredients; if not, to the Author of the Compoſition. But neither will this Diſtinction alone be always agreeable to the Rule of Equity: For if I hold any ſuch *Matter* in my Poſſeſſion, whether rude and unwrought, or whether fitted or diſpoſed to receive a *Form*, which I either keep for Sale, or elſe have in ſuch Abundance, as to be ſtill furniſh'd for my own Occaſions, there's no reaſon why I ſhould not leave ſuch a thing to the Faſhioner of it, upon his refunding the Price of the ſaid *Matter*. But if I have deſign'd any Quantity of *Matter* to my own particular Uſe, and have no Convenience of procuring the like, then the Want which I am in turns the Favour of my Sentence on my ſide, though perhaps the *Matter* was only in *potentia remota*, had only a diſtant Capacity, not an immediate Fitneſs for this Work [a]. Nay, tho' a Man ſhould frame a thing partly out of his own Matter, and partly out of another's, yet even this doth not in all caſes make it undubitably certain, that the thing ought to be aſſign'd to him that made it, on this Reaſon; becauſe the Shape and Figure is not only owing to his Pains, but he likewiſe contributed Part of the *Matter:* For, it may be, his Pains were of little worth, and likewiſe his part of the *Matter* inconſiderable, ſo that the *Matter* belonging to the other Perſon exceeds both. And again, there are ſome things which take up a certain Quantity of *Matter;* ſo that in any Degree to leſſen it renders it unſerviceable, if not abſolutely, yet however to that particular Deſign. In this caſe Judgment is to be given for him who ſtands moſt in need of the thing thus framed.

As for what remains, *Grotius*'s Aſſertion [b] is univerſally true, *That ſince things conſiſt of Matter and Form, as their conſtituent Parts, if the Matter belong to one, and the Form to another, there naturally follows a Community to each, according to their reſpective Proportions* [4] *: Juſt as a whole Body compoſed by the mixture of two Parcels of Matter of the ſame kind, is common to the two Owners* [c]. *But when a thing can neither conveniently be held in common, nor divided, then either poſitive Laws or Equity muſt determine which Party ſhall reſign the whole to the other, upon receiving the Value of his Share* [d]. It is ſtill in all caſes to be enquired, Whether the Perſon who beſtows a Shape on another's *Matter*, doth it with an honeſt or with a diſhoneſt Deſign? For he who acts thus out of a knaviſh Principle, can by no means pretend that the thing belongs to him, rather than to the Owner of the Matter, tho' all the former Reaſons ſhould concur; that is, tho' the Figure ſhould be moſt valuable; tho' the *Matter* ſhould, as it were, be loſt and ſwallow'd up in the Work; and tho' he ſhould be in very great want of what he had thus compacted. For the greater part of the two doth not draw to itſelf the leſs, barely by its own Virtue, or on its own Account; but there is required farther ſome probable Ground and Plea in the Owner of that part which exceeds, on which he may build his Claim. Hence, if a Man out of wilful and deſign'd Fraud, puts a new Shape on my Matter, that he may by this means rob me of it, he neither gains any *Right* over the *Matter* by this Act, nor can demand of me a Reward for his Labour, any more than a Thief who digs thro' my Walls can deſire to be paid for his great Trouble in making a new Door into my Houſe; or than one can deſire a Fee, who breaks an Impoſthume, otherwiſe incurable, with a Blow that he deſign'd for my Death; or than *Autolycus* could have ask'd a Price for painting the Horſes he firſt ſtole. And all this doth not proceed from any poſitive Conſtitutions, but from the very Dictate and Appointment of natural Reaſon [e], tho' Nature doth not determine any particular Penalty in the Caſe. For to have exercis'd ſuch a Villany *gratis*, is not properly a Puniſhment: And on the other hand 'tis moſt juſt and reaſonable, that I ſhould not be obliged to pay a Man Wages for endeavouring to do me a Miſchief.

XI. What the antient and modern Lawyers have ſo laboriouſly deliver'd concerning Increment by Rivers, depends, for the moſt part, not ſo much on any conſtant and natural Reaſon, as on the poſitive Ordinances of particular Nations: And therefore we may be allow'd to uſe more Brevity on this Subject.

The two chief Enquiries made in the caſe before us are, Firſt, *Whether the Rivers, by thus ſecretly forſaking their Banks, do add to the Dominion of whole Territories?* And, Secondly, *Whether they improve, in the like manner, private Eſtates?*

The former Queſtion is of greater Moment, in as much as it may often prove the occaſion of great Controverſies between Nations; it being uſual for Rivers to lie as the common Boundaries of different States. Now when ſuch a River hath any way alter'd its Courſe, the Point in Diſpute is, *Whether the Limits of the Seigniories are likewiſe chang'd, and whether the additional Land goes to them whoſe Banks*

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[a] Vid. l. vi. tit. 1. & l. 61. *D. De rei vindic.*

[b] *Dict. loc.* ſ. 19.

[c] Ibid. ſ. 27. Vid. l. vi. tit. 1. leg. 3. ſ. 2. & leg. 5. *Dig. De rei vindic.*

[d] Vid. l. vi. t. 1. l. 23. ſ. 2, 3. *D. De rei vindic.*

[e] Add *Leg. Wiſigoth.* l. x. t. 1. c. 7.

Mr. Barb. *NOTES* on §. x.

[4] The Latin is, *Si duorum materiæ ex voluntate dominorum confuſæ ſint, totum id corpus, quod ex confuſione fit, utriuſque commune eſt, veluti ſi qui vina ſua confuderint, aut maſſas argenti vel auri conflaverint; ſed & ſi diverſæ materiæ ſint, & ob id propria ſpecies facta ſit, forte ex vino & melle mulſum, aut ex auro & argento electrum, idem juris eſt, nam & hoc caſu communem eſſe ſpeciem non dubitatur. Quid ſi fortuitu, & non ex voluntate dominorum, confuſæ fuerint, vel ejuſdem generis materiæ, vel diverſæ, idem juris eſſe placuit.*

it augments? Here we are firſt of all to ſuppoſe a Diſtinction between ſuch States as are *limited*[1], or encompaſs'd with artificial Bounds (with which we may reckon thoſe that are parcell'd out by Meaſure, as by the number of Acres, being as to the preſent Buſineſs the ſame) and *arcifinian*, ſuch as are naturally fenced againſt Invaders, with the Boundaries of Rivers and Mountains. After this we are to enquire, Whether the neighbouring People of the two oppoſite States left the River between them void of particular Dominion, and common to the Uſe of both; or whether they agreed to fix their reſpective Limits in the midſt of it, ſo that half ſhould belong to one People, and half to the other? And laſtly 'tis to be conſider'd, Whether the whole River belongs to one People, ſo that the Limits of their Dominions reach to the Bank of their Neighbours? If then both the States are bounded in the manner firſt deſcribed, by artificial Encloſures, or by Meaſure, which immediately touch each other, without any void Space between, tho' the River ſhould change its Courſe, yet the Territories will remain of the ſame Extent: Nor can there here be any room for the Caſe before us, ſince whatever Space ſhould thus happen to be left, already belongs to one or to the other State. If the River in the middle were left void and common, then the Ground added to the Bank or little Iſlets which ſtart up, ſhall go to thoſe who firſt take them into Poſſeſſion: Yet 'tis moſt convenient, that both the former and the latter ſhould be occupied by that People to whoſe Banks they are moſt nearly ſeated. If the whole River belong to a ſingle State, the Iſlets riſing in it ſhall belong to the ſame State only; but as for what is gotten from the River by the oppoſite Banks, it ſeems moſt reaſonable that it ſhould belong entirely to the other People. But it moſt commonly happens, as 'tis moſt agreeable, that the Lands reaching to the Stream on each ſide are ſuppos'd to be fenced only with theſe natural Bounds; and that conſequently the End of each Dominion is to be conceiv'd in the Midſt of the Channel: For here the Water, as it plainly ſeparates and diſtinguiſheth the reſpective Lordſhips, ſo it affords to each County a kind of natural Bulwark. Yet ſtill it is requiſite in this Caſe, that the River do not, as it were, make a common Cuſtom of drowning its Banks, and of cutting it ſelf out a new Channel every Year. When therefore two neighbouring Nations poſſeſs Lands thus bounded by Nature (which in a doubtful Caſe is always preſumed) the River by gradually changing its Current, changeth likewiſe the Limits of the Dominions, and whatever Addition it makes to either ſide belongs to thoſe on whoſe Banks it falls, provided that this [2] Alteration be made by ſmall Degrees, and that the River do not at one ſudden Rupture forſake its Channel, and force a new way. For the gaining or loſing of inſenſible Parts, or any ſuch Change as entirely leaves the old Shape and Figure, ſuffers a thing to remain in all [3] appearance the ſame as it was. And the Conveniency of a natural Boundary is too great to be ſlighted and forſaken upon a ſmall Damage. But if a River, deſerting the Channel it once fill'd, ſhall have broke up another Paſſage for its whole Current; and the People through whoſe Lands it now runs, do not think the advantage of a natural Boundary to be of ſo great Conſequence, as that for the ſake of it they ſhould reſign ſo conſiderable a part of their Territory, then the Borders ſhall continue as before, in the middle of the forſaken Channel. For as a Stone is uſed for a Boundary, not on the account of its Nature, but of its particular Poſition; ſo a River concludes and ſeparates different Countries, not in its vulgar Notion, as 'tis a Bulk of Water gather'd from certain Fountains and Rivulets, and from other Streams of Note and Size, and then diſtinguiſh'd by a particular Name; but as it runs in ſuch a Channel, and hath ſuch Banks to encompaſs and confine it [a].

XII. As to the Lands of private Perſons in this Caſe, we are of Opinion it ought firſt to be conſider'd, whether the River on which ſuch a particular Eſtate happens to lie, divides the Territories of two diſtinct Governments; or whether it only paſſeth thro' the Dominions of one: And then, whether the River be publick or private. In the former Caſe it depends abſolutely on the Pleaſure of the Government, either to leave ſuch Increments in private Hands, or to challenge them for the common [1]. For at firſt it generally happen'd, that ſuch or ſuch a People ſeiz'd on this or that

Tract

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[a] Comp. *Grot.* l. ii. c. 3. ſ. 16. *&* *ad eum loc.* Bœcler. *&* Ziegler.

Mr. BARB. *NOTES on* §. XI, XII.

[1] *Grotius*, from whom our Author took this Diſtinction, had not read carefully enough the antient Writers, who treated upon the Bounds of Lands, which is the Cauſe that he has miſtaken their Senſe. They call that *ager limitatus*, Land bounded, which is diſtributed by the Order of the Prince, to every one a certain number of Acres compaſſed about with Fences, whence it is that they are called Lands divided and appropriated. We underſtand by Lands contained within a certain Extent by Meaſure, *ager menſura comprehenſus*, a Space of Ground meaſured into Acres, of which a certain Number are given to Men in general, without aſſigning any particular Part, which from hence is called *ager aſſignatus per univerſitatem*. Laſtly, *arcifinian* Lands are thoſe which never were meaſured, *ager eſt arcifinius, qui nulla menſura continetur*, ſays *Frontinus*, *De re agraria*, c. 1. and of which the firſt Occupyer appropriates to himſelf as much as he pleaſeth, and he can till, from whence they are named *agri occupatorii*. Theſe laſt have not always natural Bounds, and every one fixes them as he pleaſeth, *viz.* an Hedge, Rail, Ditch, *&c.* Thus *Gronovius* the Father (on *Grotius*, l. ii. c. 3. §. 16.) delivers himſelf in general, and he is a ſufficient Judge in theſe Matters; but his Notes of another ſort, which he makes on *Grotius*, would have been much better, if he had applied himſelf more to the Study of the Law of Nature, and Matter of good Reaſoning in general, than to grammatical Niceties and Criticiſm, as Mr. *Le Clerc* obſerves in his *Biblioth. Choiſe*, Tom. iv. p. 266. But tho' our Author has made a Miſtake here by following *Grotius* inconſiderately, yet the Fault had not been great, if he had otherwiſe reaſoned well from this Diſtinction taken in the Senſe he gives it.

[2] Hence it is, that the *Roman* Lawyers take it for certain, *Eſt autem alluvio incrementum latens; per alluvionem autem id videtur adjici, quod ita paulatim adjicitur, ut intelligi non poſſit, quantum quoquo temporis momento adjiciatur*, Inſtit. l. ii. c. 1. §. 20. See alſo, *Digeſt.* l. xli. tit. 1. *De acquir. rerum Dominio*, leg. 7. §. 1.

[3] The Law is, *Quapropter cujus rei ſpecies eadem conſiſteret, rem quoque eandem eſſe exiſtimari*, Digeſt. l. v. tit. 1. *De Judiciis*, &c. leg. 76.

[1] On the contrary it is credible, as Mr. *Hertius* obſerves, that for the moſt part ſuch as united themſelves together in civil Societies, were every one in particular poſſeſſed of Lands. He alledges a Paſſage in *Cicero* to this purpoſe, *De Offic.* l. ii. c. 21. which is quoted l. viii. c. 5. §. 2. n. 1. following; but it doth not fully prove it; for they who went together to find out ſome uninhabited Country, did doubtleſs deſign as much to ſecure themſelves the peaceable Enjoyment of the Lands, which ſhould be aſſigned them, as thoſe that they were already poſſeſſed of by the Right of the firſt Occupyer, if they ſhould unite with ſeveral other Families to

form

Tract of Land by the *Great*, and afterwards parcell'd out to each Man a particular Poſſeſſion in it, uſually contain'd under a certain and definite meaſure. As therefore what remain'd of the Territory, after this Allotment to private Perſons, was ſtill the publick Poſſeſſion of the State; ſo whatever happens to be added to any particular Share, is likewiſe ſuppoſed to accrue to the Publick. Yet inaſmuch as the adjoining Fields frequently ſuffer great Damages from the Rivers by Floods, and becauſe the Increments we are ſpeaking of, advancing by ſlow degrees, ſeem to be of little Conſequence to the publick Revenue; therefore many Governments have thought it a reaſonable Favour and Bounty to grant theſe Improvements to the Perſons on whoſe Lands they happen to fall. And there is the more Equity in this Conſtitution, in caſe the reſpective Perſons were wont to keep up the Banks at their own Charge. This *Right* is preſum'd to accompany any piece of Land aſſign'd to a private Perſon, not by any determinate meaſure, but in groſs; though perchance in the formal Delivery of it ſome kind of meaſure might be expreſs'd [a]: And 'tis the ſame Caſe, when in aſſigning the Bounds of any Land, the neighbouring River is mention'd at large. But if this Increment be very conſiderable, and far exceeding the meaſure of the private Poſſeſſion, then it ſhall be adjudg'd to belong to the Community. As for the Iſlets which ariſe, theſe no private Man can claim to himſelf, without the expreſs Grant of the State; becauſe being plainly ſeparated from the particular Demeſn, they can on no account be eſteem'd a Part or Increment of it. And their being ſeated next to ſuch a Poſſeſſion, is no more an Argument that they ought to paſs to the particular Proprietor of it, than that any other Man ſhould challenge a part of a Street or a publick Place, only becauſe it lies juſt by his Door.

If a River ſeparates the particular Lands of Perſons ſubject to the ſame State, then, ſince it can add nothing on one ſide, but what it took from the other, 'tis by all means reaſonable, that the Increment ſhall go to him on whoſe Land the Damage is committed. Thus the *Roman* Laws [2] rightly ordain'd, That in caſe the Violence of the Current adds a piece to my Land, which it hath torn from yours, it ſhall remain your Property as before. Which Judgment will more eſpecially hold good in floating Lands, ſuch as *Strabo* [b] mentions in the Fens of *Euphrates*, built upon Hurdles of Reeds, and moved with Boat-Poles into their former Seat, when the Water had carried them off. But if it hath ſtuck long upon my Banks, and the Trees which it brought with it have there taken Root, from that time forward it ſhall be deem'd an acquiſition to my Eſtate. Whence 'tis clear, that the Owner of the loſt Fragment ought to have brought it back again to its former Place, before it was incorporated with my Land, if he intend to reſume the Property of it. When 'tis uncertain what and how much hath been waſted from another's Soil, the Sufferer is hereby hindered from putting in his Claim to the Increment; which yet, according to natural Law, doth not accrue to him who owns the Ground where it faſtens, but to the People who are Sovereigns of the River. For 'tis in the higheſt manner agreeable to Reaſon, that not only the Water of a common River, and the things contained in it ſhould be publick, but likewiſe the Channel, and the Banks, and whatever Improvement either that or theſe happen to gain. For it ſeems very improper to ſay, that the Channel, conſider'd in it ſelf, is a part of the adjacent Land, but that it is look'd on as publick, ſo long as it's cover'd with the publick River; which being once remov'd, it becomes private, according to its primitive Nature: As if 'twas only a Burthen or Service laid on the Grounds of particular Men, that they ſhould grant the River a Paſſage thro' them.

If a River forſakes its Channel, or any Part of it, and cuts out a new way, ſince the latter is taken from the oppoſite Land, the former deſerted Channel ought in Equity to be adjudg'd to the Owner of the Land, who now ſuffers, to comfort him for his Loſs: And in caſe the River forſake likewiſe this new Paſſage, the Ground ſhall then return to the antient Proprietor, and not to thoſe who poſſeſs the Country about it. But whatever is determin'd in thoſe Caſes of the Increments left by the Current, and of the Alteration of Channels; this, no Doubt, is but juſt, that the Burthen which before lay on any Ground, ſhould be leſſen'd in proportion to what it loſeth by ſuch an Accident. Which Point, as [c] *Herodotus* informs us, was ſettled amongſt the *Egyptians* by a particular Law.

It is not leſs equitable, that Land drown'd by a Flood ſhould belong to the former Owner, either when the Water [4] is gone off without trouble, by one violent outlet, or by ſlow degrees; or when his Pains and Labour have cut out a Paſſage for it. But 'twill be ask'd, *To whom ſhall the new Bulk of Water belong, 'till ſuch time as the Land by draining ſhall be recover'd?* Here we judge it neceſſary to enquire, Whether the drown'd Land hath paſſed into the Form of a Lake, or a Fen, or whether it

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[a] Vid. l. xix. t. 1. l. 13. ſ. 14. *D. De act. empt. & vendit.*

[b] *Geograph.* l. xvi. p. 528. Edit. *Genev. Caſaub.*

[c] *Euterpe*, p. 81. Edit. *H. Steph.*

Mr. Barb. *NOTES on* §. xii.

form the Body of a State. It does not nevertheleſs follow from hence, as Mr. *Hertius* affirms, that the Right which a Subject may have to appropriate ſuch things as he finds without an Owner, within the Bounds of the State, as the firſt Occupyer, does not depend either upon the tacit or expreſs Will of the Sovereign. After what manner ſoever the State is form'd, the whole Country belongs to all the Body; and ſo it follows, that the Laws of Union extend ſo far as to give the People, or them that repreſent them, Right to diſpoſe in divers manners the Goods of each particular Perſon, as the publick Good requires. See l. viii. c. 5. This is ſo much the more certain at preſent, becauſe our Kings have for a long time enjoyed this Right by the conſent of the People.

[2] The Words of the *Roman* Law are; *Quod ſi vis fluminis de tuo prædio partem aliquam detraxerit, & vicini prædio attulerit, palam eſt eam tuam permanere. Plane ſi longiore tempore fundo vicini tui hæſerit, arboreſque, quas ſecum traxit, in eum fundum radices egerint; ex eo tempore videntur vicini fundo acquiſitæ eſſe.* (It ought to be read, *Videtur* —— *adquiſita*, as the *Florence MSS.* has it.) See *Vinnius* upon the Place, *Inſtit.* l. ii. c. 1. §. 21. and *Digeſt.* l. xli. leg. 7. §. 2. and l. xxxix. tit. 2. *De damno infecto*, &c. leg. 9. §. 2.

[4] Theſe Alluvions happen for the moſt part thro' the Negligence of the Proprietors, who take not ſufficient Care to ſecure the Banks of the Rivers bordering upon their Poſſeſſions. The *Roman* Law did not reſtore Lands overflowed to their former Owner, unleſs they had not changed their Form, *i. e.* when they were covered with Water for a ſmall time, without making a true Channel. This Mr. *Noodt* proves contrary to the Opinion of the Lawyers in his *Probab. Juris*, l. i. c. 1.

is added to the Channel of a publick River? In the former Caſe, the Lake or the Fen ſhall for ever appertain to the Owner of the Ground; and in like manner in the latter Caſe [5], for ſo long time as he ſhall entertain any Deſign of reducing the Current to its former Banks. As for private Rivers, which give me in one Place as much as they rob me of in another, the Matter is clear beyond Diſpute. But what if a River belonging to my private Eſtate ſhall make it ſelf a new Channel through the Ground of another Man, ſhall that Part of it, which covers my Neighbour's Ground, belong to me, or to him? In our Opinion Judgment ought to be given for the latter. Yet ſtill I retain a Right of turning the Current to its proper Place. But if I refuſe thus to bring back the Current to my own Demeſns, I cannot oblige the other Party to pay for the Water, nor ſo much as pretend that it ought to be common to us both in that Part. For thoſe things which are our own barely on account of their being contain'd within our Limits or Space, and which therefore ſeem Acceſſions to the ſaid Space [6], when they once happen to get out of it, are either to be recall'd by our Care and Diligence, or elſe to paſs out of our Propriety, and to be reckon'd henceforward the natural Increments of the new Space to which they are removed. But in all theſe Caſes the poſitive Laws of different Governments may variouſly determine, as ſhall appear convenient. In *Aggenus Urbicus*'s Comment we find the following Rules laid down, *If this be done in Lands taken by Occupancy, whatever the Force of the Water hath ſtolen away, no one may have the privilege of recovering: which Conſideration lays a Neceſſity on Men to keep up their Banks, yet ſo as not to endamage their Neighbour. But if it be done in Lands that have been meted out, and aſſign'd in Portions to diſtinct Owners, then the Poſſeſſor ſhall loſe nothing; becauſe every one knows the exact Form and Dimenſions of what was allotted for his Share in the Hundred to which he belongs.*

Concerning the Lands which border on the *Po*, *Caſſius* thus determines; *Whatever the Water waſheth away in its ordinary Channel, the Poſſeſſor ſhall loſe: Becauſe he ought to defend his own Bank, without prejudicing other Mens Property. But if the Flood fall down with a greater Force, ſo as to alter its Channel, every Man ſhall regain his own Meaſure; becauſe 'tis manifeſt the Damage happen'd not through the Neglect of the Poſſeſſor, but through the Violence of the Torrent. If in this Caſe the Water form an Iſlet, it ſhall be his Property from whoſe Land it was taken; but if it was borrowed from out of ſeveral Eſtates together, each Perſon ſhall receive his own.* Comp. *Grot.* l. viii. c. 8. ſ. 8, *&c.* and Ziegler *ad dict. loc.*

Mr. BARB. *NOTES on* §. XII.

[5] Our Author inconſiderately mentions Lakes and Fens in this Place.

[6] See Mr. *Thomaſius*'s *Juriſprud. Divin.* l. ii. c. 10. §. 151, *&c.*

CHAP. VIII.

Of Right over other Mens Goods or Poſſeſſions.

I. *A Man may have a Right over other Mens Goods diverſe ways.*
II. *How many ſorts of Right we have over others Goods.*
III. *The Right of holding in Fee.*
IV. *The Right of a Ground-plat.*
V. *The Right of an honeſt Poſſeſſor.*
VI. *Services, what; and of how many ſorts?*
VII. *The Uſe with the Profits.*
VIII. *The bare Uſe.*
IX. *The Habitation.*
X. *The Works of Servants.*
XI. *The Services of City Eſtates.*
XII. *And of Country Farms.*

I. SUCH is the force of Property or Dominion, that the *Proprietor* alone hath Power to diſpoſe of his own Goods; and all others are bound to abſtain from them. Yet inaſmuch as the Diviſion of things amongſt Men was not introduc'd with this Deſign, That all Communication of Goods ſhould thereupon ceaſe; it hence comes to paſs, not only that we are often by the Law of Humanity engaged to grant others the Subſtance or the Uſe of our own Poſſeſſions, but likewiſe that others may acquire a [1] *Right* to them, either perfect or imperfect, and conſequently may procure by a good and juſt Title ſome Benefit or Advantage from our Peculiar.

We ſhall here obſerve in ſhort, how many ways this may happen; the whole Subject being ſo largely explain'd by the Expoſitors of the *Civil Law* [a].

II. The chief *Rights* over the things of others, accruing to Perſons who are not the Proprietors, are by ſome reduc'd to theſe five: The *Right* of holding in Fee; the *Right of Ground-plats*; the *Right of Poſſeſſion upon an honeſt Preſumption*; *Pledges* or *Mortgages*, and *Services* [1].

[a] To whom add *Selden*, *de Jur. Nat. & Gent.* l. vi. c. 2.

Mr. BARB. *NOTES on* Chap. VIII. §. I, II.

[1] The Author expreſſes himſelf more clearly in his Abridgment of the Duties of a Man and Citizen, l. i. c. 12. §. 8. thus; either by ſome Agreement, or ſome other way, a Right greater or leſs to obtain ſome certain Profit or Advantage from a thing that belongs to us, *&c.*

[1] We may add *the Right of Fealty*, of which we ſhall ſpeak in Note *ult.* of this Chapter. I ſhall alſo by and by ſhew that Mr. *Hertius* hath taken notice of this plain Omiſſion.

III. The [1] *Right* of holding in *Fee*, which is granted to another by the Owner of an immoveable thing, upon condition of paying ſuch a reſerv'd Acknowledgment, impowers the Tenant in *Fee*, not only to uſe and enjoy the ſaid thing after the fulleſt manner, but likewiſe to diſpoſe of it; though not without ſome little Reſtraint as to the Point of Alienation. The particular Contract, by virtue of which this ſort of *Right* is immediately ſettled, can be rank'd neither under *Buying and Selling*, nor under *Letting and Hiring*; ſince it doth not confer an abſolute Property on the other Party, and yet a much greater Degree than in ordinary Leaſes; but eſpecially ſince the reſerv'd Acknowledgment is (commonly ſpeaking) far leſs conſiderable than the Rent of vulgar Tenants. As the Rules obſerv'd either by common Law, or by particular Agreement, in the renewing of this Contract, in the paying of the ſettled Rent, in the Alienation of the *Fee*, and in the Continuance of it, the Civilians afford us large Information.

IV. He that either upon paying ſuch a Fine, or engaging for ſuch a certain Rent, hath obtain'd *the* [1] *Right of a Ground-Plot*, may enjoy the ſame, and make any Diſpoſal or Conveyance of it, as much as if he were the firſt Proprietor [2]; and conſequently may claim the Lordſhip, though not of the Soil itſelf, yet of all that is built upon it. It was otherwiſe in the former Caſe; where even *profitable Dominion* of the Soil belongs to the Tenant of the *Fee*: The Reaſon of introducing ſuch a *Right* was this; That *Perſons* were willing to admit Strangers upon their Land, yet ſo as not to loſe any thing in the Bulk and Dimenſions of it. Therefore they made a Grant of the Surface, reſerving the main Soil to themſelves, and requiring a moderate annual Rent to be paid on this [a] Conſideration. If the Surface be loſt, as ſuppoſe, if the Buildings fall, or are conſum'd by Fire, the *Right of the Ground Tenant* [3] expires, ſo that the Lord of the Ground may again diſpoſe of it as he thinks fit.

V. *The Right of Poſſeſſion* [1] *upon an honeſt Preſumption* (belonging to thoſe who with a good and ſincere Intention receive a thing of another's from a falſe Proprietor, yet upon a juſt Title, and ſuch as would otherwiſe be ſufficient to convey the *real Dominion* to them) is thus far equivalent to *ſtrict Property*, That ſuch a *Poſſeſſor* may challenge all the [2] *Fruits* and *Profits* as his own, may diſpoſe of the thing as he pleaſeth, and defend his Poſſeſſion, nay, and ought to be maintain'd in it by the Laws againſt all Claimants, except the juſt Lord. And this Poſſeſſion after a certain Term of Years will give the Poſſeſſor an irrevocable Dominion, and ſuch as ſhall hold good even againſt him who was at firſt the lawful Proprietor. On which Point we ſhall hereafter enlarge [b].

Now this Right was at firſt ſet on foot for the Benefit of human Commerce, and the Peace of Society and Government; to the intent that he who endeavours to obtain a thing upon a good Title, and with an honeſt Mind, ſhould not afterwards be unreaſonably oppreſs'd, or incommoded; as he muſt needs be, were all other Perſons for ſuch a Space allow'd to diſturb him in his Hold; or were he bound upon the true Proprietor's challenging the thing to refund likewiſe the Fruits and Profits which he had conſumed: Or, Laſtly, If his Poſſeſſion were always to hang in an uncertain fluctuating Condition. As indeed it is a Rule not only enacted by *civil Conſtitutions*, but likewiſe founded on natural Reaſon, that every Man ſhall

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[a] Vid. *Juſtin*. l. xviii. c. 5. n. 14. Edit. *Græv*.

Mr. Barb. *NOTES* on §. III, IV, V.

[1] The Word *Emphyteuſis*, from which this *Jus Emphyteuticum* is derived, comes from the *Greek* Word ἐμφυτεύειν which ſignifies to engraft or plant. Since the Owners of barren Land can't eaſily find ſuch as will farm them, it has been thought expedient to make over theſe ſort of Inheritances for ever, to till, plant, and improve them any way. By this Agreement the Proprietor of the Ground reſerves to himſelf a certain Rent for ever, and the Emphyteute or Leſſee on the other ſide entitles himſelf to the Profit of his Labour and Induſtry by gathering the Fruits of another's Eſtate, which he has enrich'd by his own Care, only paying ſome ſmall Rent. In the Iſſue the Lands are reſtored to the Leſſor, not only fertile and in a good Condition, but the Eſtate likewiſe, which in its own Nature produces no Fruits, although it is otherwiſe of ſome Value, as Houſes and other Buildings are. See *Inſtit*. l. iii. c. 25. *De Locatione & Conductione*, §. 3. *Digeſt*. l. vi. tit. 3. *Si ager vectigalis*, i. e. *Emphyteuticarius*, *petatur*, *Cod*. l. iv. tit. 66. *De Jure Emphyteutico*, and Mr. *Daumat*'s Civil Laws reduced to their natural Order, Part I. l. i. t. 4. Sect. 10. Mr. *Titius*, in his Obſervat. on *Lauterbach*, 209. affirms, That it is not neceſſary to make any particular kind of Contract in *Emphyteuſis*. " For, *ſays he*, when " we have transferr'd to another the Property of a thing either in whole or in Part, if he doth it gratuitouſly, 'tis a Donation; if " he requires a certain Price, 'tis a Sale, altho' he otherwiſe makes ſome private Agreement for an annual Rent." See the ſame Author's *Jus Privatum Romano German*. l. iii. c. 11. §. 5, *&c*. where he alſo treats of the Right of Place.

[1] See Chap. 4. §. 2. above.

[2] This Right may be moſt properly called *Dominium utile Fundi*, and not *Jus Superficiarium*, as our Author does. For he that has this Right has Power to place any thing upon the Surface of that Ground, though it belong to another. Indeed, the *German* Lawyers expreſs themſelves ſometimes after that manner. And Mr. *Hertius* has an entire Diſcourſe (among his Comment. and Opuſc. Tom. 3.) which he entitles, *De Jure Superficiario*. And the *Roman* Lawyers call him that has this Right *Superficiarius*, i. e. as they expound it, *qui in alieno ſolo ſuperficiem ita habet, ut certam penſionem præſtet*, Digeſt. l. vi. tit. 1. *De rei vindic.* leg. 74, 75. The Buildings alſo which are poſſeſſed after that manner are named *Bona Superficiaria*, Digeſt. lib. l. t. 16. *De verborum ſignificatione*, leg. 49. and the Rent paid *Solarium*. *Vectigal enim hoc ſic appellatur, Solarium, ex eo, quod pro ſolo pendatur*, Digeſt. l. 43. t. 8. *Ne quid in loco publico vel itinere fiat*, leg. 2. §. 17. See a whole Title in the *Digeſts* upon this Matter, l. xliii. t. 18. *De Superficiebus*.

[3] Others differ in their Opinion, becauſe, ſay they, this part of the Property which the Owner of the Ground transfers to him that hath Right of Place, *Superficiario*, falls in ſome manner upon the Ground itſelf. See a Book printed at *Wittemberg* in 1704, entitled, *Balthaſaris Wernheri Juris profeſſ. publici, &c. Elementa Jur. Nat. & Gent.* &c. c. 14. §. 37. And Mr. *Hertius* takes to the ſame ſide. He ſays, that at leaſt, unleſs the Parties have agreed otherwiſe, and there be ſome Rule of the Civil Laws about it, we muſt believe that no Man can affirm otherwiſe, than that the Right of Place ends with the firſt Building. " Real Services, *adds he*, have not ſo great an Effect as Right of Place, and yet they muſt be renewed, when the Building to which they " are annexed, comes to be built again, *Digeſt*. l. viii. t. 2. *De Servitut. Prædiorum urban*. leg. 20. §. 2.

[1] The Law ſays, *Vel etiam poteſt dividi poſſeſſionis genus in duas ſpecies, ut poſſideatur, aut bona fide, aut non bona fide*, Digeſt. l. xli. tit. 2. *De acquir. vel amitt. poſſeſſione*, leg. 3. §. 22.

[2] The Law is, *Bonæ fidei emptor non dubie percipiendo fructus etiam ex aliena re ſuos interim facit, non tantum eos qui diligentia & opera ejus pervenerunt, ſed omnes; quia quod ad fructus attinet, loco Domini pæne eſt*. Digeſt. xli. tit. 1. *De adquir. rerum Dominio*, leg. 48. *in princip*. See alſo Mr. *Noodt*'s *Probab. Juris*, l. ii. c. 7. and what will be ſaid c. 13. §. 8. following.

be left to enjoy what he hath got with honeſt Intention [3], till ſuch time as the Claimant ſhall have demonſtrated a ſtronger *Right* than *Poſſeſſion.* For what Troubles and Diſquiets might be every day brought on any Perſon, if upon Suit of every Petitioner he ſhould be oblig'd to relinquiſh what he fairly holds, and to proſecute the other Party in order to a Recovery [a]? The Caſe of *Pledges* or *Mortgages* will hereafter be explain'd [b].

VI. *Services*, in reſpect of the Perſon to whom they are due, are ſo many *Rights* of receiving certain Profits or Advantages from things which belong to others, or of abridging the right Owner in the uſe of what he poſſeſſeth, ſo that he ſhall not be able to apply it to all purpoſes. But in reſpect of the Perſon who is to pay them, they are ſo many Obligations to grant another ſomewhat out of a Man's own Poſſeſſion [1]; or, for the benefit of another to forbear uſing his own Property in ſuch a particular manner. *Services* [2], in reſpect of the Object towards which the Payment of them is directed, are divided into *perſonal* and *real:* Not as if the Benefit of each did not ultimately terminate in the Perſon, but becauſe ſome Profits of this kind accrue to a Man, only on account of his poſſeſſing ſome certain Eſtate [c]. Which Diſtinction others expreſs in this manner: *Advantages, ariſing from other Mens things, either come to a Perſon directly and immediately, on the ſcore of his being ſuch a Perſon, or elſe mediately, by the Intervention of ſomewhat which he holds as his Property, and to which this Service is owing.*

VII. In the *Liſt of perſonal Services* are commonly reckon'd thoſe which follow, *Uſe and Profits, Uſe, Dwelling,* and *the Works of Servants* [1]. *Uſe* and *Profits* is a *Right* of enjoying freely what belongs to another, yet ſo as not to impair the main Subſtance [2]; or, a *Right* of receiving all ſuch Advantages from another's *Property,* as can ariſe from it without injuring the Principal. For, though in the ordinary Courſe of Nature, he who is Lord of the Thing is alſo Lord of the *Fruits,* yet there is nothing to hinder, but that theſe two may be ſeparated, and the *Dominion* or *Property* lodg'd in one Perſon, whilſt another hath a *Right* to all the Benefits. And this may be ordained and appointed, either by the ſtanding Laws of any Government, or by the occaſional Sentence of the Judge; as when a thing held before in common, cannot conveniently be divided any other way [3]: Or by the Act of private Men, as by Teſtament [4], or by Compact [5]. Only there is one Caſe which ſeems to require Service by the bare Notion of Nature and Reaſon; and that is, That the Father ſhall have the *Uſe* and *Profits* of all Goods which fall to the Son in his Minority [6]. It is evident that *Uſe* and *Profits* can be appointed properly in thoſe things alone which afford ſome outward uſe of themſelves diſtinct from their Subſtances, or which are not conſum'd by being enjoy'd; provided they are really capable of yielding any Service, Ornament, or Delight. But there can be no proper room for the like Tenure in things which are no way ſerviceable, but in being ſpent: Inaſmuch as the very Body and Subſtance, and conſequently the Propriety of any thing is preſumed to belong to him, who hath a *Right* to waſte or conſume it at his pleaſure. Yet 'tis a Rule in the *Civil Law,* That Money and other conſumable things may be turn'd by

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[a] See the Expoſitors of the Civil Law, *ad* t. 6. l. 2. *D. De Publiciana in rem actione.*

[b] Lib. v. c. 10. ſ. 13, &c.

[c] Vid. *Grot.* l. i. c. 1. ſ. 4. *Add.* l. viii. t. 2. leg. 32. ſ. 1. *in fin. D. De ſervit. præd. urb.*

Mr. BARB. *NOTES* on §. v, vi, vii.

[3] See l. ii. c. 6. n. 4. and 5. aforegoing, and l. iv. c. 12. §. 9. and l. v. c. 13. §. 6. as alſo Mr. *Daumat*'s Civil Laws in their natural Order, Part I. l. iii. t. 6. Sect. 4. §. 1.

[1] The *Roman* Lawyers ſay, That the Nature of Servitude conſiſts not in doing ſomething in favour of another, but in ſuffering or not doing certain things. *Servitutum non ea natura eſt, ut aliquid faciat quis, veluti viridia tollat, aut amæniorem proſpectum præſtet, aut in hoc, ut in ſuo pingat; ſed ut aliquid patiatur aut non faciat,* Digeſt. l. viii. tit. 1. *De Servitutibus,* leg. 15. §. 1.

[2] The Words of the Law are, *Servitutes, aut perſonarum ſunt, ut uſus, & uſusfructus; aut rerum, ut ſervitutes ruſticorum prædiorum & urbanorum,* Digeſt. ibid. leg. 1.

[1] *Uſusfructus eſt jus alienis rebus utendi & fruendi ſalva rerum ſubſtantia,* Digeſt. l. vii. t. 1. *De uſufructu, & quemadmodum quis utatur, fruatur,* leg. 1. and *Inſtit.* l. ii. t. 4. *princip.* We ought to obſerve, that Uſufruct or Uſe for the Profits, and other ſort of Servitudes are the Rights which we enjoy gratuitouſly: For if we pay an Annual Rent, 'twill be then a kind of Letting or Hiring.

[2] See l. vi. c. 2. §. 8. following.

[3] *Conſtituitur adhuc uſusfructus, & in judicio familiæ erciſcundæ, & communi dividundo, ſi judex alii proprietatem adjudicaverit, alii uſumfructum,* Digeſt. l. vii. t. 1. *De uſufructu, &c.* l. vi. §. 1.

[4] *Uſusfructus pluribus modis conſtituitur, ut ecce ſi legatus fuerit, ſed & proprietas deducto uſufructu legari poteſt, ut apud hæredem maneat uſusfructus,* ibid. princ. *Item alii uſumfructum, alii deducto eo fundum legare poteſt,* Inſtit. l. ii. tit. 1. §. 1. So a Teſtator may bequeath a Property, and leave an Uſufruct, either to an Uſufructurer or to his Heir, or any other Legatee, as alſo he may make a Reſerve of his Uſufruct for a Portion, a Gift among Survivors, to be ſold, exchanged, paſſed away, or other things of like nature. *Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo uſumfructum ejus retinuerit,* &c. *Cod.* l. viii. t. 54. *De Donationibus,* leg. 28. See concerning this whole Matter Mr. *Daumat*'s Civil Laws in their natural Order, Part. I. l. i. t. 11.

[5] *Et ſine teſtamento autem, ſi quis velit uſumfructum conſtituere, pactionibus & ſtipulationibus id efficere poteſt,* Digeſt. l. vii. t. 1. leg. 3. *princip.*

[6] As an Houſe, Land, a Slave, a Beaſt, *&c.* But Wine, Oil, Bread-Corn, Money, *&c.* are not capable of an Uſufruct. *Conſtituitur autem uſusfructus non tantum in fundo & ædibus, verum etiam in ſervis & jumentis, & cæteris rebus, exceptis iis, quæ uſu conſumuntur. Nam hæ res, neque naturali ratione, neque civili recipiunt uſumfructum; quo in numero ſunt vinum, oleum, frumentum, veſtimenta, quibus proxima eſt pecunia numerata. Namque ipſo uſu aſſidua permutatione quodammodo extinguitur,* Inſtit. l. ii. t. 4. §. 2. *Trebonianus* has very unfitly joined to theſe Habits, as *Cujacius* has obſerved, for they do not conſume at all by their Uſe. See Mr. *Noodt*'s *Probab. Juris,* l. ii. c. 4. and Mr. *Thomaſius*'s Diſcourſe, *De Pretio, affect.* c. 1. §. 18. Medals, and ſuch pieces of Money as are not current, but are deſired for their Antiquity, may be beſtowed as an Uſufruct, as appears by the following Law which Mr. *Noodt* explains learnedly after his mannner in his Obſervations, l. i. c. 5. *Nomiſmatum aureorum vel argenteorum veterum, quibus pro gemmis uti ſolent, uſusfructus legari poteſt,* Digeſt. l. vii. tit. 1. leg. 28. We may ſay the ſame things of Pictures and Statues. *Statuæ & imaginis uſumfructum poſſe relinqui magis eſt, quia & ipſæ habent aliquam utilitatem, ſi quo loco opportuno ponantur,* Ibid. leg. 41. The Antient Lawyers do not agree upon this Queſtion, Whether we can have the Uſufruct of a thing incorporeal, or of a bare Right, as a Permiſſion to paſs through another Man's Ground, or to carry Water through it, *&c.* As for my ſelf I am of Opinion, that if we conſider the thing in it ſelf, without any of the Subtilties of the *Roman* Lawyers, there is no Difficulty in it, and we may without ſcruple affirm it: For theſe ſort of Rights are valuable, and do not periſh in the uſing. Nor is it neceſſary that the Ground of an Uſufruct ſhould be a ſenſible thing, and really exiſt any where but in the Mind. It is ſufficient, that 'tis a thing that may be look'd upon as belonging to any one, and from whence we may receive ſome advantage, and without which it ceaſes to be as before. So alſo Debts owing may be reputed a real, good, and a true Fund.

Will [7] into this kind of Tenure, and be given in Legacy; in which caſe the Money or Things are ſo made over to the Legatee, as to be his own; but under this neceſſary Condition, That he give Security to the Heir to reſtore the like Sum, and the like things, or the Value of the things, when the Term of his Grant is expired. So that the Security here given to the Proprietor doth, as it were, ſupply the place of the real Subſtance.

He that holds *the Uſe and Profits* of a thing hath a *Right* to claim all the Advantages proceeding from it, as well natural as civil [8]. Yet the *Roman* Laws excepted [9] the Iſſue of a Maid-ſervant; probably on this Reaſon, That the deſign of granting another the Uſe of our Servants reſpected their Work only, and not their Off-ſpring. As for the other *natural Fruits*, they become the *Tenants of Uſe and Profit*, by taking or gathering them; that [10] is, when he hath ſeparated them from the Body or Subſtance, and laid them by themſelves. Whence it follows, that the Fruits or Profits, if not yet ſeparated, belong to the Proprietor; and in caſe the *Tenant for Uſe and Profit* dies before he hath gather'd them, they cannot be challeng'd by his Heir: Though, if it appear that any Pains were ſpent, or any Induſtry imploy'd [11], in bringing the Fruits to Perfection, it will then be equitable to admit the Heir to a Participation of them; ſo far, at leaſt, as to compenſate the Pains of the Deceas'd, and to hinder him from labouring in vain. *Civil Fruits* belong to the *Tenant for Uſe and Profit*, till the time is laps'd [12], for which the Grant was firſt made.

Farther, As he who holds a thing in this manner, ought to uſe it like an honeſt Man [13], or as becomes a good Husband, and ſo apply it to that particular kind of Advantage, which either the Nature of the thing, or the Will of the Proprietor requires; ſo is he likewiſe bound to guard, maintain, and keep it ſafe, and whole [14]; as alſo to pay Taxes [15], Dues, and other Burthens, ordinary and extraordinary, at leaſt ſuch as do not exceed the main Profits. For all theſe Troubles, as well as that of Culture and Improvement, neceſſarily fall on him who deſires to reap the Benefit and Gain: Nor is it preſum'd that any Perſon would lay ſo grievous a hardſhip on himſelf, as not only to grant another the Profits of his Goods or Eſtate, but likewiſe to reſerve the Burthens to be diſcharg'd at his own Expence.

This way of holding is ſaid to expire at the deceaſe of the Tenant [16]; becauſe, commonly ſpeaking, at the firſt making ſuch a Grant, the Merit of the Party was conſider'd, which cannot deſcend to others. And inaſmuch as 'tis a great Burthen upon a Man to have the Fruits of his Property paſs ſtill into other Hands, therefore the Words in theſe Grants are to be interpreted in the ſtreighteſt manner; ſo that if the Form ran thus, *to him and his Heirs*, it ſhall not be extended to the Heirs in a

Mr. Barb. *NOTES* on §. vii.

[7] *Quaſi uſusfructus*, 'tis an Expreſſion of the *Roman* Law, *ſed utilitatis cauſa ſenatus cenſuit, poſſe etiam earum rerum uſumfructum conſtitui, ut tamen eo nomine hæredi utiliter caveatur. Itaque ſi pecuniæ uſusfructus legatus ſit, ita datur legatario, ut ejus fiat, & legatarius ſatisdet hæredi de tanta pecunia reſtituenda, ſi morietur, aut capite minuetur. Cæteræ quoque res ita traduntur legatario, ut ejus fiant, ſed æſtimatis his ſatiſdatur, ut* ——— *tanta pecunia reſtituatur, quanti hæ fuerint æſtimatæ. Ergo ſenatus non fecit quidem earum rerum uſumfructum* (*nec enim poterit*) *ſed per cautionem quaſi uſumfructum conſtituit*, Inſtit. l. ii. tit. 4. §. 2. See the Title of the *Digeſts*, which treats, *De uſufructu earum rerum quæ uſu conſumuntur vel minuuntur*, l. vii. t. 5.

[8] *Uſufructu legato, omnis fructus rei ad fructuarium pertinet*, Digeſt. l. vii. tit. 1. *De uſufructu, & quemad. quis utatur, fruatur*, leg. 7. *prin.* where we may find all the Particulars at length in the reſt of this Law and the next. The Uſufructuary for example may ſearch for Mines, Quarries, Beds of Chalk, Coal, *&c.* which are found in the Ground, of which he has the Profit, although the Proprietor himſelf knows nothing of them, provided neverthelеſs that he do no Damage to the Corn, Trees, Vines, and in a word, all things uſed in Husbandry, to which the Owner of the Ground has deſigned it. See Mr. *Noodt*'s Obſervations, l. i. c. 9. This able Lawyer in the following Chapter of the ſame Work examines how, and by virtue of what the Uſufructuary of the Ground, where there are Deer, may appropriate the Profit and Revenue to himſelf. We may read all this in the Original, and withal the Reflection which Mr. *Bernard* makes thereon in his Extract of the News of the Republick of Letters, *April* 1706. p. 430, 431.

[9] See c. 7. §. 4. n. 1. aforegoing.

[10] *Is vero ad quem uſusfructus fundi pertinet, non aliter fructuum Dominus efficitur, quam ſi ipſe eos perceperit. Et ideo licet maturis fructibus, nondum tamen perceptis, deceſſerit, ad hæredes ejus non pertinent, ſed Domino proprietatis acquiruntur. Eadem fere, & de colono dicuntur*, Inſtit. l. ii. t. 1. *De rerum diviſione*, &c. §. 36.

[11] This is no point of the *Roman* Law; but the *Saxon* Law follows a Maxim ſo juſt, requiring that in this laſt Caſe all the Fruits ſhould belong to their Heirs. *See Balth. Whernher*'s *Element. Jur. Nat. & Gent.* chap. xiv. §. 42.

[12] For Example, if a Rent commence at the Beginning of the Year, and the Uſufructuary die in *October*, the Heirs ſhall have the Surmount of the Rent for that time, and the reſt to *January* following ſhall return to the Proprietor. See Digeſt. l. vii. tit. 1. leg. 26, and 58. *princip.*

[13] *Cavere autem debet uſufructuarius viri boni arbitratu perceptum iri uſumfructum, hoc eſt, non deteriorem ſe cauſam uſusfructus facturum, cæteraque facturum, quæ in re ſua faceret*, Digeſt. l. vii. t. 9. *uſufructuarius quemadmodum caveat*, leg. 1. §. 3. *Debet enim omne quod diligens paterfamilias in ſua domo facit & ipſe facere.* Ibid. tit. 1. *De uſufructu*, &c. leg. 65. *mancipiorum quoque uſusfructus legato non debet abuti, ſed ſecundum conditionem eorum uti*, Ibid. leg. 15. §. 1. So that the Uſufructuary may neither miſuſe the Ground, nor impoveriſh it, nor change what the Proprietor hath deſigned for his bare Diverſion, tho' it be to augment his Revenue. For Example, he may not cut up the Trees which are planted in a Walk to make himſelf a Garden, or ſow it with Corn. *Et ſi forte voluptare fuit predium, viridaria, vel geſtationes, vel deambulationes arboribus infructuoſis opacas, atque amœnas habens, non debebit dejicere, ut forte hortos olitorios faciat, vel aliud quid, quod ad reditum ſpectat*, Ibid. leg. 13. §. 4. There are ſeveral Laws with this Title that may be conſulted.

[14] *Eum, ad quem uſusfructus pertinet, ſarta tecta ſuis ſumptibus præſtare debere, explorati juris eſt*, *Cod.* l. iii. tit. 33. *De uſufruct. & habit. & miniſterio ſerv.* leg. 7. This extends to the leaſt Reparations, and other neceſſary Expences to improve and preſerve the Goods they have the Profit of. For if the Houſe, for Example, tumble down without the Fault of the Uſufructuary, he ſhall not be obliged to rebuild it. *Si quæ vetuſtate corruerunt, reficere non cogitur, modica igitur refectio ad eum pertineat, quoniam & alia onera agnoſcit, uſufructu legato*, &c. Digeſt. l. vii. t. 1. leg. 7. §. 2. See §. following of the ſame Law.

[15] *Ut puta ſtipendium, vel tributum, vel ſalarium, vel alimenta ab ea re relicta.* See alſo Law 27. §. 3. and Lib. xxxiii. tit. 2. *De uſu & uſufr.* &c. leg. 28.

[16] *Morte quoque amitti uſumfructum, non recipit dubitationem; cum jus fruendi morte extinguatur, ſicuti ſi quid aliud quod perſonæ cohæret*, Digeſt. l. vii. t. 4. *Quibus modis uſusfructus vel uſus amittitur*, leg. 3. §. 3. This hath place when the Uſufructuary dies before the time his Uſufruct expires, or before the accompliſhment of the Condition, which ſhould put an end to it. See *Cod.* l. iii. t. 33. *De uſufr. & habit.* &c. leg. 12. For the Reaſon why a certain or uncertain time is fixed, is only, that the Uſufructuary, if he lives beyond it, may not preſerve his Right; ſo that if he dies before, the general Rule holds in its full Force as to him. Farther, our Author ought not to have forgotten another way by which his Uſufruct may be loſt; and that is, when the time of its Continuance is at an end, or when a certain Condition is to be accompliſhed.

ſecond Deſcent [17]; ſince the Property of a thing, if for ever excluded from the Uſe [18], is utterly inſignificant: In which Senſe we are to take *Cicero's* Definition, *Id cujuſque proprium eſt, quo quiſque fruitur atque utitur: That's truly the Property of every Man, which he uſeth and enjoys.* Hence, if a Legacy only for *the Uſe and Profits* was left to a publick Community, which in other reſpects may be perpetual, yet the *Roman* Laws order'd [19], *That the Grant ſhould expire at the end of a hundred Years:* As it muſt ceaſe before, if the State or City be diſſolv'd or raz'd by the Violence of an Enemy [20]. From the ſame grounds it proceeds, that a Tenure of this kind cannot be alienated [21]; becauſe at that rate the Proprietor's Claim might be for ever ſhifted off, and the thing might paſs to one whom he would look upon as an Intruder into his Rights and Poſſeſſions. A grant of *Uſe and Profits* was likewiſe, according to the *Roman* Laws, made extinct by the two higher degrees of the *Capitis diminutio*, or Disfranchiſement of a Citizen [22]. For as they were unwilling to let this Burthen lie on the Proprietor, after the Party, in whoſe favour it was at firſt appointed, could receive no benefit from it; ſo they judg'd it by no means convenient, that a Perſon, who had forfeited the Privilege of a free Subject, ſhould be ſtill capable of holding ſuch a Right over the Goods of thoſe who were true and lawful Members of the State.

To proceed; this Right, by virtue of ſome publick Law, or of ſome private Covenant, may in a certain period of time [23] be loſt by Diſuſe (which alters many things for the worſe) or by uſing it in a different manner from the Rules preſcrib'd [24]; or by impairing the thing, either through deſign'd Wickedneſs, or groſs Neglect. The Right is likewiſe extinct, if the thing happen to periſh [25]; nor doth it revive, though the thing be renewed or repaired; by reaſon of that ſtrict Interpretation which this Affair demands. For Inſtance; *If I build a Houſe in the ſame place with another which I loſt by Fire, it is not judg'd to be the ſame as the former.* And indeed, ſince the Work muſt have put me to conſiderable Charges, it would be very hard, if I muſt raiſe a Building which on my ſide will turn to no account.

Laſtly, If either the Proprietor make over his Right to the Tenant [26], or the Tenant reſign to him, the *Uſe and Profit* expires; ſince a Man cannot receive *Service* from what's his own; or, becauſe this,

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[17] This is proved commonly by this Law of the *Code*, l. iii. t. 33. *Sancimus & hujuſmodi legatum firmum eſſe [ſi quis fundum, vel aliam rem cuidam teſtamento relinqueret, quatenus uſusfructus apud hæredem maneret] & talem uſumfructum una cum hærede finiri, & illo moriente, vel aliis legitimis modis eum amittente, exſpirare*, leg. 14. But 'tis evident, as others have obſerved, that he treats there of the Heir of a Teſtator, and not of the Heir of an Uſufructuary. See *Vinnius* upon the *Inſtitutes*, l. ii. t. 4. §. 3, and Mr. *Titius* upon *Lauterbach. Obſerv.* 225.

[18] This is the Reaſon that the *Inſtitutes* give, to ſhew how many ways the Right of an Uſufruct may be extinguiſhed. *Ne tamen in univerſum inutiles eſſent proprietates, ſemper abſcedente uſufructu, placuit certis modis extingui uſumfructum, & ad proprietatem reverti*, l. ii. t. 4. §. 1.

[19] The Term is fixed on as that to which the longeſt Life of Man can extend. *Et placuit centum annis tuendos eſſe in uſufructu municipes, quia is finis vitæ longævi hominis eſt*, Digeſt. *De uſufructu*, &c. l. vii. t. 1. leg. 56. See alſo l. xxxiii. t. 2. *De uſu & uſufructu*, &c. leg. 8.

[20] The Law does not ſpeak at all of an Enemy; it only ſays, If a Plough paſſes through a City, *&c.* (*i. e.*) if it be deſtroy'd any manner of way, which may happen by the Order of the Supreme Governour for the Puniſhment of the Inhabitants. *Si uſusfructus civitati legetur, & aratrum in eam inducatur, Civitas eſſe deſinit; ut paſſa eſt Carthago, ideoque quaſi morte deſinit habere uſumfructum*, Digeſt. l. vii. t. 4. *Quibus modis uſusfr. vel uſus amittitur*, leg. 21. The Sacking of a City is expreſſed here with an alluſion to a Cuſtom of which *Horace* ſpeaks, l. i. Ode 16.

——— Imprimeretque muris
Hoſtile aratrum exercitus inſolens.

Th' inſulting Army brought unto the Wall,
The Hoſtile Plough to raze it till it fall.

See the Notes of *Dion. Gothofred.* upon the Law itſelf, of which he treats.

[21] *i. e.* The Uſufruct being a Right purely perſonal, it can't be transferred to a third; ſo that he acquires and enjoys it in his own Name, as holding it immediately of the Proprietor. But this does not hinder but that the Uſufructuary may not only let it out to farm, but reſign, ſell, or give the Enjoyment of it to a third. All that is meant is this, that the third perſon ſhall enjoy it no longer than the Uſufructuary enjoys it himſelf, yet not ſo fully as if he had the proper and immediate Uſufruct. *Uſufructuarius vel ipſe frui ea re, vel alii fruendam concedere, vel locare, vel vendere poteſt; nam & qui locat, utitur, & qui vendit, utitur. Sed & ſi alii precario concedat vel donet, puto eum uti, atque ideo retineri uſumfructum*, Digeſt. l. vii. t. 1, leg. 12. §. 2. Whence it appears, that when the Uſufructuary diſpoſeth of the Enjoyment of the Goods, of which he has the Uſufruct, according to his Mind, 'tis the ſame as if he enjoy'd it himſelf; and in this Caſe the Right of the Uſufruct remains always in the Uſufructuary, though he has transferr'd the Enjoyment of the Fruits to a third, as the Expreſſion of the *Roman* Lawyers implies, *Ut ipſum quidem jus remaneat penes maritum [qui poſt divortium reddere teneretur uſumfructum fundi dotis nomine acceptum] perceptio vero fructuum ad mulierem pertineat*, Digeſt. l. xxiii. t. 3. *De Jure Dotium*, leg. 66. This Law is a matter of Diſpute among the Interpreters of the *Roman* Law, about which we may conſult *Vinnius* on the *Inſtit.* l. ii. t. 4. §. 3 numb. 4. and Mr. *Titius* on *Lauterb. Obſ.* 226.

[22] *Finitur autem uſusfructus morte uſufructuarii, & duabus capitis diminutionibus, maxima & media*, Inſtit. l. ii. t. 4. §. 3. See alſo the *Code*, l. iii. t. 33. leg. 16. §. 2. *in fine*. And for *Diminutio capitis*, (i. e.) the Disfranchiſement of a Citizen, of which he ſpeaks, ſee what I have obſerved above, l. iii. c. 6. §. 3. n. 5.

[23] That is to ſay, If he neither enjoys himſelf, nor by any other the Goods of which he has the Uſufruct. This is what is called, *non uti per tempus*, Inſtit. §. 3. *ut ſupra*. *Non utitur* (ſay the Lawyers elſewhere) *uſufructuarius, ſi nec ipſe utatur, nec nomine ejus alius*, Digeſt. l. vii. t. 1. leg. 38. See Note 21. above. Before *Juſtinian* the Uſufruct of things Moveable was loſt, if they were not uſed for a Year, and of things Immoveable in two Years. But that Emperor order'd that the Uſufruct of both ſhould not be loſt, but by Non-uſage for ten Years, if the Uſufructuary was in the place where the Goods were, and twenty, if he were at a diſtance. See *Code*, l. iii. t. 34. *De ſervitut. & aqua.* leg. 13.

[24] *Non utendo per modum*, Inſtit. *ubi ſupra*. See Digeſt. l. viii. t. 6. *Quemadmodum ſervitutes amittuntur*, leg. 10. §. 1. & 11. *princ.*

[25] *Rei mutatione interire uſumfructum placet. Veluti uſusfructus mihi ædium legatus eſt, ædes corruerunt vel exuſtæ ſunt, ſine dubio extinguitur.* In this caſe the Uſufructuary hath neither right to the Materials nor Place where the Houſe ſtood. *Certiſſimum eſt ——— nec areæ, nec cæmentorum uſumfructum deberi*, Digeſt, l. vii. t. 4. leg. 5. §. 2. See alſo, leg. 8, 9, 10, 12, 23. *Eſt enim jus in corpore, quo ſublato, & ipſum tolli neceſſe eſt*, Inſtit. l. ii. t. 4. *in princ.* But this muſt be ſome particular Uſufruct, for when we have an univerſal Uſufruct, (*i. e.*) over all the Goods, the Enjoyment of the reſt is preſerved. *Bonorum autem uſufructu legato, areæ [ædium incenſarum] uſusfructus peti poterit, quoniam qui bonorum ſuorum uſumfructum legat, non ſolum eorum quæ in ſpecie ſunt; ſed & ſubſtantiæ omnis uſumfructum legare videtur, in ſubſtantia autem bonorum etiam area eſt*, Digeſt. l. vii. t. 1. *De uſufructu, &c.* leg. 34. §. 2. Farther, the Interpreters of the *Roman* Law ſay, That to know whether the thing of which we have the Uſufruct be deſtroyed, we muſt conſider whether the Name be changed. See *Vinnius* upon the *Inſtitutes*, l. ii. t. 4. ſ. 3. n. 5, 6.

[26] *Item finitur uſusfructus, ſi Domino proprietatis ab uſufructuario cedatur —— vel contrario, ſi uſufructuarius proprietatem rei acquiſierit, quæ rei conſolidatio appellatur*, Inſtit. l. ii. t. 4. §. 3.

and all other *Services* do properly denote a Right over ſomewhat that belongs to another. But when a Perſon uſeth his own Poſſeſſion, and receives Advantages from it; this he does by virtue of his Dominion[27], and wants not a new Title or Commiſſion.

VIII. *Uſe*, as they term it, is when a Man receives from a thing belonging to another[1], only the daily and neceſſary Service, the Subſtance remaining as before. And this is of leſs Extent than *Uſe and Profits*, the Perſon to whom it is granted being only allowed to take ſo much Advantage from the thing, as is ſufficient for himſelf and his Dependents; which Allotment is meaſur'd according to his Dignity and Condition[2]. Thus, for Inſtance; *As he, who hath obtain'd the Uſe of another's Houſe, may dwell in it with his own Family*; *ſo he cannot fairly receive either a Gueſt of long continuance*[3], *or an Inmate who ſhall lodge there without being a Member of the ſame domeſtical Society*; *in caſe the* Proprietor *himſelf dwells likewiſe under the ſame common Roof*; (but 'tis otherwiſe if the Grant runs for the ſole *Uſe* of the entire Tenement) *nor can he, according to the regular Courſe, transfer the Uſe to another*; *it being a Matter of very weighty Conſideration, and of great Difference, whom a Man takes to cohabit with him.* As to the Preſervation and Reparation of the thing in which any Perſon hath thus obtain'd a *Uſe*, it ſeems moſt agreeable to Equity, that if ſuch a Uſe be once granted, there remains no farther Fruit or Benefit to the Proprietor, than the *Uſer* ſhall be obliged to keep the thing ſafe and ſound. If the Profit accruing to both be equal, they ſhall maintain or repair the thing at joint Charges[4]. But if the *Uſe* be inconſiderable in compariſon with the Profits which the Owner ſtill reſerves to himſelf; in this Caſe 'tis eaſily preſum'd, that he intended not to charge it with any Burthen.

IX. *Dwelling*, in the *Civil Law*, is a *Right* by which a Man receives all the Advantages commonly proceeding from the letting out the Houſes of others[1]. This is of a narrower Compaſs than the *Uſe and Profits* of the ſame Houſes; the latter taking in likewiſe the Benefit ariſing from the Reception of Goods, and many the like Cauſes. And yet it is of a wider Extent than the bare *Uſe*; inaſmuch as the Perſon who hath obtain'd it, may let out the reſpective Buildings to other Tenants, inſtead of inhabiting them himſelf.

X. By the Right *of Servants Works* is receiv'd all the benefit ariſing from the Labour of another's Servant[1]. Which *Right* the *Roman* Laws make more contracted, than the *Uſe and Profits* of the ſame Servant; becauſe he is capable of bringing in Advantage by other means beſides his Work.

XI. *Real Services*, due to any Perſon on account of ſome Eſtate or Poſſeſſion, are, in general, ſo many Rights, by virtue of which my Neighbour's Eſtate is charg'd with yielding ſome certain Advantage to mine. The *Civil Law* divides them into *Services of City Eſtates*[1], and *Services of Country Eſtates.* By *Country Eſtates* are meant Lands, and inferior Buildings, erected only for the Convenience of Agriculture, and preſervation of Cattle. Under the Term of *City Eſtates*[2] are comprehended all Buildings deſign'd for the Reception of human Inhabitants, for the Exerciſe of Commerce, and the like Uſes, though ſeated at any Diſtance from the City. The Occaſion of eſtabliſhing all theſe Services was generally taken from *Neighbourhood*; a Relation which may juſtly be thought to border very near on that of Friendſhip. For, inaſmuch as it contributed highly both to the Profit and the Pleaſure of Men, that many of them ſhould join their Dwellings and Poſſeſſions, which Convenience could ſcarcely ſubſiſt, ſhould each Perſon go about to exclude another from the Uſe of his Property in every Degree, therefore Neighbours were wont

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Mr. BARB. *NOTES* on §. VII, VIII, IX, X, XI.

[27] *Nulli enim res ſua ſervit*, Digeſt. l. viii. t. 2. *De ſervitut. præd. urban.* leg. 26. *princip.* See alſo l. vii. t. 6. *Si uſusfructus petetur, &c.* leg. 5. *princip.*

[1] *Minus autem Juris eſt in uſu, quam in uſufructu. Nam is qui fundi nudum habet uſum, nihil ulterius habere intelligitur, quam ut oleribus, pomis, floribus, fœno, ſtramentis & lignis ad uſum quotidianum utatur.* By the *Roman* Laws the Uſer can neither ſell, nor make over, nor give away his Right. *Nec ulli alii jus quod habet aut locare, aut vendere, aut gratis concedere poteſt*, Inſtit. l. ii. t. 5. *De uſu & habit.* §. 1. This Right is eſtabliſh'd, and ceaſed in the ſame manner as the Uſufruct. *Iiſdem illis modis, quibus uſuſfructus conſtituitur, etiam nudus uſus conſtitui ſolet, iiſdemque illis modis finitur, quibus & uſusfructus deſinit.* ibid. *princip.* See Mr. *Daumat*'s Civil Laws in their Natural Order, Part I. l. i. t. 11. Sect. 2.

[2] *Aliquo enim largius cum uſuario agendum eſt pro dignitate ejus, cui relictus eſt uſus*, Dig. l. vii. t. 8. *De uſu & habit.* leg. 12. §. 1.

[3] All that our Author ſays about the Uſe of an Houſe is not at all agreeable to the *Roman* Law; but I muſt own, that ſeveral of the Laws which I have quoted, and ſome of which our Author refers to, are confuted. See one of them corrected by Mr. *Noodt* in his *Probab. Juris.* l. iii. c. 7. who in the following Chapter of the ſame Work corrects and explains another which relates to this Matter. One general Remark may be alſo made upon all the Places mention'd in this Chapter, which is, That the Laws of each State, and the mutual Agreements of Parties, or the Will of him that gives freely, may be diſtinguiſhed a thouſand ways. So that no Rule can be made which can abſolutely and unchangeably agree to all Caſes, and we muſt ſeriouſly attend to the particular Circumſtances of every Affair to decide it afterward according to the Nature of the thing and Maxims of Equity, what are the Engagements both of him that confers any of theſe Rights, and of him who receives them.

[4] *Si domus uſus legatus ſit ſine fructu, communis refectio eſt rei in ſartis tectis, tam hæredis, quam uſuarii. Videamus tamen ne ſi fructum hæres accipiat, ipſe reficere debeat. Si vero talis ſit res, cujus uſus relegatus eſt, ut hæres fructum percipere non poſſit, Legatarius reficere cogendus eſt. Quæ diſtinctio rationem habet*, Digeſt. l. vii. t. 8. leg. 18.

[1] *Sed ſi cui habitatio legata, ſive aliquo modo conſtituta ſit, neque uſus videtur, neque uſusfructus, ſed proprium aliquod jus —non ſolum in ea degere, ſed etiam aliis locare*, Inſtit. l. ii. t. 5. §. 5. See alſo the *Code*, l. iii. t. 33. *De uſufruct. & habit.* &c. leg. 13. We neither loſe this Right by Non-uſage, or a civil Death. See the *Digeſts*, l. vii. t. 8. *De uſu & habit.* leg. 10.

[1] *Operis ſervi legatis neque uſus neque uſusfructus in eo legato eſſe videtur*, l. xxxv. t. 2. *Ad legem Falcidiam*, leg. 1. §. 9. This Right is loſt only by the Death of the Slave, and not by the natural or civil Death of him who might ſo diſpoſe of the Slave, nor by Non-uſage. See *Digeſt.* l. vii. t. 7. *De operis ſervorum*, and l. xxxiii. tit. 2. *De uſu & uſufructu*, &c. leg. 2.

[1] The Law is, *Servitutes ruſticorum prædiorum & urbanorum*, Digeſt. l. viii. tit. 1. *De Servitut.* leg. 1. Some Men maintain, that this Diſtinction is of no Uſe, becauſe it ſhews no Difference as to the effects of Right. See Mr. *Thomaſius*'s Diſcourſe, *De ſervit. Stillicidii*, which is the fifteenth among his Diſcourſes at *Leipſick*, §. 14. as alſo Mr. *Titius*'s Obſerv. on *Lauterbach.* Compend. Obſerv. 243.

[2] The Words of the Law are, *Urbana prædia omnia ædificia accipimus, non ſolum ea quæ ſunt in oppidis, ſed & ſi forte ſtabula ſunt, vel alia meritoria in villis & in vicis, vel ſi Prætoria voluptati tantum deſervientia, quia urbanum prædium non locus facit, ſed materia*, Digeſt. lib. l. t. 16. *De verbor. ſignificat.* leg. 198.

wont to ſettle it amongſt themſelves, *That no Man ſhould uſe his own things to all purpoſes, and in all reſpects, leſt others ſhould thereby be reduc'd, as it were, to Hardſhips and Streights; but that each Perſon ſhould allow others ſuch a moderate uſe of what he himſelf poſſeſſed, as they could not want without great Prejudice to their Affairs*[4]. Vid. D. lib. vii. t. 6. l. 1. ſ. 1, 2. *D. Si uſus-fr. petatur.* & lib. viii. t. 1. l. 15. *D. De Servit.* l. 10. *D. De Servit. Urb. præd.* l. xx. ſ. 2. l. 31. *d. t.*

Heſiod. Op. & Dier. l. i. ver. 343, *&c.*

Τὸν δὲ μάλιςα καλεῖν, ὅςις σέθεν ἐγγύθι ναίει,
Εἰ γάρ τοι καὶ χρῆμ' ἐγχώριον ἄλλο γένηται·
Γείτονες ἄζωνοι ἔκιον, ζώσαντό δε πήοι
Πῆμα κακὸς γείτων, ὅσσον τ' ἀγαθὸς μέγ' ὄνειαρ
Ἔμμορέ τοι τιμῆς, ὅς' ἔμμορε γείτονος ἐσθλȣ.

In *Engliſh* thus;

Call Neighbours firſt, when *Work* is to be done;
Your Kinſmen ſtay to dreſs, undreſs'd your Neighbours run;
Ill Neighbours Heaven for Puniſhments deſign'd,
As good for Bleſſings: If one good you find,
Think you have found a Treaſure ——

Socrates (in *Xenophon.* Ἀπομν. Lib. ii. p. 432. *in fin.* Ed. *H. Steph.*) reckons up theſe Advantages of a Neighbour's Service; *To light your Fire when you have Occaſion; to aſſiſt you in any good Office; to be ready at hand for the affording you his kind Succour, if you happen to fall into any Misfortune*, Add. *Plato de* LL. lib. viii. p. 915. *Edit.* Francof. 1602. On the other ſide, 'tis a general Rule to be obſerv'd in the challenging theſe Services, that they be not carried too far, and that they be us'd with Modeſty, ſo as to cauſe no Trouble or Uneaſineſs to thoſe that live about us.

The particular *Services of City Eſtates* are reckoned (for the moſt part) as follows: *The Services of bearing a Burthen*[5], by which any *Neighbour* is bound to let my Houſe reſt upon his Wall or Pillar. The Conſequence of which is, That the Perſon who owes me this Service, ſhall be likewiſe engaged to repair the ſaid Wall or Pillar, becauſe otherwiſe, if the Support ſhould fall, the *Service* comes to nothing. *The Service of letting in a Beam*[6], by which I am allow'd to carry on a Rafter or Beam, or any other Piece which joins my Building together, till it enters into my Neighbour's Houſe, and is there faſten'd. *The Service of jutting or ſhooting* out[7], which impowers me to extend any kind of Building over the Houſe or Ground of another Man, yet ſo as not to make it reſt upon the ſaid Houſe or Ground: As in Balconies, Pent-houſes, and the like. *The Service of raiſing a Building higher*[8], by which we are bound, though to our own Inconvenience, to give another leave, for his Benefit and Advantage, to raiſe his Houſe; which we might otherwiſe forbid, or prevent.

The Service of not raiſing a Building higher[9]; by which a Man, for the Profit and Convenience of the adjoining Tenements, is conſtrain'd to keep his Houſe low, or not to raiſe it beyond ſuch a fix'd Height.

The Service of Lights[10], by which my Neighbour is obliged to admit my Lights, or my Windows for the Conveyance of *Light*.

The Service of not hindring Lights; by means of which my Neighbour can attempt nothing towards the leſſening or obſcuring the Lights of my Houſe.

The Service of Proſpect; by which my Neighbour is bound to let me look freely into his Eſtate, and cannot deprive me of that Benefit.

The Service of not hindring Proſpect; by which a Man is tied up from doing any thing in his Eſtate, which might interrupt a free Proſpect on any ſide, eſpecially towards any delightful Place.

The Service of receiving Dropping Water[11], denotes an Obligation to ſuffer any ſuch Conveyances to empty themſelves upon our Ground, though to our Burthen and Trouble.

The Service of not receiving Dropping Water, denotes an Obligation not to turn the ſame little Spouts or Gutters, which are already uſeful to our Neighbour, into a new Courſe for our own Advantage.

The Service of receiving the River[12], by which my Neighbour is bound to grant Paſſage to the larger Currents which flow (like a River) thro' my Houſe in Pipes or Canals.

The Service of not turning away the River, reſtraining my Neighbour from diverting any ſuch Channel or Stream which iſſues out of his Houſe, ſo as to hinder it from paſſing through my Eſtate, to my great Benefit.

Laſtly, We are to refer to the ſame Head[13] *The Service of imploying Sinks and Kennels; of pouring out any thing upon a Neighbour's Ground*, and whatever there are beſides of the ſame kind.

Mr. BARB. *NOTES* on §. XI.

[4] The Rights of Service are not confined to what is abſolutely neceſſary for the Uſe of the Poſſeſſor of the Ground, but they extend alſo to whatever is for the Convenience and Pleaſure of the Owner, as much as for his Profit. See Mr. *Noodt*'s *Probab. Juris*, l. i. c. 2. where we may find many curious Obſervations for the underſtanding of ſeveral of the *Roman* Laws about Services.

[5] *De ſervitute, quæ oneris ferendi cauſa impoſita erit*, &c. Digeſt. l. viii. t. 5. *Si ſervitus vindicetur*, &c. leg. 6. §. 2. *Eum debere columnam reſtituere, quæ onus vicinarum ædium ferebat, cujus eſſent ædes, quæ ſervirent*, l. viii. t. 2. *De ſervit. præd. urban.* leg. 33.

[6] *Jus immittendi tigna in parietem vicini.* ibid. leg. 2. See Mr. *Thomaſius*'s Diſcourſe, *De Servit. Stillicidii*, §. 59.

[7] *Projiciendi, protegendive*, ibid. *Inter projectum & immiſſum hoc intereſſe, ait Labeo, quod projectum eſſet id quod ita proveheretur, ut nuſquam requieſceret, qualia mæniana & ſuggrundia eſſent; immiſſum autem quod ita fieret, ut aliquo loco requieſceret, veluti tigna, trabes, quæ immitterentur*, lib. l. t. 16. *De verbor. ſignificat.* leg. 242. See l. v. c. 5. §. 4. *infra*, and *Amm. Marcellinus*, l. xxvii. c. 9. *in fine*, quoted alſo by Mr. *Hertius*.

[8] *Altius tollendi —— aut non extollendi*, l. viii. t. 2. *ut ſupra.*

[9] *Luminum ſervitute conſtituta id acquiſitum videtur, ut vicinus lumina noſtra excipiat. Cum autem ſervitus imponitur, ne luminibus officiatur, hoc maxime adepti videmur, ut jus ſit vicino invitis nobis altius ædificare, atque ita minuere lumina noſtrorum ædificiorum*, ibid. leg. 4.

[10] *Inter ſervitutes, ne luminibus officiatur, & ne perſpectui offendatur, aliud & aliud obſervatur, quod in proſpectu plus quis habet, ne quid ei officiatur ad gratiorem proſpectum & liberum.* ibid. leg. 15.

[11] *Item ſtillicidium avertendi in tectum, vel aream vicini, aut non avertendi*, ibid. leg. 2. See alſo leg. 20. §. 2, 5, 6. See alſo Mr. *Thomaſius*'s Diſcourſe on the ſame Subject.

[12] *Ut flumen recipiat quis in ædes ſuas vel in aream*, Inſtit. l. ii. t. 3. §. 1.

[13] *Jus cloacæ mittendæ ſervitus eſt*, Digeſt. l. viii. t. 1. leg. 7. This Service is alſo for Country-Dwellings. See t. 3. *De ſervit. præd. ruſtic.* leg. 2. *princip.*

XII. *The Services of Country Eſtates* [1]; or which are due to Lands and Hereditaments imploy'd in rural Affairs, are commonly reckon'd in this Catalogue. *Paſſage*; the Right of a Path for Men to walk through my Neighbour's Ground into mine, for the Benefit of the latter. *Carriage*; the Right of driving Beaſts or Wains. *Road*, or *Way*; the Right of going, walking, driving; as likewiſe of carrying, leading, bearing, and drawing any thing which makes for the advantage of my Eſtate. *Water-courſe*; the Right of bringing *Water* thro' my Neighbour's Field, for the Benefit of my own; whether I uſe this *Water* for the Ground, or for the Beaſts, or only to free my Land from an unneceſſary Burthen and Flood. 'Tis the Nature of theſe *Services*, that they cannot be granted in part [2], being of no Uſe unleſs entire. For, as the *Civil Law* obſerves in one of theſe Inſtances; *A* Road *or* Way *is then wont to be finiſhed, when it reacheth either to a Town, or to ſome high and publick Way, or to a Ferry, or to ſome other Farm of the ſame Lord.* Therefore it would be vain and uſeleſs to obtain a Paſſage only thro' half another's Ground, if we were not allow'd to go farther. *Water-draught*; the Right of fetching *Water* from a Spring, or other Place, for the neceſſary Occaſions of our Ground: Which *Grant* is preſum'd to include alſo another [3], of free Paſſage to the Spring or Well. *Waterage for Cattle*; a Right to drive the Beaſts which feed in our Ground, to drink at our Neighbour's Pool. To the ſame Head belongs, *The Right of feeding our Cattle on another's* Paſture: Concerning which Right it hath been obſerv'd, That the Lord of the Ground, which is charg'd with this Service, is not hereby hinder'd from feeding his own Cattle in the ſame Place, provided he do not over-ſtock it, ſo as to intercept the Right of the other Party. And ſo too he, who hath the Right of Paſturage, ought not to bring in diſeas'd or ſcabby Beaſts, which might communicate the Infection to others.

Laſtly, To theſe are added, *The Right of burning Lime, of digging Sand, of cutting Stakes, of felling Wood, and of hewing Stone*; as they turn to the advantage of Country Eſtates. All which have been by others explain'd more at large [4].

Mr. Barb. *NOTES on* §. xii.

[1] *Servitutes ruſticorum prædiorum ſunt hæ: Iter eſt jus eundi, ambulandi homini, non etiam jumentum agendi. Actus eſt jus agendi, vel jumentum, vel vehiculum. Via eſt jus eundi, & agendi, & ambulandi,* Digeſt. l. viii. t. 3. *De ſervit. præd. ruſtic.* leg. 1. See about this Mr. *Bynkerſhoek*'s Obſervations, l. iv. c. 7. *Aquæductus eſt jus aquam ducendi per fundum alienum. In ruſticis computanda ſunt aquæ hauſtus, pecoris ad aquam adpulſus, jus paſcendi, calcis coquendæ, arenæ fodiendæ* —— *Etiam ut* —— *pedamenta ad vineam ex vicini prædio ſumantur,* &c. ibid. leg. 3.

[2] *Quia via conſummari ſolet, vel civitate tenus, vel uſque ad viam publicam, vel uſque ad flumen, in quo pontonibus trajiciatur, vel uſque ad proprium aliud ejuſdem Domini prædium.* ibid. leg. 38.

[3] *Qui habet hauſtum, iter quoque habere videtur ad hauriendum.* ibid. leg. 3. §. 3.

[4] See Mr. *Daumat*'s Civil Laws in their natural Order, Part I. l. i. t. 12. As to the Right of Fiefs or Fealty (which our Author has omitted) 'tis the common Opinion, that they are derived from the People of the antient *Germany*. See *Grotius*, *De Jure Belli & Pacis*, l. i. c. 3. §. 23. and *Paul Hachenberg*'s *Germania Media*, &c. Diſſert. 9. or the Extract in *Bibliothec. Univerſ.* Tom. vi. p. 356, *&c.* as alſo Mr. *Thomaſius*'s Diſcourſe, intit'led, *Selecta capita hiſtoriæ juris feudalis Germanici*, which is among his *Selecta feudalia* printed at *Hall* in *Saxony* in 1708. Yet ſome, among whom is our Author, as we may ſee l. viii. c. 4. §. 30. following, believe that it had its Original from the *Romans*. See Mr. *Hertius* upon the Plaee, and his Diſcourſe, *De feudis oblatis*, Sect. 1. §. 2. which is in Tom. ii. of his Comments and Opuſc. Mr. *Thomaſius* himſelf thought formerly, that Fiefs were in uſe among ſeveral People before the *Germans*, tho' he could not find out the firſt Riſe of them. See his Diſcourſe, *De Origine & Natura Feodi oblati*, which is the twelfth among his Diſputations at *Leipſick*. But be that as it will, there are ſeveral ſorts of Fiefs, of which at this time we ſhall ſpeak of the moſt common only. A Fief then is a Right of enjoying fully an immoveable or incorporeal Eſtate that belongs to another, to whom we have obliged ourſelves to pay Homage and Fealty with certain Services and Duties upon that account. The Right paſſes to the Heirs, but moſt commonly to the Males only in a right Line, or the collateral Relations on the Father's ſide; for thoſe on the Mother's have no Title. He that grants theſe Lands in Fealty is the Lord, and he that receives them is called his Vaſſal. Where the lineal Heirs capable of Succeſſion are extinct, or the Vaſſal is found guilty of Felony, *i. e.* hath broken the Engagements he was under to his Lord, or neglects certain Forms in his Tenure: Or, laſtly, performs not the Conditions by which he holds his Fief, it then returns to the Lord. We may find the Cuſtoms of Fiefs in the Body of the Civil Law, which Collection was made about the Year 1154. But Mr. *Thomaſius* has publiſh'd an Author more antient, *De Beneficiis*, as Fiefs are called, written before the eleventh Century, and has joined with it two fine Diſcourſes; the one concerning the Author and Antiquity of that Work; the other of the good Uſe of it; and in them proves, that the Author wrote in the twelfth Century, and at the Bottom of each Paragraph has made References to parallel Places in the *Speculum Saxonicum & Suevicum*; all which are found in his *Selecta Feudalia* beforemention'd. In fine, Multitudes of Authors all over *Germany* have publiſhed Treatiſes about the Nature of Fiefs.

CHAP. IX.

Of Transferring of Property in general.

I. *It proceeds from Property, that we may alienate a thing.*
II. *The Conſent of two Perſons is required in every Alienation.*
III. *Which is to be expreſſed by ſome Signs.*
IV. *An Alienation is made entirely, or upon Conditions.*
V. *Whether Livery be required in every Alienation.*
VI. *Property is either accompanied with, or ſeparated from Poſſeſſion.*
VII. *What, and how manifold Poſſeſſion is.*
VIII. *How Property is gained by bargaining only.*
IX. *True, and feigned Delivery.*

WE are now to conſider the *derivative Ways of Acquiſition*, by which Dominion or Property already eſtabliſh'd paſſeth from one to another: Which, before we proceed particularly to examine, it may be convenient to premiſe ſomewhat about the transferring of Property [1] in general. The Power and Privileges then [2] of alienating our own Poſſeſſions, or of conveying them to others, ariſeth from the Nature of *full Property* [3]: For ſince this enables a Man to diſpoſe of his own how he pleaſeth, it ſeems the very principal part of that Ability, that he may, if he thinks convenient, transfer the thing to another, by which means he may either procure to himſelf ſomething more ſerviceable, or at leaſt may have an Opportunity of obliging a Friend by his own Turn.

II. Now as the Conveyance of Rights and of Things is tranſacted between two Parties, the one from whom, and the other to whom they paſs [a]; ſo in thoſe Methods of Acquiſition which flow from the Force and Virtue of Property, the Concurrence of two *Wills* is required [1], the Giver's and the Receiver's [b]: For Alienation doth eſpecially denote, that the thing paſſeth from the Proprietor with his free Conſent, and is not taken from him by meer Violence againſt his Will. Again, To make a thing change Maſters, it is neceſſary likewiſe that the latter agree, as well as the former; it being inconvenient, that a thing, which, as to its natural Subſtance, exiſts ſeparately from me, ſhould be, as it were, join'd and united to me, unleſs I embrace it with my own Conſent and Choice. But in Caſes where the Property is ſaid, of Right, to paſs to Men without their Knowledge, as in Inheritances, there the Law is preſumed to make an Acceptance by way of *Fiction*, in Favour of the Heir. Of which this is an Evidence, that the Heir may refuſe the Inheritance [2]; and unleſs, either in Perſon or by Proxy, he takes actual Poſſeſſion of it, he is not affected by thoſe Obligations which ariſe from it, or are charg'd upon it.

III. Farther, ſince Alienations ought to be made with the Conſent of both Parties, and ſince it is inconſiſtent with human Society, that bare internal Acts ſhould be allow'd a Power of producing Rights to hold valid and effectual with regard to other Men; therefore 'tis required on both ſides, as well on the Giver's as on the Receiver's, that they declare their Conſent by ſufficient Signs, that others may be fully aſſur'd of it: Such as are, Nods, Geſtures, Words, Writings; to which, in ſome Places are added, ſolemn Profeſſion before a Magiſtrate, publick Regiſtring, and the like [1].

IV. It is evident, moreover, that when a Tranſlation or Alienation hath been perfectly and unconditionally made, the Alienator retains no manner of Right or Title to the thing which was before his own. Which Conſequence, though it be naturally implied in every Act of this kind, yet 'tis uſual in ſolemn Renunciations and Surrendries, expreſly to declare, That neither we our ſelves, nor our Heirs will hereafter make any Pretenſion or Attempt upon what we have now given up; and that if any ſuch Motion happens, it ſhall be null and void: Becauſe, when we have once made a thing another's, we cannot, to any purpoſe, claim the Diſpoſal of it again. Yet frequently, after a thing hath been alienated, the former Owner reſerves ſome kind of Claim, or a ſort of Chance Right, which in Caſe of ſome particular Event, now unknown, exerts its Force. And this, either becauſe in the Act of Alienation it was thus ex-

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[a] Vid. *Grot.* l. ii. c. 6. ſ. 1, 2.

[b] See what has been ſaid upon this in l. iii. c. 6. ſ. 15.

Mr. BARB. *NOTES on* Chap. IX. §. I, II, III.

[1] The Words of the Law are, *Eſt autem alienatio omnis actus per quem Dominium transfertur.* Cod. lib. v. t. 23. *De Fundo Dotali*, leg. 1.

[2] *Nihil enim tam conveniens eſt naturali æquitati*, ſay the *Roman* Lawyers, *quam voluntatem Domini, volentis rem ſuam in alium transferre ratam, haberi.* Inſtit. l. ii. t. 1. *De rerum diviſ.* §. 40.

[3] To ſpeak properly, we can't ſay that the Power of Alienation is the Conſequence of the Right of Property, becauſe 'tis the Property that is alienated, and one and the ſame thing can't be the Cauſe and Matter of an Alienation. The Truth is, the Power of transferring a Man's Goods to another proceeds from the natural Liberty which every one hath to preſerve his Right, or make it over to whom he pleaſes. Whence it comes, that he may alienate not only the Property, but alſo all other Rights, unleſs there be ſome Law, Agreement, or ſuch like Act, which reſtrains this Liberty within certain Bounds. *Titius*'s Obſervations, 312. numb. 2.

[1] So the Law ſpeaks; *In omnibus rebus quæ Dominium transferunt, concurrat oportet affectus ex utraque parte contrahentium, nam ſive ea venditio, ſive donatio, ſive conductio, ſive quælibet alia cauſa contrahendi fuit, niſi animus utriuſque conſentit, perduci ad effectum id quod inchoatur non poteſt.* Digeſt. l. xliv. t. 7. *De obligat. & action.* leg. 55. See l. iii. c. 6. §. 15. above.

[2] See the Title of the Digeſts, *De acquirenda vel amittenda hæreditate*, l. xxix. t. 2.

[1] Certain Marks or Signs; for Example, when any one among the *Germans* alienated an immoveable thing, he deliver'd a Rod called *Effeſtucatio*, or he took up ſome Duſt or other Piece of the Soil, and caſt it upon the Folds of the Robes of the Buyer. See Mr. *Hertius*'s Notes upon this Place.

preſly covenanted; as is the Practice in Sales with Liberty of Refuſal [1], in things alienated under an Exception or Condition [2], and when only a diminutive or imperfect Property is transferr'd [3], as happens in the Grant of *Feuds*, and of *Copies* and *Leaſes*: Or, becauſe the Alienation includes a tacit Condition, which Condition coming to paſs, the Right of the former Owner to the thing thus convey'd revives; whence ariſe thoſe ſeveral Actions in Civil Law [4], of *Falſe Debt*; of things given upon a certain Cauſe [5], which Cauſe did not follow [6]; of the Recovery of ſpouſal Preſents upon not proceeding to Marriage; of Recovery of Dowry upon Divorce or Separation [7].

Vulcan, in *Homer* [a], upon his taking *Venus* in Adultery [8], challengeth the ἔεδνα, the Preſents he made his Father in Law, in proſpect of the Match. 'Tis a Rule in the *Alcoran*, *That if a Suiter put away his Spouſe before Conſummation, ſhe ſhall retain half of what he gave her, unleſs ſhe chooſe to throw him back all.*

V. But the chief Point uſually controverted on this Subject is, *Whether or no in the transferring of* Property *the Law of Nature requires* Delivery? For others have already well obſerv'd, That *Delivery* cannot rightly be plac'd amongſt the Ways of *acquiring* [1], ſince 'tis only an Act intervening in the *Conveyance* of it. *Grotius* [b] is of Opinion, *That, according to the* Law of Nature, Property may *be transferr'd by bare Covenant; and that* Delivery *is only requir'd by a civil or poſitive Ordinance; which being receiv'd by many States, is through miſtake ſtyled, The* Law of Nations. On the other hand, the Expoſitors of the *Roman* Laws declare, *That the Dominion of things cannot be transferr'd by bare Covenants* [2], *though thus much be expreſly intimated in the Tranſaction; but that* Delivery *is ſtill requiſite.* The Reaſon of which Neceſſity they take to be this: *That Dominions firſt took their Riſe from* natural Poſſeſſion, *and that therefore in paſſing them away, ſuch an Act muſt intervene, by which the* natural Poſſeſſion *of the thing may be immediately obtain'd.* Some have further remark'd, *That in* originary Acquiſitions, *as ſuppoſe in Occupancy, or firſt Seizure, the* Title *or* Cauſe, *and the manner of acquiring, fall in with each other.* But that in *derivative Acquiſitions* theſe two are ever diſtinct: *Delivery* and *Acceptance* being the manner of transferring *Property*, or rather the Acts which occur in transferring it; whilſt *Donation* [3], *Buying*, and *Selling*, *&c.* are the Titles or Cauſes upon which the Conveyance is made. Tho' we have already ſhewn, that bare *Occupancy* is not a ſufficient Title for *Dominion*, but that it muſt in all Caſes be grounded on ſome precedent Covenant [4]. Others take a middle Judgment in the Point; and as they deny that *Delivery* is by the Law of Nature *neceſſary*, ſo they maintain, that 'tis however agreeable to *Reaſon*; inaſmuch as I cannot exerciſe *Dominion* over a thing, unleſs I apply it, as it were *corporally*, to my ſelf; which can be done only by *Delivery* on the one ſide, and by *actual Seizure* on the other [5].

VI. In our Judgment, the Matter may be clearly reſolv'd, by obſerving, that *Dominion* is capable of two different Conſiderations; either as it denotes a bare *moral Quality*, by virtue of which we underſtand that a thing belongs to ſome Perſon, and that it ought to be ſubject to his Diſpoſal; or as it implies, farther, ſome degree of *natural Power*; by which we are enabled to put immediately in execution any Purpoſe that we have made concerning the ſaid thing: Or, what amounts to the ſame, *Dominion* is ſometimes conſider'd as abſtracted from *Poſſeſſion*, and ſometimes is conceiv'd as united to it; this being, as it were, the final Completion of *Property*; upon the Arrival of which it fully exerts its direct Effects. For the better Illuſtration therefore of the Point, it will not be inconvenient to ſay ſomewhat of Poſſeſſion in general.

VII. By *Poſſeſſion* then we underſtand, not the bare Retention of a thing; ſuch as a *Keeper* [1], an *Adminiſtrator*, a *Borrower*, or a *Tenant for Uſe and Profit*, have with regard to the Goods of others; but ſuch as carries along with it an Affection and Deſire of having the thing to one's ſelf [2]. This they

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[a] *Odyſſ.* l. viii. v. 18.

[b] Lib. ii. c. 6. ſ. 1. & c. 8. ſ. 25. and elſewhere.

Mr. Barb. *NOTES on* §. iv, v, vii.

[1] See hereafter, in l. v. c. 5. ſ. 4.

[2] See the ſame place.

[3] See what we have ſaid in c. 4. ſ. 2.

[4] *Condictio indebiti*, which is explained before, l. iii. c. 4. §. 5. n. 4.

[5] *Condictio cauſa data, cauſa non ſecuta.* This is when a thing, which was given upon a Condition, which was not performed, is required again. See the Interpreters upon the *Digeſt.* l. xii. t. 4. and Mr. *Noodt*'s *Probab. Juris*, l. iv. c. 4, 5.

[6] See upon this Subject, *Cod.* l. v. t. 1. *De Sponſalibus & Arris ſponſalitiis & proxeneticis*, & t. 3. *De Donationibus ante nuptias, vel propter Nuptias, & Sponſalitiis.*

[7] See the Digeſt. l. xxiv. t. 3. *Soluto Matrimonio dos quemadmodum petatur.*

[8] This was the Cuſtom in thoſe Times. See Mr. *Le Clerc*'s Notes upon *Gen.* xxxiv. 12. and Mr. *Perizonius*'s upon *Ælian.* Hiſt. l. iv. c. 1. p. 301, 302.

[1] It is a Determination of the Roman Law, *Per traditionem quoque jure naturali res nobis acquiruntur*, as the Lawyers ſpeak, *Inſtit.* l. ii. t. 1. *De rerum diviſione*, §. 40.

[2] *Traditionibus & uſucaptionibus Dominia rerum, non nudis pactis transferuntur*, Cod. l. iii. *De pactis*, leg. 20. See alſo, l. vi. t. 1. *De rei vindic.* leg. 50. and the *Code* with the ſame Title, l. iii. t. 32. leg. 15, 26. as alſo l. iv. t. 39. *De hæredit. vel actione vendita*, leg. 6.

[3] *Nunquam nuda traditio transfert Dominium, ſed ita, ſi venditio aut aliqua juſta cauſa præceſſerit, propter quam traditio ſequeretur*, Digeſt. l. xli. t. 1. *De acquir. rerum Dominio*, leg. 31. *in princip.* See *Vinnius* upon the *Inſtitutes*, l. ii. t. 1. §. 40.

[4] I have proved the contrary above, c. 4. §. 4. n. 4. See alſo § 8. n. 1.

[5] See Mr. *Daumat*'s Civil Laws in their natural Order, Part I. l. i. t. 2. Sect. 2. §. 10. with the Note.

[1] The Law ſays, *Denique ait ab eo, apud quem depoſita eſt, vel commodata, vel qui conduxerit, vel qui legatorum conſervandorum cauſa, vel dotis, ventriſque nomine, in poſſeſſione eſſet, vel cui damni infecti nomine non cavebatur, quia hi omnes non poſſident, vindicari non poſſe*, Dig. l. vi. t. 1. *De rei vindic.* leg. 9. See l. xli. t. 2. *De acquir. vel amittend. poſſeſſione*, leg. 3. §. 20.

[2] *Et apiſcimur poſſeſſionem corpore & animo, neque per ſe animo, aut per ſe corpore*, Digeſt. l. xli. t. 2. *De acquirend. vel amittend. poſſeſſione*, leg. 3. §. 1. *Is qui pignori accepit, aut qui precario rogavit, non tenetur noxali actione, licet enim juſte poſſideant, non tamen opinione Domini poſſident*, Dig. l. ix. t. 4. *de noxal. actionibus.* leg. 22. §. 1. See *Cujacius*'s *Obſervat.* l. ix. c. 33. Farther, here are ſome great Diſputes (which are for the moſt part but Brangles about words) among the Roman Lawyers themſelves, but more among their Interpreters, the one fixing one Senſe upon the Word *Poſſeſſion*, and the other another, as well as to the diviſion of it into *Natural* and *Civil*, See Mr. *Daumat*'s Civil Laws in their natural Order, Part I. l. iii. t. 7. and Mr. *Titius*'s Obſervations on *Lauterbach.* 1022, *&c.* as alſo his *Jus Privatum Romano German.* printed in 1709. l. ii. c. 7, 8.

they divide into [3] *natural* and *civil:* Which Diviſion may again be conſider'd in two reſpects; either as to the outward *manner* of poſſeſſing or retaining; or as to the inward Form or Eſſence of Poſſeſſion. In the former Senſe we are then ſaid to have natural Poſſeſſion, when having once taken a thing, we ſtick to it, not only by the Inclination of our Mind, but by *actual*, and as it were, *corporal Application. Civil* Poſſeſſion may in this Senſe be kept in Mind only, when 'tis loſt as to the Body. Inaſmuch as national Laws, in ſome particular Caſes, ſtill allow the Advantages, which follow Poſſeſſion, to thoſe who have quitted their actual hold [4], or loſt things out of their Hands. In the latter reſpect natural Poſſeſſion is, when we have indeed a Mind and Inclination to keep a thing as our own, yet without any juſt perſuaſion of Property, ſuch as might ariſe from a lawful Title. But *civil Poſſeſſion* implies not only a Deſire, but likewiſe a reaſonable Ground for that Deſire; which, according to the common and regular Courſe, is always underſtood in national Conſtitutions, when they allow any favour to Poſſeſſion [a].

Now the proper Subject of *Poſſeſſion* are bodily Subſtances [5], whether with or without Motion: The leſs proper or the analogous Subject, are *incorporeal* Things [6], as *Rights*, which we poſſeſs by uſing them, and by the Power of ſo uſing them; as likewiſe *Deeds* and *Writings*, upon which an Action may be grounded towards ſome certain Claims. To the conſtituting and compleating the Nature of Poſſeſſion, it is requiſite that the Perſon to be put into poſſeſſion ſhall either by himſelf, or by Proxy [7], corporally take to him the Thing it ſelf, or the Badge and Sign of it, or the Inſtrument of Cuſtody, according as the Nature of the thing permits; and conſequently, that the Thing be after ſuch a manner ſubjected to his Power, as that he may be able actually to diſpoſe of it. If many Bodies are united and connected to each other, then the *taking* any one part with a deſire of poſſeſſing the whole, is conſtrued for *taking* the whole, ſo far as it lies free and void of Owners. Thus, for inſtance, *he who would take poſſeſſion of a Field, or of a Houſe, is not obliged to walk over every Foot of Ground, or to creep into every Garret; but 'tis enough for him to enter on any part* [8]. A complex Body made up of particular ſeparate Bodies, as a *Flock*; for example; if all the Parts are preſent, 'tis ſuppoſed to be *taken* all by laying hold on any one: But if the Parts are divided as to place, one part of the Flock, for inſtance, in this Field, and another in that [9]; here each part is to be *taken* by it ſelf. *Incorporeal* Things, when they adhere to a *corporeal*, are preſum'd to be *taken* together with it. But if they are to be acquired in the Goods of others, then they are *taken* either when we are introduced to a thing, over which [10], for inſtance, we deſign to appoint a *Right* or *Service*; or when we exerciſe any Act which flows, as it were, from ſuch a *Right*.

In *negative Rights* [11] it is equivalent to *Poſſeſſions*, if I forbid a Man any thing, or oppoſe him in his deſign upon it, and if he reſts ſatisfied after my forbidding or oppoſing him. To proceed; ſuch a Seizure, or the exerciſe of ſuch an Act is neceſſarily required in the obtaining of every Poſſeſſion: Though it may by *civil Ordinances* be appointed, That the Property of a thing ſhall otherwiſe by Right paſs to a Man ſo effectually, as that he ſhall bring as ſtrong an Action againſt one who detains the thing from him, as if he had taken corporal Poſſeſſion of it [b].

Farther; As to the acquiring a thing by *Occupancy*, it is neceſſary, that the thing lay free and vacant: So if a thing is to paſs from another to me, with ſuch force and virtue, as that I may be able hereafter actually to diſpoſe of it, it is likewiſe neceſſary that he abdicate and diveſt himſelf of the Poſſeſſion, and remove it, as it were, out of his Cuſtody, that I may have Power immediately to ſeize on it. And this is enough to make it properly be ſaid, that a thing is deliver'd by another; there being no need that he ſhould directly put it into my very Hands. As I may very well be ſaid to feed a Man, tho' I do not chew his Meat for him; and then thruſt it into his Mouth, but only lay it

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[a] Vid. *Polyb.* l. xii. c. 7.

[b] To which Point belongs what is alledg'd by *Grotius*, l. ii. c. 8. ſ. 25.

Mr. BARB. *NOTES on* §. VII.

[3] *Ut poſſeſſio non ſolum civilis, ſed etiam naturalis intelligatur,* Digeſt. l. xli. t. 5. *Pro hærede, vel pro poſſeſſore,* &c. leg. 2. §. 1.

[4] See above, c. 6. §. 12. n. 10.

[5] This is a Diſtinction of the *Roman* Law. By things corporal is underſtoood every thing that is the Object of our Senſes, and may be touch'd, as the Ground, Man, a Garment, a Piece of Gold or Silver, *&c.* Whereas things incorporeal are not obvious to our Senſes, and conſiſt only in a certain Right that Men have; ſuch are, an Inheritance, an Obligation, a Pawn, an Uſufruct, a Service, *&c. Corporales hæ ſunt, quæ tangi poſſunt, veluti fundus, homo, veſtis, aurum, argentum, & denique aliæ res innumerabiles. Incorporales autem ſunt, quæ tangi non poſſunt, qualia ſunt ea quæ in jure conſiſtunt, ſicuti hæreditas, uſus, uſusfructus & obligationes quoquo modo contractæ,* Inſtit. l. ii. t. 2. §. 1, 2. *Cicero* in his Topicks calls the firſt, things that really exiſt; and the other, things that have no Exiſtence but in our Minds. *Eſſe ea dico* (ſays he) *quæ cerni tangive poſſunt, ut fundum, ædes, parietem, ſtillicidium, mancipium, pecudem, ſupellectilem, penus, & cætera. Non eſſe rurſus ea dico, quæ tangi demonſtrarive non poſſunt, cerni tamen animo & intelligi poſſunt, ut ſi in uſucapionem, ſi tutelam, ſi gentem, ſi agnationem definias, quarum rerum nullum ſubeſt quaſi corpus, eſt tamen quædam conformatio inſignita & impreſſa intelligentia, quam notionem voco,* c. 5. See Mr. *Noodt*'s *Probab. Juris,* l. ii. c. 3.

[6] *Ego puto uſum ejus juris pro traditione poſſeſſionis accipiendum eſſe,* Dig. l. viii. t. 1. *De ſervit.* leg. 20.

[7] *Generaliter quiſquis omnino noſtro nomine ſit in poſſeſſione, veluti procurator, hoſpes, amicus; nos poſſidere videmur,* Dig. l. xli. t. 2. *De acquir. vel amitt. poſſeſſione,* leg. 9.

[8] *Non utique ita accipiendum eſt, ut qui fundum poſſidere velit, omnes glebas circumambulet, ſed ſufficit quamlibet partem ejus fundi introire, dum mente & cogitatione hac ſit, uti totum fundum uſque ad terminum velit poſſidere,* ibid. leg. 3. §. 1.

[9] The Interpreters of the *Roman* Law infer this from a Law, which imports, That if in an Herd which one has gotten by Right of Preſcription, a Beaſt be found, that belongs to another who has bought it ſince the time of the Preſcription began, to run with the others, he can't become the lawful Owner of that Beaſt, becauſe he did not take poſſeſſion of all the Beaſts in the Flock at the ſame time, and of all them that afterwards ſhould be joined to it, but only of the firſt. *Rerum mixtura facta an uſucapionem cujuſque præcedentem interrumpit, quæritur?* ——— *Non autem grex univerſus ſic capiatur uſu, quomodo ſingulæ res; nec ſic quomodo cohærentes. Quid ergo eſt? Etſi ea natura ejus eſt, ut adjectionibus corporum maneat idem, non tamen* (for ſo it ought to be read with *Haloander* and *Cujacius*) *univerſi gregis ulla eſt uſucapio, ſed ſingulorum animalium ſicut poſſeſſio, ita & uſucapio, nec ſi quid emptum intermixtum fuerit gregi, augendi ejus gratia, idcirco poſſeſſionis cauſa mutabitur, ut ſi reliquus grex domini mei ſit, hæc quoque ovis; ſed ſingulæ ſuam cauſam habebunt, ita ut, ſi quæ furtivæ erunt, ſint quidem ex grege non tamen uſucapiantur,* Digeſt. l. xli. t. 3. *De uſurpationibus & uſucapionibus,* leg. 30. §. 2.

[10] *Dare enim* (*hæres uſumfructum*) *intelligitur, ſi induxerit in fundum legatarium, eumque patiatur uti, frui,* Digeſt. l. vii. t. 1. *De uſufructu,* &c. leg. 3. *in princip.*

[11] That is to ſay, which conſiſts in hindring a Perſon from doing certain things.

in ſuch a place, whence he may conveniently reach it for his uſe [a].

VIII. Theſe Rules being laid down, it is evident, that *Dominion* conſider'd meerly as a *moral Quality*, and as it abſtracts from Poſſeſſion [1], may certainly be transferr'd by bare Covenants; but that as 'tis underſtood to include likewiſe ſome degree of natural Power, by means of which it may immediately be put in Act, beſides Covenants, *Delivery* is farther required: which doth not ariſe from the force of poſitive Law, but from pure natural Reaſon. Nor yet is it neceſſary to affirm, That before *Delivery* the Alienator retains ſome kind of imperfect Dominion; unleſs we would very unartificially aſcribe the Name of Dominion to a bare natural Ability, actually to diſpoſe of a Thing, without a *moral Power* or *Right*.

For after the Covenant is compleated, or after the *Right* is by Covenant transferr'd on another, the thing immediately commenceth *his*, and regards purely his Intereſt and Advantage; and the Alienator can lawfully exerciſe no Act about it, but ſuch as tends towards delivering up the Poſſeſſion to the other Party. If, before Delivery, he make any other diſpoſal of the ſaid thing, he doth this only *de facto*, and not *de jure*. And *Delivery* it ſelf is not properly the final Act of Dominion, but the Releaſement and Abdication of corporal Cuſtody. For that only is eſteem'd an Act of Dominion, which by virtue of Dominion is *freely* perform'd. But *Delivery* is made not *freely*, but upon Neceſſity, or Obligation. As the Reſignation of a Magiſtrate cannot be ſtiled an Act of his Office, if we conſider that Office as denoting a Power to command others.

But tho' a thing can no longer be reckon'd my own, when I have made over the full *Right* of it to another Man, yet 'tis ſomewhat different whether I ſtill corporally detain the ſaid thing, or whether the other Party hath already got poſſeſſion of it. For in the former caſe he is both unable to apply it preſently to his actual Uſe; and beſides, if I refuſe to deliver it, he muſt compel me to grant him poſſeſſion in a forcible way. And if Matters ſtand thus, beſides the Inconvenience of wanting the thing in the mean time, if you live under civil Government, you muſt be at the trouble of making out your Right to the Judge; and if he either through Corruption or Neglect ſhall pronounce a falſe Sentence, you muſt ſit down contented: But if you are in a ſtate of natural Liberty, you muſt try out the Matter by the doubtful Fortune of War.

On this account it is that the *Roman* Laws affirm [2], That thoſe Contracts which treat of the alienating of Things, do give only a *Right to the Thing*; as if before Delivery the Perſon were plac'd, as one may ſay, at a diſtance from the Thing, only with a Right of joining it to himſelf hereafter. But that when Dominion hath received its final Completion from corporal Seizure, then a Right is eſtabliſh'd *in the Thing*. Yet the Law frequently ſupplies the former Deficiency: As for inſtance, by reckoning amongſt the *Rights in a Thing*, the *Right* of Inheritance [3], or that which the Heirs have to the Goods of the Deceas'd, although they have not yet got Poſſeſſion. As for the other diſtinction of the *Roman* Laws, in granting a [4] *real Action* upon a *Right in a Thing*, and a *perſonal Action* upon a *Right to a Thing*, the ground of it ſeems to be this, That when a thing once perfectly belongs to me, I

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[a] Vid. lib. xli. t. 2. l. 1. ſ. 21. l. 51. Dig. *De acquir. poſſeſſ.*

Mr. Barb. *NOTES on* §. VIII

[1] It is evident, that in this Queſtion every body underſtands a moral Power, or Right of diſpoſing of a thing that appertains to them, and no Man doubts, but to exerciſe this Right actually, he ought to be in poſſeſſion of the thing; ſo that the diſtinction of our Author is uſeleſs, and he might better maintain the Affirmative plainly. Farther, according to the Maxims of the civil Law, a ſettled Poſſeſſion does not require a perpetual keeping of it, nor is it neceſſary to have the thing poſſeſſed in our Hands, or under our Eyes. *Licet poſſeſſio nudo animo acquiri non poſſit, tamen ſolo animo retineri poſſit, Cod.* l. vii. t. 32. leg. 4. Why then can't a Property be gained, as it is a Right purely Moral, by a bare Agreement, without taking any Poſſeſſion? See *Balthaſ. Whernher. Elem. Jur. Nat. & Gent.* c. 14. ſ. 50.

[2] *Jus ad rem.* This diſtinction is not found in ſo many Terms in the Body of the *Roman* Law, as our Author ſuppoſes it, but it is in the Canon Law, which uſes it in treating of the Collation of Benefices. " Jus vero quod ſecundo *AD PRÆBENDAM*, " *NON IN PRÆBENDA*, hujuſmodi competebat, *&c. Decretal.* l. iii. t. 4. *De præbendis & dignit. in* 6. Can. 40. Quarum " gratiarum ratione tunc non erat ad collationem proceſſum, & ſic per conſequens *JUS IN RE* non fuerat ipſis impetrantibus adqui- " ſitum, *&c.* ibid. t. 7. *De conceſſione præbendæ*, &c. Can. 8. Per ordinationem ſeu diviſionem noſtram prædictam *JUS AD REM* " expectantibus, *&c. Extravag. Joan.* 22. t. 4. *De conceſs. præbend.* c. 1. See Mr. *Thomaſius*'s Diſcourſe, intitled, *Philoſophia* " *Juris de obligat. & action.* c. 2. ſ. 115. 'Tis the third among his Diſputations at *Leipſick*. So that the Interpreters of the *Roman* Law have borrowed their diſtinction of *Jus in re & ad rem* from the Canon Law, and they uſe it as a conſequence of what the antient Lawyers ſpeak, that no bare Agreements transfer any Property, and therefore a thing muſt be deliver'd, unleſs there has been a Poſſeſſion for ſome time, as it happens in Preſcription. See the Law quoted above, ſ. 5. n. 2. Hence it follows, that when, for example, a Bargain of Sale is paſs'd, no Right is acquir'd to the thing it ſelf (*Jus in re*) but only a Right to oblige the Seller to deliver it to us, that we may take Poſſeſſion of it, and by that means acquire a Right to it. This is what the Interpreters call *Jus ad rem*, as much as to ſay, a Right to have and acquire a thing; whereas by *Jus in re*, they underſtand the Right that they have already acquired to the thing.

[3] " Omnia fere jura hæredum perinde habentur, ac ſi continuo ſub tempus mortis hæredes extitiſſent, Dig. lib. l. t. 18. De di- " verſis regul. juris, leg. 193.

[4] A perſonal Action is, when we proſecute at Law a Perſon who is obliged to give or do ſomething on our account, by virtue of a real and particular Obligation that he is under, whether by ſome voluntary Engagement, (*i. e.*) a Promiſe, or by a Contract, or for ſome Crime or Fault, as having ſtolen ſomething from us, or endamag'd our Goods, *&c.* And this Obligation is ſo perſonal, that he can't engage himſelf to a third, who is Poſſeſſor by a juſt Title for the thing due to him, till we have actually releaſed him. As for example, if a Tradeſman, after he has ſold me a Stuff, ſells and delivers it at the ſame time to another, I have no Right to require that this ſecond Buyer ſhould let me have it; but the *Roman* Laws allow me an Action of Warranty againſt the Seller. See *Digeſt.* l. vi. t. 2. *De publiciana in rem actione*, leg. 9. ſ. 4. and *Code*, l. iv. t. 39. *De hæreditate vel actione vendit.* leg. 6. On the contrary, an Action real is, when a Man ſeizes, as we may ſay, upon a thing as fully belonging to us already, ſo that we have right to demand it of any one that has it in his Poſſeſſion, and the Defendant is obliged to yield it to us not by a particular and perſonal, but by virtue of that general Obligation, by which every one is ty'd to reſtore the Goods of another. This ſort of Action is called Vindication, and a bare Demand, whereas a Perſonal Action is uſually ſtiled *Conditio.* " Omnium " autem actionum, quibus inter aliquos apud Judices arbitroſve de quacunque re quæritur, ſumma diviſio in duo genera deduci- " tur, aut enim in rem ſunt, aut in perſonam. Namq; agit unuſquiſq; aut cum eo qui ei obligatus eſt, vel ex contractu, vel ex " maleficio, quo caſu proditæ ſunt actiones in perſonam, per quas intendit adverſarium ei dare aut facere oportere, & aliis quibuſ- " dam modis. Aut cum eo agit, qui eſt ei nullo jure obligatus, movet tamen alicui de aliqua re controverſiam, quo caſu proditæ " actiones in rem ſunt, veluti ſi rem corporalem poſſideat quis, quam Titius ſuam eſſe adfirmet, poſſeſſor autem Dominum ejus ſe " eſſe dicat ——— Appellamus autem in rem quidem actiones, vindicationes, in perſonam vero, conditiones, Inſtit. l. iv. t. 6. §. 1. " & 15. In the firſt, *Res, non perſona convenitur*, Digeſt. xlix. t. 14. *De jure fiſci*, leg. 19.

have nothing to do but to purſue and take it whereſoever I find it; and there is no new and peculiar Obligation requir'd in the other Party to engage him to deliver it. But a bare Right to a thing preſuppoſeth that the thing is not yet fully united to me, and that the other Party is by a peculiar Obligation tied to procure that it ſhall be thus united: therefore I am to urge him, that he would leave the thing, as 'twere, vacant for me, ſo that I may take it into my own Poſſeſſion.

As to what remains, tho' it be a common Saying, That *a Thing in hand is better than an Action in the Court*; yet 'tis certain, that our Eſtate may be increas'd by a bare *Right* to a thing, and by *perſonal Actions*. As on the contrary, what a Man by a perfect Obligation owes to another, he cannot, to any purpoſe, reckon amongſt his Goods and Fortunes, tho' he retains, as yet, the corporal Poſſeſſion of it. Hence he, who poſſeſſeth a thouſand Pounds, and owes a thouſand, hath nothing; and he that owes more than he poſſeſſeth, hath leſs than nothing. For in the Words of the Civil Law, *Id ei abeſſe videtur, in quo eſt obligatus* [a]; *So much ſeems wanting to him, as he is bound to make good.*

IX. We are to obſerve beſides, that *Delivery* is either *true*, or *feigned* and *ſuppos'd*; the latter of which is done *manu brevi* [1], in ſhort, and without Formality, to ſave Time and Trouble. Now this chiefly takes place, when I make over by Grant the Property of my Goods to another, reſerving, for a certain Term [2], the *Uſe* and *Profits* to my ſelf. (Tho' in ſome Grants of this kind it is now an uſual Practice for the Donor to deliver the Keys to the other Party, who immediately reſtores them again.) As likewiſe, when I reſolve that a thing of mine, which another now hath in his Poſſeſſion [3], ſhall for the future be his Right and Property: Or when, having firſt lent or ſet out to hire, or given in truſt, a certain thing to you, I afterwards ſell it you [4], or reſign it in way of Profit or Portion. This *feign'd Delivery* is likewiſe of uſe between three Perſons by Delegation [5]; as if, for Inſtance, a Man out of Bounty or Debt would give me ſomewhat, and I order him to give it a third Perſon. For that's the ſame as if it had been firſt offer'd to me, and by me deliver'd into the other Party's Hands.

Delivery then is ſaid to be made *manu longa* [6], or by a round-about way, when a thing is not immediately brought to another Body, but only ſhewn or pointed out at a leſs or a greater Diſtance [7]. For I have, as far as in me lies, deliver'd that, of which I have quitted the Poſſeſſion, and have put another in a Method of obtaining it for himſelf. And to this Head they refer alſo thoſe Caſes, in which any Sign or Inſtrument of Cuſtody (as Keys [8], for Inſtance) is given up. As for the Caſe of throwing or ſcattering Largeſſes among the common People, the Deſign of it is not, that the things thus diſpers'd ſhould be look'd on as *derelict*, or forſaken, and ſo be afterwards acquired in the way of [9] *Occupancy*, by the firſt Takers; but ſuch a piece of Bounty is really a Species of *Donation*, reach'd out indefinitely to all the Members of the Crowd; ſo that the thing thus thrown in common is ſuppos'd to be deliver'd, as 'twere, to the firſt Man in the Multitude that lays hands on it. Yet *Cæſar* ſpeaks otherwiſe in his Complement to the Soldiers, upon granting them the Liberty of Plunder:

—— —— Neque enim donare vocabo,
Quod ſibi quiſque dabit.

I call it not my Gift what each brave Man
Shall give himſelf.

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[a] Lib. iii. t. 5. leg. 28. Dig. *De negot. geſt.*

Mr. Barb. *NOTES on* §. IX.

[1] Our Author, tho' he does not diſtinctly tell us, whether the Deliverance, *manu brevi*, belong to the real or feigned Deliverance, and ſpeaks nothing of that which is made *manu longa*, as ſufficiently underſtood, yet he ſeems to refer it to the feigned Deliverance, as the Lawyers from whence he borrows this Diſtinction do; but then he tells us not, that the ſame Lawyers make the Deliverance with a *long hand* of the feigned kind alſo, and ſo leaves the Reader in the dark. Wherefore, to clear the Difficulty, I ſhall ſhew you what a real Deliverance is, *viz.* it is a Corporal Act, by which we tranſmit a thing from one hand to another, *i. e.* from one Perſon to another; and then, to make our Author's Senſe plain, the Sentence ought to be read, *Traditionem eſſe vel veram, vel fictam, quæ* [*vel longa, vel*] *brevi manu fieri dicatur.* And in this Senſe we find the Phraſe *brevi manu*, Dig. l. xxiii. t. 3. *De Jure Dotium*, leg. 43. §. 1.

[2] "Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo uſumfructum ejus retinuerit; etiamſi ſtipulatus non fue-" "rit, eam continuo tradidiſſe credatur, nec quid amplius requiratur, quo magis videatur facta traditio, *Cod.* l. viii. t. 54. *De Donationibus*, leg. 28.

[3] Si rem meam poſſideas, & eam velim tuam eſſe, fiet tua, quamvis poſſeſſio apud me non fuerit. *Dig.* l. xli. t. 1. *De acquir. rerum Dominio*, leg. 21.

[4] "Interdum etiam ſine traditione, nuda voluntas Domini ſufficit ad rem transferendam. Veluti ſi rem, quam commodavi, aut" "locavi tibi, aut apud te depoſui, vendidero tibi; licet enim ex ea cauſa tibi non tradiderim, eo tamen quod patior eam ex cauſa" "emptionis apud te eſſe, tuam efficio. *Ibid. leg.* 9. §. 5. Veluti ſi rem quam quis tibi accommodaverit —— poſtea aut vendide-" "rit tibi, aut donaverit, aut dotis nomine dederit. *Inſtit.* l. ii. t. 1. *De rerum diviſ.* §. 43.

[5] See Lib. v. c. 11. ſ. 13. following.

[6] As when a Man tells Money on a Table to any one. "Pecuniam, quam mihi debes, aut aliam rem, ſi in conſpectu meo" "ponere te jubeam, efficitur, ut & tu ſtatim libereris, & mea eſſe incipiat. Nam tum quod à nullo corporaliter ejus rei poſſeſſio" "detineretur, adquiſita mihi & quodammodo manu longa tradita exiſtimanda eſt. *Dig.* l. xlvi. t. 3. *De ſolutionibus & liberationibus*, leg. 79. See alſo l. xli. t. 2. *De acquir. vel amitt. poſſeſſione*, leg. 1. ſ. 21. and Mr. *Noodt's Probab. Juris*, where he alſo ſhews, that the Preſence of a thing is not always neceſſary by the *Roman* Law, becauſe it may be thought delivered to him on whoſe Account we paid it.

[7] If for Example, he that ſells me a Field, ſhews me it from the top of his Houſe, declaring at the ſame time that he releaſes it to me, it is as much mine as if I were carried to the Place and ſet my Foot in it. "Aut ſi mihi fundum vicinum mercato venditur," "in mea turre demonſtret, vacuamque ſe poſſeſſionem tradere dicat, non minus poſſidere cœpi, quam ſi pedem finibus intuliſſem. *Dig.* l. xli. t. 2. *De acquir. vel amitt. poſſeſſ.* leg. 1. ſ. 21.

[8] "Item ſi quis merces in horreo repoſitas vendiderit, ſimul atque claves horrei tradiderit emptori, transfert proprietatem mer-" "cium ad emptorem. *Dig.* lxli. t. 1. *De acquir. rerum Dominio*, leg. 9. ſ. 6. and l. xviii. t. 1. *De contrahend. empt.* leg. 74. See alſo the *Code*, l. viii. t. 54. *De donat.* leg. 1.

[9] "Hoc amplius interdum & in incertam perſonam collata voluntas Domini transfert rei proprietatem, ut ecce Prætores &" "Conſules, cum miſſilia jactant in vulgus, ignorant, quod eorum quiſque ſit accepturus, & tamen quia volunt, quod quiſque" "acceperit, ejus eſſe, ſtatim eum Dominum efficiunt. *Inſtit.* l. ii. t. 1. *De rerum diviſ.* ſ. 45. *Dig.* l. xli. t. 1. *De acquir. rerum Dominio*, leg. 9. ſ. 7.

Sometimes only Tickets are ſcatter'd, upon producing of which the Bearers receive the Import and Contents of them. Thus *Titus* the Emperor in ſome of the Shows which he preſented, threw about little round Tablets of Wood, each with ſome kind of Prize inſcribed, as Garments, Gold, Horſes, Oxen, Sheep, and Slaves. Thoſe who had the good Fortune to catch theſe Tables, upon carrying them to the Managers and Stewards, were gratified with the Purport of the Inſcription.

CHAP. X.

Of Wills and Teſtaments.

I. *How many derivative ways of Acquiſition.*
II. Grotius*'s Definition of a Will is examined.*
III. *What is a Will to us.*
IV. *Whether Wills proceeded from the Law of Nature is doubted.*
V. *The Antients diſpoſed of their Goods while they were living.*
VI. *How far Wills proceeded from the Law of Nature, and how far from poſitive Laws?*
VII. *An Inheritance given by Will, wanting due Form, may be enter'd upon, if none oppoſe it.*
VIII. *But the Heir may null that Will, as if his Anceſtor had died inteſtate.*
IX. *Donation in caſe of Death.*

AMONGST the derivative ways of *Acquiſition*, ſome regard the Chance of Death, and ſome transfer things whilſt both Parties are alive [1]. In both Caſes the things are convey'd from one Perſon to another, either by expreſs Will of the former Proprietor, or by the Appointment of ſome Law interpoſing in the Affair. Varro *De Re Ruſtica*, l. ii. *Somewhat muſt neceſſarily intervene, before what was another's can become mine* [2].

II. On account of Death 'tis the common Practice of Mankind to transfer things by *Teſtament*: The Nature and Origin of which Act we ought with ſome Care to examine. According to *Grotius* [a] therefore a Teſtament is the *Alienation of a whole Eſtate in caſe of Death, and before that time revocable; in the mean while the Right of Poſſeſſing and of Enjoying being reſerv'd.* Whereas 'tis not altogether certain, whether a *Teſtament* can rightly be call'd an Alienation, in that ſtrict Senſe under which it denotes ſuch an Act, by which a Man makes a thing that was his own become another's. For Alienation being in this Senſe a transferring of Right from one to another Perſon, conſequently ſuppoſeth the Exiſtence of the two Parties at the time of its Date; ſo that henceforward the thing may be ſaid to be eſtrang'd from him who thus transferr'd it. But the Teſtator [1], ſo long as he draws Breath, retains a full and abſolute Right to all his Goods, without the leaſt Diminution. Therefore, whilſt he lives, he cannot properly be ſaid to have alienated any thing: And at the Moment of his Death he loſeth immediately all the Right he held whilſt alive, and is reckon'd as no body in civil Conſideration. Therefore an Alienation cannot be ſaid to be made at that time, when in reſpect of the Party who ſhould alienate, nothing can be call'd his own or another's. Nor is the Difficulty taken off, if we affirm, That the Alienation is indeed made when the *Will* is ſign'd, but depends in the mean while upon the Caſualty of Death, as upon a neceſſary Condition. For in every Act of Alienation two Parties muſt join Conſents; the one from whom, and the other to whom the thing is transferr'd; and theſe Conſents muſt be united by conſpiring, as it were, together at the ſame time. But now nothing happens more frequently, than that a Man ſhall not know

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[a] Lib. ii. c. 6. ſ. 14.

Mr. Barb. *NOTES on* Chap. X. §. I, II.

[1] Here is a more exact Diviſion of derivative Acquiſitions: I. In reſpect to the Law, by virtue of which Property is transferr'd, we may divide them into Acquiſitions; 1. Natural; 2. Civil; and 3. Mixt. Natural Acquiſitions are ſuch as are conformable to the Rules of the Law of Nature only, *i. e.* which depend only upon the mutual Conſent of Parties. Thus we acquire by virtue of all Engagements, where the civil Law leaves every one at their full Liberty. Civil Acquiſitions are ſuch as transfer a Property without the Conſent of the Proprietor. The principal way of acquiring here is by Preſcription. See Chap. xii. ſ. 1. n. 1. following. Acquiſitions mixt are made by the mutual Conſent of Parties, either expreſs or tacit, but yet with ſuch regard to civil Conſtitutions, that if they be not conformed to, the Act is void. Thus we get things by a Will or Contract, yet the Laws of the State preſcribe certain Forms to be uſed in ſuch ſort of Actions. II. Theſe three ſorts of Acquiſitions may be conſider'd either with reſpect to the Time they were made, or in reſpect to the Thing acquired As to the Thing, they are univerſal or particular, according as we acquire the Goods of a Perſon, in whole, or in part. As to Time, they have place either in caſe of Death, or in time of Life. See Mr. *Titius*'s Obſerv. on *Puſend.* 300, *&c.* The firſt ſort comprehends Wills, and Gifts in caſe of Death, which are treated of in this Chapter. The other comprehends all Agreements and Contracts in which any Alienation is concerned, to which we may alſo refer Donations among the Living, altho' our Author in his Abridgment of the Duties of a Man and Citizen, l. i. c. 12. has ranked them under a different Head, and ſo has not touch'd on them in this Place. But we ſhall ſupply this Defect by a Note, becauſe he has not treated of them in this Work.

[2] *Quod alterius fuit, id, ut fiat meum, neceſſe eſt aliquid intercedere.* Varro De Re Ruſtica, l. ii. c. 1.

[1] See above, ſ. 4. n. 2. All that our Author ſays here proves only, that in a Will the Alienation is real and clear, not irrevocable; but that hinders not, but that the Teſtator's Act may be look'd upon as a kind of imperfect Alienation, and which may become perfect, and give the Heir a true Right, tho' liable to no Effect. So that there is a great Difference between an Alienation by Will, and a bare verbal Declaration of a preſent Deſign to give ſomething one time or another, to a certain Perſon. For the Effect of ſuch a Declaration depends always upon the Humour of him that made it, and can't take place without ſome better Aſſurance from him. Whereas ſo long as the Teſtator has not revoked his Will, the Right of the Heir continues, whatever Humour he is in; but if the Teſtator having reſolved to change the Legacies he has made of his Goods, but for want of time does it not, or becauſe he flatters himſelf that he ſhall have time enough when he comes to die, the Heir and Legatees have acquired a full and irrevocable Right, which they have Power to enjoy.

himſelf

ſhall not know himſelf to be Heir 'till the *Will* comes to be open'd upon the *Teſtator's* Deceaſe. And likewiſe when the Will is thus open'd, 'tis at the Choice of the Heir appointed, whether he will enter upon the Inheritance, or wave and refuſe it.

Again, Since all the Right of the Heir by *Will* commenceth at the Teſtator's Death; he hath not, before that Moment, any Right which can be ſaid to depend on the Death of the Party as on a Condition. Beſides, when any kind of Alienation is made, though ſuch as may be recall'd, yet it ought to transfer ſuch a Right on the Perſon towards whom it is directed, that it ſhall not be diſannull'd at the bare Pleaſure of the Alienator. For otherwiſe, neither the Alienator can be ſuppos'd to have contracted any Obligation, nor the other Party to have acquired any Right, if the whole Tranſaction amounted to no more, for Example, than this ſlight Promiſe, *You ſhall have, one time or other, ſomewhat which I now poſſeſs, provided you don't diſpleaſe me in the mean while; but then you ſhall have no Right to hinder me from being diſpleas'd at any time when I think fit, or without any manner of Reaſon.* Such an Act as this cannot be ſtiled an Alienation, being a bare Declaration of a Man's preſent Deſign, without any neceſſity of continuing the ſame Reſolution; which is incapable of producing any Obligation on the one ſide, or any Right on the other [a]. But a Teſtament is really ſuch a Declaration of a Man's Intentions, as doth not confer any Right on the other Party before the Teſtator's Death; ſuch, at leaſt, as may have the effect of full and perfect Right againſt the Claim of the Teſtator himſelf. For after the Will is drawn up, the Teſtator doth not only retain the moſt abſolute Right of poſſeſſing and enjoying, making over to the Heir only the bare Property; but indeed the Property itſelf is ſtill, without the leaſt Diminution, his own. Of which we have this evident Token, That after all this he may alienate his Goods, or may ſtrike out thoſe who at preſent ſtand Heirs, without any Poſſibility of Redreſs. But now even revocable Alienations ever ſuppoſe ſome Caſualty, or ſome Condition under which they are to be revers'd, and which doth not depend merely on the Alienator's Pleaſure or Humour.

III. We ſhall expreſs the Nature of a Teſtament more plainly, and more agreeably to the Senſe of the *Roman* Lawyers, if we call it, *A Declaration* [1] *of our Will touching the Succeſſors to our Goods, after our Deceaſe, yet ſuch as is mutable and revocable at our Pleaſure, whilſt we live, and which creates a Right in others to take Place only, when we are gone.* Concerning which Mutability the Law of general Kindneſs commands thus much, *That no Man, unleſs on Account of his Demerit, be wheedled and cajol'd with falſe Hopes* [2], *or be ridiculed and expoſed.* Whence, tho' we can hardly diſapprove of what *Pliny* reports of *Domitius Tullus*, who had chous'd ſome hungry Raſcals in the wicked Tribe of the *Hæredipetæ*; *Others on the contrary*, ſays he [b], *commended this Humour; in that he fruſtrated the evil Hopes of ſuch Men, whom, conſidering the Practice of the Age* [3], *it is a Part of Prudence thus to deceive* [c]: yet *Valerius Maximus* [d] had good Reaſon to cenſure *Q. Cæcilius* and *T. Barrulus*, of whom the former put a Trick of this kind on *L. Lucullus*, the latter on *Lentulus Spinther*, their greateſt Friends and Benefactors.

IV. Whether theſe Teſtaments owe their Original to natural or to poſitive Law, is diſputed amongſt the learned. The Meaning of which Queſtion is not, Whether a Man be obliged by the Law of Nature to make a Will (for that certainly is in every Man's Choice, unleſs ſo far as it proves neceſſary to prevent Quarrels amongſt his [e] Relations) but whether after Property hath been introduc'd, it neceſſarily follows from the Nature of that Eſtabliſhment, that a Man may effectually diſpoſe of his Goods by Will, or whether this Power is granted to Proprietors by poſitive Conſtitution? *Grotius's* Judgment [f] in the Caſe is, *That a Teſtament, as many other Acts, may indeed receive a particular Form from civil Ordinances; yet the Eſſence and Subſtance of it is nearly allied to Property, and upon Suppoſition of Property, belongs to the Law of Nature.* Or, that the Power of diſpoſing effectually of what we poſſeſs, is deriv'd from the Law of Nations [1], which the *Civilians* term *Jus Primarium*, the firſt or principal Law; but the Reſtraint which lies upon us to diſpoſe of them only after ſuch a certain manner, is owing to civil Appointment. In regard to which Aſſertion, 'tis not improbable,

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[a] Vid. *ſupra*, l. iii. c. 5. ſ. 5.

[b] Lib. viii. Epiſt. 18.

[c] Add *Lucian* in Dialog. *Simyl.* & *Polyſtrat.* Tom. i. p. 275. Edit. *Amſt.*

[d] Lib. vii. c. 8. ſ. 5, 8.

[e] Comp. *Iſa.* xxxviii. 1.

[f] Lib. ii. c. 6. §. 14.

Mr. Barb. *NOTES* on §. iii, iv.

[1] Their Words are, *Teſtamentum eſt voluntatis noſtræ juſta ſententia, de eo quod quis poſt mortem ſuam fieri velit*, Dig. l. xxviii. t. 1. *Qui teſtamenta facere poſſunt*, &c. leg. 1. *Ambulatoria enim eſt voluntas defuncti uſque ad vitæ ſupremum exitum*, l. xxxiv. t. 4. *De adimendis vel transferendis legatis*, &c. leg. 4.

[2] Hear what the Oracle of *Gaſcoigne* (which is the Title that the Abbot of St. *Real* in his Preface to *Cicero*'s Epiſtle to *Atticus* gives *Montagne*) ſays, "I now ſee 'tis time loſt to beſtow much Pains in Courtſhips; one Word ill conſtrued blots out the Merit "of Ten Years. Happy is he that can hit the time, pleaſe their Humour at the laſt Gaſp! The neareſt Action pleaſes moſt; "not the beſt or moſt frequent good Offices, but the freſheſt and moſt preſent do the Work. Theſe Men manage their Wills as "Apples or Rods, to encourage or correct every Action of their Dependents. 'Tis a thing of too much Attendance and Weight "to be thus hurried every Moment, and againſt which wiſe Men reſolve once for all, reſpecting, above all, Reaſon and publick Ob"ſervation. Eſſay, l. ii. c. 8. p, 284, 285." See alſo a fine Paſſage in Mr. *de la Bruyere*'s Characters, in the Chapter about certain Uſages, printed at *Bruſſels* in 1697. The Character begins thus; "It is true, there are a ſort of Men whoſe Will nothing "can determine but Death, becauſe ſo long as they liv'd they were never reſolved nor quiet, *&c.*

[3] The Latin is, *Alii contra hoc ipſum laudibus ferunt, quod* [*Domitius Tullus, cum ſe captandum præbuiſſet*] *ſit fruſtratus improbas ſpes hominum, quos ſic decipere pro moribus temporum prudentia eſt.* See alſo what is ſaid above, l. iii. c. 5. ſ. 5. n. 3. As to ſuch Men in general, and the Right which their ſervile Addreſſes to gain an Inheritance, when they are ſucceſsful, gain, read two curious Diſcourſes of Mr. *Thomaſius*; the one intitled, *De Jure injuſto Hæredipetarum*, publiſh'd at *Hall* in *Saxony* in 1695, and the other, *De Captatoriis Inſtitutionibus*, in 1696, and reprinted in 1703.

[1] The Diſtinction of the Law of Nations into primæval and ſecondary was not made by the *Roman* Lawyers, but their Interpreters. Moreover, the Power of making Wills ought to be referred to that Right of Nations which they call ſecondary, and not to the primæval, which is nothing elſe, according to them, but the Law of Nature taken in the Senſe which I have elſewhere explain'd it, l. ii. c. 3. ſ. 2.

but that ſome Scruple may ariſe [2]. For ſince the things, over which Property was firſt eſtabliſhed, are deſigned only to ſerve the Uſes of Men in this Life, and ſince the dead loſe all their Title to worldly Poſſeſſions, it ſeem'd not altogether ſo needful, that Property ſhould contain in it a Power of ordering what ſhould become of a Man's things after his Deceaſe. But it might have been ſufficient to have allow'd every Perſon the Command of his Goods during Life, diſabling him to extend it farther, and to have left to the Care of the living the Management of what belong'd to the Dead, who are no longer Members of human Society.

Farther, ſince Death removes Men from all Concerns below, it ſeem'd that the Diſpoſals and Declarations made in their Life-time might be afterwards neglected with Impunity.

Mr. Barb. *NOTES on* §. iv.

[2] Our Author in my Opinion makes a Difficulty where there is none. I am miſtaken if his falſe Notion about the Original of Property, which we have above confuted, hath not made him without Reaſon reject *Grotius*'s Judgment, and multiply Beings without Neceſſity. Another Author, which I have ſeen ſince my firſt Edition of this Work, aſſerts, That the Power of making Wills is only from civil Right, a Principle worſe grounded in my Judgment, as I have ſhewn above, c. vi. §. 1. n. 1. I ſhall now only ſpeak of this Poſition of his, That the Right of Property ends and is extinct with Poſſeſſion of itſelf. See Mr. *Bynkerſhoek*'s Obſervation, l. ii. c. 2. The Hypotheſis being then confuted, 'twill be eaſy to invert the Conſequence. I aſſert then, That the Settlement of Property being neither founded on any Agreement, nor limited by the time of Poſſeſſion, but depending only (as we have ſhewn) upon this, That every one has ſeized for ever of a certain reaſonable Portion of the Goods of this World, which naturally belong no more to one than another, it follows, that when a Man hath appropriated to himſelf any thing after that manner, no other Perſon can pretend to it, unleſs he abandons it anew to the firſt Occupant, or transfers it to ſome other; but he hath a Right to diſpoſe of his Goods during his Life, and may leave them, as their Proprietor, to whom he pleaſes, after his Death. And truly I can't ſee why this ſhould not be a conſequent of the Right of Property. Suppoſe Men were immortal, ſhould not a Proprietor eternally preſerve the Right he has once gotten? The neceſſity of Dying, to which all Men are ſubject, will permit them to enjoy their Goods but a few Years, and then it is but natural to make up the Loſs, and perpetuate as far as they can their Right of Property after their Death, by declaring to whom they will have it paſs; and ſo the Heir taking the place of the Dead, and repreſenting him in ſome manner, no other can pretend to his Goods any more than if he had poſſeſſed them himſelf. In the *Code* 'tis laid down as an uncontroverted Maxim, That Men can deſire nothing more reaſonable, than to have a liberty to diſpoſe of their Goods at their Death. *Nihil eſt enim quod magis hominibus debeatur, quam ut ſupremæ voluntatis, poſtquam jam aliud velle non poſſunt, liber ſit ſtilus, & licitum, quod iterum non redit, arbitrium*, l. i. t. 2. *De Sacroſanctis Eccleſiis*, leg. 1. See the Paſſage of *Quinctilian* quoted below, §. 5. n. 2. All the World agree, That Men while they live, and hold as it were hand in hand, may transfer to others, either abſolutely, or upon certain Conditions, the Right of Property which they have to a thing; and why then may they not do the ſame at their Death, and in a manner revocable or irrevocable? I can't ſee the great Difference there is between theſe two things, eſpecially if we conſider the Donations in caſe of Death, of which this Author treats at the End of the Chapter, and which without doubt are a Right purely civil. Further, the Goods which Men ordinarily leave at their Death being uſually either the Fruits of the Induſtry alone of the Proprietor, or things which are cultivated and improved by Care and Labour, would it not be unjuſt to have them abandoned after his Death to the firſt Occupyer; ſo that he can't have the Satisfaction before his Death of thinking that he ſhall leave them to ſuch Perſons as he loves? 'Tis true, that (as Mr. *Bynkerſhoek* ſays) the Earth was appointed for the Service of Men of all Ages, and that all Generations, that ſucceed one another, ought to have a Proviſion for themſelves by their Labour and Travail. But it does not follow, that by natural Right, when a Perſon dies, he leaves his Goods to ſome body, as he muſt neceſſarily do, no Man being able to carry any thing away with him to the Grave; and there are in the World beſides things enough which belong to the firſt Occupant, if we will take the Pains to find them out. Mr. *de Bynkerſhoek* himſelf acknowledges, that if every Man's Goods after his Death were left to the Plunder of others, it would cauſe infinite Diſorders; and therefore the civil Laws have regulated Succeſſions and allowed Wills. Farther, it is not neceſſary that they, to whom we diſpoſe our Goods, ſhould know and accept, when we are alive, what we intend to bequeath them at our Death. Our Author maintains, that in reality the Will of him who transfers his Right, and of him to whom it is transferr'd, ought always to be united in a mutual Conſent at the ſame time; but in this he doth not agree with himſelf, for he acknowledges above, l. iii. c. 9. §. 4. That a Gift is valid, though the Donor be dead before 'tis accepted by the Legatee, if he who ought to declare it be only a bare Reporter of the Will of the third. As to the dead Perſons themſelves, they have nothing to do with the things of this World; but it doth not follow that they never had, while they were yet alive, a Right to order the diſpoſal of their Goods after their Death, but only they are not in a condition to make it of Force themſelves. If the Antients, as our Author ſpeaks, made their Relations ſwear to perform the Orders they made when they died, 'twas to engage them more ſtrictly by an Oath, and not that they believed no other Reaſon ſufficient to oblige them to fulfil the Will of a Perſon dead. We ſee that in the higheſt Antiquity ſuch, as were not Members of any Society, diſpoſed of their Goods before they died, without Controul. *Abraham*'s Example is remarkable; he had Parents in *Charran*, in *Meſopotamia*, and without going far; he had with him in *Canaan*, where he dwelt, his Nephew *Lot*; nevertheleſs, when he thought he ſhould have no Children, he deſigned to exclude all his Relations, and make *Eleazar*, his Steward or chief Slave, his Heir, *Gen.* xv. 2. We muſt then conclude, that a Power of diſpoſing of our Goods in caſe of Death, in a manner either revocable or irrevocable, reſults from the Right of Property, and by Conſequence is founded on the Maxims of the Right of Nature and Nations. So that if the civil Laws preſcribed certain Limitations and Forms to that Power, it proceeds from the Authority which the Sovereign hath to limit the Right of Property, and to regulate the Uſe that Citizens ought to make of their Goods; as you may ſee, l. viii. c. 5. §. 3. following. In fine, what I have ſaid is ſo true, that our Author himſelf, after an uſeleſs Circle, returns again to the ſame Point, and in the following Chapter builds the Succeſſion to a Perſon inteſtate upon the Preſumption of the Will of the dead Perſon. All the Difference is, that inſtead of making the Power of diſpoſing of his Goods at his Death to depend upon the Right of Property, he refers it to a tacit Agreement of the People, by which he ſuppoſes, without Neceſſity, that they entred into a common Covenant to put ſuch a Strength in Property, as according to him it had not before. This Notion is the more ſatisfactory to me, becauſe Mr. *Buddeus*, in his Diſcourſe intitled *De Teſtamentis Summorum Imperantium*, maintains alſo againſt the Opinion of our Author, That the Power of making Wills proceeds from natural Right, and not from civil only. He alſo there obſerves among other things, that the Diſpoſals of the Teſtator can't be executed without the Conſent of the Heir; yet the want of that Conſent does not deprive the Teſtator of that Right which he hath by Nature to diſpoſe of his Goods; a Right which hath ſuch a Virtue and Effect, that no Man can lawfully appropriate to himſelf the Goods of a dead Perſon, before he knows whether the Heir will accept the Inheritance deviſed to him, or no. If this be obſerved, the Will of the Dead is fully ſatisfied, becauſe without doubt he intended not to force his Goods upon his Heir againſt his Will. The Heir alſo has ſome Right during the Life of the Teſtator, altho' 'tis not irrevocable, nor becomes his 'till the Teſtator is dead, without a Change of Reſolution. They, who affirm the contrary, are fallen into this Error for want of diſtinguiſhing well between Acts imperfect and not conſummate, and ſuch as are null and of no effect. It is certain, that by natural Right a Will can't be entirey fulfilled, 'till the Heir accepts of the Succeſſion after the Death of the Teſtator, yet it doth not follow that before that 'tis a vain Act, and of no Force. It is valid ſo far as the Nature of the thing will permit, and in this, that no other Perſons can claim the Goods of the Deceaſed, until he that is appointed the Heir refuſes to inherit. The reſt of Mr. *Buddeus*'s Diſcourſe is worth the reading. At preſent I ſhall only obſerve, that Mr. *Thomaſius*, who heretofore forſook the Opinion now oppoſed, is returned to it again; but I can't find that either in his *Fundam. Jur. Nat. & Gent.* l. ii. c. 10. §. 9, *&c.* nor in his Diſcourſe, *De Origine Succeſſionis Teſtamentariæ*, printed at *Hall* in 1705, he has confuted any of the Reaſons now laid down. In a Word, whether it be advantageous to civil Society to leave every one at their Liberty to diſpoſe of their Goods by Will, is a Queſtion of a different Nature, and which our Author himſelf will treat of in the laſt Paragraph of the following Chapter.

Id cinerem & manes credis curare ſepultos [a] ?

Think you cold Duſt and Shadows feel ſuch Cares?

An Evidence of this it ſeems to be, that the moſt antient Men we read of in Story were wont to engage their Friends by Oaths to fulfil their laſt Commands, as if no human Bonds were ſtrong enough to oblige them in this Caſe. See *Gen.* xxiv. 2, 3. xlvii. 29. *Diodor. Sic.* l. ii. p. 119. Ed. *Rhodom.* c. 33. ſpeaking of *Parſodes*'s Death.

Thus too in *Sophocles* (*Trachin.* 1192, *&c.*) *Hercules* requires an Oath from *Hillus*, for the Performance of his laſt Commands.

So *Conſtantinus Ducas* obligeth his Wife *Eudocia* by Oath never to enter on a ſecond Marriage after his Deceaſe. Yet by what Stratagem ſhe recover'd her Writing from the *Patriarch*, who had the keeping of it; and how, as if ſhe had hereby been releas'd from her Engagement, is very ſtrange, ſhe marry'd *Diogenes*, we read in *Zonar.* Tom. iii. in *Eudocia*, and in *Michael Glyc.* Ann. Tom. iv.

So in *Joſephus* (*Archæolog. Jud.* xvii. 10.) *Herod*'s Commands for ſlaying the chief of the *Jews* are neglected by his Siſter and her Husband. So;

Juſſerat hæc rapidis aboleri carmina flammis
Virgilius, Phrygium quæ cecinere Ducem.
Tucca vetat, Variuſque ſimul; tu, maxime Cæſar,
Non ſinis.

Virgil thoſe Strains which rais'd the *Trojan*'s Fame,
Dying, bequeath'd to feed th' injurious Flame.
Tucca and *Varius* ſtop the raſh Deſign,
And you, great *Cæſar*, ſave the Glories of your Line.

Dio Caſſius, lib. lix. relating how *Tiberius*'s Will was declar'd null by *Caligula* and the Senate, adds this Reflection, *That no Counſel or Foreſight can prevail againſt the Ingratitude of Men, and the Power of Poſterity.* To which may be applied that Saying of *Lucan*,

—*Nulla fides rebus poſt terga relictis*, l. ii. v. 628.

In vain we truſt to things we leave behind.

Therefore 'twas at the Pleaſure of the Survivors, whether or no a Man's Will ſhould take effect, even after he was dead. And conſequently they were to determine by ſome Agreement amongſt themſelves, how far they ſhould comply with the Deſires of thoſe who had now loſt the common *Rights* of Men. Without ſuch an Appointment any precedent Diſpoſal would have been vain and uſeleſs, which the *Author* could not, and others who could would not maintain and put in Execution.

But, on the contrary, it manifeſtly appears, that 'twas not ſufficient, in order to the Peace of human Society, to introduce ſuch a Property or Dominion of things, as ſhould turn only to the preſent momentary Uſe; but 'twas needful to make it ſuch as ſhould hold good hereafter: Man, ſo far as Nature allows, having no leſs a Right to preſerve Life for the future, and to provide Means towards obtaining that End, than for the preſent Moment. To which if we add, That we are enjoin'd to take a particular Care of thoſe who are allied to us in Blood, whoſe Race we wiſh may continue to an indefinite extent of Ages, it will on the whole appear to have been conducive to the Peace of Mankind, not to make the Force of Property depend on any fix'd Period of Time; ſince this would have created no leſs Confuſion and Trouble than the primitive Community: But to aſſign it, as 'twere, an Indefinite Duration, by means of which it might paſs down and be continued to others. Now as to the preſerving and the continuing this Property, thoſe who live in a ſtate of natural Freedom, appoint Means according to their own Judgment. But in civil Governments, as it is ſupported by the publick Strength, ſo it hath been variouſly temper'd and retrench'd, as particular Nations have at any time thought it to be for their Intereſt.

As for the Notion invented by the *Author* of the *New Method of Law* [4], I queſtion whether it will meet with the Approbation of ſound Judges. *Teſtaments*, ſays he, *by meer Right*, that is, *without the Confirmation of civil Ordinances, would be of no force or weight, unleſs the Soul were immortal; but becauſe thoſe who are taken out of this World do really ſtill live, therefore they remain Proprietors of their Goods; and thoſe whom they appoint their Heirs are to be look'd on as their Stewards and Managers.*

V. But as no one will be forward to maintain, that for a Man to be able to diſpoſe of his Goods at ſuch a time as he is the true Proprietor, and to fix the Effect of his Diſpoſal on a time when he ſhall not be Proprietor, is repugnant to the Law of Nature: So, on the other hand, it doth by no means appear that this flows by any neceſſary Reaſon from the Eſſence of Property.

Thus much indeed flows from thence, That a Man whilſt alive may confer a Right to his Goods on another living Perſon, which ſhall not be extinct upon the Death of the Collator, being ſtill kept alive in the other Party who ſurvives. For inaſmuch as the Efficient and the Effect are diſtinct and ſeparate Beings, there's no Neceſſity that the latter ſhould always die with the former. And therefore, as a Man in his Life-time may fully transfer ſomewhat which he poſſeſſeth on another, who ſhall not loſe the Property of it by the Death of him from whom it was receiv'd; ſo nothing hinders but that a Man may make over the Property of any thing to ſome Perſon elſe, yet ſo as to reſerve ſtill to himſelf a certain Right over the ſaid thing during his continuance in this World. Hence in the moſt antient times we find the Fathers of Families diſpoſing of their Goods at the Approach of Death [1]; (for as to the Paſſage in *Gen.* xv. 3. *Abraham* ſeems not to have already made his Servant's Son his Heir, but only to have thought of making him, in caſe he happen'd himſelf to die without Iſſue) yet ſo, as that they themſelves open'd and publiſh'd their Will to their Children, that theſe, by acquieſcing in it, might ſeem to confirm it by mutual Covenant amongſt themſelves. By this means the Right immediately paſs'd from the living Parents to the living Children; and the latter were admitted preſently, as 'twere, into Poſſeſſion of the Goods. And 'tis probable, that thoſe primitive Men, who follow'd ſo plain and frugal a way of Life, commonly were not cut off by our ſudden and violent Diſtempers, but decay'd leiſurely by the gentle waſting of the radical Moiſture; ſo that they were Maſters of their Reaſon to the laſt, and were never ſummon'd by Death unawares, and upon a Surprize [a].

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[a] Vid. *Virgil.* Æn. iv. 34.

Mr. Barb. *NOTES on* §. iv, v.

[4] This Notion is abſurd, and contrary to what is ſaid, *Eccleſ.* xi. 19. and *Luke* xii. 20. and ſo is juſtly diſapproved by our Author. By the Title I gueſs the Author of it to be the famous Mr. *Leibnitz*, who publiſh'd a Work under that Title exactly at *Frankfort* upon the *Mein* in 1703; but having not ſeen it, I am not poſitive.

[1] By this it appears, that it was a Cuſtom in the Times of the Patriarchs to diſpoſe of their Goods as they ſaw fit in caſe of Death. But if we examine the Paſſages of the Old Teſtament which our Author quotes, and are ſet down in the Margin, we ſhall ſee that they prove not what he would infer from them, that the transferring of Property was made among the Living, and, as it were, from hand to hand.

After the ſame manner *Cyrus*, in *Xenophon* [b], allots his Sons with his own Mouth the Diviſion of their Father's Fortunes. And indeed theſe laſt Diſpoſals ought to obtain great Favour and Allowance; it being thought no ſmall Comfort under our mortal Condition, that what a Man hath labour'd for in his Life, ſhould afterwards fall to that Perſon rather than others, whom he particularly chooſeth and deſires [2]. *'Tis eſtabliſhed*, ſays *Quinctilian* [c], *by the Laws and Cuſtoms of the State, that as often as it can poſſibly be done, the Teſtaments of the deceas'd ſhould be ſtrictly obeyed. And this upon no ordinary Grounds and Reaſons. For there ſeems no greater Conſolation in Death, than to have a Will which ſhall hold good after Death, Otherwiſe a Man might think an Eſtate a Burthen, if he had not the full Diſpoſal of it; and if all the Right which we are allow'd to have over it, whilſt we live, were to be taken from us when we die.* Nor is *Statius*'s Reflection on Barrenneſs unworthy of Conſideration:

Orbitas omni fugienda niſu,
Quam premit votis inimicus hæres,
Optimo poſcens (pudet heu!) propinquum
Funus amico.
Orbitas nullo tumulata fletu!
Stat domo capta cupidus ſuperſtes
Imminens leti ſpoliis, & ipſum
Computat ignem.

From Barrenneſs, good Providence defend!
Which feeds the Wiſhes of th' ungodly Heir,
Begging the ſpeedy Funeral of his Friend.
Barrenneſs buried with no parting Tear!
The eager Succeſſor in th' empty Seat
Stalks like a Victor in a Fortreſs won,
Greedy to faſten on the Spoils of Fate;
And counts, with grudging Care, the Charges
of a Stone. *Sylv.* iv. vii. 34, *&c.*

Add to theſe a Paſſage out of *Pindar*, who thus ſpeaks,

Ἐπεὶ πλοῦτος ὁ λα-
χὼν ποιμένα ἐπακτὸν ἀλλότριον
Θνάσκοντι στυγερώτατος.
Od. X. ver. 106, *&c.*

The Rich Man much doth grieve,
That when this World he leaves,
Strangers his Wealth receive.

VI. But the *Queſtion* under Debate doth not proceed ſo much with regard to theſe actual Diſpoſals during Life, as to thoſe Teſtaments by which a Man ſo conveys his Poſſeſſions, as to retain the liberty of altering them to his laſt Breath, ſo that the Right of the Heir to the reſpective Goods ſhall not commence 'till the Teſtator's Deceaſe: Which Method of Appointment many have, with very good Reaſon, preferr'd to that other, but now mention'd, by which Men upon the Brink of Death diſtributed their Goods amongſt their Heirs with their own Hands. For ſome ſudden unforeſeen Fate frequently either hurries Men out of the World, or however removes them far from their Friends, ſo as they want Time or Opportunity to expreſs by Mouth their laſt Reſolution.

And again, Perſons who ſeem'd to have had more than one Foot in the Grave, have often by ſome ſtrange Turn recover'd their Health, when they utterly deſpair'd of it. And it was likewiſe judg'd more convenient, that a Man ſhould diſpoſe of his Goods rather whilſt he was in Eaſe and Quiet, and Maſter of a ſound and clear Reaſon, than when he was trembling at his laſt Hour, or when his Mind was ſhock'd and weakened by the force of his Diſtemper.

Beſides, it was more advantageous for each Perſon to remain Lord of his own Poſſeſſions to his final Gaſp, and to give no Man ſuch a *Right* over them as could not, without Inconvenience, at any time be revoked, when either the Merit of the Party, or his own Inclination ſhall alter [d]. (As the *French* tell us, *'Tis ſenſeleſs to put off our Cloaths before we are near going to Bed.*) For tho' the Conveyance of *Right*, in this Caſe, might be made reverſible, or ſuch as the Conveyer might diſannul, upon appearance of ſome *Condition*, either caſual or voluntary [1], on the part of him to whom the Conveyance was made; yet the Doubts which muſt neceſſarily have ariſen about the proof of this *Condition*, and which each Perſon would have urg'd for his own Title, muſt have occaſion'd endleſs Diſputes. At leaſt he, who had been once declar'd Heir, would have conceiv'd the higheſt and moſt mortal Reſentment againſt the Diſpoſer, ſhould he for any ſlight Reaſon be depriv'd of what he had already ſeiz'd upon in Hope and Expectation. Many likewiſe have expos'd themſelves to very great Dangers, by openly naming their Heir too ſoon. Thus *Caligula*, when Perſons had put him down in their Wills amongſt their Children, and had made open Profeſſion of it, and yet ſtill liv'd on, gave them the Name of *Mockers*, and ſent many of them a poiſonous Meſs to diſpatch them [e].

When *Herod* had taken up a Deſign of dividing his Kingdom amongſt his Sons, *Auguſtus* forbad him to proceed, ordering him, ſo long as he liv'd, to

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[a] See *Gen.* xxv. 5, 6. — xlviii. 22. *Deut.* xxi. 16, 17. 1 *Kings* i. 35. *Sirac.* xxxiii. 24.

[b] *Cyropæd.* l. viii. c. 7.

[c] Declam. 308. *princip.*

[d] See *Sirac.* xxxiii. 20, *&c.*

[e] *Sueton. Calig.* c. 38. Add. *Sueton. Galb.* c. 9. *Liv.* 40. c. 54.

Mr. Barb. *NOTES* on §. v, vi.

[2] His Words are, *Et in more civitatis, & in legibus poſitum eſt, ut quotiens fieri potuerit, defunctorum teſtamento ſtetur, idque non mediocri ratione. Neque enim aliud videtur ſolatium mortis, quam voluntas ultra mortem; alioqui poteſt grave videri etiam ipſum patrimonium, ſi non integram legem habet, & cum omne jus nobis in id permittatur viventibus, auferatur morientibus.*

[1] See lib. iii. c. 8. ſ. 4.

keep both his Kingdom and his Sons in due Subjection [a]. As the Family of *Auguſtus* himſelf was afterwards diſtracted with a very fatal Emulation, upon his naming a Succeſſor in his Life-time: It hath therefore been thought ſafe to take care Mens Wills ſhould only be publiſh'd after their Death, that they may bring no *Odium*, and no Danger upon them, whilſt they live.

On the ſame Ground it hath been look'd on as a moſt deteſtable and barbarous Villany to unſeal and divulge a Teſtament during the Life of the Teſtator. So when *Cæſar*, upon the breaking out of the civil War, caus'd *Antony*'s Will, which he had depoſited in the Hands of the *Veſtal* Virgins, to be rehearſed in open Senate; many took very grievous Offence at the Act. *For*, as *Plutarch* obſerves [b], *they judg'd it to be moſt monſtrous and unreaſonable, that a Man ſhould be obliged to give an Account, whilſt alive, of thoſe things which he intended ſhould be done after his Death.* Eſpecially ſince amongſt the *Romans* 'twas an uſual thing to give Judgments and Characters of particular Perſons in theſe laſt Inſtruments [2]. As appears from frequent Inſtances in *Tacitus*. *Add.* leg. 1. ſ. 38. *D. Depoſiti*, l. i. ſ. 5. *D. ad L. Cornel. De Falſis.*

Now tho' the Reaſons here alledg'd, and others the like highly recommend to moſt Nations this way of final Diſpoſal, yet we cannot hence evince, that ſuch Teſtaments do naturally flow from the *Propriety* of things, and conſequently are preſcribed by the Law of Nature. For tho' we ſhould ſuppoſe, that by the common Conſent of Mankind ſuch a Force was granted and affixed to *Property*, as that a Perſon might conſtitute whom he pleas'd to poſſeſs his Goods after his Deceaſe; yet that this ſhould be done in ſuch a particular manner, whereby both the Teſtator's Will ſhould remain ambulatory or changeable during his Life [3], and the *Right* of the Heir not begin 'till the Teſtator's Death, and the Party who is Heir not know ſo much 'till then; all this is invented and eſtabliſh'd by poſitive Ordinances. For otherwiſe, in transferring *Right* from one to another, according to the regular Courſe, it had been neceſſary that the Conſents of the two Parties ſhould exiſt together at the ſame time [4], and, as 'twere, meet and unite: From which Union the Tranſlation of Right is conceiv'd to ariſe. But now in the Caſe before us, 'tis ſo far from being neceſſary, that the Conſents of the Teſtator and of the Heir ſhould be united; that there is allow'd an Interval of Time, even between the Death of the former, and the Entrance of the latter; the Law, in the mean while, ſupporting the Heir's *Right*, which might otherwiſe ſink.

VII. It is wont likewiſe, with great Pains and Labour, to be diſputed; Whether the Heir by Will can with a ſafe Conſcience enter upon the Inheritance, when the Will was defective in any Point or Form required by civil Ordinances? As likewiſe, Whether the Heir at Law, or he who was to ſucceed in caſe the Party had died inteſtate, can honeſtly overthrow ſuch a Will, upon failure of theſe Formalities, tho' he is aſſur'd that the Teſtator ſeriouſly deſign'd to bequeath his Goods to the Perſon there ſpecified? Thoſe who take the negative ſide of both Queſtions, rely chiefly on the Hypotheſis formerly mention'd [1], that the making of Wills is a Precept of the Law of Nature. Whence they conceive that he, who overthrows a Will thus defective, may indeed defend his Proceeding in outward Cogniſance, or in civil Courts, but not in the inward Judicature, or in the Court of Conſcience.

For the thorough Underſtanding of theſe Matters we ought beforehand to obſerve, that national Laws are ſcarce in any Point more careful, or more ſtrictly exact in requiring certain Forms and Ceremonies, than in Teſtaments; as well to prevent the many Frauds and Juglings which might creep into thoſe written Inſtruments, as to cut off thoſe moſt grievous Contentions, which Avarice would have rais'd upon the Caſe; ſcarce any thing being gotten with leſs Pains than a rich and plentiful Inheritance. Hence, inaſmuch as every Perſon of competent Years, and not ſtupidly rude and ignorant, is preſum'd either to have known himſelf, or to have been able to learn from more ſkilful Heads, after what manner the Laws of his Country command Teſtaments to be made; no one is ſuppoſed to have expreſs'd his ſerious Reſolution in ſuch a way as he knew would not hold good againſt thoſe who ſhould oppoſe it in Court; eſpecially conſidering that Men are allowed ſo vaſt a Time for the ſettling this Buſineſs. When therefore a Teſtament is found diſagreeable to the civil Conſtitutions, 'tis eaſily preſum'd that there hath been ſome fraudulent Contrivance, or that the Teſtator either was not well in his Wits, or elſe drew up the Inſtrument negligently and haſtily, and more by the Inſtigation of others, than by his own free Motion: So that the only End and Deſign of thoſe Forms was, that a forged Teſtament ſhould not be ſet afoot inſtead of a true one; or a ſudden and unadvis'd Impulſe be admitted for a deliberate Reſolution: Eſpecially ſince, without any ſuch Act, the Law calls to

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[a] *Joſephus* Antiq. *Jud.* l. xvi. c. 8.

[b] In *Anton. p.* 942. *Dio Caſſ.* lib. l. calls this Act of *Cæſar*, *A moſt unjuſt Proceeding.*

Mr. Barb. *NOTES* on §. vi, vii.

[2] See Mr. *Thomaſius*'s Diſcourſe, already quoted, *De Captatoriis Inſtitutionibus*, §. 19. You'll find in the following Paragraphs many curious things about the Cautions that the *Romans* took to hinder Men from being put into Wills.

[3] I own, that a wiſe Man ought to diſpoſe of his Goods, and ought not to change his Will raſhly or out of an Humour, as they do, of whom Mr. *de la Bruyere* ſpeaks in a pleaſant Railery in the Place I referred to above. "A peeviſh Man as long as they live "puts them into his Will, they appeaſe him, and tear their Draught, and throw it into the Fire; they have as many Wills in their "Cheſt, as Almanacks on their Table; they may count them by the Year." But it doth not follow from hence, that they may not by a natural Right diſpoſe of their Goods in caſe of Death, but in an irrevocable manner. On the contrary, as upon the moſt mature Deliberation 'tis eaſy to miſtake in the choice of his Heirs, or ſuffer himſelf to be deluded by ſome crafty Fellow, or change one's Mind, ſo alſo a thouſand unforeſeen Caſes happen, from which great Inconvenience may ariſe, if the diſpoſals of our Goods, which we have once made, muſt remain unchangeable. It is very natural, that no Man ſhould tie his own Hands, and that Death alone ſhould fix a Teſtator's Will entirely. Without this the Right of Property will be limited where it ought to have the greateſt Liberty, I mean, by the Diſpoſal of his Goods for a time, and ſo be inevitably ſtript of them through the ſad Conſequences of the natural Condition of Mankind.

[4] See what is ſaid on §. 2. n. 1. and §. 4. n. 2.

[1] I do not ſee how ſuch a Conſequence can be drawn from hence in reſpect to the firſt Queſtion; for whether the Power of making a Will proceed from natural Right, or only from civil, as it only is a bare Permiſſion in reſpect of the Teſtator, the Forms requiſite are alſo an Advantage to thoſe who might otherwiſe pretend to his Goods, ſo that it belongs to them to renounce it, and they are thought to do ſo, when they do not require the diſannulling the Will.

the Inheritance the next of Kin, thoſe who are ordinarily ſuppos'd to have ſtood faireſt in the Opinion and Wiſhes of the deceas'd. But though it may ſo happen, that one who goes about to declare his Mind in this Matter, upon ſerious thoughts and mature deliberation, may miſtake as to the uſual Forms; yet Courts of Judicature have no other means to be inform'd what was the Intention of the deceas'd, than by theſe Inſtruments. And ſince 'twas at firſt allowable for the civil Authority to put this power of making Wills under ſuch Rules, as ſhould render it more ſerviceable to the publick Good, there's no need to recede from the common Decrees, for the ſake of one or two private Perſons; ſince if ſuch a Precedent were once admitted, endleſs Cheats and Quarrels would ever be ſtarting up.

Again, He who is balk'd of an expected Inheritance upon a Failure in the Writings, cannot complain of hard Uſage; For, neither can he plead the Prerogative of Blood and Birth (becauſe then he would have ſucceeded without Will) nor can any Man by Teſtament acquire a Right which ſhall hold good, at leaſt in caſe of Oppoſition, unleſs it be ſquar'd according to the Statute. Wherefore ſuch a Perſon muſt attribute his Diſappointment rather to his own Misfortune, than to any Injury of others. But, notwithſtanding all this, if the Will be not call'd in Queſtion, then the nominated Heir may fairly enter upon the Poſſeſſions. For the Flaw which the civil Ordinances ſuppoſed upon defect of Formalities, doth in this caſe vaniſh (it being taken for granted that the Teſtator ſeriouſly deſign'd this Perſon for his Heir) and really the Goods belong to him rather than to any others, after thoſe, who according to the general Courſe of the Law would have ſucceeded by Birth, acquieſce in his Claim, and tacitly wave their own *Right*. Becauſe a ſerious Purpoſe not declared with due Solemnity is ſo far only adjudg'd by the civil Laws inſufficient to transfer *Right*, as it ſeems to require that others ſhould be excluded, who might challenge a Right to the ſame thing upon another Bottom. Therefore, if the Buſineſs be not brought into Court, the want of thoſe ſolemn Forms requir'd by poſitive Statutes, doth not in the leaſt affect or impair it, provided it hath all Conditions beſides, which otherwiſe, and according to the general Law of Nature, are ſufficient to conſtitute a *Right*. So that the Failure in point of Form ſeems to prejudice the Heir by Will only, if he is oppoſed by thoſe whom the Law would have advanc'd to the Succeſſion, in caſe the Party had died without Will. But when theſe are ſilent, and forbear to plead their Title, then for the Teſtator to have any way ſignified in earneſt whom he intended for his Heir, is judg'd ſufficient to transfer the Property. And this ſome Nations which were either unacquainted, or diſguſted with the ſcrupulous Exactneſs of the *Roman* Law, have thought enough to make a Will perfectly Valid. After all, 'tis certain beyond Diſpute, that they who receive any thing by Virtue of a Will, which they know to be forg'd, are really guilty of a Sin, though they were not themſelves concern'd in the Cheat [2]. Hence *Tully* juſtly cenſures the Act of *M. Craſſus* & *Q. Hortenſius*, who in the Caſe of a forg'd Will, becauſe they were not conſcious to themſelves of any ſhare in the Cheat, did not refuſe a ſhare in the Advantage. *De Offic.* l. iii. c. 18. Add. *Valer. Max.* l. ix. c. 4. ſ. 1. For, in the firſt Place, the Teſtator did not intend that his Goods ſhould come to them; and then, the ſame Goods were already aſſign'd by the Laws to others, upon the not appearing of any legal Teſtament of the deceas'd.

VIII. Nor (as to the ſecond *Queſtion*) doth the Heir at Law, by overthrowing ſuch a defective Will, whatever Aſſurance he may have that 'twas the ſerious Intention of the deceaſed, properly do any Injury either to the Teſtator himſelf, or to the teſtamentary Heir. Not to the former, becauſe he had no Right of beſtowing his Goods by his laſt Diſpoſal on any others than the natural Heirs, unleſs he had obſerved the Form preſcribed by the Laws of the Country. Not to the latter; becauſe no Right which ſhall hold good againſt the natural Heirs can be conferr'd on him in any other way, than by a Teſtament fram'd as the civil Conſtitutions direct. Nevertheleſs Perſons, who have courted the Fame of extraordinary Humanity, have thought it more generous to ſtick cloſe to the Will of the deceaſed, though not exactly expreſs'd according to the Forms of Law; either to avoid the Imputation of Avarice, or becauſe tender and compaſſionate Minds are ſo ſenſibly affected with the Thoughts of Death, as not to ſuffer that what a Man intended for his laſt Appointment ſhould be intended in vain [1]. *Pliny*, Lib. iv. Epiſt. 10. *You are wont moſt religiouſly to obſerve the Wills of the deceaſed; the bare Underſtanding of which (however it be expreſs'd) is to a good Executor the ſame as the niceſt Form of Law.* Idem, Lib. ii. Epiſt. 16. *I have fix'd it as a kind of private and peculiar Law to my ſelf, to defend a Will as perfect, though deficient in ſome legal Point.* Idem, Lib. v. Ep. 7. *This Teſtament, if you regard the Law, is null; but if you conſider the Intention of the deceas'd, is firm and valid. As for my Part (though I fear the Men of my own Profeſſion will not reliſh very well ſuch a Declaration) I am more ſwayed by the Teſtator's Intention, than by any exactneſs of Law.* He that will follow this Example, ought certainly to be applauded for a noble and bountiful Spirit. For the ſame Reaſon thoſe who deſire the Character of great Benevolence, are careful to perform the laſt Commands or Requeſts of their Relations or Friends, though ſomewhat burthenſome to themſelves. On which occaſion we may

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Mr. Barb. *NOTES* on §. vii, viii.

[2] The Story is this; In the Time of *Cicero* certain Men brought from *Greece* to *Rome* a forged Will of *L. Minutius Baſilus*, who left a great Eſtate; and that they might make it of Force the more eaſily, they made *Marcus Craſſus* and *Q. Hortenſius*, two Men of the greateſt Reputation at that time, Heirs with them. Theſe Men miſtruſted that the Will was forg'd; but becauſe they were not concern'd in the Forgery, they thought they might take the Advantage. But *Cicero* blames them with Reaſon for their Compliance, by which Means they became not only Favourers and Defenders, but Complices in the Injuſtice, *De Offic.* l. iii. c. 18. See alſo *Valerius Maximus*, l. ix. c. 4. §. 1. To this we may add the excellent Sentence which *Cicero* immediately ſubjoins, *Mihi quidem etiam veræ hæreditates non honeſtæ videntur, ſi ſint malitioſis blanditiis officiorum, non veritate, ſed ſimulatione quæſitæ, i. e.* To me thoſe real Inheritances ſeem not honeſt which are gained by fawning Courtſhips and Attendance, and not by fair Dealings.

[1] The Latin is, *Religioſiſſime ſoles cuſtodire defunctorum voluntatem, quam bonis hæredibus intellexiſſe pro jure eſt. Neque enim minus apud nos honeſtas, quam apud alios neceſſitas valet.* Again, *Ego propriam quandam legem mihi dixi, ut defunctorum voluntates etiamſi jure deficerentur, quaſi perfectas tuerer.* And again, *Hoc, ſi jus aſpicias, irritum eſt, ſi defuncti voluntatem, ratum & firmum eſt: mihi autem defuncti voluntas (vereor quam in partem Juriſconſulti, quod ſum dicturus, accipiant) antiquior jure eſt, utique in eo, quod ad communem patriam voluit pervenire.*

take notice of that irregular Will in *Lucian* [a]; *where a poor Man bequeaths to one of his rich Friends his Mother to keep, and to another his Daughter to match her off, and to give her a Portion.* Yet ſtill on the other hand he is not to be cenſur'd, who doth not refuſe an Advantage allow'd him by the Laws of his Country [2].

The *Queſtions* which remain are to be determined by the Cuſtoms and Ordinances of particular States [3]: As how far a Man may be authoriz'd to divide his Eſtate amongſt many, either all Co-heirs, or ſome Heirs, and others Legatees. As likewiſe, Whether an Inheritance paſſeth down with a full conveyance of *Right*; or whether under the nature and burthen of a *Truſt?* On which Points the Civilians diſcourſe at large [4]. But this the Law of Nature manifeſtly requires, *That the Burthens and Debts incumbring an Eſtate ſhall lie on the Heir* [5], *by whatever Means he ſucceeds:* Yet not beyond the Value of the Inheritance, nor ſo as that he ſhould be bound to make up the Deficiency out of his own ſeparate Fortunes, unleſs he hath laid a particular Obligation on himſelf to that purpoſe.

IX. We uſually diſtinguiſh from Teſtaments, *Donations in caſe of Death*; by which both Parties living and conſenting [1], one transfers on the other a Right to his Goods, if he chance to die. Of theſe there ſeem to be two kinds eſpecially remarkable.

One [2], When a Man conceiving himſelf to be under a probability of mortal Danger, ſo grants a thing to another, as not to make it his immediately upon his acceptance, but only if the Danger really proves mortal, as he expects: Or, when a Man makes his own Death, which he apprehends to be near, on account of the preſent Danger, the Condition of his Grant; ſo that if he eſcape the Danger, the Grant is void [3]. See an Example in *Homer*, Odyſſ. lib. xvii. ver. 78, &c. It may not be altogether improper to rank under the ſame Head the Act of King *Philip* in *Livy*, lib. xxxii. c. 38. who finding himſelf under a neceſſity of engaging with the *Romans* in Battle, delivered the City *Argos* to *Nabis*, *as 'twere to hold in truſt; to be reſtored in caſe he got the Victory, but to be kept, if he proved unfortunate.*

Add. *Diodor. Sic.* lib. xv. c. 19. p. 341. C. Ed. *Rhodom.* Where he ſpeaks of *Amyntas* his Gift to the *Olynthians.*

Thus *Hercules* ſpeaks in *Euripides*; *Alceſt.* ver. 1020, &c.

Γυναῖκα δὲ μοὶ σῶσαι λαβὼν
Ἕως ἂν ἵππȣς δεῦρο Θρήϊκας ἄγων
Ἔλθω, τύραννον Βιϛόνων κατακτανῶν·
Πράξας δ᾽ ὃ μὴ τύχοιμι, νοϛήσαιμι γὰρ
Δίδωμι τὴν δὲ σοῖσι πρόσπολον δόμοις.

With you I leave the Dame, to be reſtor'd
When I return, and lead in Triumph home
The *Thracian* Steeds, when firſt the Tyrant's Fate
This Hand hath ſeal'd. But if my Wiſhes fail
(Which Heav'n avert!) then keep her as your own:
Add a new Honour to your Family.

The other, When any Perſon makes over to another his Poſſeſſions after his Death, reſerving to himſelf in the mean time the Poſſeſſion, and the full Uſe and Profits; but in ſuch a manner, that the Donation ſhall, before his Death, be revocable on ſome particular Cauſe; as if the other Party ſhould afterwards offer ſome ſignal Injury; or if he himſelf, being childleſs when the Grant was made, ſhall afterwards have Iſſue of his own.

But, if the Donor made his Grant reverſible, not on any external Condition, but meerly of his own Pleaſure, then the Grantee ſhall acquire no *Right*, ſo long as the Donor retains a natural Ability to change his Mind; that is, ſo long as he continues Maſter of his Reaſon. For as, on the one ſide, he is not under any *Obligation* who may releaſe himſelf, when he pleaſeth, without any Payment or Performance; ſo on the other ſide, a bare Hope, which may be taken away purely at another's Fanſy, cannot come under the Name of *Right.* The *Right* therefore of the Grantee ſhall commence only upon the Donor's Deceaſe; and conſequently this Act approacheth near to the caſe of a Teſtament, ſtrictly ſo call'd.

But, when a Perſon moved with the Thoughts of any Danger which threatens his Life, ſo grants

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[a] In *Toxar.* p. 47. t. 2. Edit. *Amſt.*

Mr. Barb. *NOTES on* §. viii, ix.

[2] See Mr. *Hertius*'s Diſcourſe, *De Colliſione legum*, Sect. 3. §. 2. in Tom. i. of his Comments and Opuſc. Mr. *Buddeus* ſeems to be of a contrary Opinion in his Treatiſe, *De Teſtamentis Summor. Imperat.* c. 1. §. 8. but I do not ſee that he has anſwered our Author's Reaſons. Another thing in queſtion is, Whether he that has diſannull'd a Will can in Conſcience make void all the Legacies? And whether one may always in Conſcience diſpenſe with the Payment of ſome Legacies of a Teſtator, which are null in Law, tho' the Will is otherwiſe valid in itſelf? To this I anſwer, That if a Teſtator has given any Legacies for juſt Cauſes, as for an acknowledgment of ſome Services done him to procure ſome Advantage to Society, *&c.* 'tis not only Knavery but Injuſtice not to diſcharge them. The Reaſon is, becauſe he knows it to be the Will of the Dead, tho' there is ſome defect in the Form, and his Will is ſo reaſonable, that ſometimes the Perſons concerned have an imperfect, if not a perfect Right, to require the Gifts. Whereas, when he that ſucceeds a Perſon inteſtate, makes void his Will, he may ſuppoſe that the Teſtator was ſurprized, or that there was ſome Fraud in making the Will; and ſo much the more, if the Teſtator labours to diſinherit the lawful Heir, it is very hard to obſerve exactly all the neceſſary Formalities; ſo that the Heir at Law may look upon it as a thing morally impoſſible, and by conſequence count that Act null which is not agreeable to Law, by virtue of which he has a Right to claim the Succeſſion, reſerving to himſelf (as I have ſaid) the Execution of all thoſe wiſe and equitable Diſpoſals which may be found in a Will ſo made void.

[3] See about the Subject of Succeſſions, as well by Law as Will, the ſecond Part of Mr. *Daumat*'s Civil Laws in their Natural Order, and the Interpreters of the *Digeſts*, l. xxviii. to xxxix. excluſive, or upon the *Inſtitutes*, l. ii. from t. 10. to the End.

[4] This is when the Heir is obliged to another, either at the end of a certain Term, or in ſome Caſe, to give up either all the Inheritance, or Part of it only. See the *Inſtitutes*, l. ii. t. 23, 24. and the Interpreters upon the *Digeſts*, l. xxxvi. t. i. *ad Senatus conſult. Trebellian.* Moreover, a Feoffment in truſt is often odious, becauſe it is uſed to evade the Law, or to deprive the lawful Heirs. See an excellent Paſſage to this Purpoſe in Mr. *de la Bruyere*'s Characters, in the Chapter, *Of certain Cuſtoms*, printed at *Bruſſels* in 1697. The Character begins thus: " The Law which forbids Murder, does it not comprehend in it the Prohibition of " a Sword, Poiſon, Fire, Water, Treachery, open Force, and all the means by which Murder may be effected?

[5] See the following Chapter, in the laſt Section.

[1] *Mortis cauſa donatio eſt, quæ propter mortis fit ſuſpicionem —— cum magis ſe quis velit habere, quam eum qui donat, magiſque ei cui donat, quam hæredem ſuum*, Inſtit. l. ii. t. 7. §. 1. See the Interpreters upon this Title, and upon that of the *Digeſts*, which is quoted in the following Note.

[2] *Tertium genus eſſe donationis ait, ſi quis periculo* [*mortis*] *motus non ſic det, ut ſtatim faciat accipientis, ſed tunc demum, cum mors inſecuta*, Dig. l. xxxix. t. 6. *De mortis cauſa donat.* &c. leg. 2.

[3] *Aliam eſſe ſpeciem mortis cauſa donationum ait, cum quis imminente periculo commotus ita donat, ut ſtatim fiat accipientis*, ib.

a thing, as to make it immediately upon acceptance belong to the other Party, and doth not recal it, upon eſcaping the Danger, then the Promiſe ſhall be rather put in the Claſs of ordinary Donation [4], or ſuch as are made without any regard to Death. Though in caſe the Grant was very large, and ſuch as will weaken the Donor's Eſtate, much more if it comprehend the whole Poſſeſſion, it ſhall be preſum'd to have been made only upon his preſent Proſpect of Death, and not to hold good, unleſs he ſo miſcarried.

That kind of Grant likewiſe, by which a Man transfers Property on another, without the Power of retracting, yet ſo as to enjoy the Uſe and Property during his own Life [5], is to be reckon'd amongſt the ordinary Donations, or ſuch as are made between living Parties.

Mr. BARB. *NOTES on* §. IX.

[4] *Ubi ita donatur mortis cauſa, ut nullo caſu revocetur, cauſa donandi magis eſt, quam mortis cauſa donatio, & ideo perinde haberi debet, atque alia quævis inter vivos donatio,* Ibid. leg. 27.

[5] See what is ſaid, l. v. c. 4. §. 1. n. 1. following, concerning Gifts among the Living.

CHAP. XI.

Of Succeſſions to Perſons who die inteſtate.

I. *Succeſſion to Perſons that die inteſtate depends upon a Preſumption of their Will.*
II. *Yet as it is agreeable to Reaſon.*
III. *Children are preferred before all others.*
IV. *Parents are to maintain their Children.*
V. *What is meant by Maintenance.*
VI. *Who are to be accounted Children.*
VII. *What more than Maintenance is due to Children, and why.*
VIII. *It is not neceſſary that Goods ſhould always be equally divided among Children.*
IX. *Legitimate Children are to be preferred before natural.*
X. *Provided that the Father owns them.*
XI. *Or does not diſinherit them.*
XII. *Of the Right of Repreſentation.*
XIII. *Parents muſt ſucceed for want of Children.*
XIV. *And for want of them the neareſt Relations in their Order.*
XV. *Whether Friends may be preferr'd before Kindred?*
XVI. *Or Benefactors before Relations?*
XVII. *The Order among Kindred.*
XVIII. *The Civil Laws allow a larger Power of diſpoſing Eſtates.*
XIX. *The Heir of the deceaſed, how far he is obliged to pay his Debts.*

ACcording to the diſpoſal of the Law of *Nature*, without any particular expreſs Act of the former Lord, the Properties of things are ſaid to paſs in *Succeſſions to inteſtates* [1]. For Property having been at firſt endued with ſuch a Force and Power, as that by virtue of it a Man was enabled not only to do what he pleas'd with his Goods during his own Life, but likewiſe effectually to transfer them upon others after his Death; it did not ſeem probable, that if a Perſon was found to have made no Settlement of his Goods, whilſt he lived, he was therefore willing they ſhould after his Death become, as it were, derelict, and lie free to any that would take poſſeſſion of them [a]. In this caſe then natural Reaſon ſuggeſted, That Men ought to follow the *preſum'd Will* of the deceas'd, or ſuch a Diſpoſal as he might moſt probably be ſuppos'd to have deſign'd. Now in doubtful Matters every one is ſuppos'd to have deſign'd that, which is moſt agreeable both to his *natural Inclination*, and to the Engagements of his Duty [b].

II. The regular Courſe of *natural Inclination* is this, That we ſhould labour to make the moſt plentiful Proviſion for thoſe who deſcend from our own Body, and next to theſe for the reſt who are allied to us in the degrees of Conſanguinity: For nearneſs of Blood commonly uniteth and engageth Mens Minds in a particular Affection; and almoſt all Perſons have this deſire implanted in them, that they eſpecially wiſh well to their own Families, and would have them ſucceed and flouriſh as much as poſſible.

As to natural *Duties*, one of the chief of them is, *That we take due Care for the maintenance of thoſe whom Nature hath enjoin'd us to cheriſh with a peculiar Concern and Regard; as likewiſe, that we ſhew our ſelves grateful towards our Benefactors.*

Now altho' it might ſo happen, that theſe *Preſumptions* ſhould often vary from the real Intention of the deceas'd, yet the Peace and Tranquillity of Mankind required, That no particular Conjectures ſhould be eaſily admitted againſt theſe common Rules; ſince by this means a Door would be opened to endleſs Contentions. And therefore the preſent Affair in the Intentions of the deceas'd is conſider'd, not ſo much according to what it was, as according to what it ought to have been, and agreeably to the Rules of *Duty* [1]. Amongſt which one of the firſt Rank is this; *That no Man give occaſion to* Ruptures and Quarrels *amongſt others.* Hence it is expedient for the common Peace, that ſome general Method ſhould be follow'd in this Buſineſs, though the Intention of ſome few ſhould happen to be neglected, rather than that, by endeavouring to ſatisfy the Deſire of every private Perſon, we ſhould involve our ſelves and others in endleſs Difficulties.

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[a] *Pindar. Olymp.* Od. x.
Πλοῦτος ὁ λαχὼν ποιμένα, &c.
——— Thoſe Riches grieve the dying Man
Which Strangers Hands muſt ſeize ———

[b] Comp. *Grot.* l. ii. c. 7. §. 3.

Mr. BARB. *NOTES on* Chap. XI. §. 1.

[1] As this ſort of derivative Acquiſition is founded upon the tacit Will of the dead Perſon, it is conſequently natural according to the Diviſion laid down above in c. 10. §. 1. n. 1. But becauſe there may intervene divers Diſpoſals of the civil Law, which for the promoting of Peace do or ought to regulate as exactly as poſſible all that concerns Succeſſions to Perſons that die inteſtate, in this reſpect Acquiſition is mixt, ſince it contains as much and ſometimes more of the civil than of natural Right.

Beſides, he who would have his own particular Purpoſe abſolutely obey'd, ought to have expreſly ſignified thus much. Thus nothing is more uſual, than for a Father to love one of his Children with a more ardent Affection than the reſt: And then who doubts but he is willing an extraordinary Proviſion ſhould be made for his Darling's Subſiſtence? Yet if he die inteſtate, they ſhall divide the Inheritance by equal ſhares; not as if 'twere repugnant to the Law of Nature to allot one Child a larger Portion than another, but becauſe there would ariſe infinite Diſputes in Families, if the Father's Affection were to be the Meaſure of parcelling out Eſtates. The ſame Inconvenience would follow, if a Man dying childleſs ſhould leave ſeveral Brothers, to whom he expreſs'd very different degrees of kindneſs in his Life-time.

Again, 'Tis no uncommon thing for a Man at his Deceaſe to leave behind him a Kinſman in ſome remote Degree, for whom he had never any particular Paſſion, and to whom he was never obliged for any Service or Favour; whereas, on the other ſide, he may have ow'd all his Fortunes to the Kindneſs of a Stranger: Who will not ſay, That the deceas'd ſet a much greater Value on his Benefactor in this Caſe, than on his Relation? Yet, becauſe to enter into a Compariſon between the Ties of Blood, and of Gratitude, muſt have occaſion'd many Controverſies difficult to be reſolv'd, it hath been the Judgment of all Nations, that in the caſe of Inteſtates a Kinſman ſhall be preferr'd to a Patron or Benefactor. Eſpecially, ſince if a Perſon on account of a Kindneſs beſtow'd were to ſtand in the Roll of Inheritance, before the Relations of the deceas'd, he might ſeem to have performed the former Act more as a Uſurer, than as a Friend. But if the Benefactor were preferr'd in the expreſs Will of the deceas'd, 'tis but Equity that the ſaid Will ſhould be obeyed.

From all which it appears, that natural Reaſon in deciding the caſe of Succeſſion, upon default of teſtamentary Diſpoſals, regards the Intention of the deceas'd Party, not as it was ſtrictly in itſelf, concerning which there is often very little Aſſurance; but according as it agrees with the common Inclinations of Mankind, and with the Meaſures of Duty, and ſo as that no Fuel may be adminiſtred to Controverſies and Contentions [a].

This Judgment of natural Reaſon is ſeconded in all States by civil Ordinances; as well that the Avarice of ſome Perſons might not ſtir up deſperate Quarrels amongſt thoſe who ſeem'd to have equal Reaſon on their ſide; as that this whole Affair might be wiſely accommodated to the publick Safety.

III. In the Succeſſion therefore to *Inteſtates*, by the guidance of Reaſon, and by the conſent of all the known Kingdoms, Children have the Preference of all others, even of Parents themſelves [1]. See 2 *Corinth.* xii. 14. *Rom.* viii. 17. *If Children, then Heirs. Ariſtot. Nicom.* viii. 14.

Parents have a more certain knowledge that ſuch Perſons are their Children *, *than Children can have that ſuch are their Parents. And in this caſe there ſeems to commence a ſtronger Relation from the Cauſe to the Effect, than from the Effect to the Cauſe.*

Iſæus, Orat. V. †.

The Law it ſelf aſſigns over to the Son the Goods of the Father, and allows not him to make a contrary Will who hath legitimate Iſſue. Idem. Orat. ii. *If a Man deceaſing leave Daughters lawfully begotten, he can give away nothing, nor make any diſpoſal without their Conſent.* And again, a little after, *The Law ſays, a Man ſhall diſpoſe of his Goods at his own Pleaſure, if he leave no legitimate Sons; but if he leave Daughters, their Pleaſure is to determine his Diſpoſal, and not his own. Therefore with their Daughters Conſent they may*

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[a] Add *Bœcler. ad Grot.* l. ii. c. 7. §. 13.

Mr. BARB. *NOTES* on §. II, III.

[1] This may ſuffice in my Judgment to anſwer the Difficulties which Mr. *Bynkerſhoek*, Obſerv. l. ii. c. 1. propounds, where he ſays, " That Fathers and Sons do often not love each other, and Brothers rarely live amicably, much leſs other Relations: That " they alſo who are neareſt related by Blood moſt eaſily quarrel, and conceive more implacable Hatred againſt each other than Stran-" gers or indifferent Perſons. *The ſame Author alſo maintains*, That to prove that the Laws are not founded upon the Preſumption " of the Will of the Dead, 'tis ſufficient to conſider that a Wife is excluded from ſucceeding to her inteſtate Huſband, although " ſhe muſt be ſuppoſed dearer to him than a Parent, and quotes thereupon, *Gen.* ii. 24. " But beſides that there are diverſe degrees of Affection, and tho' he may love his Wife with much Paſſion, as it ſometimes happens, though not often, it doth not therefore follow, that he would have her to be the Heir of all his Goods. It only proves, that in ordering Succeſſions to inteſtate Perſons, Regard is had to the Intereſt of the State, and the Preſervation of Families, as well as the ordinary Inclination of private Perſons, who nevertheleſs often agree in their Deſires with the Intentions of the Lawyers. For who is there that does not deſire that his Eſtate ſhould go to his Family? Moreover, Mr. *de Bynkerſhoek* furniſhes us with Arguments that the *Roman* Law engages us to follow, if not altogether, yet at leaſt ſo far as the publick Good permits the Will and Affection of the dead Perſon, as appears from a whole Chapter of the ſame Work, l. i. c. 19. where the Author explains the Law very well, which ſays, That a Father diſcharges his Duty as he ought when he makes his Son his Heir. *Perinde habebitur atque ſi ſua manu pater tuus te hæredem ſcripſiſſet*, FUNCTUS DULCI OFFICIO, Cod. l. ix. t. 23. *De his qui ſibi adſcribunt in teſtam.* leg. 1. We alſo know, that Wives are not altogether excluded from ſucceeding to the Goods of their Huſbands, and that the Laws call us to them, when the Relations by Father's and Mother's ſide are wanting. *Maritus & Uxor ab inteſtato ſibi invicem pro antiquo jure ſucedunt, quoties deficit omnis parentum liberorumve ſeu propinquorum legitima vel naturalis ſucceſſio, fiſco excluſo*, Cod. l. vi. t. 18. leg. 1. *Unde Vir & Uxor.* See the ſame Title in *Digeſt.* l. xxxviii. t. 11. and the Interpreters upon it.

[1] *Cum ratio naturalis, quaſi lex quædam tacita, liberis parentum hæreditatem addiceret, velut ad debitam ſucceſſionem eos vocando, propter quod & in jure civili ſuorum hæredum nomen iis inductum eſt, ac ne judicio quidem parentis, niſi meritis de cauſis ſummoveri ab ea ſucceſſione poſſunt*, &c. Dig. l. xlviii. t. 20. *De bonis damnatorum*, leg. 7. princ. See alſo Mr. *Bynkerſhoek*'s Obſervations, l. i. c. 19. above quoted.

* Μᾶλλον ἴσασιν οἱ γονεῖς τὰ ἐξ αὐτῶν, ἢ τὰ γεννηθέντα, ὅτι ἐκ τούτων καὶ μᾶλλον συνῳκείωται τὸ ἀφ' οὗ τῷ γεννηθέντι, ἢ τὸ γεννώμενον τῷ ποιήσαντι.

† *Iſæus*'s Greek is, Ὁ νόμος αὐτὸς ἀποδίδωσι τῷ υἱεῖ τὰ τοῦ πάτρος, καὶ οὐ διαθέσθαι ἐᾷ ὅτῳ ἂν ὦσι παῖδες γνήσιοι. Orat. 5. And again, Οὔτε γὰρ διαθέσθαι οὔτε δοῦναι οὐδενὶ οὐδὲν ἔξεστι τῶν ἑαυτοῦ, ἄνευ τῶν θυγατέρων, ἐὰν τὶς καταλιπὼν γνησίας τελευτᾷ.

give and bequeath, or appoint any Method of Succeſſion. But without ſuch Approbation they cannot adopt an Heir, or put their Fortunes into other Hands.

Add. Lib. xlviii. tit. 20. Leg. 7. *Princip. D. De bonis damnator.*

Julian in Cæſarib. ¶. *It is the legal Cuſtom to let the Sons ſucceed to what the Fathers poſſeſs; and this is a Rule which we all deſire to ſee obſerved.*

Thus *Valerius Maximus* obſerves, Lib. vii. C. 7. Sect. 2. that the *procreationis vinculum, the Band of Generation,* is the ſtrongeſt and cloſeſt Tye which can affect Mankind.

That which ſo highly favours the Childrens Claim is, not only the Obligation laid by Nature on their Parents to provide for their Maintenance and good Inſtitution, but likewiſe that ſtrong and vehement Affection, which can only be extinguiſh'd (and that very rarely) either by the enormous Wickedneſs of the Children, or by the unuſual Barbarity of the Parents.

IV. As to that Maintenance, which Parents owe their Children [1], it hath been doubted by Authors, whether the Obligation to pay it were perfect or imperfect, or whether it belong'd to expletive or to attributive Juſtice [a]. 'Tis the Opinion of ſome, *That Parents do indeed owe their Children Maintenance, but then 'tis by the latter kind of Juſtice only, and not by the former; ſo that Parents would act very inhumanly, ſhould they deny them this Aſſiſtance; yet Children have no Right to challenge it from them againſt their Wills, this being the proper Effect of expletive Juſtice: though civil Statutes may inveſt Children with a full and perfect Right in this Matter.* But we are rather inclined to think, That *Parents* lie under a *perfect Obligation* to maintain their *Children*, ſo long as they are unable to maintain themſelves; and this Duty ſeems to be laid upon them, not only by Nature itſelf, but by their own proper Act, in bringing them into the World [2]. For they would be in the higheſt manner injurious to their Iſſue, ſhould they have given the Children Life, for no other Reaſon, but that they might afterwards ſee them periſh. By the *Act of Generation* therefore they ſeem to have voluntarily bound themſelves, to endeavour as far as in them lies, that the Life which they have beſtowed ſhall be ſupported and preſerved. And thus the Children will have a *perfect Right* of receiving Maintenance from their Parents. Yet this Right is hinder'd from producing all its Effects by the natural Weakneſs of Children under that Age, in which they cannot provide for their own Support. And conſequently they do not ſo much want Right as Power and Strength to execute that Right; only in ſome Points the civil Ordinances help them out, and compel their *Parents* to keep and feed them, upon refuſal. Though, through the wiſe Ordering of the Creator, the natural Affection of *Parents* is of ſo great Force, as that, commonly ſpeaking, they joyfully undertake and diſcharge their *Duty*, without the Compulſion of the civil Government.

V. Not only thoſe things which are neceſſary for the preſervation of natural Life fall under the Term of Maintenance or *Alimony*, but thoſe likewiſe which fit and prepare a Man for a ſocial and civil Life. And the former are due, 'till ſuch time as the Children are able to ſupport themſelves by their own Induſtry. As for the Meaſure of what ought to be ſpent on Education, in training up Children for a civil Life [1], it is to be ſtated according to the Fortunes of the Parents, and the Genius and Capacity of the Children. Thus much at leaſt is required, *That they be enabled to become honeſt and uſeful Members of human Society.* But this is a general Rule in the whole Affair; *That as Nature doth not command Parents to pinch and defraud their own Inclinations, and to make themſelves miſerable for the ſake of their Iſſue; ſo a Parent placed in a high and wealthy Condition is, no doubt, in fault, if he do not take care that his Children be brought up after the moſt exact and accompliſh'd Manner of Inſtitution.*

VI. Under the general Name of Children [1] are comprehended not only thoſe of the firſt Degree, but thoſe too of the ſecond, &c. whether deſcending from Sons or Daughters; in caſe their nearer and more proper Parents are not able to maintain them [2].

Farther, Maintenance is due not to legitimate Children alone; but to natural, and even to inceſtuous Iſſue [3]. For what Reaſon is there that the

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[a] Vid. *Grot.* dict. loc. Sect. 4.

Mr. Barb. *NOTES* on §. iii, iv, v, vi.

¶ His Words are, Παισὶν νομιμὸν ἐπιτρέπειν τὰς διαδοχὰς καὶ τοῦτο ἅπαντες εὔχονται.

[1] Every one almoſt knows, that among the antient *Greeks* and *Romans* 'twas thought that they had a Power to expoſe or ſlay their own Children, and that Chriſtianity had much ado to aboliſh that barbarous Cuſtom, as appears by Mr. *Noodt*'s Treatiſe, *De partus expoſitione & nece apud veteres*, which was reprinted in 1709.

[2] See lib. vi. c. 2. §. 4. following.

[1] See lib. vi. c. 2. §. 6, 12. following.

[1] *Liberorum appellatione nepotes & pronepotes, cæterique, qui ex his deſcendunt, continentur —— Etenim idcirco filios, filiaſque concipimus atque edimus, ut ex prole eorum earumve diuturnitatis nobis memoriam in ævum relinquamus,* Dig. lib. l. t. 16. *De verborum ſignificatione,* leg. 220. See alſo leg. 56. and *Inſtit.* l. i. t. 14. *Qui teſtamento tutores dari poſſunt,* leg. 5.

[2] *Ipſum autem filium vel filiam, filios vel filias, & deinceps, alere patri neceſſe eſt, non propter hæreditates, ſed propter ipſam naturam & leges, quæ & à parentibus alendos eſſe liberos imperaverunt, & ab ipſis liberis parentes, ſi inopia ab utraque parte vertitur,* Cod. l. vi. t. 61. *De bonis quæ liberis in poteſtate patris, &c.* leg. 8. §. 5. See alſo the *Digeſt*, l. xxv. t. 3. *De agnoſcendis & alendis liberis,* leg. 5. §. 1. 5. and leg. 8.

[3] See *Grotius*, l. ii. c. 7. §. 4. numb. 4. and §. 6. and Mr. *Daumat*'s Civil Laws in their Natural Order, Part II. l. i. t. 1. Sect. 2. §. 8. 'Tis certain that a Baſtard has as near a Relation to his Father as a lawful Child; and many among the *Greeks* made no difference between theſe two ſorts of Children, as Mr. *Le Clerc* has obſerved upon *Gen.* xxi. 10. where he alledges this Authority,

Ὁ δὴ νόθος τοῖς γνησίοις ἴσον σθένει	A Baſtard's equal to a lawful Heir,
Ἅπαν τὸ χρηστὸν γνησίαν ἔχει φύσιν·	An honeſt Man is always rightly born.
Soph. in Aleadis apud Stob. Serm. 77.	

The *Egyptians,* as Mr. *Le Clerc* proves in the ſame Place by a Paſſage out of *Diodorus Siculus,* counted none of their Children Baſtards, though they were begotten of their Slaves which they had bought. And we may obſerve, that the Patriarchs of the Old Teſtament had an equal Regard to the Children of their Concubines, as of their lawful Wives, as appears from the Example of *Jacob,* who divided his Goods equally between the Children he had by *Leah* and *Rachel,* and thoſe he had by his two Concubines. The ſame thing is ſtill in uſe among the *Mahometans,* as our Author obſerves below, §. 9.

poor innocent Infant ſhould be ſuffer'd to famiſh for another's Sin? Yet if the latter be left together with the legitimate Iſſue, they ſhall not eaſily challenge to be admitted to equal Shares, unleſs the Parents made expreſs Declaration to this Purpoſe.

In reſpect of theſe ſeveral parts of Maintenance, upon the Parents Deceaſe during the Minority of the Children, the Inheritance is not only theirs, if he died inteſtate, but farther, it cannot rightly be taken from them by his expreſs Will, ſo far as is nececeſſary for the obtaining this End. For it doth not ſeem probable that a Child of theſe Years ſhould be capable of committing any ſuch Offence as might render him unworthy of ſo needful a Support.

VII. Whatever exceeds this Proportion of Maintenance, is due to the Children, when able to provide for themſelves, not ſo much by any expreſs Command of the Law of Nature, as upon this Principle, That, commonly ſpeaking, Parents deſire that none ſhould fare better than their own Children [1]. Therefore 'twas a very ſingular Diſpoſal, that of *Crates* the *Theban*, who lodg'd his Money in the Hands of a Banker upon theſe Terms, *That if his Children proved ignorant, it ſhould be reſtored to them; but if they happen'd to be Philoſophers, it ſhould be diſtributed amongſt the common People*; becauſe Men of that Profeſſion could be in want of nothing. As to what ſome have advanced, That Parents get all for the ſake of their Children, and therefore the Children, even in the Parents Life-time, have ſuch a Right to their Goods, as ſhall be valued againſt them, in other Caſes, beyond the Neceſſaries of Maintenance; this is abſolutely falſe: For, every Man in his Gettings hath firſt of all an Eye to himſelf, and labours chiefly on his own Account. *Horat.* lib. ii. Epiſt. 2. v. 190, *&c.*

> *Utar, & ex modico, quantum res poſcet, acervo*
> *Tollam; nec metuam quid de me judicet hæres,*
> *Quod non plura datis invenerit.*

Juv. Sat. xiv. ver. 136, 137.——*Manifeſta phreneſis*
Ut locuples moriaris egenti vivere fato.

But what remains above his private Neceſſaries, he is willing ſhould paſs to thoſe who are deareſt to him, as commonly, his Children [2] are preſum'd to be. And Children have thus far only a peculiar Title to hope for their Parents Eſtate, as that in caſe of no expreſs Will to the contrary, their Claim is preferr'd to all others; and becauſe it very rarely happens, that Parents are induc'd to lay aſide this ordinary Affection.

It is well enacted by the *Roman* Laws, *That every Parent, who diſinherits his Child, ſhall be oblig'd expreſly to give his Reaſon for ſo doing*; and that ſome certain Cauſes only ſhall be ſufficient to juſtify him in this Proceeding. Nay farther, the ſame Laws gave the diſinherited Children an Action [3], *de inofficioſo Teſtamento*; *Of a Will not made according to natural Affection and Duty.* The Deſign of which was not to bring into Diſpute, Whether or no the Teſtator had a Power of tranſmitting his Goods to others, rather than to his Children, upon juſt Cauſes; but to diſcuſs and examine the Reaſons which mov'd the deceas'd to make a Settlement contrary to the common Inclinations of Mankind. And if, upon ſuch a Hearing, it was diſcovered that the Father thus neglected his Iſſue, either through his own abſurd Fanſy and Humour, or through the fraudulent Intruſion of others, the Inheritance was by publick Authority avowed to thoſe to whom it would otherwiſe have deſcended, had the Father conſulted with Reaſon and Conſcience in his laſt Diſpoſal. And therefore *Cicero* [4] well replies upon *Erucius*, who charg'd his Client *Roſcius* with a Deſign to diſinherit his own Son, *It ought to have been the Buſineſs of the Accuſer, to lay open all the Sins and Vices of the young Man, which might be ſuppos'd able to incenſe the Father to ſuch a height, as that he ſhould once entertain a Reſolution of doing Violence to Nature it ſelf, of baniſhing that Affection which was ſo deeply rooted in his Mind; and, in a word, of forgetting utterly that he was a Father.* 'Tis remarkable under what Colour the diſinherited Children, by the ſame Laws, mov'd for Relief: For it being neceſſary that they ſhould ground their Complaint on a Suppoſition that the Cauſe of their Diſinheritance was unjuſt, they pretended in the Form of the Action, *That their Parents at the time of making ſuch a Will had loſt the uſe of their Reaſon.*

Still, as to other matters, a Father ought ſo to favour his Children, as not to lay aſide his juſt Regard to other Duties. Hence, when he may be judg'd to have made ſufficient Proviſion for his own Family, he is not in the leaſt hindred from imploying his Goods in Acts of Gratitude and Liberality [5], though to the leſſening of his Childrens Fortunes. Thus in caſe a Man hath either receiv'd extraordinary Kindneſſes from another, or is able by a ſeaſonable Beneficence to put ſome great Genius, now ſtrugling with Poverty, into a way of doing great Service; what reaſon is there but that he ſhould be allow'd to deviſe ſome part of his Goods to ſuch excellent Uſes? It's plain, Antiquity highly celebrated the Action of King *Attalus*, who having been oblig'd by his Brother *Eumenes* with very

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Mr. BARB. *NOTES on* §. VII.

[1] This ſhort Story might have been put better in another place.

[2] See Mr. *Thomaſius*'s Diſcourſe, entitled, *De legitima viventis*, c. 3. §. 23, *&c.* publiſh'd and maintain'd by way of Diſputation at *Hall* in 1700, where it appears what we are to think of Legitimacy, or of that portion of Goods, be it greater or leſs, of which according to the Laws and Cuſtoms, Children can't juſtly be deprived by the Authentick Will of their Father. For, as *Grotius* obſerves, l. ii. c. 7. n. 3. Natural Right obliges to give a neceſſary Maintenance to Children, but what is more than that, they have no other Right to than what the Conſtitutions of the civil Laws give them. But if any deſire to know the exact Quota of the Goods that ought to deſcend to Children, and other things which concern their Legitimacy, let them conſult the Interpreters of the *Digeſts* quoted in the following Note, and Mr. *Daumat*'s Civil Laws in their Natural Order, Part II. l. iii. t. 3.

[3] *Inofficioſa querela*, which is when the Diſpoſals of Parents are looked upon as contrary to their Duty. See upon this Subject, *Inſtit.* l. ii. t. 18. and *Digeſt.* l. v. t. 2. *De inofficioſo teſtamento*, as alſo Mr. *Daumat*'s Civil Laws in their Natural Order, Part II. l. 3. t. 2. and the Obſervations of Mr. *de Bynkerſhoek*, l. ii. c. 12.

[4] *Cicero*'s Words are, *Id erat certi accuſatoris officium, qui tanti ſceleris argueret, explicare omnia vitia & peccata filii, quibus incenſus parens potuerit animum inducere, ut naturam ipſam vinceret, ut amorem illum penitus inſitum ejiceret ex animo, ut denique patrem eſſe ſeſe oblivi ſceretur.*

[5] See Mr. *Le Clerc*'s Reflections upon what he calls good or bad Luck in the matter of Lotteries, c. 12. p. 189, *&c.*

ſingular Favours, left his Kingdom to *Eumenes*'s Son, though he abounded in male Iſſue of his own [7].

VIII. Neither doth a Father lie under any Neceſſity of dividing his Goods amongſt his Children in equal Shares; but he may aſſign to one or two ſomewhat above the reſt, as an extraordinary Bounty; either on account of ſingular Merit, or of great and illuſtrious Hopes, or even of particular Affection [a]. So likewiſe in diſtributing Portions, a juſt regard may be had to the Credit of the Family, that it may hereafter retain its Strength and Splendor. If this Intereſt cannot be ſecur'd upon an equal Diviſion of the Patrimony between many Children, the Father may, without any breach of the Law of Nature, deviſe the chief part of his Goods to one, and command the reſt to ſit down contented with ſmaller Portions. Hence the Rights of Primogeniture [1] obtain'd among many Nations, which according to the moſt antient Inſtitution, conferr'd on the eldeſt Son the regal Government of the Family, the domeſtical Prieſthood [2], and double Share of what his Father poſſeſſed, Which double Proportion was deſign'd to defray the charge of Entertainments, and of religious Ceremonies; as *Grotius* conceives [b] [c].

On the contrary there have not been wanting Nations, where the younger Brothers ſucceed to the largeſt Share of the Inheritance, or at leaſt have their Option, to chooſe what part they like.

Which Cuſtom is built on this Principle, *That the elder Brothers have for a long time enjoy'd the Benefit of Education from their Parents; of which the younger being often depriv'd by too untimely a Loſs, they deſerve ſome Conſideration to requite and comfort them under their Diſadvantage.*

Tho' the latter of theſe Inſtitutions ſeems more agreeable to low and mean Families, the former to the great and noble.

So again, when Daughters marry into other Families [3], 'tis not neceſſary that they ſhould receive Fortunes out of their Father's Eſtate equal to their Brothers Shares. For 'tis a very fooliſh Argument to imagine, that a Father muſt needs act contrary to his Duty, in making an unequal diſtribution of his Goods amongſt thoſe whom he hath equally begotten. Therefore *Pliny* [d] ſpeaking of a Lady who had left Two Thirds of her Eſtate to a Nephew, and but One Third to a Niece, calls it, *Honeſtiſſimum Teſtamentum, A moſt honeſt and worthy Teſtament.*

And hence too it may be appointed not only by Statute, but by bare Covenant likewiſe, That Children born in Concubinage, or in ſuch Marriage [4] as is conſtrued good and juſt only in a natural ſenſe, not in the Eye of the Law, ſhall claim no more than neceſſary Maintenance, or at leaſt ſhall be excluded from the main Inheritance [e].

And here, by the way, we cannot but wonder why St. *Auſtin* [f] ſhould paſs ſo ſevere a Cenſure on the *Voconian* Law, by which female Iſſues were incapacitated to receive an Inheritance above ſuch a certain Sum. It's plain the *Spartan* Law was far more grievous, which utterly forbad the giving Portions to Virgins; for this Reaſon, as *Plutarch* tells us [g]; *Leſt ſome ſhould remain unmarried for want of larger Fortunes; and others again be courted for their Riches; but that every Man in ſeeking out a Partner for himſelf, ſhould look wholly into the Manners of the Woman, and make Virtue alone the Rule and Standard of his Choice.* Nevertheleſs, this is a Point which requires great Caution and Prudence, leſt a Father ſhould ſow the Seeds of Envy and Hatred amongſt his Children, if, without very weighty Cauſe, he ſhould ſeem to have treated with unequal Favour thoſe who were equal in Merit and [h] Degree. And the Divine Law of *Deut.* xxi. 17. is grounded on the ſtrongeſt Reaſon; leſt the Father, charm'd with the Enticements of his now *beloved* Wife, ſhould either frame a falſe Cauſe for diſcarding the Firſt-born, the Son of a former *hated* one; or ſhould catch at every little Failing to his diſadvantage. 'Tis indeed altogether the ſafeſt Courſe [5], not

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[a] See *Gen.* xlviii. 22. [b] Add *Deut.* xxi. 17. Of the extraordinary Prerogative of the Firſt-born amongſt the *Japoneſe*, ſee *Bern. Varen.* Deſcript. *Japon.* c. 15. [c] *In locum* Deut. *cit.* [d] Lib. vii. Epiſt. 24. [e] Vid. *Grot.* l. ii. c. 7. ſ. 8. *ſub fin.* & Bœcler. ad d. l. [f] De Civit. Dei, l. iii. c. 31. His Words are, *Ea lege quid iniquius dici aut cogitari poſſit, ignoro, I know not what could be ſaid or thought of more unjuſt than that Law.* The Law he ſpeaks of was made at the Motion of *Cato* the Cenſor, and Enacted, That none ſhould leave a Daughter above five and twenty thouſand Seſterces in Inheritance, as *Paulus Manutius* (*de L. L. Rom.*) ſhews from *Dio. Caſſ.* l. 56. Though *Aſconius Pædianus* (*ad Orat. Cicer. in Verrem de prætura urb.*) reports the thing thus: *Voconius* preferr'd a Law, *That no Cenſus*, i. e. *no very Rich Perſon, ſhould make his Daughter his Heireſs.* He had ſaid before, *the Antients call'd thoſe Perſons Cenſi, who own'd themſelves before the Cenſor to be worth an hundred thouſand Seſterces.* Add *Liv.* Epit. l. xli. *Quintil.* Declam. 264. *Gell.* l. vii. xii. xvii. xx. [g] Apophth. *Lacon.* 227, 228. Edit. *Wech.* [h] See *Gen.* xxxvii. 4.

Mr. BARB. *NOTES* on §. VII, VIII.

[7] The Story in *Plutarch* is of *Attalus Philadelphus*, to whom *Eumenes* his Brother when he died left his Wife and the Crown of *Pergamus*: For although he had ſeveral Children by his Queen, yet he left his Crown to *Attalus* the Son of her firſt Husband, till that Prince came to be of full Age to reign. Neither of theſe Examples is much to our Author's purpoſe.

[1] See upon this Subject Mr. *Buddeus*'s excellent Diſcourſe, intitled, *De Succeſſione Primogenitorum.* It is the third among his *Selecta Juris Nat. & Gen.* to which we may join another Diſcourſe in the ſame Volume, intitled, *De Comp. offic.* §. 31, &c.

[2] It is not certain that Prieſthood was a Right of Primogeniture. See Mr. *Le Clerc* on *Gen.* xxv. 31.

[3] See chiefly the Diſcourſe of Mr. *Perizonius*, *De Lege Voconia*, where he ſhews that that Law fixed at an hundred thouſand Seſterces, which make 2500 Crowns of our money, the Portion of any Woman, whether an only Daughter or Siſter.

[4] Hence it is that Princeſſes and other Women of Noble Families, when they marry into other Families, ſometimes renounce the Succeſſion to a Kingdom, or to the Eſtates of the Families from whence they are deſcended; ſo that neither themſelves nor Heirs can put in any Claim to them. See Mr. *Buddeus*'s Diſcourſe, *De Teſtamentis Summorum Imperantium, ſpeciatim Caroli* II. *Hiſpaniæ Regis*, c. i. §. 39, &c. and c. ii. §. 10, &c.

[5] In general the ſafeſt diſtribution of our Goods when we die is according to the uſage of our Country, in my Opinion. The Laws have better contrived it than we can, and we had better commit a Miſtake by their Direction, than hazard it raſhly by our own Choice. They are not properly ours, ſince a civil Preſcription made without us has deſigned for the good of our Succeſſors. And though we have ſome liberty allowed by them, yet I take it to be the greateſt and moſt apparent Cauſe, why many are deprived of thoſe Eſtates to which their good Fortune entitled them, and common Juſtice would have given them, and ſo we abuſe our liberty without Reaſon to follow our idle and private Fanſy — We take too much to heart our Succeſſions by a Male Iſſue, although we could make our names eternal, and value too much our vain Conjectures of what ſhall be, which fill us with childiſh Hopes———'Tis meer Folly to make extraordinary Choices upon the account of ſuch Imaginations, in which we are ſo often deceived. The pleaſant Dialogue of *Plato* between a Lawgiver and his People (*De Legibus*, l. xi. Tom. 2.) will be a Reputation to this Paſſage. Is it not then, ſay they, lawful for us, when we find our End approaching, to diſpoſe of our

not to recede in this Matter from the Direction and Diſpoſal of the Laws of our Country. Which made my Lord *Bacon* [a] obſerve, That *younger Brothers, tho' otherwiſe commonly fortunate, are ſeldom or never ſo, where the elder are diſinherited.*

Hence it is, that in caſe the Father dies inteſtate, and the Laws of the Land ordain nothing to the contrary, Children ſucceed to the Inheritance with equal Shares: Becauſe, when the Point is doubtful, thoſe who ſtand related to the deceas'd in an equal Degree, are preſum'd to have been equally beloved. Now thoſe likewiſe are accounted *equal* Shares, which, tho' not ſtrictly ſo, becauſe inferior perhaps in Value to the reſt, yet have been taken by any one of the Coheirs, either by his own Choice, with the conſent of his Fellows, or by their Aſſignation, or by the Deciſion of Lots. *Quinctilian's* Obſervation (Declam. v. p. 65, 66. Edit. *Lugd. Bat.*) is not unworthy our Remark. *We have the ſame natural Affection towards all our Children, without any Difference or Degree; yet taking each one of them by themſelves, we commonly find ſome peculiar Reaſon for our Fondneſs, and without breaking the Equality of their Endearment to us, there is ſomewhat again, which by a tacit Inſtinct of the Mind engageth us to ſet our Love deeply upon each in particular, as if he were the only Object of it. One is recommended by his Precedency in Birth; another by the Innocence of Infancy; a third by a ſweet Aſpect, and a Face that invites a Kiſs: Some are eſpecially valued for their honeſt Gravity and ſevere Plainneſs of Temper: In ſome we love their very Misfortunes and Calamities, and embrace with a peculiar Pity a maim'd Limb, or a weak and diſtemper'd Body. But ſtill the general Equality holds good; whilſt whatever any of them ſeems to want to render him amiable in one reſpect, is made up to him by ſome other Advantage above the reſt.*

IX. But we are obliged to add on this Subject, that not only the Laws of particular States, but natural Reaſon itſelf allows more Favour to legitimate, than to natural Children; though the latter partake no leſs of the Father's Blood than the former. For they who owe their Birth to a Man's irregular Luſt, without any ſerious Intention, can on no account enter into compariſon with thoſe who were begotten for the Increaſe and Defenſe of his Family, and upon the deſire of having Heirs to ſucceed him. But if any Perſon is inclined to advance a natural Son to the Station and the *Rights* of legitimate Iſſue, in a ſtate of Nature, he may fairly do it after he hath once taken care that no Injury ſhall thereby accrue to his Children who are properly legitimate, or to any who have obtain'd the next *Right* after them: Under civil Government he muſt proceed in the Affair as the Laws permit and direct [b] [1]. *Ariſtophanes* [c] reports, it was one of *Solon's* Laws, *That upon failure of legitimate Offspring, the Inheritance ſhall be ſhared by the next of Kin: But that a Baſtard ſhall not be deem'd next of Kin, nor any Relation be ſuppoſed between him and the proper Sons.* On the contrary, amongſt the *Mahometans*, as to the point of ſharing the Father's Eſtate, there is no difference obſerved between the Sons of the Wife, the Concubine, or the Servant-Maid.

When a Man is deſirous to raiſe Iſſue rather by a Concubine [2] who hath engag'd herſelf to be true to his Bed, than by a proper Wife, for the Benefit of his Children by a former Marriage, the Sons of the Concubine ſhall, even without [3] any expreſs Will of the Father, be poſtpon'd; and upon receiving moderate Portions, ſhall leave the main Inheritance to the others. Yet in caſe a Man hath therefore taken a Concubine, that he might avoid the Pride or the Expences of a Wife, or will not admit her to his Name and Honour, or for ſome other political Reaſons, or on account of ſome Covenant or Obligation which he lies under; then the publick Ordinances of the Commonwealth are to determine, whether ſuch Children ſhall be admitted to an equality with others born in lawful Wedlock; or whether upon failure of theſe they ſhall exclude the next of Kin. For if the Man were abſolutely free from the Reſtraint of poſitive Laws, I ſee nothing that could be offer'd in prejudice of the concubinary Iſſue in this Caſe; ſince the Cohabiting of their Father and Mother amounted in natural Conſideration to a true Marriage: Eſpecially if the Father in the Buſineſs of their Education, and in his Actions and Expreſſions of Affection towards them, hath never made any Diſtinction. Hence I ſhould be of Opinion, that *Jacob's* Sons, born of his Handmaids, ſhould have ſucceeded to equal Shares with the reſt, even upon ſuppoſition that their Father had made no ſuch expreſs Diſpoſal; becauſe we do not find that he ever treated them in a different manner. But ſtill, if the Father ſhall particularly declare, that he refuſeth to enter into ſolemn Marriage, for this Reaſon, *That what he hath may deſcend to the neareſt of his collateral Kindred* (as ſome political Conſiderations may now and then move a Man to do) then even the concubinary Children in the

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[a] *Eſſay* 7. towards the End.

[b] Vid. l. v. t. 27. l. 6, & 7. *C. De Natural. Lib.*

[c] In *Avibus*, ver. 1660.

[d] Add *Bœcler.* ad *Grot.* d. l. Sect. 8.

Mr. BARB. *NOTES* on §. VIII, IX.

" our Goods as we pleaſe? O God, what Cruelty is this! May we not, according as we find our Family or Friends have been
" ſerviceable to us in our Sickneſs, old Age, or Buſineſs, give them more or leſs, as we think fit?" To whom the Lawgiver replies
in this manner: " My Friends, who muſt ſoon die certainly, it is hard for you to know yourſelves, and what belongs to you ac-
" cording to the Inſcription at *Delphos*. As for me, who make Laws, I hold, that you know not what is good for your
" ſelves, nor what is fit for you to enjoy. Both yourſelves and Goods belong to your Family, as well in preſent as to come, but
" both your Family and Goods belong more to the State. Wherefore, for fear that ſome Flatterers in your old Age, Sickneſs,
" or ſome other Humour, ſhould draw you to make an unjuſt Will unbecoming you, I muſt take care. For having reſpect both
" to the publick Intereſt of the Nation and good of your Family, I will eſtabliſh Laws, and make you ſenſible, that (as it is rea-
" ſonable) private Advantage muſt give place to the publick. Go you on chearfully, where human Neceſſity leads you, it belongs
" to me, who impartially regard things, to take as much Care as I can of the common good, and ſecure what you neglect."
This long Paſſage of *Montagne*, I hope, will not be tireſome to the Reader, l. ii. See alſo *Charron* of Wiſdom, l. iii. c. 14. n. 38. and *Bacon's* Serm. Fidel. c. 7. *in fine*.

[1] See Dr. *Potter's* Antiquities of *Greece*, l. iv. c. 15. See alſo §. 6. n. 5. above.

[2] See lib. vi. c. 1. §. 36. following.

[3] In the Original *Latin* the Words are, *Etiam expreſſa voluntate patris*, which is kept in all the Editions, the laſt put out by Mr. *Hertius* in 1706. not excepted. But there can be no doubt but the Word *ſine* after *etiam* is omitted, and ſo it ought to be render'd as the *Engliſh* Tranſlator has, without any expreſs Will of the Father: For certainly, if the Father had declared his Will about it, it muſt have been followed.

faireſt Caſe ſhall be allow'd to claim no more out of the Eſtate than a bare Maintenance, or whatever the Will of their Father, or the Laws of the Land aſſign them more [a].

As the bare Law of Nature knows no difference of Rank and Degree, ſo according to that 'tis the ſame thing whether a Man have Iſſue by a Wife of a more illuſtrious, or of a more obſcure Condition, provided ſhe is honeſtly betroth'd to him. If therefore in any Place the Children of a leſs noble Mother are allow'd leſs Privilege and Favour, this is wholly owing to poſitive Conſtitutions. Which likewiſe, as they may upon account of ſome Reaſons of State poſtpone the concubinary to the legitimate Race, and not admit them with the *aſcending Line* upon failure of the *deſcending*: So they can ſcarce in Equity utterly exclude them, if there was no original Fault in the Act of Generation. But then theſe are by all means to be diſtinguiſh'd from Children begotten in a way naturally ſinful, as in Adultery or Inceſt: Who, how clear ſoever they may be of any ſhare in their Parents Guilt [b], yet ſhall on account of it be obliged to reſt ſatisfied with Maintenance only, and ſhall not be admitted with the other Children, who were begotten on the hope and proſpect of inheriting their Father's Poſſeſſions. But the Parties could entertain no ſuch hope of raiſing Heirs, when they concurr'd in theſe Impurities; ſince they wiſh that their Sin may perpetually lie conceal'd, rather than be the means of producing thoſe who ſhould, as it were, bear publick Teſtimony to the Shame and the Wickedneſs of their Parents.

X. *Grotius* [c] farther remarks, that there are two more Conditions ſtill required in the Succeſſion to *inteſtates*, *That the Children appear to have been really begotten by him whoſe Eſtate they claim, and that there be no Tokens extant of a contrary Will.* For no Man ſhews a fatherly Affection for Children begotten by others; and a preſum'd Will muſt always give place, when contradicted by an expreſs Declaration and Diſpoſal. As to the firſt of theſe Conditions, that ſuch a Perſon was the Father of another, cannot always be either demonſtrated by indubitable Arguments, or ſo clearly made out by Teſtimony, as in the Mother's Caſe; eſpecially where Women live under no other Guard or Reſtraint beſides their own Modeſty and Conſcience: The main Proof therefore in this Point is, the certainty of Marriage; by which Union the Wife both engageth her Faith to be true to her Husband's Bed, and likewiſe is plac'd, as it were, under his Inſpection, he at the ſame time receiving a Power over her Body. Now all Perſons are preſum'd both to obſerve the Faith they have engag'd, and to exerciſe the Power they have receiv'd, unleſs there be direct and manifeſt Evidence of the contrary. So that every one ſeems to be, as it were, in poſſeſſion of this *Right*, that he ſhall be deem'd the Son of him who appears to be join'd in Marriage with his Mother. [1]. And no Man, unleſs he is out of his Wits, will diſturb himſelf in this Poſſeſſion, and accuſe his Mother of Adultery for the ſake of finding a new Sire. Julius Sabinus *with his natural Vanity was ſtrangely exalted by aſcribing to himſelf the Glory of a falſe Original; pretending that his Great Grandmother had been very nearly acquainted with* Julius Cæſar *in his* Gallick *Expedition*, Tacit. *Hiſt.* l. iv. c. 55.

Jupiter aut falſus pater eſt, aut crimine verus.

Jove's a *falſe* Father, or in Sin a *true*.

If others attempt to bring this Matter into Diſpute, it ſhall be incumbent on them to prove their Charge: As for Inſtance, *That the pretended Father at the time of the Conception was diſabled by Sickneſs, or was abſent in a diſtant Country* [2]. In *Xenophon* (Hiſt. *Græc.* l. iii. p. 289. Edit. *H. Steph.*) *Ageſilaus*, after the Death of *Agis* King of *Lacedemon* his Brother, endeavours to prove *Leotychides* illegitimate upon theſe Reaſons, That his Father had ſome time diſown'd him; that he exceeded his Father in Comelineſs of Body; that he was born ten Months after the parting of his Father and Mother; that his Father *Agis* had expell'd his Mother from the royal Bed.

XI. As to the ſecond Condition, it is judg'd another Exception againſt a Son's ſucceeding to an *inteſtate* Father, if it appear that his Father hath expreſly deſired and declared the contrary: As ſuppoſe [1], if he hath either abandon'd (as was uſual amongſt the antient *Greeks*) or diſ-inherited him, as 'twas a Cuſtom among the *Romans*.

We have before intimated, that very great and weighty Cauſes [2] are requir'd to juſtify either of theſe Proceedings. *Grotius* adds, *That Suſtenance is ſtill to be allow'd to the abandon'd or diſinherited Son, unleſs his Crime deſerv'd Death.* Tho' I can hardly ſee how it is poſſible, that a Son, during thoſe Years of Minority, in which his Father naturally owes him Suſtenance, can be guilty of ſuch an Offence, as ſhall deſerve either capital Puniſhment, or *Diſheriſon*.

XII. On the Propoſition which we before advanced, *That Parents are oblig'd to afford Suſtenance to their Children, not only of the firſt, but of farther Degrees, in caſe their proper Parents, who ought to perform this Office, are extinct*, is chiefly founded the

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[a] Add *Bœcler.* ad *Grot.* d. l. Sect. 8.

[b] Vid. *Gratian.* c. 3, *&c.* Diſtinct. 56.

[c] Dict. loc. Sect. 8.

Mr. Barb. *NOTES* on §. x, xi.

[1] *Semper certa eſt mater, etiamſi vulgo conceperit. Pater vero is eſt, quem nuptiæ demonſtrant*, Digeſt. l. ii. t. 4. *De in Jus vocando*, leg. 5.

[2] The Words of *Ageſilaus* are ſo miſrepreſented by our Author for want of throughly underſtanding the *Greek*, that I have thought fit to give the Reader a new Tranſlation of them. *Ageſilaus* then alledges, " That *Agis* never own'd *Leotychides* for his Son, " and that *Leotychides* his Mother, who muſt needs know better than *Agis*, had diſown'd that ſhe ever bore him (for there is no ſuch thing in *Plutarch*, as that he exceeded his Father in Comelineſs of Body, as our Author tranſlates πολὺ καλλίον ἐκείνȣ, which ſignifies only better than he) " That by an Earthquake cauſed by *Neptune*, *Agis* was toſs'd out of his Bed from his Wife in the ſight of all the " World, which evidently proves, that he was not the Father of *Leotychides*, which was better confirm'd by the time of his Con" ception, which is an infallible ſign in theſe Matters. For when *Leotychides* was born, it was ten Months after *Agis* had eſcaped, " and never after lay with his Mother. " See alſo *Plutarch* in the Life of *Alcibiades*, p. 203. Edit. *Steph.* Theſe Reaſons are not very concluding. See upon the laſt Article *Joan. Vincent. Gravinæ Origines Juris Civilis*, l. ii. p. 301, *&c.*

[1] See Dr. *Potter*'s Greek Antiquities, l. iv. c. 15. *in fine*, and *Iſaac Caſaubon* upon *Diogenes Laertius*, l. i. §. 94.

[2] *Antenor* (in *Dictys Cretenſ.* l. iii. c. 26.) reſolv'd to baniſh his Son *Glaucus* from his Family, for making one of *Paris*'s Company at the ſtealing of *Helen*.

Equity of that *Right* term'd, *The Right of Repreſentation*; by virtue of which Children are ſuppos'd to fill the Place of their deceas'd Father [1], ſo as to be allow'd the ſame ſhare in the Family Inheritance, as their Father, were he now living, would receive; and conſequently to ſucceed on the level with thoſe who ſtand in their Father's Degree [2]. And it would indeed be a lamentable Misfortune, if, beſides the untimely Loſs of their Father, they ſhould farther be depriv'd of thoſe *Poſſeſſions*, which either the Rule of the Law, or the Deſign of their *Progenitors* had given their *Parents* juſt hopes of enjoying [a]. But if in any Place the *civil Conſtitutions* will not admit of this *repreſentative Right*, the Children, who have been ſo unhappily bereav'd of their Father and of their Hopes, muſt endeavour to bear the Calamity as an Affliction which Providence hath laid upon them.

XIII. Upon failure of Iſſue in the firſt, and the other deſcending Degrees, [b] Reaſon ſuggeſted that *Inheritance* ought to turn back into the Line of *Aſcendents*; as well in conſideration that, for the moſt part, either the *Poſſeſſions* themſelves, or at leaſt the firſt Seeds and Principles of them, which the Children afterwards increas'd, proceed from the *Parents*, as becauſe their extraordinary Benefits give them an eſpecial Title to this Reward: Who ſince they would much rather have deſired, *That their Children ſhould inherit their Fortunes*, yet when they ſurvived them, contrary to the ordinary courſe of *Nature*, 'twas but equitable they ſhould receive, however, this melancholy Comfort, of ſucceeding to what the Children poſſeſs'd. *'Tis a Condition* (as *Pliny* obſerves) *abundantly unhappy, for a Father to be the ſole Heir of his own Son* [1]. Panegyr. c. 38. Vid. l. v. t. 2. l. 15. *D. De inoffic. teſtam.* Lib. xxix. t. 4. *D. Si quis, omiſſa cauſa, &c.* leg. 26. Cod. lib. iii. t. 28. *De inoffic. teſtam. &* t. 25. *De Inſtitut. &c.* leg. 9. & Lib. vi. t. 56. ad Senatuſconſ. *Tertull. &* Lib. iii. t. 3. de ſenatuſconſ. *Tertull.*

Philo the *Jew* *, reporting, That *Moſes* eſtabliſh'd this Order of Inheritance, *That the Sons ſhould ſtand firſt, the Daughters next, then the Brothers, and in the fourth place the Uncles by the Father's ſide*, uſeth this as an Argument to prove, that Fathers likewiſe may inherit what their Sons leave behind; *For 'twould be ſenſeleſs* (ſays he) *to imagine, that the Uncle ſhould be allow'd to ſucceed his Brother's Son, as a near Kinſman to the Father, and yet the Father himſelf be abridg'd of that Privilege. But inaſmuch as the Law of Nature appoints, that Children ſhould be Heirs to their Parents, and not Parents to their Children,* Moſes *paſſed this Caſe over in Silence, as ominous and unlucky, and contrary to all pious Wiſhes and Deſires: Leſt the Father and Mother ſhould ſeem to be Gainers by the immature Death of their Children, who ought to be afflicted with moſt inexpreſſible Grief. Yet by allowing the Right of Inheritance to the Uncles, he obliquely admits the Claim of the Parents, both for the Preſervation of Decency and Order, and for the continuing the Eſtate in the ſame Family.*

Some Parents too have the additional Title of an infirm and indigent old Age; under which ſad Condition their Children were otherwiſe obliged to maintain them: As one of the *Attic* Laws expreſly enjoin'd [2]. *Iſæus* Orat. vii. *The Law commands us to maintain our Parents, under which Name are comprehended not only our Father and Mother, but our Grandfather. For theſe are the firſt of our Kindred, and from theſe deſcend the Goods and Fortunes which their Poſterity enjoy. Theſe therefore we are neceſſarily bound to ſupport, even tho' they ſhould have nothing to leave us.* Add. *Grot. d. l.* Sect. 5. & Ziegler ad *d. l.* Yet in caſe a Father hath without Reaſon grievouſly hated and injur'd his Son, without any ſubſequent Reconciliation, the Son may juſtly exclude him from the Right of Inheritance [3]. It's the ſame with him who expos'd his Son, when an Infant, utterly neglecting his Support: For here no doubt the Claim of the Foſter-father, who hath undertaken the Care and Burthen of the Child's Education, ought firſt to be admitted. Nay, farther it ſeems reaſonable, That an adoptive Father ſhould in this point be preferr'd to a natural Parent; that he may recover what he hath expended on bringing up another's Child. We are likewiſe to obſerve, that the Lawyers do not admit of *Repreſentation* in the aſcending Line, as they do in the deſcending; that is, if a Man die without Iſſue, leaving a Father, and a Grand-father by his Mother's ſide, the latter of theſe ſhall not be allow'd to make Claim in the room of his Daughter. A Rule which ſeems to be grounded on this Conſideration, That naturally the Hopes of Succeſſion do not aſcend, but deſcend: Wherefore, the Son had indeed Hopes of ſucceeding his Father, and might tranſmit the ſame Hopes to his own Iſſue; but the Mother had never any Hope or Deſire of inheriting after her Children; and ſo could not, contrary to the Order of Nature, convey back any ſuch Hope to her own *Parents*: And conſequently, the nearer Claimant here excludes very juſtly the more remote [4].

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[a] Add *Bœcler.* ad *Grot.* d. l. Sect. 6.

[b] Vid. *Grot.* l. ii. c. 7. ſ. 5. *ibique Ziegler.*

Mr. BARB. *NOTES* on §. XII, XIII.

[1] *Sine dubio nepos filii loco ſuccedit,* Digeſt. l. i. t. 6. *De his qui ſui vel alieni juris ſunt,* leg. 7. *Quotcunque autem nepotes fuerint ex uno filio, pro uno filio numerantur,* ib. l. xxvii. t. 1. *De excuſationibus tutorum,* &c. leg. 2. §. 7.

[2] This Succeſſion by Deſcent (*ſucceſſio per ſtirpes*) is diſtinguiſh'd from Succeſſion by Heads (*ſucceſſio per capita*) thus: In the laſt all the Coheirs have an equal Portion, whereas in the other ſeveral Children have no more all together than a Portion in the Inheritance equal to what their Father had, and to what every one of the Coheirs had; who are in the ſame Degree as he was whom they repreſent. See *Juſtinian*'s Novels, 118. c. 1.

[1] *Pliny*'s Words are, *Sic quoque abunde miſera res eſt, pater filio ſolus hæres.*

The Words of the *Digeſt* are, *Nam etſi parentibus non debetur filiorum hæreditas propter votum parentum, & naturalem erga filios charitatem, turbato tamen ordine mortalitatis, non minus parentibus quam liberis piè relinqui debet.*

* *Philo*'s Greek is this, Καὶ τετάρτην δὲ θείοις πρὸς πατρὸς ἀπονέμει τάξιν, αἰνιττόμενος ὅτι καὶ πατρὸς γένοιντ' ἂν υἱῶν κληρονόμοι, πάνυ γὰρ εὔηθες ὑπολαβεῖν, ὅτι πατρὸς ἀδελφῷ νέμων κλῆρον ἀδελφιδοῦ διὰ τὴν πρὸς τὸν πατέρα συγγένειαν, αὐτὸν ἀφείλετο τὸν πατέρα τῆς διαδοχῆς, ἀλλ' ἐπειδὴ ὁ νόμος φύσεώς ἐϛι κληρονομεῖσθαι τοὺς γονεῖς ὑπὸ παίδων, ἀλλὰ μὴ τȣ́τȣς κληρονομεῖν, τὸ μὲν ἀπευκταῖον, καὶ παλίμφημον ἡσύχασεν, ἵνα μὴ πατὴρ καὶ μήτηρ προσοδεύεσθαι δοκῶσι τὰ ἐπὶ ὠκυμώροις τέκνοις ἀπαρηγόρητα πένθη, πλαγίως δ' αὐτοὺς ἐκάλεσε τοῖς θείοις ἐφιεὶς, ἵνα καὶ ἀμφοτέρων ϛοχάσηται, καὶ τοῦ πρέποντος, καὶ τοῦ μὴ τὴν ȣ̓σίαν ἀλλοτριωθῆναι.

[2] That *Greek* Orator's Words are, Κελεύει γὰρ ὁ νόμος τρέφειν τȣ̀ς γονέας γονεῖς δὲ εἰσὶ μήτηρ, καὶ πατὴρ, καὶ πάππος, καὶ τήθη, καὶ τȣ́των μήτηρ καὶ πατὴρ, ἐὰν ἔτι ζῶσιν· ἐκεῖνοι γὰρ ἀρχὴ τοῦ γένȣς εἰσὶ, καὶ τὰ ἐκείνων παραδίδοται τοῖς ἐγγόνοις, διόπερ ἀνάγκη τρέφειν αὐτȣ́ς ἐϛι, κᾂν μηδὲν καταλίπωσι.

[3] See *Juſtinian*'s Novels, 115. c. 4. and Mr. *Daumat*'s Civil Laws in their Natural Order, Part II. l. iii. t. 2. Sect. 2. §. 4.

[4] The Words of the Novel are, *Si autem plurimi adſcendentium vivunt, hos præponi jubemus, qui proximi gradu reperiuntur, maſculos & fæminas, ſive paterni, ſive materni ſint.*

XIV. When the deſcending and the aſcending Lines both fail, the Succeſſion to *inteſtates* devolves on the collateral Kindred. As to the order in which they are to be admitted, where the *civil Statutes* do not expreſly ſettle it, 'tis to be determin'd by *natural Conjecture:* Which always favours that Perſon, whom we preſume to have ſtood faireſt in the Affection of the deceas'd; yet ſo, as that we meaſure this Affection more by the common Inclination of wiſe and ſober Men, and according as it tends to the Prevention of Quarrels, than by the moroſe Humour of ſome few particular Perſons. Now, according to the Judgment of wiſe Men, natural Reaſon in this Caſe pays an eſpecial Regard to Nearneſs of Blood, yet ſo as at the ſame time to conſider from what Source the reſpective *Poſſeſſions* ſeem'd to flow to the deceas'd [1], or who formerly parted with any thing [2], or ſuffer'd any Loſs upon account of his coming into the World. Thus *Ariſtotle*'s firſt Rule [a] is, *The Affection between Parents and Children*; and his next, *The Love between Brethren, ariſing from their Relation to the ſame common Stock, and improv'd by the likeneſs of Years and Education.* After theſe follow Brothers Children, and other Relations join'd to us by virtue of that fraternal Union. And then (all theſe being firſt conſider'd, whom Nature, as it were, neceſſitates us to love and eſteem) in the laſt Place thoſe are admitted, whom either paſt Kindneſſes or Agreeableneſs of Temper and Manners, or peculiar Likeneſs of Inclinations, or known Fidelity, recommends and endears. *Tully* [3] placeth the Degrees of Kindred in the Order following: *The firſt Society is in Wedlock; the next in Children; it comes then to a Family, and a Community of all things. The Relation of Brothers comes next; and after that, of Brothers and Siſters Children; who, when they are too many for one Houſe, are tranſplanted into others, as into Colonies. And then follow Matches and Alliances, with increaſe of Kindred, conſequent upon them. Now the Relation of Blood and the Kindneſs that ariſeth from it neceſſarily endears Men to one another.*

XV. But the high Encomiums given to Friendſhip in Authors may raiſe a Doubt, whether Friends are not ſometimes to be preferr'd to Relations [1]? *Of all Societies,* ſays *Tully, none hath more of Excellency, or of Strength, than when good Men, alike in Manners, are united by a familiar Acquaintance.*

So *Homer*;

A hearty Friend deſerves a Brother's Love.

And *Euripides*;

—— —— A Stranger to our Line,
If once in Mind and Manners firmly tied,
Is worth a thouſand Kinſmen. ——

And indeed it frequently happens, that we take more Satisfaction in the Company and Converſation of an indifferent Perſon, than of one related to us in Blood, and intruſt many things with the Secrecy and Fidelity of the former, which we conceal from the latter. In fine, we addreſs our ſelves more readily to ſerve the Friend than the Relation; becauſe he, on the other ſide, is the more ready of the two to aſſiſt us in any Difficulty.

But it cannot hence be concluded, That by virtue of a general Cuſtom, coming up almoſt to the Force of a Law, a Friend is to take place of Relations, though the deceaſed Party ſhould chance to have expreſſed more Tokens of Affection towards him, than towards them. For in the Buſineſs of tranſmitting an Inheritance, we are not guided only by Kindneſs and Good-will, but we conſider farther, on whom 'tis moſt proper and convenient that our Fortunes ſhould deſcend. And ſince Men are carried on by a general Propenſion to wiſh the Family in as good a Condition as poſſible, from which they derive their Original, therefore 'tis commonly moſt convenient that our Goods ſhould continue in our own Line. Beſides, 'tis no neceſſary Conſequence to ſay, I was highly delighted with this Perſon's Familiarity and Converſe, therefore 'twas my Inclination likewiſe to transfer my Poſſeſſions upon him. For this Friendſhip between Perſons not allied in Race, generally extends no farther, than to a mutual Signification of Good-will, a Communication of Deſigns, and the ordinary Services and Offices of Life. But before I can be conceiv'd to have join'd Houſes, as it were, with a Stranger, by conveying to him my Eſtate, 'twill be neceſſary to produce an expreſs and legal Will to this Purpoſe. Thus, although according to the antient Manners of the *Romans*, in the Order of common Duties, *After Parents and Children, the firſt Place was given to Pupils or Wards; the ſecond to Clients or Dependents* [2]*; the third to Gueſts; and the laſt to the Kindred by Blood and Marriage, accord-*

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[a] *Nicom.* viii. c. 14.

Mr. Barb. *NOTES on* §. xiv, xv.

[1] That is to ſay, if the Goods or Eſtate came by the Father, they ought to paſs to the collateral Kindred on the Father's ſide; but on the contrary, if they came by the Mother, the collateral Relations of her ſide ought to be preferred.

[2] That is to ſay, That what Right a Man hath parted with to another Perſon, as ſoon as he is dead, it ſhall return to the ſame Man again, or to his Heirs. See §. 17. following.

[3] *Off.* i. c. 16. Of the Relation between Brothers ſee *Plutarch. De fratern. amor.* and *Xenophon*, l. viii. *Cyrop.* in *Cyrus*'s laſt Speech, and l. ii. *Socrat. Memorab.* Add *Bœcler.* ad *Grot. dict. loc.* ſ. 9, 10, 11. Towards illuſtrating the Obligation between thoſe of the ſame Blood it may not be improper to mention the Law received in the Kingdom of *Tonquin*, by which all Quarrels ariſing amongſt Perſons thus allied, are referr'd to the deciſion of their common Kindred, and not brought into the ordinary Courts of Juſtice; as we are told by *Alexander de Rhodes, Itiner.* l. ii. c. 7, 8. Mr. *Hertius* adds, That there is a Law of the like Nature at *Padua*, about which *Marcus Antonius Planco* has compoſed a Book on purpoſe.

[1] The Original of theſe Quotation is, *viz.* Of *Tully*, *Omnium ſocietatum nulla præſtantior, nulla firmior, quam cum viri boni, moribus ſimiles, ſunt familiaritate conjuncti.*

Of *Homer*.
——— ——— Οὐ μέν τι κασιγνήτοιο χερείων
Γίνεται ὅς κεν ἑταῖρος ἐὼν πεπνυμένα εἰδῇ. Odyſſ. 8. ult.

And of *Euripides*.
Ὡς ἀνὴρ ὅστις τρόποισι συντακῇ, θυραῖος ὢν
Μυρίων κρείσσων ὁμαιμόνων ἀνδρὶ κεκτῆσθαι φίλος. Oreſt. 806.

Further, we may conſult upon this Queſtion Mr. *Buddeus*'s Diſcourſe, intituled, *De Comparatione obligationum, quæ ex diverſis hominum ſtatibus oriuntur*, §. 35, *&c.* among his *Selecta Jura Nat. & Gent.*

[2] *Aulus Gellius*'s Words are, *Conveniebat autem facile, conſtabatque ex moribus populi Romani primum juxta parentes locum tenere pupillos debere fidei, tutelæque noſtræ creditos* [*ſi neceſſe eſſet in opera danda faciendoq; officio alios aliis anteferre*] *ſecundum eos proximum locum, clientes habere, qui ſeſe itidem in fidem, patrociniumque noſtrum dediderunt, tum in tertio loco eſſe hoſpites, poſtea eſſe cognatos adfineſque.* Lib. v. c. 13.

ing to the Degree of Nearneſs in which they ſtood; yet in tranſmitting *Poſſeſſions* this Method of proceeding was not in the leaſt regarded. Farther, if Friends, in the caſe of *inteſtates,* were at any time to have the Advantage of Kinſmen, this would open a wide Field for Quarrels and Contentions, as well amongſt the Friends themſelves, if they happen'd to be more than one, as between them and the Relations. For to take more Pleaſure in a Man's Company, or to communicate Affairs more freely with him, is not preſently to be look'd on as an infallible Token that he ſtands higheſt in our Affection. Many times a jocoſe or eaſy Temper, Equality of Years, or Sagacity of Judgment, render the Acquaintance of a Friend more pleaſant or more profitable to us, than that of a Relation, who poſſibly may want the ſame Advantages. Yet when we are about to diſpoſe of our Goods, we are ſeldom ſway'd by this Conſideration to favour the former more than the latter. *Heſiod*'s Advice will here be good,

Let not thy Friend thy Brother's Rights invade [3].

Laſtly, The Degrees of Kindred are eaſily diſtinguiſh'd and reckon'd up; but who will undertake to ſettle the Degrees of Friendſhip in ſo exact an order, as to leave no room for Cavil and Diſpute?

XVI. But ſtill 'tis urged with better Pretence, That thoſe Friends at leaſt are to be preferr'd to Relations in the caſe of Succeſſion to Eſtates, by whoſe Bounty, Counſel, or Aſſiſtance the reſpective Eſtate was acquir'd; it being but equitable, that the Goods ſhould return to the place whence they originally flow'd. Yet here likewiſe there will be moſt plentiful Matter for Contentions; the cutting off of which ought to be made the chief Aim and Deſign of all Laws. For a Friend putting in his Claim with ſuch a Plea, might be well anſwer'd to this Purpoſe: That either what he takes for Merit was not the conferring, but the returning a Kindneſs; or, that if he was the firſt Benefactor, he hath ſince receiv'd a ſufficient Requital; or, that he gave without any hope or proſpect of Return; and deſired, that his Bounty ſhould reach not to the Perſon only, but to the Family of his Friend; or, that what he did was undertaken upon the Principle of Glory, or of preſent Advantage; that, in caſe we had not found his Aſſiſtance, we did not want Opportunity of being reliev'd in our Diſtreſs by other Means; that it cannot certainly be determin'd how much his Aid contributed to our acquiring thoſe Goods which he demands to inherit: And then again, that he, who hath been only uſeful to us in getting a thing, cannot preſently require, that we ſhould admit him to hold the thing in common with us. Farther, That the good Offices of Friends would be turn'd into a mercenary Service, or rather into perfect Uſury, if they were to be advanced to the Eſtate of *inteſtates*, before the Relations of the deceas'd: For then a Kindneſs to another could not be ſuppos'd to be conferr'd with any other Deſign, than that the Receiver ſhould only for a little time be the Steward and Keeper of what was beſtow'd, or ſhould reſtore it with large Increaſe at his Death. Therefore, when there is no expreſs Diſpoſal extant in Favour of the Friend, the *Right* of the Kinſmen ſhall obtain: Yet ſo as that, together with the Goods of the deceaſed, they ſhall likewiſe take upon themſelves his Obligation towards this great Benefactor; and ſhall endeavour, as far as in them lies, to repay it in a moſt grateful manner, acknowledging by whoſe Aſſiſtance they arrive at ſo ample an Inheritance. Nor is it reaſonable for any Man obſtinately to urge againſt this Judgment that Saying of *Ariſtotle* [1]: *We ought rather to requite a Benefactor, than to oblige a Friend, if both cannot be done together*: Or that of *Cicero* [2], *There is no Duty more neceſſary, than that of repaying Kindneſſes.* And again; *There being two Kinds of Liberality, one of beſtowing, the other of returning a Benefit; whether or no we will beſtow, depends on our own Choice; but not to return the Favours of a good Man, is abſolutely unlawful, provided it may be done without injuring any other Perſon*: Or that of *Phocion* [3] (in *Plutarch*'s Apophthegms) who being ſeveral times called upon to give ſomewhat towards the Expence of a Sacrifice, whilſt all the reſt contributed that were about him, anſwer'd, *It would be a Shame to give you, before I pay this honeſt Man*; pointing to a Creditor of his that ſtood by. *Add.* lib. xxxix. t. 5. leg. 12. *D. de Donation.* Becauſe indeed, the Buſineſs of Succeſſions to *inteſtates* by no means can be, or ought to be exactly ſquar'd in all reſpects according to the Rules obſerv'd in conferring and in returning Benefits. For the latter are guided by the Virtues of Humanity and Bounty, and, properly ſpeaking, are vouchſafed to thoſe only, who had no ground to expect them from us, but what is owing to the Suggeſtions of theſe Virtues in our Mind. Whereas the former are built on other Foundations, on the Obligation we lie under of making Proviſion for ſome particular Perſons, on nearneſs of Blood, and on that Propenſion to advance, improve, and preſerve our own Family, enjoin'd by the Dictate of Nature. *Iſæus* Orat. *6.* [4]. *All Perſons, as they approach near their End, are provident in diſpoſing of what they poſſeſs, leſt they ſhould bring their Family to Ruin and Deſolation.* And in this Affair, that which ought to be our principal Care is, That we eſtabliſh ſo clear a Method, as ſhall be expos'd, as little as poſſible, to Controverſy and Doubt. Now, there can be no ſuch Way or Method more ready than this, That in default of an expreſs Diſpoſal by Will, the Inheritance ſhall paſs down according to the different degrees in which the Relations of the deceaſed ſtood nearer to him one than the other.

Hence Authors have remark'd, That Succeſſions to *inteſtates* proceed in a contrary courſe to the Rule of common Kindneſs; it being in the former the more neceſſary *Duty to give*, in the latter to *repay*: As, in the Caſe before us, our Children have the Preference of our *Parents*, to whom we are much more indebted and engaged. *Lucian* Ab-

Mr. Barb. *NOTES on* §. xv, xvi.

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[3] *Heſiod*'s Words are, Μηδὲ κασιγνήτῳ ἶσον ποιεῖσθαι ἑταῖρον. See alſo Mr. *Sacy*'s Treatiſe of Friendſhip, p. 155.

[1] *Ariſtotle*'s Words are, Εὐεργέτῃ ἀνταποδοτέον χάριν μᾶλλον, ἢ ἑταίρῳ δοτέον· ἐὰν ἀμφοῖν μὴ ἐνδέχηται.

[2] *Cicero*'s Words are, *Nullum officium referenda gratia magis neceſſarium eſt.* Alſo, *Cum liberalitatis genera ſint, unum dandi beneficii, alterum reddendi, demus necne in noſtra poteſtate eſt, non reddere bono viro non licet, modo id facere poſſit ſine injuria.*

[3] *Phocion*'s Words are, *Puderet me vobis dare, & huic,* (δανειστὴν *demonſtrans*) *non reddere.*

[4] *Iſæus*'s Greek is, Πάντες οἱ τελευτήσειν μέλλοντες πρόνοιαν ποιοῦνται σφῶν αὐτῶν, ὅπως μὴ ἐξερημώσωσι τοὺς σφετέρους αὐτῶν οἴκους.

dicat. *'Tis the Ordinance and Appointment of Nature, that the Affection of Parents towards their Children ſhould exceed that of Children towards their Parents.* Comp. *Bœcler.* ad *Grot.* d. l. Yet in what hath been here offer'd, we would not be underſtood to inſinuate, as if the *Duty* of Gratitude were to be allow'd no Place in the laſt Diſpoſal of our Fortunes; but only that 'twould be inconvenient to go about to ſettle a general Method for the Eſtates of *inteſtates* to be guided by, taken barely from the preſum'd Will of the Party deceaſed, touching the Exerciſe of this Virtue.

XVII. From what hath been laid down, it appears, that of all the collateral Line the Brothers ſtand neareſt to the Inheritance; as well on the account of the moſt ſweet and hearty Affection by which they commonly are engag'd to us, as becauſe they, on the ſcore of raiſing their Brother's Fortunes, receiv'd ſmaller Portions out of their Father's Eſtate. *Quintil.*[1] Declam. 321. pag. 509. *init.* Edit. *Lugd. Bat. What Friendſhip can be ſo happy as that which imitates brotherly Affection? Certainly, when we would complement thoſe whom we take for our Friends, Flattery itſelf cannot invent a higher Endearment than the Name of Brothers.* With whom the Siſters are likewiſe to be admitted, at leaſt to thoſe Goods which were either brought by the Mother, or lately acquir'd; but they have not the ſame Title to the Father's Poſſeſſions, which are uſually deſign'd to preſerve the Splendor of the Family; whereas Women, for the moſt part, marry out of their own Line. Brothers by the Father's ſide, in the paternal Inheritance, exclude thoſe by the Mother's ſide; as again, in the Fortunes left by the Mother, the latter have the Preference of the former. In Goods newly gotten ſince the time my Father married the Mother of my Half Brother, 'tis convenient that I ſhould carry off the largeſt Share; ſince toward the acquiring theſe Goods the Man uſually contributes more than the Woman. Upon Default of Brothers, the Brother's Sons ſhall come in; tho' it ſhould ſeem that theſe ought at the ſame time to let in the Great-Uncles, becauſe they too had ſmaller Fortunes, on account of dividing the Eſtate with the Father of the deceaſed. The ſame is to be ſaid of Siſter's Sons, and their Great-Uncles by the Mother, with regard to the Mother's Goods. And this Order and Method ſhall be continued down in all other Inſtances; but ſtill with this Proviſo, That where the paternal Line fails, there the Mother's Kindred ſhall be admitted to the Father's Eſtate, and ſo the Kinſmen by the Father, to the Mother's Goods, upon failure of her own Line.

XVIII. But we ought well to obſerve, That the Rules which we have propos'd for the determining this Matter are ſtiled *natural*, not becauſe they are ſo exactly preſcrib'd by any Precept of the Law of *Nature*, as that they cannot be alter'd; but becauſe they are in the higheſt Manner agreeable to the Law of *Nature*, and ſeem to be the moſt ready Means of cutting off all Diſpute, in caſes where either the expreſs Will of the deceaſed, or the national Laws are ſilent. Yet indeed in the whole Subject and Compaſs of the civil Ordinances, there is ſcarce any thing about which they are found more careful and ſolicitous, than about the Diſpoſal of Inheritances, not only for the Prevention of Quarrels amongſt Relations, but likewiſe becauſe 'tis the Intereſt of the Publick to have this Buſineſs ſettled, and moderated according to the Ends and Reaſons of particular Governments. Hence in ſome Places the Power of making Wills is left very free and wide; in others it is more or leſs abridg'd and reſtrain'd. Amongſt the *Romans* 'twas one of the Laws of the Twelve Tables[1], That *whatever a Maſter of a Family ſettled or bequeath'd with regard to his Family, or to his Fortunes, ſhould ſo ſtand.* Which was borrow'd from the Syſtem of *Attic* Laws compoſed by *Solon*: For thus *Plutarch* * reports, That *the Ordinances of his, by which he gave free Subjects the liberty of making Wills, which they never enjoy'd before, was moſt greedily embrac'd, and was eſteem'd moſt juſt and right.* Now the Reaſon which moved *Solon* to the paſſing this Act, was not that he intended to defraud the neareſt Relations of their Right of Kindred, but that by ſetting before Mens Eyes this common Advantage, he might engage them all to contend with each other in good Offices, and that Relations might keep the greater Affection and the ſtricter Ties amongſt themſelves, conſidering that they muſt exceed Strangers in Kindneſs and Good-will, if they deſired to be admitted before them to the Wealth of the Family. *Demoſthen.* adverſ. *Leptin.* p. 374. Edit. *Genev. When* Solon *enacted by Law, That every Man who wanted legitimate Iſſue, ſhould appoint for his Heir whom he pleas'd: he did not rob the next of Blood or Affinity of their Right of Kindred, but that by propoſing this common Advantage, he might engage Men to contend with each other in good Offices*[2]. Beſides, it ſeems more ſuitable to Liberty, and to the full Extent of Properties, That *no one ſhould be forced to leave his Goods, but to thoſe only whom he loved more than others.* To which we may add, That *we often conceive more probable Hopes, that a Stranger to our Blood may better imploy our Poſſeſſions in the Service and Aſſiſtance of Virtue, than ſome near Kinſman, whom the Expectation of a rich Inheritance frequently ſeduceth to Luxury and Idleneſs*[a]. And laſtly, That *'tis ſome Comfort, under the Neceſſity of a mortal Condition, if a Man may conſign over what he hath got by his own Labour, to thoſe whom he looks upon as his deareſt Friends*[b]. This Exception only there was in *Solon*'s; That *thoſe ſhould not be permitted to make Wills, who had legitimate Male Children living, to whom the paternal*

[a] *Theocrit.* Idyl. xvi. 59, *The Living waſte the Fortunes of the Dead.*

[b] *Iſocrat. Æginet.*

Mr. Barb. NOTES *on* §. xvii, xviii.

[1] *Quinctilian*'s Words are, *Quæ poteſt amicitia eſſe tamen felix, quæ imitetur fraternitatem? Certe quotiens blandiri volumus his qui eſſe amici videntur, nulla adulatio procedere ultra hoc nomen poteſt, quam ut fratres vocemus.* Read *Cyrus*'s Speech to his Children in *Xenophon Cyropæd.* Lib. viii. *Val. Maximus,* l. v. c. 5. and *Stobæus,* Serm. 82.

[1] See this Law quoted, lib. i. c. 6. §. 6. n. 6. aforegoing. See alſo two Diſcourſes of Mr. *Thomaſius*'s about the Original of Wills, and the Formalities uſed in making them, *&c.* intituled, the one, *Prima & initia ſucceſſionis teſtamentariæ apud Romanos*; the other, *De ſenſu legis Decemviralis teſtamentariæ*; both printed at *Hall* in 1705.

* *Plutarch*'s Words are, Ὁ δὲ, ᾧ βούλεταί τις ἐπιτρέψας, εἰ μὴ παῖδες εἶεν αὐτῷ, δοῦναι τὰ αὐτοῦ φιλίαν τε συγγενείας ἐτίμησε μᾶλλον, καὶ χάριν ἀνάγκης, καὶ τὰ κτήματα τῶν ἐχόντων ἐποίησε.

[2] *Demoſthenes*'s Greek is, Ὁ μὲν Σολων ἔθηκε νόμον, ἐξεῖναι δοῦναι τὰ ἑαυτοῦ ὅτῳ ἄν τις βούλεται, ἐὰν μὴ παῖδες ὦσι γνήσιοι, οὐχ ἵν' ἀποστερήσῃ τοὺς ἐγγύτατα τῷ γένει τῆς ἀγχιστείας, ἀλλ' ἵνα εἰς τὸ μέσον καταθεὶς τὴν ὠφέλειαν, ἐφάμιλλον ποιήσῃ τὸ ποιεῖν ἀλλήλους εὖ.

Inheritance was beyond all Controverſy due. It cannot be denied, but that under this ample Power of diſpoſing of Goods by *Teſtament*, there crept in, as well at *Athens* as at *Rome*, a prodigious Spawn of Cheats, like a peſtilential Infection; ſuch as paraſitical Flattery and Inveigling, eſpecially of old and childiſh Perſons, Circumventions, Forgery of Writings, and the like.

Bodinus [a] chiefly objects againſt theſe teſtamentary Conſtitutions of *Solon*, That *they allowed Men to bequeath by Will* Real *as well as Perſonal Eſtates.* By which means, as he obſerves, whilſt many of thoſe Eſtates might happen to fall on one Perſon, there aroſe a vaſt Inequality of Wealth between the Subjects, whence the Poor grew envious towards the Rich; the Rich proud and inſolent towards the Poor; Miſchiefs that have a peculiar Tendency to the diſturbing and ſubverting of Government: Eſpecially ſince the Proverb is often made good, That *the more a Man hath, the more he ſhall have.* But *Bodinus* obſerves, That *'tis the Intereſt of States, where the ſupreme Power is lodg'd in the People, to take care that ſome few Perſons do not exceed the reſt by too vaſt a Diſproportion.* Which likewiſe was the Reaſon of that *Jewiſh* Law [b], forbidding the perpetual Alienation of Land; and of that other, by which Women who had receiv'd Land in Inheritance, were enjoin'd to marry into their own Tribe, leſt otherwiſe the Land ſhould paſs from one Tribe to another [c].

Ariſtotle [3], amongſt his Rules for preſerving a democratical Government, gives this as one, That *Inheritances ſhould deſcend not by Teſtament, but by Kindred, and that no Perſon ſhall have more than one Inheritance, becauſe thus the Fortunes of Men will be kept more upon a Level.* What Miſchiefs were introduced into the *Spartan* Commonwealth by that Liberty of Teſtaments, which *Epitades* the *Ephorus* ſet up in oppoſition to *Lycurgus*'s Laws, may be read at large in *Plutarch*'s Life of *Agis* [d]. Amongſt other Nations Men were allow'd no Liberty in this Point; or if they had any ſuch Privilege, it was very much abridg'd, and reſtrain'd.

Of the *Hebrew* Laws in this Particular, *Selden* [e] and *Grotius* [f] give a full Account. Of the antient *Germans Tacitus* [g] reports, *That they had no ſuch things as Wills or Teſtaments, but every Man's Children were his Heirs and Succeſſors; and, in default of Children, thoſe of the next Degree, as Brothers and Uncles by both Parents.* Which Place of the [4] Hiſtorian, why we ſhould interpret with ſome in this manner, that the *Germans*, who had not yet learnt the Uſe of Letters, did not make uſe of formal and written Wills after the *Roman* Cuſtom, which *Tacitus* for the moſt part hath an Eye to in that Deſcription, we cannot yet find ſufficient Reaſon. For amongſt the *Romans* themſelves *Teſtaments* by Word of Mouth [5], and without Writing, were alſo allow'd. And therefore if *Tacitus* had deſign'd to obſerve, *That only written Wills were thoſe with which the* Germans *were unacquainted*; he would have expreſs'd himſelf more particularly and diſtinctly.

Beſides, That the *Rights* of Kindred were honour'd with the higheſt Reverence and moſt ſacred Veneration amongſt thoſe People, appears from what the ſame Hiſtorian afterward remarks, *The greater number of Relations any Man hath, whether by Blood or by Marriage, the more Reſpect is paid him in his Old Age: Nor are any Rewards allow'd to comfort Perſons under the Miſfortune of being childleſs. Every one looks on it as his neceſſary Obligation, to undertake the Quarrels of his Father or of any near Kinſman, as well as their Friendſhips and Alliances.* In many parts of *Germany* at this Day, if a Man hath a Son born to him, 'tis an uſual Expreſſion to ſay, *He hath got an Heir.*

Again, It doth not appear why a Nation, ſuch as the old *Germans* then were, quite ignorant of the ways of heaping up Wealth, content with the poor accommodation of houſhold Conveniences, and ſcarcely deſiring any farther Advantage from their Fields, their Cattle, and their Pains in hunting, than a daily Subſiſtence; why ſuch a Nation ſhould have any Reaſon to deſire the privilege of *Teſtaments*. It being an idle and unneceſſary Care, for thoſe who follow this way of Life, to covet to themſelves any large Extent of Land. Nor is the making of a Will ſo neceſſary a conſequence of *Property*, but that a State or People may introduce ſome one uniform Method of Inheritance, without any ſuch expreſs Diſpoſal. And this will eſpecially hold good of that People, who, as *Tacitus* informs us, *aſſigned ſuch a Tract of Land to ſuch a number of People; who afterwards parcell'd it out into private ſhares, according to the Worth and Eſteem of particular Perſons.* If it be ſaid, That theſe Men were wont, however, at their Deceaſe, to leave ſome ſort of Orders and Injuctions to their Family, we deny that every Act of this kind comes up to the nature of a *Teſtament* [h].

This method of Succeſſion, as 'tis the moſt plain and ſimple, and moſt agreeable to the common Inclinations of Nature, ſo hath it an eſpecial Tendency to the keeping up an equal Proportion in the Wealth of the Subjects, to the ſecuring a Supply of Natives in a juſt and proper Number, and to the preſerving the Eſtates and the perpetuity of Families [i].

It hath likewiſe been the common Opinion, that this muſt prove a new Bond of Affection between Relations, and engage them more heartily to promote each other's Good, whilſt they conſider'd, that they were of neceſſity to ſucceed each other in their Poſſeſſions. To this Point belongs the Paſſage of *Plato*, lib. xi. *De Legibus*, quoted by *Grotius*, and explained by *Bœcler*. Alſo that *Pliny* in his Panegyr. c. 37. ſo highly commends, that the twentieth part was releaſed to the Heirs of Families, *Quod manifeſtum erat, quanto cum dolore latum, diſtringi aliquod,* &c. becauſe 'tis plain, that Men would bear it with great Grief, or rather never endure it, to have any defalked and taken from thoſe Goods which they by Blood and Relation merited, and which they looked upon as their own, and to deſcend to the next akin, as their Inheritance. And *Publius Syrus* [6] ſaith, *Hæredem ſcire utilius eſt, quam quærere,* i. e. It is better to know than ſeek an Heir, ver. 255. And yet thoſe Governments ſeem to have ſettled the Matter with moſt Prudence, which left Men the Privilege of diſpoſing by Will thoſe Goods only which they acquired by their proper Induſtry, ordaining, That *whatever they received from their Parens or Anceſtors, ſhould paſs down again to their neareſt Relations.* For by this Method all the Reaſons produc'd on both ſides of the preſent Queſtion are moſt happily brought to a Temperament and Union.

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[a] Lib. v. c. 2. *De Republ.* [b] *Levit.* xxv. 10. Upon which ſee Mr. *Le Clerc*'s Comments. [c] See *Numb.* xxxvi. 8. [d] Add *Ariſtot.* Polit. xi. 9. [e] *De Succeſſionibus ad bona Hebræorum*, eſpecially in c. 24. [f] Add *Numb.* xxvii. 8, &c. [g] Cap. 20. [h] The *Arabian* Impoſtor hath likewiſe publiſh'd Laws to regulate Succeſſions, in his *Alcoran* under the Chapter of Wives. [i] See *Bacon*'s *Hen.* VII. p. 127.

Mr. BARB. *NOTES* on §. xviii.

[3] *Ariſtotle*'s Words are, Καὶ τὰς κληρονομίας μὴ κατὰ δόσιν εἶναι, ἀλλὰ κατὰ γένος, μηδὲ πλειόνων ἢ μιᾶς τὸν αὐτὸν κληρονομεῖν· οὕτω γὰρ ἂν ὁμαλώτεραι αἱ οὐσίαι εἶεν, καὶ τῶν ἀπόρων εἰς εὐπορίαν ἂν καθίσταιντο πλείους, *Ariſtot.* l. v. c. 9. *in fin.* See alſo, l. ii. c. 9. p. 329. See Mr. *Thomaſius*'s Diſcourſe, *De origine ſucceſſionis teſtamentariæ*, §. 39, *&c.*

[4] *Viz.* Mr. *Bœcler* upon *Grotius*, c. vi. p. 235. See Mr. *Buddeus*'s Diſcourſe, *De Teſtamentis Summor. Imperant.* &c. c. 1. §. 9.

[5] We call theſe ſort of Wills, *Teſtamenta Nuncupativa*, or Nuncupative Wills, becauſe the Teſtator *nuncupabat hæredem aut voluntatem ſuam*, i. e. he named his Heir or his Will. By the *Roman* Laws they were as good as written Wills, provided that the Teſtator declared his Will by word of Mouth in the preſence of ſeven Witneſſes, *Inſtit.* l. ii. t. 10. §. 14.

It is altogether ſtrange to the Manners and Cuſtoms of us *Europeans,* what we are told of the People of the Kingdom of *Siam, That thoſe who are Men of Subſtance amongſt them, are commonly oblig'd to parcel out their Wealth into three Diviſions, one of which goes to the King, another to the Prieſt (whence likewiſe the funeral Charges are defray'd) and the third only to the Children.* And no leſs ſtrange is the Practice of the *Ethiopians* on the Coaſts of *Guinea;* where the Goods of either *Parent* do not deſcend to their *Children,* but to the neareſt of their other Kindred.

XIX. The Heir by *Will,* and the Heir at *Law,* though they ſucceed in a different manner to their reſpective Eſtates, yet have this Obligation common to them both, *That they ſhall diſcharge the Debts of the deceas'd.* And that not ſo much on account of any tacit Engagement which they have entred into to this purpoſe [a], as becauſe theſe Debts are a neceſſary Burthen affecting the Poſſeſſions in the manner of a tacit Mortgage. For, as *Quinctilian* obſerves [1], *Such is the Nature and Condition of Inheritance, that the Creditors muſt firſt be ſatisfied before it can effectually take place.* And ſo much only is to be reckon'd a Man's Eſtate, as remains when all are paid their own [2]. Whence, likewiſe, 'tis moſt highly agreeable to natural Equity, that the Heir be not charged with Debts above the Value of the Inheritance. Nor ſhould we omit what *Gabriel* the *Sionite* tells us in his Book of the Manners of the *Eaſtern* Nations, *That the* Muſſulmanni, *when they make their laſt Will, are bound to reſtore all that they have taken by Robbery or Violence, to the proper Owner, from whom they receive a formal Diſcharge in Writing: And if they know not the Perſon to whom Reſtitution ſhould be made, they lay out the Sum in publick Buildings, as Hoſpitals, Moſques, or Bagnio's, or elſe bequeath it to the Poor, or to ſome religious Order.*

In *Ferdinand Pinto,* Cap. 21. the *Chineſe* Hermit adviſeth *Antony de Faria,* who had been guilty of Sacrilege, to do theſe three things for his Soul's Health; to reſtore what he had taken away, to beg pardon for his Offences with Tears, and to diſtribute largely in Charity to the Poor. Add. *Cap.* 60.

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[a] On which Reaſon depends that diſpoſal of the old *Roman* Law, which we meet with in l. xxix. t. 2. l. 8. *Dig. De acquir. vel omitt. hæred.*

Mr. Barb. *NOTES on* §. xviii, xix.

[6] *Gruter* in his late Edition of *Publius Syrus* reprinted in 1708, reads theſe Words diverſely thus, *Hæredem ferre honeſtius eſt, quam quærere,* It is more prudent to reſolve to leave that Perſon for an Heir, whom the Laws appoint for our Succeſſor, than to ſeek for another to whom to give our Goods, which is a different Senſe from the other reading.

[1] *Quinctilian*'s Words are, *Nam patrimonii in alium tranſituri ea ratio eſt, ut primum credito ſatisfiat.* The ſame Author had before ſaid, *Bona porro quæ ſunt? ut opinor, ea quæ detractis alienis deprehenſa ſunt.*

[2] So the Law teaches, *Id enim bonorum cujuſque intelligitur, quod æri alieno ſupereſt,* Digeſt. l. xlix. t. 14. *De jure fiſci,* leg. 11. See l. iii. t. 6. *De calumniatoribus,* leg. 5. *in princip.* Lib. xi. t. 7. *De religioſis & ſumpt. funerum,* leg. 14. §. 1. Lib. xvi. t. 3. *Depoſiti vel contra;* leg. 7. §. 1. *Lex Wiſigothorum,* l. vii. t. 2. c. 19.

CHAP.

CHAP. XII.

Of Uſucapion or Preſcription.

I. *How Uſucapion and Preſcription differ.*
II. *What Uſucapion is by the* Roman *Laws, and where it takes place*
III. *How far honeſt Dealing is required in Uſucapion.*
IV. *Continual Poſſeſſion is required.*
V. *The Reaſons of introducing Uſucapion.*
VI. *Whether the Law for Uſucapion be penal.*
VII. *Many refer Uſucapion to civil Right.*
VIII. *Whether Uſucapion can ariſe from a tacit Dereliction of the Proprietor.*
IX *It ſeems to depend upon the tacit Agreement of Nations.*
X. *How Uſucapion may be prejudicial to Children not yet born.*
XI. *Uſucapion is alſo in uſe among divers Nations.*

IT belongs to our preſent Deſign to enquire likewiſe concerning that Method of Acquiſition, by which he who hath gotten Poſſeſſion of what was really another's [1], by a juſt Title, and with honeſt Intentions, and hath alſo held it for a conſiderable time without being diſturb'd or oppoſed, obtains the full Propriety of the thing thus poſſeſs'd, ſo as to extinguiſh all the *Rights* and *legal* Claim of the former Owner. This the *Roman* Law terms *Uſucapio*, becauſe the thing is, as it were, taken and acquired by long *Uſe* or *Poſſeſſion*.

The Word *Præſcriptio* in the Senſe of the ſame Law imports ſtrictly [2] that Plea, Demur or Exception, by which the Perſon thus in Poſſeſſion invalidates the Claim of the firſt Proprietor. Though theſe different Names are frequently taken for the very ſame Notion: *and the latter now prevails in common Uſe, and is the Term by which we render the former.*

It may be worth our while to premiſe, what the *Roman* Law appointed or directed in this matter; becauſe we ſhall hence eaſily gather how far the Buſineſs depends on poſitive Conſtitutions, and how far on the Laws of Nature.

II. *Preſcription*, as *Modeſtinus* [a] [1] defines it, is the *Addition of a Property, by means of long Poſſeſſion continued to the Term of Years fixed by the Law.* *Cujacius* and others, on the Authority of *Ulpian*, uſe the Word *adeptio* inſtead of *adjectio*, *Acquiſition* inſtead of *Addition*; but we do not apprehend that

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[a] *Digeſt.* l. xli. t. 3. l. 3. *D. De Uſucap.* leg. 3.

Mr. BARB. *NOTES on* Chap. X. §. i, ii.

[1] This is a very conſiderable ſort of Acquiſition. See n. 1. upon §. 1. of chap. x. It hath alſo a place among ſeveral People in the manner, which ſhall hereafter be explained. The Author in his Abridgement of the Duties of Man and Citizen, l. i. c. 12. §. 14. ſpeaks of two other kinds of Civil Acquiſitions. The firſt is that which is gained by the Sovereign, or the Laws, which deprive a Criminal of all, or at leaſt part of his Goods, and confiſcates them or gives them to the Perſon damaged, which is treated of at large, l. viii. c. 3. The other is obtained by Arms, or Right of War. But ſee what is ſaid of this, c. 6. §. 14. above.

[2] The word *Præſcription* will beſt expreſs the Latin *Uſucapio* in our Language, and therefore we ſhall treat of it under that Name, unleſs ſome ſpecial Reaſon oblige us to uſe the Word *Uſucapion*.

[1] Beſides, Preſcription has not only reſpect to Property, but it deſtroys other Rights and Actions, when Men are not careful to maintain them, and preſerve the uſe of them during the time limited by the Law. Thus a Creditor, who has not demanded his Debt during that time, diſcharges the Debtor And he that has enjoy'd the Rent of certain Lands ſo long, can't be diſpoſſeſſed, though he has no other Title but his long Poſſeſſion. See Mr. *Daumat* upon this Subject in his Civil Laws in their Natural Order, Part. II. l. iii. t. 7. Sect. 4. and Mr. *Titius*'s Obſervations on *Lauterbach*, Obſ. 1033. As alſo, in his *Jus Privatum Romano-German.* l. ii. c. 9. We ſhall hereafter explain, how far Preſcription is of natural Right, and what Civil adds to it. As to what we have to ſay about the Preſcription of things Incorporeal and their Rights, we are to obſerve, that by Natural Right alone Preſcription does not aboliſh Debts; ſo that tho' neither the Creditor, nor his Heirs have demanded any thing for a long time, his Right is not extinguiſhed, nor is the Debtor fully diſcharged. This Mr. *Thomaſius* proves in his Diſcourſe, *De Perpetuitate debitorum pecuniariorum*, printed at *Hall* in 1706. " Time, *ſays he*, in it ſelf is of no force, either to get or loſe one's Right; it muſt be accompanied
" with ſomething elſe, which muſt give it that Power. For no Man can be deprived againſt his Will of that Right he has got by
" the conſent of another, but by his own free Releaſe. He does not diſengage himſelf by acting contrary to his Engagements; and
" in delaying to execute them, he lays no new Obligations upon him to indemnify the Perſon intereſted; ſo that the Engagements of a
" bad Paymaſter become greater and ſtronger every day, and can't be judg'd by Natural Right alone to change their Nature, and
" come to nothing at a certain Period of Time. It is alledged in vain, that it is the Intereſt of all Mankind, that Proceedings in Law
" ſhould not be eternal: For 'tis no leſs the common Intereſt of Man, that every one ſhould keep his Word, and that bad Paymaſters
" ſhould not enrich themſelves without contradiction at the Expence of the Lender; that Juſtice be done, and every one obtain his
" own Right. Moreover, 'tis not the Lender that troubles Mankind in requiring what is due to him, but the Debtor who owes, and
" will not pay. For if he paid his Dues, there would be no ground for an Action. Nor is that Pretence better grounded, that
" 'tis the Negligence of the Creditor in not demanding his Debt, that is the Cauſe of his loſing his Right, and authorizes his Pre-
" ſcription. This can only have place among ſuch as live one with another in the independent State of Nature. Suppoſe the Creditor
" be very negligent, can his innocent Negligence deſerve more to be puniſh'd than the noxious Malice of the Debtor? Or ought he not
" rather to be puniſhed for his Injuſtice? Did he defer the Payment ſo long a time without any ill deſign, yet is he not as much to
" be blamed for his Negligence? Does not the Obligation of keeping Word oblige the Debtor to ſeek for his Creditor, rather than
" the Creditor for the Debtor? Why then, if ſo much Prejudice muſt come by Negligence, why ſhould it fall rather upon the Cre-
" ditor than the Debtor? Or rather ought not the Negligence of this laſt to be puniſhed; and ſo much the more, becauſe this gets by
" Preſcription, and the other loſes? But if we conſider things abſtractly from the Civil Laws, which require that a Debt ſhall be de-
" manded within a certain Space of time, the Creditor can't reaſonably be accuſed of Negligence, becauſe he forbears the Debtor;
" ſince when he lent the Money, a time was fixed when it was to be paid. And every Man is free to allow more time than he has
" promiſed, and 'tis ſufficient for the Debtor, that the time is come, when he agreed to pay. Beſides, the Creditor may have many
" commendable Reaſons for his Action, *viz.* Prudence, Neceſſity, and Charity; for which he deſerves rather to be praiſed, than ac-
" cuſed of Negligence, as Mr. *Thomaſius* proves particularly. Laſtly, There is no cauſe to believe that the Lender has renounced
" his Debt, as a matter ſubject to Preſcription; ſince the Debtor being not obliged to pay a thing in kind, but the value of what he
" borrowed, he does not properly poſſeſs the Goods of another; and ſo can't be thought to keep it as his own. On the contrary,
" he muſt be eſteem'd to be always in poſſeſſion of his Right, 'till he has renounced it expreſly, and confirmed it under his Hand."
After this, Mr. *Thomaſius* explains how a Debt may be loſt by Time for want of Proofs, and ſhews, that without that, Preſcription can have no place by the Laws of all People yet known to us, nor by thoſe of the *Romans* as far as the Emperor *Conſtantinus*'s Time. This whole Diſcourſe is worth our reading.

this makes the leaſt difference in the thing. For he, that having got Poſſeſſion of a thing with honeſt Intention, continues his Poſſeſſion to that determinate Period which the Law expreſſeth, may be ſaid to have ſomewhat *added* to him, which he hitherto wanted. And again, he, to whom the Law thus *adds* any new Property, may be ſaid to have *acquired* or obtained it.

To proceed; as every Man, who is otherwiſe capable of acquiring Dominion, is likewiſe capable of preſcribing; ſo by this *Right of Preſcription* we may acquire Dominion over both ſorts of things, moveable and immoveable, unleſs they are particularly excepted by the Laws.

And *Firſt*, Freemen are thus excepted[2]: For ſince Liberty is ſo ſweet a Comfort, as no one can be preſum'd to have neglected any Opportunity of recovering, 'tis juſtly ſuppos'd that the Party in this Caſe continued ſo long under Servitude, and did not put in his Claim to be releas'd, only out of Ignorance of his preſent Condition, not that by this Continuance he tacitly conſented to be a Slave. So that this long Patience under his Misfortune ought rather to make him a more worthy Object of Pity, than to be interpreted to his Diſadvantage. Things conſecrated or ſet apart for the Service of Religion are likewiſe excepted; and ſo too are the Goods of Minors, during their Non-age: For by reaſon of their unexperienc'd Years the neglect of challenging what is their own cannot be ſo far charg'd upon them, as that they ought on this account to loſe it; and it would be too hard and ſevere, if they were to ſuffer for the careleſneſs of their Guardians. Further, the Law excepts ſtolen Goods, runagate Servants, and things gotten by [3] Violence, tho' ſome third Perſon hath obtain'd the Poſſeſſion of them by honeſt Means.

Thus the Laws of the Twelve Tables ordain, *Rei furtivæ æterna authoritas eſto, Let the Claim againſt Things ſtolen hold good everlaſtingly.* For, as to the Robber himſelf, his Crime hinders him from preſcribing. And the third Perſon, the honeſt Poſſeſſor, is likewiſe ſtopp'd in his *Right*, by that Fault which is ſuppos'd to affect and attend the thing ariſing from the unjuſt Means by which it was before acquired: For though, properly ſpeaking, there is no Fault or Blemiſh in the thing conſidered by itſelf, yet inaſmuch as it was taken from the former Owner in an unjuſt and villainous manner, it ſeem'd equitable to enact, That his *Right* ſhould not hereby ceaſe or be extinct; and at the ſame time to take effectual Care, that no one ſhould be a Gainer by his Wickedneſs. For ſince three Years Preſcription is ſufficient for moveable things, it had been eaſy for Thieves ſo to ſecure their Booty, by carrying it off, and putting it into other Hands, as that the lawful Owner ſhould not be able in a ſearch of three Years to diſcover it.

Beſides, amongſt the Reaſons on which the *Right of Preſcription* is founded, one is the Negligence of the Owner, in ſeeking after them. But now, ſince ſtolen Goods are uſually concealed with the ſtricteſt Caution and Cunning, this Reaſon cannot take place againſt the Perſons who loſt them. Yet notwithſtanding all this, ſince it was by ſome ſubſequent Laws enacted, That all Actions, after a conſtant Silence of thirty or forty Years[4], ſhould utterly drop, and be extinct, the *Preſcription* likewiſe of ſtolen Goods, as well as other *Preſcriptions*, ſhall be valid, at Civil Law, after ſo long a Period[5], and ſhall overthrow the Claim of the former Proprietor: Which, how unreaſonable ſoever it may appear to ſome, who look upon it as very abſurd that Injury and Impunity ſhould, by length of time, turn into a Foundation for Equity and *Right*; yet it deſerves Excuſe on Account of the general Advantage ariſing from it to the Publick. Becauſe it highly concerns the publick Peace, that Suits and Quarrels ſhould at length be finally quaſh'd, and not ſuffer'd to run on for ever, and that the Propriety of things ſhould not hang perpetually in Uncertainty and under Diſpute[6]. And becauſe within the Compaſs of

thirty

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[2] In general, all that is not concerned in Commerce. Our Author has forgotten in his enumeration of things not ſubject to Preſcription, as publick Places, Goods that belong to the Publick, what is due to the Treaſury, and the Prince's Demeſnes, which are all mention'd in theſe Laws. *Sed aliquando etiamſi maxime quis bona fide rem poſſederit, non tamen illi uſucapio ullo tempore procedit, veluti ſi quis liberum hominem, vel rem ſacram, vel religioſam, vel ſervum fugitivum poſſideat,* Inſtit. l. ii. t. 6. *De uſucapionibus & longi temporis præſcriptionibus,* §. 1. *Furtivæ quoque res, & quæ vi poſſeſſæ ſunt, nec ſi prædicto longo tempore bona fide poſſeſſæ fuerint, uſucapi poſſunt,* ibid. §. 2. *Res fiſci noſtri uſucapi non poteſt,* ibid. §. 9. *Uſucapionem recipiunt maxime res corporales, exceptis rebus ſanctis, ſacris, publicis populi Romani & civitatum, item liberis hominibus,* Dig. l. xli. t. 3. leg. 9. *Præſcriptio longæ poſſeſſionis ad obtinenda loca juris gentium publica concedi non ſolet,* ibid. leg. 45. *Veluti ſi pupilli ſint,* &c. ibid. t. 1. leg. 48. We may alſo except ſuch Goods as fall by chance to an Heir, which the Father had alienated before his Son was of Age, *Cod.* l. vii. t. 40. *De annali except.* leg. 1. §. 2. Things which a Teſtator has forbid to alienate. See *Cod.* l. vii. t. 26. *De uſucapione pro emptore,* &c. leg. 2. An Eſtate in Dower, *Dig.* l xxiii. t. 5. *De fundo dotali,* leg. 4. 16. and ſuch like things.

[3] *Quod ſubreptum erit, ejus rei æterna autoritas eſto,* as the *Athenian* Law ſpeaks, mention'd by *Aulus Gellius,* l. xvii. c. 7. and taken out of the Twelve Tables, where we may ſee that *Authoritas* ſignifies a *Right of Property,* or a Right of claiming Goods again. See *Cod.* l. vii. t. 26. *De uſucapione pro empto,* leg. 7.

[4] *Quæ ergo antea non motæ ſunt actiones, triginta annorum jugi ſilentio, ex quo jure competere cœperunt vivendi ulterius non habeant facultatem,* Cod. l. vii. t. 39. *De præſcriptione* 30. & 40. *annorum,* leg. 3. as alſo the following Title, *De annali except.* &c. leg. 1. and *Cujacius*'s Obſervations, l. x. c. 12.

[5] *Præſcriptio longiſſimi temporis,* ſo called to diſtinguiſh it from *præſcriptio longi temporis,* the ordinary Term, *Cod.* l. vii. t. 22, 33, 34, 35. and which was regulated by the Meaſure mentioned, §. 4. n. 6, 7. following. The Emperor *Juſtinian* being over-perſuaded by the Clergy of *Emeſa* or *Emiſa,* a City of *Syria,* who by reaſon of ſome feigned Titles contrived to plunder ſome of the richeſt Families of the City, made a Law, That the Goods of the Church, City, Hoſpitals, and other Places ſet apart for religious and charitable Uſes, ſhould not preſcribe under the Space of an hundred Years, *Cod.* l. i. t. 2. *De Sacroſanctis Eccleſiis,* leg. 23. But the Fraud being diſcovered, and this new Law cauſing a great number of Actions, *Juſtinian* himſelf corrected it, and reduced the Privileges to the Term of forty Years, at leaſt in the Eaſtern Churches, Nov. 9. 111. See *Cujacius*'s Obſervations, l. v. c. 5. and a good Diſcourſe of Mr. *Wherlhof,* Profeſſor at *Helmſtadt,* intituled, *Vindiciæ Grotiani Dogmatis de præſcriptione inter liberas gentes,* §. 30. Yet we muſt not confound Preſcription of an hundred Years with Time immemorial, though they often come much to the ſame. See *Grot.* l. ii. c. 4. §. 7. and the Diſcourſe above quoted, printed in 1696, §. 18, *&c.* In fine, it was *Theodoſius* the younger, and not *Theodoſius* the great, that eſtabliſh'd the Preſcription of thirty and forty Years. See the ſame Diſcourſe, §. 29. and Mr. *Thomaſius, De Perpetuitate Debitor. Pecun.* §. 27.

[6] 'Tis upon this Reaſon, as well as upon the Negligence of the Proprietor to claim his Goods again, that the *Roman* Lawyers have founded the Right of Preſcription, *Bono publico uſucapio introducta eſt, ne ſcilicet quarundarum rerum diu & fere ſemper incerta dominia eſſent, cum ſufficeret domino ad inquirendas res ſuas ſtatuti temporis ſpatium,* Dig. l. xli. t. 3. leg. 1.

thirty Years Mankind ſeem to put on a new Face, it was thought very inconvenient that the following Age ſhould be diſturb'd upon every ſlight occaſion.

Beſides, when a Man had been without ſuch a part of his Goods for thirty Years together, he was juſtly ſuppos'd to have ſat down quietly under the Loſs; ſo that there was no need of troubling ſo long a Poſſeſſion on his account. The ſame Reaſon will hold for that [7] *Preſcription* which is ſometimes allow'd in criminal Caſes; it ſeeming unneceſſary to bring to the Bar Offences committed almoſt an Age ſince, the ill Effects of which Time itſelf hath ſufficiently purged and effaced; ſo that the true end of Puniſhment is ſuperſeded.

III. But that *Preſcription* may effectually proceed, 'tis requiſite that the Party, receiving the thing at the Hands of a falſe Proprietor, do obtain this Poſſeſſion by a juſt Title [1], or upon ſuch grounds as are eſteem'd ſufficient in other Caſes for the transferring and the acquiring of *Property*: And conſequently that he acts in this Matter *bona fide*, with fair and honeſt Intention; that is, that he be able to alledge a ſufficient Reaſon why he thus poſſeſſeth it, and be perſuaded in his Mind, that the *Property* was transferr'd really on him, and himſelf conſtituted true Owner [2]. *Liban.* Declam. i. pag. 194. Edit. *Pariſ. A Man doth not become juſt Poſſeſſor of a thing barely by taking it to himſelf, but by holding it innocently.* Hence when the Lands, which formerly belong'd to King *Apion*, were left to the *Roman* People, and every Man ſeiz'd on what part he liked beſt: *Tacitus* calls this way of Proceeding, *Diutina licentia*, *A long continued Licentiouſneſs and Injuſtice.* According to the civil Law, 'tis enough if a Man had this *bona fides* [3], this Uprightneſs and Integrity of Thought at his firſt entring on the Poſſeſſion, though he happen afterwards to diſcover, that the Perſon who convey'd it to him was not the juſt Proprietor. But the Canon Law requires the ſame Integrity through the whole Term of Years on which the Preſcription is built [4]; ſo that if a Man comes in the mean time to know, that the thing was made over to him by one who had no Right to diſpoſe of it, he begins immediately to be obliged to reſtore it to the lawful Owner, and from thenceforward detains it *mala fide*, foully and diſhoneſtly; eſpecially in caſe he go about to hide it from the Owner's Knowledge by Craft and Deſign. Which Judgment ſeems to approach neareſt to the Strictneſs and Sanctity of the Law of Nature [5]: Inaſmuch as, upon the introducing of diſtinct Pro-

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[7] *Querela falſi temporalibus præſcriptionibus non excluditur, niſi viginti annorum exceptione, ſicut cætera fere crimina*, Cod, l. ix. t. 22 *Ad legem Cornel. De falſis*, leg. 12. See l. i. c. 9. §. 6. above, and what Mr. *Titius* ſays, *Obſervat.* on *Lauterbach. Obſervat.* 1124. As alſo Mr. *Thomaſius*'s Diſcourſe, intitled, *De Præſcriptione Bigamiæ*, which is the eighth among thoſe at *Leipſick*.

[1] *Ut qui bona fide ab eo qui Dominus non erat, cum crederet eum Dominum eſſe, rem emerit, vel ex donatione aliave quavis juſta cauſa acceperit, is —— uſucaperet*, Inſtit. l. ii. c. 6. princip. *Diutina ſucceſſio tantum jure ſucceſſionis, ſine juſto titulo obtenta, prodeſſe ad præſcriptionem hac ſola ratione non poteſt*, Cod. l. vii. t. 33. *De præſcript. longi temp.* &c. leg. 4. *Nullo juſto titulo præcedente poſſidentes, ratio juris quærerere Dominium prohibet. Idcirco cum etiam uſucapio ceſſet, intentio Dominii nunquam abſumitur*, Lib. iii. t. 32. *De rei vindic.* leg. 24.

[2] *Libanius*'s Greek is, Οὐ γὰρ ἐν τῷ λαβεῖν ἐστὶ τὸ δικαίως κτήσασθαι, ἀλλὰ τῷ χωρὶς ἐγκλημάτων ἔχειν.

[3] *Ut in his omnibus caſibus ab initio eam bona fide capiat —— Quod & in rebus mobilibus obſervandum eſſe cenſemus, ut in omnibus juſto titulo poſſeſſionis anteceſſoris juſta detentio, quam in re habuit, non interrumpatur ex poſteriore forſitan alienæ rei ſcientia, licet ex titulo lucrativo ea cœpta eſt*, Cod. lib. vii. t. 1. *De uſucapione transformanda, & ſublata differentia rerum mancipi, & nec mancipi*, &c. leg. 1.

[4] *Unde oportet, ut qui præſcribit, in nulla temporis parte rei habeat conſcientiam alienæ*, Decretal. l. ii. t. 26. *De præſcript.* Can. 20. See alſo Can. 5.

[5] Mr. *Thomaſius* maintains, That by natural Right an honeſt Intention is not neceſſary to make a Preſcription even in the beginning of Poſſeſſion, provided ſo long a time is run out, that it may reaſonably be preſumed, that the true Proprietor has relinquiſhed his Poſſeſſion of his Goods. "For, *ſays he*, in whatever manner we get into the Poſſeſſion of the Goods that belong to another, " from the moment that he to whom they belong, knowing that they are in our Hands, and being able, if he pleaſes, to claim them, " declares either expreſly or tacitly, that he will let them reſt there, we become the lawful Owners of them as much as if we had a " juſt Title to them originially. *Theodoſius the younger*, who eſtabliſh'd the Preſcription of thirty Years, did not require any good " intention in the Poſſeſſor; 'twas *Juſtinian*, who at the perſuaſion of his Counſellors added that Condition in certain Caſes, and " the Canon Law afterward improving, the civil required a perpetual good Intention in all ſorts of Preſcription. The Clergy of the " *Roman* Church by this means found out a way to recover ſooner or later all the eccleſiaſtical Revenues that had been alienated, altho' " the Poſſeſſors had peaceably enjoyed them by an immemorial Cuſtom. Ambitious Princes alſo made their Advantage of this Hypo" theſis to uſurp the Lands which they pretended to recover to their Eſtates, under this Excuſe, that the Lands of the Crown could " not be alienated; and ſo thoſe, who enjoy'd thoſe Goods which had been alienated, poſſeſſed themſelves of them by a bad Deſign; " ſince they ought to know, that in ſuch Caſes no good Purchaſes can be made. Hence it appears, that the Maxim of the Canon " Law, whatever ſhew of Piety it may ſeem to carry, is built on a Foundation contrary to natural Right, ſince it creates many " diſturbances among Men, whoſe Quiet requires that there ſhould be an end of all Actions and Differences, and at the end of a cer" tain time Poſſeſſors by fair dealing ſhould be ſecure againſt all Claims." Theſe are Mr. *Thomaſius*'s Notions, which I have collected from divers parts of his Works. See his Diſcourſe concerning the Perpetuity of pecuniary Debts, §. 3. in Not. lit. K. & §. 27. 32. As alſo his *Inſtit. Juriſprud. Divin.* l. ii. c. 10. §. 193, 195, 201. with the Chap. *Fundamenta Jur. Nat. & Gent.* which anſwers it, §. 14, *&c.* As for my ſelf, I own, that if the true Maſter of a thing bought, or uſurped and gotten from him, in a word, by foul Dealing, doth not put in his claim, nor declare any Deſire of recovering it for a long Space of time, though he knows very well in whoſe Hands it is, and there is nothing to hinder him from obtaining his Right; in this Caſe, I ſay, the unjuſt Poſſeſſor becomes the lawful Proprietor, provided that he hath ſome way or other declared that he was ready to reſtore it, if it had been demanded: For then the antient Owner acquits him, and manifeſtly renounces, tho' tacitly, all his Pretenſions to it. And thus our Author determines it in his *Element. Juriſprud. Univerſ.* p. 76, 77. But if he that takes Poſſeſſion honeſtly of the Goods of another comes to diſcover his Error before the time of Preſcription is expired, he is obliged to do the Duty of an honeſt Poſſeſſor. See what is ſaid in the next Chapter. But if, continuing always in his honeſt Intention, he come to the time of Preſcription, whether it agree with the Maxims of the natural Law only, or the civil Laws have reduced it to ſomething leſs, the Right of the antient Owner is entirely extinct, as I ſhall hereafter ſhew. The whole amounts to this, That as the honeſt Poſſeſſor who preſcribes is the Occaſion, tho' innocent, that the other is debarred of all his Pretences, he ought to aſſiſt him as far as he can to revenge the Wrong done by a third Perſon, who ſold him the Goods which he knew were not his own, and ſo was the cauſe of this Preſcription. In fine, tho' a good Intention is alway neceſſary to keep the Conſcience quiet, yet this is no Impediment but that human Laws may overlook this Condition either wholly or in part, to avoid great numbers of Actions. And to obtain this End, it may be very fit not to require a good intention in Preſcriptions, to which they have fixed ſo long a time, or to demand it at leaſt in the Beginning of the Poſſeſſion; and ſo the Maxim of the Civil Law in my Judgment is better grounded than that of the Canon Law. The Artifice of the Clergy conſiſts not ſo much in this, that the Determinations of the Popes require a perpetual good intention in him that preſcribes, as in this, that they will have the Goods of the Church look'd upon as not capable of being alienated, either abſolutely, or under ſuch Conditions as will make all Preſcriptions void. As for what Mr. *Thomaſius* ſpeaks of Princes, who affirm that the Demeaſnes of the Crown cannot be alienated juſtly, and that Preſcription has no place among ſuch who have no dependence one upon another in a ſtate of Nature, ſee the laſt Paragraph of this Chapter, and Lib. viii. c. 5. §. 9.

perties, all Men were ſuppoſed to enter into an Obligation, *That they would, to the utmoſt of their Power, let every Perſon enjoy his own again, when they ſhould happen to be in Poſſeſſion of it without his Conſent.* But the Compilers of the Civil Law were contented with ſecuring the outward Innocence of Mens Actions; and authoriz'd the Poſſeſſor quietly to enjoy what he had honeſtly gotten; leaving to the reſpective Owners the whole Care of ſeeking after their Goods, and of challenging them upon a timely Diſcovery.

IV. Another neceſſary Condition, in order to *Preſcription* is, *That it be founded on conſtant Poſſeſſion, ſuch as hath not been interrupted either* naturally [1], *as if the thing hath returned in the mean while to the former Owner, or hath at any time lain abandon'd or forſaken: Or civilly* [2], *as if the Owner hath been actually engaged at Law with the Poſſeſſor for the Recovery of what he loſt; or, at leaſt, by ſolemn Proteſtations hath put in a Salvo to his Right.*

Bœcler and *Ziegler*, in their Annotations on *Grotius* [a], obſerve farther on this Subject, *That the Space of Time, during which the prime Poſſeſſor holds the thing of which we ſpeak, ſhall be reckon'd to the Benefit of him that ſucceeds* [3] *in the Poſſeſſion; provided that both the former and the latter firſt entred upon it with honeſt Minds, and upon a juſt Title: For otherwiſe the prime Poſſeſſor ſhall not be allow'd to make over his Time to the next Holder; and conſequently if the former came to the Poſſeſſion by diſhoneſt Means, the Time he paſs'd in it ſhall not be computed towards the Preſcription of the latter, tho' he, for his own part, obtain'd the Poſſeſſion fairly and juſtly.*

And this Rule takes place as well in a general Succeſſor, an Heir, as a particular, a Buyer, a Grantee, *&c.* But then here is the Difference between theſe two kinds of Succeſſors; the laſt of 'em, tho' he cannot reckon the time of the diſhoneſt Acquirer to lengthen out his own, yet in caſe he himſelf was not privy to the wrongful Dealing, the Fault of the ſaid Acquirer, if it cannot be uſed for his Advantage, ſhall not turn to his Prejudice; but he ſhall be allow'd to compleat the Term of *Preſcription* in his own Perſon [4]. Whereas 'tis otherwiſe in the caſe of a general Succeſſor, or an Heir [5]: For he cannot, by his own Ignorance and honeſt Intention, atone for the Fault of the deceaſed whom he repreſents, and whoſe *Rights* he takes in full upon himſelf.

A longer Space of Time is required for preſcribing againſt one that is abſent, than one that is preſent [6].

So again, moveable things may paſs into Preſcription ſooner than immoveable [b]. The reaſon of which latter Conſtitution ſeems to be, That immoveables are judg'd a much greater Loſs than the contrary; that they are not ſo frequently made the Subject of Commerce between Man and Man; that 'tis not ſo eaſy to acquire the Poſſeſſion of them without knowing whether the Party that conveys them be the true Proprietor, or the falſe; and conſequently, that they are likely to adminiſter much leſs Occaſion to Controverſies and Suits. *Plato*'s Rules for the Preſcription of moveables are as follow; *If a thing of this kind be uſed openly in the City, let it paſs into Preſcription in one Year; if in the Country, in five Years; if it be uſed privately in the City, the Preſcription ſhall not be compleated in leſs than three Years. If it be thus held with Privacy and Security in the Country, the Perſon that loſt it ſhall have ten Years allow'd him to put in his Claim* [c]. As for the Preſcription of immoveables, this the Conſtitution of *Plato*'s Commonwealth was not acquainted with.

V. The chief Reaſons, which the Learned in the *Roman* Law aſſign for the firſt introducing of Property, are to this purpoſe; *That in order to the avoiding of Confuſion, and the cutting off of Diſputes and Quarrels, it is of great Conſequence to the publick Welfare, that the Proprieties of things ſhould be fix'd and certain amongſt the Subjects.* Which would be impoſſible, ſhould perpetual Indulgence be allow'd to the Negligence of former Owners, and ſhould the new Poſſeſſors be left in continual Fear of loſing what they held.

Then again, Trade and Commerce could not otherwiſe ſubſiſt in the World: For who would ever contract with another? Who would ever make a Purchaſe, if he could never be ſecur'd in the quiet Poſſeſſion of any thing convey'd to him? Nor would it be a ſufficient Remedy in this Caſe, That if the thing ſhould be thus challeng'd by a

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[a] Lib. ii. c. 4. §. 9.

[b] Vid. *Inſtit. ubi ſupra.*

[c] *De* LL. l. xii. p. 990, 991. Edit. *Wech.*

Mr. Barb. *NOTES* on §. iv.

[1] See the *Digeſts*, l. xli. t. 3. *De uſurpat. & uſucapion.* leg. 5. & 15. Thus we loſe a thing, or are depriv'd of it.

[2] *Utramque autem poſſeſſionem ita demum eſſe legitimam, cum omnium adverſariorum ſilentio & taciturnitate firmatur; interpellatione vero & controverſia progreſſa, non poſſe eum intelligi poſſeſſorem, qui licet poſſeſſionem corpore teneat, tamen ex interpoſita conteſtatione, & cauſa in judicium deducta ſuper jure poſſeſſionis vacillet ac dubitet*, Cod. l. vii. t. 33. De acquir. & retinenda poſſeſſione, leg. 10.

[3] *Plane tribuuntur acceſſiones poſſeſſionum his, qui in locum aliorum ſuccedunt, ſive ex contractu, ſive voluntate; hæredibus enim & his, qui ſucceſſorum loco habentur, datur acceſſio teſtatoris*, Dig. l. xliv. t. 3. De diverſis temporalibus præſcript. & de acceſſionibus poſſeſſ. leg. 14. §. 1. *Præterea ne vitioſæ quidem poſſeſſioni ulla poteſt accedere, ſed nec vitioſa ei quæ vitioſa non eſt*, l. xli. t. 3. De acquir. vel amitt. poſſeſſ. leg. 13.

[4] *Si quis loci vacantis poſſeſſionem propter abſentiam aut negligentiam Domini, aut quia ſine ſucceſſore deceſſerit, ſine vi nanciſcatur, quamvis ipſe mala fide poſſideat (quia intelligit ſe alienum fundum occupaſſe) tamen ſi alii bona fide accipienti tradiderit, poterit ei longa poſſeſſione res acquiri*, Inſtit. l. ii. t. 6. §. 7. *Diutina poſſeſſio quæ prodeſſe cæperat defuncto, & hæredi & bonorum poſſeſſori continuatur, licet ipſe ſciat prædium alienum eſſe. Quod ſi ille initium juſtum non habuit, hæredi, & bonorum poſſeſſori, licet ignoranti, poſſeſſio non prodeſt*, ibid. 12. *Cum hæres in jus omne defuncti ſuccedit, ignoratione ſua defuncti vitia non excludit —— uſucapere non poterit, quod defunctus non potuit*, Dig. xliv. t. 3. De diverſ. temp. præſcript. *&c.* leg. 11.

[5] The honeſt Poſſeſſor preſcribes in ten Years againſt a Perſon preſent, but not under twenty Years againſt one abſent, altho' he that keeps the thing be poſſeſſed of it unjuſtly, *Cod.* l. vii. t. 33. *De præſcript. longi temporis decem vel viginti annorum*, leg. 11. & Novel. *Juſtin.* 119. c. 7. See the next Note.

[6] Preſcription for moveables is gained in three Years, whereas for immoveable 'tis not gained under ten Years againſt a Perſon preſent, and twenty againſt a Perſon abſent. *Ne Domini maturius ſuis rebus defraudentur ——— cautum eſt, ut res quidem mobiles per triennium, immobiles vero per longi temporis poſſeſſionem* (i. e. *inter præſentes decennio, inter abſentes viginti annis*) *uſucapiantur*, Inſtit. l. ii. t. 6. princ. By ſuch as are preſent, is meant ſuch as are in the ſame Country. See *Cod.* l. vii. t. 33. *De præſcript. longi temp.* &c.

third Party, the Perſon from whom we receive it ſhould be obliged to make it good [1]; for after ſo long a courſe of Time thouſands of Accidents might render him incapable of giving us this Satiſfaction. And what grievous Commotions muſt ſhake the Commonwealth, if at ſo vaſt a diſtance of Years, ſo many Contracts were to be diſannulled [2], ſo many Succeſſions to be declared void, and ſo many Poſſeſſors to be ejected? It was therefore judg'd ſufficient to allow ſuch a Space, as large as in Reaſon could be deſired, during which the lawful Proprietors might recover their own. But if thro' Sloth and Neglect they ſuffer'd it to ſlip [3]; the *Prætor* might fairly reject their too late Importunity. And tho' it might ſo happen, that now and then a particular [4] Perſon loſt his Advantage of recovering his Goods utterly againſt his Will, and without his Fault, only becauſe he was unable to find out the Poſſeſſor; yet the Damage and Inconvenience ariſing from that general Statute to ſome few private Men, is compenſated by the Benefit it affords to the Publick. But we ought well to obſerve, That before we can charge the antient Proprietor with Careleſneſs and Sloth, we muſt ſuppoſe, That he had a convenient Seaſon to exert his Diligence.

Hence it is highly agreeable to Reaſon and Equity, That the time during which a Country hath been the Seat of War, ſhall not avail towards Preſcription: As *Honorius* particularly decreed, *That no one ſhould reckon towards the procuring of Preſcription that Space of Time in which the* Vandals *ſtaid upon the* Roman *Ground* [a].

VI. But there's no Neceſſity, that, in order to aſſert the Juſtice of civil Governments, in eſtabliſhing the Right of *Preſcription*, we ſhould have recourſe (with a certain *Author* [b]) to that Power of executing Puniſhment on the guilty, with which the chief Magiſtrate is inveſted. As if the Law denied an *Action* to thoſe, who for ſo long a time forbore to challenge their own, for this Reaſon only, becauſe the Parties deſerve to be put into the Liſt of Criminals, for ſuffering *Preſcription* to be pleaded againſt them; whilſt by thus neglecting their Property, they not only prejudice the common Good of the Society, but likewiſe ſin againſt their own Nature, which hath in all Caſes an eſpecial Regard to the publick Advantage: And that therefore as *Solon* ordain'd a Penalty againſt thoſe who were idle and negligent, ſo here the Neglect of the Proprietor is puniſh'd with the Loſs of his *Property*.

But indeed the principal Aim and Deſign of the Law concerning *Preſcription* is not to puniſh Mens Defaults in this reſpect, but to provide, that the State be not diſturb'd by uncertain Titles, and by Properties in conſtant Doubt and Suſpence. Though it's true, that by a Perſon's being denied to ſue for Recovery, when he hath long neglected it, he ſuffers ſome Loſs or Damage as a neceſſary Conſequence.

Beſides, to be excluded from ſome Advantage, lying open to thoſe only who are vigilant and induſtrious in their own Affairs, doth not come up ſtrictly to the nature of a Puniſhment. For we certainly uſe a Figure when we ſay, *That an idle Temper is a ſufficient Revenge to itſelf: Or, That 'tis Puniſhment enough to the ſlothful and unactive, that being ſhut out from all Poſts of Honour, they are conſtrain'd to paſs their Days in Obſcurity.*

Beſides, the Aſſertion is not true, *That thoſe who ſuffer their Goods to be with-held from them by Preſcription, are really Offenders againſt the Commonwealth.* They indeed do manifeſtly injure the Publick, who either abuſe and ſquander away their Subſtance, or whilſt they ſit brooding over it, and are Proprietors only in Name, let it grow uſeleſs for want of Application. But now a thing that is gain'd by Preſcription, is however under the Care and Management of ſome Perſon; ſo as ſtill to be ſerviceable to the Occaſions of the Community. And 'tis altogether the ſame thing to the State, whether ſuch a Piece of Ground, for Inſtance, be in the Hands of this Man, or of that, provided it doth not lie quite neglected, without any one to cultivate and improve it.

To theſe Reaſons we may add farther, That when any private Perſon receives Advantage from another's Puniſhment, 'tis neceſſarily ſuppoſed, that he was before conſiderably hurt or endamaged by the Party offending. Whereas he who commenceth a Proprietor by the Right of *Preſcription*, can on no Account be ſaid to have ſuffer'd Harm from the Neglect of the Party, whom he thus ſucceeds. Nor doth he rightly apply to the preſent Purpoſe thoſe Words of Book xvi. t. 3. *D. Depoſiti, &c. Male meritus publice*, &c. " He that hath deſerv'd ill of the Publick by embezzling what was deliver'd to him in Charge, " ought to be left to ſtruggle with Poverty, that

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[a] *Procop.* Hiſt. *Vandal.* l. i. c. 3.

[b] *Hugo de Roy, de eo quod juſtum eſt*, l. iii. t. 3, 4.

Mr. BARB. *NOTES on* §. v.

[1] See Lib. v. c. 5. §. 5. following, at the End.

[2] It was a judicious Reflection made by *Aratus* of *Sicyon* in *Tully*'s Offices, l. ii. c. 23. *Et quinquaginta annorum poſſeſſiones moveri non nimis æquum putabat, propterea quod tam longo ſpatio multa hæreditatibus, multa emptionibus, multa dotibus tenebantur ſine injuria.* He did not think that Poſſeſſions of fifty Years ſhould be diſturbed, becauſe in ſo long a time many things in Inheritances, Purchaſes, and Portions might be held without an Injury to any.

[3] The *Roman* Lawyers hold, That they who ſuffer their Goods to become ſubject to Preſcription, may be thought to alienate them. *Alienationis verbum uſucapionem continet. Vix eſt enim ut non videatur alienare, qui patitur uſucapi*, Dig. 50. t. 16. *De verbor. ſignificat.* leg. 38. *in princip.*

[4] The Ignorance of the antient Owner hinders not the Preſcription. The Civil Law orders things ſo, that he that loſeth the Poſſeſſion of his Goods may claim them again, if he can diſcover in whoſe Hands they are; but it doth not ſuppoſe it a thing abſolutely neceſſary that he ſhould actually diſcover them. The Proof of that Condition, ſays the Emperor *Juſtinian*, would run us into new Perplexities. *Ut bono initio poſſeſſionem tenentis, & utriuſque partis domicilio requiſito, ſit expedita quæſtio pro rebus ubicunque poſitis,* NULLA SCIENTIA *vel* IGNORANTIA EXPECTANDA, *ne altera dubitationis inextricabilis oriatur occaſio*, Cod. l. vii. t. 33. *De præſcript. longi temporis*, &c. leg. 12. It is ſufficient then in general to preſume, that he againſt whom the Poſſeſſor preſcribes has a competent Knowledge; and it was upon the account of this Preſumption, that the ſame Emperor took himſelf obliged to prolong the time of Preſcription, which according to the Laws of the Twelve Tables was but one Year for Moveables, and two for Immoveables. *Sed & ſi quis res alienas, Italicas tamen, bona fide poſſidebat per biennium, miſeri rerum Domini excludebantur, & nullus eis ad eas reſervabatur regreſſus, quæ & neſcientibus Dominis procedebant, quo nihil inhumanius erat. Si Homo* ABSENS & NESCIENS TAM ANGUSTO TEMPORE SUIS CADEBAT POSSESSIONIBUS, Ibid. t. 31. *De uſucap. transform.* &c. leg. 1.

" he may ſerve for an Example to deter others " from Wickedneſs.

Since then the Law concerning *Preſcription* is not a *penal Statute*, 'tis idle to diſpute, why the Negligence of the *Proprietor* ſhould be rather puniſh'd by the Loſs of the neglected Goods, than by ſome pecuniary Mulct. Though it is very evident, that ſuch a Mulct could not procure the true End of the *civil Conſtitutions* in this Affair, which was, " To cut off all thoſe Suits and Quarrels that " would for ever have been ſpringing up, and to " enſure, at leaſt, a quiet Enjoyment to long Poſ- " ſeſſors, whoſe Caſe entitles them to more than " ordinary Favour.

For in the firſt Place the Matter muſt have been brought into Court by the Claim of the former Proprietor, where the Cauſe would have been the more difficult and perplex'd, by reaſon of the things continuing ſo long in other Hands; and then the preſent Poſſeſſor was to be ejected, whence a new Hardſhip would ariſe. For if the Fine were to go to the Magiſtrate, then the Poſſeſſor's juſt Title and honeſt Intentions were likely to ſtand him in no ſtead. Nor if the Poſſeſſor himſelf were to receive the Fine for a Comfort and Recompence, would all the Doubts be hereby reſolv'd. Becauſe, ſhould the Fine be leſs in Value than what the Poſſeſſor loſeth by quitting his Hold, he muſt ſtill be, in part, a Sufferer: But were it as much, or more, then the antient Claimant would get little by his Suit. Therefore there cannot be, in the Point before us, a more ready way to Peace and Quietneſs, than to declare, that after the Term of Years appointed for *Preſcription*, the Right of the former Owner ſhall ceaſe and be extinct.

VII. By what Law *Preſcription* was firſt ſet on Foot, the learned are not well agreed: Moſt aſcribe its Original to *civil* or *poſitive Law*, and oppoſe it to thoſe Methods of Acquiſition, which are commonly ſaid to proceed from the *Law of Nations*. Nay, *Cujacius*[a] goes ſo far as to affirm, *That Preſcription doth really contradict the Law of Nations, in that it takes a Man's Property from him, without his Conſent: That it interferes likewiſe with natural Equity, tho' only for the Sake of publick Good; whilſt it endamageth private Owners, but turns to the Benefit and Advantage of the Community.* To which *De Roy* anſwers, [b]*That each particular Proprietor, in ſubjecting himſelf to thoſe Laws which eſtabliſh Preſcription*[1], *doth at leaſt implicitly conſent to that Tranſlation of his Right.* Another Reaſon urg'd by *Cujacius*, to prove this Eſtabliſhment to be contrary to the Law of Nations, is as follows: *That, according to the ſaid Law, no Man can conſtitute another as the true Proprietor of a thing, unleſs he were himſelf ſo before*: Whereas, by the civil Law, he who receives a thing from one who was not the Proprietor, may yet obtain the Property of it himſelf, if he can preſcribe for it in the uſual manner. To which *De Roy*[c] again replies, *That in the Buſineſs of Preſcription the Seller, or any other Non-proprietor, conveys nothing more than the Title and honeſt Poſſeſſion; but that the Property is wholly added either by the ſtanding Law, or by the publick Magiſtrate, who even according to the Law of Nations is inveſted with juſt Power to make new Ordinances, and to transfer Properties from one Perſon to another, out of a fair and reaſonable Regard to the publick Good; the Party who thus ſuffers for his own Neglect, really conſenting to this Conveyance of his Property, or at leaſt being preſum'd to conſent by his long Silence.*

Some maintain *Preſcription* to proceed from *civil* and *poſitive Law*, upon the Strength of this Argument; that in caſe a Man hath not originally obtain'd a Right on ſome other Bottom, the bare Length of Time can give none, as being deſtitute of all Power to produce any Effect. *For tho' every Thing*, ſay they, *is done in Time, yet Time itſelf can do nothing.*

Now as to the Reaſon here propoſed, thus much indeed is certain, *That it depends wholly on the Determination of poſitive Law, why Preſcription ſhould be rather compleated at the Tenth or Twentieth Year (for Inſtance) than at the Ninth, or the Sixteenth*: Yet no one can deny but that the Conſent of all Nations, to which they were moved by the Care of the common Peace, might be able to aſſign ſome moral Efficacy to the Courſe of Years; at leaſt ſo far, as that in Proceſs of Time ſome certain Preſumptions and Favours, on the ſide of Perſons in Poſſeſſion, ſhould be granted to defend and confirm their Right, though attributed to other Cauſes than the bare Time it ſelf. For tho' pure natural Reaſon, and the Agreement of all the World, do not fix any one Point of Time as the neceſſary Condition of obtaining a future Right, yet they

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[a] Add *Leg.* i. *Dig. De Uſucap.*

[b] Dict. loc.

[c] Lib. iii. t. 4. ſ. 8.

Mr. Barb. *NOTES on* §. vii.

[1] This is a very good Reaſon. For the Laws may limit the Right of Property many ways, and make them paſs from one to another without expreſs Conſent, nay, ſometimes againſt the Will of the antient Proprietor. So that though Preſcription had no Foundation beſides natural Right, yet 'tis not unjuſt, that the Laws give it an Authority among Members of the ſame Kingdom. For, as I ſhall ſhew hereafter, 'tis ſo far from being contrary to natural Equity, that it is very conformable to it, and anſwers the End and Deſign of Property itſelf. Upon the whole, a good Deſign is neceſſary to preſcribe with a good Conſcience, as I have ſaid §. 3. n. 5. whether the civil Laws require it, or no. I alſo ſuppoſe, that Preſcription is fixed at a time long enough, as we ordinarily reckon it. For, in my Judgment, an honeſt Man could leſs help himſelf among the *Romans*, when the Preſcription for moveable Goods was made in one Year, and immoveable in two, in which the Emperor *Juſtinian* did acknowledge there was ſome Injuſtice,as I have ſhewed above, §. 5. n. 4. Upon this ground Preſcription is not an odious Right, nor conformable to natural Right, although Mr. *Placette* ſays 'tis, and in his Treatiſe of Reſtitution, l. v. c. 6. compares it to an unjuſt Arreſt, which yet does not free from the Obligation to Reſtitution. He aſſerts, " That the Law of God does not admit of this Right, and that " the Jubile always reſtored the antient Proprietors to the Poſſeſſion of their Goods, though voluntarily alienated. " But this has no relation to the Right of Preſcription. God, for Reaſons ariſing from the Conſtitution of the *Jewiſh* Republick, forbad the perpetual Alienation of their immoveable Eſtates; and not of their Goods in general, as Mr. *La Placette* expreſſes it. See l. v. c. 5. §. 4. following. In fine, there is nothing in the Law of *Moſes* that condemns Preſcription as an unjuſt Eſtabliſhment, and we can no more infer it from the Example he brings, than we may conclude that the perpetual Alienation of Lands is odious, and not conformable to natural Right. The other Example which this Author adds, is not better apply'd. Although the *Jebuſites* had maintain'd themſelves ſeveral Years in the poſſeſſion of the City of *Jeruſalem*, after God had given the Children of *Iſrael* all the Land of *Canaan*, yet *David* drove them from thence. This is a ſpecial Caſe, from which no Conſequence can fairly be deducted; and Mr. *La Placette* ought to remember, that when the *Ammonites* claimed certain Lands, which they affirmed to be theirs, *Jeptha* oppoſed them with this Argument, That the *Iſraelites* had enjoyed the peaceable Poſſeſſion of them three hundred Years, which was enough to ſecure the Property to them. See *Judges* xi. 25.

might allow this Effect to a ſpace of very conſiderable Extent and Latitude.

Others have choſe to expreſs themſelves doubtfully and timorouſly in the matter; being ſenſible of the vaſt Advantage which the Law for Preſcription brings to the Publick; they thought it probable, that from the very Nature of the thing, and its antecedency to any poſitive Ordinance, *Preſcription* is of Force to transfer *Property*; ſince natural Reaſon in the ſtricteſt manner commands the doing of thoſe things which conduce to the common Benefit and Peace. But then they qualify this Aſſertion, by adding, *That though the Light of Reaſon ſuggeſts, that the Thing is highly fitting, and that 'tis expedient it ſhould be enacted by a poſitive Conſtitution, yet 'tis not altogether ſo neceſſary, as to be immediately eſtabliſh'd by the meer Law of Nature.*

Again, many do not ſtick to acknowledge, that *Preſcription* is not repugnant to the Law of Nature, and conſequently, that it may be pleaded as a fair Title amongſt thoſe who are wholly govern'd by the ſaid Law, in relation to each other, and lay the Foundation of it in the *tacit Dereliction* of the former Proprietor: For the Proof of which [1], they ſuppoſe before-hand, “That Nature allows every Man to renounce and abdicate his Right, when he thinks fit to hold it no longer. Now, that this Deſire of abdicating ſhould be able to produce any Effect, in relation to others, 'tis neceſſary that it diſcover itſelf by ſome certain Tokens; it being incongruous to human Nature to derive any outward Efficacy from the bare internal Acts of the Mind. Theſe Tokens are either Words, or Deeds. If the Will be expreſs'd by Words, then there is no need of waiting for the Term of Preſcription, ſince the Right is immediately transferr'd on the other Party. And it is the ſame when a Man declares his Reſolution concerning a thing by ſome poſitive Deed; as ſuppoſe, if he either caſt it from him, or abandon it; unleſs the Circumſtances be ſuch, as that we ought to conclude, that he either rejected, or relinquiſh'd it only for a time, with Intention to demand and reſume it again hereafter [c]. Thus if the right Owner of a thing ſhall knowingly deal and bargain about the ſame thing, with another who hath the actual Poſſeſſion of it, he ſhall juſtly be deem'd to have given up his own Right, ſo that it ſhall fall and be extinct upon the very Moment of compleating any ſuch Bargain and Tranſaction. Preſcription therefore can take place in thoſe things alone, which the former Owner hath not renounced either by Words, or by any expreſs Deed, or overt Act; but in which we preſume his Inclination to leave them, from his neglecting to enquire after them, and to challenge them again. For even Non-performances or Omiſſions, conſider'd with their due Circumſtances, do, in moral Account, paſs for actual Deeds, and may prejudice the Non-performer [d]. But before we can preſume upon a Man's Intention from ſuch an Omiſſion, 'tis neceſſary that the Omiſſion did ariſe from pure inculpable Ignorance. Wherefore thoſe, who are in Poſſeſſion of other Mens Goods, do then only gain the Property of them by the tacit Conſent of the former Owner, when he knows them to be thus poſſeſs'd, and yet forbears to challenge them upon a convenient Opportunity. For there can no other Reaſon be aſſign'd, why a Perſon who thus knows the Matter, and hath his free Choice to determine accordingly, ſhould yet be utterly negligent and ſilent in it, but this, that he hath no longer any Care or Concern for the thing detained, nor will reckon it his own for the future [e].

“Farther, As to the raiſing this Preſumption of a Man's voluntary Neglect to demand his Property, length of time affords a very ſtrong Conjecture: For 'tis hardly poſſible, but that in a courſe of many Years we ſhould gain Intelligence that our Goods are in other Hands, and have Opportunity of recovering them, or at leaſt of interrupting the Poſſeſſor's Title, by declaring and proteſting againſt it.

“Again, If we were at firſt hinder'd from putting in our Claim thro' Fear, this Fear too will in time vaniſh, and we ſhall be likewiſe able to provide ſo well for our own Security, as to be in no Danger of ſuffering from the unjuſt Detainer.

As to the Objection [2], *That no one can eaſily be preſum'd to throw away his own*; “'Tis anſwer'd by affirming on the other Hand, that no one can be thought willing, that a thing which for ſo vaſt a while he hath not at all regarded, nor given any one Indication of Care about it, ſhould any more appertain to him.

Tho' all this be very plauſibly alledg'd, yet 'tis certain that a long continued Silence doth not always give us ſufficient Ground to ſuppoſe a *tacit Dereliction*. For, as it may happen, that a Man, for the longeſt Space we can fix, might either have been ignorant of his Right, or hinder'd from aſſerting it thro' want of Power and Apprehenſion of Danger; [f] ſo again, if he claims his Goods, tho' after never ſo long a Seaſon, 'tis manifeſt that he did not before abſolutely abandon and give them over. And conſequently this Foundation for *Preſcription* will not be ſuch, as ſhall hold univerſally, or extend to all Caſes.

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[a] Add *Grot.* l. ii. c. 4. ſ. 9. *Bœcler.* & *Ziegler.* ad dict. loc. ſ. 1.

[b] Lib. ii. c. 4. ſ. 3, &c.

[c] Add Lib. xli. t. 1. l. 9. Sect. *ult.* D. De A. R. D. ſ. 8. Lib. xiv. t. 2. ad L. *Rhod.* l. 8. Lib. xlvii. t. 2. leg. 43. ſ. 11. *D. De furtis.* Lib. ii. t. 14. l. 2. ſ. 1. *D. De pactis.*

[d] Vid. *Numb.* xxx. 5, 12. D. lib. xxii. t. 1. l. 17. ſ. 1. *De Uſuris*, &c. Lib. xli. t. 1. leg. 44. D. De A. R. D.

[e] Add *Bœcler.* ad *Grot.* d. l. Sect. 5. & *Ziegler.* ad l. d.

[f] Vid. *Can.* xiii, xiv. *Cauſ.* 16. *Quæſt.* 3. in *Gratian.*

Mr. BARB. *NOTES on* §. VIII.

[1] We may conſult Mr. *Wherlhof*'s Diſcourſe already quoted, *viz. Vindiciæ Grotiani Dogmatis de præſcript. inter gentes liberas*, §. 9, *&c.* where he makes a kind of Comment upon that Place of *Grotius.*

[2] *Grotius* comes at length to the Concluſion, and having anſwer'd directly in oppoſing the Reaſon which our Author himſelf confutes afterwards, he infers, that we ought to ſuppoſe every Man honeſt 'till the contrary appears.

As to that other Reaſon offer'd by *Grotius* [3], to prove that a *Dereliction* may be preſum'd from long Silence, *Becauſe we muſt not believe that Men are ſo uncharitably diſpos'd towards each other, as that they would ſuffer any Perſon to continue in a perpetual Courſe of Sin, for the ſake of a periſhable Enjoyment*; this doth not at all affect the preſent Queſtion. For, beſides that it ſeems a little too ſimple to flatter ourſelves with ſo large Promiſes of Mens Conſciences and Piety; [a] he that comes to a Poſſeſſion by honeſt Means, and with Innocency of Intention (and him only we have pronounced capable of commencing Proprietor by *Preſcription*) is really in no Sin; becauſe the manner of his obtaining the Poſſeſſion fully perſuades him, that he obtain'd the Property together with it. And it doth not appear that any Man is obliged voluntarily to call in queſtion his own Right, eſtabliſhed upon a lawful and probable Title. But if the detaining of another's Goods after this manner were indeed in it ſelf ſinful, the Guilt were to be taken off, not by the Silence of the Owner, but by his expreſs Confeſſion, and the Renunciation of his *Right*, did he reſolve to give full Relief and Satisfaction to the Conſcience of the Poſſeſſor. But in this Caſe the Poſſeſſor's Right would not be owing to *Preſcription*, but to the ſolemn Act of the former Proprietor.

IX. Amongſt theſe different Opinions this ſeems to be clear and evident, That as the Propriety of things was introduced out of a regard to the *common Peace*, ſo it flows as a Conſequence from the ſame Principle, that they who have been let in to the Poſſeſſion of any thing upon a fair and honeſt Preſumption, ſhould at length be ſecured in the Enjoyment of it; and that others ſhould not be allowed to raiſe perpetual Suits and Quarrels about their Title. But the particular Space of time within which ſuch an innocent Poſſeſſion grows up to the Force and Strength of Property, we do not find preciſely determined, either by natural Reaſon, or the univerſal Conſent of Nations; but it is to be adjudg'd by the Opinion of good and true Men upon the Caſe, not without ſome conſiderable degree of Latitude. Yet ſo as that this Latitude ſhall not be cavill'd and pick'd at, with the like Sophiſtry as *Horace* hath uſed on another Occaſion:

> *Scire velim chartis pretium quotus arroget annus:*
> *Scriptor abhinc annos centum qui decidit, inter*
> *Perfectos vetereſque referri debet, an inter*
> *Viles atque novos? excludat jurgia finis.*
> *Eſt vetus atque probus centum qui perficit annos.*
> *Quid, qui deperiit minor uno menſe vel anno,*
> *Inter quos referendus erit? vetereſne poetas,*
> *An quos & præſens & poſtera reſpuet ætas?*
> *Iſte quidem veteres inter ponetur honeſte,*
> *Qui vel menſe brevi, vel toto eſt junior anno.*
> *Utor permiſſo, caudæque pilos ut equinæ*
> *Paulatim vello, & demo unum, demo etiam unum,* &c.
>
> Epiſt. iii. lib. i. ver. 35, &c.

> I'd know what Years an *Author*'s ripe for Fame;
> Suppoſe a Century gone; where ſhall his Name
> Be fix'd? I'th' antient Roll of finiſh'd Wit,
> Or the vile modern? Let the Bounds be ſet.
> *He's old and ſtanch at a full Century's Date.*
> What if he dropt a Month, a Year too late;
> With the old Heroes ſhall he ſhare the *Prize*,
> Or ſink with thoſe our Children ſhall deſpiſe
> Upon their Father's Judgment? *We'll preſume*
> *Him of full Age, who comes ſo near the Sum.*
> I'll hold you to't, 'till by Degrees I clear
> The Horſe's Tail, and pick it Hair by Hair.

[a] Add *Ziegler* ad *Grot. loc. citat.* Sect. 8.

Mr. Barb. *NOTES on* §. viii.

[3] In truth the Silence of the Proprietor proceeds commonly from theſe things only, *viz.* either he knows not who hath his Goods, or he is ignorant of his own Right to them, or he hath ſome Reaſon, more or leſs ſtrong, why he doth not put in his Claim. So that we can't lay it down for a Principle in general, that there is a tacit forſaking of Goods properly ſo called. 'Tis almoſt always againſt a Man's Will that he is deprived of his Poſſeſſions; and if the civil Laws ſuppoſe the voluntary Negligence of the antient Owner, they ſuppoſe no leſs the Poſſibility, which I have obſerved above, §. 5. n. 4. Men are not commonly ſo careleſs as not to know their Intereſts, nor if they appear, to maintain them, eſpecially when the thing they are about is any thing conſiderable. And the Preſcription is made moſt commonly not only againſt the Proprietor of the thing himſelf, but againſt his Heirs, who are ſubject to be ignorant of their Right, or are unable to preſerve it by a ſimple Conteſt, which has place at leaſt in a Preſcription of time immemorial. We muſt find out ſome other Principle which ſuppoſes rather the Sentiments that the antient Owner ought to be of, than what he really is. And this, in my Opinion, will not be hard to find, if we attend to the Nature and Deſign of Property itſelf. I ſay then, that the natural uſe and effect of the ſettling of Property of Goods is not to aſſure every one of a perpetual Right of what once belonged to him for ſo long a time as he ſhall be diſpoſſeſſed againſt his Will. In reality the Duration of the Right of Property depends not abſolutely on the Right of Poſſeſſion, as I have ſhewed above, c. 6. §. 1. n. 1. This would reduce Right to nothing, and deſtroy the End for which it was eſtabliſh'd. But yet it is not leſs contrary to that End, that the long Poſſeſſion of another ſhould deſtroy his Claim, who has not voluntarily renounced his Right to ſuch Goods as are not in his Power. All our Goods which we enjoy are of that nature, that a thouſand Accidents can deprive us of them againſt our Will, and make them paſs innocently into another's Hands. They are deſigned to maintain Commerce in the World, and ſo to remain no longer in the Patrimony or Family of the Proprietor, to whom they are often of little uſe in themſelves, than he can part with them for ſomething he wants. Moreover, if the End of Property requires that the Proprietors ſhould enjoy what they have peaceably, and not be in danger of loſing their Right from the Moment that they are in Poſſeſſion of a thing, it is no leſs requiſite, in my Judgment, that he who believes, and has Reaſon to believe himſelf the lawful Proprietor, ſhould never be ſubject to be deprived of what he has honeſtly got, and to which he has a juſt Title. It may be every one's Caſe, and no Man can be certain that there is no ſecret Fault in the Acquiſition he is poſſeſſed of. Beſides, in things of a moral Nature we muſt judge according to appearance, and according to the common Proverb, *Not to be*, and, *Not to appear*, are all one. So that when a putative Property, if I may ſo ſpeak, produces the ſame effect as a more real and more inconteſtable one, becauſe the Right of the true Owner does not appear, theſe two ſorts of Property may well paſs for one and the ſame in time, and the Right of the putative Proprietor may quite exclude the Claim of him who might receive one. This is the more juſt, becauſe the contrary would produce a thouſand Troubles in Society; and the more honeſt the Poſſeſſors are, through whoſe Hands the things have paſs'd ſucceſſively, the greater Right will the laſt Poſſeſſor be thought to have, how ſmall a time ſoever the others may have kept it. From whence I conclude, that the antient Owner, and much more his Heirs, ought at the end of ſuch a conſiderable time to renounce freely all their Pretenſions, and that if they do not, the Right of the honeſt Poſſeſſor is not a whit the leſs well founded. There is nothing to be perceived, as we ſuppoſe it, neither in the Nature of the thing itſelf, nor in the Quality of the Perſon of whom he held it, that can give him occaſion to ſuſpect that there is any defect in his Title; and 'tis not his Fault if he, to whom it appertains, without knowing it, has not diſcover'd, or not been earneſt in ſearching into it. In a Word, it is a great Misfortune for the antient Proprietor, for which he has Reaſon to comfort himſelf: And if the Poſſeſſor becomes afterwards the true Owner, he is ſometimes obliged to reſtore the thing, not by the Rigour and Rule of Juſtice properly ſo called, but by a free Motion of ſome of thoſe Virtues that require us to releaſe his Right, as if a rich Man can preſcribe againſt a poor Man, or one in mean Circumſtances, &c.

But in fixing the particular Period, a Regard ſhall be had both to the antient Owner, and to the new Poſſeſſor. To the former, leſt he ſhould be too ſoon excluded from the Privilege of following and finding out what he hath loſt. In which point natural Equity requires that *Preſcription* ſhould not be compleated in ſo little time between abſent Parties, as between thoſe who are both on the Spot. To the latter, leſt he ſhould undeſervedly ſuffer Damage, when 'tis too late for him to gain Redreſs by convicting the firſt injurious Detainer [2], from whom the thing was honeſtly receiv'd; or when the thing is ſo riveted to his Fortunes and Eſtates, as to make the chief Bottom upon which they depend. Hence, inaſmuch as moveable things paſs in Commerce to others more frequently than immoveables, ſo that having gone thro' ſo many Hands, 'tis more difficult to find out the Perſon by whom they were firſt convey'd, 'tis but reaſonable to allow a longer Space for the recovering the former than the latter; eſpecially, ſince thoſe likewiſe do much ſooner ſuffer and decay by Uſe than theſe: For it would little avail the former Proprietor to receive his Goods when impair'd, and waſted, and render'd unfit for his Service. And tho' a Man at his firſt gaining ſuch a thing of another's, may have made a very advantageous Bargain, or tho' his Title coſt him little; yet it ſeems hard, and an obvious matter of Complaint, that any one ſhould be forced to part with a thing that hath now a long time grown, as it were, into his Patrimony and Inheritance: And the rather, becauſe on the other hand we have reaſon to believe, that he who hath contentedly wanted a thing during a great part of his Life, within which he hath been able to make ſufficient Proviſion for himſelf by other means, will not think it an Injury or Hardſhip that he be obliged to want it for ever. To which may be apply'd that of *Tully*, Off. ii. c. 22. *Where's the Equity, that an Eſtate, poſſeſs'd many Years before, ſhould be got by him that had it not, and be loſt by him that had it* [3]? See the Story of *Aratus* the *Sicyonian* in the next Chapter. So that upon taking in all theſe Conſiderations, it will be no difficult Task for a fair and honeſt Arbitrator to find out ſuch a Term for *Preſcription* in particular Caſes, as ſhall be agreeable to natural Equity. Tho' 'tis the better way in civil States, that all the points of Controverſy may be brought within a narrow Compaſs, to fix in general ſome certain and neceſſary Bounds, at which *Preſcription* ſhall commence valid, according to the Nature of the Subject. We are therefore altogether of Opinion, that *Preſcription*, as it abſtracts from the points of Time eſtabliſh'd by civil Ordinances, is, as it were, the Corollary or Appendix of Property. And by Conſequence, that when the Property was firſt introduc'd [4], it was likewiſe agreed upon by general Conſent, for the ſake of the publick Peace, that he who poſſeſſed a thing in his own Name, neither by violent Detention, nor by fraudulent Concealment, nor by a precarious Title, ſhould be preſum'd the true Proprietor of it, 'till any one was able to prove the contrary: And that he who had held a thing honeſtly obtain'd, a very long Seaſon, during which any Man of ordinary diligence would have enquired after his own, ſhould defend his Hold againſt the tardy Claimant, who ſo long neglected to make his Challenge.

X. Upon theſe Principles, and if we place the Reaſon of *Preſcription* not barely in the Dereliction of the former Owner, we may with the more Eaſe reſolve this very intricate Queſtion, *Whether or no, or after what manner, Children, not come into the World, can loſe their Right by the tacit Dereliction of their Parents and Anceſtors?* Which we may underſtand two ways; either of ſuch *Preſcription* as was compleated before the Children were born, or of ſuch as only commenced in their Father's Time, and was compleated at his Death. In the former Senſe, if we take the negative ſide, we are encounter'd with this Difficulty, that *Preſcription*, thus underſtood, will not in the leaſt contribute to the Peace of Empires and Dominions; moſt Goods being in their Nature capable of deſcending by Inheritance to Poſterity; and therefore 'twould be in vain for the Preſcriber to overthrow the Claim of the Father, if the Son might afterwards renew the Suit. But if we incline to the affirmative Part, it will ſeem ſtrange, how Silence or Negligence ſhould prejudice thoſe who were unable to prefer an *Action*, or ſo much as to ſpeak a Word, and indeed, who were not yet in Being; or how the Default of one Perſon ſhould thus turn to the Damage of another. Which Doubt *Grotius* [a] hath taken off by the following Remark: *That a thing not yet exiſtent can have no Accidents, ſo a Perſon, who is as yet no part of Nature, can have no Right, and conſequently nothing can be ſaid to be taken from him* [b]. *By him, who is as yet no part of Nature, we mean him who is not conceiv'd, not he who is conceiv'd, but not born: Becauſe the latter, in many Inſtances of Right* [1], *is already ſuppos'd to be a Member of human Society* [c]. It may be added in Confirmation of this Judgment, That the Goods of Parents do only then begin to belong to their Children, when the Parents themſelves hold and enjoy them, 'till the very time at which the Children ought to inherit them. Which Rule may be thus extended to a larger Compaſs: He that is not yet in Being can acquire no *Right*, unleſs by the Intervention of another already in Being, from whom the *Right* ſhall be deriv'd to him upon his coming into the World, yet ſo as that it ſhall obtain no Effect in relation to him, 'till after he is actually born. And this happens when any thing is acquir'd or deliver'd to another, to be held in ſuch a manner as

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[a] Lib. ii. c. 4. ſ. 10. n. 2.

[b] M. Senec. *Controver*. l. i. c. 6. p. 93. towards the End, *Edit*. Gronov. *Before we obtain'd any actual Exiſtence, Nature hath the whole Government of us, and caſts us into what Fortune ſhe pleaſeth. Our true Rate and Value then commenceth, when we are at our own Diſpoſal.*

[c] Vid. lib. xxxvii. t. 9. l. 7. *princ. D. De ventre in poſſeſſ. mittend.* & Lib. xxxviii. t. 16. l. 7. *D. De ſuis & legitim. hæred.* & Lib. l. t. 16. l. 231. *D. De verb. ſignif.*

Mr. Barb. *NOTES on* §. ix, x.

[2] The Original in all the Editions of it has *per Evictionem*. This is an Inadvertency of our Author, who doubtleſs meant *per Evictionis præſtationem*.

[3] The Latin of *Cicero* is, *Quam autem habet æquitatem, ut agrum multis annis, aut etiam ſeculis ante poſſeſſum, qui nullum habuit habeat, qui autem habuit amittat?*

[4] There needs no Argument to be ſuppoſed. See what is ſaid upon the former Paragraph, Note 3. The Author argues upon the falſe Notion he has formed to himſelf of the Original of Property, which we have confuted in its Place.

[1] See l. i. c. 1. §. 7. n. 4. above.

that he ſhall be able to tranſmit it to his Succeſſors. Yet here there is an obſervable Difference; for ſome things are ſo conferr'd on another, as that the Intereſt of the Giver is not at all affected, whether the thing deſcend to the Heir, or not; though, ſo far as he is concerned, he grants the Receiver free leave thus to tranſmit it. But other things are conferr'd after ſuch a ſort, as that the Donor retains a *Right* over the manner of holding, which he himſelf appointed, ſo that it cannot be altered without his Conſent. Now which ſoever of theſe ways we ſuppoſe a thing poſſeſſed by any Man, with the power of tranſmitting it to his unborn Poſterity, if it happen by any means to be intercepted or alienated before the Birth of the Heir, he is not the leaſt injured thereby; unleſs the Title or Pretenſion to it (if not the thing itſelf) were expreſly left him in the manner of an Inheritance. For in the former caſe, ſince both the thing holden, and the way of holding it are fully in the Poſſeſſor's Diſpoſal, if he convey it away from himſelf; or if, by any change whatſoever, it ceaſe to be his, all the *Right* he had to it is immediately extinguiſhed; and conſequently cannot be derived upon his Heir as yet unborn, who can claim no Right to Goods of this Nature held by his Anceſtors [2], but what they deliver to him, as it were, from hand to hand, after he is actually in Being. But in the latter Caſe, inaſmuch as the prime Donor ſtill reſerved to himſelf a Power over the Tenure [3], if his Conſent be obtained, the Poſſeſſor doth not at all damnify thoſe that come after him, ſhould he either alienate the thing, or give it over for loſt, by whatever Accident it was convey'd from him. Tho' all this be true, yet *Piſiſtratus* was of another Opinion, as appears from his Epiſtle to *Solon*, where he gives the following Reaſon amongſt others for his ſeizing on the Government; *I have not uſurped what belong'd to others; I only claim that by my own juſt Right and Title, which the* Athenians, *having firſt confirmed by Oath to* Codrus *and his Family, afterwards took away* [a].

The Queſtion taken in the latter of the two Senſes, which we obſerved it to be capable of, is denied by the Civilians; for they ſay, *That Preſcription heretofore begun, ſtops during the Years of Minority* [4], *and upon their Expiration runs on effectually again.* Yet I am of Opinion, there may be a Caſe, in which the Favour of Poſſeſſion ſhall over-balance the Favour of Minority: As for Inſtance, ſuppoſe it ſhould ſo happen, that when I want only a Month or two of compleating my *Preſcription*, and it is morally certain that the antient Proprietor will not within that Space give me any Trouble about the Title, and if he ſhould then deceaſe, leaving an Infant Heir, it would be unreaſonably hard, if after five and twenty Years Poſſeſſion I ſhould be thruſt out of my hold for want of thoſe two Months: Eſpecially, if it be now impoſſible for me to recover Damages of him, from whom I received what is thus challenged; as I might have done, had the Diſpute been ſtarted before the Goods devolv'd upon the Minor. Here certainly, if the Buſineſs be referr'd to the Arbitration of an honeſt Man, and one who knows that the Grounds and Reaſons of *Preſcription* are not to be drawn barely from the Neglect of the former Owner, he will give Judgment for me rather than for the other Party. Nor doth it ſeem ſo very grievous, that a *Right* which under the Father was, as we may ſay, at its laſt Gaſp, ſhould utterly expire under the minor Son: And eſpecially, becauſe Men eſteem it a much greater Hardſhip to let go a thing which they have held a conſiderable time, than to be debarr'd of what is not yet come to their Hands.

XI. From hence it appears, that they too [1], who are ſubject to no common Law beſides that of *Nature and of Nations*, may alledge againſt each other's Claim, a long, uninterrupted, and honeſtly obtained Poſſeſſion: And ſo much the rather, as publick Poſſeſſions cannot be diſturbed without far greater Confuſion and Danger than private. Though it muſt be confeſſed, that in Controverſies between Princes and States it is frequently not altogether ſo neceſſary to appeal to *Preſcription*, ſince the *Right* of the Poſſeſſor [2] may, or at leaſt ſhould be deduced more ſolidly from other Foundations. And *Bœcler* [b] hath obſerv'd before us, *That thoſe who in this Buſineſs of Preſcription mention only the Point of Time, often intend to ſum up their whole Claim in this ſhort Expreſſion: Under which are*

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[a] *Diogen. Laert.* in *Solon.* l. i. ſ. 53.

[b] Add *Grot.* dict. loc. Sect. 2.

Mr. BARB. *NOTES* on §. x, xi.

[2] The Words of the *Roman* Law are, *Item Labeo ſcribit etiam eum, qui poſt mortem patris ſenatoris natus ſit, quaſi ſenatoris filium eſſe. Sed —— non proprie ſenatoris filius dicetur is, cujus pater ſenatu motus eſt, antequam iſte naſceretur. Si quis conceptus quidem ſit, antequam pater ejus ſenatu moveatur, natus autem poſt patris amiſſam dignitatem, magis eſt, ut quaſi ſenatoris filius intelligatur, tempus enim conceptionis ſpectandum pleriſque placuit,* i. e. An Infant that is born after the Death of his Father, who was a Senator, ſhall be eſteemed a Senator's Son, if his Father kept his Dignity to his Death; but he ſhall not be eſteemed a Senator's Son, if his Father were removed from the Senate before he was born; but if he were conceived before his Father's Degradation, but not born, he ſhall be accounted as it were a Senator's Son in regard to his Conception.

[3] See l. viii. c. 5. §. 9. following.

[4] The Words of the Civilians are, *Non eſt incognitum id temporis, quod in minore ætate tranſmiſſum eſt, longi temporis præſcriptioni non imputari. Ea enim tunc currere incipit, quando ad majorem ætatem Dominus rei pervenerit,* Cod. l. vii. t. 35. Quibus non objicitur longi temporis præſcriptio, leg. 3.

[1] The famous Father *Du Puy*, Counſellor and Library-Keeper to the King of *France*, maintains the contrary, in a Diſcourſe, intitled, *Whether Preſcription is of force amongſt Sovereign Princes?* It is found in a Collection of ſeveral Treatiſes touching the Rights of Chriſtian Kings, printed at *Paris* in 1655, and at *Roan* in 1670, but Mr. *Wherlhof*, Profeſſor at *Helmſtadt*, has confuted it fully in his *Vindiciæ Grotiani dogmatis de præſcriptione inter gentes liberas contra illuſtrem ſcriptorem Gallicum Petrum Puteanum.* This Work, quoted before, is worth the reading, tho' after what I have ſaid in my Notes, as well as this Author in the Text, 'tis eaſy to ſee on which ſide the Truth lies. I ſhall only obſerve, that Mr. *Wherlhof* requires that he would explain by what Right the Crown of *France* has paſs'd to the *Carlovingians* by the means of *Pepin*, and to the *Capetians* by *Hugh Capet*, if it be true, according to the Principle of that *French* Author, That the Succeſſors of an Uſurper can never acquire a lawful Right of Force againſt the Poſterity of the King unjuſtly dethroned.

[2] But it is true alſo, that moſt times the other Titles are not ſufficient, becauſe in paſſing from one Poſſeſſor to another, and by different Titles, we ſhall find at laſt ſome of them diſhoneſt and faulty, which will deſtroy and render uſeleſs all that depend on it, how good ſoever they be in themſelves, if the length of time, which has paſſed ever ſince, will not purge the foulneſs of the Original.

likewiſe to be underſtood the Adjuncts of Time, as the quitting the thing which is now the matter of Diſpute, or the Intention of quitting it, or any Tokens of renouncing the Right and Title. And ſince the Plea of Time is in the main plauſible, eſpecially with vulgar Hearers as (if it gave an Advantage to other Proofs) it is a politick Stratagem to urge this Notion in general, and in groſs, wilfully avoiding all Explications or Additions which might be able to give Strength to ſuch a thing as Time, which of itſelf can produce no Effect; and, inſtead of them, to heap up Inſtances and Examples of former Diſputes, that the Diſcourſe may ſeem more full, and may carry a fairer Colour as to the main Point.

Tacitus [a] calls it by no better Name than *Vaniloquentia, Impertinence* or *idle Talk*, in *Artabanus*, when he laid claim to the antient Bounds of the *Perſian* and *Macedonian* Empires.

Sapores, as *Ammianus Marcellinus* [b] informs us, renewed the ſame Claim many Ages after; to whom *Conſtantius* gave this Anſwer in his own way; *That 'twas ſtrange he ſhould forget how the* Perſians *were enſlaved by the* Macedonians; *the latter of which Nations being ſubdued by the* Roman *Power, their Bondſmen could not but fall under the ſame Dominion* [c].

Thus likewiſe *Solyman*, the great *Turk*, would often ſay, *That he had a Right to the City of* Rome, *and to all the Weſtern Empire, as being the lawful Succeſſor of* Conſtantine, *who had remov'd the imperial Seat to* Byzantium. Yet in the moſt noble Examples upon Record, you will find, that beſides the Argument of long continued Poſſeſſion, ſome Title or other capable of producing Sovereignty hath been at the ſame time alledg'd.

Thus *Iſocrates* [3], under the Perſon of *Archidamus*, having ſhewn in the firſt Place that the *Lacedemonians* became Maſters of *Meſſene* by the Title of a juſt War, afterwards brings in the length of Poſſeſſion, as a kind of ſecondary and inferior Proof: *Nor are you ignorant*, ſays he, *that all the World agree, Poſſeſſions, whether publick or private, ſhould after a long Period of Time be fix'd and confirm'd, and paſs as lawful Inheritance.* To which he ſubjoins, that the Title of his Country to *Meſſene* was not controverted heretofore, when a fair Opportunity was offer'd to that Purpoſe [d]. And indeed, in Cauſes of this Nature, 'tis always a fair Preſumption in favour of the *Poſſeſſor's Right*, that, during ſo long a Space, no Perſon elſe hath put in his Pretenſions. For theſe Matters are uſually of ſo very great Importance, and are tranſacted ſo openly and in broad Day, that if a third Party hath any Right in the Caſe, he can neither be long ignorant of it, nor want occaſion of preſerving it, at leaſt by declaring and proteſting againſt the Uſurper.

Therefore there can happen very few Caſes, in which *Dominion* and *Sovereignty* ſhall not be the Conſequences of *Preſcription*, when a State or People have poſſeſs'd themſelves of any thing upon a peaceful Title. And as for what they gain in War, it is hardly neceſſary to plead *Preſcription* on that Account. For ſo long as the Hoſtility continues, the Poſſeſſion of all that hath been won from the Enemy is ſupported only by Force and Violence; and at the ſame time the Enemy hath a Right of recovering his Loſſes by any means he can uſe: Eſpecially if, having given any unjuſt Occaſion of the Quarrel, he is ready to make Satisfaction. Hence, inaſmuch as a War may be protracted for more than Fifty Years, they, who loſt any Place at the firſt breaking out of the Difference, may regain it by Force at any time before the Buſineſs is adjuſted by a Peace.

The *Numidians*, in *Livy* [e], pleading *Preſcription* againſt the *Carthaginians* for a Tract of Land (which bore the Name of *Emporia*) talk to this Purpoſe; *That the Right was ſometimes held by the State of* Carthage, *and ſometimes by the Kings of* Numidia, *as either had Opportunity to ſeize upon it; and that the Poſſeſſion was always in the Hands of thoſe who appear'd ſtrongeſt in the Field.*

When a Peace is concluded, 'tis eaſy to ſee what both ſides are to hold for the future; and then what is yielded up by one Party, the other immediately acquires with full Right, and hath no need to wait for the Title of *Preſcription*. If any third Perſon lays claim to the ſame thing, he will be ſure to declare his Pretenſions in good time; and if poſſible, whilſt the Treaty is in agitation: For afterwards Warriors will not eaſily be prevail'd upon to reſtore what they have won by the Sword, to thoſe who were idle Spectators of the Quarrel [f].

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[a] Ann. vi. c. 31.

[b] Lib. xvii. c. 5.

[c] In *Zonaras*, Tom. iii. ad ann. 354. See likewiſe *Herodian*, l. vi. c. 6.

[d] Add *Alberic. Gentil. De Jure Belli*, l. i. c. 22.

[e] Lib. xxxiv. c. ult.

[f] Vid. *Grot.* l. iii. c. 6. Sect. 7.

Mr. BARB. *NOTES on* §. XI.

[3] *Iſocrates*'s Words are, 'Αλλὰ μὴν ȣ̓δ' ἐκεῖνο ὑμᾶς λέληθεν, ὅτι τὰς κτήσεις, καὶ τὰς ἰδίας, καὶ τὰς κοινὰς, ἣν ἐπιγένηται πολὺς χρόνος, κυρίας, καὶ πατρῴας ἅπαντες εἶναι νομίζȣσι.

CHAP. XIII.

Of the Obligations which ariſe immediately from Property.

- I. *Every one is obliged to abſtain from another's Goods.*
- II. *Others Goods kept by us are to be reſtored.*
- III. *Which is proved.*
- IV. *And illuſtrated.*
- V. *Contracts made about others Goods are void, as ſoon as they are known.*
- VI. *What is gained by another's Goods muſt be reſtor'd.*
- VII. *An honeſt Poſſeſſor is not bound to reſtore, if the Goods are decayed, or loſt.*
- VIII. *But he is bound to reſtore the preſent Fruits.*
- IX. *And ſuch as are ſpent, if he muſt have ſpent others of the like Value.*
- X. *But not them he has neglected to gather.*
- XI. *He is not obliged, who has given away what was given him, but with a Diſtinction,*
- XII. *Nor if he has ſold what he bought with a Diſtinction alſo.*
- XIII. *How he may recover the Price, who has really ſold another Man's Goods.*
- XIV. *Whether if a Man buys another's Goods, he ought to reſtore them to the Seller?*
- XV. *He that has another's Goods, and knows not the Owner, may keep them.*
- XVI. *Whether what's given for a bad Reaſon muſt be reſtored.*

HAving enquired into the Nature and Origin of *Property,* as likewiſe into the ſeveral ways by which it is eſtabliſh'd, it follows that we conſider thoſe Obligations, which, upon the introducing of *Property,* affect Mankind immediately [1] and on their own Account, without the Intervention of other Duties. Of theſe the firſt is, That every Man ſhall ſuffer another, who is not engaged in Hoſtility againſt him, to diſpoſe of his own Poſſeſſions, and likewiſe quietly to hold and enjoy them; nor ſhall, either by Force or Fraud, impair, divert, or draw them to himſelf. Whence it appears, that Theft [2], Rapine, removing of Boundaries, and the like Crimes are forbidden by the bare *Law of Nature.* *Euripides* [a] ſpeaks excellently to this Purpoſe;

God hates the violent, commanding all [3]
To live on what their honeſt Pains procure;
And not to feed their Wants with mutual Spoils.
Oppreſſors ſhould be baniſh'd human Race,
Unworthy of the Name. One common Heaven
Gives Light and Air to Man; one Earth a Seat,
A Scene of Induſtry, where all may ſtrive
To raiſe their Stock, and ſpread their Fortunes wide;
But not to rob, or force their Neighbour's ſtore.

II. Farther, When the things of one Man come into the hands of another without the latter's Fault (where under the general Name of things we comprehend likewiſe our Right over Perſons, ſo far as it may be profitable to us, as the Right of Maſters over their Servants) we are to conſider, whether the thing be ſtill remaining, or not.

As to things which remain, there ariſeth this Obligation concerning them; That he, who is in poſſeſſion of what belongs to us, ought to imploy his utmoſt Ability towards putting it again under our Command. Which Obligation doth not exert its force, 'till ſuch time as the Party in Poſſeſſion comes to know that the thing is ours.

We add, That he imploy his utmoſt Ability, or do as much as in him lies; for no one can be bound to an impoſſible Performance. Nor is he oblig'd to put himſelf to Charges in making the Reſtitution; and whatever Expences he hath been at on any thing on that Account, he may fairly demand of the Owner, and may detain the thing 'till they are paid. But 'tis enough if he ſignify, that another's Goods are in his Hands [b], and that he will be no hindrance to the Owner in the Recovery of them. And theſe Rules are ſo true, that the *Roman* Laws forbid Men to challenge their own, when found

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[a] *Helen.* ver. 909, *&c.*

[b] Vid. *D.* Lib. x. t. 4. l. 1. ſ. 3. *De fugitiv.* We ſpeak here all along of the innocent and well-meaning Poſſeſſor; for the Obligations which lie on the diſhoneſt Poſſeſſor are open'd in another Place. See the next Paragraph towards the End.

Mr. Barb. *NOTES on* Chap. XIII. §. 1.

[1] The Duties which concern Property may alſo be conſidered with Relation to the Owner himſelf, who is obliged to obſerve, according to the Uſage of Right, all the Law of Nature. And ſo he'll do very ill to abuſe his Goods in any manner, which may redound to the Contempt of the Deity, or Prejudice of his Neighbour. On the contrary, he ought to make uſe of them to the Glory of God well underſtood, and to the putting his Laws in Practice; and laſtly, to procure an Advantage to other Men, as well as to our ſelves. *Titius*'s *Obſerv.* 313.

[2] The *Roman* Lawyers ſay poſitively, that Theft and Robbery are contrary to natural Right. *Furtum eſt contrectatio rei fraudulоſa, lucri faciendi gratia, vel ipſius rei, vel etiam uſus ejus, poſſeſſioniſve, quod lege naturali prohibitum eſt admittere,* Dig. lib. xlvii. tit. 2. *De furtis,* l. 1. §. 3. See alſo lib. l. tit. 16. *De verb. ſignif.* l. 42. *Salmaſius* in his Treatiſe *De Uſuris,* c. ix. raiſes great Difficulties about it, but in Mr. *Hertius*'s Judgment not worth repeating.

[3] *Euripides*'s *Greek* is,

Μισεῖ γὰρ ὁ Θεὸς τὴν βίαν, κτητά δε
Κτᾶσθαι κελεύει πάντας, ȣ̓κ ἐς ἁρπαγὰς
Ἐατέος ὁ πλȣ̃τος ἄδικός τις ὢν,
Κοινὸς γὰρ ἐςὶν ȣ̓ρανὸς πᾶσι βροτοῖς
Καὶ γαῖ, ἐν ᾗ χρὴ δώματ᾽ ἀναπληρȣμένȣς
Τ᾽ ἀλλότρια μὴ χεῖν, μηδ᾽ ἀφαιρεῖσθαι βίᾳ.

We have alſo two fine Fragments of *Menander* upon this Subject, both of them recited by *Clemens* of *Alexandria, Stromat.* lib. v. p. 605, 606. and by *Euſebius, Præp. Evang.* l. xiii. c. 13. and which are alſo found in Mr. *Le Clerc*'s Collection lately publiſh'd. They are the more remarkable, becauſe they confirm what I have proved at large, l. ii. c. 4. §. 3. note 4. before going. For we may ſee by the common Notions of the Heathens deliver'd in their Plays on the *Theatre,* that, to pleaſe the Gods, we muſt not covet other Mens Goods, nor debauch our Neighbour's Daughter, or Wife, but be kind, ſerviceable, charitable, *&c.*

by others *ſine pactione*, without ſome Bargain in order to give the Finder Satisfaction [a]; whilſt they affirm at the ſame time, *That he who takes up any thing of another's with a Deſign of converting it to his own Uſe, is guilty of Theft, whether he knows the particular Owner, or not* [b][c]. Yet if I become Maſter of a thing upon a juſt Title, and with an honeſt Intention, I am not bound to call my own Right into diſpute, and to give publick notice that ſuch a thing is in my Cuſtody, to the end that it may be challeng'd, if it ſhould happen to belong to another. For when the manner of my getting the Poſſeſſion was in no reſpect faulty [1], my Innocence and Integrity clear me from all Imputation of Guilt in detaining another's Goods.

This farther Reſtriction is likewiſe to be underſtood in the preſent Duty; *If he who was before the true Owner, hath ſtill any probable means left of his recovering what he loſt*; that the Obligation we are now aſſerting, may not be thought to overthrow the Right of *Preſcription* [d].

III. Now that this Obligation is ſufficiently founded in the bare Notion of *Property*, appears evident. For ſince a Perſon may happen, by many Accidents, to loſe his hold, and be thrown out of the Poſſeſſion of what is really his own; our Goods, and eſpecially thoſe which are moveable, would be in a very ſlippery and uncertain Condition, if, when they ſtray into another Man's hands, he might intercept or conceal them from us; much more, if he might detain ſuch a thing openly, and repulſe us with Violence, when we attempted to make good our Claim. And therefore, as in a State of Communion 'tis a matter of Right that each Perſon ſhall be allow'd to uſe the common Store as fully and freely as the reſt; ſo upon the firſt appropriation of things, when all other Perſons did, as it were, renounce their Right to what any one had received as his private Share, the diſtinct Proprietors are ſuppoſed to have made this Agreement amongſt themſelves [1], *That he who chanced to be in poſſeſſion of another's Goods, after he knew it to be another's, ſhould cauſe it to return to its Owner.* For the Power and Virtue of Property would be too weak, and the keeping of things would require too much Expence, as well as too much Care and Trouble, if theſe ſtray'd Goods were only then to be reſtor'd, when the Owner made a formal Challenge of them; becauſe he muſt very frequently be ignorant which way they are gone, or where they are lodg'd.

As to a Man's being bound to reſtore a thing, when claim'd by the Owner, 'tis altogether the ſame Caſe, whether he got Poſſeſſion by honeſt, or by diſhoneſt Means: For this Obligation doth not ariſe from any Default, or any Fact of ours, or

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[a] *Vid.* Lib. xlvii. t. 2. l. 43. ſ. 9. *D. De furtis.* Lib. xix. t. 5. l. 15. *D. De Præſcript. verbis.* & Lib. xii. t. 5. l. 4. ſ. 4. *D. De cond. ob turp. cauſ.* [b] *Joſephus* Antiq. iv. c. 8 *He that takes up Gold or Silver in the Way, let him ſeek out the Perſon who loſt it, and by the Help of the Cryer let him reſtore it in the ſame place where 'twas found; and let him be perſuaded, that 'tis a very ill way of gaining Profit, to enrich himſelf by the Damage of others.* [c] Concerning this, ſee c. 6. ſ. 12. [d] Comp. *Grot.* in the Place above-cited.

Mr. Barb. *NOTES* on §. II, III.

[1] The Edition of this Work put out in 1706 adds, after *Vitioſi*, theſe Words, *Aut ſuſpecti*, i. e. faulty or ſuſpicious, Words too important to be left out; for if we have the leaſt Suſpicion, that the thing belongs not really to him, who is about to make it over to us, we muſt not take it; and if we do receive it, we reduce our ſelves to a Neceſſity of reſtoring it fully, leaſt our Suſpicion ſhould prove true.

[1] There is no need of ſuppoſing ſuch a general Agreement, as we have proved upon c. 4, 6. The Obligation of reſtoring the Goods of another is as natural a Conſequence of Property, as it is not to take them. But this Obligation ought to be underſtood in ſuch a Manner as not to deſtroy the Rights of an honeſt Poſſeſſion, or a putative Property, which, as I have before obſerved, §. 8. Note 3. produces the ſame Effect as a Property more real and inconteſtable, ſo long as the real Owner appears not. This neither *Grotius*, nor our Author, nor any other that I know of, were aware of, and therefore have been puzzled very much to determine ſeveral Caſes which have fallen in upon this Subject, and ſo many times their Solutions were inconſiſtent one with another, which proves ſufficiently, that their Principle upon which they argued, was not ſound. I ſay then, that one of the principal Uſes of our Goods being to trade withal, and that Uſe requiring that the honeſt Poſſeſſor ſhould be reputed in all reſpect the lawful Proprietor, ſuch a Poſſeſſor can be obliged to reſtore only what is in Being, *i. e.* what he has not parted with, nor is in any manner periſhed; for he then has nothing, and ſo can reſtore nothing, as our Author himſelf acknowledges, in reſpect to what is given away, or ſold again, as it was acquired, and to what is ſpent or loſt. Moreover, all that the honeſt Poſſeſſor hath done, or performed, as ſuch, upon the account of the Goods of another, which he believed his own, is as valid, as to him, as if he had diſpoſed of a thing to him, of whom no other Perſon can claim any thing, and the Profit, which might redound to him by ſuch Goods, while he was in the Poſſeſſion of them, or when he parted with them, belongs to him by Conſequence. For as he was, and ought to be ſuppoſed the true Proprietor, the Rights and Profits of the Property did abſolutely accrue to him, ſo long as he had no Reaſon to ſuppoſe otherwiſe. And then if the antient Owner recovers his Goods, he begins again, as we may ſay, at a new Expence, to follow his Buſineſs. The peaceable Enjoyment of the honeſt Poſſeſſor is as a kind of *Interregnum*, which has interrupted the Power of the true Proprietor, but inſures to the putative Proprietor the Effects of his Management, while he was in full Authority. This being agreed on, we may ſee in my Judgment how far the natural Obligation of reſtoring the Goods of another extends, when Men have had an honeſt Poſſeſſion with a juſt Title. If he hath diſpoſed of them by any good and irrevocable Act to a third Perſon, who has honeſtly received them, he is only obliged to aſſiſt, as much as he can, the old Owner to make him, who has wrongfully taken and retain'd his Goods, to give him Satisfaction, and to declare to the new Poſſeſſor the Right of the true Proprietor, that he may do what he ought in the Caſe. But if the thing is yet in the hands of the honeſt Poſſeſſor, or he has got the Poſſeſſion of it without Charge, or it has coſt him ſomething. In the firſt Caſe, as when a Perſon has obtained a thing by Free-gift, or has found a thing, he ought to return it fairly and readily without any Demand, at leaſt if it has occaſioned no greater Expence to him than is made up by the keeping of it. In the other Caſe, if one has bought it, or taken it to pawn, it is juſt that the true Owner, who would recover his Goods, ſhould repay the honeſt Poſſeſſor what he has given, otherwiſe he may keep the thing; and if the other do not redeem it before the time of Preſcription is come, it then entirely changes the Owner, ſo that the firſt can have no Title to it. By theſe Principles it is eaſy to determine clearly all the Queſtions, which can concern this Matter, as we ſhall ſee in the Notes upon the following Paragraphs, where I ſhall rectify our Author's Notions. Although he is not of the ſame Sentiments with *Grotius*, yet he reaſons in general according to the Notions of that great Man, whoſe Authority ſeems to overſway him here. This I mention not by mere Conjecture; for in his Elements of *Juriſprud. Univerſ.* which was the firſt Work that I attempted to comment on, he took notice of the Weakneſs of *Grotius*'s Opinion, and determines it in ſuch a Manner, as can't be well grounded but by ſuppoſing the Principles that I have diſtinctly eſtabliſhed; for he ſays, "That as yet "the civil Laws of ſeveral People permit any one to take Goods where he finds them; nevertheleſs, if we conſider natural Right, "the true Proprietor may not take it immediately from the honeſt Poſſeſſor, though he may from the Perſon who deprived him of "his Goods; for, *adds he*, why ſhould the honeſt Poſſeſſor loſe it, or be proſecuted more than the true Owner, ſeeing 'tis not his Fault? Lib. i. *Def.* 5. §. 25. p. 77, 78.

from any particular Covenant made with the Claimant, but from the thing itſelf; or rather from that general Covenant to this Purpoſe, which we ſuppoſe to be the neceſſary attendant of Property. He then, who obtain'd the thing honeſtly, is barely oblig'd to make Reſtitution; but he who procur'd it diſhoneſtly, beſides the neceſſity of Reſtitution, hath likewiſe contracted a Guilt, and is on that account liable to Puniſhment. *Good Faith*, or honeſt Intention, doth then ceaſe, at leaſt, in the Court of Conſcience, when a Man hath full Aſſurance, that what he holds belongs to another [a]. Though it is enough to ſecure him from human Puniſhment, if he were thus well-meaning and ſincere only at his firſt entring on the Poſſeſſion.

IV. This is confirm'd and illuſtrated by the Divine Law itſelf, *Deut.* xxii. 1, 2, 3. And leſt any ſhould imagine that the Duty there enjoined is to be paid to Friendſhip only, 'tis expreſly added, *Exod.* xxiii. 4. that the ſame ought to be perform'd to an Enemy.

Joſephus [b] hath given us this Gloſs on the Law whith we are now mentioning: *If any Man*, ſays he, *find Gold or Silver in his way, let him ſeek out the Party who loſt it, and reſtore it by the Hands of the publick Cryer, in the very place where he took it up, judging with himſelf, that no Advantage can be good, which ariſeth from another's Damage. The ſame he muſt do with regard to the ſtray Sheep and Cattle he meets with in the Deſert. If he cannot preſently find out the Owner, let him retain the things in his own Cuſtody, calling God to witneſs, that he intended not to make a Gain of what belonged to his Neighbour.* Yet the mortal Hatred which the *Jewiſh* Nation profeſs'd againſt all others, afterwards turn'd this natural into a civil Law, to be put in practice only towards their own Country-men [c].

One of the moſt remarkable Inſtances of *Reſtitution*, which Hiſtory affords, is that of the Emperor *Theophilus*, who, when a Woman cry'd after him in his Progreſs, and claim'd the Horſe on which he rode, finding upon Enquiry that the Governor of a certain Province had taken it away, and preſented it to him in his own Name, he immediately gave back the Horſe to the poor Woman; and having no others at hand from his own Stable, was content to make uſe of the next he could borrow. Which, they tell us, was the Riſe of that Cuſtom, which afterwards obtain'd, for the Emperors to carry in their Train a great Number of Horſes, for Supplies, in caſe of any ſuch Accident [d].

The Example of the *Spartans*, which *Grotius* mentions [e], who condemn'd their General *Phœbidas* for ſeizing on the *Cadmean* Fort, and yet ſtill kept the Place in their Hands [f], doth not come up to our Point: For they were, no doubt, injurious and diſhoneſt Poſſeſſors, and therefore were bound to Reſtitution by another Principle. Nor is the Story of *M. Craſſus*, and *Q. Hortenſius*, more proper in the preſent Queſtion, as *Tully* [g] gives the Report: *Some Perſons*, ſays he, *brought out of* Greece *to* Rome *a forged Will of* L. Minutius Baſilius, *a very wealthy Man; and the more eaſily to carry their Point, put down* M. Craſſus, *and* Q. Hortenſius, *two who had the greateſt Power and Intereſt in the City, as Joint Heirs with themſelves. The two Gentlemen, though they ſuſpected the Deed to be counterfeit, yet relying upon their own Innocence in the Matter, did not refuſe to make this ſmall Advantage of the others Wickedneſs. What then? Is it enough that they appear to have had no Hand in the Fact? I am not of that Opinion: For he certainly is to be cenſur'd as unjuſt, who not only forbears to drive off an Injury from another, but aids and encourages it.* Here the Gentlemen had as great a ſhare in the Crime of Forgery, as Receivers are ſaid to have in that of Theft; inaſmuch as they apprehended themſelves to have been put into the Will for no other Reaſon, but that their Name and Authority might protect the Authors of the Cheat.

From the ſame Head we may diſcover the Cuſtom of awarding *Wrecks* to the Prince [1], or to the State, to be diſagreeable to Equity [h]. As we may

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[a] Vid. Lib. xvi. t. 3. l. 1. Sect. ult. D. l. ii. l. iii. l. iv. *Depoſiti, vel contra.*

[b] *Antiq.* l. iv. c. 8.

[c] Vid. *Seld. De Jure Nat. & Gen. ſec. Hebr.* l. vi. c. 4. & *Grot.* in Annot. ad d. l. Sect. 1. Add. *Polyb.* l. vi. c. 31. *princip.*

[d] *Curopalat.* de Off. *Conſtant. & Cedren.*

[e] *Ubi ſupra*, n. 3.

[f] *Plutarch.* & *Cornel. Nep.* in *Pelopid.*

[g] Off. iii. c. 18.

[h] Vid. *Grot.* l. ii. c. 7. ſ. 1. & *Bœcler.* ad d. l. *Jac. Godofred.* De Imperio Maris, c. 11. *Jo. Loccenius* De Jure Maritimo, l. i. c. 7. ſ. 9. *Bodin.* De Republ. l. i. c. 10. *Gramond* Hiſt. *Gall.* lib. xvi. and others.

Mr. Barb. *NOTES on* §. iv.

[1] See Mr. *Hertius*'s Note on that Place, and his Diſcourſe, *De Superioritate Territoriali*, §. 56. in Tom. ii. of his *Comment. & Opuſc.* There are ſome places in *Germany*, where the Preachers ſcruple not to pray to God in the Pulpit, that he would make many Shipwrecks upon their Coaſts. And Mr. *Thomaſius* maintains, that neither theſe Prayers, nor the Cuſtom itſelf are abſolutely unreaſonable, or diſagreeable to the Rules of Charity or Juſtice; for though, as he ſays, in the time of the Wreck there is no Deſign to abandon utterly what is caſt away, yet there is no hopes ordinarily of recovering it, and we know that there is as much Reaſon to fear that the Goods are utterly loſt, as if they had been caſt into the main Ocean: Beſides, the Owner of the Coaſts may, at the place where he has a Right to demand Cuſtoms of Strangers, uſe all means to repay himſelf for the Expences he is at in maintaining the Port and Shore. We may add to this, that it is often very hard to know whoſe Goods and Merchandizes thoſe are, that the Sea throws upon the Shore. So that they are a kind of Alluvions, which, by the Right of Nations, is a lawful way of getting. The publick Prayers, made on this Subject, ought not to be underſtood as if they begged of God that he would make a great number of Shipwrecks, but only that he would cauſe that the Sea ſhould not retain the Goods caſt into it, but diſcharge itſelf of them by caſting them upon their Coaſts rather than any other; for what Reaſon is there for us to ſuppoſe, that ſuch holy Church-men ſhould every Day beg God's Help for a thing contrary to all natural Right; or, at leaſt, that ſome of their Brethren ſhould not charitably adviſe them of ſuch a deteſtable Sin, which they had been guilty of ſo long a time? Theſe are the Reaſons of the Author of whom he ſpeaks, which he delivers in his Diſcourſe, *De Statuum Imperii poteſtate Legiſlatoria contra Jus commune*; printed at *Hall* in 1703, §. 42. The manner in which he juſtifys the Prayers ſo manifeſtly abſurd (to ſpeak no worſe of them) would make us believe that he is not in earneſt, and that he diverts himſelf with want of Conſcience in the Clergy. As for the Confiſcation of the Goods belonging to ſuch as have ſuffered Shipwreck, the Proprietors who caſt them away, do not look upon them altogether loſt, but that they reſerve to themſelves a Right of claiming them, if ever they happen to be caſt upon the Shore, as they know it often comes to paſs. See above, c. 6. §. 12. And 'tis not by theſe Misfortunes, that the maintenance of Ports and Shore ought to be upheld: The Toll would be too exorbitant and odious; ſuch as loſe their Goods would at this Rate pay for thoſe that have the good Luck to ſave them, and get to the End of their Voyage. That it is no leſs a Shipwreck, than if it happened in the main Sea, as Mr. *Thomaſius* ſays, ſhews plain enough how frivolous the Pretence of making

may likewiſe gather the Abſurdity of that Practice in ſome Countries, by which the ſtolen Goods, when diſcover'd [2], are not reſtor'd to the Owner, but are claim'd by the publick Treaſury [a].

V. Inaſmuch as this Engagement to reſtore the Goods of others ariſeth from a general Agreement amongſt all Mankind, a Bar is hereby put to all particular Contracts made about a thing which is any way kept from the true Owner; the Effect of which is, that when the thing is known to be another's, any Bargain about the conveying it to a third Party becomes null and void [1]. And this too is the ground of *Diogenes*'s Jeſt on two Thieves, one of which had plunder'd the other; *One*, he ſaid, *had ſtolen ſomewhat, but the other had loſt nothing* [b].

As to that Law of the *Digeſt* [2], produced by *Ziegler* [c], to prove that a Contract made after ſuch a Diſcovery is not always evacuated or hindered by the Force of Property, it is really no prejudice to what we now aſſert: For in the Caſe there alledg'd the Intereſt of the Creditor is more concern'd that the Pledge ſhould remain ſafe, than the Intereſt of the Debtor who owns it; and the Debtor cannot challenge the Pledge, unleſs upon Payment [d].

The Judgment of *Tryphoninus*, in the ſame place of the *Digeſt*, upon the other Caſe which he there propoſeth, doth not to me appear ſatisfactory. *A Man caſt for a capital Crime*, ſays he, *hath depoſited an hundred Pounds in your Hands; the Man is afterwards tranſported, and his Goods confiſcated; the Queſtion is, Whether you ſhall reſtore the hundred Pounds to him who gave it you in Charge, or whether you ſhall pay it into the Treaſury? If we regard only the Law of Nature and of Nations* [3], *the Money is to be given back* [4] *to the Party who committed it to your Truſt; if we conſider the End of civil Government, and the Rule and Method of poſitive Laws, you ought rather to throw it into the publick Stock. For he, who hath deſerv'd ill of the whole State, ſhould be left to ſtruggle with Poverty too amongſt his other Inconveniences, that his Example may deter others from offending.*

But, indeed, ſince ſovereign Rulers have even by the Law of Nations a Power to puniſh Criminals in their Fortunes and Eſtates; when ſuch a Penalty is juſtly agreed againſt a Malefactor, 'tis agreeable to the very Law of Nature, that all his Goods ſhould be forfeited to the Government: Yet that the Confiſcation of Goods ſhould attend any one particular Crime rather than others, is purely owing to the Appointment of poſitive Conſtitutions. The conſideration of that Benefit which accrues to the Publick from Penalties duly inflicted (the Reaſon urged by *Tryphoninus*) did indeed ſhew that ſuch a penal Sanction ought to be approved of; but it was not properly the Cauſe, why the [5] Treaſury ſhould have the advantage of the Criminal, as to challenging the Sum which he had lodg'd in other Hands. For by the Sentence of the Court all the Right and Property of the condemn'd Criminal over his Goods was taken from him, and conferr'd on the Government; and conſequently what he formerly gave in Truſt is to be deliver'd back, not to him, but to the publick

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[a] Vid. *Ant. Matthæ, De crimin.* tit. *De furtis*, c. 4. ſ. 4.

[b] *Diog. Laert.* l. vi. ſ. 54.

[c] Add. *Grot.* d. l. Sect. 1.

[d] See a full Inſtance in B. xvi. t. 3. l. 31. ſ. 1. *D. Depoſiti vel contra.*

Mr. BARB. *NOTES on* §. IV, V.

making Satiſfaction is, and the Difficulty of knowing the true Owners of the Merchandizes, which the Sea caſts up, proves only, that they ought to be adjudged to the firſt Comer, without examining if there be Reaſon to demand them; and if the Owner can't be found, they belong to the Lord of the Country as firſt Occupant: In a Word, the Cuſtom, of which we are ſpeaking, can't be juſtify'd, but by ſuppoſing that Property is loſt with actual Poſſeſſion; an *Hypotheſis*, which I have ſufficiently confuted above, Chap. vi. §. 1. Note 1.

[2] See l. iii. c. 1. §. 11. Note 3. foregoing.

[1] This is only when there is no honeſt Intention. But when the Contract is performed already, before we are aſſured that the thing belongs to another, we neither can, nor ought to break the Bargain. And the antient Proprietor hath nothing to do to demand his Goods of him, who is not in Poſſeſſion of them, and had a full Right to diſpoſe of them, as I have ſhewed above, §. 3. Note 1.

[2] The Words are, *Item Pomponius*, l. xxxiv. *ſcribit, parvi referre res noſtras, an alienas intulerimus, ſi tamen noſtra interſit ſalvas eſſe. Etenim nobis magis, quam quorum ſunt, debent ſolvi, & ideò ſi pignori merces accepero* [*ob pecuniam nauticam*] *mihi magis, quam debitori, nauta tenebitur, ſi ante eas ſuſcepit*, Digeſt. Lib. iv. tit. 9. *Nautæ, Caupones, Stabularti*, &c. l. 1. §. 7.

[3] *Incurrit hic & alia inſpectio, an bonam fidem inter eos tantum, inter quos contractum eſt, nullo extrinſecus adſumpto, æſtimare deleamus, an reſpectu etiam aliarum Perſonarum, ad quas id, quod geritur, pertinet; exempli loco, latro ſpolia, quæ mihi abſtulit, poſuit apud Seium inſcium de malitia deponentis, utrum latroni an mihi reſtituere Seius debeat? Si per ſe dantem, accipientemque intuemur, hæc eſt bona fides, ut commiſſam rem accipiat is, qui dedit, ſi totius rei æquitatem, quæ ex omnibus perſonis, quæ negotio iſto continguntur, impletur, mihi reddenda ſunt, quoi* (for ſo we muſt read with *Grotius*) *facto ſceleſtiſſimo adempta ſunt, & probo hanc eſſe juſtititiam, quæ ſuum cuique ita tribuit, ut non diſtrahatur ab ullius perſonæ juſtiore repetitione*, Digeſt. l. xvi. *Depoſiti vel contra*, Leg. 31. §. 1. See l. iii. c. 6. §. 11. at the End aforegoing.

[4] *Reus capitalis Judicii depoſuit apud te centum libras, is deportatus eſt, bona ejus publicata ſunt; utrumne ipſi hæc reddendæ, an in publicum deferendæ ſunt? ſi tantum Naturale Jus & Gentium intuemur, ei, qui dedit, reſtituendæ ſunt; ſi Civile Jus, & Legum ordinem, magis in publicum deferendæ ſunt. Nam malè meritus publicè, ut exempla aliis ad deterrenda maleficia ſit, etiam egeſtate laborare debet.* Ibid. princip.

[5] See Mr. *Noodt*'s *Probabilia Juris*, l. iii. c. 2. As to the thing itſelf, there ought, as I think, ſome Diſtinction to be made; if we ſpeak of a truly wicked Perſon, who is guilty of enormous Crimes, and who appears to be hardened in Sin, 'twill be a means to make him go on in his evil Courſes to reſtore what he has intruſted us with. But if the Criminal be condemned for things which are not evil, but only as they are forbidden by the Laws; or if ſome violent Paſſion, Temptation or Habit, aſſiſted by his Temper, has hurryed him into the Commiſſion of an Action heinous in its Nature; we may not only, but we ought, in my Judgment, to reſtore our Truſt faithfully to the unhappy Perſon. And in this he doth nothing contrary to the Duty of a good Citizen. For the End and Deſign of the Laws, which puniſh with a general Confiſcation of Goods, requires that all that appears, or can be diſcovered, ſhould be confiſcated; but it doth not require that every one ſhould go and declare what he has in his Hands, belonging to the Criminal. This were to enlarge the Severity of the Law, whereas it ought to be mitigated as far as poſſible; and if it expreſly commands, that none ſhall conceal any thing that is his, it ought to be interpreted in ſuch a manner, as to imply, that he ſhall be guiltleſs if he undergo the Puniſhment to be inflicted on ſuch as have the Courage to run the Hazard of ſerving an unhappy Perſon. The Tyes of Relation and Friendſhip, which it is the Intereſt of the publick to favour and cheriſh, make this Interpretation reaſonable, ſince it is common to truſt a thing with a Relation or Friend; and if he find, that by putting the thing intruſted to him into the Treaſury deprives Children or other innocent Perſons of a thing that ought to deſcend to them, how great a Criminal ſoever the Offender may be whoſe Goods are confiſcated, and how horrid ſoever the Crimes which have brought this Puniſhment on him, there is no human Law can be ſo underſtood as to oblige him in Conſcience to diſcover the Secrets, or betray the Intereſt of them who ought to inherit the thing intruſted to us, and have done nothing to deſerve to be diſappointed of it.

Receivers. Becauſe all kind of Property, whether it ariſeth from poſitive Ordinances, or from the Law of Nations, hath this effect amongſt others, That he, who is in poſſeſſion of any thing over which the ſaid Property extends, ſhall be bound to reſtore it to the Party who at preſent appears to be the true Owner [6]. What Demurs and Exceptions the Law of reſtoring things given in charge admits in other Caſes upon account of particular Circumſtances, is frequently ſhewn by Authors. Vid. *Cic.* Off. iii. c. 25. *Seneca* De Benef. l. iv. c. 10. *Ambr.* De Off. l. i. c. ult. To which may be added what *Polybius* (in excerpt. *Peireſc.* p. 172.) reports of *Ariarathes* King of *Cappadocia*, who having recover'd the Kingdom from *Orophernes*, demanded of the *Prienians* the forty Talents which *Orophernes* had put into their Hands; and upon their refuſing to deliver them to him, fell upon their City with Fire and Sword, in *Polybius*'s Opinion very unjuſtly. Tho' this Action of *Ariarathes* may be commended, if we firſt ſuppoſe that *Orophernes* had injuriouſly depriv'd him of his Crown.

Upon this natural Obligation to *Reſtitution*, the Compilers of the civil Law have built a great number of additional Rules [a]. And this too is the Ground of claiming by judicial Proceſs [7], what is detain'd from us, together with all the Actions which border on that Claim; and in ſome ſort, the *Action* of falſe Debt [8]; the *Action* for Recovery of what we have given [9], either upon ſome Reaſon, which Reaſon hath not been made good, or elſe upon no Reaſon at all [10]. Though theſe *Actions* are ſaid likewiſe to depend upon a kind of imaginary Contract [11]. For when we deliver a thing without intending it for a matter of pure Bounty, it is ſuppos'd to be given by the one Party, and receiv'd by the other on this Condition, That it ſhall be delivered back, in caſe there appear no Reaſon why it was given.

What hath been ſaid about the *Reſtitution* of the main Thing or Subſtance, extends likewiſe to the Fruits or Profits of it, ſuch as are now remaining; ſo much ſtill being deducted as amounts to the Charges of producing, gathering, or preſerving them.

VI. But if what we have honeſtly gotten, tho' really belonging to another, hath been as honeſtly *ſpent*, then it ſeems moſt agreeable to natural Equity, that we ſhould not pay the whole Value of it to the Owner, but only the Advantage they brought us, or ſo much as we were made the richer by it; provided ſtill that the Owner hath not been requited for what he loſt, ſome other way. For if I honeſtly acquire and conſume what was ſtolen from you, when you have already received full Satiſfaction from the Thief, you can then demand nothing of me, how much ſoever I have been a Gainer by my Bargain. The Ground and Reaſon of this Aſſertion is not ſo much to be taken from the End of *Property* [b] (which was eſtabliſh'd that every Man might, according to Proportion, enjoy his own: whereas he, who gains by what is mine, hath more than his Proportion, as I on the contrary have leſs) as from the following Conſideration; That a thing in which I have not loſt my Property, either by my own free Conſent, or by Default, or by the Right of War, ſtill belongs to me; as doth likewiſe all the Fruit and Product of it. When ſuch a thing therefore hath fallen into another Man's Hands, who hath made an Advantage by ſpending it; his Honeſty and good Intention ſecure him indeed from all Guilt and Cenſure; yet he can on no Pretence with-hold the Profits, when I lay claim to them [1], becauſe they are to be look'd on as the Reſidue, or the ſurviving part of the thing, at leaſt they are the proper and neceſſary Fruit proceeding from it. Hence it is one of the moſt common and proverbial Sayings [2], *That no Man ought to gain by another's Loſs*; that is, by ſuch a Loſs as he did not himſelf procure, either by his Conſent or Default, ſo as to be the Cauſe of the Damage, or to have it any way imputed to him. For it can be no Sin in me to take an Occaſion of Advantage from the Loſs or Damage of another [3], when it was not of

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[a] Vid. l. xxv. t. 2. l. 25. *D. De act. rerum amotar.*

[b] Vid. *Grot.* l. ii. c. 10. ſ. 2.

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[6] There are, adds our Author here, other Caſes, in which the Law, which commands to reſtore our Truſt, admits of Exceptions; as when a Man who has put his Sword into our keeping becomes delirious, and then comes to demand it; or when he, that hath put a Sum of Money into our Hands, raiſes War againſt the State.

[7] *Rei vindicatio.* See *Digeſt.* l. vi. t. 1. and what I have ſaid above, c. 9. §. 8. Note 4.

[8] See above, l. iii. c. 4. §. 5. Note 4.

[9] See Chap. ix. of this Book, §. 4. Note 5.

[10] *Conditio ſine Cauſa* is, when we promiſe or give a thing for a Cauſe which is ſuperſeded, or upon a Condition which was never performed; as if one receives a Portion in order to a Marriage, which was never accompliſhed, but was diſannulled.

[11] In the Opinion of the *Roman* Lawyers there is no Obligation to another, which is not founded on the Conſent of him, who is bound by it; when there appears no ſigns of a Conſent in certain things, wherein Men are nevertheleſs obliged, they ſuppoſe it, and call it a *Quaſi Contract.* But in all the Caſes that they alledge on this Occaſion, and which reſpect the Management of another's Buſineſs by Commiſſion; the tranſacting of publick Affairs in Societies; the Adminiſtration of a Guardianſhip; the Addition or Acceptation of an Inheritance, and the Payment of a thing not due. In all theſe Caſes the Obligation proceeds either from a tacit Agreement, properly ſo called, or from a poſitive Law, or from ſome Maxims of moral Equity only, and there is no need of feigning the formal Conſent of a Perſon wholly ignorant of what paſſes. See what I have ſaid above, l. iii. c. 4. §. 2. Note 3. and *Inſtitut.* l. 3. t. 28. *De obligationibus, quæ quaſi ex contractu naſcuntur.*

[1] He may very well diſpenſe with it, ſince, as I have ſhewed above, §. 3. Note 1. all the time that he was the honeſt Poſſeſſor, he acted as Maſter, and ſo was really; ſo that the Profit he had from it was a Part or Revenue which came from the Goods of another, but was an Acquiſition made by virtue of his Right of Poſſeſſion, and it ought to remain his with ſo much the greater Reaſon, becauſe 'tis almoſt always one way or other the Fruit of his Induſtry.

[2] The Words of the *Digeſt* are, *Jure Naturæ æquum eſt, neminem cum alterius detrimento & injuria fieri locupletiorem.*

[3] *Demades,* the *Athenian,* condemned a Man of his City, who profeſſed an Art of ſelling things neceſſary for Funerals, under pretence of taking too much Profit, and becauſe that Profit could not be compaſſed but by the Death of many Men. This Judgment ſeems to have been ill given, becauſe he made no Profit but by ſome Man's Damage, and by the ſame Reaſon all Gain may be condemned. The Merchant can't manage his Buſineſs but by corrupting of Youth, the Husbandman does his by the dearneſs of Corn, the Builder by pulling down of Houſes, the Officers of Juſtice by Law-Suits and Quarrels, the Grandeur and Calling of the Clergy is ſupported by Mens Deaths and Vices; no Phyſician is much pleaſed with the Health even of his Friends, as an antient *Greek* Comedian ſpeaks; nor a Soldier with the Peace of his Country, and ſo of the reſt. And which is worſe, if every one

of my own procuring [a]. It is obſervable, that in the Books of the *Roman* Laws many Caſes are determin'd according to the Equity of this general Rule [4], with ſome difference from the ordinary Tenure and Strictneſs of the Letter. Vid. *Inſtit.* lib. iv. tit. 7. Upon the ſame Foundation the *Action* which they term [5] *de in rem verſo* ſeems to depend. *Vid. D.* lib. xv. tit. 3.

VII. From the Rules already propoſed may be drawn a ſatisfactory Deciſion of many Points uſually controverted as well by Lawyers as Divines; which we think it may be proper to tranſcribe out of *Grotius:* Firſt, *He that honeſtly and innocently gains Poſſeſſion of what is another's (for of him only we would here be all along underſtood; inaſmuch as the diſhoneſt Poſſeſſor doth not only ſtand obliged on account of the thing itſelf, but is farther obnoxious by his own Crime) ſo long as he continues in this Integrity* [b], *is bound to no Reſtitution, in caſe the thing periſh or be loſt; becauſe he neither enjoys the Subſtance, nor any Fruit or Advantage of it* [c]. We add, That he doth not ſtand bound, though it ſhould have happened to periſh by his Default: For his honeſt Intention was to him in the Place of Property [1]. Now a Proprietor, tho' he loſe his Goods through his own Neglect [2], yet is thought to ſuſtain ſufficient Damage by the Loſs, and is liable to no farther Puniſhment: But we are to pronounce otherwiſe, if the Perſon in Poſſeſſion, underſtanding the thing to be another's, voluntarily made away with it to avoid *Reſtitution.*

VIII. Secondly, *Such a Poſſeſſor through honeſt Miſtake is bound to reſtore, not only the thing it ſelf, but likewiſe ſuch Fruits or Products of it as are ſtill remaining; becauſe, in natural Eſtimation, he that is Owner of the thing, is Owner too of the Fruits* [d]. *Yet here they do diſtinguiſh between the Fruits of the thing, and the Fruits of the Man's own Labour.* Grotius *is of Opinion, that the former only ought to be given up, and not the latter; becauſe theſe are not due to the thing itſelf, tho' perhaps they could not have been procured without it.* Others think, that even the latter Fruits ſhould be reſtored, and alledge a Law of the *Code* [e] in favour of their Aſſertion [1]. And indeed this Judgment ſeems to come neareſt to the Rule of Kindneſs and Humanity; provided this Clauſe be ſubjoined, That the honeſt Poſſeſſor may in this Caſe deduct, as well the Expence which the thing hath put him to, as a due Reward for his Labour [f]: As likewiſe that, to prevent troubleſome Suits, the Proprietor upon claiming his own ſhould not be too raking and greedy, ſhould not (as we ſay) *ſweep Duſt and all:* For after the Buſineſs hath been qualify'd by theſe two Alleviations, it will ſeldom happen that the honeſt Poſſeſſor ſhall have much to give up out of the Advantage he made by his own Induſtry.

IX. Thirdly, *Such a Poſſeſſor is bound not only to reſtore the thing, but likewiſe to ſatisfy for the Fruits which he hath ſpent* [1], *if it appear that he would have ſpent as much otherwiſe* [g]: *For he is judged to be ſo much the richer, whilſt by ſpending onother's Goods he*

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[a] See *Montaigne*'s Eſſ. l. i. c. 20. *Cicero,* Off. iii. c. 5. *'Tis againſt Nature to increaſe our own Advantage by the Damage of another Man.* Which is borrowed from that of *Terence,* Andr. A. 4. Scen. 1.

Hoccine eſt credibile aut memorabile,
Tanta vecordia innata cui quam ut ſiet,
Ut malis gaudeat, atque ex incommodis
Alterius, ſua ut comparet commoda?

Is this to be believed, or can't be thought
That any one can be ſo vile and naught,
As to rejoice in th'ills of other Men,
That to themſelves Advantage they may gain?

See *Digeſt.* lib. l. t. 17. *De diverſis regulis Juris,* leg. 206.

[b] Comp. *Ziegler.* ad *Grot.* d. l.

[c] *Vid.* D. l. v. t. 3. l. 40. *D. De hæred. petit.* & l. vi. t. 3. *D. De rei vindic.*

[d] *Add.* l. vi. t. 1. l. 20. 50. *D. De rei vindic.*

[e] Lib. iii. t. 32. leg. 22. *De rei vindic.*

[f] Vid. l. 5. t. 3. l. 36. ſ. 5. l. 38, 39. *D. De hæred. petit.* & lib. vi. t. 1. l. 27. ſ. 5. l. 31. l. 48. l. 65. *D. De rei vindic.*

[g] *Vid.* lib. *ubi ſup.* l. 25. ſ. 8, 9. *D. De hæred. petit.* & l. vi. t. 1. l. 52. *D. De rei vindic.*

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one would ſearch themſelves, he'd find that our Wiſhes inwardly are for the moſt part raiſed and ſupported by the Expence of another; which being conſider'd, it comes into my Mind, that Nature does not in this ſwerve at all from her general Courſe; for Phyſicians hold, that the original Growth and Increaſe of every thing is the Alteration and Corruption of another; for as *Lucretius* ſays, lib. ii. ver. 752, 753.

Nam quodcunque ſuis mutatum finibus exit,
Continuò hoc mors eſt illius, quod fuit ante.

This Chapter of *Montaigne*'s Eſſays, to which the Author refers us, and which is the twenty firſt of the firſt Book, was ſo ſhort, that I thought that the Reader would no more grudge to read it, than I have done to copy it out. See *Seneca De Beneſ.* l. vi. c. 38. from whence 'tis almoſt all taken.

[4] See Examples of this in *Grotius,* B. 2. c. 10. ſ. 2. n. 2, &c.

[5] The Words are, *Quod cum eo, qui in alienâ poteſtate eſt, negotium geſtum eſſe dicitur,* & *Digeſt.* l. xv. t. 3. *De in rem verſo.*

[1] This Approbation of the Author is remarkable, but he ſaw not the Conſequences of it, and it follows from all the other Principles of his Deciſion of the following Caſes.

[2] The *Roman* Law alſo diſpenſes with the honeſt Poſſeſſor in reſtoring what is loſt through his Negligence, and what he has conſumed, or laviſhly ſpent, believing it was his own. *Quemcunque igitur ſumptum fecerint ex hæreditate, ſi quid dilapidaverunt, perdiderunt, dum re ſua ſe abuti putant, non præſtabunt,* Digeſt. l. v. t. 3. *De Hæreditatis Petitione,* l. 25. §. 11. *Sicut autem ſumptum, quem fecit, deducit, ita ſi facere debuit, nec fecit, culpæ hujus reddat rationem niſi bonæ fidei poſſeſſor eſt, tunc enim, quia quaſi ſuam rem neglexit, nulli querelæ ſubjectus eſt ante petitam hæreditatem,* Ibid. leg. 31. §. 3. Mr. *La Placette* nevertheleſs in his Treatiſe of Reſtitution, l. iv. c. 5. p. 257. adds this Reſtriction, At leaſt if there be no Fault in the Getter. Indeed this appears more agreeable to the common Principles, but yet we may diſcern from hence that thoſe Principles are not ſound.

[1] The Truth is, the honeſt Poſſeſſor may keep both, as belonging to him by a full Right according to the Principles that we have above eſtabliſhed, §. 3. n. 1. So that let the Rules of the civil Law be what they will, I believe, that conſidering natural Right only, upon the whole Matter a good Intention produces the ſame Effect as to the Poſſeſſor as a real Property, as the *Roman* Lawyers themſelves have agreed by this Maxim (making only an Exception in ſuch Caſes, as the Law has ordered otherwiſe.) *Bona fides tantundem poſſidenti præſtat, quantum veritas, quoties Lex impedimento non eſt.* Digeſt. lib. l. t. 17. *De diverſ.* Reg. Jur. leg. 136.

[1] If the honeſt Poſſeſſor may lawfully keep the Fruits produced by Nature, as I have aſſerted in the foregoing Note, by a much ſtronger Reaſon is he excuſed from reſtoring the Fruits ſpent. The Interpreters of the *Roman* Law do not agree, that the civil Laws oblige to Reſtitution in this laſt Caſe, although the Author cites ſome Texts for it. See *Vinnius* upon the Inſtitutes, l. ii. t. 1. *De Rerum Diviſione,* §. 35. Num. 9, 10.

hath ſaved his own[a]. Yet here we are of Opinion, That beſides the Limitation above added, it ſhould be likewiſe conſidered, whether the well-meaning Poſſeſſor be able to recover of the Party, who ſold him the thing, ſo much as he loſeth upon its being claim'd by the true Owner[2]. If this is impoſſible to be done, the Poſſeſſor is ne'er the richer by the Bargain, when he is forced to reſtore what he bought, and yet cannot make himſelf whole by recovering the Price he gave. As to the Example of *Caligula* produced from [b] *Sueton*, who tells us, *That when he reſtor'd any exil'd Princes to their Dominions, he gave them up likewiſe the Revenues, which had been brought in the mean time into the* Roman *Treaſury*. We may obſerve, that he believed their Kingdoms to have been unjuſtly taken from them, and conſequently himſelf to be in diſhoneſt Poſſeſſion. Or if he did not condemn his Predeceſſor's Act in this Matter, yet it may ſtill be queſtioned, whether he reſtored theſe Fruits and Profits out of ſuppoſed Duty and Conſcience, or out of meer Generoſity. So that we take it to be the truer Judgment to affirm, that the innocent Poſſeſſor is obliged to reſtore the Value of what he hath ſpent, when he cannot recover Damages of the Perſon who cheated him with this falſe Title. For in that Caſe he cannot be ſuppoſed to have enriched himſelf by the Purchaſe. And it ſeems a greater Hardſhip to pay the Value of a thing that is ſpent and gone, than to reſtore the thing itſelf, were it forth-coming.

X. Fourthly, *Such a Poſſeſſor is not bound to make good thoſe Fruits or Profits which he neglected to take; becauſe he neither hath them, nor any thing elſe in their Room.* And his Negligence about what was his own, or in all Reſpects the ſame as if it had been his own, is adjudg'd to be a ſufficient Prejudice to him[c].

XI. Fifthly, *If ſuch a Poſſeſſor, having receiv'd the thing as a free Gift, ſhall have afterwards beſtow'd it on another, he is not obliged to make Satisfaction to the Owner, unleſs it appear that he would have given as much ſome other way*[1]; *for then the ſparing his own Stock will be reckon'd a matter of Gain and Advantage to him.* This Account ſeems to ſuppoſe a Diſtinction between Donations out of Duty, and Donations out of meer Bounty; as that the former only are to be made good in the Caſe before us, and not the latter. Becauſe, ordinarily ſpeaking, no Man is preſum'd to give in this gratuitous manner, unleſs he thinks himſelf to have ſomewhat ſuperfluous; and conſequently his Inclination to give is judged to have proceeded from his Opinion, that the thing which he thus diſpoſed of, and which proved to be another's, was more than he wanted for his own Uſe. And as to that Obligation which ariſeth from ſuch a Bounty in the Receiver, it is by no means reckon'd amongſt thoſe things which are capable of being rated at a ſet Price; and therefore he, who only expects an uncertain Return for what he hath actually beſtow'd, doth not in the leaſt appear to have been made richer by what he parted with on this Proſpect[d]. But it is to be conſidered likewiſe farther, whether the Preſent be ſtill remaining in the laſt Receiver's Hands or not: If it be, the Proprietor ſhall claim it directly of him, and not trouble the intermediate Receiver: If not, the main Burthen ſhall ſtill fall on the Perſon who either now poſſeſſeth the thing, or hath been made richer by it. But the intermediate Poſſeſſor ſhall only come in for a ſmall Share in the Burthen, inaſmuch as he too perhaps had an Opportunity of making ſome Advantage[e].

XII. Sixthly, *If ſuch a Poſſeſſor, having firſt bought the thing, ſhall afterwards have alienated it, he ſhall not be bound to give the Owner any more than the Overplus of the prime Coſt*[1]; *or ſo much as he hath gain'd by his Bargain. But if it firſt coſt him nothing, and yet he hath ſold it, he ſhall then be obliged to give up the Price received*[2], *in caſe the Owner cannot recover the thing itſelf of the preſent Poſſeſſor; and unleſs the former Party hath ſquander'd away the Price he took, which, if not ſo eaſily gotten, had not been ſo prodigally ſpent.* But he, who puts a thing off for juſt ſo much as it coſt him, is no Gainer, being ſuppoſed only to recover his own. Nor can it be ſaid in this Caſe, that the Price ſupplies the room of the thing; unleſs he parted with it out of a knaviſh Deſign: Becauſe otherwiſe the Owner is to challenge his Goods from the hands of him who is now in Poſſeſſion.

There is a Law of the *Digeſts*[f] urged in the preſent Caſe, which runs thus; *If after a Thief hath ſold the Goods he ſtole, the Owner of them ſhall by violent means get the Price out of his Hands, he ſeems to be guilty of Robbery as much as the other Party was before, and to be equally obnoxious to the Law.* For all agree, that the Advantage of a ſtolen thing, or the Money into which it is turn'd, is not itſelf likewiſe ſtolen. But this Law properly reſpects civil Governments. For thoſe who live

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[a] *Add.* lib. xlvi. t. 3. l. 47. ſ. 1. *D. De ſolution.*

[b] *Calig.* c. xvi.

[c] *Vid.* lib. vi. t. 1. l. 78. *D. De rei vindic.*

[d] *Vid.* lib. v. t. 3. l. 25. ſ. 8. *D. De hæred. petit.* Comp. *Ziegler.* ad *Grot.* d. l. ſ. 7.

[e] *Add. Struv.* Exercitat. xi. ſ. 13.

[f] *Vid.* lib. xlvii. t. 2. l. 48. Sect. ult. *D. De furtis.*

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[2] Either this Exception is ill grounded, or it may be extended to other Caſes, which the Author does not. From whence it appears that theſe Determinations are not very coherent.

[1] It is true, 'tis of ſome Advantage, but then 'tis as true, that as he might receive the Preſent, and make it his own, ſo he had alſo Right to alienate it in what manner he pleaſed. And ſo what he ſpared of his own Goods is lawfully gotten by him, and conſequently all the Diſtinctions, which our Author hereafter makes, are needleſs.

[1] From what has been ſaid in the foregoing Notes it follows, that the honeſt Poſſeſſor is not obliged to reſtore the Value of the thing, nor the Gain he has made by parting with it, whether he bought it, or it was given him. So that the Author's Diſtinctions here are alſo ſuperfluous.

[2] 'Tis for this Reaſon that Mr. *La Placette* maintains, and upon this Suppoſition ſays, " That as it is agreed that we muſt reſtore " a thing if it be in Being, he is perſuaded, that we can't keep the Price that aroſe from it. " Treat. of *Reſtitution*, l. iv. c. 5. Obſerve whither unſound Principles will carry Men, when they are once engaged in them!

in a State of natural Liberty, may as fairly ſeize by Violence the Price of what hath been ſtolen from them, as the thing itſelf.

XIII. Seventhly, *Such a Poſſeſſor, though he purchas'd the thing at a conſiderable Expence, yet is bound to reſtore it, and cannot require his Charges of the Owner, but of the Seller. For, otherwiſe, the Right of challenging would turn to no Account* [1]*, if the Challenger were to refund the Price. And he who buys a thing of another, whom he might ſuſpect not to be the true Proprietor, ought to have provided particularly for his own Security, in caſe the thing ſhould afterwards happen to be claim'd: Though this Condition of ſecuring the Buyer's Title is indeed imply'd in all Contracts of Sale, according to natural Equity* [a].

To the Rule above-mention'd the following Exception ought to be added; *Unleſs in a caſe where the true Proprietor could not in all Probability have recovered Poſſeſſion of his own, without ſome Expence: As ſuppoſe the Goods were detain'd in the hands of Thieves or Pirates, and from them purchas'd.* For here the honeſt Man, who delivers the Goods, may fairly deduct ſo much as the Proprietor would have gladly ſpent to regain them: Becauſe the actual Poſſeſſion, eſpecially when not to be recovered without difficulty, is capable of being rated at a certain Value, and the Proprietor, when re-inſtated in it, is adjudg'd to be, on this account, ſo much the richer [2]. Whence aroſe the Cuſtom for Perſons who have loſt any thing, to promiſe Μήνυτρον, a Reward and Encouragement to the Finder. [b] For the ſame Reaſon, though the buying of what's already our own be void, according to the ordinary courſe of the civil Law, yet *Paulus* affirms it to be good and valid [3], if it be firſt agreed upon, that the Poſſeſſion of what's our own may be purchas'd, when remaining with another.

'Tis propos'd as a farther Queſtion on this point, *Whether a Man who buys a thing thus detain'd, purely with Deſign to convey it to the Owner, may demand the Price to be refunded?* Some take the negative part; becauſe, ſay they, *The Right accruing to the Proprietor cannot be taken off by this Allegation of the Buyer.* [c] But indeed, if ſuch a Purchaſer foreſaw with fair probability, that the true Owner would hardly recover his Goods by other means, and if the Price which he gave do not riſe above what the actual Poſſeſſion which he reſtores may be valu'd at, then 'tis abſolutely requiſite that what he expended ſhould be repaid him. But whether he who redeems the thing in this Caſe ſhall be allow'd an Action [4] againſt the Proprietor, ſuch as they term *Negotiorum geſtorum*, or to recover the Charges he hath been at in the Proprietor's Buſineſs, it is the Province of the Civilians more nicely to ſtate and enquire. [d] The Reaſon, which *Grotius* offers for his omitting to determine that Matter, is, *Becauſe the aforeſaid Action ariſeth purely from the Civil Law, having none of thoſe Foundations to reſt upon, from which bare Nature introduceth an Obligation in the Caſe.* But tho' 'tis not indeed the Concern of the Law of Nature to examine, or determine, to what particular Action at civil Law the preſent Caſe may be, or ought to be reduced; yet it cannot be deny'd but that the very Action above ſpecify'd, of recovering Charges on account of Buſineſs manag'd for another, hath a Foundation in natural Equity, and in tacit Compact. For it cannot on any pretence be requir'd of me, that I ſhould by my kind and generous Aſſiſtance preſerve or improve another Man's Goods altogether gratuitouſly, and without receiving what I am out of Pocket in his Service [5]. It ſeems therefore the moſt plain and natural way of reſolving ſuch Caſes, that the Party who redeems a thing after this manner, as likewiſe he who tranſacts any Buſineſs on another's Behalf, be ſuppos'd to hold the thing which he hath redeemed, or about which he hath imploy'd his Money or his Pains, as a Pledge or Mortgage, till ſuch time as he receives Satisfaction. Yet if there be no Fruits of his Labour remaining, which he might take hold on for his own Security, and if the other barbarouſly deny to pay him for his ſo uſeful and profitable Aſſiſtance, I am not of opinion that he may apply the ſame means towards aſſerting his Right as are uſed in that other kind of Right which ariſeth from expreſs Contract; but all he can do ſhall be to expoſe the ungrateful Wretch to publick Hatred and Deteſtation, as one who doth not deſerve the leaſt Inſtance of good Will

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[a] *Vid.* Lib. v. t. 3. l. 22. & *D. De Hæred. petit.* l. 25. princ. Sect. 1. & Lib. xviii. t. 1. *De Contrah. Emp. &c.* leg. 16, &c. *C.* Lib. vi. t. 32. l. 3. & *C. De rei vindic.* Lib. xxi. t. 2. l. 1. *D. De evict. &c.* Lib. xiv. t. 2. l. 2. ſ. 3. *D. De L. Rhodia.* & Lib. viii. t. 45. l. 16. *D. De evict.* & Lib. vi. t. 2. l. 2. *C. De furtis.*

[b] *Vid.* Moſch. Idyll. 1. imitated by *Apuleius*, Metam. l. vi.

[c] *Vid.* Lib. l. t. 17. l. 11. *D. De diverſ. reg. juris.*

[d] An *Actio negotiorum geſtorum* is, when one Man has done for another a Buſineſs unknown to him, without any Commiſſion or any expreſs Order from him. See B. iii. t. 5. *D. De Negotiis geſtis.*

Mr. BARB. *NOTES* on §. XIII.

[1] It is ſufficient, that the Proprietor can always recover the ſame thing in Specie from whomſoever is in Poſſeſſion of it by an honeſt Intention. We are ſometimes glad to recover our Goods at any Expence, either becauſe the things are rare, or we have great need of them, or becauſe we take ſingular Pleaſure in the Poſſeſſion. Further, Either we know not that the thing belongs to us, and in this Caſe we do or ought to count that 'tis all Profit, if we obtain Reſtitution; or we know not what's become of it, and in that Caſe we ought to look upon it either intirely loſt, or very hard to be recovered, ſo that we ought to be ſatisfied in paying the honeſt Poſſeſſor that which he has given. But if we believe that it is bought very dear at the Price, and ſo had rather leave it in the hands of the honeſt Poſſeſſor, 'tis not the Fault of this latter; and there is no Reaſon why he ought to loſe his Money rather than the other his Goods. You'll ſay perhaps, he ſhould have taken better Security. But we ſuppoſe he hath taken all the Care he ought, or could. The Neceſſity and Nature of Commerce in this Life permits us often to have no certainty, that the Perſon of whom we buy, for Example, or take a thing to pawn, is the lawful Proprietor of it, or can make a valid Contract with us about it, much leſs require perſonal Securities, and make them in force in caſe of Eviction. See above, §. 3. not. 1.

[2] See the Interpreters of *Petronius*, Chap. xcvii. *Edit. Burman.*

[3] The Words are, *Rei ſuæ emptio tunc valet, cum ab initio agatur, ut poſſeſſionem emat, quam forte venditor habuit, & in judicio poſſeſſionis potior eſſet*, Digeſt. lib. xviii. t. 1. *De contrahen. Emptione*, &c. l. 34. §. 4.

[4] *Actio negotiorum geſtorum* is when one does the Buſineſs of any Man upon his own Head, without any Commiſſion, or expreſs Order on his part. See *Digeſt.* l. iii. t. 5. *De negotiis geſtis*, and l. v. c. 4. §. 1. following.

[5] This tacit or feigned Agreement is no ways neceſſary. It is ſufficient to ſay, that if we do not repay, nor ſatisfy him, who out of his meer good Will has done ſome Buſineſs for us, we ſhall do him Wrong, which is forbidden by the Law of Nature, *Titius*'s Obſervat. on *Lauterbach.* 96. See above, §. 5. not. 11.

from Mankind [6]. The *Roman* Laws have conſider'd the Equity of ſuch a Reſtitution in handling the like Caſes [a]. And in the whole Compaſs of this Affair *Terence*'s Remark ought to paſs for a general Caution, that *Jus ſummum ſumma ſæpe eſt malitia* [b]; *The higheſt Right is very often the higheſt Wrong.*

XIV. Eighthly, In the Opinion of *Grotius*, *He who buys another Man's Goods cannot return them upon the Hands of the Seller, and demand back his Money in their ſtead. Becauſe ſo ſoon as ever they came under his Power, there commenc'd in him an Obligation of reſtoring them to their true Owner.* In which Caſe we are of a different Judgment: For certainly I am not bound to purchaſe a thing which I know to be another's, only that the true Maſter may recover his Goods, and that I may loſe my Money [1]. When therefore I find the thing which I bought to belong to another Owner, and am unwilling the Claim ſhould be directed againſt me, either to avoid the trouble of the Diſpute, or becauſe I deſpair of getting my Money again of the Seller, I ſhould think that I might fairly recede from ſuch a Bargain (provided it were not too late) to avoid the drawing upon my ſelf an unneceſſary and unprofitable Contention; yet ſo as that I ſhould be at the ſame time obliged to diſcover to the Owner, upon his Demand, where his Goods are lodg'd, that he may have an Opportunity of regaining them [c].

XV. Ninthly, *He who comes honeſtly by the Poſſeſſion of a Thing, and knows not whoſe it is, is not by the Law of Nature bound to give it to the Poor; though ſuch an Appointment by civil Ordinances would be very juſt and commendable.* The Reaſon is, becauſe by the Force of Property none can claim a Right in the thing beſides the Proprietor. But now, to the Party here concern'd, the not appearing of a Proprietor is the ſame as if there were none: Which is indeed a general Rule in other Caſes. And therefore there's no body who hath a better Title to hold the Goods, whilſt the Owner is unknown, than he who after this fair and upright manner is at preſent in Poſſeſſion of them.

XVI. Tenthly, What *Grotius* aſſerts, *That a Fee taken either on a diſhoneſt Account, or for an honeſt Service, yet ſuch as ought to have been perform'd* gratis, *is not to be reſtor'd*, we allow; if the Neceſſity of Reſtitution is to be deriv'd wholly from the Propriety of things conſider'd by itſelf [1]. For thus he, to whom any thing hath paſs'd with the conſent of the former Owner, cannot be obliged to refund it. But when the Cauſe of receiving ſuch a Fee was diſhoneſt, as ſuppoſe Extortion, then there ariſeth an Obligation to reſtore it from another Principle. And under the general Name of Extortion ought to be comprehended all Ways and Methods (tho' not ſo violent) of picking Mens Pockets by corrupt Dealings: As when Magiſtrates refuſe to adminiſter Juſtice without a Bribe [d] [2].

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[a] Vid. lib. xi. t. 7. l. 14. ſ. 13. *D. De religioſ. & ſumpt. funerum.* & Lib. iii. t. 5. l. 6. ſ. 3. *D. De negot. geſt.* & Lib. xiv. t. 2. l. 1. *D. De lege Rhodia.*

[b] *Heautontim.* Act. iv. Scen. 5. ver. 47, 48.

[c] Vid. Lib. vi. t. 1. l. 17. princip. *D. De rei vindic.* & *Ziegler. ad Grot.* d. l. Sect. 10.

[d] See 1 *Sam.* xii. 3, 4. Where *Samuel*'s Intention ſeems to have been, not to make ſhew of any extraordinary Sanctity, but to declare by that ſolemn Proteſtation, that he had in no reſpect tranſgreſs'd the common Duty of a Judge; and conſequently, that he had not deſerv'd by any Fault of his to be thruſt out of his Office by the creation of a King. See before, B. iii. c. 7. Sect. 9.

Mr. Barb. *NOTES on* §. xiii, xiv, xvi.

[6] *David* in 1 *Sam.* xxv. 7, 15, 21. ſent his Men to demand a Reward for his Mens Pains in guarding *Nabal*'s Flocks, and was angry at his Denial, which he reſolved to revenge, and not a verbal Affront only.

[1] But he treats not here of a Bargain of Sale, which never was perform'd; for no body, I think, can imagine, that in this caſe we ought to pay the Money; and having got the thing to be ſold, cauſe it to be reſtored to the true Owner. The Author ſeems to leave us to gueſs at his Senſe, which conſiſts in a tacit Conſequence from what he has before formerly aſſerted, and ſeems to be this; One is not obliged to hold to his Bargain, when he diſcovers that the Goods are not the Seller's own; nay, he may endeavour to break it, tho' he has already paid the Price agreed on, and received the Goods. 'Tis not yet altogether the ſame thing, eſpecially if we argue from the Author's Principles. He had better, as the Commentator upon *Grotius*, have applied the Proverb, *True Charity begins at Home*; and what I have ſpoken of the honeſt Poſſeſſor will put the thing out of doubt. The Law quoted by the Author makes nothing to his purpoſe, as will be diſcerned at the firſt Sight.

[1] See what is ſaid above, l. iii. c. 7. §. 6. Note 2.

[2] Our Author quotes here 1 *Sam.* xii. 3, 4. upon which ſee Mr. *Le Clerc*'s *Comment.*

OF THE LAW of NATURE AND NATIONS.

BOOK V.

By William Percivale, M. A. Student of *Chriſt-Church.*

CHAP. I.

Of PRICE.

I. *After Property, the Meaſure of Things muſt be introduced.*
II. *What is the moral Quantity of Things.*
III. *How many kinds of Price.*
IV. *What is the Foundation of the common Price of Things.*
V. *Many profitable Things have no Price, and why?*
VI. *Why the Prices of Things riſe.*
VII. *Of the Price of Fanſy.*
VIII. *Of the lawful Price.*
IX *Of the common Price.*
X. *The Cauſes why the common Price riſes and falls.*
XI. *The common Price is not ſufficient for the Commerce of Man's Life.*
XII. *Hence an eminent Price was ſet in Money.*
XIII. *Which, for the moſt part, was made of Metals.*
XIV. *How far the Governours of Societies may ſet an Eſtimate upon Money.*
XV. *In ſo doing, they ought to have reſpect to Land.*
XVI. *The Value of Money is alſo ſubject to an Alteration.*

SINCE Things that are the Subject of Property are of different Natures, and adminiſter differently to human Neceſſities; and ſince it often happens, that either the ſame Thing belongs to many (the Parts of which are not in all reſpects alike) or that [1] Things of a different Nature are to be exchang'd for one another: Hence it becomes neceſſary for Men to agree upon ſome common Meaſure, by which Things of a different Nature may be compared together, and made equal to one another. Now Things are thus compared, and found to be equal, or unequal, in reſpect of their Quantities; for Equality is nothing elſe but an agreement of Quantities: And therefore we muſt conſider the Quantity of Things and Actions, as far as they are uſeful to human Life, together with the Foundation and common Meaſure of that Quantity.

Mr. Barb. *NOTES on* Chap. I. §. 1.

[1] Commerce is a Conſequence of Property of Goods, and Price is the Conſequence of Commerce, or a Thing neceſſary to accommodate each other by way of Exchange, to which all Commerce in general is to be reduced. So that the *Roman* Lawyers have Reaſon to refer the Settlement of Commerce to the Law of Nations, underſtood in the manner that I have explain'd it elſewhere, Lib. ii. cap. 3. §. 23. note 3. *Ex hoc jure gentium ——— Dominia diſtincta, agris termini poſiti, ædificia collocata : commercium, emptiones, venditiones, locationes, conductiones, obligationes inſtitutæ, exceptis quibuſdam, quæ [à] jure civili introductæ ſunt.* Digeſt. lib. i. tit. 1. De Juſtitiâ & Jure, leg. 5. Mr. *Thomaſius* nevertheleſs maintains, that Commerce is not the Law of Nations farther, than by aſſuming that Right from ſuch general Cuſtoms as have proceeded from the corrupted Manners of Mankind, and which are ſettled by corrupted Reaſon; ſeeing that the Neceſſity, Diverſity, and great Increaſe of Commerce is the Effect of Vice, and the Growth of it. See the Diſcourſe, *De Jure Statuum Imperii dandæ Civitatis,* §. 14. and that, *De Pretio affectionis in res fungibiles non cadente,* Chap. i. §. 5. both printed at *Hall* in *Saxony*. But this reſpects another Queſtion, which rather relates to Divinity, than the Civil Law. (See *lib.* i. *cap.* 1. §. 11. aforegoing.) It is ſufficient, that in the State that Things now are, Commerce, as well as Propriety of Goods, is neceſſary among Men in the Condition they are; ſo that we may ſay, that the Settlement of Commerce in general is very conformable to the moſt pure Reaſon, and the Law of Nations, ſo called in the moſt agreeable Senſe. Laſtly, As Commerce is a Conſequence, and one of the chief Uſes of Property, we muſt be careful not to extend the Rights of Property

II. We find then, that Things are ſaid to be equal, not only as they agree in *three Dimenſions*, but in ſome other reſpect. Thus Honour, Labour, and Wages are ſaid to be equal, or unequal, not by reaſon of their agreeing or diſagreeing in Dimenſion, but upon ſome other account. And therefore there muſt be ſome other Quantity, beſides that which is term'd Phyſical and Mathematical, tho' Philoſophers have hitherto talk'd of no other. Which is evident, if we conſider, that the Nature of Quantity in general does not conſiſt in the Extenſion of Subſtance, but in Things being capable of having a Value put upon them, and conſequently of being compared together. But ſince things receive a Value, not only from their natural Subſtance, but alſo in reſpect of ſome moral Conſideration; it follows, that beſides the natural there muſt be alſo a moral Quantity [a]. However, Things of the ſame Nature and Goodneſs receive a Value even from their natural Quantity, as a great Diamond, *caeteris paribus*, is more valuable than a ſmall one; which yet we have not always a regard to in the Valuation of Things of a different Species, or Goodneſs; for a great Dog is not always more valuable than a little one, or a great Maſs of Lead than a ſmall Piece of Gold.

How Perſons are morally valued according to Opinion [b]; and their Actions, according as they are productive of Merit or Demerit, has already been diſcourſed of in its proper Place [c]. My Deſign here is only to treat of the moral quantity of Things and Actions, as they are conceiv'd to have ſome uſe in the common Affairs of Life, and as they are capable of being compared together in order to Commerce. This we call *Price*, which is the *moral Quantity or Value of Things or Actions, by which they are uſually compared together in order to Traffick.*

III. *Price* may be divided into [1] *proper* and *eminent*; the *firſt* is placed in Things and Actions, ſo far as they are capable of procuring either the Neceſſaries, or Conveniences, or Pleaſures of Life: the *other* is placed in Money, which is ſuppoſed to contain *virtually* the Prices of all Things elſe, and to be the common Meaſure and Standard of them.

IV. For the right underſtanding the Nature of the *proper Price*, it is neceſſary to conſider diſtinctly, firſt, upon what it is founded; ſecondly, what it is that raiſes or ſinks it. The Foundation of the Price or Value of any Action or Thing is, [1] Fitneſs to procure either mediately, or immediately, the Neceſſaries, or Conveniences, or Pleaſures of human Life. Hence, in common Diſcourſe we call thoſe Things that are uſeleſs, Things of no Value; and thoſe Men too we ſay are of no Value, that are unprofitable Burthens of the Earth. Thus the Cock, in the Fable, ſet no Value upon the Jewel, becauſe of no uſe to him. *Grotius*, l. ii. c. 12. §. 14. is of Opinion, That *Want is the moſt natural meaſure of the Price of Things.* Where if he means, that Want, in its own nature, is the Foundation of Price, or that therefore Men only value a thing, becauſe they want it, it will not univerſally hold true. For, if ſo, thoſe things that are ſubſervient to our ſuperfluous Pleaſures would bear no Price, which yet the Luxury of Man has ſet a great Rate upon. For we do not really want any thing, but what we cannot, unleſs with great Inconvenience, be without, *Mat.* ix. 12. But if his meaning be, that the Want of the Buyer raiſes the Price, I own it is commonly ſo; but that it is the natural meaſure of Price, that the more a Man's Neceſſities preſs him, the more may be juſtly exacted of him, no honeſt Man will admit: Nor does that [2] Place of *Ariſtotle*, cited by *Grotius*, make for the purpoſe; for the χρεία, or [3] *Want*, he ſpeaks of there, which in a manner preſerves and holds together all Commerce, is not the Foundation of Price, but of Bartering only. For if Men wanted nothing but what they could ſupply themſelves with, there would be no bartering, or exchanging Commodities, but every one would keep and enjoy his own [4].

V. Yet it is obſervable, that ſome of the moſt uſeful things of human Life have no Price ſet upon them; either becauſe they are and ought to be free from Property, or becauſe they are excluded from Commerce, or laſtly, becauſe they come within the reach of it, no otherwiſe than as Appendages of ſome other thing; beſides, the Law has remov'd ſome Actions from Commerce, and thereby exempted them from Price. Thus the Air, the Sky, the heavenly Bodies, and the vaſt Ocean not being appropriated, can bear no Price, how ſerviceable ſo-

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[a] See B. i. c. 1. §. 22. [b] See B. viii. c. 4. [c] See B. i. c. 8. See B. viii. c. 3. §. 18, &c.

Mr. Barb. *NOTES on* §. iii, iv.

ſo far as to do a conſiderable Hurt to Commerce. We have ſeen the Uſe of this Remark in the two laſt Chapters of the preceding Book; and 'tis probable that it may ſerve elſewhere to decide ſeveral Caſes better than they uſually are.

[1] The Author ſaith *Pretium vulgare*; but if we ſhould tranſlate it ſo, *viz. a vulgar* or *common Price*, we ſhould confound that ſort of Price with the other that is treated on at §. 9. *Pretium commune*, i. e. the Genus with the Species. Moreover, the Terms *Proper*, or *Intrinſick*, do in themſelves much better expreſs the Notion in which our Author underſtands the Word *vulgare* in this Place, as any one may eaſily perceive.

[1] It is one of the general Reaſons; for that which is of no Uſe, paſſes commonly for a Thing of no Value. But whence comes it then, that Water, and ſome other things very uſeful for Life, are not rated at any Price? as our Author ſpeaks a little lower. We muſt therefore add another Reaſon here, I mean, That things that are capable of Price ought to be not only of ſome Uſe, if not truly, yet at leaſt in the Opinion and Affections of Men; but alſo of ſuch a Nature, as not to be ſufficient for the Needs of all the World. And ſo the more uſeful and rare a thing is in this laſt Senſe, the higher or lower the proper and intrinſick Price will be. If the Faſhion of a thing paſſes away, or few Men eſteem it, then it becomes a good Bargain, how dear ſoever it was before. On the contrary, if a thing that is common, and coſts little or nothing, becomes rare, nothing more needs to ſet a Price on it, and ſometimes to make it very dear; as appears, for Example, by Water in dry Places, and at certain times, as in a Siege, &c. By this Principle we muſt explain and rectify all that our Author hath ſaid concerning the Foundation of Price in general. See *Titius*'s *Obſervat.* on *Pufendorf*, CCCXXXI, and on *Lauterbach. Obſerv.* DIII. as alſo Mr. *Thomaſius*'s *Juriſprud. Divin.* Lib. ii. c. 11. §. 33, &c. and his Diſcourſe *De Pretio Affectionis*, c. 1. §. 10, &c.

[2] *Ariſtotle*'s Words are, Δεῖ ἄρα ἑνί τινι πάντα μετρεῖσθαι —— τοῦτο δ' ἐστὶ τῇ μὲν ἀληθείᾳ ἡ χρεία, ἣ πάντα συνέχει.

[3] So *Ariſtotle* expreſly ſpeaks, Ὅτι ἡ χρεία συνέχει ἕν τι ὄν, δηλοῖ, ὅτι ἂν μὴ ἐν χρείᾳ ὦσιν ἀλλήλων, ἢ ἀμφότεροι, ἢ ἕτερος, οὐκ ἀλλάττονται i. e. *Want includes one thing; which ſhews, that if Men ſtood not in need of one another, neither both, nor either of them would change.* Nicom. lib. v. c. 8.

[4] *Ariſt.* Polit. i. c. 6. (9) *Bartering obtains in every thing, and began naturally from ſome Peoples having more than they had occaſion for, and others having leſs: For then they were forced to exchange, 'till they had furniſh'd themſelves with what they wanted.*

ever they may be to human Life. And the Law having forbid [1] things ſacred to be brought into Commerce [2], has thereby exempted them from Price, although ſome of them have nothing in their own Nature to render them incapable of it. Nor can any Price be aſſign'd for a Freeman's Head; it being a Contradiction to be free, and at the ſame time expoſed to Sale; for he is no ſooner expos'd to Sale, but he ceaſes to be free: And therefore, even upon this Account, [3] Liberty is ſaid to be an invaluable Thing, becauſe the Advantages of it are ſo great, as to exceed all Value. Here 'tis worth obſerving what *Philo Judæus, De Spec. Leg.* p. 597. *Edit. Genev.* delivers, *Prices were ſet upon thoſe who had devoted not only their Goods, but themſelves; not according to their Beauty, or Stature, or ſuch like, but according to their Age and Sex: for the Law fixes two hundred Silver Pieces as a Price for a Man, from the twentieth to the ſixtieth Year of his Age, and one hundred and twenty upon a Woman; from the fifth to the twentieth Year eighty for a Man, and forty for a Woman; from Infancy to the fifth Year twenty for a Man, and twelve for a Woman; if paſt the ſixtieth Year for a Man ſixty, for a Woman forty. All of the ſame Age and Sex are rated at the ſame Price, for three good Reaſons; firſt, becauſe the Dignity of the Vow is the ſame, whether great or mean Perſons make it. Secondly, in the caſe of a Vow Perſons ought not to be rated upon the ſame Terms with Slaves expoſed to Sale; for thoſe are more or leſs eſteem'd, according to the Beauty and Vigour of their Bodies. Thirdly and chiefly, becauſe with God there is no reſpect of Perſons, as there is with Men.* See *Levit.* chap. xxvii.

Many things alſo have no Price, becauſe they are not capable of being poſſeſſed ſeparately by themſelves, which yet very much enhance the Price of the thing they appertain to; as the want of them takes from it not a little [4]. Thus the lying open to the Sun, a clear and wholeſome Air, a pleaſant Proſpect, the Winds, Shades, &c. conſider'd ſeparately in themſelves, bear no Price, becauſe they cannot be enjoy'd without the Land they belong to; but yet of what Moment they are in the Purchaſe of Lands and Tenements, no Man is ignorant.

Pliny, Nat. Hiſt. lib. xii. cap. 1. ſays of the *Plane-Tree*, That the People pay Taxes for the very ſhade of it. Thus in *Holland*, thoſe that have Windmills pay a yearly Tribute for the publick Wind, as is pretended. And hence, by the way, it appears how the Cauſe that [5] *Demoſthenes* pleaded before the Judges, about the ſhadow of the Aſs, ought to be decided: For he that hired the Aſs could not hinder the Owner from lying down where the ſhadow of the Beaſt fell, but might immediately have taken it away, by driving the Aſs to ſome other Place. Laſtly, whatſoever Actions either divine or human Laws command to be done *gratis*, or forbid to be done at all, and ſo exclude from Commerce, cannot be brought under any Price. Of which nature are thoſe ſeveral Actions which have ſome ſupernatural Effect aſſign'd to them by divine Inſtitution; as Remiſſion of Sin, by the Abſolution of the Prieſt; the Application of ſpiritual Benefits, by means of the Sacraments; and ſuch like: Which whoever confers upon another for any valuable Conſideration, is guilty of Simony; and to meaſure ſuch things with Money, is look'd upon as Impiety and Irreverence towards the divine Author [a]. Unlawful too it is to beſtow eccleſiaſtical Preferments for Money, upon unworthy Perſons, which ought to be given to deſerving Men *gratis* [b]. Neither ought the rewards and teſtimonials of Virtue and Learning to be ſold to thoſe that don't deſerve them; not only becauſe by this means they grow cheap, but becauſe ſuch Men are often by a pompous Title recommended to publick Imployments, to the great prejudice of the Commonwealth [c]. And indeed 'tis a ſhame to the Men of Letters, that ſome ſhould take ſuch Liberty, as *Fabius* of *Bentivoglio* [d] expreſs'd in Jeſt, who, going to make a certain Perſon a Doctor, met by chance an Aſs, that yawning with an open Mouth, look'd as if he were laughing: To whom, *Why laugh you,* ſays he, *you ſilly Creature? We can make you a Doctor too, if you have but Money* [e]: The Practice of the *Chineſe* is otherwiſe, of whoſe Examinations and Preferments, *vid.* Neuhof. *in Gener. Deſcript. Sinæ.* c. 3. Plin. *Nat. Hiſt.* l. xvi. c. 4. “Oaken Crowns were the noble Badge of the Soldiers Valour, but now of late are Marks of the Emperor's Clemency; ſince, by reaſon of the licentiouſneſs of our civil Wars, it ſeems meritorious not to kill a Subject. O happy times! which have rewarded ſuch noble Services with Honour only, and, when other Crowns were valued for the Gold they were made of, would not allow the preſerving a Subject to be rewarded with any thing that might bear a Price; thereby clearly profeſſing, that they thought it a Sin even to ſave

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[a] See *Acts* viii. 20.

[b] Add. *Decretum Gratiani*, Cauſ. 1. Quæſt. 1, 2, 3.

[c] *Vid.* Plin. *Nat. Hiſt.* l. xvi. c. 4.

[d] Vid. *Janum Nicium Erythræum*, Pinacotheca 2. c. 29.

[e] *Ovid. De Arte Amandi*, lib. ii. ver. 163. *Secum habet ingenium, qui, cum libet, Accipe dicit.*

Mr. Barb. *NOTES* on §. v.

[1] By *Res Religioſæ* the *Roman* Law underſtands principally Places where any thing had been buried. See *Inſtit.* B. ii. t. 1. ſ. 8, 9. and *Dig.* B. xi. t. 7. *De Religioſ. & Sumptib. Funerum*, &c.

[2] This Privilege, which is granted to things ſacred, belongs not only to Temples, and other things ſet apart immediately to the Service of God, but what's neceſſary for the Maintenance of Miniſters, and all that appertains to them. This Privilege, I ſay, owes its Original to the pious Fraud of the Miniſters intereſted; and in the Chriſtian Church the Clergy have not only imitated the Pagan Prieſts in that reſpect, but have perhaps outdone them. See Mr. *Thomaſius*'s Diſcourſe *De Bonorum Sæculariſatorum Natura*, §. 2, &c. printed at *Hall* in 1707.

[3] *Libertas ineſtimabilis res eſt*, Digeſt. lib. l. tit. 17. *De Div. Reg. Juris*, leg. 106. I rather quote this Law, than that Paſſage of *Philo*, cited by the Author at large, becauſe it ſpeaks only of the Valuation of Perſons devoted to God, which are to be redeemed; a Valuation made according to Age and Sex, without any regard to Stature, Beauty, or ſuch like things. But tho' free Perſons are not the Subject of Commerce, it doth not follow that they can't be made ſo, as Mr. *Hertius* obſerves, in reſpect of the Advantages to their Freedom. See lib. iii. chap. 1. §. 7, 8. before-going. The Right of governing free Men is alſo capable of Valuation, and is of a Nature that may be alienated, if we will. See *Grotius*, lib. i. chap. 3. §. 12. and what this Author ſays, lib. vii. chap. 6. §. 16. following.

[4] See lib. iv. c. 5. §. 2. above.

[5] See *Plutarch de Dec. Oratoribus*, and the Scholiaſt of *Ariſtophanes de Veſpis*, ver. 191.

“ a Subject for the ſake of Lucre.” Thus a Judge ought not to ſell that Juſtice which he ſhould adminiſter *gratis* [6].

[a] *Non bene conducti vendunt perjuria teſtes,*
Non bene ſelecti judicis arca patet.
Turpe reos empta miſeros defendere lingua,
Quod faciat magnas turpe tribunal opes.
Turpe tori reditu cenſus augere paternos,
Et faciem lucro proſtituiſſe ſuam.

Plutarch, in the Life of *Romulus*, p. 25. talking of the Duty of Patrons towards their Clients, adds, *'Tis accounted a mean and ſordid thing for thoſe who are rich to accept of a Fee from thoſe that are poor.* From whence the *Cincian* Law afterwards had its Original. *Hic clamoſi rabioſa fori Jurgia vendens improbus, iras & verba locat*, Sen. *Herc. fur.* ver. 171, *&c.* Vid. Quint. *Inſtit. Orat.* l. xii. c. 9. The *Roman* Laws thought it mean to ſet a Price upon Philoſophy and civil Knowledge. *Vid. Dig.* lib. l. t. 13. leg. 1. § 4, 5. *D. De extraordin. cognit.* and *Grot.* in *Flor. Spar.* in *h. l.* and *Quint.* Inſtit. Orat. l. xii. c. 7. where diſputing whether a Price ought to be ſet on Eloquence, among other things, he ſays, *It may be a means of rendring things cheap to put a Price upon them.* A Ruffian, or a Sorcerer, can't juſtify his being hired for Money to kill a Man. A Scholar ought not to debaſe his Style and Learning in writing Scandal; nor ought any Man to proſtitute his Credit, by maintaining an unjuſt Cauſe, or ruining a juſt one by Perjury; and many more of the ſame Stamp.

VI. There are ſeveral Reaſons why the Prices of things ſhould riſe, or fall; why one thing ſhould be preferr'd before another of as great, or greater Uſe. For here the neceſſity of the thing, and the eminency of its Uſe does not always take place. Nay, we generally find the moſt neceſſary things are cheapeſt; becauſe, by the peculiar Providence of God, Nature affords a greater Increaſe of them. “ Whatſoever is neceſſary for Mankind, the divine Providence has contriv'd that it ſhould not be dear, or hard to be got, as are Pearls, Gold, Silver, and other Things, which neither our Body, nor Nature requires; but as for thoſe things we cannot ſafely be without, ſhe has plentifully diſpers'd them throughout the World [b].” That which chiefly raiſes the Price, is Scarcity. *Thoſe things that are ſcarce*, ſays *Sextus Empiricus* [c], *are valued: thoſe that grow amongſt us, and are every where to be had, are quite otherwiſe. If Water were difficult to be met with, how much more valuable would it be than the things we moſt value now? Or, if Gold lay in the Streets as common as Stones, who do you think would value it, or lock it up?* And therefore ſome have thought it a Maſter-piece in Trade to procure a Scarcity. As the *Dutch*, in many Parts of the *Indies*, root up the *Cloves* and *Nutmegs* to prevent too great a Plenty of thoſe Spices. “ The *Egyptians* do not permit their *Paper-reed* to grow in many Places; by which they procure a Scarcity, and conſequently raiſe the Price, but hinder the common Uſe and Advantage of it, *Strabo*, lib. xvii. p. 799. *Edit. Par.* That which is ſcarce is valuable: Water is not valued, altho' the moſt uſeful thing in the World, *Plato Euthydemo*, p. 211. *C. Ed. Wech.* Curious Dainties are not valued for their Taſte, but for their being hard to be gotten, *Mamertin.* Paneg. *Julian.* c. xi. n. 3. *Ed. Cellar.*” Beſides, a thing is ſtill more valuable, when 'tis not only ſcarce, but alſo comes from remote Places. *Pliny* [d] tells us of two Boys, the one born in *Aſia*, the other in *France*, who were wonderfully alike, and whom therefore the Merchant ſet a prodigious Rate upon, and the Purchaſer look'd upon nothing in his whole Eſtate to be more valuable. For the Ambition of Mortals eſteems thoſe things moſt, which few Men have in common with them; and on the other ſide thinks meanly of thoſe which are ſeen in the hands of every one. Nay, ſo perverſe we often are, as to eſteem a thing the more, becauſe it is forbidden; its being forbidden whets our Curioſity. And therefore *Lucian* [e] with Reaſon ridicul'd thoſe, *who in Winter load themſelves with Roſes, and are pleas'd with them when ſcarce and out of Seaſon; but nauſeate and deſpiſe what is in Seaſon, and agreeable to Nature.*

But generally we ſet a great Value upon nothing but what raiſes us, in ſome meaſure, above the rank and Condition of others; and for this Reaſon Honours particularly are more valuable for being ſcarce. “ The Rewards of Virtue ought to be chaſte and ſacred, not to be communicated to wicked or mean Perſons; for things that are ſcarce and difficult, are recommended to Men by the Rewards that attend them [f].” Tho' indeed it proceeds from the Corruption and Pravity of human Nature, that we value real Goods more or leſs, according as few or many poſſeſs them in common with us. For my Goods are never the worſe, becauſe others poſſeſs the like; nor the better, becauſe others want them. Thus my Health is not the leſs valuable to me, becauſe others alſo enjoy theirs; nor the more, becauſe others are ſick. Nor is my Knowledge leſs worth, becauſe others are knowing too; nor would the Value of my Wiſdom riſe, ſhould other People prove Fools. He therefore that prides himſelf in ſeeing others want the good things which he is Maſter of, ſeems indeed to take pleaſure in other Mens Misfortunes: And, on the other ſide, he that thinks his own Goods the worſe, becauſe others poſſeſs them in common with him, ſeems to be moved with Envy [g].

But indeed, as in many things, ſo in this, the general Courſe of Mens Lives deviates from right Reaſon. Hence it is, that the Luxury of Man has ſet moſt unreaſonable Rates upon many things, which human Nature could eaſily be without: Which ſome think were contrived on purpoſe, that there might be ſome Uſe in vaſt prodigious Riches.

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[a] Ovid. *Amor.* Lib. i. El. x. ver. 37, *&c.*

[b] Vitruv. *De Architect.* l. viii. *in the Preface.*

[c] Pyrrhon. *Hypoth.* lib. i. c. 14. p. 29. Ed. *Genev.*

[d] Lib. vii. cap. 12.

[e] *In Nigrino*, p. 38, 39. Ed. *Amſt.*

[f] *Cic.* De Invent. l. ii. c. 39. Vid. *Corn. Nep. Miltiade*, c. 6.

[g] See *Numb.* xi. 28, 29. *Mark* ix. 38, 39.

Mr. Barb. *NOTES on* §. v.

[6] The Words of the *Digeſt* are, *An & Philoſophi Profeſſorum numero ſint? Et non putem —— quia hoc primum profiteri eos oportet, mercenariam operam ſpernere. Proinde ne Juris quidem Civilis Profeſſoribus jus dicent: eſt quidem res ſanctiſſima Civilis ſapientia, ſed quæ pretio nummario non ſit æſtimanda, nec dehoneſtanda*, lib. l. tit. 13. De Extraordinariis Cognitionibus, &c. l. 1. §. 4, 5. We may add, That the *Roman* Law allowed neither the Immunities, Privileges, nor Rewards to Poets, that it did to the Profeſſors of other Sciences, of which Monſ. *Le Clerc* gives the Reaſons in Tom. i. of his *Parrhaſiana*, p. 51, *&c.*

What mighty Rates ſome Pearls bear, *Whoſe Goodneſs conſiſts in ſuch a degree of Whiteneſs, Largeneſs, Smoothneſs, and Weight,* [1] *Qualities ſo hard to be match'd, that never any two of thoſe Pearls are found alike!* Plin. Nat. Hiſt. l. ix. c. 35. *Pearls bear the greateſt Price of any thing; they were firſt brought to* Rome *when* Alexandria *was taken, not long before* Sylla's *Time; but a little after were ſo much in Faſhion, that even ordinary Women affected to wear them; for they uſed to ſay, A Pearl to Women, when they appear'd in publick, was as good as a Lictor,* Idem. ibid. *Some Jewels are ſo valuable, that no Price can be ſet upon them,* Id. l. xxxvii. Proœm. *Our* Coral *amongſt the* Indians *bears as great a Price as their Jewels do amongſt us,* Idem. l. xxxii. c. 2. Ad. Idem. c. xvii. 34. l. x. c. 29. l. xii. c. 14, 17, 19. l. xiii. c. 5. l. xxxvii. c. 4. l. vi. c. 7. Of Silk. *With ſo much Pains, and ſo far is it brought, that Women, when they appear in publick, may be ſeen through. At this Day* Amber *with us bears a moderate Rate, in the* Eaſt *it is vaſtly dear.* [2] Nay, the Folly of Men fanſies there muſt be ſomething extraordinary in what coſts much. *Heliogabalus* ordered the Prices of the Dainties provided for his Table to be repreſented to him greater than really they were; for that, he ſaid, created an Appetite to them —— *magis illa juvant, quæ pluris emuntur,* Juv. Sat. xi. ver. 16. *Luxury has impos'd a Price upon the very Dregs that the Sea caſts up,* Curt. l. viii. c. 9. n. 19. Ed. Cellar. *Old Plate receives a Value from the Fame of the Workmen; Braſs from a few Mens Folly,* Sen. Conſol. ad Helv. c. xi. *Janus Nicius Erithræus* [a] tells us of *Tulips,* that thirty Years ago (when he writ this) they lay upon the Top of the *Alps,* without any Care or Notice taken of them: Yet, when they were brought to Town, the People fond of them for their Rarity, ſet ſuch a Price upon them, as that every Root ſold for above a hundred Crowns. But after they had increaſed and grew common, their Price ſunk ſo low, that hardly any thing was cheaper. *As our Deſires are, ſo are our Eſteem of things; and there's no End of raiſing the Prices of things, unleſs we firſt ſet Bounds to our Extravagancies,* Cicero in Verrem, l. iv. c. 7. China *and* Earthen *Wares are the dearer for being brittle: For 'tis an Argument of Riches, and a glorious piece of Extravagancy to have a thing that ſhall immediately be wholly deſtroyed,* Plin. l. xxxiii. *The Brittleneſs makes* Cryſtal *the dearer: For among unskilful People the Danger, which ought to ſink the Price, raiſes it,* Sen. De Ben. l. vii. c. ix. Strab. l. ii. p. 87. Ed. Genev. *Of precious Stones, that are ſo much valued, that thoſe that have them not, are as happy as thoſe that have them.* For Mankind is ſo whimſical and ſilly, as to think thoſe happy who poſſeſs Superfluities, rather than thoſe who abound in all the Neceſſaries and Conveniencies of Life. And therefore it ought to be rank'd among the ſenſeleſs Opinions of the common People to value things either for their being new, or ſcarce, or hard to be gotten, or brought from far, unleſs their Goodneſs alſo and their Uſefulneſs recommend 'em. *Charron de la Sageſſe,* l. i. c. 39. num. 11. and l. ii. c. 9. num. 2. *Agatharchis de mari rubro,* c. xlix. ſpeaking of the *Alilæi* and *Caſſandrini,* whoſe Country abounded in Gold, ſays, *They barter'd Gold for a triple quantity of Braſs, but gave double for Iron. For they proportion'd their Rates according to the Plenty or Scarcity of the Commodities, in which we have not ſo much Regard to the Nature of the Thing, as the Neceſſity of its Uſe.* But thoſe things that are of daily Uſe, and eſpecially ſuch as relate to Proviſion, Apparel, and Arms, riſe in their Price, when they become neceſſary as well as ſcarce; as in a Dearth of Corn, or in a Siege, or in ſlow Voyages, where Hunger and Thirſt are craving to be ſatisfied, and Life muſt be preſerv'd upon any Terms. *Plin. Nat. Hiſt.* l. viii. c. 57. *Quinctil. Declam.* xii. p. 176. *Ed. Lugd. Bat. In a very great ſcarcity any thing that can be bought is cheap.* When *Hannibal* beſieged *Caſilinum,* a *Mouſe* was ſold for two hundred Pieces of Gold; and he that ſold it died of Hunger, whereas he that bought it was preſerved. The Prices of artificial things, beſides the Scarcity of them, are much raiſed by the [3] Neatneſs of the Art. “In which *L. Mummius* was ſo ignorant, that when he had taken *Corinth,* and thereby got poſſeſſion of the Statues and Pictures drawn by the ableſt Maſters, he proclaimed to thoſe whom he had hired to tranſport them into *Italy,* that if they loſt them, they ſhould find him new ones, *Vell. Pat.* l. i. c. 13. The Reputation of the Artificer adds Credit to ſome, and others are the more valuable for the Character of their former Poſſeſſor. As *Lucian* [b] mentions one, who had bought *Epictetus's* earthen Lamp at three hundred *Denarii,* hoping, no doubt, to get *Epictetus's* Wiſdom, by ſtudying by that Light. Thus the City *Cuſco* in *Peru* was in ſo great Requeſt, that even the Seed that grew near it, tho' really no better than any other, was yet of more Value than that which grew elſewhere [c], In ſhort, the Difficulty, the Elegancy, the Uſefulneſs, and Neceſſity of the Work, the Scarcity of Workmen, their being [d] Maſters in the Art, their not being under a Neceſſity of Working, all contribute to the raiſing of the Price. *That ſort of Work is moſt artificial, which depends leaſt upon*

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[a] *Pinacoth.* lib. iii. c. 17. in the Life of *J. Barclay,* who was a great Admirer of them.

[b] *Adverſus indoctum,* p. 386. *Ed. Amſtel.*

[c] *Garcilaſſo de la Vega,* Comment. Reg. l. iii. c. 20.

[d] “The *Athenians* had more need of good ſtrong Roofs to their Houſes, than the famous Ivory Statue of *Minerva;* yet I had rather be *Phidias* than the beſt of Carpenters. For a Man muſt be rated, not according to what he can do; but according to what Reputation he is in; eſpecially ſince few can draw or carve finely; but any one is capable of being a Carpenter, or a Porter.” *Cic. in Bruto,* c. 73. “Thus *Nicias* gave a Talent for a Servant to look after his Silver-Mines.” *Xen. Mem. Socrat.* p. 435. in fin. l. 2.

Mr. Barb. *NOTES on* §. vi.

[1] *Etenim qui modus eſt in his rebus cupiditatis, idem eſt æſtimationis: Difficile eſt enim finem facere pretio, niſi libidini feceris:* i. e. In theſe Things the Value of them is according to Mens Deſires. 'Tis hard to ſet Bounds to the Price 'till you have limited your Deſires after them. *Cicero in Verr.* lib. iv. chap. 7.

[2] Hence it was, that by the *Roman* Law an Eunuch-ſlave, which was above ten Years old, and underſtood ſome Art, was valued at more than a Slave that pretended to Phyſick. See *Cod.* lib. vi. tit. 43. *Commun. de Legat.* & l. 3. princip. and Mr. *Thomaſius's* Diſcourſe, *De Pretio Affectionis,* &c. chap. ii. §. 15.

[3] 'Tis becauſe curious Works are rare. So that the Author improperly diſtinguiſhes between the Rarity of ſuch things as are relate with it; as is evident from other Examples alledged by him. See Mr. *Thomaſius's* Diſcourſe, *De Pretio Affectionis,* and chap. i. §. 11.

Fortune; that the moſt ſordid, which moſt defiles the Body; that the moſt ſervile, which is of moſt Labour to the Body; that the moſt ignoble, which requires the leaſt Virtue, Ariſt. Polit. l. i. c. 7. (11.) And again, *That Exerciſe, Art, or Diſcipline is to be reputed mean, that renders either the Body or the Soul unfit for the Practice of Virtue*, Polit. l. viii. c. 2. (4.) *As for the more noble Arts, ſome are more worth than they coſt: you purchaſe of a Phyſician Life and Health, Things invaluable; of a learned Tutor the liberal Sciences, and the Adornment of the Mind: And therefore, in ſuch Caſes, we do not pay for things they teach us, but for their Labour*, Sen. De Ben. l. vi. c. 15.

VII. But ſometimes it happens, that ſome certain things are valued at an high Rate by ſome particular People only, which may be call'd *The Price of Fanſy*. It was a Saying of a certain *Arabian*, *Whatſoever is dear, altho' it be dear, yet if I have a Fanſy for it, it is not dear; nor can any thing that pleaſes be ſaid to coſt too much*, Leo Afric. l. iii. *All Gifts are valued, as they are acceptable to the Receiver*, Liban. Declam. xli. p. 870. D. Edit. Pariſ. And this, where Animals are the Object, proceeds from a ſort of Acquaintance with them [1]; or, becauſe they know how to ſuit themſelves with our Humour; or becauſe we have eſcaped ſome imminent Danger by their Aſſiſtance; or perhaps they are the Remembrancers of ſome ſignal Event. Beſides, ſome things are recommended by the Friend that gives them, ſo that we would not part with them for ſeveral others of the ſame Goodneſs.

> —— *Mihi linteum remitte,*
> *Quod me non movet æſtimatione,*
> *Verum eſt μνημόσυνον mei ſodalis,*
> Catul. Carm. xii. 11, 12, 13.
> ——— *Acceptiſſima ſemper*
> *Munera ſunt, Author quæ pretioſa facit.*
> Ovid. Epiſt. xvii. ver. 71, 72.

Many alſo put a Value on things, becauſe ſome great Man, whom they are willing to compliment, has expreſs'd an Eſteem for them. Thus, this or that Proviſion or Apparel riſes in its Price, when the King is pleas'd to be taken with it. But here ſome obſerve, that the Fanſy of the Buyer ought not to raiſe the Price of the Commodity, unleſs ſome other Cauſes concur. The [2] *Roman* Laws make no allowance for the Fanſy of the Party in the Reſtitution of Damage done by Chance [a]: And yet Merchants frequently raiſe the Price, when they ſee the Buyer fond of the Commodity. *Diodorus Siculus* [b] obſerves what an advantage the *Italian* Factors made of the Drunkenneſs of the *Gauls*: *They brought them Wine, and ſold it at moſt unconſcionable Rates; for they had a Boy for a Hogſhead, and ſo exchang'd their Wine for a Butler.*

However the Affection of the Seller may fairly raiſe the Price, if ſo be he ſignifies it to the Buyer; for to part with a beloved thing, for the ſake of the Buyer, deſerves ſome Conſideration [c]. Laſtly, The Price of things is ſometimes enhanced by ſome vitious Habit of Mind, as Vain-glory, Cruelty, and the like [d].

VIII. And theſe always raiſe the Prices of things, as their Contraries always lower them. But, in order to regulate the Prices of particular things, *pro hic & nunc*, and to reduce them to a juſt Standard, we muſt remember, that in the ſtate of Nature every one has Power to put what Price he pleaſes upon his own Goods, as being, in that ſtate, the ſole and ſupreme Maſter of them. For, in this Caſe, ſhould another prize my Goods, it would ſtill be in my Power to accept or reject it; and thus I ſhould, in the end, put the Price upon them my ſelf: and tho' I lay never ſo extravagant a Rate upon them, no Man can have any Cauſe to complain; for no one ought to be concern'd how much I magnify my Riches in my own Fanſy; and they who think the Price too great, may let it alone. And therefore, if any one has a mind to my Goods, 'tis fit I ſhould put what Price upon them I pleaſe; as, on the other ſide, ſhould I force my Commodity upon another, I muſt take what the Buyer, who is indifferent, will be pleas'd to give me. Indeed, if any one thro' ill Nature, or Hatred, or Envy, refuſes a Man in want, either to ſell at all, or at leaſt ſells upon hard [1] unreaſonable terms, then, and only then there is Cauſe to complain. From whence it follows, that in a ſtate of Nature, the

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[a] Vid. Lib, ix. t. 2. l. 34. D. *ad* L. Aquil. & lib. xxxv. t. 2. l. 36. *ad* Leg. Falcid.

[b] Lib. v. c. 26. p. 304. The ſame d. l. c. 17. relates, " That the People of *Baleares* valued one Woman at the Rate of four Men, they were ſo prone to Venery.

[c] *Add.* l. lxii. ſ. 1. l. 63. D. *ad* L. Falcidiam.

[d] What Rates the old *Gauls* ſet upon the Heads of their Enemies, ſee in *Diod. Sic.* l. v. c. 29. p. 307. and *Strabo*, l. iv.

Mr. Barb. *NOTES* on §. vi, vii, viii.

[4] *Reſpondetur, quædam pluris eſſe, quam emuntur. Emis à Medico rem inæſtimabilem, vitam, & valetudinem bonam: à bonarum artium Præceptore ſtudia liberalia, & animi cultum. Itaque his non Rei pretium, ſed Operæ ſolvitur, quod deſerviunt, quod à rebus ſuis avocati nobis vacant. Mercedem non meriti, ſed Occupationis ſuæ ferunt* See *Quintil.* Inſtit. Orat. l. xii. c. 7. in fin. *Pythagoras* blamed thoſe that took Money of young Men for teaching them ſuch things as were not to be valued: Μισθὸν τῶν ἀτιμήτων πράττοντας. Jambl. *de Vit. Pythag.* c. xxxiv. num. 245. *Ed. Kuſter.*

[1] I have a little corrected this Place to make it agree with what he has ſaid in his *Abridgment of the Duties of a Man and a Citizen*, lib. i. c. 14. §. 4. and have alſo been obliged to make ſome ſmall Alterations a little farther; for this Paragraph, and ſome others in this Chapter are very diſorderly placed.

[2] The Words are, *Si ſervum meum occidiſti, non affectiones æſtimandas eſſe puto (veluti ſi filium ſuum naturalem quis occiderit, quem tu magno emptum velles) ſed quanti omnibus valeret. Sextus quoque Pedius ait, Pretia rerum non ex adfectione, nec utilitate ſingulorum, ſed communiter fungi.* Digeſt. lib. ix. tit. 2. *Ad Leg. Aquil.* leg. 33. See alſo lib. xxxv. tit. 2. *Ad Leg. Falcid.* leg. 62, 63. and Mr. *Thomaſius*'s Diſcourſe *De Pretio Affectionis*, &c. c. iii. §. 12, 13.

[1] Mr. *Thomaſius*, in his *Juriſprud. Divin.* l. ii. c. 11. §. 13. diſtinguiſhes between a thing of the ſame kind, and a thing which is capable of an Equivalent; for only the firſt can be valued as high as we pleaſe. As for the other, if in a Loan, or Exchange, for Example, one pretends to value his Wine or Corn at an higher Rate, altho' in reality they are of the ſame Nature and Goodneſs as that of the other Bargainer, Mr. *Thomaſius* ſays, " That he offends againſt the natural Equality of Men, which doth not allow us " to weigh our own and other Mens Goods in an uneven Balance, and judge differently of them, or of what appertains to them, " without a juſt Cauſe. " We may alſo add, That the Nature of Commerce, by which Prices are ſettled, requires Equality; for there is a viſible Inequality, when things of the ſame Kind and Goodneſs are eſtimated at a different Rate: Whereas, when we are treating about Things of a different Nature, beſides that they can't be ſo exactly equalled, the Eſteem which the Proprietor hath for it may be reſpected in the Valuation as a part of the Price, and ſo reduce the Exchange to a juſt Equality.

Price of every thing is to be determined by the Agreement of the Contractors ; nor can any one be ſaid to have offended againſt the Law of Commerce for making the beſt of his Market, provided he has not been inhuman towards the neceſſitous [a].

But in a regular Government the Prices of things are determined, either by an Order from the Magiſtrate, or ſome Laws, or elſe by the common Judgment and Eſtimate of Men, together with the Conſent of the Parties : The former may be call'd the *legal*, the other the *natural Price* [b]. The *legal* is always preſum'd to be conſonant to Juſtice and Equity, unleſs the contrary does evidently appear : for ſometimes groſs Ignorance, and more frequently Hatred or Favour towards the Buyer or Seller, or ſome other Corruption, or private Intereſt, interpoſes. The *legal Price* is fix'd, as it were, in a Point, and admits of no Latitude, but the leaſt Exceſs becomes Injuſtice. And when 'tis fix'd (as moſt commonly it is) in Favour of the Buyer, the Seller cannot in Juſtice demand more ; but the Buyer may, with the Conſent of the Seller, ſink below it, provided he does not fall ſhort of the loweſt Degree in the *natural Price* : and the Seller may lawfully take leſs, provided it does not tend to the Prejudice of others of the ſame Trade. But if the Price be fix'd in Favour of the Seller, then the Buyer cannot lawfully preſs the Seller to take leſs, who yet, if he thinks fit, may take it [2]; for any Man may recede from his own Right : However, in this Caſe, the Seller may take more, provided it does not exceed the [3] higheſt Degree in the *natural Price*. On Labour, the Price is generally fix'd in Favour of the Labourer ; on Commodities, in Favour of the Buyer. In ſome Places, a more ſubtil Method is taken to prevent unreaſonable Prices ; as in *Greece*, the *Fiſhmongers* were not permitted to ſit, but obliged to ſell their Fiſh ſtanding, that ſo, by the tediousneſs and tireſomneſs of the Poſture, they might be forced to ſell them while they were ſweet, and at a moderate Rate.

IX. But the *natural Price*, which is not fix'd by Law [1], admits of ſome Latitude, within which more or leſs may be demanded and given. Of this Price *Seneca* is to be underſtood, when he ſays, [2] *What matters how much it is, ſince the Buyer and Seller agree upon it ?* The Value of things is according to the Market ; when you have commended them, they are worth ſo much as they can ſell for, and no more. *De Benef.* lib. vi. c. 15. And *Law* 63. of *Book* xxv. 1, 2. of the *Digeſt. ad L. Falcid. The Prices of things* [3] *are not fix'd according to the Fancy, or Uſe of particular People, but as they are valuable to every body.* See alſo *Law* 33. of *Book* ix. t. 2. of the *Digeſt. ad L. Aquiliam. In ſome Places* (ſays *Ariſtotle, Nicom.* ix. 1. towards the End) *the Laws allow no Action for voluntary Commerce ; thinking it reaſonable that the Creditor ſhould entirely depend upon the Honeſty of the Debtor : For they thought the Debtor fitter to judge how much ought to be paid, than the other. For many things are differently rated by thoſe that are in Poſſeſſion, and thoſe that deſire to be in Poſſeſſion of them ; every one ſetting a great Rate upon his own. But a Return ought to be made according to the Opinion of him that is to make it ; which perhaps ought to be adjuſted, not according to the Value he puts upon the things, when in Poſſeſſion of them, but according to the Value he put upon them before he had them* [c]. By reaſon of this Latitude they generally divide the *natural Price* into three Degrees ; the loweſt or favourable, the middle or reaſonable, the higheſt or rigorous : within which Degrees any thing may be bought or ſold dearer, or cheaper. But of what Extent this Latitude may be, it is not eaſy to give a Rule that will reach all Caſes : But that may be ſaid to be the juſt Price, which is generally agreed upon by thoſe who ſufficiently underſtand the Market and the Commodities. Hither may be referred that of *Varro de Ling. Lat.* lib. iv. * Pretium *eſt, quod æſtimationis emptioniſque cauſa conſtituitur : dictum a* peritis, *quod hi ſoli poſſunt facere recte id.* Yet *Salmaſius, De Uſuris*, ridicules this Derivation, and that with Reaſon.

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[a] See *Gen.* xli. 49. & xlvii. 13, &c.

[b] That is, as Mr. *Barbeyrac* has it, the ordinary or current Price.

[c] *Vid.* Grot. l. ii. c. 12. ſ. 14. & Ciceron. Verrin. De Signis. *Qui modus eſt in his rebus cupiditatis, idem eſt æſtimationis.*

Mr. BARB. *NOTES on* §. VIII, IX.

[2] It is not always allowed to give a Price lower than what is ſet by the Law ; and this takes place chiefly when the Taxation is fixed, not for the Intereſt of private Perſons only, but for the publick Good, and as a ſumptuary Law. Nor may we always content ourſelves with leſs ; which ought principally to be obſerved, when the Magiſtrate, by fixing a Price, endeavours to hinder Monopolies, or to encourage Merchandiſe and Commerce in general, as Mr. *Thomaſius* has very well obſerved in his *Juriſprud. Divin.* ubi ſupra, §. 56, 57.

[3] See *Athenæus*, l. vi. c. 2.

[1] The common Price, according to Mr. *Thomaſius*, ubi ſupra, §. 24. hath alſo Place among thoſe who live in the independent State of Nature. For, as he ſays, it would be very hard to maintain any Commerce, if every one ſhould always over-value his own Goods, and under-value another's. The beſt way to preſerve an Equality between Perſons naturally equal, is, that every one ſubmit himſelf to the Judgment of the greater Number ; and ſo there is Reaſon for ſuch an Eſtabliſhment in Nations as this, That both Bargainers ſhould ordinarily govern themſelves by the Eſtimation which their Equals make of things of a like Nature. So that if Men do not follow that Eſtimation, they may be thought to offend, not truly againſt the Law of rigorous Juſtice, but againſt the Laws of Humanity, and natural Honeſty. 'Tis alſo a great Imprudence in Trading to value our Goods at ſo high a Price, as to find no Buyers ; as it often happens, when Men over-value their Goods at more than they are thought worth by ſuch Men, as commonly deal in them, and underſtand them. See the ſame Author's Diſcourſe, intitled, *De Æquitate Cerebrina*, leg. ii. *Cod.* ii. *De Reſcindenda Venditione*, c. ii. §. 24.

[2] *Seneca*'s Words are, *Quid intereſt quanti ſint, cum de pretio inter ementem & vendentem convenerit.* —— *Pretium cujuſque rei pro tempore eſt. Cum bene iſta laudaveris, tanti ſunt, quanto pluris venire non poſſunt.*

[3] He treats here of the Value of a Damage, and not of what may be given or required in Buying and Selling, or making any other Contract. See the Diſcourſe quoted c. ii. §. 34.

* A Price, in Latin *Pretium*, is that which is appointed upon the Account of the Value and Buying of a thing ; 'tis ſo called from *Peritis*, *i. e.* ſuch as are ſkilful, becauſe they only are able to fix it.

X. In regulating this *natural Price*, Regard is to be had to the Labour and Expence [a] of the Merchant, in importing and taking Care of his Goods; for upon this ground it is that a Merchant can juſtify his ſelling ſo much dearer than he bought: But this Regard is only to be had to thoſe Expences which they are uſually put to; extraordinary Chances have nothing to do here. And therefore it can be no reaſon for a Merchant to raiſe his Rates, becauſe he happen'd to break his Leg, or to fall ſick, or becauſe part of his Goods were caſt away, or ſtolen; unleſs ſuch Accidents contribute to the Scarcity of the Commodity; much leſs can he bring in his own extravagant and ſuperfluous Expences. But his Time, his Study, his Care, in getting, preſerving, and ſorting his Commodities, as alſo his Servants Wages, may fairly be rated by him. And it would be inhuman, and tend to the Diſcouragement of Induſtry, to allow a Tradeſman, or a Man of any other Calling, no more Gain than juſt enough to ſupply him poorly and ſparingly with the Neceſſities of Life. The Difficulty alſo, and Length and Danger of the Voyage, may be brought into the Account, as alſo the different Value of Monies and Commodities in different Countries. Beſides, the way of Sale may alter the Caſe; for they who ſell by Retail may demand ſomewhat more than thoſe who ſell by Wholeſale; their Trouble being greater, and it being more advantageous to have a good round Sum paid down at once, than to receive the ſame by little and little. But what ſudden and frequent Alterations the Markets admit of by reaſon of the Plenty or Scarcity of Buyers, Money, or Commodities, is well known. For the Scarcity of Money and Buyers proceeding from ſome particular Cauſe, meeting with a Glut of Commodities, ſinks the *Price* [b]. As, on the other ſide, the Plenty of Buyers and Money, or the Scarcity of the Commodity, raiſes it [c] [1]. Beſides, it helps to lower the Price, when the Seller forces his Commodities upon us of his own Accord, as if they lay upon his Hands [2], for that proceeds from a Scarcity of Buyers; and beſides, in this Caſe, the Purchaſer has often no Occaſion for the thing, nor would buy it, but that he thinks it a good Bargain: And indeed, in ſuch a Caſe we often buy, not ſo much for our own, as for the Seller's ſake. And therefore, when things are ſold by Auction, or Inch of Candle, they often go off for leſs than otherwiſe they would ſell for; it being the Condition of that ſort of Sale, that [3] the Ware ſhould go to the higheſt Bidder: And yet, ſometimes, the Warmth and Emulation of the Company riſes above the ordinary Price; which is indeed, at all times, rais'd by the Plenty of the Buyers. Again, the Seller ought to have Allowance made him for the Loſs enſuing, or the Gain he foregoes, by ſelling at that time when the Buyer is importunate: For it would be unreaſonable to expect me to part with my Goods, but upon ſuch Terms as to be no Loſer by them. Beſides, the Loſs or Gain, by reaſon of ſlow or prompt Payment, may be, and indeed always is, brought into the Account: For [4] a Day is part of the Price; which is more if paid down upon the Nail, than if paid ſome time after; for in the mean time I might perhaps turn and apply it another way to my Advantage [d]. And therefore [e] *Polybius* commends the Generoſity of the younger *Scipio, for paying his Siſters their Portions forthwith, which he was not obliged to do 'till two or three Years after, and that too at* Rome, *a City where no Man gives away any thing at all, or pays a Penny before it be due; ſo diligent is every Body in getting Money, and ſo much Advantage do they make of the Time.*

[5] Laſtly, We may add what *Themiſtocles*, when he was going to ſell his Farm, gave a publick Advertiſement of [f], *That he had a good Neighbour. A Houſe*, ſays *Sadus* [g], *that has got ſuch a Neighbour as you* (ſpeaking to a raſcally *Jew*) *may poſſibly ſell for ten* Drachmæ *of bad Money; but there is hopes, that when you are gone, it may be worth an hundred.* A good Neighbour therefore raiſes the Price of a Farm; eſpecially in a Country where the good old way of the *Spartans* obtains [h], *who made free with their Neighbours Servants, Dogs, and Horſes, as if they were their own: And when a Man wanted any thing that his Neighbour was Maſter of, he need but to open his Store-houſe, and to furniſh himſelf from thence with what he had occaſion for.* The Cauſe of raiſing the Price of Slaves, in *Juſtin*, was very unuſual, and not a little owing to Cruelty: *The Price of the* Theban *Captives was rais'd*, ſays he, *not for their being ſerviceable to the Buyer, but out of Hatred to the Enemy* [i].

XI. But, when moſt Nations had degenerated from their primitive Simplicity, 'tis eaſy to imagine that this proper Price could not ſuffice for the Diſpatch of Buſineſs and Commerce, which daily increaſed: For Commerce conſiſted in Bartering only; and Work was paid in Work, or elſe in Commodities. But after our Luxury had increaſed our Neceſſities, and we, not content with the Produce of our own Soil, had a mind to the Delicacies of other Nations, it was hard for any one to poſſeſs ſuch Goods, for which any other would be

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[a] See *Grot.* in the Place above-cited. [b] "Cheapneſs proceeds from a multitude of Sellers." *Tacit. An.* vi. c. 17. [c] Vid. *Socrat. Hiſt. Eccleſ.* l. iii. c. 17. in the Beginning. [d] Vid. *Mart.* l. vi. ep. 30. [e] *In excerptis Peireſcianis. Add. Grot.* l. ii. c. 12. ſ. 14. [f] *Plut. Apophtheg.* p. 185. *D.* [g] *Roſar. Perſ.* c. iv. [h] Mention'd by *Plutarch, Inſtit. Laconicis,* p. 238. *Ed. Wech.* [i] *Juſt.* l. xi. c. 1.

Mr. Barb. *NOTES on* §. x.

[1] I have added this Period taken out of our Author's Abridgment *De Officio Hom. & Civ. B.* l. i. c. 14. ſ. 6. where 'tis ſaid, a high Price is ſet upon a thing, when 'tis ſold only to pleaſe one importunate to have it, and without which Intreaty it would not have been ſold. Any one may ſee that this ought not to have been omitted.

[2] Eſpecially, where *Cato*'s Rule of good Husbandry is obſerved, which *Plutarch* relates in his Life, "Nothing is cheap that is "ſuperfluous; and what we have no Occaſion for, although 'tis ſold for a Farthing, comes dear." 'Tis a Proverb, *Merx ultronea putet*, Proffer'd Ware ſtinks. *Plutarch*'s Words are, Ὅλως δὲ μηδὲν εὔωνον εἶναι τῶν περιττῶν, ἀλλ' οὗ τις οὐ δεῖται, κἂν ἀσσαρίου πιπράσκηται, πολλοῦ νομίζειν· In vit. Caton.

[3] See Chap. v. §. 6. following.

[4] *Nam Dies ſolutionis, ſicuti ſumma, pars eſt ſtipulationis.* Digeſt. l. ii. tit. 13. *De Edendo,* l. 1. §. 2. See alſo l. xviii. t. 2. *De in Diem addictione,* l. 4. §. 6. & l. 15. *in fin.*

[5] In all this Paragraph the Author treats only of the outward Circumſtances, which help to raiſe or leſſen the Price of things. But we ought always to ſuppoſe that the natural and internal Qualities of the things themſelves do very much alter the Value, becauſe theſe intrinſick Qualities or Circumſtances increaſe or leſſen the Benefit we may have by it. To this the Example of *Themiſtocles*, alledg'd by this Author, is to be referred, *&c.*

willing to barter thoſe Commodities that we wanted, or which indeed could be exactly equivalent to them. And, in a well-regulated State, where the Subjects are divided into various Orders and Ranks, there muſt needs be ſeveral ſorts of Men which would not be able to ſubſiſt, or at leaſt very hardly, did the ſimple way of Bartering ſtill prevail. As 'tis very evident that thoſe Nations, which are yet unacquainted with the Uſe of Money, are perfect Strangers to the more improv'd and cultivated way of Living. Vid. *Busbeq.* Epiſt. iii. where he treats of the Manners of the *Colchi*, *Add.* l. i. princ. l. xviii. t. 1. *D. De contrah. Empt.* And therefore *Maximus Tyrius*, Diſſ. xxxvi. p. 344. *Ed. Lugd. An.* 1630, is in a ſweet Dream, when he ſays, *Meat, Drink, and Raiment, and other Neceſſaries Men provide, by bartering Braſs and Iron; and thoſe of more Value, by Gold and Silver. But this is through the Corruption of Mankind: for without any Uſe of Metals they might communicate* gratis *to one another, by this moſt juſt Meaſure, that he who wants ſhould provide for his Neceſſity, by borrowing of him that abounds; and he that abounds, ſhould lend upon no other Condition, than that he in his Turn ſhould be ſerviceable to him.*

XII. And therefore the moſt civiliz'd Nations, by Agreement, thought fit to ſet a certain *eminent* Price upon ſome particular thing, as a Meaſure and Standard for the Price of every thing elſe; by the help of which one might procure any ſaleable Commodity, and Commerce might be carried on [1] more conveniently. [2] To this Purpoſe *Ariſtotle* [a] diſcourſes excellently; *When Want*, ſays he, *had made Bartering neceſſary, any ſimple Exchange of Commodity was ſufficient to anſwer our preſent Exigencies. But becauſe we knew not what, or how much we might have Occaſion for hereafter, the Uſe of Money was introduced; which is, as it were, a Pledge or Security, on which Men have agreed to impoſe ſuch a Power, as to make it capable of procuring any ſaleable Commodity.* And in another Place [b], *When Mens Neceſſities were to be ſupply'd from abroad, by importing what they wanted, and exporting what they abounded with, it was neceſſary to introduce the Uſe of Money. For every thing neceſſary for Life could not eaſily be convey'd backward and forward. And therefore to carry on ſuch a Barter they conſented to give and receive ſuch a thing at ſuch a Value, as Iron, Silver, or any thing elſe: which, at firſt, was determined by Quantity, or Weight; but after had a Stamp put upon it, to ſave the Trouble of Weighing; for the Stamp is a Token and Demonſtration of ſuch a Quantity.* Again, * [c] *Becauſe an Architect deſerves more for his Work, than a Shoemaker does for his; and it would be difficult for theſe two to barter together, it being unreaſonable to give a Houſe for a Pair of Shoes; therefore, to render ſuch things ſaleable, Mankind have thought fit, by common Conſent, to make uſe of a Piece of Silver, which they call* Money: *And this, for the Maintenance of civil Communication, they have agreed ſhould be accepted for any Commodity, according to the Value and Price of it.*

XIII. For this Purpoſe the more noble and ſcarce Metals, Gold [d], Silver [e], and Braſs ſeemed moſt proper. For as we accept a Man of known Credit and Value, and not every common Fellow for a Surety, ſo no Man would part with his Goods, which perhaps he had acquired with great Labour and Induſtry, for what he might meet with any where, as a handful of Duſt and Sand; it was neceſſary therefore Money ſhould conſiſt of ſuch a Matter, as might be convenient for keeping, and, by reaſon of its Scarcity, ſhould have the Value of many things crouded and united in it. Theſe Qualities are found in Metals, which are alſo of ſuch a cloſe compacted Subſtance, as not eaſily to be worn out, and yet capable of being divided into minute Pieces, both which are abſolutely neceſſary for that which is deſign'd to be a Standard and common Meaſure in Commerce. But ſince this Uſe of Money does not follow from the Nature of Things, but the common Conſent and Agreement of Men [f]; any thing elſe, in Caſes of Exigency, may ſerve in its ſtead. Thus Leather, Paper, and ſuch like, with ſome certain Stamp upon them, have often paſs'd for Money, in Times of Neceſſity; which, when thoſe Emergencies were over, have been exchang'd for the common Species [g]. Thus in the Kingdom of *Congo* and *Tombutto* in *Africa* [h], and in many Places of *North*

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[a] *Nicom.* l. v. c. 8. " Money was found out as a common Meaſure to which all other things ſhould be referred. " *Nicom.* ix. c. 1.
[b] *Polyb.* l. i. 6. (9) *Nicom.* l. v. c. 8. " All things that are barter'd ought to be capable of being compared together, to which " Uſe Money is ſubſervient; which, in a manner, is a *Medium*, for it meaſures all things: For Money was ſubſtituted by Conſent, " and is therefore call'd νόμισμα, as being ſuch, not *by Nature*, but νόμῳ *by the Law*; it being in the Power of Man to alter it, or " make it uſeleſs. Every thing ought to have a Price ſet upon it, for ſo there will be continual Traffick; and where that is, there " muſt be Society. Money therefore, as a *Medium*, renders things commenſurable, and conſequently equal. For there can be no " Society, where there is no Exchanging; nor Exchanging, where there is no Equality; nor Equality, but where things are com" menſurable.
[c] *Magn. Moral.* l. i. c. 34. *Rhet.* l. i. c. 16. " Money is, as it were, the Rate of the Worth of other " things; and therefore all other things are procurable by it. "
[d] Which, why it is eſteemed the moſt noble, may be ſeen in *Plin. Nat. Hiſt.* l. xxxiii. c. 3. about the end.
[e] *Vid. etiam* l. xxxiv. c. 14. *Plin. Nat. Hiſt.* & *Lucian. in Charon.* p. 350. *Edit. Amſt.* where *Iron* is preferr'd to Gold.
[f] *Add. Philoſt. in Vita Apollonii Tyan.* l. ii. c. 3.
[g] *Vid. Polyæn. Stratag.* lib. iii. c. 10. n. 1. of *Timotheus* and *Demetrius*. *Seneca de Beneficiis*, lib. v. c. 14. at the end.
[h] In *Leo Afric.* lib. vii.

Mr. BARB. *NOTES. on* §. XII.

[1] The *Roman* Lawyers have well diſcover'd the Original and firſt Eſtabliſhment of Money, ſaying, *Origo emendi, vendendique à permutationibus cœpit. Olim enim non ita erat nummus, neque aliud merx, neque aliud pretium vocabatur; ſed unuſquiſque ſecundum neceſſitatem temporum, ac rerum, utilibus inutilia permutabat, quando plerumque evenit, ut quod alteri ſupereſt, alteri deſit; ſed quia non ſemper, nec facile concurrebat, ut cum tu haberes quod ego deſiderarem, invicem haberem quod tu accipere velles, electa materia eſt, cujus publica & perpetua æſtimatio difficultatibus permutationum, æqualitate quantitatis ſubveniret; eaque materia forma publica percuſſa, uſum dominiumque, non tam ex ſubſtantia præbet, quam ex quantitate; nec ultra merx utrumque, ſed alterum pretium vocatur.* Digeſt. l. xviii. tit. 1. De contrahenda emptione, &c. leg. 1.

[2] Theſe Paſſages our Author quotes at large, but without any great Neceſſity.

* The *Greek* of this Paſſage is, Ἐπεὶ δὲ ὁ οἰκοδόμος πλείονος ἄξιον ποιεῖ τὸ αὐτοῦ ἔργον, ἢ ὁ σκυτεὺς, καὶ ἣν ἔργον ἀντικαταλλάττεσθαι, καὶ τῷ σκυτεῖ πρὸς τὸν οἰκοδόμον, ἀνθ' ὑποδημάτων δ' οὐκ ἦν οἰκίαν λαβεῖν, ἐνταῦθα ἤδη ἐνόμισαν ταῦτα πάντα ὠνητὰ, καί τι ἀργύριον προσαγορεύσαντες νόμισμα, τούτῳ χρῆσθαι, καὶ πρὸς τὴν ἀξίαν ἕκαστον ἑκάστου διδόνται, τὴν ἄλλαξιν ποιεῖσθαι παρ' ἀλλήλων, καὶ τούτῳ τὴν πολιτικὴν κοινωνίαν συνέχειν.

America, a certain ſort of Sea-ſhell is in Uſe, inſtead of Money. The *Apalachites*, a People of *Florida* [a], uſe certain black and white Grains for Money. The ſmall Money of the Province of *Caniclu* are Lumps of Salt [b], which are alſo current among the *Abyſſines* [c]: Tho' certainly ſuch ſort of Money is capable of carrying on but a very ſmall Trade. In the Kingdom of *Siam* the great Money is Silver, the ſmall a certain ſort of Shell [d]. And here, by the way, we may obſerve, that in *Congo* they look upon Iron to be a nobler Metal than Gold, or Silver, becauſe theſe are of little Uſe, whereas that affords moſt convenient Inſtruments for the Service of Life. Among the *Ethiopians* Braſs was the moſt ſcarce and precious Metal [e]. And indeed, laying aſide the Uſe of Money, Mankind could better be without Gold and Silver, than without Iron [1]. The *Peruvians* [f] thought themſelves happy that the *Europeans* help'd them to Iron Inſtruments. And one of their Grandees could not enough admire a Pair of Sciſſars brought over by the *Spaniards*, ſaying, *Had the* Spaniards *brought nothing elſe but Razors, Sciſſars, Combs, and Looking-glaſſes, it would have eaſily oblig'd them to give all their Gold and Silver in Return.* For before that they ſhaved themſelves with Knives of Stone, not without great Pain. As for their Gold, and Silver, and Jewels, they gave them their King, not as Tribute, but as a Gift [g]. In a certain Country of *Arabia* they barter'd an equal Weight of Gold and Silver for Iron; for they abounded in the former Metals, and wanted the latter [h]. Heretofore theſe Metals us'd to paſs by Weight [i]; inſomuch that ſtill, among ſome Nations, the Money is denominated from the Names of Weight. But that growing inconvenient, it became cuſtomary every where for the ſeveral Princes of each Nation to coin Money of a certain Size [2], and to ſtamp it with a certain Mark to determine its Value. *Alexis Severus* gave Order, *That the Pieces of Money of two, three, four, and ten Pounds Weight, up to thoſe of fifty, and an hundred, which* Heliogabalus *had coin'd, ſhould be melted down, and no longer paſs in Payment; and that for the future the Money ſhould be denominated from the Quantity of the Metal. For he obſerved, that the Emperor was at a greater Expence in Largeſſes, by being under a neceſſity of giving away ten Shillings, nay, ſometimes thirty, fifty, or a hundred in a ſingle Piece, becauſe he had not a ſufficient Stock of ſmaller Pieces to diſtribute.* Lamp. c. xxxix.

XIV. But altho' the Value of Gold, and Silver, and Money depend upon the Agreement of Men; yet the ſupreme Magiſtrate has not a Power at large of determining it, as he thinks fit, but muſt have regard to ſome certain Conſiderations. And firſt, all Nations, that we know of, agree that Braſs is leſs worth than Silver, and Silver than Gold, and that Silver bears ſuch a certain Proportion to Gold [k]. Again, Money is not deſign'd for the Conveniency of Commerce between Natives only, but alſo between them and Foreigners. And therefore, if the Magiſtrate ſhould raiſe the Money extravagantly, he would render it uſeleſs in our Traffick with Foreigners. Indeed, among Subjects of the ſame Nation [l], *Neither the Banker, nor the Farmer can refuſe the King's Money; but whether they like it or no, muſt take it in Payment.* But between us and Foreigners, ſhould not the Quantity and Goodneſs of the Metal be ſo adjuſted, as to render our Money, at leaſt, as good as that of the Country with which we traffick, it would be a great Clog and Hindrance to Merchandiſe, and would reduce us again to the Neceſſity of Bartering; which, of itſelf, would not be ſufficient to carry on Trade, unleſs we export as much or more than we import; and Foreigners ſtand in need of our Commodities, and we not of theirs [m]. And becauſe, where our Eſtate lies in Moveables, it chiefly conſiſts in Money, it muſt apparently be much leſſen'd, when that admits of ſo much Alloy, as to diſcover its own Baſeneſs in its Looks. [1] *Polyænus* [n] relates of *Leucon*, that he commanded all his Subjects to bring in their Mo-

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[a] Concerning which, vide *Rochefort. Deſcript. Antillarum Inſul.* Part II. c. viii. n. 8.

[b] As *Paul* of *Venice* relates, l. ii. c. 38.

[c] *Franc. Alvarez.* c. xlvi.

[d] Vid. *Jod. Schouten, in Deſcript. Regn. Siam. Add. Polydor. Virgil. De Invent. rer.* l. ii. c. 20. *Alexand. Neapol.* l. iv. c. 15. *Budeus ad* l. i. *D. De contrab. empt.*

[e] *Herodotus Thalia* concerning the *Ethiopians*.

[f] *Garcilaſſ. Comment. Reg.* l. i. 21.

[g] *Idem, ibid.* l. v. c. 7. *Add. Th. Mor. Utopia*, l. ii.

[h] *Diodor. Sic.* l. iii. c. 45. *Add. Strab.* l. xvi. "Iron is therefore ſaid to be better than Gold, becauſe this is defended by that." *Lucian. in Charron.* d. l. And *Plin. Nat. Hiſt.* l. xxxiv. c. 14.

[i] Vid. *Plin.* l. xxxiii. c. 3.

[k] "If for half a Pound of Gold a Man receives a double "Proportion of Silver, he receives only a double, whereas he ought to receive a twelfth Proportion. *Plat. in Hipparcho*, p. 514. *C.* "*Ed. Wech.* In the League that the *Romans* made with the *Ætolians*, they were to give one Pound of Gold for ten of Silver." *Polyb. excerp. leg.* l. xviii. 5. *Add. Bod. De Rep.* l. vi. c. 3. p. 1071, *&c.*

[l] That of *Arrian* takes place, *Diſſert. Epiſt.* l. iii. c. 7.

[m] Vid. *Polyb.* l. vi. c. 47. about the End.

[n] Lib. vi. c. 9. *Add. Bodin. De Rep.* l. vi. c. 3. *Greg. Tholoſan. Syntag. juriſ. univerſ.* l. xxxvi. c. 2.

Mr. Barb. *NOTES on* §. xiii, xiv.

[1] See Mr. *Locke*'s Philoſophical *Eſſay upon Hûman Underſtanding*, l. iv. c. 12. §. 11.

[2] From whence that of *Juvenal*, Sat. xiv. ver. 291.

Conciſum argentum in titulos, facieſque minutas.

[1] To avoid the Cheat of falſe Money, it ought not only to be mixed with a good Alloy, but ſo curiouſly wrought, that the Labour, joined with the intrinſick Value of every Piece, ſhould make it worth more than it commonly goes for. This is Mr. *Bernard*'s judicious Reflection, made by him in his *News from the Republick of Letters*, Mar. 1704. But when falſe Money creeps into the publick Commerce, private Perſons ought not to bear it, but the State ought to take it at the Weight which they received it. Our Author commends the Juſtice of the Senate of *Venice* in this Caſe; and we have had as great an Inſtance lately of it in *England*. Under the Reign of King *William* III. the Money was in ſuch a bad Condition, becauſe it had been ſo much clipt in the foregoing Reigns, in which there was no Care taken to prevent it, that it was diminiſh'd above a third Part of the true Weight. This made Men believe that they had more than they had; for tho' the Money had not been leſſen'd by publick Authority, yet in Commerce the Value was one third Part leſs than it went for, which ruin'd Trade in many reſpects. Mr. *Locke* took notice of this Abuſe, and foretold, That in a little time, if ſome Remedy were not taken, *England* would want Money to buy Bread, which happen'd in 1695, inſomuch that the Parliament was obliged to amend it in the Beginning of the next Year. That great Philoſopher was one of thoſe who helped to make it appear, that there was no other way to ſave the Commerce of *England*, but to coin the Money anew at the publick Charge, without diminiſhing the Price. Whereupon the Parliament following the Advice of this great Man, given them in two ſmall Works, "Made, in the midſt of a terrible War, a Reformation of the Coin, which many States would "have been afraid to attempt in Peace. Some Kingdoms would have rais'd and lower'd the Money, only to have brought the "Wealth of private Men into the Prince's Treaſury, not regarding what Loſs the People had by it: But the Maxims of the *Engliſh* "Government will permit no ſuch thing." Mr. *Clerc*'s *Biblioth. Choiſi*, Tom. vi. p. 384, &c.

ney to have it new coined; and, when he had coin'd it, he order'd every Piece to go for double; and ſo gain'd half of the Money, without doing Wrong to his People. Indeed, ſuch a thing as this may admit of ſome Excuſe, in caſe of Neceſſity, if remedied when that is over. But what *Zonaras* and others tell of *Nic. Phocas*, cannot be palliated: For he having coin'd a Quantity of light Money, beſides the weighty that was current, would receive none but the weighty into his Treaſury, but made all his Payments in the light [a]. Some Legiſlators indeed have taken this Courſe, to extirpate Covetouſneſs, Luxury, and ſuch Vices, by introducing baſe Money. Lycurgus *cry'd down all the Gold and Silver of* Sparta, *and allowed nothing to paſs but Iron, having aſſign'd a ſmall Price to a vaſt Weight and Bulk of it; ſo that* 10 l. *would take up a large Room, and require a Teem of Oxen to bring it home. By this Means he utterly rooted out ſeveral ſorts of Villany. For who would ſteal, or cheat, or receive a Bribe which could not be concealed, and which no Man was the better for having in his Poſſeſſion, ſince it could not be applied to any other Uſe? For, they ſay, he made all the Iron red hot, and quenched it in Vinegar, which, by that means, became brittle, and good for nothing.* By the ſame Methods were all idle ſuperfluous Arts rooted out, when nothing could be got by them: For the Iron Money not paſſing in *Greece*, none of the foreign Delicacies could be imported from thence into *Sparta*, which cut the very Nerves and Sinews of Luxury. *Lyſander* [c] brought back Gold and Silver into *Sparta*, and with them Avarice. Indeed, among other Nations too, Covetouſneſs crept in with the Uſe of Money. For as long as their Riches conſiſted in Corn, Cattle, and ſuch like, the Cumberſomeneſs of their Goods, together with the Difficulty of managing and preſerving that which was ſo liable to Corruption, was ſure at length to put a ſtop to their boundleſs Deſire of increaſing their Store. But now, ſince the Uſe of Gold and Silver has been found out, a covetous Man may embrace his Millions. *Plato* [d] in his Commonwealth, to take off his Subjects from too great a Thirſt after Lucre, commanded, *That no private Man ſhould have any Gold or Silver: That the Money which the Subjects make uſe of, ſhould be ſuch as paſſes no where elſe. But yet that the Publick ſhould have in Poſſeſſion ſome of the current Money of* Greece, *in caſe they ſhould have an Occaſion of waging War, of Travelling, or of ſending an Embaſſy: That Travellers, at their Return home, ſhould pay into the Publick all the foreign Money they bring with them, and receive that of their own Country for it.* The Great *Cham* at *Cambalu* put his royal Stamp upon a vaſt Sum of Money made of the Bark of Mulberry-Trees, which no Man in his Dominions, upon pain of Death, dared to refuſe, or to coin and uſe other [e]. The Foreigners too, who traded into thoſe Parts for the Gold, Silver, and the Jewels which they imported, were forced to take that Money, which they converted into the Commodities of the Country, and ſo exported again. By which means that Prince heaped up a prodigious Quantity of Gold and Silver. The *Perſians* call the Leather-Money, which an unjuſt King had impoſed upon them, *Shehreva*, i. e. Money impoſed on the Subject at the Pleaſure of the Prince. The Memory of which has made ſuch an Impreſſion upon them, that when they would denote the Injuſtice of any King, they expreſs it by ſaying, *He impoſes Leather-Money upon his People* [f]. On the other hand, the Care that the *Venetian* Senate took of their Subjects is much to be commended: For when the ſmall Money had been debaſed, and a vaſt Quantity of it crept in among them, that Calamity not being removeable any other way, the Senate made a Decree, That whoſoever within ſuch a time ſhould bring in their bad Money, ſhould have it exchang'd for good. Upon which account, above five hundred thouſand Crowns were diſburſed out of the Treaſury [g].

XV. But ſince Money is the common Meaſure of the Value of other things, its Value ought by no means to be altered, but where the Intereſt of the Publick does evidently require it. And then too, [1] the more moderate the Alteration is, the leſs will the Peoples Accompts be confounded. And therefore ſuch a ſort of Matter was choſen for the carrying on of Commerce, the publick and unalterable Value of which, conſtantly applied to the ſame Quantity, might be able to relieve and ſupply all the Inconveniences that were found in ſimple Barter [h]. But yet, as to the unchangeable Value of the Money, we muſt obſerve what *Grotius* [i] aſſerts, *That the Currency of Money is not naturally derived from the Matter only, nor yet from this or that particular Form and Denomination; but from its Capacity of being compar'd with all other things, or at leaſt all thoſe that are moſt neceſſary.* The Meaning of which Place is, that it does not proceed from [2] the *Matter* [k] of the Money only, *v. g.* its being Gold or Silver, that a certain Piece goes *pro hic & nunc*, for ſo much, and is equivalent to ſuch a Commodity (for the Currency of Money does not only depend upon one Piece's being equivalent to another of the ſame Quantity and Quality, for

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[a] *Add. Jo. Mariana, Hiſt. Hiſpan.* l. xv. c. 9.

[b] *Plutarch. in Lycurg.* p. 44, 45. *Ed. Wech.*

[c] *Vid. eund. in Lyſandr.*

[d] *De Legibus*, l. 5. p. 848.

[e] See *M. Paul* of *Ven.* l. ii. c. 21.

[f] *G. Gentius ad Sadi Roſarium Perſicum*, c. iii. *Add. Buchanan. Hiſt. Scot.* l. xii. p. 450.

[g] *Andr. Maurocenus Hiſt. Venet.* l. xiv. p. 641. We may obſerve out of *Plin. Nat. Hiſt.* l. vi. c. 22. " That the King of *Taprobanes* very much admired the Juſtice of the *Romans*, in that the *Denarii*, which he had taken, " were all of equal Weight, whereas the Stamp made it appear that they had been coined at different times." *Vid. Solin.* c. lxvi.

[h] *Vid.* lib. xviii. t. 1. l. 1. *D. De contrah. Emp.*

[i] B. ii. c. 12. ſ. 17.

[k] *Vid. leg. ubi ſupra.*

MR. BARB. *NOTES* on §. xv.

[1] See the End of the foregoing Note. Mr. *Hertius* alſo quotes here the Hiſtory of Mr. *Thuanus*, lib. viii. in the Year 1551, about the End; and lib. cxxix. in the Year 1602. *De Reide, Annal. Belg.* l. v. in 1586. and *Grotius*'s *Hiſt. Belg.* lib. v. in the Year 1595.

[2] This is not the Senſe of *Grotius*: But this great Man means, as *Gronovius* explains him, and as it will appear eaſily by attending to his Words, and the Sequel of his Diſcourſe, That if Money be capable of an Equivalent, 'tis not only becauſe we may give Dollars, for Example, for Piſtoles, or Pieces of fifteen or thirty Souſes for Dollars, but becauſe we may give Money for Corn, Wine, *&c.* for, ſays he, we muſt pay, unleſs we have otherwiſe agreed, for Things as much as they are worth at the Time and Place of Payment. *Quæ æſtimatio, ſi aliud non convenerit, facienda erit tempore & loco ſolutionis.* 'Tis another thing to ſay, that if we muſt have regard in exchange to the intrinſick or extrinſick Value of the Species, it happens at the Beginning of the Debt: This Queſtion ſhall be handled a little lower, ch. vii. §. 6, 7. The Author doth not ſpeak here, at leaſt directly, of the Value of Money, with reſpect to the Rareneſs or Abundance of other things. He ſpeaks only of it in ſhort, at the End of the Paragraph, when he explains the Words of *Michael* of *Epheſus*, a Commentator on *Ariſtotle*.

all *conſumable Commodities* are ſuch) but upon its containing virtually the Prices of any thing elſe; nor from any particular Denomination, as that it is call'd a Ducat, Crown, Dollar, or Florin; nor from its having ſuch a certain Stamp [a]; but from its Capacity of being compared, in reſpect of Plenty or Scarcity, with other things, eſpecially thoſe that afford the more neceſſary Supports of human Life. Now Land does this; for from it, mediately or immediately, proceed moſt things that human Life ſubſiſts on. And the Product of it being one Year with another pretty equal, it may be preſum'd to have its natural Value fix'd and certain, to which the Prices of other things, at leaſt of ſuch as have not received their Value from the Luxury or Folly of Man, are referr'd, as to a Standard. For 'tis very reaſonable, that the Prices of ſuch things as are the Product of Land, or are maintain'd by it, ſhould be regulated by the Price of the Land itſelf. Since therefore the Land every where is in private Hands (moſt Mens Eſtates being now in Land) the Value of Money muſt needs riſe or fall, according as it is ſcarce or plentiful, in proportion to Land. For every civiliz'd Nation conſiſting chiefly of two ſorts of Men, the *Farmer*, and the *Tradeſman* or *Labourer*, if, in a great Plenty of Money, Land and its Product ſhould ſell cheap, it muſt needs break the *Farmer*; and on the other hand ſhould Money be ſcarce, and Land and its Product dear, it muſt needs beggar the *Tradeſman*. Which in Fact we find true; for when a plentiful Harveſt makes Corn cheap, if the Work of the *Tradeſman*, and thoſe that earn their Living by their Labour, ſtand at the ſame rate as in fruitful Years, the *Farmer* is found to get little by his plentiful Crop. And the ſame Inconvenience preſſes the *Tradeſman* and *Labourer* when Corn is dear, if ſtill their Labour keeps its old Price. Since therefore, in indifferent Years, the Commerce between the *Labourer* and the *Farmer* is beſt adjuſted, and there is then leaſt Complaint between them; it is evident, that in fixing the Price of Money the greateſt Regard ought to be had to Land, eſpecially where the Country does not ſubſiſt upon Merchandiſe only, but chiefly upon its own Produce.

XVI. From what has been ſaid, we may judge, whether a Farm, that was rated at a hundred Pounds two hundred Years ago, ought not, *cæteris paribus*, to be rated more now; and whether the Wages, that were large enough then, are not in all Reaſon a little too ſcanty now. For it will not ſuffice to ſay, that the Pieces of Money have the ſame Weight, Goodneſs, Name, and Shape, which they had formerly; but we muſt conſider, that within this two hundred Years ſuch a vaſt quantity of Gold and Silver has been imported into *Europe* from *Africa* and the *Indies*, not to mention the many Silver Mines of *Europe* itſelf, that the Value of Money has, by degrees, ſunk very much; inſomuch that (as *Bodinus* [b] obſerves) Commodities bear ten times the Price they did formerly [1], by reaſon of the Plenty of Gold and Silver. And therefore the old Price of Land and Wages ought to riſe, *cæteris paribus*, in the ſame Proportion [c]. For ſuppoſe Commerce to be carried on by pure Barter in any Country which affords very little Wine, but Abundance of Corn; here, for a ſmall Parcel of Wine, we ſhall receive a great deal of Corn; but if, by good Management, the Vineyards ſhould happen to produce a larger Vintage, without doubt, for the ſame Quantity of Corn, we muſt give a greater Proportion of Wine than formerly. In like manner, when Money is ſcarce in Compariſon of other things, a great many things will be purchas'd with a little Money; but Money, on the other hand, increaſing, more of it muſt be given for the ſame things. For ſince the Metal, as to its *natural Price*, may be, and often is brought into Commerce as well as other Commodities, its Value muſt riſe and fall according to the Scarcity or Plenty of it. And the *eminent Price* of Money muſt neceſſarily follow the *natural Price* of the Metal: For it is unreaſonable, that a Quantity of Silver, conſider'd as a Commodity, ſhould bear a very different Price from what it does when conſider'd as Money. For ſo the ſame thing, conſider'd as its own Meaſure, would be greater or leſs than itſelf, conſider'd as the thing meaſured. And this is the Reaſon why, when the Prices of almoſt every thing elſe have been altered by reaſon of the Plenty of Money, Gold and Silver have ſtill kept their old Price, an Ounce of Silver being worth a Crown now, as well as formerly. For if the Price of Bullion, like the Prices of other things, had been *v. g.* quadrupled, an Ounce of Silver now would coſt four Crowns, ſo that little would be got by coining Money.

When therefore the Price of a thing happens to be changed, we muſt carefully diſtinguiſh, whether that Change be made in the Value of the thing, or in the Value of Money. The former happens, when the Plenty of Money ſtanding as it was, the Commodity begins to be more plentiful, or ſcarce, than uſual; the latter, when the Commodity remaining as uſual, the Plenty of Money has increas'd, or decreas'd. Thus, when in a plentiful Seaſon I can buy a Buſhel of Wheat for one Crown, which in a Dearth I cannot have under three; the Reaſon is, becauſe the Value of Wheat, and not of Money is changed; but when a Farm now lets for two hundred Pounds, which an Age ago let but for an hundred; the Value, not of the Farm, but of the Money, is altered [d]. But altho' Money admits of vaſt Changes, and a common Meaſure ought to be fixed and unalterable, Money nevertheleſs is capable of being made a common Meaſure. For this Change in Money is never

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[a] Vid. l. i. *D. De contrah. Empt. ubi ſupra*, "Money is of Uſe, not ſo much for its Subſtance, as its Quantity." Alſo l. xlvi. t. 3. l. 94. ſ. 1. *D. De Solution.* "In Money the Species is not ſo much conſider'd as the Quantity. [b] *De Rep.* l. vi. c. 2. p. m. 1028. [c] *Add. Val. Max.* l. iv. c. 3. ſ. 12. [d] "The royal Treaſure being brought into the City at the *Alexandrian* Triumph, cauſ-"ed ſuch a Plenty of Money, that the Intereſt of it ſinking very much (*Oroſius* ſays Half in Half) the Price of Land was raiſ'd." *Sueton. Auguſt.* 42. *Add. Joſeph. De Bello Judaico*, l. vi. c. 32. *Franc. Lopez. de Gomora, Hiſt. Gen. Ind.* c. 117.

Mr. Barb. *NOTES on* §. xvi.

[1] Mr. *Hertius* quotes a *Dutch* Hiſtorian, who relates, that the City of *Arnheim* gave a ſplendid Entertainment to a Duke call'd *Arnaldus*, with his Dutcheſs, and an hundred and ſixty ſix of his Retinue, at no greater Expence than fifty ſeven Dollars of that Country Money. *Jo. Iſaac Pontanus*, in his *Hiſt. of Gelderl.* l. ix. Hence it comes alſo, that there are Places of publick Employments which have ſuch ſmall Revenues. Salaries alſo remain in the ſame State that they were appointed two or three hundred Years ago, not conſidering that a thouſand Dollars now are of little more Value than an hundred were then.

ſo ſudden, as in other things, which depend very much upon the Uncertainties of the Weather, Storms, and other Caſualties; but the Value of it is leſſen'd by ſuch inſenſible Degrees, that we do not perceive it, while it decreaſes, but, after a long time, find that it has decreas'd [a].

[a] *Add. Jac. Godofredi Diſſert. De mutatione & mutatione & augmento Monetæ aureæ.*

CHAP. II.

Of Contracts in general, that preſuppoſe the Price of Things.

I. *The Difference between Bargains and Contracts, according to Mr.* Hobbes.
II. *According to the Interpreters of the* Roman *Law.*
III. *Some Advice about what they have delivered.*
IV. *Our Opinion about the Difference.*
V. *Contracts are divided into ſuch as oblige;* 1. *One Party only;* and 2. *ſuch as oblige both Parties.*
VI. *And into real, of bare Conſent, verbal, and in Writing.*
VII. *In ſome particular Name, and without a Name.*
VIII. *Beneficial and chargeable.*
IX. *How many ſorts of chargeable Contracts.*
X. *Of mix'd Contracts.*

WE come now to treat of ſuch Contracts as preſuppoſe Property and Price. And firſt, We will enquire into the Difference between *ſimple Pacts,* and *Contracts. Hobbes* [a] defines a Contract to be *the Action of two, or more, making over their Right to one another. But ſince in every Contract either both Parties perform their Bargain upon the Spot, ſo as neither truſts the other; or one performs, and the other is truſted; or neither performs, but each truſts the other:* To the firſt of theſe only he gives the general Name of *Contract.* The other two ſorts, where either one or both Parties are truſted, he calls *Pacts.* But this Difference does not concern the intrinſick Nature of *Contracts* and *Pacts,* but regards the Execution of them only: And 'tis againſt common Senſe, that a Sale, *v. g.* where the Goods are deliver'd for ready Money, ſhould be call'd only a *Pact.*

II. The *Roman* Lawyers almoſt all agree in making *Pact* the general Term which comprehends all the Affairs, wherein Men are concern'd with one another, and they define it in general to be [1], *The Agreement of two or more in the ſame thing.* Then they divide *Pact* into *Pact properly ſo call'd,* and *Contract:* The former is, *when the Object is ſome Matter of no Conſequence, and, in its own Nature,* [2] *incapable of bearing an Action in the civil Court.* This they again divide into *ſimple Pact,* and not *ſimple;* which latter they again ſubdivide into [3] *legal* and *additional.* They ſay farther, That an Agreement may become more than a *ſimple Pact,* either by its own intrinſick Nature, or by the external Confirmation of the Law; for it is *that* that properly renders Agreements *legal Pacts.* Moreover, they tell us, that this intrinſick Nature may be of two ſorts, for ſome do not retain the general Name of Agreements, but are call'd by ſome [4] particular Name of Contract; others, altho' of no particular Denomination or Form, yet exceed the Limits of *ſimple Pact,* by having a Matter of [5] Conſequence for the Object of them, as the Performance of a Promiſe, the Delivery of Goods, or

[a] *De Cive,* c. 2. ſ. 9.

Mr. Barb. *NOTES on* Chap. II. §. 1.

[1] *Pactum autem à pactione dicitur* ——— *Et eſt Pactio duorum, pluriumve in idem placitum conſenſus. Conventionis verbum generale eſt, ad omnia pertinens, de quibus negotii contrahendi tranſigendive cauſa conſentiunt, qui inter ſe agunt.* Digeſt. l. ii. tit. 14. De Pactis, l. 1. §. 1, 2, 3. Cujacius's Obſerv. l. ii. c. 15.

[2] *Nec obeſſe tibi poterit, quod dici ſolet, Ex pacto actionem non naſci.* Cod. lib. ii. tit. 3. De Pactis, leg. 10. *Nam ſi conventio, placiti-fine ſtetit, ex nudo pacto perſpicis actionem jure noſtro naſci non poſſe.* Lib. iv. tit. 65. De Locato & Conducto, leg. 27. But ſimple Conventions always afford a valid Exception, as our Author obſerves in the next Paragraph; I mean, That when a ſimple Promiſe is made to any one, to require nothing of him, or not to ſue him at Law, which might rightly be done, if, after that we lay an Action upon him, we have debarred ourſelves immediately of our Action, altho' the Agreement was not confirmed by an Engagement in Form, and the Plaintiff has done nothing on his Part to free himſelf from it. *Sed cum pactum conventum exceptionem perpetuam pariat,* &c. Digeſt. l. xx. tit. 6. *Quibus modis pignus, vel Hypotheca ſolvitur,* leg. 5. princip. *Igitur nuda pactio obligationem non parit, ſed parit exceptionem.* lib. ii. tit. 14. De Pactis, leg. 7. §. 4. *Si paciſcar ne pro judicati, vel incenſarum ædium agatur, hoc pactum valet.* ——— *Nam & de furto paciſci lex permittit. Sed & ſi quis paciſcatur, ne depoſiti agat, ſecundum Pomponium, valet pactum.* Ibid. §. 13, 14, 15. *Quædam actiones per pactum ipſo jure tolluntur: ut injuriarum, item furti. De pignore jure honorario naſcitur pacto actio, tollitur autem per exceptionem, quotiens paciſcor.* Ne Petam. leg 17. §. 1, 2. See alſo leg. 27. § 4. In this there is much Inconſiſtency: for why ſhould a ſimple Contract be of force to hinder us from obtaining what we might otherwiſe lawfully ſue for, more than give a Right to ſue for any thing? That which can diſcharge an Obligation, is it not capable of producing a new one?

[3] *Ubi obiter monendum cordatiores recte abſtinere à vocabulo* Pactorum veſtitorum. *Non enim quia dicitur, e. g. ex nuda gratia, ex nuda benevolentia, etiam dicendum fuerit ex gratia veſtita.*

[4] As that of Sale, Hire, Society, Loan, Pledge, &c. *Conventiones, quæ pariunt actiones, in ſuo nomine non ſtant, ſed tranſeunt in proprium nomen contractus, ut emptio, venditio, locatio, conductio, ſocietas, commodatum, depoſitum, & cæteris ſimiles contractus.* Digeſt. l. ii. t. 14. De Pactis, l. 7. §. 1. See §. 7. following.

[5] *Sed ſi in alium contractum res non tranſeat, ſubſit tamen cauſa, eleganter Ariſto Celſo reſpondit, eſſe obligationem, ut puta, Dedi tibi rem, ut aliam mihi dares, dedi, ut aliquid facias, hoc* συνάλλαγμα, i. e. *contractum eſſe, & hinc naſci civilem obligationem.* Ibid. §. 2.

the doing of Work; and theſe are properly *Contracts*, which by their own Force effectually oblige, and which [6] in Juſtice and Equity bear an Action. Yet they add, that [7] *ſimple Pacts* may be actionable, by Conſent of the Parties; and *Pacts* added to ſuch [8] Contracts as admit of Equity, partake of the Nature and Force of Contracts.

III. But ſince *Pacts* are not, in their own Nature, actionable in the civil Court, and 'tis our Buſineſs to explain the Force they have in their own Nature, we can't therefore follow this Diviſion ſo cloſely. For 'tis evident, that the Law may deny Agreements, even in Matters of Conſequence, an Action in the civil Court [1]. To this Purpoſe, ſays *Strabo*, l. xv. p. 488. in the Beginning, *a Truſt of Charge cannot be recovered by Law; Witneſſes and Seals ſignify nothing, for 'tis but a bare Truſt.* * Sen. de Benef. l. iii. c. 15. wiſhes, *That no Debts had the Benefit of the Law, but were left entirely to depend on the Honeſty of the Party* [a]. But as to what the *Roman* Law ſays, that *ſimple Pacts* admit of no Action, we muſt diſtinguiſh between ſuch as are *affirmative*, and ſuch as are *negative*. The Force of *negative Pacts* (where the Agreement is, not to demand) is both in the Natural and Civil Law not to be productive of, but to exempt from an Action [b]: [2] For ſince they are deſigned in favour of the Debtor, that nothing may be demanded of him, they can be of no other Uſe, than to keep off the Demand of the Creditor, *i. e.* to exempt from an Action. But as for *ſimple affirmative Pacts*, they do not want in themſelves a Power of Obliging [3]. But the Reaſon why the *Roman* Law did not make them actionable, was, to prevent a vaſt Multitude of Law Suits; eſpecially conſidering that ſome of theſe *Pacts* proceeded from Unadviſedneſs (for elſe they might have been made in Form of Law) and others were of no Uſe, as tending to no Conſequence, when put in Execution. That this is the Signification of the Word *Cauſa*, ſo often made uſe of by the Civilians, is plain from *Plaut. Aſinar.* Act. iii. Scen. 1. ver. 17. *Sola ego in caſteria* [4] *ubi quieſco omnis familiæ cauſa conſiſtit*, i. e. *omne emolumentum quod ex familia capis.* Thus, if any ſhould agree, not to waſh their Hands,

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[a] See *Grot.* B. ii. c. 18. ſ. 10.

[b] *Nuda pactio obligationem non parit, ſed parit exceptionem, D.* Lib. ii. t. 14. De Pactis, leg. i. §. 4.

Mr. BARB. *NOTES on* §. II, III.

[6] *Legitima conventio eſt, quæ lege aliqua confirmatur, & ideo interdum ex pacto actio naſcitur, vel tollitur, quotiens lege vel Senatuſconſulto adjuvatur.* De Pactis, Leg. 6. Hence it is, that by the Prætor's Edict a Mortgage was good and valid, although it was founded upon a ſimple Contract only. See the ſame Title of the *Digeſts*, leg. 17. §. 2. and Mr. *Noodt*'s *Probab. Jur.* l. ii. c. 8. 'Tis the ſame, when a Man promiſes to give ſo much in Portion with his Daughter. See *Cod.* l. v. t. 11. *De Dotis Promiſſione & nuda Pollicitatione*, leg. 6. I ſhall alledge but one Example more, and that is of Gifts among Perſons living: For the Emperor *Juſtinian* ordained, That tho' one had not delivered a Thing, of which he had promiſed to make a Preſent, nor was under any Engagement in Form, he ſhould neverthleſs be obliged in Juſtice to keep his Word ſtrictly. See *Cod.* lib. viii. t. 54. *De Donationibus*, l. 35. §. 5. The End of this Law plainly ſhews (to mention it by the bye) that it was made at the Requeſt of the Clergy, who were always mindful of their Intereſts, that they might ſecure to themſelves all the Gifts which they could any ways obtain; for it treats afterwards of thoſe *impious* Perſons, who retracted, after they had promiſed to give ſomething to pious Uſes, or to the Clergy, and it threatens them with divine Vengeance: TANTOQUE MAGIS HAEC FIRMA ESSE, *ſi piis actibus, vel* RELIGIOSIS PERSONIS, *donatio deputata ſit* —— *ne in præfatis piis cauſis, ex quibuſdam machinationibus, non ſolum indevotus, ſed etiam* IMPIUS DONATOR *intelligatur*, POENASQUE *non ſolum legitimas, ſed etiam* COELESTES EXPECTAT, &c.

[7] *Hæc verba* (*Rogavit Titius, ſpopondit Mævius*) *non tantum pactionis loco accipiuntur, ſed etiam ſtipulationis. Ideoque ex ſtipulatu naſcitur Actio.* Ibid. leg. 7. §. 12. See §. 5. n. 1. following.

[8] Provided, ſay they, that they have been added ſoon after the Concluſion of the Contract; for 'tis not the ſame if they be added ſome time after. *Solemus enim dicere pacta conventa ineſſe bonæ fidei judiciis; ſed hoc ſic accipiendum eſt, ut ſi quidem ex continenti pacta ſubſequuta ſunt, etiam ex parte actoris inſint, ex intervallo non inerant.* Ibid. §. 5. See what is ſaid §. 8. following, and ch. 10. §. 7. As to Contracts of ſtrict Right, ſimple Conventions, tho' made on the Spot, make no part of a Contract, nor afford an Action in Juſtice, tho' they ſtrengthen an Engagement. But when they leſſen it, they enter into the Contract, and yield the Defendant an Exception valid in Law. Mr. *Noodt, De Uſuris & Fænore*, l. iii. c. 1. p. 188. promiſes to ſhew it at large, in a Work which he intitles *De Pactis*, and is with Impatience expected by all ſuch as know the Sagacity and Ability of the Author.

[1] This Paſſage may be explained by another of *Nicholas Damaſcenus*, related by *Stobæus*, Serm. xlii. Παρ' Ἰνδοῖς ἐάν τις ἀποστερηθῇ δανείου, ἢ παρακαταθήκης, οὐκ ἐστὶ κρίσις, ἀλλ' αὐτὸν αἰτιᾶται ὁ πιστεύσας. Among the *Indians*, if any refuſe to reſtore Money lent, or a Pawn, the Creditor, or he that has truſted the Pawn, has no Action at Law againſt the Debtor, or Perſon who hath been truſted, but he muſt blame himſelf for truſting another. Which *Perizonius* explaining, ſays, They only imply, that theſe kinds of Suits were rare among the *Indians*. But there is a ſtronger Paſſage in the ſame Book, where *Strabo* ſays, upon the Credit of *Oneſicritus*, That thoſe who inhabit in that Part of the *Indies* that is ſubject to *Muſicanus*, had no Actions at Law but for Murder and Injuries, Δίκην δὲ μὴ εἶναι, πλὴν Φόνου καὶ ὕβρεως· And that for two Reaſons; 1. Becauſe no Man can be aware of the Inſolence of another, ſo as to prevent Deception in Contracts: And 2. Becauſe the State ſhould not be troubled with multitudes of Law-Suits, as the *Greek* implies, Οὐκ ἐπ' αὐτῷ γὰρ τὸ μὴ παθεῖν ταῦτα· τὰ δ' ἐν τοῖς συμβολαίοις ἐπ' αὐτῷ ἑκάστῳ, ὥστε ἀνέχεσθαι δεῖ, ἐάν τις παραβῇ τὴν πίστιν, ἀλλὰ καὶ προσέχειν, ὅτῳ πιστευτέον, καὶ μὴ δικῶν πληροῦν τὴν πόλιν. This plainly ſhews, that it was a publick Eſtabliſhment to eaſe the Judges of many troubleſome Cauſes, and not the bare Effect of the Probity and Honeſty of private Perſons in fulfilling their Contracts; and ſo the οὐκ ἐστὶ κρίσις of *Damaſcenus*, and δικὴν μὴ εἶναι in *Strabo* do ſignify. But this is farther confirmed by *Ariſtotle*, who ſays, in *Ethic. ad Nicomach.* l. viii. c. 15. Διὸ παρ' ἐνίοις τούτων οὐκ εἰσὶ Δίκαι· And again, Ἐνιαχοῦ τ' ΕΙΣΙ ΝΟΜΟΙ, τῶν ἑκουσίων συμβολαίων ΔΙΚΑΣ ΜΗ ΕΙΝΑΙ, lib. ix. c. 1. See *Grotius*, lib. ii. c. 17. §. 10. and *Cujacius*'s *Obſerv.* l. xi. c. 9. Moreover, in *Ælian.* l. iv. c. 1. we find, that among the *Sardinians* there was a Law, importing, that they could bring idle Perſons to Juſtice, and make them give an Account how they lived, in theſe Words, Ἀργίας ἦσαν δίκαι, καὶ τὸν εἰκῇ ζῶντα ἔδει κρίνεσθαι, καὶ διδόναι τὰς εὐθύνας, ἀποδεικνύντα, ὅθεν ζῇ. See alſo a Paſſage of *Plato*'s, quoted l. iii. c. 4. §. 10. n. 2. above.

* *Seneca*'s Wiſh is good, and becoming a Philoſopher; but to aboliſh all Conſtraint to perform all voluntary Engagements, is impracticable in any State, as things are, and cannot have Place but in an *Utopia*; as indeed *Seneca* owns, ſaying, *Sed neceſſaria optimis prætulerunt*, &c. Things neceſſary muſt be uſed inſtead of the beſt. See l. iii. c. 4. §. 6.

[2] See §. 2. Note 2. above.

[3] See l. iii. c. 5. §. 11. Note 2. above.

[4] *Plautus*'s Words are miſunderſtood by our Author; the true Senſe of them is, " All the Revenues by which I maintain my " Family, muſt ceaſe, if I do not trade in my Art. " See *Gronovius*'s *Obſervat.* l. iv. c. 26. Moreover, when the *Roman* Lawyers ſay, A Contract without a Cauſe obliges not; they mean not, a thing that brings ſome Profit to one or other of the Contractors, but, a thing actually made or given in the ſight of another, to whom we are engaged, without examining whether it be profitable or not. See §. 2. Note 5. above. So when one ſays, I give you this, that you may give me that, or that you may do that for me; this is a Contract: But if one ſays, I will give you this, provided you will give me that; this is an Agreement without a Cauſe. See

Vinnius

Hands, or comb their Head, or change their Linen for ſuch a time (as ſome Slovens have done) what need would there be to trouble a Magiſtrate upon the Breach of ſuch Agreements ? Which indeed are ſcarce allowable by the Law of Nature [5].

IV. In my Opinion, the Difference between *Pact* and *Contract* may be beſt taken from the Object, ſo as to call that [1] *Contract*, which concerns thoſe Things and Actions that are the Subject of Traffick, and ſo preſuppoſe Property and Price ; and that *Pact*, by which we covenant about other things. By this means *Pacts*, ſtrictly ſpeaking, will take in all negative Agreements, by which we covenant not to do, or not to demand, what otherwiſe we might do or demand : As alſo thoſe Agreements that have for their Object the Exerciſe of our natural Faculties, ſo far as they barely tend to the promoting mutual Profit and Advantage, conſider'd meerly by themſelves, without any regard to Price, or any valuable Conſideration ; in a Word, when we agree to do ſome Work that is not mercenary : Tho' ſome Agreements there are, which not being converſant about things, may indifferently be called either Pacts, or Contracts, as that of Matrimony [2].

V. All Contracts may be divided into three Sorts, Firſt, [1] Thoſe that lay an Obligation upon one Party * only, which Condition cannot be [2] changed by any thing *ex poſt facto* ; as in the Loan of a conſumable Commodity, and [3] Stipulation. Secondly, Thoſe that equally oblige both Parties †, as in buying and ſelling, letting and renting, Partnerſhip, *&c.* Thirdly, Thoſe of a middle Nature, as the Loan of a thing not conſumable, a Truſt, a Pledge, *&c.* which naturally, as appears from the principal End of the Contract, oblige me only that am the Receiver ; nor can they originally affect the Giver. But Accidents may fall out ſo as to lay an Obligation upon him alſo ; as if I ſhould be at neceſſary Expences for the thing, or ſuffer Damage by it, for which the Owner ought to be anſwerable. In this Caſe the Expences are to be repair'd, and the Damage made good.

VI. Again, the *Roman* Lawyers frequently divide Contract [1] [a] into *real*, *conſenſual*, *literal*, and *verbal*. The *real* is ſo call'd, not becauſe it is converſant about ſome real thing, for all Contracts are ſo ; but becauſe [2] a Pre-delivery of ſome real Commodity is neceſſary to intitle us to a Demand of that, which gives this Contract its Denomination [b]. Thus I muſt have received ſomething of my Creditor, before I can ſtand obliged as a Debtor [c] : Nor can a Truſt, or Loan be demanded, before it has been deliver'd to me. But, by the way, the Contract of lending is one thing ; a Pact, or Promiſe to lend, another. A Truſt, one thing ; a Promiſe to take in Charge, another.

Conſenſual are ſo call'd [3] [d] (not becauſe they alone require the Parties Conſent) but becauſe they immediately oblige, upon each Party's declaring his Conſent, by proper Signs. Nor is it neceſſary, that one thing ſhould be firſt delivered, or ſome Work firſt done.

A *verbal* Contract, or Stipulation, [4] [e] as it conſiſts in uſual Forms of asking and anſwering Queſtions, is unknown to the Law of Nature.

Nor is it more agreeable to that Law, that a Man who has not received a thing, ſhould be ob-

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* μονόπλευρος. † δίπλευρος. [a] *Obligationum quæ ex contractu ſunt, quatuor ſunt ſpecies. Aut enim re contrahuntur, aut verbis, aut literis, aut conſenſu,* Inſtit. l. iii. t. 14. *De Obligat.* [b] Vid. l. ii. t. 14. l 17. *D. De Pactis.* [c] Add. *Val. Max.* lib. viii. c. 2. ſ. 2. [d] Vid. *Inſtitut.* lib. iii. t. 23. *De Obligat. ex conſenſu.* [e] Vid. *Inſtitut. ubi ſupra,* t. 16.

Mr. BARB. *NOTES on* §. III, IV, V, VI.

Vinnius upon the *Inſtitutes,* lib. iii. t. 14. §. 2. 'Tis in this Senſe, almoſt, that the Word *Cauſa* ought to be taken, when we ſpeak of a perſonal Action, for a thing given, and the Cauſe follows not : *Condictio cauſâ datâ, cauſâ non ſecutâ.* In fine, 'tis certain, that in the *Roman* Law, when we ſay, for Example, that we ought to reſtore the Goods of another, with the Fruits and Revenues that the Proprietor hath received from them, we make uſe of the Word *Cauſa* : *Nec enim ſufficit, corpus ipſum reſtitui, ſed opus eſt, ut & cauſa rei reſtituatur,* Digeſt. l. vi. t. 1. *De Rei vindicatione,* l. 20. And ſo we muſt underſtand it in t. 1. l. 22. *De uſuris, & fructibus, & cauſis,* &c.

[5] See what I have ſaid *Note* 6. on l. iii. c. 5. §. 9.

[1] Every Man is at liberty to diſtinguiſh and range his Notions, as he thinks good. But, in truth, there is no Difference in the main between Contracts and ſimple Agreements, according to the Law of Nature alone.

[2] The *Roman* Lawyers do not nevertheleſs give the Name of Contract to Marriage, as Mr. *Hertius* obſerves, tho' they ſay, *Contrahere Matrimonium,* Digeſt. l. xxiii. tit. 2. *De Ritu Nuptiarum,* leg. 22. But the Agreement made upon the account of Marriage, as to what concerns Goods, may form a Contract, according to the Senſe of the *Roman* Law, and the Definition of our Author. Whence it is, that *Juſtinian,* Novel cxix. c. 1. puts a Gift upon the account of Marriage among private Contracts.

[1] This Diviſion is not found formally in the *Roman* Law ; but there is a Law, *Digeſt.* lib. l. t. 16. *De verborum Signif.* leg. 19. which ſeems to intimate, that every Contract, properly ſo called, is obligatory to both Parties. But ſee *Vinnius* upon the *Inſtitut.* l. iii. t. 14. §. 2.

[2] To underſtand this, we ought to read what the Author ſays a little lower of mixt Contracts. See *Vinnius* on the *Inſtitutes,* l. iii. t. 15. §. 2. num. 2.

[3] In a Stipulation one of the Contractors muſt demand, and the other anſwer poſitively, after this manner : Doſt thou promiſe to give me, or do ſuch or ſuch a thing for me ? Yea, I do promiſe it. *Verbis Obligatio contrahitur ex interrogatione & reſponſione, cum quid dari fierive nobis ſtipulamur.* ——— *In hac re olim talia verba tradita fuerunt,* SPONDES? SPONDEO. PROMITTIS? PROMITTO. *Fide jubes? Fide jubeo. Dabis? Dabo. Facies? Faciam.* Inſtitut. lib. iii. t. 16. *De verborum obligationibus,* princip.

[1] *Obligationum quæ ex contractu ſunt, quatuor ſunt ſpecies. Aut enim re contrahuntur, aut verbis, aut literis, aut conſenſu.* Inſtitut. l. iii. t. 14. *De Obligat.* §. 2.

[2] *Re enim non poteſt obligatio contrahi, niſi quatenus datum ſit,* Digeſt. l. ii. t. 14. *De Pactis,* l. 17. in princip. See t. 15. of lib. iii. of the *Inſtitutes, Quibus modis re contrahitur Obligatio.*

[3] Such are the Contracts of Selling, Hiring, Society, and Commiſſion. *Conſenſu fiunt obligationes in emptionibus, venditionibus, conductionibus, ſocietatibus, mandatis. Ideo autem iſtis modis obligatio dicitur conſenſu contrahi, quia neque ſcriptura, neque præſentia omnimodo opus eſt. At nec dari quicquam neceſſe eſt, ut ſubſtantiam capiat obligatio, ſed ſufficit eos, qui negotia gerunt, conſentire.* Inſtit. l. iii. t. 23. *De Obligationibus ex conſenſu.*

[4] See Note 3. upon the §. aforegoing.

liged by bare *Writings* [5] [a] as much as if he had. But yet, there is good Reaſon why this ſhould obtain in the *Roman* Law: For ſince the Magiſtrate cannot be ſatisfied of the Truth of a Debt, but by Inſtruments and other Proofs, when Writings appear owning the Debt, he muſt preſume upon it, till the contrary be prov'd. Indeed there are no Contracts, but what may be expreſs'd in Writing; and this may be done two ways: for either the Contract may be made, and the Conſent of the Parties declared in Writing; and, in this caſe, the Contract is then finiſhed, when the Writings are in all reſpects perfected; which obtains chiefly in *conſenſual*, and ſuch ſort of Contracts: or elſe the Writing is only an Evidence of a Contract already finiſhed. Which laſt is to be preſumed, if the caſe be doubtful [b].

VII. Again, Contracts are divided into [1] *named* and *nameleſs*. The former ſort are thoſe, which by reaſon of their daily Uſe have a particular proper Name aſſigned them, expreſſive of the Form and Contents of the Buſineſs; and which being mentioned, immediately ſignifies what was done (for altho' Bartering, which is reckoned amongſt the *nameleſs* Contracts, ſeems to have a Name, yet 'tis a general one, and does not expreſs, whether it be the Contract of [2] *Goods* for *Goods*, *Buying*, *Selling*, or any other.) And therefore in the *Roman* Law theſe had certain fixed Forms of proceeding; whereas others of leſs frequent Uſe, containing no more than what was expreſly mentioned, had no proper Form of their own, but one accommodated to the Thing; and therefore an Action, upon Account of theſe was always expreſt in a certain Form of Words [c].

VIII. The Diviſion of Contracts into † *gainful* and * *chargeable* makes moſt for our Purpoſe, whereof the firſt brings ſome Advantage to one Party *gratis*, as in the Caſe of a Loan, Commiſſion, or [1] Charge. The latter binds both to an equal Share of the Burthen; for here we act, or give, in order to receive an Equivalent. Upon this ſeems to be founded the Diſtinction of Contracts into thoſe that admit of Equity, and thoſe that are tied up to the Rigour of the Law. In *the former* the Magiſtrate has Liberty to weigh and eſtimate the thing, according to [2] Equity and Conſcience; in *the latter* he is obliged right or wrong [3] to proceed according to the ſtated Forms of Law. Now Reaſon tells us, that *chargeable Contracts* are of the former ſort, and admit of a more looſe Interpretation in the Courts of Equity; for ſince the Obligation is mutual, neither Party ought to be over-burthened. But *gainful Contracts* belong to the latter, and do not allow of ſuch a looſe Interpretation, or that any one ſhould be bound to do more than he has expreſly declared; for elſe a Man's Generoſity might prove too great a Burthen to him [d].

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[a] Vid. *Inſtitut. ubi ſup.* t. 22. [b] Vid. *Grot.* l. ii. c. 16. ſ. 30. and hereafter in c. 5. ſ. 2. *in fin. ibiq. not.* [c] Vid. *Grot.* l. ii. c. 12. ſ. 3. † *Contractus beneficus.* * *Contractus oneroſus.* [d] Add. *Arn. Vinnius* ad. ſ. 28. *Inſtit. de Actionibus*, l. iii. t. 4.

MR. BARB. *NOTES* on §. VI, VII, VIII.

[5] Before *Juſtinian*, Men might, for 5 Years after the Date of a Note Obligatory, plead and maintain, that he had not received the Money or Goods mentioned; but that Emperor confined it to two Years. See *Inſtit.* l. iii. t. 22. *De Literarum Obligationibus.* The Proteſtation or Declaration of not receiving, to which the Owner of the Note has recourſe, is called *Querela*, or, *Exceptio non numeratæ Pecuniæ*; and it belongs to him, of whom it is ſaid to be received, to prove that he did really receive it. The Reaſon of it was, as it is expreſs'd in the Code, becauſe the Denial of a Fact is not capable of a Proof. *Quum inter eum, qui factum adſeverans, onus ſubiit probationis, & negantem numerationem (cujus naturali ratione probatio nulla eſt) & ob hoc ad Petitorem ejus rei neceſſitatem transferentem, magna ſit differentia*, l. iv. t. 30. *De non numerata Pecunia*, leg. 10. May we not ſay, that 'tis managed as a Diſpute in the Philoſophy Schools? And if we examine the Thing well, is it not really the Author of the Note that affirms and maintains the Falſity of the Fact, of which the other is furniſhed with a Proof, reputed valid, till the contrary appears? and by virtue of which this laſt ought to be ſuppoſed to hold to the Negative, and conſequently is exempted from Proof, according to the Maxim treated on? Further, as Mr. *Hertius* obſerves, 'Tis very rare that any Man puts a Note into the Hands of him to whom it is made, before he has received the Money or Thing which is acknowledged due by it; and if he is ſo ill-adviſed, 'tis his own Fault. It may alſo happen that the Money may be lent without Witneſſes, and ſo the falſe Debtor may thereupon think to keep the Goods of the Creditor; and ſo much the more, becauſe the Space allow'd to the firſt to maintain that he has not received, and to oblige the other to prove it, is too long. Upon the whole, it appears, that our Author repreſents the Idea's and Maxims of the *Roman* Law very imperfectly.

[1] See §. 2. Note 4, 5. above.

[2] As for Example, if we give a Thing to a certain Perſon to ſell for us, upon Condition that he ſhall keep to himſelf all that he gets above a certain Price ſet him. This is a Contract without Name, which yields an Action in a Form preſcribed. *Cum deficiant vulgaria atque uſitata actionum nomina, præſcriptis verbis agendum eſt, in quam neceſſe eſt confugere, quotiens contractus exiſtant, quorum adpellationes nullæ jure civili proditæ ſunt. Naturâ enim rerum conditum eſt, ut plura ſint negotia, quam vocabula --- Si tibi rem vendendam certo pretio dediſſem, ut quo pluris vendidiſſes, tibi haberes, placet, neque mandati, neque pro ſocio eſſe actionem, ſed in factum, quaſi alio negotio geſto*, Digeſt. l. xix. t. 5. *De præſcriptis Verbis, &c.* leg. 2, 3, 4, 13. princip. Laſtly, As to what concerns the Nature of Contracts without Name, ſee Mr. *Titius* on *Lauterbach*, Obſ. 620.

[3] See *Digeſt.* l. xix. t. 4. *De Rerum permutatione*, leg. 1. §. 2.

[1] Our Author has forgot to mention *Donations made by living Parties*, as well in Chap. iv. as in this; but Mr. *Barbeyrac*, in his firſt Note upon the firſt Sect. of that Chapter has ſupplied this Defect.

[2] *Tantundem in bonæ fidei judicis officium judiciis valet, quantum in Stipulatione nominatim ejus rei facta interrogatio*, Digeſt, l. iii. t. 5. De negotiis geſtis, leg. 7. Moreover, in the *Roman* Law, the Number of honeſt Contracts, call'd, *Bonæ Fidei*, is not determined clearly. See *Inſtit.* l. iv. t. 6. *De Actionibus*, §. 28, 29. nor do the Interpreters agree about them. See *Titius* in *Lauterbach.* Obſerv. 1148, *&c.*

[3] This goes ſo far, that if we require, for Example, one Dollar more than appears to be due, we loſe our Cauſe. *Hic tu ſi amplius HS. nummo petiſti, quam tibi debitum eſt, cauſam perdidiſti, propterea, quod aliud eſt Judicium, aliud Arbitrium*, Cicer. Orat. pro Q. Roſcio Comœdo, c. 4. *Si quis agens, intentione ſuâ plus complexus fuerit, quàm ad eum pertineat, cauſâ cadebat*, i. e. *Rem amittebat, nec facile in integrum reſtituebatur à Prætore, niſi minor erat viginti quinque annis*, Inſtit. l. iv. t. 6. *De Actionib.* §. 33. See *Plautus*'s *Moſtellar.* Act. iii. Scen. 1. §. 123. *Sueton. Claud.* c. 14. *Seneca, ep.* xlviii. *init.* Moreover, this nice Exactneſs was enjoyned, becauſe thoſe who had the Cognizance of Civil Affairs were commonly inferior Judges, whoſe Power was limited by the Prætor. See Mr. *Noodt*'s curious Treatiſe *De Juriſdictione & Imperio*, lib. i. c. 13.

IX. All *chargeable Contracts* are reducible to four Heads; Firſt, [1] † *Goods for Goods* ; Secondly, * *Work for Work* ; Thirdly, ‖ *Goods for Work* ; Fourthly, *† *Work for Goods*. Where the Word *Work* is taken in a large Senſe, ſo as to comprehend even the *Deed* of another Man. *Grotius* [a] admits of but three, leaving out *Goods for Work* ; for that, he thinks, falls in with *Work for Goods* ; and indeed there is no real Difference between them, for both expreſs that Goods and Work are barter'd for one another : But in one, the Contract in a manner begins upon the Delivery of the Goods ; in the other, upon doing the Work. So that in the one the Doer ſeems the Author of the Contract ; in the other, the Giver: For in ſome Contracts, tho' both ſides are equally obliged, yet they take their Riſe from one only ; as in *buying*, the Buyer begins the Contract ; in *letting*, the Tenant, *&c.*

To the *firſt Head* belong all thoſe Contracts, where one thing is exchanged for another, as in Bartering ſtrictly ſo call'd. Where we may obſerve a Diſtinction nice enough, which ſome make between the general Contract of *Goods for Goods*, and *Bartering*. The *former* is, when the things exchanged are indefinite, as an Ox for a Mule ; or where, at leaſt, one Part is ſo ; as a Horſe for this particular Ox; Oil for Corn in general. But when the Goods in Contract are determined, *v. g.* this Ox for this Horſe, it becomes *Bartering* [b]. Hither may be referred the giving Money for other Money of different Species, or in a different Place ; which is now call'd *Exchange* [c]. Sometimes indeed Money is given for Money, ſo as to make it perfectly Buying and Selling ; as the Money ſtamp'd with Victory, which *Pliny* [d] tells us, before it had received that Stamp [2], was accounted a Commodity. If Goods are given for Money, the Contract is call'd *Buying* and *Selling*. Sometimes the Uſe of a Commodity is given for a Commodity, as if I lend my Horſe for a Book. Sometimes the Uſe of one thing for the Uſe of another, as if I let you live in my Houſe, upon condition that you let me enjoy your Land. Sometimes the Uſe of a thing for Money, which is properly called *Letting* and *Renting*. Some things too we give, in order to receive as much of the ſame ſort ſome time after.

Of the *ſecond* Head, *Work for Work*, there are innumerable ſorts, according to the infinite Variety of uſeful or pleaſant Actions, which may, in a manner, be exchang'd and perform'd for one another. In *Amm. Marcellinus*, l. xvi. c. 10. this ſort of Contract is call'd *Pactum reddendæ viciſſitudinis* And in *Apuleius* in Apolog. *Mutuarias operas cum vicinis cambire* [3].

To the *third* ſort, *Goods for Work*, belong the letting-out, or hiring Work, or Day-labour for Money, as alſo that ſort of Contract, by which Goods are ſecur'd and freed from Danger for Money, which is call'd *Inſuring*. As alſo, when any Commodity, conſumable or not conſumable, is given for the Performance of any Work.

To the *fourth* Head, *Work for Goods*, belong thoſe Contracts, by which any Work is done for any thing, or for the Uſe of any thing, or ſuch like [e]. Beſides, there may be Contracts not reducible to any of theſe Heads, as implying Disjunction [4] [f]. Such as were the nuptial Donatives among the *Muſcovites*, of which *Sigiſmund* Baron of *Herberſtein* gives this Account : *Thoſe that are invited to the Wedding, preſent the Bride ; all the Preſents the Bridegroom marks, and lays up carefully ; when the Wedding is over, he reviews them, and thoſe that he likes, he ſends to the Market to be priz'd ; all the reſt he returns back with Thanks. Thoſe that he keeps, he makes amends for, at the End of the Year, according to the Value of them, either in Money, or ſomething equivalent. If any one puts a greater Value upon his Gifts, the Bridegroom appeals to the ſworn Appraiſers, and forces him to ſtand to their Valuation. But if, in a Year's time, he does not make a Return, or ſend back the Gift, he is fined double. And if he forgets to have it valued by the ſworn Appraizers, he is forced to repay it at the Value of the Giver. And this Cuſtom the common People obſerve in all ſorts of Donatives.* The ſame thing is related of the Preſents the *Perſians* give liberally to Strangers [g] ; for which, if they do not receive a greater Return, they not only complain, but often revoke what they had given, or the Value of it.

All theſe ſorts of Contracts have this in common, that when they are perform'd on both ſides, the Parties have no longer any thing to do with one another upon this Score. And therefore [6] *Grotius* [h] calls them *Diremtorii*, and oppoſes them to

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† *Do, ut des.*

* *Facio, ut facias.*

‖ *Do, ut facias.*

*† *Facio, ut des.*

[a] In the aforeſaid Place.

[b] Vid. *Mornacium ad* lib. v. *D. De præſcriptis verbis.*

[c] In Latin *Cambium*, in Greek Κόλλυβος.

[d] Nat. Hiſt. lib. xxxiii. c. 3.

[e] Vid. *Totum*, t. 5. l. 19. *D. De præſcript. verbis.*

[f] As alſo the *Contractus æſtimatorius, de quo vid.* l. xix. t. 3. *D. De æſtimatoria actione.* Add. *Plaut. Captiv.* Act. ii. Scen. 3. ver. 18, *&c.*

[g] Vid. *Petrum della Valle, Itin.* Part ii. Epiſt. 1.

[h] In the aforeſaid Place.

Mr. BARB. *NOTES on* §. IX.

[1] So the *Digeſts* diſtinguiſh them, *Totius ob rem dati tractatus ---- in his competit ſpeciebus. Aut enim do tibi, ut des ; aut do, ut facias ; aut facio, ut des ; aut facio, ut facias*, l. xix. t. 5. *De Præſcript. Verb.* &c. l. 5. princip.

[2] See Mr. *Noodt*'s *Probabilia Juris*, l. iv. c. 4. where he recites a Law of the *Digeſt*. lib. xii. t. 4. *De condictione cauſâ datâ, cauſâ non ſequutâ*, leg. ult. which being corrected by an happy Conjecture, which he propoſes, ſhews, for Example, that the Lawyers looked upon it as an Exchange, and not a Sale, to give foreign Money for a Slave. See alſo *Bern. Briſſon. ſelect. Antiquit.* lib. i. c. 8.

[3] The laſt of theſe ſpeaks of thoſe who went up and down to do Husbandry Work the one for the other. *Ego adeo ſervos tu an habeas ad agrum colendum, an ipſe mutuarias operas cum vicinis tuis cambias, neque ſcio, neque laboro*, Apolog. p. 20. cum notis Pricæi. And *Am. Marcellinus* treats of certain auxiliary Troops, hired on condition of aſſiſting as long as there is need. *Hos ſequebantur poteſtate proximi reges numero quinque, regaleſque decem, & optimatum ſeries magna, armatorumque millia triginta & quinque, ex variis nationibus, partim mercede, partim pacto viciſſitudinis reddendæ quæſita*, l. xvi. c. 12.

[4] This is, when one truſts a thing to another to ſell at a certain Price, on condition, that he either returns the thing again, or the Value, according to the Price ſet on it. *Cum res æſtimata vendenda datur ---- æſtimatio periculum facit ejus, qui ſuſcepit. Aut igitur ipſam rem debebit incorruptam reddere, aut æſtimationem de quâ convenit*, Digeſt. lib. xix. t. 3. *De Æſtimatoria.* See *Plaut. Captiv.* Act. ii. Scen. 3. ver. 18, *&c.*

[6] *Grotius*'s Diviſion is into *Diremtorii* and *Communicatorii*, and not *Commutatorii*, as our Author has it, which he makes the two kinds of Contracts, which he calls *Permutatorii*. Moreover, there is another conſiderable Miſtake in the Original ; for we may obſerve that our Author underſtands *Grotius*'s Words, *Actus permutatorii aut dirimunt partes, aut communionem adferunt*, as if *dirimere partes* ſignified to divide the Parties or Contractors, and cauſe them to have no Dealings one with another. But *Grotius* was too nice to uſe ſuch a barbarous Expreſſion ; for if we examine his Words, we ſhall find his Notion to be this, that theſe ſorts of Acts either regulate the Part that each Contractor ought to have, or make the things about which they treat common.

thoſe Contracts which he calls *Commutatorii*, the Completion of which conſiſts in having Dealings continued between the Parties, as in that of Partnerſhip, where, for one another's Advantage, two or more join, either Work or Goods, or Work on one ſide, with Goods on the other. And theſe, together with thoſe which we call *gainful*, are generally *ſimple* Contracts.

X. But ſome Contracts are *mixt*, and, as it were, compounded of two ſorts: as if I deſignedly buy a thing for more than the Value, and ſo give the Overplus of the Price to the Seller; or [1] ſell a thing for leſs than the Value, and ſo give what is wanting of the Price to the Buyer: This is partly giving, partly buying and ſelling. Thus *Cæſar* ſold vaſt Farms to *Servilia* for a Trifle [a]. If I give greater Wages than the Work is worth, it will be partly Gift, partly Hire: which great Men ſometimes do out of Grandeur, thinking it for their Honour to reward any Man's Work more than it deſerves; and this is partly Liberality, partly Contract [b]. And on the other ſide, a Man may accept of Part of his Wages, and forgive the reſt [c]. If I bargain with a Goldſmith to make me Rings out of his own Gold, it will be partly *buying*, partly *hiring* [d]. Tho' ſome look upon it to be only *buying*; ſince in buying, we not only pay for the Materials, but for the Workmanſhip too. And there is little Difference whether the thing is already made, or to be made [2]. Nor can I be properly ſaid to hire, where the Perſon of the Workman remains at his own Diſpoſal [e]. When Land is let out for Rent, it is a *mixt* Contract of *ſelling* and *hiring*, tho' the Law of *Zeno* makes it a Species of itſelf. A *Grant by Fee* is ſo far a *gainful* Contract, as being much greater than the *military Service* that is due for it. Indeed, as far as this *military Service* may be exacted for the Protection that the Lord gives his Vaſſal, it partakes ſomething of the *ſecond* ſort of Contract, *Work for Work*; yet that which is the Principal in the Contract, belongs to the *third* ſort, *Goods for Goods*. But if this *Fee* be charged with the Incumbrance of a certain Quit-Rent, ſo far it partakes of Land-renting. Laſtly, *nautick Intereſt*, or what we call *Bottomry*, which vaſtly exceeds all other common Uſury, is mixt of borrowing and inſuring. But in Partnerſhip, tho' one contributes Money and Work, another only Money, yet it does not ſeem to be a *mixt* Contract. For it does not become mixt from the different Performances (for if I hire a Man to dig in my Vineyard, to ſow my Ground, and plant my Orchard, it is all but the ſimple Contract of Hiring) but from our Agreements in Matters of a different Nature, by one and the ſame Covenant.

Grotius [f] is of Opinion, that a Contract becomes *mixt* by the *Acceſſion of one Act to another*, as in Suretiſhips and Pledges. But in this he ſeems not ſo very accurate; for a third Species muſt reſult from a Mixture properly ſo call'd: Whereas in Suretiſhip the Security is not mix'd with the principal Contract, but is only added to it, as an extrinſick Confirmation. For the giving Security makes no Alteration in the Debt; but only makes Proviſion for the Creditor, in caſe the principal Debtor ſhould prove inſolvent. However, to ſpeak more accurately, there are in Suretiſhip two Contracts, which ſeem to be but one, becauſe the ſame Surety hath to do with both Creditor and Debtor; for there paſſes but a bare Promiſe between the Surety and the Creditor; and yet, ſtrictly ſpeaking, that Promiſe only ſhews that he is obliged to make good the Debt, and is not that which obliges him; for that which obliges him is the principal Contract, whereby the Surety by his Promiſe has brought an Obligation upon himſelf to ſupply the Failure of the Debtor: So that his Promiſe partakes of the Nature of the Contract itſelf. Now this Suretiſhip is no Gain to the Creditor; for he gets nothing by it, but a proper means of recovering his own. And altho' his Security is hereby provided for, yet not the Creditor, but the Debtor is beholden to the Surety; for without this Security the Creditor had never enter'd into Contract.

But when the Surety pays the Debt, then there ariſes an Account between him and the Debtor. For in this Caſe [3] he is ſuppoſed to have lent the Debtor the Money, or, which is all one, to have paid it by his Order and Commiſſion. Now this Act of Suretiſhip cannot be reckon'd an Act of Liberality; either in reſpect of the Debtor or Creditor; for the Debtor gets nothing by it, and the Creditor without it had not entred into any Engagement.

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[a] *Suetonius Julio*, c. 50.

[b] Add. *Matt.* xx. 9, &c. lib. xxvi. t. 7. l. 12. ſ. 3. *D. De adminiſtr. & peric. tutorum.*

[c] Add. *Val. Max.* l. v. c. 2. ſ. 10.

[d] So ſays *Grotius* in the aforementioned Place, ſ. 5.

[e] Vid. l. xviii. t. 1. l. 20. *D. De contrab. empt.* & Lib. iii. t. 25. ſ. 4. Inſtit. *De locat. & conduct.*

[f] In the aforecited Place, ſ. 6.

Mr. Barb. *NOTES on* §. x.

[1] That is to ſay, if the Sum be inconſiderable, in compariſon of the real Value of the thing, altho' it be much below the true Price. For if one gives, for Example, as much for a Dollar as is worth thirty or forty, then the Gift ſo much exceeds, that it ſwallows the Sale; and if the Diſproportion be yet greater, it can't be call'd a Sale but in Jeſt. This was the pretended Sale practiſed among the *Romans*, when, whatever Price the Goods were of, which one was ſaid to buy, he gave to the Seller, with certain Formalities, a ſmall Price of current Money, which was called, *Nummo addicere*. Alſo *Ulpian* ſays in the Law quoted by Mr. *Hertius*, that a Sale, ſuch as is laſt mentioned, is not good and valid in ſuch Caſes, as there ought to be a true Sale; whereas, when a Man ſells a thing at a very low Price, the Sale is valid, and is only looked upon as a kind of Gift at leaſt, if it be not between ſuch Men as are forbidden to give any thing to each other. *Si quis donationis cauſâ minoris vendat, venditio valet. Totiens enim dicimus in totum venditionem non valere, quotiens univerſa venditio donationis cauſâ facta eſt; quotiens vero viliore pretio res, donationis cauſâ, diſtrabitur, dubium non eſt, venditionem valere. Hoc inter cæteros, inter virum vero & uxorem, donationis cauſâ venditio facta pretio viliore nullius momenti eſt.* Digeſt. lib. xviii. t. 1. *De contrahendâ Emptione*, leg. 38. See lib. xix. t. 2. *Locati conducti*, leg. 47. & lib. xli. t. 2. *De adquirendâ vel amittendâ poſſeſſione*, l. 10. §. ult.

[2] The Words of the Digeſt are, *Nec poſſe ullam locationem eſſe, ubi corpus ipſum non detur ab eo, cui id fieret.*

[3] Theſe Fictions of Law are nothing but an empty Circle, uſed unneceſſarily: For the Rules of Equity are ſufficient to ſhew, that the Debtor ought to have paid rather what the Surety paid for him to do him Service, otherwiſe he was the Cauſe of the Damage.

CHAP. III.

Concerning the Equality which ought to be obſerved in chargeable Contracts.

- I. *The Equality to be obſerved in chargeable Contracts.*
- II. *The Faults of a thing are to be diſcovered.*
- III. *The Nature of a Contract requires it.*
- IV. *Whether what concerns not the thing itſelf, muſt be diſcovered?*
- V. *The Faults known on both ſides need not be mention'd.*
- VI. *No Man is to be ſcared into a Contract.*
- VII. *In gainful Contracts Equality need not to be obſerved.*
- VIII. *In a chargeable Contract nothing is ſuppoſed to be given.*
- IX. *How Inequality not foreſeen is to be corrected.*
- X. *Whether over-reaching in Buying be lawful.*

IN all [1] Contracts that are purely *chargeable*, and have nothing of the *gainful* mixt with them, where the Law, or the Market has fix'd the Prices of things, an Equality ought to be obſerved; or, one Party ought to receive as much as the other; and if one happens to receive leſs, he has a Right to demand the reſt [2]. And this is plain from the End of ſuch Contracts; for therefore a Man enters into them, that for his Goods or Work he may receive an Equivalent; which, for certain Reaſons, he prefers to his own Goods or Work.

But yet this admits of a more accurate Demonſtration; for ſince Contracts are neceſſary for my obtaining thoſe things which I had no Right to claim; and ſince it is preſumed that a Man gives nothing *gratis*, which he parts with upon Contract: We cannot therefore think, that any one deſigns to give away, by Contract, more than he ſuppoſes he receives; and conſequently a Contract can give a Right to another Man's Goods, no farther than as they are equivalent to ſomething which that other Man receives [a].

II. Now to find out and adjuſt this Equality, it is neceſſary that the Parties contracting be each of them alike acquainted with the Commodity and the * Qualities of it [1].

† *Conſule de gemmis, de tincta murice lana,*
Conſule de facie corporibuſque diem.
Ovid. De Arte amandi, l. i. ver. 250, 251.

And therefore he that is going to make over the Property of a thing, ought to expoſe, not only the good Qualities, but alſo, to the beſt of his [2] Knowledge, the Defects and Faults of it; for otherwiſe a juſt Price cannot be aſſigned [3]. To this Place belongs B. xix. t. 1. l. 1. ſ. 1. *D. De Act. empt. & vend.* L. xviii. t. 1. l. 43. ſ. 2. *D. De contrah. empt.* As alſo the whole firſt Title *De ædilit. edict.* B. xix. Where the Faults are reckon'd up one by one, which ought to be told in Sale of Cattle and Slaves; and which, if concealed, makes void the Bargain: So that the Seller muſt either take his Goods again, which is call'd *Redhibition*, or abate in the Price; but the firſt was not obſerv'd, if the Fault or Ail was inconſiderable. *Res bona fide vendita, propter minimam cauſam inempta fieri non debet*, Dig. l. xviii. t. 1. *De contrah. empt.* l. 54. So Mr. *Noodt* explains this Law very well in his Obſervat. l. ii. c. 11. Add. *Gell.* l. iv. c. 2. [4] *Cicer. Off.* l. iii. c. 16. *It is an Ordinance of the Civil Law, in the Matter of Eſtates, that the Vender ſhould ſtill tell the Purchaſer the Defects or Inconveniencies of the Eſtate;*

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[a] Vid. *Deut.* xxv. 13, &c. Lib. xlvii. t. 2. l. 52. ſ. 22. *De furtis.* l. vi. ſ. 1, 2. *D. De extraord. crimin.* l. xxxii. ſ. 1. *De leg.* Cornel. *De falſis.*

Mr. BARB. *NOTES on* Chap. III. §. I, II.

[1] Here is a plain Reverſe of the Order; for our Author does not treat of gainful or free Contracts till the next Chapter; and ſo he ought to have treated of chargeable Contracts, and the Equality to be obſerved in them. He is guilty of the ſame Careleſneſs in his Abridgment of the Duties of a Man and Citizen, l. i. c. 5. but I eaſily helped that, by only changing the third and fourth Paragraphs for the ſixth and ſeventh; but ſince I muſt change two Chapters here to do it, I dare not uſe that Liberty, and ſo have thought it enough to advertiſe the Reader of it.

[2] *Add*, or break off the Contract quite.

* That are of any Conſequence.

[1] In *Euripides*'s *Cyclops*, when *Silenus* came to ſell *Ulyſſes* Cheeſe and Milk, *Ulyſſes* bad him bring it out of his Cave; becauſe Contracts ought to be made in the open Day; Ἐκφέρετε. Φῶς γὰρ ἐμπολήμασι πρέπει. ver. 137.

† This Paſſage of *Ovid*'s concerns the Prudence of the Buyer, and the Caution he ought to uſe, that he be not cheated, rather than any Obligation the Seller is under to diſcover the Faults of his Goods.

[2] The *Roman* Law requires that it be done plainly, and without any Equivocation. *Dolum malum à ſe abeſſe præſtare venditor debet, qui non tantum in eo eſt, qui fallendi cauſâ obſcure loquitur, ſed etiam qui inſidioſe loquitur, obſcure diſſimulat.* There is alſo another Law to this Purpoſe, which treats of the Services of Inheritances; *Venditor, ſi cum ſciret deberi ſervitutem, celavit, non evadet ex empto actionem; ſi modo eam rem emptor ignoravit. Omnia enim, quæ contra bonam fidem fiunt, veniunt in empti actionem, ſed ſcire venditerem & celare, ſic accipimus, non ſolum ſi non admonuit, ſed & ſi negavit ſervitutem iſtam deberi, cum eſſet ab eo quæſitum.* About this whole Matter conſult Mr. *Daumat*'s Civil Laws in their natural Order, l. i. t. 2. §. 11. Part I.

[3] It had better have been ſaid, Otherwiſe the Buyer will not give ſo much. Our Author ſeems to ſuppoſe a Price, below which nothing is to be ſold. But of this ſee what is ſaid §. 9.

[5] *Cicero*'s Words are, *Ac de jure quidem prædiorum ſancitum eſt, apud nos jure civili, ut in his vendendis vitia dicerentur, quæ nota eſſent venditori. Nam cum ex duodecim tabulis ſatis eſſet, ea præſtari, quæ eſſent linguâ nuncupata, quæ qui inficiatus eſſet, dupli pœnam ſubiret, à Juriſconſultis etiam reticentiæ pœna eſt conſtituta. Quicquid enim eſſet in prædio vitii, id ſtatuerunt, ſi venditor ſciret, niſi nominatim dictum eſſet, præſtari oportere.*

for it being ſufficiently provided by the twelve Tables, that every Man ſhould make good what he promiſes, or declares by Word of Mouth, upon Penalty of double Damages for denying it ; the Civilians *have ſet a Puniſhment upon Concealments too, by enacting, that if the Seller of an Eſtate knew any Fault or Error, without expreſly acquainting the Purchaſer with it, he ſhould be obliged to make it good.* Add the Example that follows in *Cicero.* Ambroſ. de Off. l. iii. c. 10. *In Contracts the Faults of the Commodity ought to be expreſſed ; which, if it be neglected, although the Goods be in the Poſſeſſion of the Purchaſer, yet the Bargain may be vacated by an* Action of Deceit. (Although what he there ſays of an *Action of Deceit* does not rightly agree with the *Roman* Laws.) *Lactant.* l. v. c. 17. *He who does not correct the Error of the Seller (as ſuppoſe he ſees him deliver, by a Miſtake, a more precious Commodity than was agreed for) or who does not own his Servant to be a Run-away, or his Houſe to be infected, conſulting his own Profit and Advantage, is not a wiſe Man, as* Carneades *would have it, but a crafty Knave.*

Plato makes it a Law, that if a Phyſician buys a Slave, who labours under any incurable Diſtemper of Body, or Mind, he muſt ſtand to the Bargain: But if an unskilful Perſon makes the Purchaſe, the Seller that impoſes upon his Ignorance, muſt be fined double : But if one unskilful Man buys of another, the ſingle Price is to be reſtor'd [b].

III. This Neceſſity of diſcovering the Faults ariſes from the Nature of the thing, becauſe otherwiſe a juſt Price could not be aſſign'd ; and not from the common Bond of Humanity (as if that received a cloſer Tie by Contract) nor from the Contractors [1] entring into ſome ſort of Acquaintance, which may ſeem to oblige them to other Duties than thoſe that are required by the Nature of Contracts ; for when the Conditions are performed on both ſides, we don't think our ſelves more obliged to him we dealt with, than to any other Man, tho' indeed ſuch an Occaſion may ſometimes be the means of an Acquaintance and Friendſhip with him. And therefore, it is no Conſequence, that, becauſe it is not againſt the Law of Humanity to conceal a thing, therefore it is not againſt the Law of Contract. For if I be not engaged in Contract, I may lawfully conceal from others ſeveral things, tho' I alone am Gainer by it, which if I ſhould diſcover, other People would ſhare with me. As in caſe I ſhould find a Treaſure in a deſert Place, without any Owner, no Law obliges me to tell another, that he too may partake of it [c]. *Vid.* [2] *Matt.* xiii. 44. For here if the Purchaſer had told of the Treaſure, he had not bought the Field ſo cheap. *Vid. Grot.* l. ii. c. 8. ſ. 7. Hither may be referred the Story of *Anicas*, who firſt diſcovered the *Samoyedes*, and ſettled a Trade with them, related by *Londorpius* in his continuation of *Sleidan, ad an.* 1607. *Cic. Off.* iii. c. 10. ſays well, *That we ought not to neglect our own Advantage, when we can improve it without Injury to another.* For as *Chryſippus* elegantly obſerves, *He that runs a Race, ought to endeavour might and main to get the Victory, yet he muſt not lay hands on him that he runs with, or uſe any other foul Play. And juſt ſo it is in human Life ; any one may lawfully endeavour to better his Condition, but not at the Expence and Injury of another. Ambr.* has expreſt this Paſſage, *Off.* l. iii. c. 4. In Contracts that of [3] *Val. Max.* l. viii. c. 2. ſ. 1. ought to take place. *A fair Dealer ought, neither to magnify the good Qualities, nor conceal the ill ones of his Commodities.* [4] Hither may be referred that of *Plato de Leg.* l. xi. p. 966. *The Law which provides againſt the Seller's Over-reaching, ought alſo to be extended to the Workman : And therefore he had beſt take heed that he does not rate his Work at more than 'tis worth, for he cannot be ignorant of the Value of it. And certainly it ought to be allow'd, in a free State, that a Workman ſhould make uſe of Art, which is a plain Thing, and far from Deceit to impoſe upon the unskilful.* Hither too may be apply'd that which [5] *Socrates* ſays he heard of *Aſpaſia*, *Good Match-makers, that are ſincere in their Commendations of others, do good in making Alliances between Families; but thoſe that are falſe, do no good in commending. For when the Parties are undeceived, it ſo happens that they hate one another ; and thoſe too that were inſtrumental in the Match.* Xen. Mem. l. ii. p. 439. *Ed. H. Steph.*

IV. But as it cannot be doubted but the Faults of the thing itſelf ought to be declared ; ſo whe-

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[a] *De LL.* l. xi. p. 965. *Ed. Wech.*

[b] *Plato* in the ſame Place, " Let no Commendation or Oaths attend the Sale of any " Commodity. "

[c] See above, B. iv. c. 6. ſ. 13. and Mr. *Barbeyrac*'s ſecond Note upon this Section.

Mr. Barb. *NOTES* on §. III.

[1] Our Author ſeems here to refer to *Grotius*, tho' he names him not ; but he miſtakes his Senſe : For that great Man ſays, l. ii. c. 12. §. 9: That Bargainers enter a more particular Society, than that of Men in general, which only ſignifies, that they who deal together, engage themſelves thereby to certain things, to which they are not obliged as Men ; becauſe, as he ſays a little lower, Contracts are made for the mutual Advantrge of the Contractors. But we muſt not infer from hence, either that theſe Engagements extend farther than the Nature of a Contract ; or, that beſides this Contract, the Contractors, as ſuch, are obliged to one another in any other thing, more than thoſe who never had any Dealings one with another.

[2] This Example is only proper here, ſuppoſing that the Treaſure belongs of Right to the Owner of the Field ; for if the Laws of the Country adjudged it to him (as *Grotius* concludes from that Place, that the *Jews* Law did) the Buyer was guilty of a criminal Artifice, or indirect Robbery, if we conſider the Action in itſelf, without any relation to the Parable, whoſe Circumſtances, we know, are not at all to be urged, no more in this than in the Parables of the unjuſt Steward, *Luk.* xvi. 1. and Judge, *Luk.* xviii. 2. But to ſpeak my Thoughts, 'tis very uncertain whether it was in Uſe among the *Jews*, that the Maſter of the Field ſhould have the Treaſure found in it, ſince *Grotius* alledges no other Proof than the Circumſtance of the Parable, which can't be ſafely depended on. Suppoſing then, that by the civil Laws the Treaſure, unknown to the Owner, ought not to be left to the Proprietor of the Place where it is found, nor to be kept for the Prince ; in this Caſe I cannot ſee any Cheat in the Silence of the Buyer ; for inaſmuch as the Owner himſelf hath not diſcovered the Treaſure, he has no more Right to it than any other Man, and the Buyer is not obliged to tell him of what Diſcovery he has made. See l. iv. c. 6. §. 13.

[3] *Val. Maximus*'s Words are, *Bonæ fidei venditorem nec commodorum ſpem augere, nec incommodorum cognitionem obſcurare oportet. Plato* forbids Sellers to advance their Goods too much ; and above all, to ſwear that 'tis worth ſo much, or coſt ſo much, Ἔπαινος δὲ ὅρκός τε περὶ παντὸς τοῦ πωλουμένου ἀπέστω, *De Legib.* l. xi. He orders a little higher, not to pitch two Prices, but to ſet the true Price at firſt. Ὁ πωλῶν ἐν ἀγορᾷ, ὁτιοῦν μηδέποτε εἴπῃ δυὸ τιμὰς, ὧν ἂν πωλῇ.

[4] *Plato*'s Words are, Καὶ ἀναιρουμένῳ δ' ἔργον ξυμβουλευτὴς νόμος ἅπερ τῷ πωλοῦντι ξυνεβούλευε, μὴ πλέονος τιμᾷν διαπειρώμενον, ἀλλ' ὡς ἁπλούστατα τῆς ἀξίας, ταυτὸν δὲ προστάττει, καὶ τὸ ἀναιρουμένῳ· Γιγνώσκει γὰρ ὅγε δημιουργὸς τὴν ἀξίαν, ἐν ἐλευθέρων οὖν πόλεσιν οὐδήποτε χρὴ τέχνῃ, σαφεῖ δὲ καὶ ἀψευδεῖ φύσει πράγματι, διαπειρᾶσθαι τῶν ἰδιωτῶν τεχνάζοντα αὐτὸν τὴν δημιουργόν·

[5] *Socrates*'s Words are, Τὰς ἀγαθὰς προμνηστρίδας, μετὰ μὲν ἀληθείας τ' ἀγαθὰ διαγγελλούσας, δεινὰς εἶναι συνάγειν ἀνθρώπους εἰς κηδείαν, ψευδομένας δ' οὐκ ὠφελεῖν ἐπαινούσας. Τοὺς γὰρ ἐξαπατηθέντας, ἅμα μισεῖν ἀλλήλους τε, καὶ προμνησαμένην.

ther circumſtantial Matters, which tho' they be not of the Subſtance of the thing itſelf, yet help in the juſt prizing of it, ought to be laid open, both on the ſide of the Buyer, and of the Seller, has been controverted among the Antients. [1] *Cicero* [a] has a Caſe to this Purpoſe: *An honeſt Man*, ſays he, *ſets ſail from* Alexandria *to* Rhodes *with a Freight of Corn; the* Rhodians *being in great Diſtreſs for want of it, and the Commodity bearing an exceſſive Price: This Perſon knows that there are other* Alexandrian *Ships under way, and bound for the ſame Port, and with the ſame Cargo: Shall he tell the* Rhodians *there are other Merchants coming with Relief, or ſay nothing of it, and make the beſt Market of his Corn that he can? Antipater* is of Opinion, *That all the Circumſtances ought to be laid open; ſo that the Purchaſer may not be kept ignorant of any thing* (*tho' it does not concern the Subſtance of the thing in hand*) *which the other knows. Diogenes*, on the other ſide, ſays, *That the Vender is bound to diſcover all the Faults, ſo far as he is obliged to it by the Civil Law, and to manage his Bargain without Fraud; ſo that being to ſell the Commodity, he may without Deceit make the beſt of it. Here*, ſays he, *I have brought my Corn; I have expos'd it to Sale; I ſet no higher a Rate upon it than others do, nay, perhaps, I can afford it cheaper, there being now a greater Qantity than there was before. How is that?* (replies *Antipater*) *Is it not our Duty to conſult the Good of Mankind, and ſerve human Society? Don't we lie under an Obligation, from our Cradle, to make our private Intereſt the ſame with the publick, and the publick the ſame with our private? Shall we then conceal that from the publick, which it ſo much concerns them to be inform'd of?* To this *Diogenes: 'Tis one thing to conceal, and another not to tell. Do I tell you, at this Inſtant, what is the Nature of God, and what the Happineſs, or chief Good of Man, which it much more concerns you to know than the Price of Corn? And yet you will not ſay that I conceal this from you. But I am not obliged to tell whatever is for your Advantage to hear.* To this *Antipater* replies; *Yes, you are obliged, if you remember that Men are naturally linked together in Society. Well* (ſays *Diogenes*) *I do not forget it: But will you have it to be ſuch a Society, as that no Man ſhall have any thing in it particular of his own? If ſo, there's no longer any buying and ſelling, but only giving* [2]. Here *Cicero* himſelf ſeems to incline towards *Antipater's* Opinion [b]; for he ſays, * *This Concealment of the Corn-Merchant is not the Practice of an open, a frank, a ſincere, a juſt, a good Man; but rather of a ſhifting, a cloſe, a deceitful, a malicious Huckſter.* And yet *Cicero* himſelf ſeems to free him from the Imputation of Knavery; for a little after [3] [c], he defines Knavery to be, *the pretending one thing, and the doing another*, which cannot be objected in this Caſe. And therefore the Merchant did not act unjuſtly, in ſaying nothing of the Ships that were coming. For Juſtice only obliges us to expoſe what immediately concerns the thing itſelf; *as if a Houſe, by reaſon of its being infected, had been commanded by the Magiſtrates to be pull'd down*; with which Example *Cicero* illuſtrates this Paſſage. But nothing of this Nature was conceal'd; the Goodneſs of the Corn appear'd openly, and, at the time of the Contract, was really worth as much as it was ſold for, altho' likely to be leſs worth in a little time. Nor had the *Rhodians* a Right, properly ſpeaking, to know this of the Merchant, as never having made any Bargain with him about it [4] [d]. But whether he acted againſt the Law of Courteſy and Good-nature, is another Queſtion, which I would not eaſily hold in the affirmative. For Good-nature does not oblige me to do another Man a Courteſy *gratis*, except he be in extreme

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[a] Off. l. lii. c. 12.

[b] Chap. xiii. d. l.

[c] Chap. xiv.

[d] Vid. *Grot.* l. ii. c. 12. ſ. 9. n. 3.

Mr. Barb. *NOTES on* §. iv.

[1] *Cicero's* Words are, *Si, exempli gratiâ, vir bonus Alexandria Rhodum magnum frumenti numerum advexerit, in Rhodiorum inopia & fame, ſummaque annonæ caritate, ſi idem ſciat, complures mercatores Alexandria ſolviſſe, naveſque in curſu frumento onuſtas, petentes Rhodum viderit, dicturuſne ſit id Rhodiis, an ſilentio ſuum quamplurimo venditurus? Sapientem, & bonum virum fingimus, de ejus deliberatione & conſultatione quærimus, ſi celaturus Rhodios non ſit, ſi id turpe judicet, ſed dubitet, an turpe non ſit. In hujuſmodi cauſis aliud Diogeni Babylonio videri ſolet, magno & gravi Stoico, aliud Antipatro, diſcipulo ejus, homini acutiſſimo. Antipatro, omnia patefacienda, ut ne quid omnino, quod venditor nôrit, emptor ignoret. Diogeni, venditorem, quatenus jure civili conſtitutum ſit, dicere vitia oportere, cætera ſine inſidiis agere, & quoniam vendat, velle quàm optime vendere. Advexi, expoſui, vendo meum non pluris, quam cæteri, fortaſſe etiam minoris, cum major eſt copia. Cui ſit injuria? Exoritur Antipatri ratio ex altera parte. Quid ais? Tu cum hominibus conſulere debeas, & ſervire humanæ ſocietati, eaque lege natus ſis, & ea habeas principia naturæ, quibus parere, & quæ ſequi debeas, ut utilitas tua communis utilitas ſit, viciſſimque communis utilitas tua ſit, celabis homines, quid iis adſit commoditatis & copiæ? Reſpondebit Diogenes fortaſſe ſic, Aliud eſt celare, aliud eſt tacere, neque ego nunc te celo, ſi tibi non dico quæ naturæ Deorum ſit, quis ſit finis bonorum, quæ tibi plus prodeſſent cognita quam tritici utilitas; ſed non quicquid tibi audire utile eſt, id mihi dicere neceſſe eſt. Immo vero* (*inquit ille*) *neceſſe eſt, ſiquidem meminiſti eſſe inter homines natura conjunctam ſocietatem. Memini* (*inquit ille*) *ſed num iſta ſocietas talis eſt, ut nihil ſuum cujuſque ſit? Quod ſi ita eſt, ne vendendum quidquam eſt, ſed donandum.*

[2] Mr. *Placette* is of our Author's Opinion alſo; but the Paſſage ſhews, that *Cicero* did not much favour the Scholar againſt the Maſter.

* *Tully's* Words are, *Non igitur videtur —— frumentarius ille Rhodios —— celare debuiſſe. Neque enim id eſt celare, quicquid reticeas, ſed quuum id, quod tu ſcias, ignorare emolumenti tui cauſâ velis eos, quorum interſit id ſcire. Hoc autem celandi genus quale ſit, & cujus hominis, quis non videt? Certe non aperti, non ſimplicis, non ingenui, non juſti, non viri boni; verſuti potius, obſcuri, aſtuti, fallacis, malitioſi, callidi, veteratoris, vafri.*

[3] This is *Aquilius's* Definition; for theſe are *Tully's* Words, *Cum ex eo* [*i. e. Aquilio*] *quæreretur, Quid eſſet dolus malus? Reſpondebat, Cum eſſet aliud ſimulatum, aliud actum.* See Mr. *Noodt's* Treatiſe *De forma emendandi doli*, &c. *cap.* 2. where he ſhews us, that this is not a perfect Definition, and that the *Prætor* only gives an Example of what is comprehended under *Dolus*, or Deceit; ſo that he does not exclude Diſſimulation, by which one conceals what he does. Thus our Author's Reflection makes nothing againſt *Cicero*; and 'tis ſufficient to anſwer this great Author, That inaſmuch as thoſe, from whom we conceal a thing, are not concerned to know it, there is no Wrong done them; ſince they have no Right to require a Diſcovery, which hath place in the thing we are now treating of, for ſome Reaſons already alledged, and others which will be added below.

[4] I ſhall here add two Reflections, taken out of Mr. *La Placette's* Treatiſe of *Reſtitution*, p. 297. " I. It ſeems not worſe to " ſell that a little dear, which ſhall be ſoon ſold at a worſe Market, than to buy at a good Market, what we know we ſhall ſell dear " ſome little time after: For the Heathens, and particularly *Ariſtotle*, approves of the Action of *Thales*, who foreſeeing that a great " Scarcity would happen in a little time, bought a great Quantity of Corn, by which he got very much. See ch. v. following, at " the End. And as for what concerns the Chriſtians, they have an Example of *Joſeph*, who did the ſame in *Egypt*. II. If the Mer- " chant, being got to *Rhodes*, had found that Corn had been brought thither from ſome other Place, and he muſt ſell at a lower " Price than it coſt him at *Alexandria*, or if his Veſſel had been loſt in a Tempeſt, he muſt have born the Loſs, and no Man would " have minded to make good his Damage. Why then might he not make uſe of his good Fortune, which brought him into the

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treme Want of it. But this was not the Caſe of the *Rhodians*, they wanted Corn indeed, but not Money; for they were famous among the Antients for their Riches. Beſides, I am not obliged to do a Kindneſs, when 'tis like to tend more to the Detriment of the Giver than the Benefit of the Receiver. But, in this caſe, the Merchant would have loſt more than the Purchaſers would have got by the Intelligence. For if he vended it to a great many Purchaſers at the Market-price, each would have felt it but little; and if any one Man had engroſs'd the whole, he might thank his own Avarice, if he loſt by it; and indeed we cannot expect, in the common way of the World, that Men ſhould be ſo very exact in the Performance of this Duty: For, provided the Love of Money does not tempt the Merchant to cheat us, we may eaſily excuſe them from what the Law of Courteſy and Good-nature may ſeem to oblige them to.

V. As for Faults already known to the Buyer, they need not be mentioned, for in this caſe both Parties proceed upon the ſame Foot [a]. So likewiſe, where the Seller has told the Faults, the Bargain ought to ſtand good, for then 'tis manifeſt that the Buyer conſents to them; [1] *Cicero* has a Caſe [b] to this Purpoſe. Gratidianus *ſold to* S. Orata *thoſe very Houſes which he himſelf had bought of him but a few Years before. Theſe Houſes paid a Duty to* Orata *(which was out of his Mind) but* Gratidianus *made no mention of it in conveying his Right. The Cauſe was brought into the Court.* Craſſus *was for* Orata, *and* Anthony *for* Gratidianus. Craſſus *inſiſted upon the Law, that the Seller knowing it ought to have acquainted the Purchaſer with the Incumbrance, but did not do it.* Anthony *inſiſted upon matter of Equity, that the Incumbrance was not unknown to* Orata, *who had ſold the Houſes, which made it needleſs for* Gratidianus *to ſay any thing of it; nor could* Orata *be ſaid to be deceived, that knew what Title he had bought.* For as *Ulpian* ſays, lib. xix. t. 1. l. 1. ſ. 1. *D. De Act. empt.* [2] *He does not ſeem to have the thing concealed, who knew it, nor ought he to be advertiſed of it, who was not ignorant.* Add. l. xviii. t. 1. l. xliii. ſ. 1. l. lvii. ſ. 3. *D. De contrah. empt. Lib. ult. D. De Ædilit. edicto* [3]. Upon the ſame Principle was founded the Sentence that *Marius* gave in the Caſe of [c] *Fannia*, who had been married to *Tinnius*; but upon a Divorce demanded back her Dowry, which was conſiderable. He objected Adultery againſt her. The Cauſe was brought before the Conſul. After a Hearing on both ſides, it appearing, that ſhe had been an immodeſt Woman, and that her Husband, knowing her to be ſuch, had yet ventured to marry her: The Conſul reproved them both, and order'd him to reſtore her Dowry, and her to be fined four *Aſſes* for her ſcandalous Behaviour [d].

VI. Beſides, as in all Pacts, ſo eſpecially in Contracts, neither Party ſhould be forced into a Bargain by an unjuſt Fear. The *Lacedemonians* therefore did right in reſcinding the Purchaſe of the Land that the *Elians* had extorted from the Poſſeſſors thro' Fear: For they were of Opinion, *To force a Title from the weaker under the Pretence of Purchaſe, was no better than downright Robbery* [e] [1]. Thus when *Cicero* [f] objected againſt *Verres*, the Pictures and Statues which he had brought out of *Sicily*; *Verres* thought he could anſwer the Accuſation in a Word, by ſaying [2], *I bought them.* But *Cicero* replies, *That their Anceſtors had wiſely enacted, that whoſoever ſhould be ſent Governour into a Province, ſhould not be allowed to make any Manner of Purchaſe: And for that Reaſon Money and Equipage was provided them by the Publick. Slaves indeed were not, becauſe there was ſcarce any Man of Figure in* Rome, *but had ſome of them. And yet no*

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[a] Vid. *Grot.* l. ii. *ubi ſupr.* n. 3.

[b] *De Off.* l. iii. c. 16.

[c] *Plutarch in Mario*, p. 427. *Ed. Wech.* and *Val. Max.* l. viii. c. 2. ſ. 3.

[d] Vid. l. xlviii. t. 5. l. 13. ſ. 9, 10. *D. Ad L. Jul. De adult.*

[e] Xenoph. l. iii. *Rer. Græcarum*, p. 288. Vid. *Grot.* l. ii. c. 12. ſ. 10.

[f] Orat. ix. l. 4. c. 5.

Mr. Barb. *NOTES* on §. iv, v, vi.

" of Gain? On this Account (ſays Mr. *La Placette*) I dare not condemn the Merchants, who make their Gains by the Advices " which they receive from their Correſpondents in other Countries. As theſe Correſpondences coſt them ſomething, it is juſt they " ſhould gain by them, nor can I think that they are bound in Conſcience to diſcover them to any body.

[1] *Jus Craſſus urgebat* (ſays *Cicero*) *quod vitii venditor non dixiſſet ſciens, id oportere præſtari; æquitatem Antonius, quoniam id vitium ignotum Sergio non fuiſſet, qui illas ædes vendidiſſet, nihil fuiſſe neceſſe dici, nec eum eſſe deceptum, qui id, quam emerat, quo jure eſſet teneret.* Moreover, to underſtand the Cauſe of this Suit, we muſt ſuppoſe that *Sergius* demanded an Abatement in the Price, upon the account of the Right of Servitude, which had been heretofore apparently reſerved upon the Houſe, when it was ſold to *Marius*, which made it of a leſs Value; for he affirmed, that ſince that Servitude was known, no body asked the Price of it.

[2] *Ulpian*'s Words are, *Hæc ita vera ſunt, ſi emptor ignoravit ſervitutes, quia non videtur eſſe celatus, qui ſcit; neque certiorari debuit, qui non ignoravit.*

[3] To this belongs that of *Horace*, Lib. II. Ep. ii. ver. 14, *&c.* where he brings in a Fellow ſelling a Slave; who, after having reckoned up his good Qualities, adds,

—— Semel hic ceſſavit; &, ut fit,
In ſcalis latuit, metuens pendentis habenæ.
Des nummos, excepta nihil te ſi fuga lædat,
Ille ferat pretium, pœnæ ſecurus, opinor.
Prudens emiſti vitioſum: dicta tibi eſt lex.

This Boy was faulty once, he ſtay'd at Play,
And, when he fear'd the Laſh, he ran away;
Buy, if you like him now, his Faults are told,
The Dealing's fair, and he may take your Gold,
And ne'er be thought a Cheat for what he ſold.
Mr. *Creech.*

Add. l. xxix. t. 5. l. 1. ſ. 33. *D. De Senatuſc. Silaniano.* Lib. xxi. t. 1. *D. De Ædilit. edicto*, l. 17. ſ. 10.

[1] *Plutarch*'s Words are, Γνόντες μηδὲν δικαιότερον εἶναι βίᾳ πριαμένȣς, ἢ βίᾳ ἀφελομένȣς, παρὰ τῶν ἡττόνων λαμβάνειν.

[2] *Cicero*'s Words are, *Verbo jam uno repellar, Emi, inquit. —— Primum ſi id quod vis, tibi ego concedam, ut emeris —— quæro, cujuſmodi tu judicia Romæ putaris eſſe, ſi tibi hoc quenquam conceſſurum putâſti, te in Prætura, atque imperio tot res, tam pretioſas, omneſque denique res, quæ alicujus pretii fuerint, tota ex Provincia coemiſſe. Videte Majorum diligentiam, qui nihil dum etiam iſtiuſmodi ſuſpicabantur, veruntamen ea quæ parvis in rebus accidere poterant, providebant. Neminem, qui cum poteſtate, aut legatione in provinciam eſſet profectus, tam amentem fore putaverunt, ut emeret argentum; dabatur enim de publico, ut veſtem, præbebatur enim legibus; mancipium putaverunt, quo & omnes utimur, & non præbetur à populo. Sanxerunt,* NE QUIS EMERET MANCIPIUM, NISI IN DEMORTUI LOCUM, *ſi quis Romæ eſſet demortuus? Imo, ſi quis ibidem: non enim te inſtruere domum tuam voluerunt in provincia, ſed illum uſum provinciæ ſupplere. Quæ fuit cauſa, cur tam diligenter nos in provincia ab emptionibus removerent? Hæc, Judices, quod putabant ereptionem eſſe, non emptionem, cum venditori vendere ſuo arbitratu non liceret. In provinciis intelligebant, ſi is, qui eſſet cum imperio & poteſtate, quod apud quemque eſſet, emere vellet, idque ei liceret, fore uti, quod quiſque vellet, ſive eſſet venale, ſive non eſſet, quanti vellet, auferret.*

Man, in his Province, could buy a Slave, but in the room of a dead one; for they look'd upon it to be plundering, and not purchaſing, when the Seller could not ſell at his own Rate. And in a Province, they were convinced, that if the Governor, back'd with Power and Authority, ſhould be permitted to buy what he pleas'd, it would be brought to that paſs, that he would have whatſoever he had a fanſy for, whether expos'd to Sale, or no, and at his own Rates. Add. *l.* xviii. *t.* 1. *l.* xlvi, lxii. *D. de contr. empt* & *l.* xlviii. *t.* 11. *L. penult. D. ad L.* Jul. *repetund. L.* vi. *l.* 2. *t.* 20. *l.* 11. *de his quæ vi metuſque cauſa,* &c. *Conſtitut. Sicularum, l.* 1. *t.* 88. *ſ.* 1. *Tacitus, Ann.* xiv. *c.* 14. *in fin.* “When the Purchaſer can force him to it, the Seller lies under a Neceſſity of parting with his Goods. Hither may be referr'd what *Dio Caſſius* relates of *Ceſar,* l. xlii. who, after *Pompey*'s Defeat, ſeized upon that Money, which he had no other pretence of Levying, than under the ſpecious Name of a Loan, tho' otherwiſe he had taken it by Force, as if it had been his Due, and never had any deſign to reſtore it.” But yet [a] ſometimes the Subject may be forced by the Government in Matters of Sale or Hire: As when Merchants are obliged to ſell that which the Government is in great Want of; or when their Waggons or Ships, or they themſelves are preſt; which, when the Good or Neceſſity of the Publick requires, and a juſt Rate is paid, may be fairly allowed of. Sometimes too, the State obliges us to buy ſuch a ſort of Commodity, of this or that Man only, and no where elſe.

VII. But 'tis plain, that in *gainful Contracts* this Equality does not take place; for where an Equality is to be obſerved, the Contract ceaſes to be *gainful* [1]. But when a Preſent is made by way of Recompence [2], the Contract is ſomething like Hiring. And yet, in a Charge, or a Commiſſion, an Equality may ſometimes be regarded, tho' indirectly, and by Accident; for if any thing, beſides Labour, has been laid out in ſoliciting the Buſineſs, or managing the Charge, it ought exactly to be refunded. And the Reaſon is, becauſe in ſuch Contracts as theſe the Labour is given *gratis,* but the Expence [3] tacitly agreed upon to be repaid [b].

VIII. But in *chargeable Contracts* an Equality is to be ſo ſtrictly regarded, that if one Party has received more than his Due, he muſt not retain the Overplus, upon preſumption that it was deſigned for a Gift. For Men do not enter into ſuch ſort of Contracts, with a Deſign to give any thing [1]. And therefore ſuch a *mixt Contract* muſt not be preſumed, unleſs the Party expreſly conſents to it, or it appears that he knew the Thing to be under-rated. An Example we have in *Pliny,* l. vii. Epiſt. 11, & 14. where he ſays, “He had, upon the ſcore of Friendſhip, ſold Lands for leſs than they are worth. It was generouſly done of *Scævola,* who being upon a Purchaſe, bid the Proprietor tell him, in one Word, what he would have for the Eſtate; who when he had done it, *Scævola* told him he had undervalued it, and gave him 10000 *Seſterces* more than his Bargain.” *Cic. Off. l.* iii. *c.* 15.

IX. From what has been ſaid, it follows, that altho' all the Faults have been expos'd [c], and nothing demanded more than what was ſuppoſed to be the Value; yet if afterwards there appears to have been an Inequality, without any Fault of the Contractor (as ſuppoſe ſome Blemiſh lay undiſcovered, or they miſtook the Price) it ought to be corrected, and Amends made to the Sufferer [d]. Nor is it neceſſary by the Law of Nature [1], that this Inequality ſhould exceed the half of the juſt Price. For that famous Law [e], which

Mr. BARBEYRAC's *NOTES on* § VII, VIII.

[1] The Words are, *In ſummâ ſciendum eſt, mandatum, niſi gratuitum ſit, in aliam formam negotii cadere. Nam mercede conſtitutâ, incipit locatio & conductio eſſe;* & *(ut generaliter dicamus) quibus caſibus ſine mercede ſuſcepto officio, mandati ſive depoſiti contrahitur negotium, in caſibus intervenienti mercede locatio & conductio intelligitur contrahi. Vid.* S. Fin. inſtit. de Mandato, l. 3. t. 27. ſ. 13. & D. l. 16. t. 3. l. 1. ſ. 9. D. Depoſ. *&c.* l. 1. § 9.

[2] The *Roman* Lawyers call it *Honorarium.* See *Digeſt. l.* 11. *t.* 6. *Si menſor falſum dixerit. leg.* 1. *princ.* & *l.* 50. *t.* 13. *De extraordinariis cognitionibus, &c. leg.* 1. § 10.

[3] This Fiction of Law is no ways neceſſary. The Maxims of Equity are ſufficient only to ſecure to him, who has received a Truſt, or who is charg'd with another Man's Buſineſs, his Damages and Expences, which he is at in ſerving the Perſon that has entruſted him, or given him a Commiſſion.

[1] See the foregoing Chapter, § 10. Note 1.

[a] See *l.* 3. *c.* 3. § 12. above. [b] *Vid.* l. 12. prin. D. depoſiti d. l. [c] V. *Grot. l.* 2. *c.* 12. *ſ.* 12.

[d] Add. *l.* 19. *t.* 1. *l.* 13. *Princ. ſ.* 1, 2, 3, 4. *D. de act. emp.* & *l.* 21. *t.* 1. *l.* 1. *ſ.* 2. *D. de ædilit. edicto.* [e] *Cod. lib.* 4. *t.* 1. 44. *l.* 2. *C. de reſcinden. vendit.*

Mr. BARBEYRAC's *NOTES on* § IX.

[1] The Words of the Code are, *Rem majoris pretii, ſi tu vel pater tuus minoris diſtraxerit; humanum eſt, ut vel pretium te reſtituente emptoribus, fundum venundatum recipias, auctoritate Judicis intercedente; vel ſi emptor elegerit, quod deeſt juſto pretio, recipias.* Mr. *Thomaſius* has publiſh'd a curious Diſcourſe upon this Law in 1706. under this Title, *De Æquitate cerebrinâ Legis* 2. *Codicis de reſcind. vend. & ejus uſu practico:* Of which this is the Abridgment of the moſt conſiderable Matters in it; A Sale or Contract made null for the Smallneſs of the Price, altho' there was no Deceit or Force otherwiſe uſed, was not known before *Diocleſian.* From that time it hath been a Maxim current among the Lawyers, that by the Law of Nature every one may make as advantagious a Market for himſelf as he can, and to that End may make uſe of all innocent Artifices. Whence they began to make uſe of ſuch ſharp Terms as theſe, *circumſcribere, circumvenire,* which are commonly taken in the worſt Senſe. See the Notes 1, 2. of the following Paragraph. After *Diocleſian,* the Emperors *Conſtantine the Great, Gratian, Valentinian* and *Theodoſius, Honorius* and *Arcadius* repeal'd that Law of that Pagan Emperor. *Venditionis atque emptionis fidem, nullâ circumſcriptionis violentiâ factam, rumpi minime decet. Nec enim ſola pretii vilioris querela, contractus ſine ullâ culpa celebratus, litigioſo ſtrepitu turbandus eſt,* Leg. 1. See alſo *Leg.* 4, and 7. *Diocleſian* himſelf ſeems to have retracted it at length, as appears by another Reſcript, which is found under the ſame Title of the Code, and which is cited in the next § Note 5. 'Tis true, that at the End of that Law we find a Clauſe conformable to the 2d Law there treated on; but when we examine the foregoing Diſcourſe, 'tis only a Clauſe put in by *Tribonian*; for if the Reaſons alledg'd in the 8th Law be good, as they really are, they prove that a Contract ought not to be nulled, unleſs one of the Contractors has paid more by the half, or received one half leſs than the Thing is really worth. There are all the Signs in the World that the End of the 2d Law, where the Meanneſs of the Price, which nulls a Contract, is fixed to half the full Value of the Thing, is an Addition of *Tribonian*'s: For beſides, that it might have been better placed among the foregoing Words, the Laws of the *Theodoſian* Code contradict it, and ſimply and in general diſallow the Nullity of a Contract, upon the Account of the Smallneſs of the Price alone; and there appears no Footſteps of any Diſtinction of what is above or below the true Price. *Tribonian* having found in the *Gregorian* and *Hermogenian* Codes, whoſe Compilers not dreaming to bring the Civil Law into the Form of a Syſtem, had gathered together all the Imperial Conſtitutions and Ordinances before

which refuſes Relief, but where the Inequality is ſo notorious, is purely poſitive, and founded principally upon this, That it would be impoſſible to diſpatch Buſineſs, if the Magiſtrate might be appeal'd to for every little Injury of this kind. And beſides, the Nature of the Market requires that we ſhould look about us, if we would not be deceived, for whatever Rate the Seller puts upon his Goods, the Price is ultimately determin'd by the Buyer [a]; tho' indeed the Determination of this Law is too groſs. For tho' the Magiſtrate ought not to be troubled for every Trifle, yet I ſee no Reaſon why he ſhould not relieve me, if I have been very much injur'd, altho' not half in half: As if I ſhould ſell a Houſe worth 900 *l.* for 600 *l.* 'tis hard I ſhould be debarr'd the Benefit of the Law, for the Recovery of the 300 *l.* when in much leſs conſiderable Caſes an Action is allowed me. And therefore, as a ſmall Damage, even in the Law of Nature, is not ſufficient to break off a Bargain; ſo where the Damage is great, altho' it amounts not to half the juſt Price [2], the Bargain ought to be reſcinded, or the Price made up. And this Greatneſs of the Damage is to be eſtimated, either by the Exorbitancy of the Price, or the Poverty of the injur'd, which ſometimes renders the Loſs intolerable to him, which a richer Man would not be ſenſible of. Nay, even where the ſaid Law is in Force, the Buyer is obliged, in Conſcience, to make up a very great Damage, altho' it comes not up to half the Price; for that Law only deſigns the Eaſe of the Magiſtrate, and not that one Man ſhould be a Gainer at another's Loſs. Indeed they do well to extend the Benefit of the Law to the Buyer [3], as well as to the Seller; which too, they tell us, is to be extended to all other ſorts of Contracts.

Among the *Jews* [b], if one defrauded another, whether Buyer or Seller, the Law afforded no Relief, if the Cheat came under the Sixth Part of the juſt Price. But if it exceeded the Sixth Part, the Buyer might either immediately, or at any time during the Negotiation, reſcind the Bargain, and recover the whole Price: But if the Seller had been the Sufferer, he was never barr'd from making a Recovery. And the ſame Law obtained in the Bartering of *conſumable Commodities*, as of Fruit, Corn, and ſuch like. But the *Jew* only, if injur'd, enjoy'd the Benefit of this Law; and not the *Gentile*, if injur'd by a *Jew*.

X. To what has been ſaid, the *Roman* Lawyers have taken a great deal of Pains to reconcile a Paſſage in the *Digeſts* [c], [1] which ſays, *That in Buying and Selling the Parties may* [2] *naturally over-reach one another*. Of which *Grotius* [d] ſeems to give a good Explication. For he ſhews, that *may* and *muſt* do not always denote that it is lawful, but only that it is ſo far permitted, as that the Sufferer can have no Remedy, in caſe the other inſiſt upon the Bargain, and, being tax'd of Injuſtice, replies, that it was nothing but what was agreed upon betwixt them:

Conſtantine, not troubling themſelves whether they agreed one with another, or not. *Tribonian*, I ſay, having found theſe two Reſcripts of *Diocleſian*, of which the laſt was directly contrary to the firſt, but appearing to him nevertheleſs equitable, believed that they might be reconciled by a Diſtinction, which he annexed to each of them. After this he ſuppreſs'd the 1ſt and 7th Laws of the *Theodoſian* Code, becauſe they could not eaſily be accommodated in any ſuitable manner, to his Notions; and tho' he retain'd the 4th, which is now the 15th in the Title of the *Juſtinian* Code, he made ſeveral Alterations in it, that it might make for his Purpoſe evidently, as among others this: Inſtead of *Repetitionis in Reliquum, PRETII NOMINE VILIORIS, copiam minime conſequatur*, as the Laws of *Gratian*, *Valentinian*, and *Theodoſius* import, he put, *PAULO vilioris pretii nomine*, &c. This manifeſt Corruption made all that he had to ſay of *Diocleſian*'s two Reſcripts plauſible. And I will add, tho' Mr. *Thomaſius* did not obſerve it, that there is Reaſon to believe, that in Book VIII, the Word *Paulo* is alſo inſerted in the ſecond Period, before *Minore pretio*. The Canon-Law having afterward approved the Foundation of the Law of the *Juſtinian* Code, it was look'd upon as a Concluſion flowing from indiſputable Equity, and paſſed for a Rule in all the Courts, except *Magdeburg*; where ſuch Political Ordinances are almoſt quite aboliſhed. Nevertheleſs Mr. *Thomaſius* maintains, that it cann't be brought into Practice, becauſe the common Price, by which the Damage muſt be regulated, is very changeable and uncertain; ſo that it is very hard to fix a Moiety or a Quarter, *&c.* Further, a great Damage, ſuch as that we are ſpeaking of, cann't be done in a Contract, without ſome great Grief to one of the Contractors at leaſt, and then there's no need of *Diocleſian*'s Law; or the Fault may be on both Sides; and then we muſt judge according to the Principles eſtabliſhed above; *Lib.* 3. *c.* 6. § 6. See more in the following Note.

[2] But Mr. *Hertius* obſerves here and in his Diſcourſe *De Lytro*, Sect. 2. § 22. How doth this agree with what our Author ſays, *c.* 1. § 8. of this Book? *Grotius* alſo ſays, That as to outward Actions, the Inequality to which both Parties have conſented, and there has been no Lying nor Concealment of any thing that ought to have been diſcovered, ſuch an Inequality paſſes for Equality; ſo that in the Civil Law, no Action in Juſtice lay before the Conſtitution of *Diocleſian (i. e.* before Law 2. ſpoken of in the foregoing Note.) Likewiſe, between ſuch as are united only by the Law of Nations, no Reſtitution can be required, nor any Man be forced to make good ſuch Damages, *l.* 2. *c.* 12. § 26. *n.* 1. It is true that he adds, that this is only an outward Permiſſion, which is of no Force in *Foro Conſcientiæ*, tho' it may be ſtrengthened by Cuſtom. But this ſuppoſeth, that the fixing a Price in Contracts is grounded on the Nature of Things themſelves, or depends on the Will of a third Perſon; whereas the Truth is, that laying aſide all Fraud, and all Orders of the Civil Law, 'tis the Conſent of Parties that fixes the juſt Price; ſo that after their Agreement, there is no Injury done contrary to juſtice, properly ſo call'd. See Mr. *Thomaſius*'s Diſcourſe, quoted *c.* 2. § 15, *&c.* 'Tis another Caſe to determine, whether we may commonly uſe this Right (See *c.* 1. § 9. Note 1.) or whether we do amiſs in uſing it againſt the Laws of Liberality and Bounty, which require our Help to our Neighbour in his Need, and not to make an Advantage of his Want or Misfortune. Upon which Account he that compoſed *Diocleſian*'s Reſcript, may be freed from the Blame which Mr. *Thomaſius* charges on him, *ſup.* § 32. that he confounds the Rules of Humanity and Juſtice: For in the Stile of the *Roman* Lawyers, *Humanum eſt*, ſignifies, 'Tis Juſt, Equitable, and Reaſonable, *&c.* See, for Example, *Code l.* 1. *t.* 14. *De Legib. & Senatus conſ. & Leg.* 8.

[3] *Cujacius* maintains, *Obſervat.* xvi. 18. & xxiii. 32. that it was not allowed by the *Roman* Law.

[a] To which may be applied that of *Cicero*, *Off. l.* 3. *c.* 17. "Laws and Philoſophers provide againſt Frauds different Ways; "the Laws regarding only Matters of Overt Act, whereas Philoſophers judge according to Equity and Reaſon." [b] *Selden de J. N. & G. l.* 6. *c.* 5. [c] *Add.* l. 19. t 2. l. 22. ſ. 3. D. locati, *&c.* [d] L. 2. c. 12. ſ. 26.

Mr. Barbeyrac's *NOTES on* § X.

[1] *Idem Pomponius ait, in pretio emptionis & venditionis naturaliter licere contrahentibus ſe circumvenire.* Digeſt. l. 4. t. 4. De Minoribus, Leg. 16. § 4.

[2] This Explication of the Word, *Naturally*, is not proper; for it is never taken by the *Roman* Lawyers ſo far as I know, for Cuſtom; and tho' it may ſignify ſo in Authors, yet it follows not, that we may ſo explain it here. Nothing is more common in the Body of the Law, than to ſignify by *Naturaliter*, a Thing agreeable to natural Reaſon, or the Law of Nature; and ſo it is to be underſtood here. And ſo *circumvenire* (or as another Law has it, *circumſcribere*) ſignifies here any Innocent Art to get as good a Bargain as we can. The Word *Dolus* here is taken in a good or bad Senſe; and ſo *Lucretius* uſes the Word *Decipere*, in theſe Verſes:

Ut puerorum ætas improvida ludificetur,
——— *Deceptaque non capiatur.*

That th' careleſs Age of Boys may ſo be cheated,
And being deceived, may not be defeated.

Mr.

them: And he that won't open his Eyes, as the Saying is, muſt open his Purſe. *Add. Lex Cujavior. t. 15. c. 9. ſ. 1.* and *Capitulare Caroli, l.* v. *c.* 210. *In Xenoph. de Memorab. Socr. l.* ii. towards the End, this Rule is given, *'Tis a Piece of good Husbandry, when a valuable Thing can be bought cheap, to buy it.* Add a witty Saying of *Cicero's* in *Gellius,* l. xii. c. 12. *Vid.* Sen. de Beneficiis, *l.* vi. *c.* 38. Where he diſputes whether *Demades* did well at *Athens,* in condemning one who got his Livelihood by providing Things neceſſary for Funerals, having prov'd that he deſired a quick Trade, which could not be without the Death of a great many People. Add *Capitulare Caroli, l.* i. *c.* 131. As for the Inſtance of *Jabob*[3], his Craftineſs is the more excuſable, becauſe he had to do with a deſigning Man, who endeavoured every way to over-reach him, [a] and who impos'd hard Conditions upon him, giving him only half of the Young for keeping his Sheep, and yet making him ſtand to all Accidents. So alſo the Word *naturally* [b] does not always ſignify what ought to be done by, or what is congruous to the Law of Nature, but what is cuſtomary, as, 1 Cor. xi. 14. *Doth not even*[4] Nature *itſelf teach you, that if a Man have long Hair, it is a ſhame unto him?* Yet here the Word Κομᾶν, *to have long Hair,* may be taken for too nice a Care in adorning the Hair, which Women ſeem to claim as their Right, and which ſeem too effeminate in a Man [c]. Tho' indeed it is diſagreeable to the Dictates of natural Reaſon for a Man to aſſume that Habit, which Length of Time has appropriated to Women, and by which their Sex is diſtinguiſh'd from ours. But to return to the Matter in hand. *Lib.* iv. *t.* 44. *l.* xlviii. *C. de reſcind. vendit.*[5]. "It is the conſtant Way of Buying "and Selling, for the Buyer to beat down the "Price, and the Seller to raiſe it, till after many "Words on both Sides, the former riſes in his "Bidding, and the latter falls a little from his "Demands; at laſt they agree in a certain Price." *Anacharſis in Diogenes Laertius,* B. i. ſ. 105. did not abſurdly call the Market, "A Place to cheat "one another in, and deſtin'd to Covetouſneſs." *Add.* l. xviii. *t.* 19. *D. de ædilit. edicto.* Every Man has naturally a great Deſire of increaſing his Stock, and therefore Trade could hardly be carried on in a Society, were there not ſome Incouragement for Induſtry. Vid. *l.* xvii. *D. de Contrah. empt.* "He "deſerves to be laugh'd at, who ſuffers himſelf to "be impoſed upon." *Plin.* l. i. *c.* 24. *princip.* "To "make a bad Bargain is the more ungrateful, be- "cauſe it expoſes the Folly of the Maker."

> ——— *An tibi mavis*
> *Inſidias fieri, pretiumque avellier ante,*
> *Quam mercem oſtendi?*
> Hor. Sat. l. i. ſ. 2. v. 103, 104, 105.

> Would you be cheated? the Occaſion's fair,
> Since you would buy before you ſee the Ware.
> Mr. CREECH.

Beſides, each Party ſeems by tacit Conſent (ſince an exact Equality, even by the niceſt Scrutiny, is ſo difficult to be determin'd) to indulge one another the Liberty of deviating a little from the true Price. And therefore it ſeems to be the received Law of the Market, that every one ſhould be free to make his beſt Advantage of Buying and Selling, provided there be no Deceit in the Commodity itſelf [d]. For if there be, the Opinion of *Fulgentius* [e] will take place, who ſays, *That* Mercury *was therefore ſuppoſed to be the God of Trade and Thievery, becauſe there is no Difference between the Cheating and Lying of a Tradeſman, and the Robbery and Perjury of a Thief.* "The *Ephori* fined a Young "Man for Buying a Farm at a cheap Rate; "and the Reaſon they gave, was, Becauſe ſo "young a Man was ſo much given to Lucre. *Æl. V. H. l.* xiv. *c.* 44.

Mr. *Thomaſius ſupra* § 29. prefers another Explication, but not ſo exact or natural, tho' in the End it comes much to the ſame. It ſeems alſo to me, that in the Law of the Digeſts, *lib.* 19. *tit.* 2. *locat.* &c. *Leg.* 22. § 3. Theſe Words, *quod pluris & minoris ſit,* ſignify that which is worth more or leſs, and not what the Buyer eſteems leſs worth, and the Seller more, at the Beginning of a Market, as that able Lawyer underſtands them.

[3] See Mr. LE CLERC's Note upon *Gen.* 31. 12.

[4] St. *Paul* ſpeaks there only of the Cuſtom that was ſettled in his Time; from which he could not depart without a Mark of Singularity, and offending againſt common Decency. The Word, *Nature,* is often oppoſed to Inſtruction, and we know that Cuſtom is a ſecond Nature; ſo that we have no need of a Maſter to teach us, what has been once ſettled in a Country.

[5] It will be convenient to ſet down the Law entire, for the Reaſon alledged by me Note 1. of the preceeding Paragraph: *Si voluntate tuâ fundum tuum filius tuus venundedit, dolus ex calliditate, atque inſidiis emptoris argui debet, vel metus mortis, vel cruciatus corporis imminens detegi, ne habeatur rata venditio. Hoc enim ſolum, quod paulo minore pretio fundum venditum ſignificas, ad reſcindendam venditionem invalidum eſt. Quod ſi videlicet* CONTRACTUS *emptionis, atque venditionis cogitaſſes ſubſtantiam, & quod emptor viliore comparandi, venditor cariore diſtrahendi votum gerentes, ad hunc Contractum accedant, vixque poſt multas contentiones paulatim venditore, de eo, quod petierat detrahente, emptore autem huic, quod obtulerat, addente, ad certum conſentiant* PRETIUM, *profecto perſpiceres, neque bonam fidem, quæ Emptionis atque Venditionis conventionem tuetur, pati, neque ullam rationem concedere, reſcindi propter hoc conſenſu finitum contractum, vel ſtatim, vel poſt pretii quantitatis diſceptationem, niſi minus dimidiâ juſti pretii, quod fuerat tempore Venditionis, datum eſſet, Electione* [*jam*] *emptori præſtitâ ſervandâ.* Cod. l. 4. t. 44. De reſcind. Vendit. Leg. 8. *See the Title* De Ædilitio Edicto, Leg. 18, 19. & de contrahendâ emptione. Leg. 71.

[a] *Gen.* 31. 39. [b] *Mornacius* upon the Words *naturaliter licet circumvenire,* explains *naturaliter* by εὐφυῶς dexterouſly; but he is in the wrong: For that Word does not belong to *circumvenire,* but to *licet.* [c] According to that of *Ovid,* Ep. 4. *Heroid.* v. 75. *Sint procul à nobis juvenes, ut fœmina, compti.* [d] Add *Mich. Montaigne, Eſſ. B.* 1. *c.* 20. [e] *Mytholog.* l. 1. c. 23.

CHAP. IV.

Of gainful Contracts in particular.

I. *What a Commiſſion is.*
II. *The ſpecial Reſpect had to it by the* Romans.
III. *The Perſon Commiſſioned ought to be very diligent.*
IV. *How far he ought to be indemnified.*
V. *Whether a Commiſſion can be ſatisfied by an Equivalent?*
VI. *Of a Loan, and how it differs from a voluntary Grant.*
VII. *Of a Charge.*

We come now to conſider ſome of the principal Contracts more particularly; which, tho' they have been handled very copiouſly by the *Roman* Lawyers, yet, ſince moſt of what they have ſaid, has been taken from the Law of Nature and Nations, may fairly be brought back to their proper place. Of *gainful Contracts* [1] the chief [a] is a [b] [c] *Commiſſion* [2], whereby one Man undertakes *gratis* another Man's Buſineſs, at his Requeſt, and upon his Authority. This Contract indeed does not directly and in itſelf, preſuppoſe Property and the Price of Things, but only by Accident, ſo far as the Perſon giving the *Commiſſion* is concern'd to repay to the Perſon receiving it, whatſoever Charges he happens to be at in the Management of it: for his Labour only is ſuppoſ'd to be promiſ'd *gratis*. Now, if any Man undertakes another's Buſineſs, unknown to him, and manages it with Succeſs, the *Roman* Law allows him [3] *an Action for Buſineſs done*, which is founded upon

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[a] Here our Author, as has been obſerved in another Place, has forgot to mention *Donations between Parties living* as Principal Contracts. See his firſt Note upon this Section.

[b] *Mandatum*.

[c] See what we have ſaid upon this in B. 3. c. 9.

Mr. Barbeyrac's *NOTES on* Chap. IV. §. 1.

[1] Donations or Gifts ought to have been treated of firſt; and I wonder this Author has ſaid nothing of them. I ſpeak here of Gifts among the Living; for Gifts among the Dead are diſcourſed of *l.* 4. *c.* 9. § 9. This Author in his Abridgment of the Duties of a Man and Citizen, *l.* 1. *c.* 12. §. 13, 14. oppoſes a free Alienation of Property or Gift to a Contract. That which made him not to range Gifts with Contracts, was, without doubt, the great Reſpect he paid the *Roman* Law in that Place, which nevertheleſs calls them ſometimes a Contract, as in Code, *l.* 2. *t.* 20. *De his quæ vi, metuſque cauſâ, geſta ſunt*, Leg. 7. &. l. 7. t. 39. De Præſcript. 30. aut 40. annorum, Leg. 8. princ. which, according to Mr. *Thomaſius*, *De Arrhis Emptionum*, § 51. is the Effect of the Careleſneſs and Harſhneſs of the Language of the Lawyers at that Time. I ſhall therefore briefly treat of Gifts among the Living in this Place. A Donation then is a Contract, by which we transfer freely the Property of a Thing that belongs to us, to another Perſon, who accepts the Benefit, whether we releaſe it to him the ſame Moment, or reſerve to ourſelves the Uſe and Poſſeſſion; ſo that the Contract is an Effect of Liberality, and the Giver actually parts with the Property of his Goods before his Death. By the *Roman* Law itſelf a bare Agreement makes the Act valid. See *c.* 2. § 2. *Note* 6. above. If the Gift be truly and lawfully made, it cann't be revoked without very great Reaſon. *Aliæ autem Donationes ſunt, quæ ſine ullâ mortis cogitatione fiunt, quas* inter vivos *appellamus* ——— *quæ ſi fuerint perfectæ, temere revocari non poſſunt. Perficiuntur autem, quum Donator ſuam voluntatem ſcriptis, aut ſine ſcriptis, manifeſtaverit*, Inſtit. l. 2. t. 7. *Dat aliquis eâ mente, ut ſtatim velit accipientis fieri, nec ullo caſu ad ſe reverti, & propter nullam aliam cauſam facit, quam ut liberalitatem & munificentiam exerceat. Hæc proprie Donatio appellatur*, Digeſt. l. 39. t. 5. Leg. 1. princ. *Abſenti, ſive mittas, qui ferat, ſive quod ipſe habeat, ſibi habere eum jubeas, donari recte poteſt. Sed ſi neſcit* ——— *Donatæ Rei Dominus non fit, &c.* ibid. Leg. 10. *Non poteſt liberalitas nolenti acquiri.* ibid. Leg. 19. § 2. 'Tis, for Example, a good Reaſon, 1. When the Receiver does not ſatisfy the Charges and Conditions upon which the Gift was beſtowed. *Generaliter ſancimus omnes Donationes lege confectas firmas, illibataſq; manere, ſi non* ——— *quaſdam conventiones, ſive in ſcriptis donationi impoſitas, ſive ſine ſcriptis habitas, quas Donationis Acceptor ſpopondit, minime implere voluerit*, Cod. l. 8. t. 54. De revocand. Donat. Leg. 10. We muſt alſo place in the ſame Rank, 2. The great Ingratitude of the Receiver, *viz.* If he makes an Attempt upon the Life or good Name of the Giver; if he has offered to him any great Wrong or Violence; if he has maliciouſly cauſed him any conſiderable Loſs or Damage; if the Giver, being reduced to great Neceſſity, he refuſes to relieve him; altho', according to moſt Interpreters, this laſt Caſe is not contain'd in the following Law. *Si non donationis Acceptor ingratus circa Donatorem inveniatur, ita ut Injurias atroces in eum effundat, vel manus impias inferat, vel jacturæ molem ex inſidiis ſuis ingerat, quæ non levem cenſum ſubſtantiæ Donatoris imponat, vel vitæ periculum aliquod ei intulerit*, ibid. We may add alſo, 3. The unexpected Birth of a Child, which happens to the Giver; for it is to be preſumed, that he would have kept his Goods for his Children, if he had had any; and ſo he gave with this tacit Condition, that if he had any Children, his Gift ſhould be null. *Si unquam libertis Patronus filios non habens, bona omnia, vel partem aliquam facultatum fuerit Donatione largitus, & poſtea ſuſceperit liberos, totum quicquid largitus fuerat, revertatur in ejuſdem Donatoris arbitrio, ac Ditione manſurum*, ibid. Leg. 8. Yet ſeveral Interpreters maintain that he ſpeaks only of the Caſe expreſs'd, *viz.* A Gift beſtow'd on a Freeman, by him who had been his Maſter, and given him his Freedom. See *Vinnius* on the *Inſtitutes*, *l.* 2. *t.* 7. § 2. But were it ſo, 'twould be a pure civil Conſtitution; for if we conſider the Law of Nature only, the Reaſon which authorizes a Revocation here, ought to be of Force as to all other Perſons. But it is true only, when the Giver beſtows all his Goods, or the moſt Part; for when the Gift is inconſiderable, in compariſon of what the Giver has left, we may reaſonably preſume that he may not do it, and that he had ſome Hopes of Children, eſpecially if the Receiver is not well furniſh'd himſelf. 4. A Gift may be revoked in part, when the Giver has not reſerved Goods enough to portion ſuch Perſons as he ought not to diſinherit; for in this Caſe the Receiver ought to return enough to make up a Portion for ſuch as have a Right, and of which the Giver cann't diſpoſe to their Prejudice. See *Code l.* 3. *t.* 29. *De inofficioſis Donationibus, & t.* 30. *De inofficioſis Dotibus.* But chiefly Mr. Daumat's Laws, in their Natural Order. *Part* 1. *l.* 1. *t.* 10. ought to be conſulted.

[2] See Mr. Noodt's *Probabil. Jur. l.* 4. *c.* 12. & *ult.* where he diſtinguiſhes between a Commiſſion, and certain Things which may be confounded with this ſort of Contract, tho' they have no relation to it.

[3] The Expreſſion of the *Roman* Law, *Utiliter gerere*, ſignifies only to do a thing for the Advantage of him for whom we manage, which Prudence engages us to do, and 'tis likely he would have done himſelf; ſo that provided it is not our Fault, we need not warrant the Succeſs, and we have Right to demand all neceſſary and needful Expences, tho' the Buſineſs has not ſo good an Event as was hoped for. *Is autem, qui negotiorum geſtorum agit, non ſolum, ſi effectum habuit negotium, quod geſſit, actione iſtâ utetur,*
ſed

on what we may properly call a [4] *tacit Commiſſion* [a], as is the [5] Obligation between a Guardian and a Minor [b].

II. The old *Romans* were extreamly exact and conſcientious in the Diſcharge of this Truſt. For they look'd upon it to be founded upon good Nature and Friendſhip [1], the great Bands and Cements of human Society; and therefore deſervedly had thoſe in Deteſtation, who under ſuch ſpecious Pretences ſhould deceive one who lays himſelf open to their Mercy, by having too good an Opinion of their Probity [c]. [2] *In private Affairs*, ſays *Cicero, our Anceſtors thought guilty of the higheſt Crime, not only him that managed his* Commiſſion *knaviſhly for his own Gain and Advantage, but even him who was wanting in his Care; and therefore judged the Breach of Truſt to be as bad as Theft. For where we cannot be preſent our ſelves, the Fidelity of our Friends is preſumed to ſupply our Place; which, whoſoever violates, impugns the Safeguard of every Man, and, as much as in him lies, diſturbs Society. We cannot do every thing our ſelves; at ſome things ſome are better than others. And therefore we contract Friendſhips, that by mutual good Offices our common Advantages may be carried on. Why do you undertake a* Commiſſion, *if you deſign to neglect it, or to make a Gain of it? Why do you intrude your ſelf into my Concerns, and by your pretended Kindneſs clog and hinder my Deſigns? Stand off, I can get another to do it for me. You undertake the Burthen of an Office which you think you can go through with, and which never ſeems heavy to thoſe who are not light themſelves: This therefore is the baſeſt of Crimes; becauſe it violates the two moſt ſacred Things, Friendſhip and Faith. For no Man commits his Buſineſs, but to a Friend, nor truſts any, but whom he thinks faithful. The greateſt of Villains therefore muſt he be, who breaks in upon Friendſhip, and at the ſame time cheats him who had not been capable of being thus cheated, had he not believed the Villain honeſt.* Cic. *pro* S. Roſcio, *c.* 38, 39. [3] Plautus *Mercatore, Act.* ii. *Sc.* 3. *v.* 42. A Young Man ſays to his Father, “I have heard you often ſay, That “every Wiſe Man ought, in the firſt Place, to “look after a Commiſſion entruſted to him.

III. For the ſame Reaſon [1] the *Roman* Laws require, that a *Commiſſion* ſhould be executed with the utmoſt Diligence, altho' undertaken purely for the Benefit of the Perſon intruſting

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ſed ſufficit, ſi utiliter geſſit, & ſi effectum non habuit negotium, & ideo, ſi inſulam fulſit, vel ſervum ægrum curavit, etiamſi inſula exuſta eſt, vel ſervus obiit, aget negotiorum geſtorem. Digeſt. l. 3. t. 5. De negotiis geſtis, Leg. 10. § 1. *Negotium gerentes alienum non interveniente ſpeciali facto* (and not *pacto*, as Mr. *Bynkerſhoek* has prov'd well, Obſ. 1. 7.) *caſum fortuitum præſtare non compelluntur*, Cod. l. 2. t. 19. De negot. geſtis. Leg. 22. It is not ſo with him who has gotten Poſſeſſion of what belongs to another diſhoneſtly, who has been at ſome Expences for his Maintenance; for if the Work he has employ'd them in comes to nothing, 'tis ſo much the worſe for him, for he cann't retain the Thing, till he has recovered his Damages; becauſe he muſt be thought to act for his own Intereſt only, without any Regard to the lawful Proprietors. On the contrary, he is anſwerable for all things that are loſt thro' his Negligence; and the Owner of the things has an Action againſt him for managing his Affairs. This is the Determination of the *Roman* Lawyers. See Mr. *Noodt*'s *Probab. Juris, l.* 3. *c.* 9. I further ſay, That by the Law of Nature only, ſuch a diſhoneſt Poſſeſſor deſerves, in Strictneſs, to loſe all his Expence, tho' he had ſome regard to the other's Profit, and the Effect continued ſo that the Proprietor got by it.

[4] See what hath been ſaid above, *l.* 4. *c.* 13. § 5. *note* 11.

[5] It is not neceſſary to ſuppoſe here either a tacit Commiſſion, or a Quaſi-Contract, as the *Roman* Lawyers ſpeak. The great Maxim of the Natural Law is, That we ought to do no Man a Damage; and if we have done any, to make it good again. This Law is ſo general, indiſputable, and indiſpenſable, that it is ſufficient to eſtabliſh all relative Obligations, as well of Guardians and Pupils, as of thoſe who have taken upon them the Care of others Affairs at their Requeſt, and ſuch as have faithfully diſcharged it. It were eaſy to prove it, if the thing were not clear in itſelf. See what is ſaid *l.* 3. *c.* 6. §. 2.

Mr. BARBEYRAC's *NOTES on* § II.

[1] *Mandatum, niſi gratuitum, nullum eſt; nam originem ex officio & amicitiâ trahit, contrarium ergo eſt officio merces: interveniente enim pecuniâ, res ad locationem, & conductionem potius reſpicit*, Digeſt. l. 17. t. 1. Mandati vel contra, Leg. 1. § 4.

[2] *Tully*'s Latin is, *In privatis rebus, ſi qui rem mandatam non modo malitioſus geſſiſſet, ſui quæſtus, aut commodi cauſâ, verum etiam negligentius, eum majores ſummum admiſiſſe dedecus exiſtimabant. Itaque mandati conſtitutum eſt judicium, non minus turpe quam furti. Credo propterea, quod quibus in rebus ipſi intereſſe non poſſumus, in his operæ noſtræ vicaria fides amicorum ſupponitur, quam qui lædit, oppugnat omnium commune præſidium, & quantum in ipſo eſt, diſturbat vitæ ſocietatem. Non enim poſſumus omnia per nos agere, alius in alia eſt re magis utilis. Idcirco amicitiæ comparantur, ut commune commodum mutuis officiis gubernetur. Quid recipis mandatum, ſi aut neglecturus, aut ad tuum commodum converſurus es? Cur mihi te offers, & meis commodis officio ſimulato officis, & obſtas? Recede de medio, per alium tranſigam. Suſcipis onus officii, quod te putas ſuſtinere poſſe, quod minime videtur grave iis, qui minime ipſi leves ſunt. Ergo idcirco turpis hæc eſt culpa, quod duas res ſanctiſſimas violat, amicitiam & fidim; nam neque mandat quiſquam fere niſi amicis, neque credet ei niſi quem fidelem putat. Perditiſſimi igitur eſt hominis, ſimul & amicitiam diſſolvere, & fallere eum qui læſus non eſſet, niſi credidiſſet.*

[3] *Plautus*'s Words are, *Sæpe ex te audivi, Pater, rei mandatæ omnes ſapientes primum prævorti decet.*

[a] See above in *B.* 4. *c.* 13. *ſ.* 7.

[b] Vid. *l.* 44. *t.* 7. *l.* 5. *princ. ſ.* 1. *D. de Obligat. & Action.*

[c] Vid. *l.* 3. *t.* 2. *l.* 1. *D. de his qui not. infam. & l.* 17. *t.* 1. *L.* 1. *ſ.* 4. *D. mandati*, &c.

Mr. BARBEYRAC's *NOTES on* § III.

[1] The Words of the Code are, *Suæ quidem quiſque rei Moderator, atque arbiter, non omnia negotia, ſed pleraque ex proprio animo facit; aliena vero negotia exacto officio geruntur, nec quidquam in eorum adminiſtratione neglectum ac declinatum culpâ vacuum eſt*, l. 4. t. 35. Mandati, vel contra, Leg. 21. The Interpreters do not agree about the Degree of Care and Exactneſs, for want of which the Perſon concerned is authorized to require Damages of him who has undertaken his Affairs, either at his own Inſtance, or the other's Requeſt. Some affirm that he is anſwerable both in the Management of the Affairs, and in the Commiſſion, for the leaſt Fault; but others ſay 'tis ſufficient to attend the Affairs of another with that Application that he ordinarily does his own. See *Vinnius* upon the *Inſtitutes*, l. 3. t. 27. § 11. num. 2. & t. 28. § 1. num. 3. and Mr. *Hertius*'s *Parœmiæ Juris Germanici*, l. 1. c. 35. § 2, 3. Nor may we wonder at ſuch a Difference of Opinions, ſince the *Roman* Lawyers themſelves do not fully agree about the Nature and Degree of Negligence for which we are reſponſible in moſt Contracts, or, at leaſt, they expreſs themſelves very ambiguouſly in the Writings that we have left us. This Mr. *Thomaſius* makes appear at large in his Diſcourſe Printed at *Hall* in 1705, entituled, *De uſu practico Doctrinæ difficillimæ Juris Romani de culparum præſtatione in Contractibus.* He alſo obſerves there, that by reaſon of the infinite Variety of Circumſtances, it is impoſſible to ſettle any general Rule, which may extend to all Caſes in this Matter. As for myſelf, 'tis my Opinion, that in what manner ſoever we have taken in hand another's Buſineſs, or are charged with their Affairs, we are always obliged by the Law of Nature, independent on the Civil Laws, to do all we can in them, but not more, at leaſt, if we have not thruſt ourſelves improperly

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it [a]. Of this *Cornelius Nepos* gives us *Atticus* [2] as a perfect Pattern [b]. *He never made any Promiſe, but with great Care and Caution; for he did not think it a piece of Generoſity, but rather Levity, to promiſe more than he could perform. But when once he had undertaken any thing, he was as indefatigable in the Proſecution of it, as if it had not been his Friend's, but his own Concern: In ſuch a Caſe he look'd upon his Reputation to be at ſtake, than which nothing was more dear to him* [c].

But if we hope to ſucceed well in giving a *Commiſſion*, we ought to conſider and form our Opinion of the Man from his paſt Diligence, and the Tenor of his former Life: For he that truſts a profligate Perſon may thank himſelf for his Diſappointments, unleſs he particularly takes upon him to be more diligent than ordinary [3], and is capable of being ſo. We read a pleaſant Story of a Man [d] who had ſore Eyes, and came to a Horſe-Doctor for Relief; the Doctor anointed his Eyes with the ſame Ointment he us'd amongſt his Horſes; upon which the Man falls blind, and the Cauſe is brought before the Judge, who acquits the Phyſician; *For if the Fellow*, ſays he, *had not been an Aſs, he had never applied himſelf to a Horſe-Doctor*.

IV. On the other hand, the [e] Agent ought to be repaid whatever Charges he has been at in the Execution of the *Commiſſion*. For having promis'd Nothing *gratis* but his Care, Diligence, and Fidelity, a tacit Compact is ſuppos'd to have been made for the Repayment of Charges: And indeed it would be hard to render a Man's Kindneſs expenſive to him [f]. And the ſame holds good of any Loſs that happens by reaſon of the Truſt, but not of ſuch a Loſs as is only occaſioned obliquely by it: And therefore thoſe Damages only are to be made up, which directly proceed from the *Commiſſion*, and not thoſe which happen only by the Bye, whilſt the Buſineſs was on foot. To this Purpoſe is that Paſſage in the [1] *Digeſts* [g]: *The Agent ſhall not account to the Perſon imploying him all the Expences, tho' perhaps ſome of them he had not been at, were it not for his* Commiſſion [2], *as if he has been plunder'd, or ſhipwreck'd, or put to Charges by his own, or his Servant's Sickneſs: For ſuch Expences as theſe ought to be imputed to Chance, and not to the Commiſſion.* Indeed, when a Man of his own accord, upon no other Motive than his own Good-will, takes upon himſelf the Management of another's Buſineſs [3], he is ſuppos'd willingly to run the riſque of all Caſualties, that unexpectedly happen in human Affairs. But the Caſe is alter'd, when a Man is commanded to manage another's Buſineſs; for there he that commands is concern'd to bear him harmleſs, ſince, in this Caſe the Perſon in *Commiſſion* had not Power to act otherwiſe. But when a Man undertakes a Buſineſs in its own Nature hazardous and dangerous [4], he is ſuppos'd (unleſs he expreſly declares againſt it) to take upon him the common Accidents that uſually attend ſuch a Buſineſs [h].

V. It is a celebrated Queſtion, *Whether a* Commiſſion *can be ſatisfied by an Equivalent?* which we find elegantly debated in *Gellius* [i]. [1] *The Queſtion*, ſays he, *is, Whether having a* Commiſſion *given, and* “ Orders

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and unneceſſarily upon a Thing, in which we could have no Proſpect of Advantage, or the Nature of the Engagements, either expreſs or tacit, into which we are entred, does not require a certain Degree of Ability and Accuracy, whether we can attain to it, or not. For I underſtand, by what we are capable of, all that a Man can do for himſelf in the Things which he is moſt concerned for. (See § 6. note 2 following.) But let it be well underſtood, that we muſt not extend this beyond the End and Nature of a Contract; for we never engage to take care, or be at Expences extraordinary, nor to neglect other Affairs leſs important in themſelves, to attend other Mens, as perhaps one would do, if he acted for himſelf. Theſe Principles being laid down, 'twill not be hard, in my Opinion, to determine, after an attentive Examination of Circumſtances, when Men are reſponſible for the Faults they have committed, in relation to Contracts.

[2] His Words are, *Quicquid rogabatur, religioſè promittebat, quod non liberalis, ſed levis arbitrabatur polliceri, quod præſtare non poſſit. Idem in nitendo, quod ſemel admiſiſſet, tantâ erat curâ, ut non mandatum, ſed ſuam rem videretur agere. Nunquam ſuſcepti negotii ei pertæſum eſt, ſuam enim exiſtimationem in ea re agi putabat, quâ nihil habebat carius.*

[3] Our Author had better have obſerved, That, when we do not know the Character of a Perſon, we cann't require greater Care than he uſually beſtows on what he loves beſt; for he cann't be thought to engage himſelf farther; and it is not his Fault, if we have too good an Opinion of him, eſpecially if he has not contributed to beget it.

Mr. Barbeyrac's *NOTES on* § IV.

[1] The Words are, *Non omnia, quæ impenſurus non fuit, mandatori imputabit, veluti quod ſpoliatus ſit à latronibus, aut naufragio res amiſerit, vel languore ſuo ſuorumque apprehenſus, quædam erogaverit. Nam hæc magis caſibus quàm mandato imputari oportet.* See alſo Mr. Daumat's Civil Laws in their Nat. Order, *Part* 1. *l.* 1. *t.* 15. *Sect.* 2. § 6.

[2] But when he makes a Journey on purpoſe, as we ſuppoſe, the Loſſes which happen by Chance ought to be look'd upon as the real Conſequents of the Execution of the Contract; for if he had ſtaid at home, he had not been expos'd either to the Tempeſt or the Thieves. And ſo they ought to be put among the Expences of attending upon his Commiſſion. Another thing is, when he falls ſick; for it is not a ſufficient Proof that it was an Effect of the Fatigues of his Journey; but if it were, he ought alſo to repay his Agent the Charges of his Sickneſs. But I am poſitive that he ought not to regard what it coſt him more than if he had been at home. See the following Note.

[3] Upon what is that Preſumption grounded? I ſhould rather aſſert, that he that takes upon himſelf a Commiſſion, will execute it at his own Charge; for, according to this Author, here is no Agreement to give his Labour only; and ſince Miſfortunes may happen every Day, the Commiſſion may be very chargeable, if it be upon the Account of the Agent. So that I do not ſee that he engages himſelf to bear the Loſſes to which he is expoſed, more than the Charges he muſt be at in diſcharging his Commiſſion. The Truth is, We may on the contrary hold, that no Man willingly runs the Riſque of unforeſeen Accidents, which, it is probable, would not have happen'd to him without the Commiſſion, eſpecially if he has not fairly conſented to it, which is not common. Such as accept Commiſſions, in the Execution of which they are ſubject to the like Accidents, will not, nor can be ſerviceable in that Caſe; and thoſe who have Power and Will, may as well do it out of mere Liberality, ſo as to require no Satisfaction for their Misfortunes, nor any Repayment of the Expences they have been at in executing their Commiſſion.

[4] Not at all, unleſs he ſo declar'd. See the foregoing Note. On the contrary, The more dangerous a Thing is known to be, we have the leſs Reaſon to believe that he would meddle with it, if he did not think he ſhould be indemnified from all ill Accidents.

[a] Vid. *Jac. Gothofred. ad Leg.* 23. *D. de Div. reg. juris.* [b] *In Vita* Attici, *c.* 15. [c] Ter. *And. Act.* 4. *Sc.* 1. *v.* 5, *&c.* [d] *Sadus, Roſar. Perſ. c.* 7. [e] *Mandatarius*, &c. [f] See *Grot. B.* 2. *c.* 12. *ſ.* 13. [g] *B.* 17. *t.* 1. *l.* 26. *ſ.* 6. *D. Mandati*, &c. [h] *Wid.* Mornac. *ad. l.* 26. *ſ.* 6. *D. Mandati, & l.* 17. *t.* 2. *L.* 52. *ſ.* 4. *pro Socio.* [i] *L.* 1. *c.* 13.

Mr. Barbeyrac's *NOTES on* § V.

[1] His Words are, *In Officiis capiendis, cenſendis, judicandiſque, quæ Græci*, Καθήκοντα, *Philoſophi adpellant, quæri ſolet, an negotio tibi dato, & quid omnino faceret definito, contra quid facere debeas, ſi eo facto videri poſſit res eventura proſperius, exque utilitate ejus,*

qui

“Orders how to manage it, you ought to act counter, if it ſeems for the Advantage of him that gave it? Thoſe that hold the negative, argue, that many have determined to have their Buſineſs done after ſuch a particular manner; and therefore he whoſe Buſineſs it is, having deliberated and fixed upon a Method, it ought not to be done otherwiſe, altho' ſome ſudden unexpected Accident ſhould promiſe a better Iſſue; for fear, in caſe of Diſappointment, the Guilt of Diſobedience, and the Puniſhment due to it, ſhould unavoidably follow: Whereas, ſhould the Thing ſucceed right, Thanks be to Providence: But yet an ill Precedent would be introduc'd, for breaking in upon well-laid Counſels, and the Sacredneſs of a *Commiſſion*.” Others, on the contrary, are of Opinion, “That the Inconveniences that may happen, upon acting Counter to Order, ought to be compared with the Probability of ſucceeding; and if the former appear lighter and leſs than the latter, then ought we to proceed accordingly; for fear of loſing an Opportunity, which Heaven in this Caſe ſeems to offer: Neither need we fear ſuch a Precedent, if thoſe that follow the Example never do it, but with the ſame Reaſon.” Then follow ſome Precepts of Prudence, “Particularly, Regard is to be had to the Temper and Nature of him from whom the *Commiſſion* is receiv'd; that he be not of a cruel, rough, untractable, inexorable Diſpoſition [a], *for in ſuch a Caſe, the ſafeſt way would be to ſtick to his Orders.*” He adds as an Example, *Craſſius Mutianus*, “Who ſent an Architect for the greater of two Beams, to raiſe his Battering Ram with; but the Architect thinking the leſſer the fitteſt, brought that; upon which Account *Mutianus* order'd him to be ſcourged, for he imagined that Diſcipline would be trampled upon, and Authority deſpis'd, if a Man, under Command, inſtead of obeying the Orders of his Superior, ſhould impertinently interpoſe his own Judgment:” Tho' this is to be ſaid for the Architect, that *Mutianus* ſending a Man ſkilful in the Art, and ſignifying to him what Uſe he deſigned the Beam for, ſeem'd, in a manner, to adviſe with him about it [2] [b]. On the other ſide, we have an Example of Mildneſs in the Emperor *Adrian* [c]; for when the People had demanded ſomething in a tumultuous manner, he order'd the Cryer to proclaim Silence. But he fearing the Conſequence of ſuch an harſh and unuſual Word, ſtretched out his Hand, and having thereby procur'd Silence, cry'd aloud, *This is what the Emperor would have*; with which the Emperor was not offended. “One time, when *Commodus* found the Bath too warm, he order'd the Keeper of it to be thrown into the Furnace: But the Servant who had received the Order, threw in a Sheep-skin, by the Stink thereof to induce the Emperor to believe his Order to be put in Execution.” *Lamprid. in Commodo, c.* 1. *Grotius* [d] is of Opinion, that a *Commiſſion* may be diſcharged by an Equivalent, provided it appears that it was not preſcribed to be manag'd under any particular Form, but under the general Conſideration and Proſpect of ſome Advantage, which may be obtain'd as well one way as the other.

In ſhort, the State of the Caſe is this: In ſome *Commiſſions* the Buſineſs only is ſpecified, and the Management of it left to the Diſcretion of the *Agent*: Sometimes the Management too is preſcrib'd, but rather by way of Advice, as ſeeming beſt to him that gives the *Commiſſion*; but yet ſo as not to exclude the *Agent* from uſing his own Method [e], if it ſhould ſeem beſt at the Point of Execution. But laſtly, The Method is ſometimes ſo ſtrictly preſcribed, that the *Agent* cannot depart from it, let what will happen. Here 'tis plain that a *Commiſſion* is ſatisfied with an Equi-

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qui tibi id negotium mandavit? Anceps quæſtio, & in utramque partem à prudentibus viris arbitrata eſt. Sunt enim non pauci, qui ſententiam ſuam unâ in parte defixerint, & re ſemel ſtatutâ, deliberatâque ab eo, cujus negotium id proficuumque eſſet, nequaquam putaverint contra dictum ejus eſſe faciendum, etiamſi repentinus aliquis caſus rem commodius agi poſſe polliceretur; nè, ſi ſpes fefelliſſet, culpa imparentiæ, & pœna indeprecabilis ſubeunda eſſet; ſi res fortè melius vertiſſet, Diis quidem gratia habenda, ſed exemplum tamen intromiſſum videretur, quo bene conſulta conſilia Religione mandati ſoluta corrumperentur. Alii exiſtimaverunt incommoda prius, quæ metuenda eſſent, ſi res geſta aliter foret quam imperatum eſt, cum emolumento ſpei penſitanda eſſe, & ſi ea leviora, minoraque, utilitas autem contra gravior & amplior ſpe quantum poteſt firma oſtenderetur, tum poſſe adverſum mandata fieri, cenſuerunt; nè oblata divinitus rei bene gerendæ occaſio amitteretur. Neque timendum exemplum non parendi crediderunt, ſi rationes duntaxat hujuſmodi non adeſſent. Cum primis autem reſpiciendum putaverunt ingenium naturamque illius, cujus res, præceptumque eſſet, nè ferox, durus, indomitus, inexorabiliſque ſit, qualia fuerunt Poſthumiana imperia & Manliana; nam ſi tali Præceptori ratio reddenda ſit, nihil faciendum eſſe monuerunt aliter, quam præceptum eſt. But our Author did not underſtand theſe Words, *Sunt enim non pauci qui ſententiam*, &c. for he alledges them as the Foundation of their Reaſons who held the Negatives, as if they ſignified, That there are many Men, who having eſpouſed one Party, will never forſake it, *&c.* whereas *A. Gellius* ſays only, That there are ſome Men, who determine in Effect *Pro* and *Con* in the ſame Queſtion, *&c.* we ought to obſerve, that in the Sentence which begins with *Neque timendum exemplum*, &c. there is ſomething corrupted, tho' the Senſe does not clearly diſcover it. See *J. Fred. Gronovius*'s Note upon it.

[2] Mr. *Montaigne* ſpeaks ſomething to this Purpoſe; blaming Two *French* Ambaſſadors, who under a Pretence of not engaging the Maſter on the worſt Side, would not give him a true Account of Affairs, and then goes on: “However that be, I would not be ſo uſed in my low Sphere. We are ready to withdraw Obedience upon every Occaſion, and uſurp upon our Maſters. Every one aſpires naturally to Liberty and Authority, and therefore to a Superior no Advantage is to be ſo prized, as ſincere and native Obedience. The Office of a Commander is ruin'd, if Men may obey at Diſcretion, and not thro' Subjection (which is *A. Gellius*'s Notion, who ſays, *Corrumpi & diſſolvi officium omne imperantis ratus, ſi quis ad id, quod facere juſſus eſt, non obſequio debito, ſed conſilio non deſiderato reſpondeat*) as *Craſſus Mucianus* ſhews, *&c.* But if we ought to conſider that ſuch a ſtrict Obedience belongs only to poſitive and preciſe Commands, Ambaſſadors have more free Orders, which in many Things depend principally on their Management. They don't barely execute them, but frame and faſhion their Maſter's Will according to their own Judgment. I have known ſome Perſons acting by others Commands, reproved for following the Inſtructions of their Kings Letters, rather than the Opportunity of diſpatching Affairs. Men of Underſtanding blame the Cuſtom of the King of *Perſia* now in uſe, which ties up their Agents and Lieutenants ſo ſtrictly to their Orders, that they cann't do the leaſt Thing without them. This Delay, in a Kingdom of ſo vaſt an Extent, has produced great Detriment to their Affairs. So *Craſſus* writing to an Artiſt, and telling him to what uſe he deſigned the Maſt; Did he not forbid him to make uſe of his Advice, or interpoſe his Determination?” *Eſſays l.* 1. *c.* 6.

[a] As was *Piſo in Seneca de Ira, l.* 1. *c.* 16.

[b] Add. *Mich Montaign. Eſſ. l.* 1. *c.* 16.

[c] Vid. *Xiphilin. Epit. Dionis ann.* 118. *& Zonaræ, Tom.* 2.

[d] *L.* 2. *c.* 16. *ſ.* 21.

[e] As in the Proverb, *Mitte ſapientem, & ipſi nihil dicas.*

Equivalent in the ſecond Caſe, not in the Third. To this Purpoſe we have a Caſe in the *Digeſts* [3] [a] *I* commiſſion *you to be Surety to* Sempronius *for* Titius, *you don't make yourſelf a Surety, but give* Sempronius *a* Commiſſion *to truſt* Titius. *If you have been at Expence upon this Account, the Queſtion is, Am I reſponſible?* Which is declared in the affirmative. *For I gained my End, which was, that* Sempronius *ſhould truſt* Titius, *and whether he does it by your Suretiſhip, or your* Commiſſion, *it is all alike to me; and I am obliged by one, as well as the other, to repay what you have laid out upon this Account.*

But, as I obſerv'd above, we muſt carefully diſtinguiſh [b] between the *Commiſſion of a Superior* and the *Commiſſion of a Friend*; which two are widely different, and agree in nothing but the Name: And therefore what the *Civilians* have ſaid upon the *latter*, are very injudiciouſly apply'd to the former. For, in private Affairs, 'tis eaſy to preſume, that the Method is preſcribed only by way of Advice, ſo as to leave room for the Diſcretion of the *Agent*. But when a Buſineſs is enjoin'd by a Superior, the bare Execution of it is ſuppoſ'd to be meant; and, in this Caſe, it will not be lawful to depart from the Method preſcrib'd, unleſs Leave be given (as frequently it is) by an expreſs Clauſe to deviate from it, as Occaſion ſhall require; or unleſs the Words, interpreted according to Reaſon, and the received Rules of Speech, ſo as to anſwer the Deſign of the *Commiſſion*, can warrant the doing of it. For that Senſe that the Meaning of his Words fairly imports, is to be preſum'd the Meaning of the Perſon: Yet this Liberty is not to be taken, but in Caſes of Neceſſity, [4] for all the Force of Authority would be eluded, and the Commonwealth would be often brought into Danger, if a Miniſter, of his own Head, ſhould take upon him the Part of the Governor. So *Otho* in *Tacitus*, H. L. i. c. 73. ſpeaks; If every Man, when he is commanded, is allowed to ask Queſtions, there is an End of all Authority. And again, *l.* ii. *c.* 39. 'tis a poor Commendation for a Soldier to comment upon, rather than execute the Commands of his Superior. *Add* lib. xlix. t. 16. l. iii. ſ. 15. *D. de re militari, &* Liv. *l.* xliv. *c.* 34. Yet Miniſters of great Abilities do well in neglecting the fooliſh Orders of their Prince. See 2 *Kings* xviii. 6. Vid. *Valerius Maximus* Lib. iii. Chap. 8. Sect. 1. *Cor. Nepos, Epam.* Chap. 7, 8. "Thus *Bavalan* did wiſely in not putting in Execution the "Murther of *Cliſſon*, which his Maſter, the Duke of "*Bretagne*, had intruſted him with." See the Story in *Buſſier's* Hiſt. *Franc.* l. xi. p. m. 391. and *Mezeray*, p. 526. tom. 2. *Par.* Edit. "'Tis remarkable, that the Vice-Roy of the *Indies* had a fair Opportunity of ſeizing upon the City *Aden*, but yet "did not do it, becauſe it was againſt the King's "Command, when yet the Taking of that Place "was of the greateſt Importance." *Hier. Oſor.* de geſtis *Emmanuel.* l. xi.

VI. [c] A *Loan* (that is, when we allow another *gratis* [1] the Uſe of any Commodity not conſumable) carries along with it theſe Conditions; that it be [2] carefully preſerv'd, and with the ſame Diligence that

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[3] The Words are, *Mandavi in hæc verba, Lucius Titius Gaio ſuo ſalutem. Peto & mando tibi, ut fidem dicas pro Publio Mævio apud Sempronium, quæque à Publio ſoluta mihi non fuerint, me repræſentaturum hâc epiſtolâ meâ manu ſcripta, notum tibi facio, quæro, ſi non fide juſſiſſet, ſed mandaſſet creditori, & alias egiſſet, quam* [*quod*] *ei mandatum eſſet, an actione Mandati teneretur? Reſpondet, Teneri.* See *Arn. Vinnius* upon the *Inſtitutes*, Lib. 3. c. 27. *De mandato* § 8.

[4] *Otho*'s Words are, *ſi, cur jubeantur, quærere ſingulis liceat, pereunte obſequio, etiam imperium intercidit.* See alſo *Lib.* 2. *c.* 39. *Tit. Liv. l.* 44. *Ch.* 34. *& Digeſt, l.* 49. *t.* 16. *De Re militari, Leg.* 3. § 15. A Vice-Roy of the *Indies*, having a good Occaſion to take the City of *Adena*, would not do it, tho' it had been a conſiderable Advantage, becauſe he had no Order for it from his Maſter, the King of *Spain*, as we are told by *Hieron. Oſorius, De Geſtis Emmanuelis, l.* 11.

[a] *L.* 17. *t.* 1. *l. ult. ſ.* 1. *D. Mandati.* [b] Which *Bæcler* takes Notice of in his Diſſertat. *de religione mandati.* [c] *Commodatum.*

Mr. BARBEYRAC's *NOTES on* § VI.

[1] The *Roman* Law defines *Commodatum* or a Loan thus, *Commodata autem Res tunc propriè intelligitur, ſi nullâ mercede acceptâ, aut conſtitutâ Res tibi utenda data eſt, alioqui mercede interveniente, locatus tibi uſus Rei videtur: Gratuitum enim eſſe debet commodatum.* Inſtit. l. 3. t. 15. § 2. *i. e.* A Thing lent is properly then, when a Thing is granted to thee to be uſed, without any Reward accepted or agreed for, otherwiſe if there be any Reward, the Uſe is hired, for Lending is free. See Mr. DAUMAT's Civil Laws in their Natural Order. *Part.* 1. l. 1. tit. 5.

[2] The *Digeſts* thus ſpeak in this Caſe, *Alias tamen* [is, *qui utendem accepit*] *exactiſſimam diligentiam cuſtodiendæ rei præſtare compellitur, nec ſufficit ei eandem diligentiam adhibere, quam ſuis rebus adhibet, ſi alius diligentior cuſtodire poterit*, l. 44. t. 7. De Obligat. & Action. l. 1. § 4. Here let us apply and explain at the ſame Time what we have ſaid, § 3. *Note* 1. If we conſider the Thing in itſelf, he, that has borrowed a Thing, is bound to take no greater Care of it than he does of ſuch Things of his own, as he moſt eſteems; I ſay, as he moſt eſteems, becauſe we may obſerve, that the moſt negligent Perſons are very careful of ſome Things, which affect them much. Their Careleſneſs uſually about their Affairs proceeds from this, that they do not affect them enough to make them reſolute to conquer their Inclination to Eaſe, or to divert them from ſome Buſineſs they are about, or to keep them from ſome Pleaſure, that they love better. As to ſuch Objects as offer themſelves to their Embraces, or when ſomething extraordinary ſtirs them up, and rouzes them, they know how to put forth themſelves and take good Methods, and juſt Meaſures enough, unleſs they be Men very dull; ſo that the Rule I give, ſerves not to authorize or excuſe their Negligence. Every one has commonly Care enough of the Affairs and Goods of another, when he does as much as he would do for himſelf in Matters of the greateſt Concern to him, and I require ſuch a Degree of Exactneſs, whereas the Lawyers allow Men to come ſhort of it in ſome Contracts. A Man cann't diſpoſe of another's Intereſts, as he may of his own; and ſo when he has the Affairs or Goods of another in his Hands, he is thought to be engaged not to neglect any thing that concerns them. But when he hath enlarged his Care and Diligence ſo far, 'tis all our Intereſts can require, if he is not evidently engaged in any thing more; but if the Care of our own Goods and Affairs ſo interferes with the Care of another's Goods and Affairs, that we cann't attend both at the ſams time, it is natural for the firſt to prevail, every one being more thoughtful (all Things elſe being equal) of himſelf than of others; ſo that this Order ought not to be reverſed, unleſs it be to ſatisfy ſome ſpecial Engagement, either expreſs or tacit. We will now return to the Contract, of which he is treating. I ſay then, that altho' a Man be not mindful of his own Concerns, but abandons all, yet is he no leſs anſwerable for his Negligence, when he has hurt, or loſt what he has borrowed; for it is certain, that if ſuch a Thing had belonged to him, and he loved it much, or had ſome extraordinary Reaſon to keep it well, and do all he could to preſerve it, he would have taken more Care of it. But when he has done all he can in this Caſe, the End and Nature of a Loan, conſidered in itſelf, can require no more of him, tho' other more fit and wiſer Perſons might have managed better, and ſecured it more from Miſchances, unleſs there be ſome tacit Agreement, not only to indemnify the Proprietor, in caſe the Thing borrowed ſhould be ſtole or much damaged, but alſo to pay for it, if it happen to periſh in our Hands, eſpecially if it be by our Fault; provided, that it might have been ſafe in the Lender's Hands, and indeed few Perſons will lend otherwiſe, eſpecially, if they ſuffer by the Loſs. We bear it, tho' with Trouble, and are uneaſy to ſee a Thing defaced or abuſed, provided we can make uſe of it as formerly, or can reſtore it at a ſmall Charge; but when 'tis quite ſpoiled, or loſt, we trouble not ourſelves in the leaſt to diſtinguiſh, whether it was by the Fault of him, to whom we lent it to do him a Pleaſure, or not, We believe it ſufficient to conſider, that if he had taken Care of it, it had eſcaped that Accident, and that it was not our Fault, that it was expoſed to it, while it was in the Hands of him that uſed it.

that prudent Men keep their own [a]; [3] that it be not put to any other Uſe, nor made uſe of any farther than the Perſon *lending* deſign'd it [b]; laſtly, that it be return'd in the ſame State and Condition, as when it was borrowed [c]; indeed what Detriment it neceſſarily receives [4] from the ordinary uſe of it, need not to be repair'd, for that the *Owner* is ſuppos'd to give *gratis* [d]. Beſides, if I *lend* a Thing for ſuch a certain Time, and in the mean while by ſome unforeſeen Accident want it my ſelf, the *other* is obliged to deliver it immediately upon Demand: For no Man is preſum'd to *lend* his Goods, but ſo long as he can conveniently be without them. And he muſt be either very careleſs, or have a Deſign to impoſe upon another, who *lends* thoſe Things which he is likely to want himſelf. And therefore a *Loan* for a certain Time is upon Condition, that the *Owner* ſhall not, in the mean time, have urgent Occaſion for the Thing himſelf; but without ſuch an urgent Neceſſity a *Loan* ought [5] not to be demanded before the Time [e].

Let us ſee therefore in what ſuch a *Loan* as this and [f] *a Grant at Will and Pleaſure* differ and agree. In reſpect of the Object and the Uſe they agree; for the ſame Thing that may be *lent*, may be *granted* during Pleaſure, and the Uſe, in both Caſes, is given *gratis*. But they differ, in that the *Loan* is a Contract, the *Grant* is not; the *former* obligatory on both Sides, the *latter* only on one. The *Loan* is given for a certain Time or End; the *Grant* only during the [6] Will of the Giver. The Receiver of the *Loan* muſt make good all Damages; the Receiver of the *Grant* only thoſe that happen by his [7] Knavery, or groſs Negligence [g].

It may indeed be doubted, whether the Receiver of a *Loan* is bound to ſtand to thoſe Chances which it was not in his Power to prevent, and this [8] is generally held in the negative [h]. But, in my Opinion, we ought to diſtinguiſh, whether or no the Damage had happen'd, if the Thing had continued in the *Owner's* Cuſtody [a]; for if it had, no Reſtitution is due, but if it had not, it ſeems due in Equity; for otherwiſe a Man's Generoſity and good Nature might be too expenſive to him, if, beſides [9] the free Uſe of his Goods, he muſt be depriv'd of the Perpetuity of them, which he had not been but upon this Account. Nor is there any Reaſon why he, rather than the other, [10] ſhould bear the Burthen of the Misfortune, ſince the *other* [11] was the Occaſion of it. The *Roman* Law [b] gave the *Lender* Damages, if the *Loan* was ſtole; and yet ſuch a Robbery might be committed without any Fault in the Perſon robb'd. Indeed if a Man, by Fire, ſhould loſe all, and be reduc'd to extream Poverty, it would be inhuman to demand the Value of the *Loan*; and ſince Fire, Shipwreck, and ſuch Chances often happen, the *Lender* may be preſum'd willing to run the Riſque of them. And thus I think that Law the 18. *prin.* and l. v. ſ. 4, & 7. *D. commodati* ought to be limited. Neither can I well approve of what is ſaid in *l.* xix. *D. dict. tit.* which does not ſeem to agree with what is ſaid in *l.* xii. *ſ.* 1. *D. dict. tit.* But yet if the *Borrower*, when he might have ſav'd the *Loan*, preſerves ſomething more valuable of his own, he becomes reſponſible. For tho' no Man can blame him for letting that periſh which was leſs valuable, yet ſince it might have been ſav'd, and was loſt for the Benefit of the *Borrower*, there is no Reaſon, why the *Lender* ſhould ſtand to the Loſs [c]. [12] On the other ſide, it is but reaſonable, that if any Expence has been laid out upon the *Loan*, beſides what was neceſſary for the Uſe of it, [13] the *Owner* ſhould repay it [d].

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[3] To uſe it otherwiſe is a kind of Robbery according to the *Roman* Lawyers, whoſe Expreſſions here are a little extravagant. *Sive is, qui rem utendam accepit, in alium uſum eam transferet, quam cujus gratiâ ei data eſt, furtum committit; veluti ſi quis argentum utendum acceperit, quaſi amicos ad cœnam invitaturus, & id peregrè ſecum tulerit: aut ſi quis equum geſtandi causâ commodatum ſibi longius aliquo duxerit; quod veteres ſcripſerunt de eo, qui in aciem equum perduxiſſet.* Inſtitut. l. 4. t. 1. De obligation. quæ ex delicto naſcuntur, §. 6. But the ſame Lawyers add, that if the Owner of the Thing borrowed permits us to make another Uſe of it, than was expreſly agreed for, and knows what is done, he is not then to blame. *Placuit tamen eos, qui rebus commodatis aliter uterentur, quam utendas acceperint, ita furtum committere, ſi ſe intelligant id invito Domino facere, eumque ſi intellexiſſet, non permiſſurum; at ſi permiſſurum credant, extra crimen videri, optimâ ſanè diſtinctione, quia furtum ſine affectu furandi non committitur.* Inſtitut. ubi ſup. § 7.

[4] The Words of the *Digeſts* are, *Si reddita quidem ſit res commodata, ſed deterior reddita, non videbitur reddita, niſi quod intereſt, præſtetur.* Lib. 13. t. 6. Comod. vel contra, l. 3. § 1. *Si commodavero tibi equum, quo utereris ad certum locum, ſi nullâ culpâ tuâ interveniente, in ipſo itinere equus deterior factus ſit, non teneris commodati; nam ego in culpâ ero, qui in tam longum iter commodavi, qui eum laborem ſuſtinere non potuit.* Ibid. l. 23.

[5] Without which he muſt take other Meaſures to provide himſelf. *Sicut autem voluntatis, & officii magis, quam neceſſitatis eſt commodare, ita modum commodati, finemque præſcribere, ejus eſt, qui beneficium tribuit. Cum autem id fecit (id eſt poſtquam commodavit) tunc finem præſcribere & retro agere, atque intempeſtivè uſum commodatæ rei auferre, non officium tantum impedit, ſed & ſuſcepta Obligatio inter dandum, accipiendumque, geritur enim Negotium invicem. Igitur ſi pugillares mihi commodaſti,* ut debitor mihi caveret, *non rectè facies importunè repetendo; nam ſi negaſſet, vel emiſſem, vel teſtes adhibuiſſem.* Digeſt. ut ſupra, Leg. 17. § 3.

[6] So the *Digeſts* direct, *Precarium eſt, quod precibus petenti utendum conceditur tamdiu, quamdiu is, qui conceſſit, patitur.* Lib. 43. t. 26. De Precario, Leg. 1. Princ.

[7] So the *Digeſts* order, *Illud adnotatur, quod culpam non præſtat is qui precario rogavit, ſed ſolum dolum præſtat; quanquam qui commodum ſuſcepit, non tantum dolum, ſed culpam præſtat. Nam immerito dolum ſolum præſtat is, qui precario rogavit, cum totum hoc ex liberalitate deſcendat ejus, qui precario conceſſit, & ſatis ſit ſi dolus tantum præſtetur. Culpam tamen dolo proximam contineri, quis merito dixerit.* Ibid. Leg. 8. § 3. See CUJACIUS *Obſerv.* 4. 7. But Mr. THOMASIUS in his Diſcourſe, *De culparum Præſtatione in Contractibus*, Chap. 1. § 48, *&c.* ſhews, that the Diſtinction between a Loan and Grant at Will is grounded only upon the Subtilties of the *Roman* Law, and that there is ſomething of Humour, in the Reaſon, that ULPIAN alledges here, as well as in the Compariſon, which he elſewhere makes between a Grant at will, and Gifts between the Living.

[8] They are grounded upon this Law among others: *Quod vero Senectute contigit, vel morbo, vel vi Latronum ereptum eſt, aut quid ſimile accidit, dicendum eſt, nihil eorum eſſe imputandum ei, qui commodatum accepit, niſi aliqua culpa interveniat. Proinde et ſi incendio, vel ruinâ aliquid contigit, vel aliquod damnum fatale, non tenebitur, niſi fortè, cum poſſit res commodatas ſalvas facere, ſuas prætulit.* Digeſt. Lib. 13. t. 6. *Commodati, vel contra*, Leg. 5. § 4. See alſo, *Leg.* 19. & *l.* 44. *t.* 7. *De Obligat. & Action, l.* 1. § 4. But from theſe Words, *Niſi forte, cum poſſit*, &c. ſeveral Lawyers infer, That in a common Danger a Man ought rather to ſave a Thing borrowed, than his own Goods; and they add this Proviſo, If the firſt be not of leſs Value. Whereupon Mr. TITIUS maintains, that theſe words, *ſuas prætulit*, mean not, That he choſe rather to ſave his own Goods, than what he had borrowed, but only that when he could have ſaved both, he took not care of any but his own, and ſo it became his Fault. Indeed all that goes before, ſhews, that ULPIAN will have the Borrower anſwerable for his own Negligence only, and not for Miſcaſualties, which he could not foreſee; ſo that theſe laſt Words muſt be explained by ſuppoſing ſome Circumſtance, by which it may appear, that the Borrower was in fault; for he is not always obliged to prefer the Preſervation of another Man's Goods before his own. The Interpreters generally hold, that the Thing borrowed ought to be of a greater Value; for otherwiſe, if we ſave it with a Prejudice to our own Goods, he that owes it ought to pay the Overplus. But this Determination is plainly falſe; for upon what Account is he, to whom the Thing borrowed belongs, obliged to pay the Value of that which is loſt, to ſave his? He is in no wiſe the Cauſe of the Damage received; and he has not promiſed to indemnify us in caſe ſuch a Thing happens, which are the Foundation of every Natural Obligation to make good the Loſſes of any other Perſon; nor is there any Civil Law that authorizes ſuch a Determination. And, indeed, who is there who would rather ſuffer his own Goods to be loſt than preſerve them, on the Condition of paying a Thing of a greater Price, than what he ſacrificed, to ſave them? Laſtly, ſuppoſe, that the Borrower ſhould prefer the Preſervation of his own Goods before what he has borrowed, altho' they were of leſs Value, 'twould only follow from thence, that, ſince he has only uſed his own Right, the Owner of the Thing borrowed, can lawfully demand nothing in this Caſe; as on the other ſide, if he neglects to uſe his own Right, he can lay the Fault on himſelf only. But it is ridiculous to affirm, that, becauſe he has preferred the Saving of the Thing borrowed before his own, that the Lender ought to account to him for it, and make good his Loſs, ſince he recovers no more than his own. Wherefore Mr. TITIUS concludes, that as often as it happens, that there is not time to ſave Two Things of equal Value, and alike expoſed, which ever of them he ſerves, 'tis ſo much the better for the Owner, and ſo much the worſe for the other. *Obſ. on Lauterbach, Obſ.* 392. Moreover, the Author before quoted, alledges a Paſſage in *Virgil*, where the Word, *Præferre*, bears much the ſame Senſe, by a like Figure, as he affirms it doth here. Mr. NOODT makes uſe of it in his Obſervat, *l.* 2. *c.* 15. to explain another Law taken out of ULPIAN, 'tis in *Lib.* 12. of the *Æneids*, where *Juno* ſpeaks to the Nymph *Juturna*, That ſhe was loved

[a] L. 13. t. 6. l. 5. ſ. 5. *D. commodati.* [b] Vid. *Val. Max.* l. 8. c. 2. ſ. 4. And *Gellius*, l. 7. c. 15. *Vid.* l. 13. t. 6. l. 5. ſ. 8. *in fin. D. commodati,* & l. 47. t. 2. l. 54. ſ. 1. *De furtis.* [c] *Vid.* l. 13. t. 6. l. 3. ſ. 1. *D. commodati.* [d] *Add.* l. ult. *D. commodati.* [e] Vid. *D. ubi ſup.* l. 17. ſ. 3, 4 *D. commodati.* [f] *Precarium.* [g] *Vid.* Wiſſemback *ad D. Diſp.* 24. ſ. 19. [h] *Vid.* l. 13. t. 6. *commodati*, &c. & l. 19. & l. 44. t. 7. l. 1. ſ. 4. *D. de oblig. & act.*

VII. [e] A *Charge* is [1] when we commit to another's Truſt and Cuſtody any Thing belonging to us, to

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loved by her Husband better than all his other Miſtreſſes, becauſe ſhe was troubled at, and perſecuted him with all her Force, *Scis, ut te cunctis —— PRÆTULERIM.* See *Servius*, who alſo alledges a Paſſage in *Saluſt* of the like Import with *Q. Curtius's*, *Lib.* 6. *c.* 4. *num.* 18. *Mare Caſpium dulcius cæteris.* The *Caſpian* Sea is ſweeter than the other, as if they were a certain Sea of ſweet Water. See the Art of Thinking, *Part* 2. *c.* 10, *&c.* where it is proved, that in Comparative Propoſitions, the Poſitive doth not always agree with both Members of the Compariſon. Mr. Noodt treats upon this Matter more at large in his *Julius Paulus c.* 7. where he produces other Examples of like Nature. But notwithſtanding all this I do not think it neceſſary to join in the Explication of Mr. Titius upon theſe Words. *Niſi fortè cum poſſit res commodatas ſalvas facere, ſuas prætulit,* which is alſo found in the *Receptæ Sententiæ* of *Julius Paulus*, l. 2. t. 4. § 3. with this Difference, that there he reads, *rem commodatum & ſuam*, the Singular for the Plural, as if this Maxim had paſſed into a general Rule, that every one is reſponſible for the ſmalleſt Faults (*culpæ leviſſimæ*) in ſuch Things, as are borrowed for his own Advantage only. (See *Digeſt. Lib.* 13. *t.* 6. *Leg.* 5. § 2.) The Lawyers look upon it as an Omiſſion, which amounts to the greateſt Fault and Neglect for a Man to prefer the Saving of his own Goods before what he has borrowed, tho' there was no way to preſerve both at the ſame time. It is ſufficient according to them, that he might have ſaved another's Goods, if he would, and they have no regard to the Concurrence of the Intereſt of the Owner, who hath lent, and that of the Borrower. If *Ulpian* had only affirmed, that the Thing borrowed ought to be paid for, when it might have been ſecured, as well as a Man's own, he need not have added that Reſtriction, which was underſtood of itſelf. It had been ſufficient for him to have ſaid, *Niſi fortè res commodatas ſalvas facere potuerit,* ſince, whether he hath ſaved, or no, the Thing belonging to us, that Circumſtance alters not the Nature of the Fault, ſince the Thing borrowed might at the ſame time be ſaved. We then ſee that the Senſe of the Words mentioned, comes to this: At leaſt, if he might have ſaved the Thing borrowed, whereas at the ſame time he ſuffer'd it to be loſt. But here the Lawyers are not aware that they make a ſpecial Caſe, which muſt be determined by ſome other Principle than their *Culpa leviſſima,* and ſince they will have the Owner of the Thing borrowed to bear the Loſs, when it happen'd by Chance, and without the Fault of the Borrower, they ought to eſteem, as a Thing of the greateſt Force, the Impoſſibility of ſaving the Thing borrowed, without ſacrificing our own Intereſts. Wherefore let us conſult what is ſaid Note 2. of this §, where we ſhall find more natural and more coherent Deciſions of this Matter.

[9] This Reaſon, Mr. Titius, *Obſer. on Pufendorf,* 365. ſays, proves nothing, becauſe the Lender knows well, or at leaſt ought to know, that theſe ſort of Accidents may happen, and ſo tacitly conſents that they be ſubject to theſe Hazards, Dangers, and Misfortunes. Otherwiſe it may be anſwer'd, that the Borrower had better have hired the Uſe of the Thing lent, than to be engaged to pay for the Thing borrowed, if it be ſpoil'd without his Fault. But beſides, that there is almoſt ever a tacit Engagement, contrary to what is ſuppos'd, as I have ſaid *Note* 2. we ought to believe that the Borrowers live at eaſe (for if they are in Streights, we may preſume that the Owner of the Thing borrowed, would generouſly take upon himſelf all fortuitous Accidents) and ſo have no Reaſon to complain, ſince the Uſage of what is lent them *gratis*, either ſpares them a Buying it, or is very advantagious, becauſe they could not, for the preſent, be accommodated any other way, or, after all, the Benefit may be thought equivalent to the indemnifying againſt the Danger of unforeſeen Accidents. And it is more grievous for him who lends, to loſe his Goods to do a Kindneſs, than it ought to be to him who borrows, to reſtore the ſame Thing, or the Value, in caſe any Accident happens, while he has them in uſe. The Maxim uſed by the *Roman* Lawyers, upon another Occaſion, may be applied here. *Etſi iniquum, damnoſum cuique eſſe officium ſuum.* Digeſt. l. 29. t. 3. Teſtamenta quemadm. aperiantur. l. 7.

[10] The Reaſon of it is clear, anſwers Mr. Titius, *ubi ſupra*, that when a Thing is ſpoiled without any Man's Fault, the Loſs muſt redound to the Proprietor, provided all things elſe be equal. See the Note foregoing.

[11] This is true; but then the Owner of the Thing borrowed, has freely conſented to it, as Mr. Titius ſays, but a Loan is uſually made on another Account, as I have obſerv'd ſeveral Times before. The Laws of the antient *Germans* order expreſly, that if a Thing periſh, or be loſt, while 'tis in the Poſſeſſion of the Borrower, he muſt pay the Owner for it, as Mr. Thomasius tells us in his Diſcourſe already quoted, *De culparum præſtatione in Contractibus*, c. 2. § 18.

[12] *Moſes* there ſays, *If a Man borrow ought of his Neighbour, and it be hurt or die, the Owner thereof not being with it, he ſhall pay for it; but if the Owner thereof be with it, the Borrower ſhall not pay for it.* The Reaſon of this, without doubt, was, that the Owner being abſent, could not take care of his Goods, nor ſee whether they were endamaged or loſt by the Fault of the Borrower. Beſides, if the Borrowers were diſcharg'd of the Loſs in the Abſence of the Owner, it might give an Occaſion to uſe the Thing borrowed ill, or to neglect it, and feign it loſt, when 'tis not. As to the Law of the *Digeſts* cited here by the Author, he entitles it *Commodati vel contra*, and it ſhould be *Depoſiti*, &c. As it is here determined, that ill Chances are ſometimes to be put to the Account of the Perſon entruſting another, Mr. Pufendorf informs us, "That there is more Reaſon "that the Borrower ſhould indemnify the Proprietor for the Loſs that happens by a like Accident." See alſo *Exod.* xxii. 13, 14, 15. And *d. l.* 18. *princ. D. commodati.*

[13] So he that has borrowed a Horſe or a Slave, ought to maintain them at their own Charge; but if either of them become ſick, the Charge of the Cure muſt be born by the Owner. *Poſſunt juſtæ cauſæ intervenire, ex quibus cum eo qui accommodaſſet agi deberet, veluti de impenſis in valetudinem ſervi factis, quæve poſt fugam requirendi, reducendive ejus cauſâ factæ eſſent; nam cibariorum impenſæ, naturali ſcilicet ratione, ad eum pertinent qui utendum accepiſſet.* Digeſt. ubi ſupra, § 2.

[a] Vid. *Grot.* l. 2. c. 12. ſ. 13. n. 1. [b] *Vid. D. ubi ſupra,* l. 21, 22. [c] *Vid.* l. 5. ſ. 4. *D. commodati.* [d] *Add. ubi ſupra,* l. 18. ſ. 2. *D. commodati.* [e] *Depoſitum.*

Mr. Barb. *NOTES* §. VII.

[1] So the *Digeſts* define it, *Depoſitum eſt, quod alicui cuſtodiendum datum eſt, —— ſi veſtimenta ſervanda Balneatori data perierunt, ſi quidem nullum mercedem ſervandorum veſtimentorum accepit, depoſiti eum teneri, & dolum duntaxat præſtare debere puto, quod ſi accepit ex conducto,* Dig. l. 16. t. 3. Depoſiti vel contra, Leg. 1. princ. & § 8. See Mr. Daumat's *Civil Laws in their Natural Order*, Part 1. l. 1. t. 7.

be kept *gratis* [a]. And here the *Truſtee* is bound to preſerve it diligently, and to return it upon [2] Demand [b]. Yet ſometimes Circumſtances may ſo happen, as to excuſe him from making a Return even then. *A* Charge [c], *which you have received from a ſober Perſon, you ſhall not* [3] *return when he is drunk, or extravagant, or mad; for in ſuch a Condition he is not fit to make uſe of it. Nor ſhall you return it to Debtors or Slaves, whoſe Creditors and Maſters lie in wait for them; for this would not be to return, but to betray the* Charge. *Suppoſe a* [4] *Man* [d], *in his Senſes, leaves a Sword in your Keeping, and demands it when he is mad; in ſuch a Caſe, to reſtore it is a Crime, and the Refuſal of it a Duty. What if you ſhould receive Money in Truſt for him, and then find that he is taking up Arms againſt his Country, would you return the Money? Certainly not, becauſe it would be againſt the Commonwealth, which ought to be preferr'd. To reſtore* [e] *a* Charge *is in itſelf a commendable thing; yet all Times and Places may not be proper for it. Sometimes the reſtoring it may be as bad as the diſowning it. The* Owner'*s Advantage ought to be conſulted, and if the reſtoring it tends to his Prejudice, it ought to be withheld. Ambr. Offic.* l. i. c. *ult.* brings theſe Inſtances: "If a Man, who had "entruſted Money to you, joins with the *Barbarians* againſt his Country; or, if any preſent be "likely to rob him of it; or, if he be mad, and "cannot keep it, you ought not to reſtore it. "Would it not be a Breach of Duty to give a mad "Man his Sword? Or to reſtore any thing ſtolen, "to the Prejudice of him that loſt it?

But if I had agreed to call for the *Charge* at ſuch a certain time, I may, nevertheleſs, if I pleaſe, change my Mind, and demand it [5] ſooner [f]. A Paſſage in *Quinctilian* [g] ſeems counter to this. *Some* Charges, ſays he, *are depos'd to be return'd at Demand; ſome at ſuch a time. How was this depoſed? To be paid you when you had left off being extravagant: But when you demanded it, you had not parted with your Extravagancies, and therefore it was not due; nor can he be ſaid to have broke his Truſt for refuſing to reſtore it at a time, when you yourſelf own he could not be forced to it.* To this I anſwer, If he that demanded it was the very Perſon that depoſed it, it ought not to be withheld; but if another had depos'd it, ſuppoſe him whoſe Heir the Demandant is, the *Truſtee* could not be obliged to reſtore it, before the Conditions required were performed [h].

As for the Degree, it is allow'd on all Hands, that ordinary Diligence is ſufficient; for the Contract is not for the *Truſtee*'s, but the *Deponent*'s Advantage, and it is his own Fault, if he depoſes his Goods in the Hands of a careleſs Perſon: And for this Reaſon the *Truſtee* does his Duty, if he takes the ſame Care of the *Charge*, as he does of other Things, and applies the ſame Diligence about that as about his own Affairs [6], be it never ſo ſmall [i]. But ſince, in a *Charge* ſome Offices of Friendſhip do uſually intervene (for no Man depoſes but with a Friend, or one that he has a good Opinion of) I think, generally ſpeaking, that Care is required in the Management of a *Charge*, which diligent, induſtrious Men uſually take about their own Affairs. Nay ſometimes a more exact Care is neceſſary, not only when it is expreſly promiſed, but when the Condition of the *Charge* requires it, as if it be very valuable, or if one's whole Fortune depends upon it [a]. Which Carefulneſs does not conſiſt in having it Day and Night before our Eyes, but that we lay it up in the ſafeſt Place we can, and where it is likely to receive leaſt Damage. And therefore although I ſatisfy the Laws of Friendſhip, if I take the ſame Care of my Friend's Goods as I do of my own, nor can any one in Modeſty deſire more; yet it is fit, when I cannot ſave both, that I neglect my own, if of little worth, to preſerve my Friends that is more valuable; for Inſtance, in a Fire, I ought to preſerve a Cheſt of Gold and other precious Things, or full of Deeds and Writings of Moment, rather than ſome of my own poor Houſhold-ſtuff. But then the *Deponent* will be obliged to pay me the Value of thoſe things which I ſuffered to periſh for the Preſervation of his, as well as other Expences and Loſſes received upon the Account of the *Charge*. But if a Man ſhould prefer the Preſervation of his own mean Goods to the more valuable *Charge* of his Friend (if it has not been covenanted to the contrary) he can be thought only to have [8] violated the Laws of Friendſhip and good Nature, and cannot be forced to make good the Value of the Thing; for he is no Gainer by it, and the Intermiſſion of Acts of Friendſhip and good Nature does not oblige to the Reſtitution of what Loſſes may happen thereupon. But the Reaſon why the *Roman* Lawyers require a leſs Degree of Diligence in a *Charge* than in a *Commiſſion*, is, becauſe the latter is managed by our own peculiar Act, and which therefore we have in our own Power to direct in every little Circumſtance of it. But in the *former* no body deſires that I ſhould be obliged to ſit up, and watch by my *Charge* Night and Day, it being enough if I lay it up in a convenient Place, and never view it, unleſs when ſome particular Occaſion requires, as I uſe to do with ſuch Things of my own [9]. To the Law in *Exod.* xxii. 12. *If it be ſtolen from him, he ſhall make reſtitution unto the Owner thereof*; *Grotius* adds this Gloſs, *Provided it be by palpable Negligence, which does not much differ from Knavery* [10].

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[2] *Præterea & is apud quem res aliqua deponitur, re obligatur (teneturque actione Depoſiti) quia & ipſe de eâ re, quam accepit, reſtituenda tenetur,* Inſtit. l. 3. t. 15. *Quibus modis re contrahitur obligatio,* § 3. See alſo *Digeſt ubi ſupra, Leg.* 12. §. 3.

[3] *Seneca*'s Words are, *Depoſitum reddere res eſt per ſe expetenda, non tamen ſemper reddam, nec quolibet loco, nec quolibet tempore. Aliquando nihil intereſt, utrum inficier, an palam reddam. Intuebor utilitatem ejus cui redditurus ſum, & nociturum illi depoſitum negabo,* l. 4. c. 10. de Benef.

[4] *Cicero*'s Words are, "Neque ſemper depoſita reddenda; ſi quis apud te gladium ſanâ mente depoſuerit, repetat inſaniens, "reddere peccatum ſit, non reddere officium. Quid? ſi is, qui apud te pecuniam depoſuerit, bellum inferat Patriæ, reddeſne De"poſitum? Non credo; facies enim contra Rempublicam, quæ debet eſſe cariſſima." *Plato* explaining that Maxim of *Simonides*, That Juſtice conſiſts in rendring to every Man his Due, ſays, "A Thing entruſted, is due to him of whom we hold it; yet we "ought not to reſtore it to him, if he be not in his Senſes; becauſe among Men, who are not Enemies, this is not to render a "Man his due, when it may tend to the Prejudice both of the Giver and Receiver." His Words are, Τί φῂς κατὰ Σιμωνίδην λέγοντα, ὀρθῶς λέγειν περὶ δικαιοσύνης; Ὅτι (ἦδ' ὅς) τὸ τὰ ὀφειλόμενα ἑκάστῳ ἀποδιδόναι δίκαιον ἐστίν. —— δῆλον γὰρ ὅτι οὐ τοῦτο λέγει, ὅπερ ἄρτι ἐλέγομεν, τὸ, τινὸς παρακαταθεμένου τι ὁτιοῦν, μὴ σωφρόνως ἀπαιτοῦντι ἀποδιδόναι, καίτοιγε ὀφειλόμενον που τοῦτο ἐστίν, ὃ παρακατέθετο —— τοῖς γὰρ φίλοις οἴεται ὀφείλειν τοὺς φίλους ἀγαθὸν μέν τι δρᾷν, κακὸν δὲ μηδέν. Μανθάνω, ἦν δ' ἐγὼ, ὅτι οὐ τὰ ὀφειλόμενα ἀποδίδωσιν, ὃς ἂν τὸ χρύσιον ἀποδῷ παρακαταθεμένῳ, ἐάνπερ ἡ ἀπόδοσις, καὶ ἡ λῆψις βλαβερὰ γίνηται, φίλοι δὲ ὦσιν, ὅ, τε ἀπολαμβάνων καὶ ὁ ἀποδιδούς. *De Republ. l.* 1. *t.* 2. This remarkable Authority may be added to what Mr. NOODT in his *Probabil. Juris* has alledg'd, *l.* 3. *c.* 2.

[5] The Words of the *Digeſts* are, *Si depoſuero apud te, ut poſt mortem tuam reddas, & tecum & cum hærede tuo, poſſum depoſiti agere, poſſum enim mutare voluntatem, & ante mortem tuam depoſitum repetere.* But this hinders not, but that we may refuſe to return to our Truſt, unleſs he who put it into our Hands order'd it to be given to ſome third Perſon, after a certain Term of Time. As for Example, If any one command us to deliver ſuch and ſuch a Thing to his Heir after his Death, unleſs he be debauch'd. And thus we may allow what *Quinctilian* hath ſaid here. For as for the Perſon who hath entruſted us, we cann't lawfully refuſe to deliver it at his Requeſt.

[6] The Words of the *Digeſt* are, "Sed is [apud quem rem aliquam deponimus] etiamſi negligenter rem cuſtoditam amiſerit, "ſecurus eſt; quia enim non ſua gratia accipit, ſed ejus à quo accipit, in eo ſolo tenetur, ſi quid dolo perierit. Negligentiæ vero "nomine ideo non tenetur, quia qui negligenti amico rem cuſtodiendam committit, de ſe queri debet, magnam tamen negligen"tiam placuit in doli crimine cadere, *l.* 44. *t.* 7. *De Obligat. & Action. Leg.* 1. §. 5. Quod Nerva diceret, latiorem culpam "dolum eſſe, Proculo diſplicebat, mihi veriſſimum videtur; nam etſi quis non ad eum modum, quem hominum natura deſiderat, "diligens eſt, niſi tamen ad ſuum modum curam in depoſito præſtat, fraude non caret; nec enim ſalvâ fide minorem iis quam "ſuis rebus diligentiam præſtabit," *l.* 16. *t.* 3. *Depoſiti,* &c. *Leg.* 32. Mr. *Thomaſius,* in his Diſcourſe *De culp. præſt. in Contract. c.* 1. § 42. obſerves very well, "That 'tis not without Reaſon that the *Roman* Lawyers, who require of a Proctor the "greateſt Exactneſs, make not a Perſon entruſted anſwerable for the moſt groſs Negligence: For a Contract of Commiſſion is not "made more for the Intereſt of a Proctor, than a Thing entruſted of the Perſon to whom it is entruſted; for a Truſt is a kind "of Proctorſhip, by which a certain Perſon is obliged to keep what he is entruſted with. It is true, that in both theſe Con"tracts we ought to take the greateſt Care and Exactneſs which we are capable of, *i. e.* as I have explained it above, as much "as we would have for our own Intereſts, about things we moſt prize. The Laws of Society and Neceſſity of Commerce en"gage us to it; ſo that any Man who leaves his Goods in the keeping of another may expect it. If the Truſtee will not do all "he can for him that depends on him, he ought to refuſe the Truſt; but ſince he willingly accepts it, 'tis juſt that he ſhould "take the ſame Care which he would readily do in his own Caſe.

[a] *Vid.* lib. 16. t. 3. *Depoſiti,* &c. leg. 1. *princ.* ſ. 8. [b] *Vid. Inſtit.* l. 3. t. 15. & l. 12. ſ. 3. *D. depoſiti, ubi ſupr.* [c] Philo Jud. *de plantatione* Noach. [d] Cicero *Offic.* l. 3. c. 25. [e] *Vid.* Sen. *de Benef.* l. 4. c. 10. [f] *Vid.* lib. 16. t. 3. l. 1. ſ. 45, 46. *D. depoſiti.* [g] *Declam.* 245. [h] Add *Val. Max.* l. 7. c. 3. ſ. 5. *inter externa.* [i] *Vid.* lib. 44. t. 7. l. 1. ſ. 5. *D. de obligat. & act.*

It may bear a Queſtion, *Whether the* Truſtee *may make uſe of the Thing entruſted with him?* To which I anſwer, That if the *Charge* can poſſibly receive any Damage in the Uſe, he ought not to do it without the Owner's Conſent. *Scævola* in *Gellius*, l. vii. c. 1. "He that uſes a Thing that "was ſimply committed to his keeping, or puts it "to other Uſes than the Owner gave him leave, is "guilty of Theft [11]." But if the Thing be never the worſe for being us'd, as if I ſhould lay a ſilver Cup for Ornament on the Side-board, or make ſome uſe of it for the Entertainment of ſome extraordinary Gueſt, I don't ſee any Harm in this, provided the Owner is not particularly concerned, that no Body ſhould ſee it, and the *Truſtee* knows that he is to ſtand to whatever Riſque it may run by being ſo us'd. But when the *Owner* has lock'd or ſeal'd up the *Charge*, we ought not, upon any Account, to open it [b]. Nay, a *conſumable Commodity* given in *Charge*, altho' neither lock'd nor ſeal'd up, may not be made uſe of by the *Truſtee* [12], unleſs he be able to reſtore the ſame in Quantity and Quality upon De-

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[8] *Thomaſius*, in his Diſcourſe aforementioned, § 44. does not think this Determination good; for he ſays, "We do not offend "againſt the Laws of Humanity, unleſs there be no Engagement." And ſince, according to our Author, when one ſuffers the Loſs of his own Goods to ſave a Thing of greater Value, with which he is entruſted, he may make him pay for his Loſs: We muſt own, that in Strictneſs he is obliged to ſave a Thing committed to his Truſt at the Expence of another of leſs Value, which belongs to him, as he is alſo obliged to be at all neceſſary Expences to preſerve his Truſt. As for me, I believe that this laſt Caſe, and ſome others, are out of the Extent of our Engagement to general Contracts. The interfering of our own Intereſt with that of a Perſon whoſe Buſineſs we have voluntarily taken in hand, or Goods to keep, begets a tacit Exception, which may not take place; but then it muſt be judged of by other Principles. I am not indiſpenſably obliged to neglect my own Affairs, tho' leſs conſiderable in themſelves, to attend another Man's, that I have undertaken; at leaſt, I am not expreſly engaged to ſuch a Preference, or the Nature of the Thing itſelf doth not require it neceſſarily. Nor are we any more obliged in Rigour to ſave what is committed to our Charge, to the Damage of a Thing of leſs Value that belongs to us; for beſides that, whatever Diſproportion there may be, if we conſider the Things in themſelves, what is of leſs Value, may be of greater Worth to the Truſtee than the other is to him that has entruſted it to him. He may have ſometimes a very great Occaſion for the Thing he muſt ſacrifice, or he may ſet a great Eſteem on it for ſome particular Reaſon, or the Loſs cann't eaſily be made good. As therefore we do not commonly engage to do all we can for the Security of our Truſt, inaſmuch as at the ſame time we do not think of the Perſervation of our own Goods, we are not, properly ſpeaking, in rigour obliged to ſuffer the Loſs of any Thing that belongs to us for this Reaſon only, becauſe it is of leſs Value than that which we have in our keeping. To this we may add, that in the Trouble into which we fall by an unforeſeen Accident, we have not ſo much Preſence of Mind, for the moſt part, as to conſider what Things are beſt worth ſaving, or if we ſhall have time enough to ſave this or that. We generally run to that which comes firſt into our Mind; and as it is natural to think of our own more than of another's Goods, no Man can think it an Injury, if we prefer the Preſervation of our own Goods, tho' of leſs Value, before that of another's. It is alſo very often hard to know whether we can preſerve our Truſt, tho' we neglect our own Goods. I conclude, All muſt be left to the Conſcience and Friendſhip of the Truſtee.

[9] But ſays Mr. *Thomaſius*, *ubi ſupra*, § 43. "As there are divers ſorts of Affairs which require a different Care, and more or "leſs Application on the part of the Proctors; ſo there are divers ſorts of Truſts, which muſt be differently kept, and with more "or leſs Watchfulneſs. One ſort of Care we muſt have of an Houſe, another of a Slave or Domeſtick Servant, another of a "Jewel, or ſome other precious Thing, another of ſuch things as are not portable; and therefore we are ſatisfy'd to place them "in a Court, or ſome ſuch Place, *&c.* ſo that 'tis not true to ſpeak generally and without Reſtriction. 'Tis ſufficient to put a "Thing in a convenient Place; and when that's done, we cann't any more conclude that a Truſtee is only anſwerable for his "Knavery and groſs Negligence, than we may infer, for the ſame Reaſon, that the Seller, before the Delivery of his Goods, "is alſo reſponſible for his Knavery, and the ſame Degree of Negligence, and nothing elſe."

[10] Mr. Le Clerc fully ſhews, by the Connexion of the Diſcourſe, that it is underſtood, that the Theft was committed either in the Sight, or with the Knowledge of the Truſtee.

[11] The Words are, *Sive is apud quem res depoſita eſt, eâ re utatur ——— furtum committit.*

[12] Mr. Sacy's Deciſion upon a Caſe which he propounds in his Treatiſe *of Friendſhip*, appears a little too ſevere, not to ſay very ſour. "I am not afraid to ſay *(theſe are his Words)* that he, to whom a Thouſand Livres are entruſted, may not make uſe of "them to ſave the Life of his Friend, who is fallen into the Hands of Thieves, who threaten to take it away, if that Sum be not "paid by a certain time. This is a Caſe, in which we ought to forget that we have any Truſt, becauſe in having ſuch "a Sum entruſted to us, 'tis as if we had none: For it is not lawful for us either to open or force the Cheſt where it is. And if "we dare to do it, we commit no leſs Crime, than if we broke open our Neighbour's Houſe, and took that Sum; the only Diffe-"rence is, that the Law puniſhing this laſt with Death, and taking no Notice of the other, leaves our Puniſhment to Infamy "tho', in the main, 'tis the ſame thing. The Sum entruſted, is in the Hands of the Perſon truſted, not as in his Houſe, but in "his Houſe to whom it belongs; and ſo when the Truſtee makes uſe of it, he ſteals it no leſs than if it were not entruſted to him, "he

[a] *Add.* Ambr. Off. l. 2. c. 29.

[b] *Add.* lib. 16. t. 3. l. 1. ſ. 36. *D. depoſit.*

Demand: For we are often in ſo great want of ſuch ſort of things, that we cannot part with them on any Terms. Laſtly, 'tis well ordained in the *Roman* Law, that whoſoever ſhould diſown a *Charge*, which the *Deponent*, in Diſtreſs, had repoſed with him, as being in danger of Fire, Shipwreck, Tumult, or ſuch like, ſhould be fin'd double; for ſuch inhuman Villany deſerves to be ſeverely [13] puniſhed, which does not ſcruple to make a Gain of thoſe Men who are the Objects of Compaſſion. *Vid.* l. i. ſ. 1, 2, 4. *D. depoſiti*, d. l. *Quinctilian*, Decl. 245. adds, "A Charge "ought to be reſtored the ſooner for being deliver'd "ſecretly and without Proof." Add^r *Exod.* xxii. 7, 8, 9. *Lev.* vi. 2, *&c.* Nay, I think it a worſe Crime to diſown or withhold a *Charge*, than to commit a Robbery; for here only Juſtice and Property are violated, but there Friendſhip and good Nature too ſuffer [a]. Nor does it extenuate the Crime, that the *Truſtee*, having the *Charge* put into his Hands, has an Opportunity of playing the Knave (which is otherwiſe tempting enough) laid in his Way; whereas the Thief has no ſuch Temptation, but of his own Accord ſeizes upon other Mens Goods, and, which is more, breaks in upon that common Security which makes every Man's Houſe his ſafeſt Sanctuary. Nor is a *Guardian* guilty of a leſs heinous Crime, who debauches an Orphan committed to his *Truſt*, and received into his Houſe [b].

Since the Keeping only is given *gratis*, it is plain that all the Expences laid out upon the *Charge* ought to be repaid, Upon which Ground it is rightly declared in the Digeſts [c], *That if a* Charge *be received at* Aſia, *to be reſtor'd at* Rome, *it muſt be at the Expences of the* Owner, *not of the* Truſtee.

"he took it out of the Houſe of the true Proprietor." *Pag.* 125, &c. This Author does not diſtinguiſh whether he be able or not to pay the Sum entruſted to him, which he made uſe of to ſave the Life of his Friend; all that he ſays tends only to prove, that, let the Reaſon be never ſo important and preſſing, for which the Thing entruſted is made uſe of, he is guilty of Theft for this alone, that he made uſe of what he had in keeping. But this is one of the Caſes of Neceſſity, which are above the common Rules, and whoſe Exception is included in all Engagements. Whatever a Man can do for himſelf, that he can certainly do in the like Circumſtances for his Friend, who is his ſecond ſelf; and we ought to have ſuch a good Opinion of him who truſts us, as to believe that he would lend us his Money for that Uſe freely, and ſo he may be thought tacitly to conſent to it. I proceed farther, and ſay, That ſuppoſing the Sum depoſited be inconſiderable, in reſpect of the Eſtate of him to whom it belongs, I cann't ſee but that it may be made uſe of to ſave the Life of a Man and a Friend, tho' we do not think him rich enough to pay ſo great a Sum under a long time, if ever. If it be allowable, as I have prov'd above, *l.* 2. *c.* 6. not only to take the Goods of another, but alſo to run the Hazard of one's Life to preſerve his, is it not much more excuſable to take the Liberty of diſpoſing of a Thing truſted to us, in ſuch a preſſing Neceſſity of a Friend? And yet there is a great deal of Difference between this Action and that of a Man who robs to ſave his Friend; for this laſt commits a manifeſt Violence and Injuſtice, whereas the other only makes uſe of the Opportunity that Providence has given him, where he may preſume upon the Conſent of him who has committed that Money to his Keeping. It is much like, as if a Man, being purſu'd by his Enemies or Thieves, takes the firſt Horſe he lights of to make his Eſcape, tho' the Maſter is neither preſent, nor knows it.

[13] The Words of the *Digeſts* are, *Prætor ait, quod neque tumultus, neque incendii, neque ruinæ, neque naufragii causâ depoſitum ſit, in ſimplum, ex earum autem rerum, quæ ſupra comprehenſæ ſunt, in ipſum in duplum - - - cum extante neceſſitate deponat, creſcit perfidiæ crimen.*

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[a] In *Piſidia* the Breach of this Duty was Capital, *Nicolaus Damaſcenus.* [b] *Add.* Ariſt. *Prob.* Sect. 29. Qu. 2 & 6. Alſo *l.* 1. *ſ.* 2. & 67. *princ. D. de furtis.* [c] Lib. 16. t. 3. l. 12. *princ. D. depoſiti.*

CHAP. V.

Of chargeable Contracts *in particular*; *and, Firſt, of* Bartering, Buying *and* Selling.

I. *Of Exchanging or Bartering.*
II. *When a Contract of Buying and Selling is compleat.*
III. *Of the Loſs or Gain of a Thing ſold.*
IV. *Of Agreements commonly join'd with Sales.*
V. *What the Buyer ought to perform to the Seller, and* e contra.
VI. *Of Buying in Hope and Expectation.*
VII. *Of Monopolies.*

Of *chargeable Contracts*, *Bartering* is deſervedly eſteem'd the Chief; for in Days of Yore [1], before Money was found out, there was no other Method of maintaining Commerce. The *Dutch* made uſe of the ſimple and antient way of Bartering Commodities, *Vid.* Tacit. *de Morib.* Germ. *c.* 5. [a]. Now *Bartering* may be made two ways; either the Commodities may be valued for Money, and then, inſtead of Money, exchanged for one another; or the Commodities may be immediately compar'd together. The *firſt* ſort is, in a manner, *Buying* and *Selling*, for here the Things are rated according to their Prices on both Sides; which Sort of *Bartering* is at this Day very frequent.

And therefore there is no Reaſon to conclude, that *pure Bartering* was in uſe at the time of the *Trojan* War, as moſt do from that Paſſage in *Homer*, Iliad. η· v. 472.

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[a] See *Grot.* B. 2. c. 12. ſ. 3. n. 3.

Mr. Barbeyrac's *NOTES* on Chap. V. § 1.

[1] See about this Diſpute Mr. *Gravina*, Profeſſor of Law at *Rome*, his *Origines Juris Civilis*, l. 2. p. 248, *&c.*

Ἔνθεν ἄρ᾽ οἰνίζοντο καρηκομόωντες Ἀχαιοί,
Ἄλλοι μὲν χαλκῷ, ἄλλοι δ᾽ αἴθωνι σιδήρῳ,
Ἄλλοι δὲ ῥινοῖς, ἄλλοι δ᾽ αὐτοῖσι βόεσσιν,
Ἄλλοι δ᾽ ἀνδραπόδεσσι.

The *Grecian* Chiefs their chearful Bowls prepare,
And *barter* Braſs and Steel for ſumptuous Fare.
Some *truck* with Slaves or Skins of ſlaughter'd Kine,
And ſome the Ox it ſelf *exchange* for Wine.

For, ſays Pliny[a], *I wiſh we could quite lay aſide the Uſe of Gold, which all good Men ſpeak againſt, and which was found out to the Deſtruction of Mankind. How much happier was it when one thing was* exchang'd *for another? As* (if *Homer* may be believed) *was done at the time of the* Trojan *War: For then, I ſuppoſe, Commerce was ſet on Foot for the Conveniences of Life.* He tells us, *That ſome purchas'd with Hides, ſome with Iron, others with Plunder: Tho' he himſelf was an Admirer of Gold, yet he ſo rated Things, as to make* Glaucus *exchange his golden Arms of a hundred Oxen Price, for* Diomedes'*s of nine. Hence it is, that the Fines inflicted by the old Laws conſiſted of Cattle, even at* Rome. Indeed, at this Day, nothing is more common than for Soldiers to *exchange* their Booty for other Commodities; for their Booty does not always conſiſt of Money, and they do not ſcruple to take other Things that come in their way. And therefore it does not follow, that Money was not in Uſe at the Time of the *Trojan* War, becauſe the Soldiers purchas'd Wine with their Plunder: Nay, there is mention made of Talents of Gold in *Homer*; for in *Iliad. ι.* v. 122. *Agamemnon* promiſes to give *Achilles* δέκα δὲ χρυσοῖο τάλαντα, *Ten Talents of Gold, & Odyſſ.* θ. v. 393. Each of the *Phæacian* Princes gives *Ulyſſes* χρυσοῖο τάλαντον τιμήεντος, *A Talent of venerable Gold.* And altho' that Gold in *Odyſſ. ν.* v. 11. is call'd, χρυσὸς πολυδαίδαλος, yet it is not probable, that all Gold was then *wrought*, or us'd only for Cups and ſuch ſort of Veſſels. Nor does it appear why *Homer* ſhould give ſuch a Veneration to Gold, if it had not been then the Standard Price of other Things. Beſides, πολυδαίδαλος may ſignify any Materials capable of being finely wrought upon. As for *Homer*'s calling *Glaucus*'s golden Arms ἑκατόμβοια, or *worth an hundred Oxen*, and *Diomedes*'s Braſs ones, ἐννεάβοια, or *worth nine Oxen*, without doubt he did it, becauſe in old Time, the greateſt Riches conſiſted in Cattle, of which Oxen being the chief, becauſe of the abſolute Neceſſity of them in Husbandry, it was uſual to refer the Price of other Things to them; which common way of ſpeaking did not immediately grow out of uſe, after Money had been made the Meaſure of all things. And therefore it is obſerv'd[b], that Maidens, who by reaſon of their Beauty received great Preſents from their Gallants, were call'd παρθένους ἀλφεσιβοίας, *Virgins who gain Oxen:* But granting that *Coin'd Money* was not then known among the *Grecians*, yet the Uſe of Gold and Silver, by *weight*, might poſſibly have obtain'd in Commerce. Indeed, that many Nations uſed Money before the *Trojan* War, is plain enough from Holy Writ.

This Place of *Homer* puts me in mind of the Controverſy between *Caſſius* and *Sabinus*[c], *Whether before Money was in uſe, or now, ſince the Uſe of it, it might be call'd* Selling, *if* v. g. *I ſhould give my Cloak for a Coat? Sabinus* aſſerted that it was, from this Paſſage of *Homer*, as if the *Grecian* Army had bought Wine with Braſs, Iron, and Men; but οἰνίζεσθαι does not properly ſignify to *buy Wine*, but to procure it by any means whatſoever, as among the Latines, *pabulari, lignari, frumentari*, ſignify to *forrage, to get Wood, and Corn* by any Method whatſoever[2]. The *other* Opinion indeed ſeems more feaſible, becauſe it is one thing to *buy*, another to *ſell*, the *Buyer* one Man, the *Seller* another; the *Price* one thing, and the *Commodity* another; but for the ſame Man to be *Buyer* and *Seller*, and the ſame Thing both the *Commodity* and *Price*, ſeems abſurd. But to this we reply what we juſt now ſaid of the two Sorts of *Bartering*; for if we ſuppoſe the Things to be firſt rated by Money, the *Buying* will be reciprocal, and therefore not abſurd for the ſame Perſon, in a different reſpect, to be both *Buyer* and *Seller*.

Under the Name of *Bartering* may be brought the reciprocal Donations which commonly paſs between Friends; which not being a Contract, do not require Equality[3]. And to this may be referr'd the changing of Arms between *Glaucus* and *Diomedes*[d], which, for the Inequality, may perhaps be ſtil'd Fooliſhneſs on *Glaucus*'s ſide, but cannot be call'd Injuſtice in *Diomedes*. *Maximus Tyr.* Diſſert. 23. ſays, "*Glaucus* rated his Purchaſe from the Occaſion, not according to the real Value." And again, *Diſſert.* 24. "Nor had he that receiv'd the golden Arms more than his Due, nor he that received the braſen, leſs; but both did generouſly; the Inequality of the Matter being made up with the Equality of the Deſign that each had of obliging the other." *Add.* Iſocr. *ad* Nicocl. *in princ.* Among the *Ruſſians* there is a Market for holy Images, which they do not pretend to *ſell*, but to *exchange* for Money[e].

II. But ſince Money has been introduc'd, the Contract of *Buying* and *Selling* has been moſt in Uſe[1], whereby the Property of a Thing, or ſome Right equivalent to it, is acquir'd for a certain Sum of Money: And here the firſt Enquiry is, *When the Contract is ſo compleated, that nothing remains but that the Seller relinquiſh the Thing, and the Buyer take Poſſeſſion*

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[2] Of this Opinion the *Digeſts* ſpeak thus, *Sed verior eſt Nervæ & Proculi ſententia, permutationem, non emptionem hoc eſſe. Nam ut aliud eſt vendere, aliud emere, alius emptor, alius venditor; ſic aliud eſt pretium, aliud merx, quod in permutatione diſcerni non poteſt, uter emptor, uter venditor ſit, ubi ſupra,*

[3] *Max. Tyrius*'s Greek is, Οὐδὲν γὰρ οὔτε τῷ λαβόντι χρυσὸς πλέον, οὔτε τῷ ἀνταξαμένῳ ὁ χαλκὸς ἔλαττον, ἀλλὰ ἀμφοτέροις καλῶς ἔχει ἑκάτερα ἐν τῷ ἀνίσῳ τῆς ὕλης, ἰσοστασίῳ τῇ γνώμῃ δοθέντα. See Mr. *Davis*'s Notes on it. We may alſo add here, That by the *Roman* Law an Exchange is a Contract without a Name, for which there lies no Action in Juſtice but the Delivery of the Thing exchanged is made on both Sides. See *Digeſt. l.* 19. *t.* 4. *De rerum permutatione*, and Mr. DAUMAT's *Civil Laws in their Natural Order*, Part 1. l. 1. t. 3.

[a] L. 33. c. 1. [b] As *Dydimus* remarks, *ad* Hom. *Il.* ζ. v. 236. [c] *Vid* Lib. 18. t. 1. l. 1. *D. de contrah. empt.* [d] *Vid.* Hom. *Il.* d. l. [e] *Olearius* itin. *Perſ.* l. 1. c. 1.

Mr. BARB. *NOTES on* § II.

[1] The Words of the *Digeſts* are, *Et ſi quidem pecuniam dem, ut rem accipiam, emptio & venditio eſt.* So we may ſell a Service, an Inheritance, a Debt, in a Word, all Sorts of Rights, Names, and Actions. See *Digeſt. De hæreditate, vel actione vendita,* l. 18. t. 4.

ſeſſion of it? According to the *Roman* Laws [2] the Contract is compleated as ſoon as both Sides have agreed upon the Price; and then the *Buyer* can force the *Seller* to deliver up the Thing; and the *Seller* can oblige the *Buyer* to take it, and to pay down the Price immediately, or at the Time appointed [a].

But the Contract may be *incompleat*, and not capable of bearing an Action, either upon a general or a particular Account. The *Firſt* is, when the *Buyer* and the *Seller* [b] [3] are not agreed, but ſtill endeavour to bring one another to their own Terms; where they are both free to give back and break off the Bargain, having not yet contracted an Obligation, provided there be no Deceit nor Deſign in either Party to elude the other; which indeed obtains in all Contracts. The *Latter* is, when the Bargain turns upon ſome Conditions [c] [4] either expreſt or underſtood; as if the Ware is firſt to be ſeen or taſted [d] [5], for here the Bargain goes upon a Suppoſition, that the Thing will not only appear as the *Seller* had repreſented it, but that it will then pleaſe too. For indeed the Knowledge of the Thing is always neceſſary for the determining of the Price; and it is imprudent to buy without ſeeing it, where we cannot depend upon the Word of the *Seller*.

The determining of the Commodity by Weight, Meaſure, or Number [e], is not properly a Condition of Sale, unleſs the Thing be ſo, as not to ſerve my Turn, but in ſuch a Quantity. However, for putting the Contract in Execution, it is neceſſary to meaſure, number, or weigh [6]; for we cannot otherwiſe ſpecify the Thing, and ſet it apart from thoſe of the [7] ſame ſort. Nor, without this Meaſuring can the Goods be deliver'd, or Property transferr'd; for I have no other way of determining what belongs to me, and what to the *Seller*. Sometimes indeed we buy at a Lump; and then Meaſuring is only for Experiment, not for the rating of the Commodity; for in that Caſe, the Meaſure does not precede the Delivery; it being one thing to ſell this Veſſel of Wine that holds ten Gallons, and another to ſell ten Gallons out of this Veſſel [8].

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[2] Altho' the Buyer pays nothing down, nor gives any Earneſt. *Eſt autem emptio Juris Gentium, & ideo conſenſu peragitur, & inter abſentes contrahi poteſt, & per nuncium & per literas*, Digeſt. de contrahendâ Emptione, Leg. 1. § 2. *Emptio & venditio contrahitur ſimulatque de pretio convenerit, quamvis nondum pretium numeratum ſit, ac ne arrha quidem data fuerit*, Inſtit. l. 3. t. 24. princ. See alſo *Digeſt. ubi ſupra, Leg.* 19, 34. § 6. & 35. § 5, 6, 7.

[3] As when they have not agreed upon the Price, but only have ſaid, We ſhall well agree, I'll ſell it at a reaſonable Price, &c. It is the ſame, according to the *Roman* Lawyers, when we ſay, I'll ſell it for what you pleaſe, for what you think reaſonable, &c. *Illud conſtat imperfectum eſſe negotium, cum emere volenti ſic venditor dicit, QUANTI velis, quanti æquum putaveris, quanti æſtimaveris, habebis emptum.* Digeſt. ibid. Leg. 35. § 1. Some aſk, Whether a ſimple Contract to ſell or buy, obliges to any thing by the Law of Nature and Nations? Mr. THOMASIUS, in his Diſcourſe *De Arrhis emptionum*, § 23. denies it abſolutely; and the Reaſon, ſays he, is clear, "There is only a looſe Conſent which is come to no Determination, and which gives no Right to "him to whom the Promiſe is made, to demand any thing: For how can he pretend that he hath bought or ſold any thing "actually? But if one has no Mind to ſell, 'tis eaſy to evade his Promiſe by exacting an enormous Price, or by annexing ſuch "Conditions as we think fit; and if one has no Mind to buy, he can as eaſily get off by very ſmall Offers, or by engaging him to very "hard Terms. Or how can a Man pretend to be endamaged, ſince there is neither any Goods ſet out, nor Price fixed; and he "hath nothing to do but to declare that he is ready to conclude the Bargain, if he reſolves to go on with it; and to take away "all Ground of Complaint, he may alledge that he has broken his Word, and ſo lay all the Blame on him that the Bargain is "not compleated?" But if we will judge of the Thing by the ſole Right of Nature and Nations, I do not think that any Man can come fully into the Sentiments of Mr. THOMASIUS. I diſtinguiſh here between an uncertain Promiſe, which neither ſignifies, or engages any Man, and a real Promiſe, upon which the Perſon, to whom it is made, may depend: The firſt ſort may be eluded after the manner that this able Lawyer hath repreſented, becauſe we have promis'd ſo far only as we pleaſe to keep it; and ſo he, to whom the Promiſe is made, has no Right, but the other ought certainly to be ordered ſo, as not to come to Nothing, and the Promiſer cann't elude it at his own Pleaſure. Let us clear this by an Example; I ſee a Thing uſeful to me in another's Poſſeſſion, and aſk him whether he'll ſell it me? He anſwers, Yea. Whereupon I go away without bargaining, or requiring him to lay it aſide for me. In this Caſe 'tis plain, that if the Owner of the Goods ſells them to another, and refuſes to ſell them to me afterward, when I come again to deſire it, he does me no Injury, for he is under no Engagement to me, no otherwiſe than that we might have agreed, if I had at that inſtant bargained; but ſince I neglected it, 'tis ſo much the worſe for me. And this hath chiefly a Place, when he that declared his Price at that inſtant, is a Trader by Profeſſion, and deals in Things of that Nature; for we know well, that if we do not take ſuch Men at their Word, when they offer to ſell a Thing at ſuch a Price, we do nothing; by a much greater Reaſon they are free to ſell, or not, when nothing is ſaid. But ſuppoſe that I ſay to a Tradeſman by Profeſſion, May I depend upon it that you'll ſell me ſuch or ſuch a Thing? And he thereupon poſitively promiſes me that he'll keep it for me, then he tacitly engages that he'll ſell it me at a reaſonable Rate, if I deal with him for a Thing whoſe Price often varies, or at the uſual Price, if there be any Rule for it; provided that I come ſoon to buy it, or in the time agreed on; for if I let the Time paſs, or, if it were not ſet, I ſtay a long time before I come again, the other Contractor is releaſed of his Word, by reaſon of the Occaſions which he may loſe of ſelling his Goods to Advantage; for before this he was not free to recant, becauſe I might fail of accommodating myſelf elſewhere.

[4] The Words of the *Digeſts* are, *Conditionales autem venditiones tunc perficiuntur, cum impleta fuerit conditio.* But this is not appropriated to a Bargain and Sale only. All ſorts of Agreements follow the ſame Rule. See what is ſaid above, *Lib.* 3. *c.* 4. *Quod ſi ſub conditione res venierit*, ſay the *Roman* Lawyers, *ſi quidem defecerit Conditio, nulla eſt Emptio, ſicuti nec eſt Stipulatio.* Digeſt. l. 18. t. 6. De Periculo & commodo Rei venditæ. Leg. 8.

[5] *Guſtus enim ad hoc proficit, ut improbare liceat*, Digeſt. lib. 18. tit. De contrah. empt. Leg. 34. § 5. *Difficile autem eſt, ut quiſquam ſic emat, ut ne deguſtet.* Ibid. tit. 4. De periculo & commodo rei venditæ, Leg. 4. § 1.

[6] As for Example: If I buy ſome Cloth for a Suit, and the Piece holds not out ſo many Ells as it ought.

[7] *Si id, quod venierit, appareat, quid, quale, quantum ſit, & pretium, & purè venit, perfecta eſt emptio.* Digeſt. De periculo & commodo Rei venditæ, Leg. 8. princip. *In his quæ pondere, numero, menſuráve conſtant,* —— *ſi omne vinum, vel oleum, vel frumentum, vel argentum quantumcunque eſſet, uno pretio venierit, idem juris eſt, quod in cæteris rebus. Quod ſi vinum ita venierit, ut in ſingulas amphoras; item oleum ut in ſingulas metretas; item frumentum ut in ſingulos modios, item argentum ut in ſingulas libras certum pretium diceretur, - - - & de his quæ numero conſtant, ſi pro numero corporum pretium ſit ſtatutum. Sabinus & Caſſius tunc perfici emptionem exiſtimant, cum ad numerata, admenſa, adpenſáve ſint; quia venditio ſub hac conditione videtur fieri ut in ſingulos metretas, & modios, & libras, quos quaſve admenſus eris vel appenderis*, Lib. 18. t. 1. De contrah. empt. &c. Leg. 35. § 5.

[8] This is not appropriated to Sales, but to all ſorts of Agreements. *Contractus venditionum, vel permutationum, vel Donationum, quas intimari [non] eſt neceſſarium, dationis etiam Arrharum, vel alterius cujuſcunque cauſæ, [quas tamen] in ſcriptis fieri placuit, tranſactionum etiam, quas in inſtrumento recipi convenit, non aliter vires habere ſancimus, niſi inſtrumenta in mundum recepta, ſubſcriptionibuſque partium confirmata, & ſi per tabellionem conſcribantur, etiam ab ipſo completa, & poſtremo à partibus abſoluta ſunt*, Cod. lib. 4. tit. 21. De fide inſtrumentorum, &c. Leg. 18. See *Inſtitut. l.* 3. *t.* 24. *De Emptione & Venditione princ.* We ought to obſerve that in this §, altho' the Author pretends only to relate the Determinations of the Civil Law, he ſo mixes his own Notions with theirs, which he endeavours to rectify and reduce to the Simplicity of the Law of Nature, that 'tis not poſſible to diſintangle them in a Tranſlation.

[a] *Add.* lib. 19. t. 5. *D. de præſcript. verbis*, &c. Leg. 5. ſ. 1. *Sine pretio nulla venditio eſt.* Lib. 18. t. 1. & l. 19. l. 34. ſ. 5, 6. l. 35. ſ. 1, 5, 6, 7. *D. de contrah. empt.* &c. [b] *Vid.* D. *ibid.* Leg. 35. ſ. 1. [c] *Vid.* D. *ibid.* Leg. 7. ſ. 1. See above in B. 3. Ch. 8. [d] *Vid.* D. *ubi ſupra.* Leg. 34. ſ. 5. [e] *Vid.* D. *ubi ſupra.*

Laſtly, the Bargain is *incompleat*, if the Parties [a] particularly agree to have one another's Conſent expreſt in Writing, and the Writings be not yet finiſh'd. But 'tis another thing, if this Writing is deſign'd only for a Help of the [9] Memory, or an Evidence of the Thing. What the *Hebrews* obſerv'd, in relation to this Contract, is curiouſly taken notice of by *Selden, De J. N. & G. ſecund. Heb.* l. vi. c. 1 & 4. Add a Place of *Theoph.* in *Stobæus*, Serm. 42.

III. And here we muſt take ſpecial Care to diſtinguiſh between the *Contract itſelf*, and the *Execution* of it. The *Contract* is compleated as ſoon as the Commodity and Price is agreed upon, provided there be no Condition added, that can ſuſpend the Obligation, or any thing elſe, that can leave room for either Party to recede from the Bargain; but the *Execution* of the Contract conſiſts in the actual Delivery of the Money by the *Buyer*, and of the Commodity by the *Seller*. It is indeed moſt natural, that as ſoon as the Contract is compleated, it ſhould be put in Execution; or that as ſoon as the Price is agreed upon, the *Buyer* ſhould deliver the Money, and receive the Commodity; which they call *Trucking with ready Money* [1]. *Vid.* Plaut. Aſin. *Act.* I. *Sc.* iii. *v.* 47. As alſo *Plato de Leg.* l. xi. in his Commonwealth enacts, "That whatſoever is bought "and ſold, be done in ſuch a certain Place of the "*Forum*, the Seller delivering the Commodity, and "the Buyer paying down the Price immediately."

But when there is ſome time between the Completion of the Bargain, and the Delivery of the Thing; it may be demanded to whom the Damage, or the Profit of the Commodity belongs in the mean time, to the *Buyer* or to the *Seller*? [2] 'Tis well known that the *Roman* Law, as ſoon as ever the Bargain is compleated, imputes the Riſque of the Commodity to the *Buyer*, [3] altho, it be not yet deliver'd, and altho' the *Seller* remains Maſter of it. By *Riſques* they mean the Accidents 'tis liable to, from external Injuries, as Theft, *&c.* or internal Decay proceeding from natural Cauſes [b] [4]. But how can the Damage belong to the *Buyer*, when he is not yet the Owner, whereas the Loſs of a Thing is to the Owner? To which ſome anſwer [5] [c], that that trite ſaying, *The loſs is to the Owner*, is true, when the *Owner* is oppos'd to thoſe who have barely the Uſe and Cuſtody of the Thing; and not to thoſe who have Right in it, and a Power to call for it as their own. Which Diſtinction is founded upon this Reaſon, that the *Buyer* might, and ought to have immediately taken Poſſeſſion of the Commodity, and to have paid down the Money; which if he had done, it had periſh'd in his own keeping; and therefore his Delay and Negligence ought not to turn to the Loſs of the *Seller*. Beſides, the Riſque belongs to the *Buyer*, not only becauſe he is the *Owner*, but becauſe the *Seller*, after the Completion of the Bargain, in reſpect of the *Buyer*, is not conſider'd as *Owner*, but as *Truſtee* of ſuch a particular Commodity, for which, if it be loſt without his Fault, he ought not to be reſponſible.

[6] But after all, ſince it is the *Seller*'s Buſineſs to give the *Buyer* Poſſeſſion, if he has not diſcharged this Duty, I do not ſee why *he*, rather than the *other*, ſhould not ſtand to the Loſs of it. For the Anſwer, *That a Perſon, having promis'd any certain Thing, does not ſtand oblig'd in caſe the Thing be loſt*, does not come up to our Caſe [d]: For there the other Party was to have gain'd the things *gratis*; and it would be hard and unjuſt for a Man that had promiſed a certain Species, upon the Loſs of it, to be bound to make good the Value. But in ſuch Dealings as admit of no Latitude, the Caſe is altered; for why ſhould

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[9] This is commonly preſumed till the contrary appear. *Fiunt enim de his* [*obligationibus quæ conſenſu contrahuntur*] *ſcripturæ, ut quod actum eſt per eas facilius probari poſſit, & ſine his autem valet, quod actum eſt, ſi habeat probationem, ſicut & nuptiæ ſunt, licet teſtatio ſine ſcriptis ſit habita.* Digeſt. lib. 22. tit. 4. de fide inſtrumentorum, *&c.*

[a] This not only reſpects Contracts of *Selling*, but likewiſe all other Compacts, *Vid. C.* lib. 4. t. 21. *De fide inſtrumentor.* &c. Leg. 17. *Vid.* Inſtit. lib. 3. t. 24. *De emptione & venditione princip.* [b] *Vid. d. tit. de peric. & commod. rei venditæ.* [c] *Vid. C.* lib. 4. t. 24. *De Pigneratitia actione*, Leg. 9. [d] According to *lib.* 45. *t.* 1. *leg.* 33. *l.* 83. *ſ.* 7. *D. de verb. oblig. & lib.* 35. *t.* 2. *l.* 30. *ſ.* 4. *D. ad L. Falcid. in fine, & lib.* 4. *t.* 3. *Leg.* 18. *ſ.* 5. *D. de dolo malo.*

Mr. Barb. *NOTES on* § III.

[1] This is what is called *Græcâ fide mercari.* See *Plaut. &c.* as in the Text.

[2] The Words of the Law are, *Quum autem emptio & venditio contracta ſit, - - - periculum rei venditæ ſtatim ad emptorem pertinet, tametſi ea res tradita emptori non ſit. Itaque ſi homo mortuus ſit, vel aliquâ parte corporis læſus ſit, aut ædes totæ, aut aliqua ex parte, incendio conſumptæ fuerint, aut fundus vi fluminis totus, vel aliquâ ex parte ablatus ſit, ſive etiam inundatione aquæ, vel arboribus turbine dejectis, longe minor, aut deterior eſſe cœperit, emptoris damnum eſt, cui neceſſe eſt, licet rem non fuerit nactus, pretium ſolvere. Quicquid enim ſine dolo & culpâ venditoris accidit, in eo venditor ſecurus eſt.* Inſtit. lib. 3. tit. 24. § 3. The Negligence for which the Seller is reſponſible, if there be no Cheat, is, what the *Roman* Lawyers call a ſmall Fault, which is oppos'd to the Care which a good Maſter of a Family commonly has of his own Affairs; for they require ſuch a Degree of Exactneſs in all Contracts, as may be for the Advantage of both Parties. *Si nihil appareat conveniſſe, talis cuſtodia deſideranda eſt à venditore, qualis bonus Paterfamilias ſuis rebus adhibet, quam ſi præſtiterit, & tamen rem perdidit, ſecurus eſſe debet.* Digeſt. lib. 18. tit. 1. De contrah. empt. Leg. 35. § 4. *Sed ubi utriuſque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in ſocietate, & dolus, & culpa præſtatur.* Lib. 23. tit. 6. *Commodati vel contra*, Leg. 5. § 2. As for me, I hold to what I have ſaid in the foregoing Chapter; and, without having regard to that Diſtinction about the Advantage, which accrues by a Contract, either to each of the Parties only, or to both together, I believe that the Seller, and every other Perſon, who is engaged expreſly or tacitly to preſerve a Thing that belongs to another, in any wiſe is reſponſible for whatever happens, if he has not done as much as he could or would for himſelf, and his own Intereſts, in things which he values moſt.

[3] Yea, when he has delivered it, provided he has not received the Payment, or given Credit, or taken ſome Pawn, or accepted a Security. *Sane qui nondum rem emptori tradidit, adhuc ipſe dominus eſt*, Inſtitut. *ib.* See alſo *Lib.* 2. *tit.* 1. *De diviſione rerum*, § 41.

[4] *Res domino perit*, ſay the Layers; a Maxim taken out of this Law of the Code, *Lib.* 1. *tit.* 24. *De pignoratitiâ actione*, Leg. 9. *Pignus in bonis debitoribus permanere, ideoque ipſi perire in dubium non venit.*

[5] In Mr. Hertius's Edition theſe Words are inſerted here, "This hath not Place but in Contracts, wherein one of the "Contractors hath in his Hands the thing that belongs to another, and not in theſe, wherein one of the Contractors owes the "other a certain thing in ſpecie. Or, as others expreſs it, the Loſs is the Owner's, when, *&c.*" The *Engliſh* Tranſlator has heal'd this Breach by ſkipping it.

[6] We may add here what Cujacius, and ſome other Lawyers affirm, that, according to the *Roman* Law, all Accidents, before Delivery, muſt fall upon the Seller. See Cujacius upon *Leg.* 33. of the *Digeſts. Tit. locati conducti*, in his Treatiſe *ad Africanum, Lib.* 8. Mr. Van Eck, Profeſſor at *Utrecht*, obſerves in his *Principia Juris Civ.* under the Title, *De periculo & commodo rei venditæ*, § 10. That the Learned cann't reconcile this Law with the common Opinion; and as for himſelf, he declares freely, that he may ſay, without any Injury to the *Roman* Lawyers Reputation, that they never were perfectly agreed about that Matter.

ſhould the *Buyer*, who has not yet had the Delivery made him according to the Contract, be deprived of the Goods, and yet pay the *Seller* the Price of them [a]?

The beſt way to diſcover natural Equity, in this Point, is to diſtinguiſh whether the Delay was abſolutely neceſſary, [7] for the Delivery of the Commodity; or only occaſion'd through the Default of one of the Parties; and if occaſioned, whether by the *Buyer*, or the *Seller?*

The firſt Caſe may be put thus; ſuppoſe I buy Cattle, which at preſent are at ſome diſtance, and the *Seller*, in driving them to me, happens to have them intercepted by Robbers, Wolves, or ſome other Accident; in this caſe no doubt the Loſs is the *Seller's*.

Where the Delay has not been neceſſary, but occaſion'd by the *Seller*, [8] then too the Loſs lies at his door.

But if the *Buyer* be the Occaſion of it, then he ſtands to the Loſs of it. For the very Moment, that the Commodity was due, and the *Seller* ready to make Delivery of it, the Property paſt to the *Buyer*, and the Thing then began to belong to him only [b]. And therefore, if the *Seller* out of Kindneſs keeps in Cuſtody the Goods, which the *Buyer* did not ſo much as commit to him in Truſt, 'tis unreaſonable to expect, that he ſhould ſtand to the Caſualties that may attend them. But in Caſe the *Buyer* had committed them to his Cuſtody, then muſt they be look'd upon as a *Charge*, and conſequently the Receiver muſt be free from whatever Caſualties may happen to them. In which Caſe, the Delivery of the Commodity ought to be made by a Fiction *brevis manus* [c], but otherwiſe than is done in the *Loan*, or *Letting* of a Thing. For there, by the Delivery we alienate our own, but here the Alienation is made to us. What has been here ſaid of the Damage may be apply'd to the Gain alſo [9] [d].

IV. Moreover 'tis uſual for this Contract to be qualified with the Addition of ſeveral other Pacts, according to the Pleaſure of the Contractors, or the Law of the Land. In which the Law of Nature is concern'd no farther, than that each Party ſtands to his Agreement, provided nothing abſurd, or unjuſt is contain'd in it, and that every Subject conform himſelf to the Law of his Country, as he expects to have his Contract valid in it. Thus nothing is more common, than to agree upon Payment of the Money ſometime after the Delivery of the Thing; and alſo, that the Thing ſhall not be deliver'd till ſuch a time; the Property, in the mean time, together with the Gain or Hazard attending it, lying in the *Seller* [1] [e].

Beſides, we frequently practiſe what the *Civilians* call [2] *Addictio in diem*, which gives the *Seller* Leave to accept of any better Bargain, that ſhall offer it ſelf by ſuch a day. This may be done [3] two ways: Firſt, when the Bargain is compleated, but upon Condition that it ſhall be null, if better Terms offer themſelves; or ſecondly, if it be only agreed *de futuro*, that it ſhall be a Bargain, if better Offers are not made [f]. In the former caſe, the Property paſſes over to the *Buyer*; in the latter, it remains in the *Seller*, till the Completion of the Contract.

What they call [4] *Lex Commiſſoria* makes [5] void the Bargain, if the Price be not paid by ſuch a Day. And in this Caſe, either the *Seller* may immediately deliver the Goods, and in Default of the Payment, claim

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[7] The *Roman* Lawyers ſay alſo, That in this laſt Caſe the Seller is bound to Damages and Gains, *i. e.* he ought to indemnify the Buyer from the Loſs he has had, or the Profit he has miſs'd of by his Delay. *Si res vendita non tradatur, in id quod intereſt, agitur; hoc eſt, quod rem habere intereſt emptoris,—— cum per venditorem ſteterit, quo minus rem tradat, omnis utilitas emptoris in æſtimationem venit; quæ modo circa ipſam rem conſiſtit. Neque enim, ſi potuit ex vino (puta) negotiari, & lucrum facere, id æſtimandum eſt, non magis quam ſi triticum emerit*, &c. Dig. lib. 19.

[8] In this Caſe the Lawyers affirm, " That if one buy Wine, upon Condition that he'll come and meaſure it, and, being meaſured, will " draw it at a certain Time; the Seller, after the Term, may pour out the Wine, to make uſe of the Hogſheads, having given " Notice to the Buyer firſt." *Licet autem venditori vel effundere vinum, ſi diem ad metiendum præſtituit, nec intra diem admenſum eſt; effundere autem non ſtatim poterit, priuſquam teſtando denunciet emptori, ut aut tollat vinum, aut ſciat futurum, ut vinum effunderetur.* Digeſt. lib. 18. tit 6. De periculo & commodo rei venditæ, Leg. 1. § 3. It is true, that the Seller is more to be commended, if he uſes not his Right, but ſells the Wine as well as he can, or buys other Veſſels for his Uſe, to favour the Buyer. *Si tamen, cum poſſet effundere, non effundit, laudandus eſt potius*—— *commodius eſt autem conduci vaſa, nec reddi vinum, niſi quanti conduxerit, ab emptore reddatur, aut vendere vinum bonâ fide*, i. e, *quantum ſine ipſius incommodo fieri poteſt, operam dare, ut quam minimo detrimento ſit ea res emptori.* But it is doubtleſs a Precept of Right, oppoſite to the Rules and Laws properly ſo called, of which Mr. Noodt treats in his *Julius Paulus*, c. 10. & 11. The Permiſſion is evidently unjuſt, and yet is not leſs full and entire in the foregoing Words; and it is noted with Reaſon, that Grotius did amiſs in placing this Example in the Number of Things good and innocent, altho' it be commendable to abſtain from it. *Interdum enim licere dicitur, id quod rectum ex omni parte, piumq; eſt, etiamſi forte aliud quid fieri poſſit laudabilius*, Lib. 3. ch. 4. § 2. num. 1. See J. Samuel. Strykij *Tract. de Jure Liciti ſed non Honeſti*, Ch. 2. § 97. &c.

[9] He that ſuffers the Loſs, ought to have the Gain, according to the indiſputable Proverb. If, for Example, a Piece of Ground be ſold, and a Flood adds ſometing to it, 'tis the Purchaſer's Gain. *Sed & ſi poſt emptionem fundo aliquid per alluvionem acceſſerit, ad emptoris commodum pertinet. Nam & commodum ejus eſſe debet, cujus periculum eſt.* Inſt. Lib. 3. tit. 24. De empt. & vend. § 3.

[a] *Ziegler* ad *Grot.* l. 2. c. 12. ſ. 15. [b] *Vid. ſupra*, l. 4. c. 9. ſ. 5. [c] See above in B. 4. c. 9. ſ. 9. [d] *Commodum ejus eſſe debet, cujus eſt periculum*, Vid. *Inſtit.* l. 3. t. 24. ſ. 3. *De empt. & vendit.* [e] *Vid.* Inſtit. *ibid. Vid.* Caton. *de re ruſticâ*, c. 80. [f] *Vid.* lib. 18. t. 2. l. 2. *D. de in diem addict.*

Mr. Barb. *NOTES on* § IV.

[1] The Words are, *Quod ſi fugerit homo, qui veniit, aut ſurreptus fuerit, ita ut neque dolus neque culpa venditoris intervenerit; animadvertendum erit, an cuſtodiam ejus uſque ad traditionem venditor ſuſceperit. Sanè enim ſi ſuſceperit, ad ipſius periculum is caſus pertinet: Si non, ſecurus eſt.* Inſtit. ibid.

[2] This is what the Lawyers call, *Addictio in diem*, of which the *Digeſts* treat, *Lib.* 18. *tit.* 2. and thus define it, *In diem addictio ita fit: Ille fundus centum eſto tibi emptus, niſi ſi quis intra Kalendas Januarias proximas meliorem conditionem fecerit, quo res à domino abeat.* Leg. 1. ibid.

[3] *Nam ſi quidem hoc actum eſt, ut meliore allatâ conditione, diſcedatur, erit pura emptio, quæ ſub conditione reſolvitur: ſin autem hoc actum eſt, ut perficiatur emptio, niſi melior conditio adferatur, erit emptio conditionalis.* Ibid. Leg. 2.

[4] *Lex Commiſſoria* is treated of *Digeſt. Lib.* 18. *tit.* 3. thus, " SI AD Diem Pecunia ſoluta non ſit, ut Fundus inemptus " ſit, ita accipitur, inemptus eſſe fundus; ſi venditor eum inemptum eſſe velit, quia id venditoris causâ caveretur: nam ſi aliter " acciperetur, exuſta villa in poteſtate emptoris futurum, ut dando pecuniam inemptum faceret fundum, qui ejus periculo fuiſſet. " Nam legem commiſſoriam, quæ in venditionibus adjicitur, ſi volet, venditor exercebit: non etiam invitus.—— Sed ſi fundus " reveniſſet, Ariſto exiſtimabat, venditori de his [fructibus] judicium in emptorem dandum eſſe: quia nihil penes eum reſidere " oporteret ex re, in quâ fidem fefelliſſet. *Digeſt. ubi ſupra, Leg.* 2, 3, 4.

[5] That is to ſay, if the Seller think fit, for 'tis for his Sake, that this Clauſe is added; otherwiſe when a Thing ſold with a Commiſſory Clauſe happens to be loſt, it renders the Sale null, ſo as not to pay for it, and ſo the Seller loſes both his Money and Goods.

claim them again with the Emolument [a]; or elſe the Goods may be kept in Poſſeſſion, till the Payment be actually made; which laſt ſeems to be the ſafeſt Way, for generally this Clauſe is deſign'd in Favour of the *Seller*, to [6] ſave him from being put to any Trouble in queſt of his Money; whereas, the Trouble would be the ſame, were he to recover his Goods out of the Hands of an ill Paymaſter [b].

[7] Sometimes too either the Laws of the Land, or the Parties themſelves grant one another the Liberty of breaking off the Bargain [c], which is done ſeveral ways; for ſometimes a Clauſe is [8] added, that upon Tender of the Price at any time, or by ſuch a certain Day, the *Buyer* ſhall be obliged to reſtore the Goods to the *Seller*, or his Heirs [d]. And this certain Day may be expreſs'd with a different Deſign, either to ſignify the Term, after which the *Seller* may have Power to break off the Bargain: or the Term, to which, and not longer, ſuch a Liberty ſhall be granted. Where 'tis obſervable, that as this Power of redeeming is deſign'd in Favour of the *Seller*, who ſometimes, upon urgent Occaſions, is forc'd to part with that which he would not willingly loſe for ever: So the fixing a Term to that Power, is in Favour of the *Buyer*; for it is to his Advantage, if he be not forc'd to quit the Poſſeſſion of his Purchaſe in ſome ſhort time, to be at length ſure of the Perpetuity of it [9]. Sometimes too, when the Sale is made in Favour of the *Seller*, the *Buyer* is allow'd the liberty to bring back the Commodity whenever he pleaſes, or at ſuch a certain time, and the *Seller* is oblig'd to refund the Money [e]. "The Emperor *Marcus*, in want of Money, having ſold all his Imperial Furniture, afterwards gave leave to the Purchaſers, for any of them, to bring back their Purchaſe, and receive their Money." *Jul. Capitol.*

Another more eaſy ſort of *Redemption*, is what they call *Jus* προτιμήσεως, or, *the Privilege of the firſt Refuſal*, that is, if the *Buyer* be hereafter diſpos'd to part with the Commodity, [10] he muſt let the *Seller* have the firſt Refuſal at the ſame Rate he would ſell it to another. In many Caſes certain Perſons pretend to this Privilege by Law; as the Landlord in [11] the Sale of his Tenant's Stock, the Creditor in his [12] Debtor's Goods, the Neighbour [13] in the Purchaſe of a neighbouring Farm, [14] any Member in a Thing that belongs to the Society, and the next of Kin, in the [15] Goods of their Relations, which is peculiarly call'd *Retractus Gentilitius*, or *the Family Privilege* [16].

Uſual too it is, at the ſelling of Land, to except one Spot, and the Uſe of it; as Prodigals, when they ſell their Eſtates, do ſometimes reſerve a Title to as much as may ſerve for their Grave, to which many think *Virgil* alludes, *Ecl.* 3. v. 104, 105.

Dic quibus in terris, & eris mihi magnus Apollo,
Tres pateat cœli ſpatium non amplius ulnas.

Tell where the Round of Heaven, which all contains,
To three ſhort Ells on Earth our Sight reſtrains.
Tell that, and riſe *Apollo* for thy Pains.

Thus *Menius*, when he ſold his Houſe to the Cenſors for a *Baſilicon*, reſerved the Right of one Pillar to build upon, that from thence he and his Poſterity might ſee the *Gladiators* that uſed to fight in the *Forum* [f].

What the Divine Law preſcribes about *Redemption*, may be read in *Lev.* xxv. 13, *&c.* [g]. The [17] Reaſon of which Injunctions was taken from the particular Conſtitution of that Commonwealth founded by *Moſes*; for his Deſign was that an equal Degree of Liberty ſhould flouriſh amongſt them; to which End it was neceſſary to hinder any from engroſſing to themſelves ſo much

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[6] Or rather we run no Hazard here, whereas the other way there is great Hazard.

[7] *Retractus, ſeu pactum de Retrovendendo*, as the Lawyers ſpeak, and our Author terms it. *Retractus* comes of the Word *retrahere*, which according to the *Roman* Lawyers ſignifies, to reſume, what has been alienated. See the *Digeſts*, *lib.* 50. *tit.* 8. *De adminiſtrat. rer. ad Civit. pertinentium*, Leg. 9. § 1. The Cuſtom of Redeeming a Thing ſold, allowed by the Law, is called a Legal Retracting, but that which is done by the Agreement of Parties is a Conventional Retracting. Some think this has a near Relation to a Bargain of Pawn. See Mr. THOMASIUS's Diſcourſe, Intituled, *De uſu practico accuratæ diſtinctionis inter emptionem cum pacto de Retrovendendo, & Contractum Pignoratitium.* Printed at *Hall*, in 1707.

[8] So the *Code* ſpeaks, "Si fundum parentes tui eâ lege vendiderunt; ut ſive ipſi, ſive hæredes eorum emptori pretium quandocunque, vel intra certa tempora obtuliſſent, reſtitueretur; teque parato ſatisfacere conditioni dictæ, hæres emptoris non paret, ut contractus fides ſervetur, actio præſcriptis verbis, vel ex vendito tibi dabitur." *Cod. lib.* 4. *tit.* 54. *De pactis inter empt. & venditorem compoſitis. Leg.* 2.

[9] The Words of the *Digeſt* are, *Si convenit, ut res quæ venit, ſi intra certum tempus diſplicuiſſet, redderetur, ex empto actio eſt, &c. Digeſt. lib.* 18. *tit.* 5. *De reſcindenda vendit. &c. Leg.* 6. See *tit.* 1. *De contrab. empt. Leg.* 3. & *lib.* 21. *tit.* 1. *De Ædilitio edicto, &c. Leg.* 31. § 22.

[10] The Laws is, "Qui fundum vendidit, ut eum certâ mercede conductum ipſe habeat; vel ſi vendat, non alii, ſed ſibi diſtrahat, vel ſimile aliquid paciſcatur: ad complendum id, quod pepigerunt, ex vendito agere poterit." Digeſt. *lib.* 18. *tit.* 1. *De contrab. Empt. Leg.* 75.

[11] So the *Code* has it, *Et ſi quidem hoc dominus dare maluerit, & tantam præſtare quantitatem, quantam ipſe revera emphyteuta ab alio recipere poteſt, ipſum dominum omnimodo hæc comparare.* Cod. lib. 4. tit. 66. De jure emphyt. Leg. 3.

[12] In this laſt Caſe, the Creditor, to whom much is due, muſt be preferred according to the *Roman* Law. *Cum bona veniunt debitoris, in comparationem extranei, & ejus qui creditor cognatuſve ſit, potior habetur creditor cognatuſve: magis tamen creditor quam cognatus; & inter creditores potior is, cui major pecunia debetur.* Digeſt. lib. 42. tit. 5. De rebus Auctoritate Judic. poſſid, &c. Leg. 16.

[13] See the Greek Novel of *Romanus* called *Lecapene*, which is abridg'd by *Cujacius*, *Feud. lib.* 5. *tit.* 15. By a Law of the *Code* the Inhabitants of a principal City could not ſell their Poſſeſſions to any, but to one of the ſame City, *Lib.* 11. *tit.* 55. *Non licere habitatoribus Metrocomiæ, loca ſua ad extraneum transferre.*

[14] As for Example, thoſe that are Legatees in common. See *Cod. lib.* 8. *tit.* 54. *De Donationibus, Leg.* 34. §. 2. & *Feudor. Lib.* 5. *tit.* 14, *&c.*

[15] See the Law quoted above *Note* 12. of this §. and *Digeſt lib.* 4. *tit.* 3. *De Minoribus*, &c. *Leg.* 35. & *lib.* 18. *tit.* 1. *De contrahend. Emptione. Leg.* 62. *Princ.*

[16] Here the Quotation out of the Law of *Moſes*, and what our Author ſays upon it, ought to be placed.

[17] For, ſays our Author lower, in a Parentheſis, I do not approve the Reaſon alledged by *Grotius* upon *v.* 29. that it is more eaſy to find a Dwelling and Subſiſtence. But *Grotius* explains here only how one might ſell the Fee-ſimple of an Houſe in the City, and not a Country Houſe.

[a] *Vid.* Lib. 18. t. 3. leg. 5. D. *de lege Commiſſor.* [b] *Vid.* L. 2, 3. D. d. t. [c] *Retractus.* [d] *Vid.* C. lib. 4. t. 54. *de pactis inter empt. & vendit. compoſitis*, leg. 2. [e] *Vid.* Liv. l. 31. c. 13. [f] *Unde* Menianorum *nomen ejuſmodi projectis adhæſiſſe creditur.* Aſcon. Ped. *in Divin.* Cicer. *c.* 16. *p.* 328. Ed. *Græv.* [g] Upon which place ſee Mr. *Le Clerc.*

Land, as might make others, diveſted of their Patrimony, dependent on them; for ſo by degrees, Lordſhip and [18] Tyranny might be introduc'd. The ſame End did [a] *Lycurgus* propoſe to himſelf, when he divided the Territories of *Sparta* into 39000 Parts: which he diſtributed among the People by Lot; and forbad them to increaſe, diminiſh, ſubdivide, or ſell. Among the *Lacedemonians* it was held unlawful and diſhonourable to ſell Land that had been a long time in the Family. *Heracl.* de Pol.

Beſides, there is another common way of Selling, which they call *per averſionem*, where Things of different Value are not rated ſeparately, but ſold together.

Laſtly, Things are ſometimes ſo ſold, as to return again to the *Seller* after a certain Term of Years, without his being oblig'd to refund the Price. Thus, in *England* Gentlemen *ſell* their Ground for 30, or 35 Years, upon Condition that the *Buyer* ſhall build upon it after ſuch a particular manner; which ſort of Contract is ſomething like that of *Renting*.

V. As for any other Obligations between the *Buyer* and the *Seller*, they eaſily appear from the Nature of the Contract, and the additional Pacts. The *Buyer* is oblig'd to pay the *Price* agreed for at the time appointed, and to give the Receiver a good Title to it, I mean, [1] to pay him with his own, and not another Man's Money [b]. And if he pays another Man's Money, and it happens to be challeng'd by the *Owner*, he is oblig'd to pay it over again, and as much more as the Receiver loſes, by having it thus challeng'd. As for the *Seller*, he is oblig'd [2] to deliver the Goods bargain'd for with ſuch Qualities as the common Nature of Contracts, or [3] the particular Agreement requires, and that too at the time appointed [c]. And if, between the Completion of the Bargain, and the Delivery of the Goods, the *Seller* ſhould repent, and be deſirous to return the Money with Amends, [4] the *Buyer* nevertheleſs is not oblig'd to accept it; but may force him to ſtand to his Bargain, unleſs in point of good Nature he be otherwiſe perſuaded; but if, through the Default and Knavery of the *Seller*, the Delivery cannot be made, the Money together [5] with Damages is to be reſtored. What the Law is, when the *Seller* is not in the Fault, we have ſaid above.

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[18] Our Author here relates a Sale in groſs, and briefly, *per averſionem*, as the Lawyers ſpeak; but, beſides that he ſpeaks ſomething of it in the beginning of § 6. we may ſee that 'tis not fitly placed here, where he treats, not of the divers Sorts of Sales, but only of the Terms and Conditions added to a Bargain and Sale, whether by Wholeſale or Retale. Wherefore I have been bold to leave out this ſhort Period, equally ſuperfluous, and fit to confound our Underſtandings.

[a] *Pleat. in Vitâ.* [b] *Vid. D.* lib. 19. t. 1. leg. 11. ſ. 2. & *C.* lib. 49. leg. 7. & leg. 13. ſ. 19. *D. ubi ſup.* [c] *Vid.* l. 11. ſ. 1, &c. *D. de Act. empt.*

Mr. BARB. *NOTES* on §. V.

[1] *Emptor autem nummos venditoris facere cogitur.* Digeſt. lib. 19. tit. 1. De actionibus empti, & venditi, Leg. 11. § 2. *See* Cod. lib. 4. tit. 49. Leg. 7. For want of Payment at the time, the Buyer ought to pay the Intereſt of his Money. *Ex vendito actio venditori competit ad ea conſequenda, quæ ei ab emptore præſtari oportet. Veniunt autem in hoc judicium infra ſcripta: In primis pretium, quanti res venit: item uſuræ pretii poſt diem traditionis: Nam cum re emptor fruatur, æquiſſimum eſt eum uſuras pretii pendere.* Dig. Lib. 13. § 19, 20.

[2] The Interpreters of the *Roman* Law do not agree here; for ſome think the ſame thing ought to be delivered, if it be in our Power; but others affirm, that if we do not put it into the hands of the Buyer, yet he is diſcharged from paying Damages or Intereſt. See *Vinnius* upon the *Inſtitutes*, lib. 3. tit. 24. *princ.* where he recites and confutes, at the ſame time, the Reaſons of the laſt. Mr. *Van Eck* nevertheleſs takes their Part, but obſerves, at the ſame time, in his *Principia Juris Civilis*, under the Title *De Actionibus Empti & Venditi*, §9. "That this Caſe ought not to give any great Trouble to the Judges or Lawyers, be-" cauſe the Damages and Intereſts may ſurpaſs the Value of the Thing itſelf; and in ſo doing it becomes very hard to keep what " is ſold up to the Price it was ſold for." Mr. *Thomaſius* ſays, "That he fell into this Miſtake by miſunderſtanding ſome Laws, " where 'tis ſaid, that the Seller, for want of delivering his Goods, ought to bear the Loſs and Intereſt." Theſe Laws ſuppoſe that the Thing ſold either cann't be deliver'd, becauſe it is periſhed, or is grown worſe by the Seller's Fault, or that it ought not to be delivered, becauſe the Buyer has no occaſion for it; as when Proviſions are not brought in at the Time agreed on, and ſo the Buyer has no way but to be contented with reaſonable Damages. Whereupon ſome imagine, tho' improperly, that a Seller has his Choice, either to deliver the Goods, or pay Damages and Coſts. See the Diſcourſe, *De Pretio affectionis, &c.* c. 2. §. 8. However this be, this Choice is directly contrary to the natural Intention of a Bargain and Sale, and very hurtful to Commerce.

[3] The Law is, *Ex empto actione is, qui emit, utitur; & in primis ſciendum eſt, in hoc judicio id demum deduci, quod præſtari convenit. Cum enim ſit bonæ fidei judicium, nihil magis bonæ fidei convenit, quam id præſtari, quod inter contrahentes actum eſt: Quod ſi nihil convenit, tunc ea præſtabuntur, quæ naturaliter inſunt hujus judicii poteſtate. Et imprimis ipſam rem præſtare venditorem oportet, id eſt, tradere: Quæ res, ſi quidem dominus fuit venditor, facit & emptorem dominum. Si non fuit, tantum evictionis nomine venditorem obligat; ſi modo pretium eſt numeratum, aut eo nomine ſatisfaciunt.* Digeſt. Lib. 19. tit. 1. § 12.

[4] On the other Side, the Buyer cann't, unleſs the Seller conſent to it, avoid taking the Thing ſold, and pay for it. This Conſent is ſo neceſſary by the *Roman* Law, that unleſs we will pay double, or can obtain a Reſcript from the Emperor, the other Contractor cann't be oblig'd againſt his Will, to forſake his Bargain, and neither the Treaſury nor Soldiers have any Privilege here. *De contractu Venditionis & Emptionis jure perfecto, alterutro invito, nullo recedi tempore bona fides patitur; nec ex Reſcripto noſtro, quo jure fiſcum noſtrum uti, ſæpe conſtitutum eſt,* ------ *Quamvis enim duplum afferas pretium emptori, tamen invitus ad reſcindendam venditionem urgeri non debet.* Cod. Lib. 4. tit. 44. De reſcind. Vendit. Leg. 3 & 6. See Leg. 7. which is a Reſcript directed to *A. A. Muracolus*, and other Soldiers. But as ſometimes Pledges muſt be given (a Circumſtance which our Author ought not to forget) it is good to know what Effect they produce. Mr. *Thomaſius* hath publiſhed a Diſcourſe on this Subject in 1702, quoted once before, and which is reduced to this in general: He ſays, "That it belongs to the Seller alone to give Earneſt commonly, " and this is at the ſame Time a Proof that the Bargain is made, and a Security of executing the Engagements entred into. As to the laſt, either they oblige to the Penalty impoſed in caſe of Delay, either in the Seller, who delivers not his Goods at the Time, or in the Buyer, who pays not at the Term fixed; inſomuch that the one loſes his Earneſt, and the other pays double, and yet is no leſs bound to ſtand to his Bargain; or they leave a liberty to recant, ſo that a Man is diſcharged from all Loſſes, and this is preſumed in a dubious Caſe, or when the Parties are otherwiſe agreed. But if the Bargain be broke by Conſent, he that has received the Earneſt is obliged to reſtore it: But if the Engagements on both Sides be performed, the Earneſt muſt be reſtored or deducted in the Payment. Mr. *Thomaſius* looks upon it as certain, that Earneſt is never given but when the Market is ended, and the Bargain made; which he ſhews us to agree well with the Principles of the *Roman* Law, altho' the Interpreters of it uſually draw other Concluſions from it. I ſhall content myſelf to recite what is ſaid in the *Inſtitutes*: *Nam quod arrhæ nomine datur, argumentum eſt emptionis & venditionis contractæ* ------- *Ita tamen impunè eis (emptori & venditori) recedere concedimus, niſi jam arrharum nomine aliquid fuerit datum. Hoc enim ſubſequuto, ſive in ſcriptis, ſive ſine ſcriptis venditio celebrata eſt, is qui recuſat adimplere contractum, ſi quidem eſt emptor, perdit quod dedit: Si vero venditor, duplum reſtituere compellitur, licet ſuper arrhis nihil expreſſum ſit.* Lib. 3. tit. 24. princip.

[5] The Words of the *Digeſts* are, *Nec videtur abeſſe* [*dolus malus*] *ſi per eum factum eſt aut fiet, quo minus fundum emptor poſſideat. Erit ergo ex empto actio, non ut venditor vacuam poſſeſſionem tradat; cum multis modis accidere poterit, ne tradere poſſit, ſed ut* ------ *dolus malus ejus æſtimaretur.* Dig. lib. 18. tit. 1. De contr. empt. Leg. 68. § 2.

[6] But if a Man *ſells* the ſame Thing to Two, and has as yet deliver'd it to neither, without doubt the firſt Bargain ought to take place; and much rather, if the Thing has been already deliver'd to him. But yet, in this caſe, the knaviſh *Seller* ought to make Satisfaction to the laſt *Purchaſer*, for whatſoever Loſs he is at by being thus diſappointed. But ſuppoſing the Delivery to have been made to the *laſt*, he, upon the Grounds of the Civil Law, will be preferr'd to the *other:* For he receiv'd the Thing of the *Owner* upon a juſt Title; and the *firſt* can have no Action againſt him; not a real one, for he was not yet Maſter of the Thing; nor a perſonal, for no Intercourſe had paſſed between them; neither can the *Seller* have any Pretence to revoke the Bargain [a] [b]. *Grotius* [c] too, in this Caſe, prefers the Title of the laſt, *Becauſe by the Delivery of the Thing, the* Buyer *makes over all his Right, which is not done by promiſing to* ſell *it.* But here *Grotius* does not ſeem to be conſiſtent with himſelf; indeed the Promiſe to *ſell* is not *ſelling*, but yet he had aſſerted, that the Property is made over at the very Moment of Contract, altho' the Thing be not delivered: And therefore after ſuch a Sale, no Right can remain in the *Seller*, any further than what tends to the Delivery of the Thing into the Hands of the *Buyer*; and conſequently whatever Bargain the *Seller* concludes afterwards, it is null, and cannot ſtand in Prejudice of him, who before has got a Right to it. And this being granted, I queſtion whether the favourable Plea of Poſſeſſion, thus unjuſtly acquired, can always hurt the Title of the firſt Purchaſer. Moreover, ſince a Man does not loſe his Right in a Thing by being deprived of the Poſſeſſion of it, and ſince a Man may honeſtly come by the Poſſeſſion of another's Goods; if therefore ſuch a Poſſeſſor *ſells* a Thing to a third Perſon, he does not extinguiſh the Right of the *Owner*; nor can he transfer to another a better Title than [7] he had himſelf. And therefore, although the Deſign of the *Buyer* be to acquire a Property in the Thing, yet ſince the Thing, which is thus ſold, either ignorantly, or deſignedly, is another Man's, it is as much as can be expected, if the *Seller* [8] gives the *Buyer* free Poſſeſſion, and puts him in Power of uſing it, and bears him harmleſs, [9] if his Title be diſputed [d].

VI. There is alſo a peculiar ſort of Sale, where the Purchaſe is no certain Thing, but *Hope* and *Expectation* only, on which, by Agreement of the Parties, a *Price* is laid. Nor is there [1] any Default in this ſort of Sale, altho' afterward the Thing happens to be above, or below the Price. The ſame obtains at *Auctions*, and where Things of different *Prices* are ſold altogether [2] at a Lump; for all ſuch ſort of Bargains have ſomething [3] of Chance in them [e]: Such as was the Caſt of a Net [f], bought of the *Mileſian* [g] Fiſhermen, which occaſioned a famous Suit between the Fiſhermen and the *Buyer* of the Caſt; for they having drawn out a golden Table in their Net, the *Buyer* claim'd it as his, for that he had bought whatever ſhould be taken, or the Fortune of the Caſt: whereas the Fiſhermen, on the other ſide, contended that the Bargain had regard only to what Fiſh ſhould be caught. And indeed they ſeem to have been in the right, for in explaining any Contract we ought to conſider the Intent of the Contractors; and here 'tis evident, they had no Thoughts of Gold, but of Fiſh only; nor does it make for the *Buyer*, that it was a Purchaſe of Chance; for that was only deſign'd to extend to the Quantity of Fiſh, and not to any Thing elſe, which by great Fortune might come to the Net. And therfore the Table ought to be look'd upon as a Treaſure found by Chance.

As for the Deciſion of the Oracle, which adjudged it to the wiſeſt, that plainly ſavour'd of the [4] crafty Covetouſneſs of the Prieſts, who there by bid fair for the procuring ſuch a glorious Prey to themſelves: For what Mortal would arrogate to himſelf the Title of the *Wiſeſt Man?* According to that of *Sophocl. Antigone*, 257. Edit. *H. Steph.* All Prieſts are greedy of Gain. See *Val. Max.* l. iv. c. 1. ſ. 7. *inter externa.* Mornac. *add.* l. xii. *D. de Act. empt.* &c.

VII. In this place ſomething may be expected to be ſaid concerning *Monopolies*, *Whether any, or all of them be againſt the Law of Nature, or no?* For 'tis an odious Name, and the Laws of many States brand it grievouſly. But here we muſt exempt ſeveral Things from the invidious Title of *Monopolies*, which indeed are not ſuch. For ſure 'tis prohibited by no Law, nor can it come under the Name of a *Monopoly*, if only one Man, in any Town, has got the way of making ſome ſort of Manufacture, or if one Man only has got ſuch a ſort of Grain in his Ground, or if ſome certain Commodity be the Produce only of one particular Country. " Since there is no ſuch " Produce of *Alume* in any other Country, which " yet is of great Uſe, it is not to be wondred at, " that the *Lipareans* have the Monoply of it, and ſet- " ting what Prices they pleaſe upon it, make vaſt " Re-

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[6] So the Code tells us, *Quotiens duobus in ſolidum prædium diſtrahitur jure: manifeſti juris eſt, eum cui priori traditum eſt, in detinendo dominio eſſe potiorem.* Cod. lib. 3. tit. 32. De rei vindicatione, Leg. 15. See *Digeſt. lib.* 6. *tit.* 2. *De publicana in rem actione*, Leg. 9. § 4.

[7] The Words of the *Digeſts* are, *Traditio nihil amplius transferre debet, vel poteſt, ad eum qui accipit, quam eſt apud eum qui tradit. Si igitur quis dominium in fundo habuit, id tradendo tranſfert: Si non habuit, ad eum qui accipit nihil tranſfert.* Digeſt. lib. 41. tit. 1. De adquir. rerum Domin. Leg. 20.

[8] *Sive tota res evincatur, ſive pars, habet regreſſum emptor in venditorem.* Digeſt. lib. 21. tit. 2. De evictionibus, &c.

[9] *Quod ſine ullius damno pars, quæ putatur eſſe vendentis, per longam poſſeſſionem ad emptorem tranſit.* Digeſts lib. 41. tit. 2. De acquir. & amitt. Poſſeſſ. Leg. 43. princ.

Mr. Barb. NOTES on § VI.

[1] Tho' there comes nothing of it: *Aliquando tamen, & ſine re venditio intelligitur, veluti cum quaſi alea emitur: quod fit, cum captus piſcium, vel avium, vel miſſilium emitur. Emptio enim contrahitur, etiamſi nihil inciderit: quio ſpei emptio eſt.* Digeſts lib. 18. De contrah. empt. Leg. 8. § 1.

[2] *Per averſionem*, an Expreſſion of the *Roman* Law: As for Example, in Law 62. § 2. of the Title laſt mentioned, *Res in averſione empta, ſi non dolo venditoris factum ſit, ad periculum emptoris pertinebit, etiamſi res adſignata non ſit.* See *Cujas Obſerv.* 8. 15.

[3] *Veluti cum futurum jactum retis à Piſcatore emimus, aut indaginem plagis poſitis à venatore, aut pantheram ab aucupe.* Dig. lib. 19. tit. 1. De actionibus empti & venditi. Leg. 11. § 18.

[4] The *Greek* is, Τὸ μάντικον γὰρ πᾶν φιλάργυρον γένος. Soph. in Antigon. p. 257. Edit. H. Steph. See Mr. *Vandale*, in his Treatiſe *De Oraculis, & de Idololatria & ſuperſtitione*, or Mr. *Fontenelles* Hiſtory of Oracles.

[a] *Add.* lib. 6. t. 2. l. 9. ſ. 4. *D. de publicanâ in rem actione.* [b] *Add. C.* lib. 3. t. 32. *De rei vindic.* leg. 15. [c] *Add.* d. l. *ſ.* 15. [d] Add. *Plaut. Perſ.* Act. 4. Sc. 4. [e] *Vid.* l. 39. t. 4. l. 9. princ. *D. de Publicanis.* But yet add *Plin.* l. 8. Ep. 2. See *Sueton.* in *Auguſt.* c. 75. [f] Concerning which ſee *lib.* 18. *t.* 1. *l.* 8. *D. de contrah. empt.* L. 11. ſ. 18. l. 12. *De de act. empt.* [g] *Plut.* in *Solon*, p. 80. *Edit. Wech.* ſays between the Fiſhermen of *Cos*, and a *Mileſian* Stranger, *Diog. Laert.* lib. 1. ſ. 28. between ſome young Men of *Ionia*, and the *Mileſian* Fiſhermen in *Thaletes.*

" Returns. *Diod. Sic.* l. v. c. 10. p. 293. Ed. *Rhodom.* For *Monopolies*, as ſuch, imply that others too would ſell the ſame, did not one Man ingroſs the whole Trade to himſelf. And therefore, he who alone brings a Commodity from a foreign Country, cannot be ſaid to ſet up a *Monopoly*, provided he does not hinder others from importing the ſame. Nor is it unlawful for any Nation, that abounds in one particular Commodity, to bargain with another Nation to let them only have the Trade of it [1], for any one may ſell his own when and to whom he pleaſes; indeed when we happen to have a Superfluity of what another cannot be without, then the Law of Humanity requires, that we ſhould not make ſuch a Bargain to the Prejudice of others. But if a Man, without contracting with the *Owners*, ſhould of his own Head aim at a *Monopoly*, by hindring ſome by Force, and others by clandeſtine Contrivances, from coming to the ſame Place, and by that means lay a Neceſſity upon all others to buy of him, it is plain that he offends againſt the Law of Humanity, and impudently breaks in upon the Liberty of the reſt.

As for *Monopolies* among private Citizens, it cannot be accounted illegal, or oppreſſive, that every one is not allowed to ſet up what Trade he pleaſes, but thoſe only who have gain'd a right by the Charter of the Corporation; thus in moſt Cities of *Europe* no Man can open a Shop, or betake himſelf to any particular Trade, but he who has ſerved ſome time an Apprenticeſhip at it, for it is not enough that he is expert in it.

Beſides, the Magiſtrate may give one Man, or one Company of Men the ſole Power of Importing certain Commodities from certain Places, excluſive of all others. And there may be ſeveral good Reaſons for the granting ſuch a Privilege. For it requires vaſt Charges to ſettle a Trade with a very remote Nation, and perhaps after great Expenſes it may not ſucceed at all; and therefore the Authors of ſuch a Commerce ought in reaſon to have Security, that others may not intercept *gratis* what they have eſtabliſh'd at their great Riſque and Charge; and beſides ſuch privileg'd Companies are better able to aſſiſt the Publick with their Riches, upon any Emergencies, than private Perſons: By this means too a greater Trade may be carried on, and with better Credit: Nor is this Method liable to ſo many Tricks and Shifts, ſince the Gain comes into the common Bank to be divided proportionably amongſt them all. But as for theſe Privileges, a prudent Government will not grant 'em, but where the Commodities are imported from remote Places, and with great Hazard; and which do not ſo much concern the Neceſſaries as the Superfluities of Life. Nor even then muſt the Merchants be allowed to enhance the Price of thoſe Things at their Pleaſure; for it is againſt Reaſon to give a few an opportunity of ſcraping up exorbitant Riches out of the Fortunes of the reſt, when the Publick gets nothing by it.

Laſtly, It ſeems unjuſt that Tradeſmen, or Farmers ſhould be forced to ſell their Manufactures, or the Produce of their Ground to certain People only, who ſell the ſame to others by Retale; for by this Means the Riches of the State may come into the Hands of a few, to the Detriment and Oppreſſion of the reſt.

I cannot but take notice, by the way, that *Grotius* [a] brings the Example of *Joſeph*, when he was Viceroy of *Egypt*, in Juſtification of *Monopolies*; tho' that Example is not much to the Purpoſe: For neither did the King hinder others from *buying* up the Corn in the Years of Plenty, nor any from *ſelling*, who had too much: Neither had the *Alexandrians* in *Strabo* [b] the *Monopoly* of *Indian* and *Ethiopick* Commodities from any Privilege, but from the Situation of the Place.

But a *Monopoly*, properly ſo call'd, as having the Force of a Privilege, cannot be ſet on foot by private Men: For how can a private Man juſtify his hindring others from meddling with ſuch a ſort of Commodity, when he has no Command over, nor can lawfully uſe Force againſt them? and therefore the *Monopolies* of private Men are ſpurious and illegal, and do not depend upon Rights and Privileges, but are generally carried on by clandeſtine Frauds and Combinations: As if ſome few by a Trick ſhould debar others from Trading to thoſe Places from whence they have their Commodities, or ſhould hinder thoſe that have them from bringing them to Market: Or, if they ſhould enter into a Combination to buy up all ſuch ſort of Commodities, and then ſtifle them, that ſo the Scarcity may enhance the *Price*. Againſt whom may be apply'd that of *Apollonius Tyanæus* in *Philoſtr.* l. i. c. 12. *in the Beginning* [2]. " The Earth is the Mother of all, for ſhe " is juſt; but you being unjuſt have made her only " a Mother to your ſelves." The Knavery of ſuch ought as much to be corrected, as thoſe who [c] enter into Compact to raiſe extravagantly the Prices of other Things, by agreeing privately to ſell nothing under ſuch a Rate: Which piece of Roguery Labourers and Workmen are ſometimes guilty of [d].

I cannot diſcommend the Sagacity of *Thales*, who rented all the Olive-yards, having foreſeen by his Skill in *Aſtrology*, that there would be great Plenty of *Olives* that Year [e] [f].

Mr. BARB. *NOTES on* § VII.

[1] See above *Lib.* 3. *c.* 3. § 6. & *lib.* 4. *c.* 5. § 10.

[2] The *Greek* is, ᾿Η γῆ πάντων μήτηρ, δικαία γάρ· ὑμεῖς δ᾿ ἄδικοι ὄντες, πεποίησθε αὐτὴν αὑτῶν μόνων μητέρα. Philoſtrat. de vitâ Apoll. Tyan. lib. 1. c. 15. in fin. Ed. Olear.

[a] L. 2. c. 12. ſ. 16.

[b] L. 17. p. 549. Ed. *Gen. Caſaub.*

[c] *Ut in* Velabro Olearii *de quo vide* Eraſm. Adag.

[d] *Add.* Plin. *l.* 8. *c.* 37. *de erinaceo*, *L. un. C. de Monopol. L.* 6. *D*, *de extraord. crim.* and *Cujacius Obſ.* 10. 19.

[e] *Ariſt. Pol.* l. 1. c. 7. (11) *Diog. Laert.* l. 1. ſ. 26.

[f] *Vid.* Cicer. *de Divinitat.* l. 1. c. 49.

CHAP.

CHAP. VI.

Of Renting *and* Hiring.

I. *What Things Hiring hath common with Buying.*
II. *The certain Uſe of a Thing, if it be intercepted, tends to the Loſs of the Leſſor.*
III. *The uncertain regularly to the Loſs of the Leſſee.*
IV. *Whether the ſame Work may be Let to many together.*

R*Enting* and *Hiring* [a], whereby the Uſe of a Thing, or Labour is granted for a certain Rate [1], bears ſome Affinity to *Buying* and *Selling*, and may be brought under almoſt the ſame Rules [b]. For the *Rent* or *Wages* anſwers the *Price*; and the *Uſe* of the Thing or the Labour anſwers the *Property* which is acquired by *Buying*; and as the Contract of *Buying* and *Selling* is compleated, when the Price is agreed upon, ſo is this of *Renting* and *Hiring*, when the Parties are agreed about the *Rent* and *Wages* [2] [c]. And as a Thing ſells the cheaper, when ſold in Favour of the *Seller*, and the dearer when in Favour of the *Buyer*; ſo in *Renting* and *Hiring*, if a Man is at a Loſs for a Tenant, or wants Work, he is contented with ſmall *Rent* or *Wages*; but if his Land or Work is ſought after, he may demand much greater. Laſtly, as in *Buying* and *Selling* 'tis generally the *Seller*'s Buſineſs to name the Price [d], and the *Buyer* ultimately reſolves upon it; ſo is it alſo in *Renting* and *Hiring* [3]. "Whoſe Buſineſs is it to aſſign the Price? He who delivers the Thing, or he that receives it? He who delivers it ſeems to leave it to the other: As they ſay *Protagoras* uſed to do, for whatever he taught, he left it to the Scholar to ſet a Value upon what he learn'd, and was paid accordingly." *Ariſt. Nic.* l. ix. c. 1. Tho' concerning this Cuſtom of *Protagoras* he himſelf thus ſpeaks in *Plato*, in the Dialogue that bears his Name. "My way is this, when I have taught any one, if he pleaſes, he gives me as much Money as I demand; if not I bring him into the Temple, and make him declare upon Oath what he thinks my Teaching is worth, and ſo much I receive." But as he who *buys* any Commodity, without agreeing upon the Price, is ſuppos'd to oblige himſelf to the common Price of it; ſo in this Contract, if Terms are not agreed upon, [4] it is left to the Equity of the Perſon *Renting* or *Hiring*, who is nevertheleſs oblig'd to give as much as is uſually given [e]. That way of paying for a Work of Pleaſure, which *Ariſtotle* [f] mentions, [5] is a perfect Cavil. *A certain Perſon promis'd a Muſician the better he play'd, the more he ſhould be rewarded. The next Day, when the Muſician claim'd his Promiſe, he reply'd that he had repay'd Pleaſure with Pleaſure* [6]. But *Ariſtotle* was right in ſaying, *He had as good received nothing, ſince he did not receive that which he expected. Rectius ſimilem cavillationem adhibuit Bochoris apud Plutarchum, Demetrio, pag. 901. D. Quum quidam amaret Thonidem meretricem, popoſcit illa ingentem pecuniæ ſummam. Adoleſcens inde, cum in ſomnis ſibi viſus eſſet cum illa concumbere, liberatus eſt libidine. Ob id mercedem ab illo inſtitit Thonis judicio exigere. Cognita cauſa juſſit Bochoris illi quantum poſtulaverat Thonis argenti in vas numeratum huc atque illuc manu jactare, ac meretricem umbra frui.* Quanquam ſententiam hanc arguit Lamia iniquitatis. *Neque enim,* inquit, *ademit meretrici umbra pecuniæ cupiditatem, ſomnium vero amore adoleſcentem expedivit.* In this Contract alſo, if any Damage happens to the Labourer, whilſt he is about his Work [7], 'tis his own Loſs, and not the *Hirer*'s [g]. Among the *Epheſians* there was a remarkable Law concerning Architects, that if the Charge in Building amounted to a fourth Part more than what the Architect had computed it, he was bound to make it good out of his own Pocket [h].

Mr. BARB. *NOTES on* Chap. VI. § I.

[1] The Words are, *Locatio & conductio proxima eſt emptioni & venditioni, iiſdemque juris regulis conſiſtit. Nam ut emptio & venditio ita contrahitur, ſi de pretio convenerit, ſic & locatio & conductio ita contrahi intelligitur, ſi merces conſtituta ſit: Et competit locatori locati actio, conductori verò conducti.* Inſt. Lib. 3. tit. 25. *Quæri ſolebat de locatione & conductione, ſi forte rem aliquam utendam vel fruendam tibi aliquis dederit.* Ibid. § 2. *At cum do ut facias, ſi tale ſit factum, quod locari, ſolet, puta ut tabulum pingas, pecunia data, locatio erit.* Digeſt. lib. 19. tit. 5. De Præſcriptis verbis, &c. Leg. 5. § 2. See more of this Matter in Mr. DAUMAT's Civil Laws in their Natural Order. *Part.* 1. *lib.* 1. *tit.* 4.

[2] The Contract of Hiring may be renewed by a tacit hiring anew, when the Time being expired, the Tenant continues to enjoy the Thing hired without any Oppoſition from the Leſſor; for, in this Caſe, both of them are ſuppoſed to enlarge the Contract for the ſame Time, and on the ſame Conditions. *Qui impleto tempore conductionis remanſit in conductione, reconduxiſſe videbitur.* ------- *ipſo anno, ſed non in ſequentibus annis.* Digeſt, lib. 19. tit. 2. Locati, *&c.*

[3] *Plautus*'s *Latin* is, *S A. Indica fac pretium. DO. Tua merx eſt, tua indicatio eſt.* And *Ariſtotle*'s *Greek* is, Ὁ γὰρ προϊέμενος ἔοικεν ἐπιτρέπειν ἐκείνῳ (τῷ προλαβόντι.)

[4] Here, as in a Matter of Sale, every one may make his Market as advantageous as poſſible for himſelf. *Quemadmodum in emendo & vendendo naturaliter conceſſum eſt, quod pluris ſit minoris emere; quod minoris ſit pluris vendere, & ita invicem ſe circumſcribere, ita in locationibus & conductionibus juris eſt.* Dig. lib. 19. tit. 2. Locat. & Cond. Leg. 22. § 3.

[5] This was done by *Dionyſius* the Tyrant, to one that played on the Flute to him, to whom he had promiſed a great Reward.

[6] *Ariſtotle*'s *Greeek* is, Ὅμοιον γὰρ τῷ μηδὲν γίγνεσθαι, ὅταν οὗ ἐφίεται μὴ τυγχάνῃ.

[7] For Example, If a Smith, in working for us, break his Hammer or Anvil, we are not bound to pay for them. *Nam etſi Faber incudem aut malleum fregerit, non imputaretur ei, qui locaverit opus.* Digeſt. lib. 14. tit. 2. De Lege Rhodiâ, *&c.* Leg. 2. § 1. In like manner, if a Tranſport Ship, being ſhattered by a fierce Tempeſt, is forced to put in at ſome Place to amend any Defect, the Expenſe muſt fall on the Owner of the Veſſel, and not on the Paſſengers. *Navis adverſâ tempeſtate depreſſâ, ictu fulminis deuſtis armamentis & arbore, & antennâ, Hipponem delata eſt, ibique tumultuariis armamentis ad præſens comparatis Oſtiam navigavit, & onus integrum pertulit: Quæſitum eſt an hi, quorum onus fuit, nautæ pro damno conferre debeant? Roſpondit, Non debere. Hic enim ſumptus inſtruendæ magis navis, quam conſervandarum mercium gratiâ factus eſt.* Ib. Leg. 6.

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[a] *Locatio & Conductio.* [b] *V. Inſtit. ibid. & l.* 3. *t.* 25. *princ.* [c] *V. Inſtit. ibid. & l.* 19. *t.* 2. *D. locati.* Which yet how it may be tacitly prolong'd. *V.* l. 13. ſ. 11. l. 14. D. *h. t.* [d] *Plaut. Perſ.* Act. 4. Sc. 4. v. 37. "'Tis your Ware, you ought to ſet the Price." [e] See *Mat.* 20. 4, 7. [f] *Nicom.* l. 9. c. 1. *Vid.* & Plut. *de auditione*, p. 41. *D.* & *de fortunâ* Alexandri, *p.* 333, 334. [g] *Vid.* lib. 14. t. 2. l. 2. t. 2. l. 2. ſ. 1. l. 6. *D. de lege Rhodiâ.* [h] Vid. *Vitruv.* l. 10. *præf.*

II. But if a Man *rents* a Thing, and any Accident intercepts the Uſe of it, or renders it worſe, *Ought the Loſs to be the Landlord's, or the Tenant's?* To which ſome anſwer, in ſhort, that if the Thing itſelf periſhes [1], the Loſs belongs to the *Landlord*; but as for Barrenneſs and other Miſchances, which intercept only the Uſe of it, they are, unleſs provided againſt by Covenant, generally at the Loſs of the *Tenant*: And the *Landlord* may juſtly demand the full *Rent* agreed upon, although perhaps the *Tenant* has not made ſo much of his Land as was expected. For, the *Landlord* gave the *Tenant* Power to make the beſt of it; and the Hopes of the Produce, when they made the Bargain, was really worth ſo much; and therefore ſince *he* made good his Part, 'tis but fair that the *other* ſhould alſo make good his.

But to canvas this Queſtion more nicely; 'tis manifeſt, [2] when the Thing periſhes without the *Tenant's* Fault, he is not oblig'd to make it good, but from that time his *Rent* ceaſes. For the Title to the whole *Rent* is founded upon Preſumption that the Thing be in Being, during the Time included in the Contract; but if the Thing ceaſes to be, the Contract ceaſes alſo [a]. And upon this is founded the Law of *Seſoſtris* an *Egyptian* King: *That if the Violence of the River ſhould waſh away any part of the Land, the* Tenant *ſhould be proportionably abated in his* Rent [b]. Again, we muſt diſtinguiſh between thoſe things, where the *Landlord* may and ought to aſſign [3] a certain and determined Uſe; and thoſe, whoſe Uſe, as to Quantity, is uncertain, and depends upon Chance, and which, upon that Account, neither can, nor ought to be determined. To inſtance in the former ſort; I *hire* a Houſe to dwell in, which my *Landlord* is oblig'd to make habitable, and therefore if the Violence of a Storm, or my Neighbour's Fire ſhould intercept the Uſe of it [4], I may fairly withhold in Proportion ſo much of the *Rent*. For the *Rent* was determined for the Uſe, which the Houſe, in the Condition it was in at the making of the Bargain, was capable of affording during the whole Time I had *hired* it for; and the Uſe beiug leſſened without any Fault of mine, the *Rent* ought to be leſſened alſo, unleſs it be immediately repaired without any conſiderable [5] Inconvenience, or Loſs to me [c]. And ſo, if a *Tenant*, or

Mr. BARB. *NOTES on* § II.

[1] This is the Opinion of GROTIUS, lib. 2. c. 12. § 18. where, to take notice by the Bye, *Gronovius* has expreſs'd his Words very badly. *Sicut res domino perit*; for he makes that great Man ſay, That if a Thing be bought, and once delivered, and it be loſt, it muſt be accounted to him who is actually the Owner of it, and not his whoſe it was. A ſtrange thing! as if any Man queſtioned it! He need not be very acute to ſee, that GROTIUS ſpeaks, on the contrary, of a Thing ſold, but not delivered; which nevertheleſs, according to what is ſaid in the beginning of § 15, is to be at the Hazard and Peril of the Buyer, whoſe Loſs he makes parallel with that of Fruits, which being ſold, and eſteemed, as we may ſay, delivered to the Farmer, yet the Loſs belongs to the Owner: Even ſo a Thing ſold is ſuppos'd to be delivered to the Buyer, altho' it remains ſome time in the Seller's Hands.

[2] The Words of the *Digeſts* are, *Si ager terræ motu corruerit, ut nuſquam ſit, damno domini eſſe; opertere enim agrum præſtare conductori, ut frui poſſit.* Dig. lib. 19. tit. 2. locati & cond. Leg. 15. § 2. *Si capras latrones citra tuam fraudem abegiſſe probari poteſt, judicio locati caſum præſtare non cogeris: atque temporis, quod inſecutum eſt, mercedes ut indebitas recuperabis.* Ibid. Leg. 9. § 4.

[3] As the Author applies himſelf only to treat of the Queſtion about Accidents, that happen to the Thing hired, and does only by the Bye, and in an imperfect manner, ſhew the Engagements of him who lets his Goods or Labour, I ſhall ſupply this Defect in a few Words. I. He then that lets out his Eſtate, ought, 1. To put the Thing into a Condition to be ſerviceable for what it is hired, and for the Time fixed, as alſo in the Manner and Way agreed on. 2. To uphold it in that Condition, as long as it depends on him, and to that end, to be at all neceſſary Expenſes, or reimburſe the Tenant for them, at leaſt, if he be not engaged by Contract to do them himſelf. See *Law* 15. § 1. *Tit. locati, conducti,* quoted Note 5 below. *In conducto fundo, ſi conductor ſuâ operâ aliquid neceſſario vel utiliter auxerit, vel ædificaverit, vel inſtituerit, cum id non conveniſſet, ad recipienda ea quæ impendit ex conducto cum domino fundi experiri poteſt.* Ibid. Leg. 55. § 1. See alſo *Leg.* 61. of the ſame Title. 3. To leave the Thing to the Tenant, till the Time that 'tis hired for is expired, at leaſt, if there happen no Caſe which may probably be excepted, if it were foreſeen; as, if the Maſter of an Houſe hath need of it himſelf, or will make ſome neceſſary Repairs, if the Tenant pays no Rent for a conſiderable Time, or pulls down the Houſe, or uſeth it ſo that it may be feared he'll ſet it on Fire, or does in it, or ſuffers ſome unlawful Trade to be maintained. *Ædi, quam te conductam habere dicis, ſi penſionem domino in ſolidum ſolviſti, invitum te expelli non oportet, niſi propriis uſibus Dominus eam neceſſariam eſſe probaverit, aut corrigere domum maluerit, aut tu malè in re locatâ verſata es.* Cod. lib. 4. tit. 65. De locato & conducto, Leg. 3. See alſo *Leg.* 15. & *Digeſt. lib.* 19. *tit.* 2. *Leg.* 30. *princ.* 35. 54. § 1. 56. 61. & *Nov* 14. *c.* 1. A Sale, and in general every Alienation of Property, made in Favour of him who is not the Heir General, diſannuls alſo the Contract of Hiring (ſee Mr. HERTIUS's *Paræmia Jur. Germ. lib.* 1. *c.* 47.) but ſo that the Land ſold, and thoſe that repreſent him, are obliged to make good the Damages and Coſts of the Tenant, if the Purchaſer, for Example, or the Legatee, will uſe their Right. *Qui fundum fruendum, vel habitationem alicui locavit, ſi aliquâ ex causâ fundum vel ædes vendat, curare debet, ut apud emptorem eâdem pactione & colono frui, & inquilino habitare liceat, alioquin probibitus is, aget eum eo ex conducto.* Digeſt. lib. 19. tit. 2. locati, &c. Leg. 35. § 1. See alſo *Cod. lib.* 4. *tit.* 65. *Leg.* 9. *Qui fundum colendum in plures annos locaverat, deceſſit, & eum fundum legavit: Caſſius negavit cogi poſſe colonum, ut eum fundum coleret, quia nihil hæredis intereſſet. Quod ſi colonus vellet colere, & ab eo, cui legatus eſſet fundus, prohiberetur, cum hærede actionem colonum habere, & hoc detrimentum ad hæredem pertinere,* &c. Digeſt. ibid. Leg. 32. See Mr. TITIUS's Obſervations on *Lauterbach*, 597, *&c. Laſtly*, The Landlord ought to indemnify the Tenant for any Faults he ſuffers by reaſon of the Faults of the Thing hired, which he knew, or ought to have known. As for Example, If a Man hires Hogſheads leaky, and loſes his Wine by it. But 'tis not ſo, if a Man hires a Paſture, where there grow ſuch Weeds as burſt the Farmer's Cattle; for, in this Caſe, it is ſufficient to demand no Rent, at leaſt, if he prove a Mixture of good Graſs with the Weeds. *Si quis dolia vitioſa ignarus locaverit, deinde vinum effluxerit, tenebitur in id, quod intereſt, nec ignorantia ejus erit excuſata. Et ita Caſſius ſcripſit. Aliter, ſi ſaltum paſcuum locâſti, in quo herba mala naſcebatur; hic enim ſi pecora vel demortua ſunt, vel etiam deteriora facta, quod intereſt, præſtabitur, ſi ſciſti; ſi ignorâſti, penſionem non petes,* Digeſt. ibid. Leg. 19. § 1. Thus much for the Hiring of Things. II. He that lets out his Labour, ought, 1. To attend faithfully to his Buſineſs, or the Work he undertakes. 2. Finiſh it in the Time agreed on, if poſſible. 3. Not to leave it without ſome great Reaſon, ſuch as may be credibly thought an Exception to his Engagement, if it had come into his Mind. 4. To make good the Damages which he may cauſe to him for whom he labours, either by his Negligence or by his Ignorance, at leaſt until he knew his Inability, and did not for that Conſideration paſs him by; for then he can blame none but himſelf, and the other is diſcharged from doing better than he was able. See Note 3 of the following §.

[4] So the *Digeſts* order, "Si vitiatum ædificium neceſſario demolitus eſſet, pro portione, quanti dominus prædiorum locaſſet, "quod ejus temporis habitatores habitare non potuiſſent, rationem duci, & tanti litem æſtimari." *Ibid. Leg.* 30. *princip.*

[5] So the Words are, "Habitatores non, ſi paulò minus commodè aliquâ parte cœnaculi uterentur, ſtatim deductionem ex "mercede facere oportet; eâ enim conditione habitatorem eſſe, ut ſi quid tranſverſarium incidiſſet, quamobrem dominum ali-"quid demoliri oporteret, aliquam partem parvulum incommodi ſuſtineret; non ita tamen ut eam partem cœnaculi dominus "aperuiſſet, in quâ magnam partem uſus habitator haberet." *Ibid. Leg.* 27. *princip.* Moreover, that the Proprietor is obliged to make neceſſary Reparations, appears from *Leg.* 15. § of the ſame Title.

[a] *Vid.* lib. 19. t. 2. leg. 15. ſ. 2. *in fin. & ibid.* l. 9. ſ. 4. *D. locati.*

[b] *Vid.* Herod. *Euterpe*; l. 4. c. 7. ſ. 12.

[c] *Vid.* l. 15. ſ. 1. l. 30. *D. h. t.*

or a *Farmer*, [6] by force of Arms, be drove out of his Houſe, or Farm, 'tis manifeſt, the *Rent* from that time ought to ceaſe; for, in this caſe, the Thing is morally loſt to the Owner, till the Enemy be ejected. But if the Corn be gathered in, and then plundered by the Enemy, the caſe is altered; and the *Tenant* is then obliged to ſtand to the Loſs.

As for *Labour*; if a Man be hired only for the Diſpatch of ſome tranſient Buſineſs, and any Miſchance hinders him from performing it, he can have no Title to his *Wages*: But if a Man takes another into his Service for a continued time, aud ſuch an Accident happens, in common Humanity he ought not to diſcard him, or to abate his *Wages* [7], eſpecially if there be Hopes that he may make Amends by his future Diligence for the time he has loſt; or if his former Behaviour has deſerved ſuch Favour.

III. But as for thoſe Things, whoſe Produce is uncertain, as Fields, Orchards, Vineyards, Rivers for Fiſhing, and ſuch like; as a plentiful Produce is to the Benefit of the *Tenant*, ſo a bad one is to his Loſs: Nor in Strictneſs of Juſtice can he deſire any of the *Rent* to be abated by reaſon of a poor Harveſt, eſpecially ſince the Barrenneſs of one Year is made up by the Plenty of another; for a good Husband is not uſed to *let* or *rent* ſuch Things for one Year only [a]. Nor can that common Objection take place here, That *no Body ought to grow rich at another's loſs*: For the *Landlord* might urge the ſame in a plentiful Year for the raiſing the *Rent*, whom in that Caſe the *Tenant* would have no Regard to. For, becauſe the Produce is more one Year than another, the *Landlord* had rather be ſure of ſuch a *Rent*, than depend upon the Uncertainty of the Seaſon: And, on the other ſide, the *Tenant* lays out a Certainty for the Hopes of an uncertain Gain, for which, if it fails him, he can blame [1] no Body but himſelf. However that *Medium* propoſed in the [2] *Digeſts* [b] may be rightly applied here, *If the Produce happen to periſh by Floods, or by Birds of Prey, or by the Inroads of an Enemy, or by a Blight, or Drought, the* Landlord *ought to make Allowance*, and the Reaſon added is, *leſt the* Tenant, *beſides the loſs of what Corn he had ſowed, ſhould be forc'd to pay the* Rent *of the Ground too, and ſo bear a double Misfortune. But if the Corn proves bad, and nothing happens more than ordinary, the Loſs is then the* Tenant's. Where it appears, that this *Medium* conſiſts in a Diviſion of the Miſchances to which the Produce is liable, into ordinary and extraordinary [c], for if the *Rent* was to be abated for every little Loſs, it would give continual Occaſion for impertinent Law-ſuits. And therefore the *Rent* of Land is determined according to the middle Produce, computing one Year with another, leſt the *Farmer* upon every little Loſs ſhould have Occaſion to complain; and yet 'tis difficult to lay down preciſely how great the Loſs ought to be for the Abatement of the *Rent*, which may better be left to the Diſcretion of an honeſt Man, conſidering all Circumſtances, than to the Determination of any general Rule.

Sometimes a *Farmer* takes Land upon Condition to pay his *Landlord* the whole Produce of it, deducting firſt the Value of his Labour. And here the *Farmer* is, as it were, an *Hireling*, and if the Year prove barren, the loſs is to the *Landlord* only.

If the *Tenant* ſhould by any Accident have the Uſe of the Land intercepted, and the *Landlord* ſhould, in the mean time, *let* it to another, or reap the Profit himſelf, which otherwiſe would be due to the *Tenant*; whatſoever Gain he makes of it, he ought to refund it to the firſt *Tenant*, or elſe to receive it in part of Payment for the *Rent*. The Duty of the *Tenant* and *Landlord* in reſpect of any Thing or Labour let out to [3] Hire, is

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[6] See in the ſame Title, *Leg*. 33. *in fine*, & 35. *princ*.

[7] See *Digeſt. lib*. 40. *tit*. 7. *De ſtatu liberis*, *Leg*. 4. § 5. & *Collumella de re Ruſticâ*, *lib*. 12. *c*. 1. *in fin*.

Mr. Barb. *NOTES on* § III.

[1] *Pliny* junior nevertheleſs pleaſes himſelf much in ſeveral Places of his Letters, in the Releaſes which he made to his Farmers in that very Caſe. See *lib*. 8. *Ep*. 2. & *lib*. 9. *Epiſt*. 38. & *lib*. 10. *Ep*. 24. But it appears by thoſe Letters, that, beſides the Vanity, he had ſome future Intereſt in ſo doing.

[2] "Servius omnem vim, cui reſiſti non poteſt, dominum colono præſtare debere ait; ut puta, fluminum, graculorum, ſturnorum, & ſi quid ſimile acciderit, aut ſi incurſus hoſtium fiat. Si qua tamen vitia ex ipſâ re oriantur, hoc damno coloni eſſe: veluti ſi vinum coacuerit, ſi raucis aut herbis ſegetes corruptæ ſint. Sed etſi labes facta ſit, omnemque fructum tulerit, damnum coloni non eſſe, ne ſupra damnum ſeminis amiſſi mercedes agri præſtare cogatur. Sed ſi uredo fructum oleæ corruperit, aut ſolis fervore non adſueto id acciderit, damnum domini futurum. Si vere nihil extra conſuetudinem acciderit, damnum coloni eſſe. Idemque dicendum ſi exercitus præteriens per laſciviam aliquid abſtulit." *Ibid. Leg*. 15. § 2. See *Cujac. Obſerv*. 15. 28. Mr. Titius on *Lauterbach*, *Obſerv*. 610. believes, that this Circumſtance in the laſt Law, *unleſs the Loſs of the Farmer be unſupportable*, ought to be chiefly regarded: For a bad Harveſt is ſo far from being prejudicial to the Farmer, that we may ſee that ſuch as hold great Farms love a Year of Scarcity more than one of Plenty, becauſe the leſs Proviſion there is, the dearer they ſhall ſell their Corn; ſo that according to this Author, all that is ſaid of Abatement of Rent muſt have reſpect only to little Farmers. But when certain Proviſions become very cheap, for Reaſons independent on a good or bad Harveſt, there is no Cauſe that an Abatement of Rent ſhould be deſired upon that Account, becauſe the Price of Things is commonly very chargeable. This is determined in the following Law, underſtood in the manner that Mr. *Bynkerſhoeke* hath explained it learnedly and judiciouſly, according to his Cuſtom. *Cum quidam de fructuum exiguitate qnereretur, non eſſe rationem ejus habendam, Reſcripto Divi Antonini continetur*. Digeſt. ubi ſupra, Leg. 15. § 5. This Lawyer explains, at the ſame time *(Obſerv. lib. 2. c. 12.)* another Reſcript of *Antoninus*'s, recited in the ſame Place. *Item alio Reſcripto ita continetur: NOVAM rem deſideras, ut propter vetuſtatem vinearum Remiſſio tibi DETUR*, ibid. *i. e.* A Man that hath taken an old Vineyard to farm, ought to impute it to none but himſelf, if it bear not as much as he expected, becauſe he might have known that before he hired it.

[3] The Words are, "Conductor autem omnia ſecundum legem conductionis facere debet, & ſi quid in lege prætermiſſum fuerit, id ex bono & æquo præſtare. Qui pro uſu autem veſtimentorum, aut argenti, aut jumenti, mercedem aut dedit, aut promiſit, ab eo cuſtodia talis deſideratur, qualem diligentiſſimus paterfamilias ſuis rebus adhibet, quam ſi præſtiterit, & aliquo caſu fortuito eam rem amiſerit, de reſtituendâ eâ non tenebitur." *Inſtit. lib*. 3. *tit*. 25. §. "Celſus etiam imperitiam culpæ adnumerandum cenſuit. Si quis vitulos paſcendos, vel ſarciendum quid, poliendúmve conduxit, culpam eum præſtare debere, & quod imperitiâ peccavit, culpam eſſe, quippe, ut artifex (inquit) conduxit." *Digeſt. ut ſupra*, *Leg*. 9. § 5. See alſo § 2, 3. & *Leg*. 11, 12, 13, 25. § 3, 4, 7, 8. 27. 30. § 4. 38. 55. § 1, 2. 60. § 2. 61. *princ*. I have ſaid at the End of Note 3. upon the § aforegoing, how it is to be underſtood, That we muſt judge by the Principles of the Law of Nature only, what is here ſaid of the Ignorance and Inability of him who takes upon him a Work or Labour. As for the Care that the Tenant ought to have of what he hires, the Lawyers are not well agreed about it; ſome will have him anſwerable for the leaſt Negligence, and others for ſmall Faults only. See Mr. Thomasius's Diſcouſe *De Culparum Præſtatione in contractibus*, c. 1. § 22. What I have ſaid of a Bargain and Sale in Note 2. upon § 3. of the foregoing Chapter, ought to be applied here.

[a] *Vid. D. ubi ſupra*.

[b] L. 15. ſ. 2. D. *h. t*.

[c] *Vid*. l. 25. ſ. 6. D. *h. t*. Where it is well added, "The *Tenant* ought to bear contentedly a moderate Loſs, when an immoderate Gain is not taken from him."

is ſhew'd in *Inſtit.* l. 3. t. 25. ſ. 5. *& in* D. *ubi ſupr.* l. 9. ſ. 2, 3, 5. l. 11. l. 12. l. 13. l. 25. ſ. 3, 4, 7, 8. l. 27. l. 30. ſ. 4. l. 38. l. 55. ſ. 1, 2. l. 60. ſ. 2. l. 61. *princ.* D. *h.* t[4].

Hither may be referr'd the Law in *Egypt*, relating to Phyſicians; who, if they took care of their Patient, according to the Direction of the publick Book, were not anſwerable if he died under their hands; but if they acted againſt thoſe Directions, they were tried for their Lives[a]. *Alexander de Rhodes*[b] relates, that in the Kingdom of *Tunquin* they agree with the Phyſician for a certain Rate at the beginning of the Diſtemper, but which he does not receive, till he makes his Cure: and if the Patient miſcarries, he has nothing for his Pains: By this means they think to quicken the Diligence of the Phyſician. The ſame Author tells us of a Phyſician, who being conſulted and bargaining for his Fee, ſaid, That *were the Patient a young Man, he would not cure him under,* 100 *Crowns, but ſince he was old, he would be contented with* 20; *becauſe the Life he ſhould reſtore was not likely to laſt long.*

IV. But if my Labour, ſuppoſe in a Journey, can be ſerviceable to many, and I am hired by one Perſon to the full Value, *Can I exact the ſame Price from others alſo? Grotius*[c] is of the Opinion I may, if the Law of the Land does not interpoſe; for it has no Relation to the Contract which I made with the firſt: Nor is my Labour the leſs valuable to him by being ſerviceable to others alſo. However ſuch a Contract as this does not ſeem agreeable to Equity and good Nature, tho' perhaps it is not ſtrictly unjuſt. For when one Man alone has paid for the whole Labour, if it can do ſervice to others alſo, without being the more painful to the Performer; in reſpect of them[1] it ought to be rankt among thoſe Favours, which are of no Expenſe to the Doer, and are yet beneficial to the Receiver. But yet ſince 'tis hard that the firſt Contractor ſhou'd bear the whole of the Burden, it is[2] but reaſonable, that the others ſhou'd contribute to him their Proportion. Thus if I hire a Ship to my ſelf, the Owner cannot take in others without my Leave; and if I am diſpoſed to admit of it, the Advantage redounds to me only.

But yet in Arts and Sciences, which receive a Value from the Scarcity of ſuch as underſtand them, the whole Price may be fairly demanded of each, though the ſame Trouble would inform many; for ſuch ſort of Arts, the more common they are made, the cheaper they grow: And therefore though my Labour be never the greater to me by being apply'd to many, yet I can[3] demand a Price upon Conſideration that my Knowledge will be leſs worth, the more it is communicated. Some indeed are not willing that the Salary, which a Man receives for teaching the liberal Sciences, ſhould come under the Denomination of *Hiring*, becauſe Learning cannot be ſold for Money; and ſo they are for making this one of thoſe Contracts which want a Name, reducible to the *4th* general Head, *Work for Goods*[d]. Be it as it will, it ſeems to have this in common with *Hiring* of Labour, that the Honeſty and Induſtry of the Party only, and not the Event, is to be regarded; ſo that although one's Labour happens to be in vain, yet the Salary agreed upon may be demanded.

Mercedem appellas? Quid enim ſcio? Culpa docentis
Scilicet arguitur, quod læva in parte mamillæ
Nil ſalit Arcadico juveni. Juv. *Sat.* vii. v. 159, *&c.*

Pay, Sir, for what? The Scholar knows no more
At Six Months End, than what he knew before.
Taught or untaught, the *Dunce* is ſtill the ſame,
Yet ſtill the wretched Maſter bears the Blame.

Sometimes that which *Pliny* mentions of the *Terandus* or *Buff*, *N. H.* l. viii. c. 34. may be applied; *when he appears in his own genuine Complexion, he is like an Aſs. 'Tis an excellent Maſter that can make a Fool wiſe*, Eurip. Hipp. Coron. *v.* 921, 922, *Nature is too violent and powerful for any Diſcipline*, Lib. *Decl.* 29. Though ſometimes that may be reply'd which *Lucian* mentions in *Hermotim.* Tom. 2. *p. m.* 293. The Speech which *Aureng-Zebe* the great *Mogul* made to his Tutor, is worth obſerving, *Vid.* Bernier *de rebus in regno Mogoris geſtis*, Part. ult. *p. m.* 57.

[4] *Eſchines* acted directly counter to this ſort of Contract, for he gave People money to come and hear him[e]: And ſo did the pompous and ambitious Rhetoricians at *Rome*, who by Intreaties and Entertainments did what they could to get themſelves Auditors. *Socrates* did not demand Money of his Auditors, but wondred, *That a Man profeſſing himſelf to be a Teacher of Virtue ſhould inſiſt upon ſo mean a Reward, and not rather look upon himſelf to be the greateſt Gainer, in having procured a good Friend; that ſuch a Man ought not to fear, leſt he, whom he had made good and honeſt, ſhould forget to be grateful to his Benefactor*[f].

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[4] We follow the Notions of the *Roman* Law, which looks upon the Tenant *(Conductor)* as he that undertakes a Work or Labour, and the Landlord *(Locator)* as he that lets it at a certain Price to be paid him. But 'tis the Impropriety of Language which makes the Notions confus'd: For, in the main, he that lets his Labour and Work for Wages to a Perſon, who is to find Matter for him to Work on, is no leſs a Landlord, than he that lets an Houſe or Land. As for Bargains at a Price agreed on, where the Undertaker finds the Materials, and is at all Expenſes, this is properly Selling. See *c.* 2. § 10. above.

Mr. BARB. *NOTES* § IV.

[1] This only proves that we can require no more of another than he has expreſly agreed to pay. But if after the former is engaged, ſome other Perſon can make an Advantage by it, nothing hinders but that ſome Recompenſe may be made to the latter for the Care he takes of his Affairs, unleſs there is ſome Reaſon from Humanity and Charity, which requires that the Service be done to him freely.

[2] This is not always neceſſary; for, provided that the Perſon hired doth not neglect the Affairs by him undertaken, if at the ſame time he can attend upon another's, he may be allow'd to make that ſmall Gain, as a little Perquiſite, which we are contented he ſhould have.

[3] Sometimes alſo that which every one gives is ſo ſmall a Thing, that what is paid for the Labour of all together, is little enough for the Labour of teaching one only.

[4] This Story is founded only on a bad Tranſlation of theſe Words, Ἐμμίσθους δ᾽ ἀκροάσεις ποιεῖσθαι, which ſignify the contrary, That *Eſchines* took Money of his Auditors, as *Aldobrandinus* obſerves.

[a] *Diod. Sic.* l. 1. c. 82. [b] *Itin.* Part 2. c. 30. [c] L. 2. c. 12. ſ. 19. [d] *Vid.* L. 50. t. 13. l. 1. ſ. 4. *D. de extraord. cogn. Vid.* Sen. *de Benef.* l. 6. c. 11. How poor Schoolmaſters are often cheated of their Wages, is ſhew'd in *Lucian*, *De mercede conduct.* [e] Vid. *Diog. Laert.* l. 2. ſ. 62. [f] Vid. *Xenoph. Apomnem.* l. 2. p. 426. Ed. *H. Steph.* in fin.

CHAP. VII.

Of the Loan *of a* conſumable Commodity.

I. *What a Loan is, and what a conſumable Commodity.*
II. *A double Uſe of theſe Things.*
III. *For what Things we are wont to be credited.*
IV. *Of tacit Lending.*
V. *Whether Lending be an Alienation.*
VI. *What if Money be altered in the intrinſick Value?*
VII. *Or in the extrinſick Value?*
VIII. *The Doctrine of the* Jews *about Uſury.*
IX. *That Uſury is not contrary to the Law of Nature is proved.*
X. *The Arguments to the Contrary are anſwered.*
XI. *Some Contracts are much the ſame as Uſury.*
XII. *The Evaſions uſed to avoid the Diſgrace of Uſury.*

THE *Loan of a* [a] *conſumable Commodity* is founded upon this Condition, that the ſame Quantity and Quality be returned in kind [b]. Things thus lent are called [1] *conſumable* [c], becauſe they are *conſumed* and periſh in the Uſe: [2] And therefore 'tis enough, if the ſame Sort of Things, tho' not the ſelf ſame Individuals, be returned. The [d] *Loan of a conſumable Commodity* differs from the [e] *Loan* of any other Thing not *conſumable*, and from the [f] *Uſe* of a Thing *let out to hire*, in this reſpect: In the two latter, the ſelf ſame numerical Thing that was *lent*, or *let out*, is to be reſtored, and no other without the Conſent of the Creditor: And that, not only becauſe the Value of ſuch Sort of Things is not always capable of being exactly adjuſted [3] [g], but becauſe it was expreſly the Condition of the *Loan* or *Letting*. Whereas in the *Loan* of a *conſumable Commodity*; if, for Example, my Neighbour borrows a Buſhel of Wheat, and returns me another Buſhel of the ſame Goodneſs, I am ſuppos'd to have received my own.

Theſe *conſumable Commodities* are ſaid to conſiſt of Number, Weight, and Meaſure, as being thereby determin'd and ſpecified; whereas other Things have their Quantities determin'd by Nature. And therefore *conſumable Commodities* are peculiarly termed *Quantities*: But other Things, which don't come under this Sort of *Loan*, are call'd *Species*. And here we muſt obſerve, that, *v. g.* Oxen are not therefore a *conſumable Commodity*, becauſe 50, or 100 of them may be ſold by Tale; for the Number, in that caſe, does, not ſpecify them, but only denotes the Quantity of the Species [h].

II. The uſe of theſe *conſumable Commodities* is either ordinary or extraordinary. The latter is when a Man borrows [1] to make an Appearance of being better provided than really he is; for ſometimes 'tis of great Importance to be thought rich; as if a Man, in order to gain upon the Affections of his Miſtreſs, ſhould borrow a Sum of Money, and ſhew it for his own; in this caſe, the Money is not taken up as a *conſumable Commodity*, nor is the Borrower ever Owner of it; and therefore he ought to return the very ſame in Specie. But the ordinary uſe of ſuch Things conſiſts in the Loſs of them; or, in other Words, I cann't directly apply them to my uſe, unleſs they be conſum'd, and ſo become loſt to me. This is plain in Corn, Wine, and other Things that turn to Nouriſhment; and Money itſelf I cann't make uſe of in buying Neceſſaries, and paying Debts, unleſs I part with it: So that altho' the Subſtance of the Money remains, yet as to me it is utterly loſt. And therefore, when ſuch Things as theſe, to the end they may be put to their ordinary uſe, are made over to another, not with a deſign to barter, but with a deſign to have the ſame return'd again; ſince the Species that was deliver'd muſt be conſum'd, the Reſtitution muſt neceſſarily be in the ſame kind [2].

III. Money

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[a] *Res fungibilis.* [b] *Vid. Inſtit. l.* 3. *t.* 15. *princip.* [c] *Vocantur res, quæ mutuo dantur,* fungibiles, *ſeu quæ* functionem *in ſuo genere recipiunt, ideo, quia quodlibet ex iſto genere vice alterius ita* fungitur, *ſeu alterius vicem ſubit, ut qui ex eodem genere, eadem qualitate, & quantitate receperit, idem recepiſſe cenſeatur,* D. L. 12. t. 1. l. 2. ſ. 1. *quæ functionem,* &c. [d] *Mutunm.* [e] *Commodatum.* [f] *Locatum.* [g] *Vid. D. ubi ſupra de rebus creditis,* leg. 2. ſ. 1. [h] *Add.* Jac. Gothofredi *Diſſert. de æqualitate & functione in mutuo.*

Mr. Barbeyrac's *NOTES on* Chap. VII. §. I.

[1] The Words of the *Inſtitutes* are, "Mutui autem datio in iis rebus conſiſtit, quæ pondere, numero, menſura conſtant; veluti "vino, oleo, frumento, pecuniâ numeratâ, ære, argento, auro, quas res aut numerando, aut metiendo, aut adpendendo, in hoc "damus, ut accipientium fiant. Et quoniam nobis non eædem res, ſed aliæ ejuſdem naturæ & qualitatis redduntur: inde etiam "mutuum adpellatum eſt, quia ita à me tibi datur. ut ex meo tuum fiat." *Inſt. lib.* 3. *tit.* 15. See *Cujas Obſ.* 11. 37.

[2] *Res fungibiles.* See what is ſaid *Lib.* 1. *c.* 2. § 10. *Note* 3. The Word *Fungibilis* is not found in the *Roman* Law; but *Functio* is uſed in the ſame Caſe, tho' it may be doubted whether the Antient Lawyers called, *Res quæ in genere ſuo functionem recipiunt,* what the Modern have abridg'd into *Res fungibiles.* The Law upon which it is grounded, is plainly corrupted, and ought to be read, in all Appearance, as Mr. *Bynkerſhoek* explains it, *Obſerv.* 1. § 10. *Mutui datio conſiſtit in rebus, quæ pondere, numero, menſurâ conſtant; quoniam eorum datione poſſumus in creditum ire. Quæ in genere ſuo ſolutionem recipiunt per functionem, quam ſpecie.* Digeſt. lib. 12. tit. 1. De Rebus creditis, &c. Leg. 2. § 1. *i.e.* (if we underſtand *tam* ---- before *quàm ſpecie*) In theſe ſort of Things we pay what we owe, by reſtoring another Thing of the ſame Kind and Quality, as well as by returning the ſame we have received.

[3] The Words of the *Digeſts* are, *Nam in cæteris rebus ideò in creditum ire non poſſumus, quia aliud pro alio invito creditori ſolvi non poteſt.* Digeſt. lib. 12. tit. 1. De Rebus creditis, &c. Leg. 2. § 1.

Mr. Barb. *NOTES on* § II.

[1] So the Law ſpeaks, *Non poteſt commodari id, quod uſu conſumitur, niſi fortè ad pompam vel oſtentationem quis accipiat. Sæpe etiam ad hoc commodantur pecuniæ, ut dicis gratiâ numerationis loco intercedant.* Dig. l. 13. tit. 5. Commod. vel cont. Leg. 3. § 6. 4.

[2] The true Character of Things, call'd conſumable Goods, is, that they periſh in the uſing, as our Author ſays. Now there are two ſorts of Conſumption: 1. Natural. 2. Civil. Natural Conſumption hath place either in ſuch Things as are loſt in the Uſe, as thoſe are which we eat and drink; or in ſuch as are ſubject to be eaſily deſtroyed, tho' we do not meddle with them, as the Fruits of Trees, &c. For as for thoſe which decay inſenſibly as we uſe them, but don't altogether periſh, as Cloaths, Earthen Ware,

III. Money, which commonly goes by Number, or Counting, Gold and [1] Silver in Bullion, Bread, *&c.* (which paſſes by Weight) Corn, Salt, Wine, Beer, Oil, *&c.* (which are ſpecified by Meaſure) and, in general, all ſorts of Proviſion; as Fleſh, Eggs, Milk, and even intire Animals, conſider'd as Proviſion, come under the Name of *conſumable Commodities* [a]. For ſuppoſe I am to make an Entertainment, and have not Proviſion enough at Home, or Money to buy it, I may borrow of my Neighbour, not only Eggs and Fleſh, but Fiſh, Lobſters, Hares, Hens, Geeſe, and even Sheep and Calves, upon Condition to repay him again in kind [b]. Fair Paper may likewiſe be brought under the ſame Denomination, as being *conſum'd* in the *Uſe*; for Paper once ſcribbled upon is loſt for any other Writing. In ſhort, under this Denomination may be reduc'd any ſort of Commodity, which can be determin'd by any certain Meaſure, and which (if after it has been apply'd to its genuine and principal Uſe, it cannot be intirely reſtored again to its former Condition) is capable of being repaid in kind. For ſuch ſort of Things, altho' they are generally the Matter of Sale, yet ſometimes happen to be borrowed. As if, *v.g.* I ſhould procure a certain Quantity of Cloth for my own Uſe, and ſhould let a Friend, who has immediate Occaſion for ſome of the ſame ſort, and has not wherewithal to buy it, make uſe of it, upon Condition to return me as much and as good of the ſame kind.

IV. And this Contract is perform'd not only expreſly, but ſometimes tacitly: As ſuppoſe I ſhould pay a Man Money by Miſtake, which I did not owe; or ſhould give a Man Money for ſome Reaſon which afterwards does not appear; in this Caſe the *Roman* Law admits of an [c] *Action for Money paid where not due*, and *for ſome Reaſon which does not appear*. For ſince ſuch Money was not paid as a Gift, but as a Debt, or for the procuring an Equivalent, and yet the Receiver became Maſter of it; it is the ſame Thing [1] as if it had been borrowed, and may be demanded back as ſuch. And therefore the Foundation of theſe Actions may not improperly be call'd a [2] *tacit Borrowing* [d]. Thus *Mauritius* the Emperor having given *Childebert*, the *French* King, Money to drive the *Lombards* out of *Italy*, after he had made Peace with them, demanded it back: *Childebert* indeed would not ſo much as vouchſafe him an Anſwer, but that was becauſe he was more powerful than juſt. *Paul Warnefrid.* de geſt. *Longobard* [3].

V. Some Years ago *Salmaſius* and ſome *Civilians* had a Diſpute, *Whether the* Loan *of a* conſumable Commodity *was an Alienation?* Now it is plain, ſince the ordinary Uſe of ſuch Things conſiſts in the Conſumption of them, they muſt be made over to the Receiver, with full Power to diſpoſe of them as he pleaſes; which cannot be done without inveſting the Property in him. But becauſe the *Creditor* gives, in order to receive back, and the *Debtor* receives, in order to refund; therefore neither is the Eſtate of the one leſſen'd, or the Eſtate of the other increaſed by it. Unleſs the *Creditor* may be rather thought a Loſer, having only an Action againſt the *Debtor*'s Perſon, in lieu of his Money, which, by Reaſon of the Trouble and Uncertainty attending it, may be reckon'd leſs worth than the Money it ſelf. And hence it is, that as Debts, due to any Man, are look'd upon as Part of his Fortune; ſo a Man is ſuppoſed to be worth only ſo much as remains to him after his Debts are paid. And he that owes more than his Eſtate comes to, may fairly be ſaid to be worth leſs than nothing. To this Purpoſe was that Saying of *Ceſar*'s, that he wanted 2500 *H. S.* to be worth nothing, *App. de bello civil.* l. ii. p. 432. B. Ed. *H. Steph.* Hence Money borrowed is call'd *æs alienum*, another Man's Money; not that the Perſon borrowing has not the Property of it, but becauſe he receiv'd it upon Condition to return as much. On the other ſide, he who is out of Debt, may ſay, *Meo ſum dives in ære*, The Money that I have is my own. In a word, he that lends Money does in-

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Ware, *&c.* they don't belong to this Place; and 'twas an Overſight of *Tribonian* to exclude Cloaths from the Number of an Uſufruct, properly ſo call'd. *Inſtitut. lib.* 2. *tit.* 4. § 2. Conſumption Civil hath Place in Things, whoſe Uſe conſiſteth in being alienated, altho' they have a continual Being. Such are not only Money, but all Things we barter with, as alſo Things made uſe of in Building, and all other Materials for Compoſitions, and Work. See *lib.* 4. *c.* 7. § 10. above. Upon this Foundation there are two ſorts of Things call'd conſumable Commodities: One, which are ſuch in their own Nature, and unchangeably ſuch; the other, which depend upon the arbitrary Will of Men, and mutable Appointment. The firſt are ſuch whoſe ordinary Uſe conſiſts in their Natural or Civil Conſumption: I ſay, ordinary Uſe; for tho' the Owner may lend ſometimes, for Example, a Sum of Money, merely for Form and Appearance, and a Beam only to ſupport a Building; yet, as that is rare, it has no regard to Laws, which reſpect Things that commonly happen only. The other ſort of conſumable Things contains ſuch, as tho' they may be uſed or lent without Conſumption, are often appointed to be ſold, or are dealt in after ſome other Manner; ſo that according to the Deſign of him of whom they are borrowed, they are ſometimes for Conſumption, and ſometimes for Uſe. As for Example, when a Man who has a Library for his own Uſe, lends me a Book, he intends that I ſhould return the ſame Copy again; ſo that if I would give him another as good, he is not obliged ordinarily to accept it: But if he of whom I borrowed the Book, be a Bookſeller, or Trader in Books, 'tis ſufficient that I return him another Book as good; becauſe, as he keeps it for Sale only, 'tis indifferent to him, whether I reſtore him the ſame Book, or another as good. 'Tis the ſame in other ſorts of Goods, unleſs they be ſuch as are very rare, or curiouſly wrought, as ſome ſort of Druggs not common, a Watch, Mathematical Inſtruments, an Air-Pump, or other Inſtruments to try Experiments, *&c.* becauſe 'tis hard to find others of the ſame Nature and Goodneſs, which may be returned for what's borrowed. This is taken out of Mr. Thomasius's Diſcourſe before quoted, *De pretio affectionis in res fungibiles non cadente*, c. 1. § 16, *&c.*

Mr. Barb. *NOTES on* § iii.

[1] We may give Gold for Silver, and pay it in other Kinds, unleſs it be otherwiſe agreed on. See *Corn. Van Bynkerſhoek*'s Obſerv. 1. 9.

Mr. Barb. *NOTES on* § iv.

[1] It is not neceſſary to ſuppoſe a tacit Lending. The Nature of the Thing ſufficiently ſhews the neceſſity of Reſtitution, as appears by the Author himſelf. But if it be ſufficient to render an Equivalent, yet it does not follow that it ſhould be by virtue of a tacit Loan; but 'tis becauſe it cann't be otherwiſe reſtored, or becauſe 'tis all one whether the Thing be recover'd in *ſpecie*, or by an Equivalent. See what is ſaid of Quaſi-Contracts in ſeveral Notes above, and among others on *lib.* 4. *c.* 13. § 13.

[2] The Lawyers call it *Promutuum.* See *Cujacius* Obſ. 8. 33.

[3] " By the way we may obſerve out of *Plutarch*, why the *Gnoſſians* us'd to take away forcibly the Money which they borrowed at Intereſt: Perhaps, that the Creditor might evade the Law againſt *Uſury*. For ſhould the Debtor refuſe paying Uſe " for what he thus took away, he would have an Action of Robbery againſt him. *Quæſt. Græc.* p. 303. Edit. *Wech.*

[a] *Vid.* D. *ubi ſupr.* l. 2. ſ. 1. D. *de reb. cred.*

[b] *Add.* Plin. *N. H.* l. 9. c. 55.

[c] *Condictio indebiti, & condictio cauſa data, cauſa non ſecuta.*

[d] Which is otherwiſe called by the *Civilians* Quaſi-Contractus.

deed *alienate* it, yet ſo as neither to leſſen his own Eſtate, nor [1] to add to that of his *Debtor*.

VI. It is a Queſtion of greater Moment, *Whether, if a Change happens in the Money, between the Borrowing and the Payment, regard muſt be had to the Value of Money, as it was* [1] *at the time of Payment?* Here moſt think fit to diſtinguiſh between the *intrinſick* Goodneſs of Money, and the *extrinſick*; whereof the former conſiſts in the certain Quantity of ſuch, or ſuch a Metal; the *latter* in the publick Rate, or Value impos'd by the Magiſtrate. If the Change happen in the *intrinſick* Value, as ſuppoſe the Metal becomes baſer or lighter (for the Change in Money is generally for the worſe) then they think the Money ought to be reduc'd to the Value it bore at the time of Borrowing. For this Contract obliges not only to reſtore the ſame Thing in kind, but in Goodneſs alſo [2]; indeed otherwiſe the ſame Quantity would not be reſtor'd. And therefore, if, for Example, in Money newly coin'd a fourth Part of the *intrinſick* Goodneſs be wanting, for 100 *l.* lent in old Money, I ought to receive 125 *l.* in the new. In like manner, if I lend another 100 *l.* half of which is perfectly Alloy, I ought to receive only 50 *l.* when the Baſeneſs of the Coin is redreſs'd. For tho' it be in the Breaſt of the Government to raiſe or lower the Value of Money, yet if the *extrinſick* Valuation differs very much from the *intrinſick* Goodneſs of the Coin (ſince Regard muſt be had to Foreigners, unleſs we would reduce our Commerce with them to pure Bartering) the Price of Commodities will be determined rather by the [3] *intrinſick* Goodneſs, than the *extrinſick* Value and Denomination of it. For ſuppoſing the Money diminiſhed a *4th* Part, we ſhould give 125 *l.* for that which we us'd to pay but 100 *l.* And therefore if a Man ſhould pay me an old Debt of 100 *l.* in ſo much new Money, he would really pay me a *4th* Part too little.

VII. But if, without any Alteration in the *intrinſick* Goodneſs, the *extrinſick* Value ſhould riſe or fall; then Regard ought to be had to the Value of the Money, as it was at the time of Contract, and the increaſe or decreaſe of it ought to be at the Gain or Loſs of the *Debtor*. For Example, if I ſhould lend 100 *Guineas* in Specie, when they go for 26 *s.* and afterwards they ſhould riſe to 30 *s.* I can't demand more than 26 *s.* the *Guinea*, if my Debt be paid in Silver, and if the Payment be made in *Guineas*, I muſt deduct 4 *s.* from each, and ſo receive not much more than than 86 *Guineas* in Specie.

And on the other hand, if they ſink to 22 *s.* and my Payment be made in Silver, I can demand 26 *s.* for every *Guinea.* But if I be paid in *Guineas*, I ought to have an Addition of 4 *s.* to each, and ſo to receive above 118 *Guineas* in Specie.

But yet this does not clear the Buſineſs, for againſt the *former* Determination the *Creditor* may make his Exceptions; for had he kept his *Guineas*, the Increaſe had been to him; which if he be now forc'd to loſe, another makes a Gain at his Loſs: And the ſame Plea may the *Debtor* have in Bar of the *latter*.

And therefore we muſt enquire further, *1ſt*, Whether any certain Sort of Money was lent, *v. g. Guineas* in Specie, upon Condition that ſo many ſhould be return'd in Specie, and in no other Money; or *2dly*, Whether they were paid as common current Money; or *3dly*, Whether all the Money of the Nation, or *4thly*, Only that Particular Species has undergone a Change. In the *1ſt* Caſe, without Diſpute, the Number of *Guineas* is to be return'd. In the *2d*, the former Deciſion takes place, and therefore the Value of *Guineas* in ſuch a *Loan* muſt be referr'd to ſome other Species as a Standard; *v. g.* ſo many *Guineas* of 26 *s.* The 3*d* Caſe, where the Change affects the whole Body of the Money, in Compariſon of the Plenty or Scarcity of other Things, may be determin'd from what has been ſaid in *Chap.* 1. *S.* 16. although it hardly ever happens in Fact, that this general Change in the Money affects the Payment of an old Debt. As for the *4th* Caſe, when the Value of any one Species riſes without any *intrinſick* Alteration, all the other Money [1] muſt needs have been debaſed. Thus *v. g.* when *Guineas* roſe from 26 *s.* to 30 *s.* it was a ſign that the Silver Money in its *intrinſick* Value was grown worſe. And therefore in this Caſe, if *Guineas* were lent in Specie, and the Payment be made in Silver, *Guineas* ought not to be valued as lent at 26 *s.* but at 30 *s.*

But

Mr. BARB. *NOTES on* § V.

[1] That is to ſay, as Mr. PLACETTE, in his Treatiſe of *Intereſt* obſerves, *Chap.* xii. p. 133. "If he that lends, transfers "the Property of a Thing to another in Specie, yet he reſerves the Value." Now the Value always exiſts, and we know what it is: We put it into the hands of the Debtor, but he is not the Owner; for if it were ſo, he might diſpoſe of it as he pleas'd, by giving, ſquandring, or playing it away, which he is not certainly allowed. But the Creditor, on the contrary, can make a Preſent of it to the Debtor himſelf, or any other. He may call it in, forbear it, ſpend it, or diſpoſe of it as he pleaſes. See the reſt of this Chapter, and the foregoing, of the Treatiſe from whence I have taken it. Hence it is, as our Author obſerves, that a Debt is called *Æs alienum, i. e.* Another Man's Money; not but that a Debtor acquires a Property to the *Species* he has received, but becauſe he gets it on Condition to render the like Value again. On the contrary, a Man who owes nothing may ſay, *Meo ſum dives in ære.*

Mr. BARB. *NOTES on* § VI.

[1] See FRANCIS HOTOMAN's *Quæſt. illuſtr.* Qu. 15, 16. upon this Queſtion, where it is determin'd otherwiſe than it is here, but not from ſolid Principles.

[2] So the *Digeſts* ſpeak, *Cum quid mutuum dederimus, etſi non cavimus, ut æque bonum nobis redderetur, non licet debitori deteriorem rem, quæ ex eodem genere ſit, reddere; veluti vinum novum pro vetere: nam in contrahendo quod agitur, pro cauto habendum eſt; id autem agi intelligitur, ut ejuſdem generis, & eadem bonitate ſolvatur, qua datum ſit.* Dig. Lib. 12. tit. 1. De Rebus credit. &c. Leg. 3. We may add to it, that if the Money had remained in the hands of the Creditor, he had loſt nothing by leſſening the Species; and ſo in the Alienation, this Conſideration paſſes into a Rule: *Alienatio quum ſit, cum ſua cauſa dominium ad alium transferimus, quæ eſſet futura, ſi apud nos ea res manſiſſet: Idque toto jure Civili ita ſe habet, præterquam ſi aliquid nominatim ſit conſtitutum.* Digeſt. lib. 18. tit. 1. De contrah. empt. &c. Leg. 67. In fine, In all this we muſt ſuppoſe that the Time for Payment was not paſſed; for if the alteration of the value of the Species was made when the Debtor delayed the Payment, or after the Creditor would not receive the Payment, it ſo much the worſe for him to whom he was bound, that the Money was not paid in a Species of the Goodneſs and Value, according to the Rule of the Law: *Unicuique ſua mora nocet.* Digeſt. lib. 50. tit. 17. De diverſis regulis Juris. Leg. 173. § 2.

[3] This appears by the following Law: *Pro imminutione, quæ in æſtimatione ſolidi forte tractatur, omnium quoque pretia ſpecierum decreſccre oportet.* Cod. lib. 11. tit. 10. De veter. numiſmatis poteſtate, Leg, 2.

Mr. BARB. *NOTES on* § VII.

[1] Mr. HERTIUS ſays here, That the Text is corrupted in all the Editions. It is true, that in the *Swediſh* and *Frankfort* Editions it is read *Valore agetur,* for *augetur*; but the Fault is ſo manifeſt, that he might without Scruple correct it in his own. As for what he ſays, that *OB* ought to be added after *augetur*, I ſee no Reaſon for it, but think it contrary to the Reaſon and Senſe of the Author.

But if common Money was lent, the *Debtor* gets the Advantage of the Riſe, unleſs the Largeneſs of the Sum, or the Enormity of the Change may plead for ſome Conſideration in behalf of the *Creditor*.

As for other *conſumable* Commodities, provided they be return'd at the Time and Place appointed [2], [a] 'tis little regarded whether their Price has riſen or fallen; but the Advantage of the Riſe, and the Loſs of the Fall belongs to the *Creditor*, unleſs they had agreed about it otherwiſe.

But when the *Debtor* is backward in his Payment, and the Price, in the mean time, happens to be altered, the *Roman* Lawyers are at a Loſs to what Time or Place the Valuation ought to be aſſigned: It ſeems moſt reaſonable that it be adjuſted according to the Time and Place of Payment. But, if it be through the *Debtor*'s Fault that the Payment is protracted; and the Price in the mean time alters, it ought to be to his Loſs [b].

VIII. *Whether* Uſury, *which is generally given for the* Loan *of Money, be repugnant to the natural and divine Law*, is a Queſtion that has been warmly debated [1]. Which ought to be canvaſt more nicely, becauſe moſt People are not of the *Perſians* Opinion, *Who*, as *Plut.* relates in his Book againſt Borrowing, *among their Sins, give the ſecond Place to Lying, but the firſt to Borrowing, becauſe it often happens that they that borrow, lye.* Tho' *Herodotus*, in *Clio*, in my Opinion better aſſigns the firſt to Lying, the next to Borrowing. How the old *Hebrews* explain the Divine Law [c], relating to *Uſury*, *Selden* [d] gives a large Account; *viz.* they thought it [2] was unlawful not only to receive, but even to give *Uſury*; and that the very Scriv'ners, Notaries, Witneſſes, and Procurers of ſuch Bargains contracted a Guilt. However, the Money of Orphans was allowed to be put out to *Intereſt* to a rich Man, provided he gave the Gain to the Orphan, but bore the Loſs himſelf.

Now they had two Sorts of *Uſury*, the one was [e] *Uſury properly ſo called*, which was covenanted for, and received at the Beginning, or during the Contract; and this was ſuppos'd forbidden by the Divine Law: The other was called the [f] *The Reſemblance of Uſury*, and was forbidden only by the Decrees of the Elders.

A Man was guilty of *Uſury properly ſo called*, not only when he received back a *conſumable Commodity* with Increaſe, but if by Reaſon of ſuch a *Loan* he lived in another's Houſe *Gratis*, till he was paid; or gave leſs Rent for it, than otherwiſe he would have done; or if he received an Emolument from a Pawn left with him upon Account of the Debt. And yet a Man never ſuffered in their Courts for receiving *Uſury*, as was uſual for the Violation of other Divine Laws, but was obliged to Reſtitution only. But, if the *Uſurer* himſelf was Dead, his Heirs were not ſo much as obliged to that; for they did not refund Money, or any other *conſumable Commodity*, but only Plate, Cloaths, Inſtruments, Cattle, and ſuch like, which had been received upon that ſcore. And this was done in Honour of the Deceaſed, and out of Reſpect to his Memory, and that too only, if it appear'd that he repented of it, and had Thoughts of making Reſtitution before he died; for otherwiſe the Heirs were not oblig'd to refund at all. Beſides, Private Men were not permitted ſo much as to receive a ſmall Preſent from their *Debtor*, while he continued ſuch; the *Lawyers* indeed might, for they were preſum'd by no means willing to violate the Precept againſt *Uſury*, but to receive it purely as a *Gift*, and not as *Intereſt*.

By that which they called the *Reſemblance of Uſury* they were forbidden to receive any Profit, or Acknowledgment of the Kindneſs (altho' utterly beſide the Contract, and after the Expiration of it) except the Payment of the Principal before the time appointed. And this again they divided into two Sorts; the *One* which related to the difference of the Time, in which ſomething was perform'd by the *Debtor*, to the Profit and Advantage of the *Creditor*; the *Other*, which related to the different manner of Contract.

The *former* they again divided into *antecedent* and *conſequent*. By *that* they underſtood whatſoever a Man, deſigning to borrow, gave to the Perſon, upon whom he had this Deſign, in hopes to bring him to it the more eaſily: By *this*, whatſoever the *Debtor* after the Receipt of the *Loan* beſtowed upon the *Creditor*, in order to prolong the Time of Payment. Nay, they would not ſo much as allow the common Offices of Humanity to be perform'd by the *Debtor* to the *Creditor*, unleſs what was uſed to paſs between them before the *Loan*.

The *latter* ſort was thought to have Regard to ſuch a Contract as this; ſays the Seller, if you buy to Day, you ſhall have it for 90 *l.* but if you put it off till to Morrow, you ſhall pay a 100 *l.* Here the Delay, together with the Increaſe of the Price, ſeems to intimate, that 10 *l.* is to be paid as Uſe. In this Caſe the Law did not oblige to a Reſtitution, nor did there lie an Action againſt the Party in the civil Court. Yet he, who offended againſt theſe Decrees of the Elders, was liable to corporal Puniſhment. He likewiſe that received a Farm in Pledge, was not allowed to let the ſame to the Owner for Rent, for that lookt like Uſury. But theſe obtain'd only between *Hebrew* and *Hebrew*; of a *Gentile* they might lawfully demand Uſury, from *Deut.* xxiii. 20. Nay, they thought themſelves commanded to do it, in

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[2] The Words of the *Digeſts* are, *Vinum, quod mutuum datum erat, per judicem petitum eſt: quæſitum eſt, cujus temporis æſtimatio fieret. --------- Sabinus reſpondit, Si dictum eſſet, quo tempore redderetur, quanti tunc fuiſſet; ſi non, quanti tunc cum petitum eſſet. Interrogavi, Cujus loci pretium ſequi oporteat? Reſpondit, Si conveniſſet, ut certo loco redderetur, quanti eo loco eſſet; ſi dictum non eſſet, quanti ubi eſſet petitum.* Dig. lib. 12. tit. 1. De rebus credit. &c. Leg. 22. *See* Lib. 13. t. 3. De conductione triticaria, Leg. 4. & tit. 4. De eo quod certo loco dari oportet. Leg. 3. lib. 17. tit. 1. Mandati vel contra, Leg. 37. lib. 45. tit. 1. De verbor. Oblig. Leg. 59.

Mr. Barb. *NOTES on* § VIII.

[1] This Paſſage of our Author might have been left out, becauſe the Queſtion here debated refers directly to the Lender, and not to the Borrower.

[2] This is certain; and God forbad it for ſome ſpecial Reaſons, which our Author ſpeaks of a little lower; ſo that nothing is more ridiculous than the blind and malicious Zeal of certain modern Authors, who, to ſhew their Reading, have blinded the Eyes of the People, by quoting the *Talmud* and *Spaniſh* Rabbins, who explain the Law in *Deut.* xxiii. 19. ſtrictly. I ſhall ſpeak upon the Paſſage in S. *Luke* vi. 35. in *Note* 6. upon § 9.

[a] Inſtance in Wine, *lib.* 12. *tit.* 1. *l.* 22. D. *de reb. cred.* [b] *Add. lib.* 13. *t.* 3. *ult.* D. *de condict.* Triticaria. & *t.* 4. D. *de eo quod certo loco*, &c. [c] Which is extant, *Exod.* xxii. 25. *Lev.* xxv. 37. *Deut.* xxiii. 19. [d] *De J. N. & G. ſec.* Heb. *L.* 6. *c.* 9. [e] רבית קצוצה i. e. *Uſury fixed and determined.* [f] אבק רבית i. e. *The Duſt of Uſury.*

in order to drain them of their Riches, and weaken thoſe Nations which God had otherwiſe deſtin'd to Deſtruction. Yet *Leo* of *Modena*[a] ſays, That *Text is to be underſtood of the ſeven Nations only that dwelt in* Canaan; *and not of the other* Gentiles: *of whom it was not lawful to receive Uſury. But yet that many, by reaſon of the Miſeries of a long Captivity, and their Lands being withholden from them, and for want of a better Way of getting a Livelihood, had degenerated from the Integrity of their Forefathers. But he proteſts that to be falſe,* which ſome ſpread abroad, *That the* Jews *every Day take an Oath to do what they can to cheat the* Chriſtians; *and,* he ſays, *it was invented to render them odious.*

IX. Let us now conſider, whether what has been thus punctually obſerv'd among the *Jews*, be the dictate of the Law of Nature; or the poſitive Law of God; and that not peculiarly calculated for the *Jews*, but for all Nations. As for what has been added by the *Jewiſh* Elders, 'tis plain, that is altogether poſitive, and impoſed only to prevent Cavils, which deſigning Men had found out to evade the force of the Law. But in general our Opinion of Uſury[b] [1] is this; provided it does not oppreſs and grind the Poor, but anſwers the Advantage which we ourſelves might have made, or which the *Debtor* does actually make of our Money (eſpecially if he borrows not out of Neceſſity, but in order to make a Gain of it) the Law againſt it is neither that of Nature, nor that of God univerſally obliging all Nations; but a poſitive Law to the *Jews* only, founded upon Reaſons in a manner purely politick. And it was generally the Opinion of the *Rabbins* themſelves [c], that *Uſury* was neither Theft, nor againſt the Law of Nature, as being founded upon Conſent and free Contract.

But the ſame may be evidently proved from Reaſon; for tho' the *Jews* were by the Divine Precept join'd together in a cloſer Tie of Amity than ordinary, yet they were oblig'd to excerciſe towards others all the common Duties of the Law of Nature [2] [3]. And therefore, if *Uſury* be againſt the Law of Nature, I don't ſee how the God of Holineſs could indulge that Nation, which he had peculiarly ſanctified, in the Practice of it, and in a manner charge them to violate a Precept of the Law of Nature, in Prejudice of thoſe who had never injur'd them; if indeed that Paſſage in *Deut.* xxxiii. 20. [d] ought to be expounded not of the [4] *Canaanites* only, but of any other Nation.

There ſeem to be ſeveral good Reaſons why ſuch a Law againſt *Uſury* ſhould more eſpecially obtain amongſt the *Jews*. The *firſt* may be taken from the Genius of the People; for they were as much addicted to the ſcraping up of Riches then, as now; in which they thought their greateſt Happineſs to conſiſt. And therefore, that their Thirſt after Riches might not tend to the Oppreſſion of the Poor, God ſeems to have provided by this Law. But yet leſt too great a Violence ſhould be offer'd to their Inclinations, he permitted them to uſe greater Liberty among Strangers.

Beſides, [5] the Conſtitution of that Commonwealth required ſuch a Law. For 'tis evident, *Moſes* deſign'd to have it *democratical* (for ſuch a State may admit of a Chief at the Head of it) and nothing contributes more to this than to preſerve, as much as poſſible, an Equality of Riches amongſt the Members; and to this end, were the Laws of *Jubilee* and *Remiſſion* inſtituted, and thoſe againſt alienating Land for ever. *Lev.* xxv. 14, 31, 35, 36. *Deut.* xv. 2. Add *Num.* xxxvi. Which the Law of *Solon* reſembles, *That an Heireſs ſhould marry her next Kinſman by her Father's ſide.*

And the very Condition of thoſe Times furniſhes us with another Reaſon for the Law againſt *Uſury*. For that Nation had then a more plain way of Trading, which conſiſted in Paſture and Huſbandry,

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Mr. Barb. NOTES *on* § IX.

[1] I uſe the Word *Uſury* to avoid the ill Phraſe of Lending at Intereſt. But ſome Authors who retain ſome Relicks of Popery, declaiming againſt the common Opinion of the Proteſtant Divines and Lawyers, maliciouſly affect to uſe the Word *Uſury* alone, and ſay, for Example, that *Uſury* is allowed, or not allowed, becauſe that Term is become odious through the Abuſe which is often made of a Contract innocent enough in itſelf, and originally denoted by it.

[2] This appears by the Law of *Moſes* itſelf; for it forbids *to oppreſs the Stranger and do him any Injury*, Exod. xxii. 21, xxiii. 9. Deut. xxiii. 7. xxvii. 19. See Mr. Noodt, *De fœnore & uſuris*, lib. 1. c. 10. p. 66, &c.

[3] And therefore they are deſervedly cenſured by *Juvenal*, Sat. 14. v. 103, 104.

Non monſtrare vias, eadem niſi ſacra colenti;
Quæſitum ad fontem ſolos deducere verpos.

Ask them the Road, and they ſhall point you wrong,
Becauſe you do not to their Tribe belong:
They'll not betray a Spring to quench your Thirſt,
Unleſs you ſhew them Circumciſion firſt.

Mr. Dryden.

[4] "If that were ſo, ſaith Mr. *la Placette*, in his Treatiſe *Of Intereſt*, God would not have excepted the poor Strangers, as "they are not excepted among thoſe that are condemn'd to Death without Mercy. See *Lev.* xxv. 35, 36. But tho' God doth "not approve that Intereſt ſhould be taken of any poor Stranger, he doth not formally forbid any part; for the Law cited here "concerns Proſelytes, who were, as it were, naturalized, and enjoyed the ſame Privileges as the *Hebrews*." See *Exod.* xii. 48. &c. *Numb.* xv. 14, &c. and Mr. Noodt, *ubi ſupra*, *p.* 60. We ſhould rather ſay, as Mr. *la Placette* alſo does, that the Expreſſion of the Law, which allows giving of Intereſt, is general, and there is no Reaſon to reſtrain the Senſe. 'Tis to no Purpoſe, that St. *Ambroſe* ſuppoſing of his own Authority, that the Permiſſion only reſpected the ſeven Nations of the *Canaanites*, who ought to have been deſtroyed, ſaith in his Book of *Tobias*, chap. xv. "That it was a lawful Act of Hoſtility, and that ſince they "might have ſlain thoſe Nations by the Right of War, by much greater Reaſon they might be allowed to ſpoil them of their "Goods; for he ſays, Lending on Uſury was an eaſier Way, and pleaſanter Means to impoveriſh and ruin them." Mr. Noodt anſwers this, *p.* 65. "That when one lends to, or makes any other Contract with an Enemy, he treats with him, not as an "Enemy but as a Man, towards whom conſequently he ought to obſerve the Law of Nature and Nations, and on that Ac-"count ſuſpend all Acts of Hoſtility. Further, God allowed the *Jews* alſo to take Money at Intereſt of Strangers; and then "we may as well ſay, That God would have Strangers to impoveriſh and ruin his own People by it." Mr. Noodt urges many other Things, which utterly overthrow St. *Ambroſe*'s Notion, and which obviate all the Evaſions which that Father, and ſuch as are of his Opinion, could deviſe. We may obſerve alſo, that at one Time, the Lending at Uſury was forbidden at *Rome*, from one Citizen to another, altho' it was permitted in reſpect to the *Latins*, who were their Allies. See *Tit. Liv.* lib. 35. c. 7.

[5] We may find theſe two Reaſons unfolded, and ſupported with ſeveral other Remarks, in the forementioned Chapter of Mr. Noodt's Book *De fœnore & uſuris*, p. 62, *&c.* We ſhould alſo do well to read what *J. Frederick Gronovius* ſays in his Treatiſe, *De Centeſimis & Unciis Uſuris*, Antexeg. 1. p. 467, *&c.* which follows his Book *De Seſtertiis*, &c. *Edit.* 1691.

[a] *De Ritibus Hebraicis*, p. 2. c. 5. [b] See Mr. *la Placette*'s Treatiſe upon *Uſury*. [c] As *Selden* in the aforecited Place informs us. [d] See Mr. *Le Clerc* upon the Place abovecited.

dry, or Manufactures; *Merchandiſe* was ſimple and moderate, the Secrets of Trade and Navigation being not known to them; and in ſuch a State no one borrows, but when he is preſt with Neceſſity. And therefore *Deut.* xxviii. 12. it is mention'd as an Argument of the greateſt Happineſs; *Thou ſhalt lend unto many Nations, and thou ſhalt not borrow* [a]. Since the Gains in ſuch a Caſe, could not but be very ſmall, the leaſt *Uſury* imaginable muſt needs be very burthenſome. And where the Money borrowed is laid out upon the Neceſſaries of Life, it will be next to impoſſible ever to recover it; for how can your Labour be able to bring you out of Debt, when it was not ſufficient to ſupport you from Borrowing? " Upon this Account the State of *Athens* " was involved in ſuch Troubles, by means of *U*- " *ſury*, that it could not be remedied otherwiſe than " by Means of *Solon*'s σεισάχθεια, i. e. *Shaking off* " *the Burthen*". Vid. *Plut. Solone*, which Miſchief *Rome* alſo felt in its Infancy,

Grotius [b] brings this as one Reaſon among others of the Law in *Deut.* xxiii. 19. *That the Chief Riches of the* Jews *lay in Husbandry and Money, whereas moſt of the neighbouring Nations made vaſt Returns by Merchandiſe: And therefore* Uſury *was allowed the* Jews *in their Dealings with them, which, with very good Reaſon, was forbidden to be taken of one another; for* Uſury *laid upon Husbandmen is every where oppreſſive.* Beſides, *Moſes* endeavour'd by that Law to endear them to one another; and they had the more frequent Occaſion to put it in Practice, becauſe then only ſmall Sums were borrowed, and thoſe too by the meaner ſort, and ſuch as ſtruggled with Want and Poverty. From hence *Phlio Judæus* [c] inforces the Exerciſe of Charity and Liberality among Fellow-Subjects [6]. Which Virtue the great *Legiſlator* has indeed eſtabliſhed by ſeveral other Laws. See *Exod.* xxi. 10, 11. xxii. 22, 23, 25, 26, 27. xxiii. 4, 5, 9, 11, 12. *Lev.* xix. 9, 10, 13, 33. xxiii. 22. xxv. 6, 10, 11, 35, 36, 37, 39, &c. *Deut.* xiv. 28, 29. xv. 2, 4, 7, 8, 9, 10, 11. xxiii. 24, 25. xxiv. 10, 11, 12, 13, 14, 15, 19, 20, 21. xxvi. 12, 13.

But now Money is borrowed for other Ends, *viz.* in order to increaſe and improve one's Wealth. When a Man borrows for this Purpoſe, why ſhould another lend for Nothing? Nay, 'tis an unreaſonable Thing, when you vaſtly improve your Fortune with my Money, not to admit me into ſome [7] Share of the Gain: For I, in the mean time, am debarr'd from making that Advantage which I might otherwiſe have expected by applying it to my own Uſe. Beſides, I have parted with ſomething valuable, which ought therefore to be conſider'd: for in lieu of my Money

[a] Add. *Deut.* xv. 7, 8. [b] Upon *Luke* vi. 35. [c] *De Charitate.*

[6] From all that has been ſaid, it appears, that *David*, Pſ. xv. 5. *and* Ezekiel xviii. 13. xxii. 12. give this Character of a good Man, *That he giveth not his Money upon Uſury*; but they treat only of the Lending forbidden by the Law, ſo long as the Government of the *Jews* was in Being, *i. e.* that which was done by one *Jew* to another. As for the Words of our Saviour JESUS CHRIST, *Luke* vi. 34, 35. they ſeem to me, if we conſider them in themſelves, or with their Connexion, not to reſpect Lending upon Uſury. His Divine Words are, *If you only love them that love you, what thanks have you?* v. 32. *And if you do good to them that do good to you, what thanks have you? Do not Publicans and wicked Men the ſame?* v. 33. *And if you lend to them of whom you hope to receive, what thanks have you?* Sinners lend to Sinners, that they may receive as much again: *But love your Enemies, and do good and lend, hoping for nothing, and great ſhall be your Reward, and you ſhall be Children of the moſt High, for he is beneficent to the Unthankful and Sinners.* This Phraſe, *Hoping for nothing*, doth not in the leaſt refer to loving your Enemies, and *Doing good*, to Lending; and I wonder that no Man, ſo far as I know, hath taken notice of it. So Lend, hoping for nothing, plainly ſignifies, Lend, tho' you cann't expect that he that borrows ſhould do the like in his Turn. The Reaſon which our Saviour uſes, is taken from the moſt noble Motive, and that is, to imitate God, who doth Good to the unthankful and unholy, which makes the Thing very clear. But if we deſire a greater Plenty of Proofs and Arguments, let us read Mr. Noodt's Firſt Book *De Fœnore & Uſuris*, and Mr. La Placette's Chap. 3. of his Treatiſe of *Intereſt*. The Truth is, JESUS CHRIST in that Text neither forbids nor approves giving of Uſury, nor had he any Occaſion to do it, ſince the *Jews*, to whom he ſpake, according to their Law, could not lend one to another, but freely. It belongs therefore to them, who condemn all Uſury in general, to prove, that it is unlawful in itſelf, and diſagreeable to our Goſpel Diſpenſation. But they'll never compaſs their Deſign, ſeeing, that tho' they have ſtudied the Natural and Moral Law with ſo much Care, yet ſome of them ſhew not only groſs Ignorance, but at the ſame time Weakneſs and Preſumption. A famous Caſuiſt, *Bannes* 2. 2 *Quaſt.* 78. *Art.* 1. *Dub.* 1. owns (as Mr. La Placette obſerves) that the Proof which the Words of JESUS CHRIST afford, takes its Force, not from the Words themſelves, which may have another Senſe, but from the Authority of the Popes and Councils, which have ſo explained them. Thus the Knot is looſed, and they, who, tho' Proteſtants, dare let out themſelves into groſs Invectives againſt the Opinions of their own Party, ſhew, that 'tis the Credit of the Fathers that they moſt value. But they make a Noiſe to no Purpoſe. All their Declamations and fierce Contentions ſerve only to ſhew that the Reading of the Fathers is capable of biaſſing their Thoughts, eſpecially when it meets with a ſerious Temper, and ſuch as are more careful to improve their Memory than their Judgment: For had theſe Men ſo much Zeal for the Honour of the Fathers, as to judge of them ſo long after their Death, as freely as they would of an Author of the laſt Age, they ought to prove by good Reaſons, either that the Fathers were infallible, or are not guilty of the Errors imputed to them. And I am willing that they begin, for that End, with Lending upon Uſury, wherein they think themſelves to triumph; and let them ſee whether they can confute the two Treatiſes before quoted, the one of a *Divine*, the other of a *Lawyer*. Waiting for what they'll do, I ſay boldly of thoſe Works, and ſome others, that have diſcover'd the Errors of thoſe antient Chriſtian Doctors, That they are Iron, Steel, and Diamond for them. See what ſhall be ſaid lower in the Note on § 10.

[7] This is what is called Intereſt Lucrative, or Gainful Intereſt: whereas Compenſative Intereſt is only a ſimple indemnifying a Man for a Profit ceaſing, and a Damage ariſing. There is no Difficulty of any Conſequence, but in the laſt; and he muſt ſhut his Eyes, that will not ſee the Juſtice of ſuch an Intereſt, ſince in requiring it, no more is demanded, than what we had when we lent it. If any doubts of it, he may be fully convinced by reading of the 5th, 6th, and 7th Chapters of Mr. La Placette's Treatiſe of *Intereſt*. As to Lucrative Intereſt, ſomething may truly be alledged more ſpecious to oppoſe it: But if we bring a Mind free from Prejudice, we ſhall eaſily find that this Intereſt is neither leſs innocent nor lawful than the Compenſative. What Mr. La Placette has ſaid upon it is ſolid, and from him I ſhall borrow ſome Reflexions. As it depends on the Creditor to lend, or not; ſo 'tis at his Pleaſure when he purpoſes to lend, whether he will pay his Money into the Hands of the Debtor for ſeveral Years, or for one only, or for a Month, or for a Week, or for one Day only. Suppoſing then that he can lend for a Day, or a Week, yet he is willing to lend for one or two Years, engaging himſelf not to demand it ſooner, why may not ſuch a Renunciation, which depends upon him, and is beneficial to the Debtor, be ſettled at a Price? When one has a Right of Service upon an Houſe or Field, he can renounce it for a Time, or for ever, and ſet a Price upon ſuch a Releaſe. The ſame Thing hath a Place in the Buſineſs of Homages and Redemptions. Upon what Account then is it forbidden to be uſed in the Right we have to call in what is borrowed? 'Tis to no Purpoſe to alledge, that when the Sum lent remains in our Hands, 'tis very probable that it affords us no Profit; and is it not then an Injury to our Neighbour to make him pay for the Uſe of it, when we loſe nothing ourſelves? Tnis Anſwer ſuppoſes two Things, and both of them alike falſe: 1. That in treating with our Neighbour, he may enquire what we ſhall loſe by lending him. 2. This is a Conſequence of the

Money I have only an Action againſt your Perſon, which cann't be proſecuted without ſome Trouble. For every Body does not conſider that of *Martial*, B. 2. Epig. 13.

> *Et Judex petit, & petit Patronus:*
> *Solvas, cenſeo, Sexte, creditori.*

It may alſo happen by ſome Accident or other, that my Debt may be loſt. “My Slowneſs, in paying “what I promiſed, has made me aſhamed of my “Debt; however, I may avoid the Cenſure of the “world by paying it with Intereſt.” *Pind. Olymp.* Od. 10. Nay ſome timesthe *Debtor* muſt be courted and careſs'd, that it may not be loſt. And ſome borrow on purpoſe to make their *Creditors* dependent on them. As the *Mareſchal de Rochelaure*, when he was tax'd by *Lewis* XIII, with taking part with the Duke of *Mayenne*, pleaded in Excuſe, That *he did not follow the* Duke, *but his Money: For his Debt would be but in a deſperate Condition, if he did not ſtick cloſe to his Debtor* [a]. Beſides it is not ſeldom that we lend to Perſons who are utterly unable to pay. To whom that of *Martial* may be apply'd, *L.* 1. *Epig.* 76.

> *Dimidium donare Lino quam credere totum*
> *Qui mavult, mavult perdere dimidium.*

And therefore ſome are of Opinion, that it would be for the advantage of the Publick, to allow none but Merchants to take up Money at Uſe; for this would make the Poor induſtrious, and force them to Frugality, who, ſome of them, are not afraid to pay Intereſt for Money to maintain their Extravagancies. And monied Men, rather than let their Money lie dead, would either take to Merchandize themſelves, or would put out their Money to thoſe that do; which would make Trade flouriſh, to the great Benefit of the Commonwealth [b]. *Grotius* [c] is of Opinion, That *the legal Intereſt ought to be ſtated, not according to the Gains of the Borrower, but the Loſs that thereby accrues to the Lender; as in Buying and Selling, and other Contracts, no regard is had to what the Receiver may make of the Commodity, but what goes away from the Seller. And, in this Caſe, ſo much goes away as every Man, in his own Calling, might and uſually does make of his Money; Allowance being made for Hazards, which in ſome Caſes are more, in others leſs.* With whom I ſo far agree, that no Man can complain, if his Debtor makes a vaſt and unexpected Return of his Money: But yet there is no doubt but I may demand higher Intereſt of him that makes a very gainful Trade, than I can of another who drives a poor one.

X. The Arguments which are brought againſt *Uſury* are eaſily anſwer'd. It is urged, That *the Loan of a conſumable Commodity ought to be given* Gratis, *becauſe the Loan of all other Things is ſo.* But I anſwer, That as I have a Power of granting the Uſe of my Goods, that are not conſumable, either *Gratis* or for *Rent*, whereof the one is a Loan, the other a Letting; ſo what ſhould hinder me from granting the uſe of my Money alſo, either *Gratis*, or [1] for a certain Recompenſe? But if you ſhould inſiſt, That *that only is a Loan which is lent out gratis*; the Conſequence would be, that Money lent upon Intereſt ought to be called by ſome other Name, and not that

the former, That every one is bound to do all he can for his Neighbour, if it coſts him nothing. If the firſt be allowed, Commerce would be eſſentially unjuſt, for it conſiſts only in endeavouring to get by what one ſells; but if the Profit made hath nothing contrary to Charity or Juſtice (which is not impoſſible) nothing hinders but that we may lawfully purſue it. If the other Suppoſition be true, we muſt condemn a Thouſand Things every Day, and have nothing to oppoſe. As for Example: I have two Houſes, of which one is of no Uſe to me, but a Charge, becauſe no Body dwelling in it, it runs to Decay. Again, I have two Copies of the ſame Book, of which one is of no Uſe. Does it follow from thence, that I may not ſell or let out that Houſe or Book? There are a Thouſand ſuch Inſtances, where it cann't be taken ill, if one ſell the Property or Uſe of certain Things which coſt nothing, and are uſeleſs to ſuch as ſell them, tho' profitable to ſuch as buy them. Why then may we not do the ſame with Money, in lending it, as innocently as in other Things? But there is another Proof more exact, and taken from the ſame Matter. A Creditor allows his Debtor to make uſe of his Money lent him; this is ſufficient to entitle him to pay him Uſe. In ſhort, If we may lawfully let an Houſe, an Horſe, Oxen, Tools, and an hundred other Things of that nature, why may we not do the ſame with Money, and, in general, with every Thing that is uſed in Commerce? Divers Things are anſwered to this, of which we may find a Solution in the next Paragraph, and in the Treatiſe from whence this is taken. We ſhall now only add the five Conditions which Mr. *La Placette* lays down to make lucrative Intereſt lawful: 1. That the Creditor is not otherwiſe bound to lend his Money freely. 2. That the Debtor obliges himſelf willingly to pay ſuch Intereſt. 3. That the Debtor may probably get by the Loan. 4. That the Intereſt is not greater than the Advantage he hopes to gain by it. 5. Laſtly, That he does not go beyond the Bounds fixed by the Laws. Let us alſo obſerve, with the ſame Author *(Chap.* 18.*)* that there are two ſorts of Profit: 1. Poſitive, when a Man gets that by his Money borrowed, which he could not otherwiſe have had. 2. Negative, which conſiſts not in getting what one has not, but in keeping what we have already, or may at length have, not in growing more rich, but to prevent being poorer. Borrowing is moſt commonly of this laſt Uſe, which happens ſeveral Ways. As for Example: A Man owes a conſiderable Sum, which he cann't pay, and pays 6 *l. per Cent.* for it; I lend him the ſame Sum at 4 *l. per Cent.* he really gets nothing, but he actually ſpares 2 *l. per Cent.* which, were it not for me, he muſt pay to his firſt Creditor. Another hath need of Money, and not getting it, is forced to ſell at a low Price thoſe Goods, which he was ſure to ſell dear in a little Time; I lend him Money, which he could not be without, and ſo prevent the Loſs he ſhould have had by his Goods. On theſe and the like Occaſions it cann't be unlawful to take Intereſt; for indeed 'tis as good an Office to prevent a Loſs, as further a Gain. Moreover, this is the only, or, at leaſt, the principal Foundation of the Intereſt paid to the Directors of the Bank called *Monts de Pieté*, an Eſtabliſhment which all the World has found ſo uſeful and profitable to ſuch as are in Neceſſity. We ought only to obſerve, that tho' this ſort of Intereſt is not ſo contrary to Juſtice as the other, yet it commonly is more oppoſite to Charity. The Need of the Borrower is ſuch very often, that he is obliged to borrow either without Intereſt, or content himſelf with an Intereſt Compenſative, which hath not Place ſo commonly in ſuch Loans as are made to them who borrow to make a poſitive Gain. To all that has been ſaid, we may join Chap. 5 and 6, of the 1ſt Book of Mr. Noodt's Treatiſe.

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[a] *Gramond. Hiſt. Gal.* l. 5. *Diodor. Sic.* l. 19. c. 24. *Plut. Eumene.* p. m. 591. C. Edit. *Franc.* 1620. [b] *Vid.* Lud. Septalium, *de ratione ſtatus*, l. 2. c. 15. [c] Ad *Lucam* 6. 35.

Mr. Barb. *NOTES* on §. X.

[1] See Mr. Noodt's *De Fœnore & Uſuris*, lib. 1. c. 6. p. 37, *&c.*

that it is unlawful. Another Objection is, *That Money is a*[2] *barren Thing*[a], *of no uſe to human Life, as are Cloaths, Buildings, Cattle,* &c. *and therefore nothing ought to be demanded for the uſe of it.* To which I anſwer, That tho' Money is ſo far barren, as not to produce its like; yet after an eminent Price has been ſet upon it, by the Induſtry of Man it gains a faculty, which naturally it had not, and becomes productive of thoſe Things which are both in natural and civil Reſpect fruitful. And therefore *Uſury* is not to be look'd upon as a natural, but as [3] a civil Increaſe. Of which however *Seneca* ſpeaks ſeverely enough: "I ſee, *ſays he,* "Deeds, and Bonds, and Writings, the Emblems "of Covetouſneſs, which deceive our vain Minds. "For what are *Uſury* and Accounts, but Names "unnaturally impoſed upon Things for the ſupport "of human Avarice? What are theſe Bills of "Contract, theſe Computations, theſe Prices ſet "upon Time, this cruel Intereſt upon Intereſt? "They are all Evils of our own making, and "depend upon ourſelves, they have nothing in "them of Solidity, that can be either ſeen, or held, "but are the empty Dreams of a covetous Mind. *De Benef.* l. vii. c. 10. [4] *Ariſtotle* too is ſevere enough upon *Uſury:* "The Art of *Uſury, ſays he,* "is deſervedly odious, for it makes a Gain of Money itſelf, and not of that for the ſake of which "it was found out; for the uſe of Money is to "carry on Traffick, but *Uſury* increaſes it, and is "therefore call'd Τόκ@, for the Thing begotten is "like the Thing that begets; but in *Uſury* Money "is both the Thing begetting and begotten; and "therefore this ſort of Gain is unnatural." *Pol.* 1. 7. *towards the end.* Beſides, Money let out to Intereſt is not apply'd contrary to its proper uſe; for he who borrows Money does it at leaſt for the ſake of Bartering. And Property itſelf was firſt ſettled with a Deſign, that every Man's Goods ſhould be immediately beneficial to himſelf; and yet it is not againſt Nature, to let out our Goods to another for Rent.

There is another Objection, which is ſomewhat nice; *In conſumable Commodities the Property cannot be diſtinguiſh'd from the Uſe, and therefore the Uſe can't be made over, but the Property muſt too,* and vice verſa. *For as the Subſtance of Corn, Wine, and Fleſh, periſhes in the Uſe of them; ſo the Money that I expend periſhes to me, as being remov'd out of my Eſtate. And therefore ſince the uſe can't be diſtinguiſhed from the Thing, nothing ought to be demanded for the uſe; it being enough, if the Thing be reſtored in kind.* To this I anſwer, that indeed the Uſe of a *conſumable Commodity* does not properly differ from its Subſtance [b] [c] [5], but yet it does not therefore follow, that the Power to make uſe of it upon an Obligation to return the ſame in Kind ſome time after is not worth ſomething. Now 'tis a Condition in every *Loan,* that the Thing be not return'd till ſome time after: But if I borrow Money for ſuch a certain Time, I may lay it out upon other fruitful Commodities, or make a Gain of it ſome other way. And thus ſuppoſe I borrow Proviſions, or other Neceſſaries, my Gain conſiſts in this, that I am not neceſſitated to part with my Goods upon ill Terms to procure Bread: Or my Money, which muſt otherwiſe have been thus expended, may now be laid out to more Advantage.

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[2] Here the wicked and lazy Servant ſays to his Maſter, *I knew that thou wert an auſtere Man, who reapeſt where thou haſt not ſowed, and gathereſt where thou haſt not ſcattered.* But the Senſe is not, that it is Cruelty to take Uſe for Money lent, which is a Thing barren in itſelf; but it is a Proverbial Speech, which implies only, that ſome Men require more than others can do. See the Interpreters upon the Place. It may be better obſerv'd from the Parable, that it proves, that lending at Intereſt is very innocent; for if it were ſinful, we cann't think that JESUS CHRIST would have put into the Mouth of the Maſter in the Parable, who repreſents GOD himſelf, theſe following Words, *Thou wicked and lazy Servant, thou kneweſt that I reaped where I had not ſown, and gather where I have not ſtrawed, you ought to have put my Money to the Bankers, that at my Return, I might have received my own with Uſury,* ver. 26, 27. See further Mr. NOODT, lib. 1. c. 7, 8. *De fœn. & uſur.* where he confutes at large the Objections which our Author propounds here, and ſome others. The ſame Lawyer alſo examines in Chap. 9. a Paſſage in *Seneca, De Benef.* lib. 7. c. 10. quoted alſo here, and proves it only meer Declamation.

[3] Some anſwer, That true it is, that the Debtor finds Means to improve the Money borrowed; but that's from his Induſtry only, and ſo conclude, he only ought to have the Profit. But (as Mr. PLACETTE ſpeaks, ch. 10.) his Induſtry is not the only Cauſe of the Profit made by the Money; for tho' Money without Induſtry would bring no Profit, no more would Induſtry without Money; and ſo one Part of the Profit muſt be imputed to the Money, and another to Induſtry. This is alſo viſible in ſome Contracts of Letting: Land will bear nothing, if it be not tilled; Tools, let to an Artiſt, will do nothing, not only if they be not uſed, but alſo if there be not Skill to uſe them. Nevertheleſs, all this is no Hindrance but that the Rent may be paid for the Land, and Uſe for the Tools: And why then may not Intereſt be paid for Money, as well as for other Things?

[4] ARISTOTLE's Greek is, Εὐλογώτατα μισεῖται ἡ Ὀβολοστατική, διὰ τὸ ἀπ' αὐτοῦ τοῦ νομίσματος εἶναι τὴν κτῆσιν, καὶ οὐκ ἐφ' ὅπερ ἐπορίσθη. Μεταβολῆς γὰρ ἐγένετο χάριν· ὁ δὲ τόκος αὐτὸ ποιεῖ πλέον· ὅθεν καὶ τοὔνομα τοῦτ' εἴληφεν· ὅμοια γὰρ τὰ τικτόμενα τοῖς γεννῶσιν αὐτά ἐστιν· ὁ δὲ τόκος γίνεται νόμισμα νομίσματος· ὥστε καὶ μάλιστα παρὰ φύσιν οὗτος χρηματισμῶν ἐστιν. De Republicâ, *lib.* 1. *c.* 10. Mr. NOODT, *De Fœn. & Uſur.* lib. 1. c. 7. p. 43. hath obſerved that *Ariſtotle* may be confuted by *Ariſtotle,* who, in the Chapter immediately foregoing, ſays, "That all Things which we poſſeſs have a double Uſe, one proper and natural, the other improper and "ſtrange. As for Example, *ſays he,* Shoes are properly made to wear on the Feet, nevertheleſs we uſe them to get Money, or "ſome other Thing in exchange for them." Ἑκάστου γὰρ κτήματος διττὴ ἡ χρῆσίς ἐστιν· ἀμφότεραι δὲ καθ' αὑτὸ μὲν ἀλλ' οὐχ ὁμοίως καθ' αὑτό, ἀλλ' ἡ μὲν οἰκεία, ἡ δ' οὐκ οἰκεία τοῦ πράγματος· οἷον ὑποδήματος, ἥτε ὑπόδεσις, καὶ ἡ μεταβλητική· ἀμφότεροι γὰρ ὑποδήματος χρήσεις. Καὶ γὰρ ὁ ἀλλαττόμενος τῷ δεομένῳ ὑποδήματος, ἀντὶ νομίσματος ἢ τροφῆς χρῆται τῷ ὑποδήματι, ᾗ ὑπόδημα, ἀλλ' οὐ τὴν οἰκείαν χρῆσιν, οὐ γὰρ ἀλλαγῆς ἕνεκεν γέγονε· τὸν αὐτὸν δὲ τρόπον ἔχει καὶ περὶ τῶν ἄλλων κτημάτων. chap. 9. init.

[5] A Sum of Money (ſays Mr. LA PLACETTE) which is lent to a Man to be traded with, is not any more ſpent by that, than a like Sum which is put into the Hands of one that acts by Commiſſion, to be employed for the ſame End, or a like Sum truſted to a Partner, to act according to our Directions. All of them act after the ſame Manner, and with the ſame Intentions. We confeſs that he that gives another a Commiſſion, and truſts a Partner, is ſtill Owner of the Money, and always in Poſſeſſion of an Equivalent. And why then may not the ſame Thing have Place with reſpect to the Creditor and Money lent? We lend not to the Man (ſays Mr. DE BEAUVAL very well, *Hiſt. de oper. Doct. Octob.* 1691. p. 66.) but to his Goods. We reckon upon the Ability to pay, and not upon the Induſtry and Fidelity of the Borrower. A Reflection, which MARTIAL puts into the Mouth of his Friend, *Lib.* 12. *Ep.* 25.

Quod mihi non credis veteri, Theleſine, ſodali,
Credis colliculis, arboribûſque meis.

You truſt not me, altho' your antient Friend,
'Tis on my Lands and Trees that you depend.

[a] See *Mat.* 25. 24. [b] *Vid.* lib. 7. t. 5. l. 1. and 2. *D. de Uſu. eor. que uſu conſumuntur.* [c] See Mr. BARBEYRAC's Third Note upon this Section.

And here we may obſerve by the way, what *Ariſtotle* [a] relates of *Cypſelus, who having devoted all his Goods to the Gods of* Corinth, *the firſt Year paid the tenth Part of them, and ſo for ten Years together.* But in ſtrict Juſtice this did not ſatisfy his Vow, unleſs for the relief of ſuch a raſh one, any favourable Interpretation may be allow'd. That Saying of *Cato* in *Cicero* [b], who thought Uſury as bad as Robbing and Murther, is to be underſtood only of Extortion, which reduces the poorer Sort to Extremities, and adminiſters to the covetouſneſs of the rich. *Our Anceſtors,* ſays the ſame *Cato* [c], *enacted in their Laws, that a Thief ſhould be condemn'd to pay double, but an Uſurer quadruple.* And yet he himſelf, if we may believe *Plutarch* [d], did craftily enough exerciſe that ſort of Uſury which we now call *Bottomry*. *Auguſtus* very juſtly cenſur'd ſome *Roman* Gentlemen, for taking up Money at low Intereſt, and letting the ſame out at high [e]. *The old* Romans *and* Greeks [f] *abhorr'd Uſury, as being burthenſome to the Poor, and the foundation of Suits and Quarrels: The* Perſians, *as being not very far removed from Deceit and Lying.* And certainly 'tis unbecoming a Chriſtian for a ſmall Sum to accept of Intereſt from thoſe whom it is in a manner Charity to relieve [g]. The *Greeks* took an excellent Method to ſupport their Friends in diſtreſs: For ſeveral entred into a Society, and had a common Cheſt, to which each contributed a certain Sum every Month; and out of this they lent Money without Intereſt, to any one of the Society that ſhould happen to be reduc'd to Neceſſity; upon Condition to refund it, if his Circumſtances ſhould ever happen to grow better [h] [i].

XI. In confirmation of what has been ſaid for the lawfulneſs of Uſury, it is obſervable, that thoſe who are againſt it, allow of ſome [1] Contracts, which in effect amount to the ſame thing. Thus, ſuppoſe *Caius* is furniſh'd with Money enough to buy a Farm, which *Seius* has a mind to, but wants Money for the Purchaſe; *Caius*, at the requeſt of *Seius*, buys the Farm, and lets it to *Seius*. No body can deny but that this Contract is lawful. But if *Caius* ſhould lend *Seius* the Money to buy it himſelf, and *Seius* ſhould pay ſo much for Intereſt as he muſt otherwiſe have paid for Rent, I don't ſee but that the Contract would be very juſt. Nay, this latter Contract is much more for the Advantage of *Seius* than the former, for here he purchaſes the Property of the Farm.

Again, Should any one put his Money into an honeſt Man's hands, upon Condition to be admitted into an equal Share of the Gain which he ſhould make of it; no Man certainly would call this Contract unlawful. But in Equity 'tis the ſame Thing, if, inſtead of this uncertain Gain, he bargains for a certain Sum, which will never be the leſs lawful for being called by the Name of *Intereſt*.

The *Alcoran* forbids *Uſury*, and yet the *Moors* borrow Money to carry on Trade, and allow the *Creditor* half the Gain; but if the Principal happen to be loſt, the *Debtor* refunds that only; but if only part of the Principal periſh, the whole muſt be made up out of the Gain of the Remainder.

A *Mortgage*, whereby a Man receives the Produce of Land given in Pledge for the *Loan* of Money, is acknowledged to be lawful [k] [l]: But if no Pledge be given, why may not the *Creditor* receive ſomething [2] anſwerable to the Produce of it [m]?

Grotius [n] rejects the Name of *Uſury*, but allows the Thing. *For,* ſays he, *there are ſome things which look like* Uſury, *but are Pacts of another Nature: as the Amends that ought to be made a* Creditor *for the Loſs he is at by being out of his Money, and the regard that ought to be had to the Gain he might have made of it; ſtill Deductions being made for Uncertainties and Accidents, and the Pains he muſt have taken in the Management of it. Thus it is not properly* Uſury *to demand a Conſideration for the Charges he is at, who lends much Money, and provides it on purpoſe; and for the danger of loſing the Principal where good Security is not given.* Now the Intereſt for Money lent, not to a poor Man, but to one that makes a Gain of it, we demand upon this very Account, becauſe we are debarred from making that Gain of it, which otherwiſe we might; and becauſe it is worth ſome Conſideration to have, inſtead of our Money, only an Action againſt the *Creditor*; and certainly 'tis reaſonable we ſhould be admitted into Part of the Gain made of that Money, which we were not oblig'd to lend, either in Juſtice or Charity. What Honeſt Man therefore will quarrel about words? And who would not laugh at thoſe who pretend they don't take *Uſury* for their Money, but [3] only what they themſelves might have made of it? Beſides, this ſuperſtitious Nicety is not at all conſiſtent with the Decrees of

Mr. Barb. *NOTES on* § XI.

[1] We may add to thoſe ſpoken of here, a Contract between three Contractors, about which ſee Mr. Placette's Treatiſe of *Intereſt*, chap. 14. See alſo Mr. Noodt, *De Fœn. & Uſur.* lib. 1. c. 12. of which the Title is, *Mores rigorem Juris Canonici circa Uſuras inflexiſſe ad æquitatem Juris Gentium, non omnino improbantibus ejus Juris interpretibus.*

[2] We ſhall treat of this, chap. 10. § 14. following. *Cum debitor* (ſay the *Roman* Lawyers) *gratuitâ pecuniâ utatur, poteſt creditor de fructibus rei ſibi pigneratæ ad modum legitimum uſuras retinere.* Digeſt. lib. 20. tit. 2. *In quibus cauſis,* &c. Leg. 8 See Mr. Noodt *de Uſuris & Fœn.* lib. 2. c. 9.

[3] *Id quod intereſt.* And they underſtand by it as the *Roman* Lawyers do, as well the Profit that was not made, as the Loſs that poſitively accrued. *Si commiſſa eſt ſtipulatio, ratam rem Dominum habiturum, in tantum competit, in quantum meâ interfuit,* i. e. *quantum mihi abeſt, quantumque lucrari potui.* Digeſt. lib. 46. tit. 8. *Ratam rem haberi,* &c. Leg. 13. See alſo *Code, lib.* 7. *tit.* 47. *De Sententiis, quæ pro eo quod intereſt, proferuntur,* and Mr. Noodt, *ubi ſupra,* lib. 1. c. 12. l. 2. c. 6.

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[a] *Oeconom.* l. 2. c. 1.

[b] *Off.* 2. *in fin.*

[c] *De re ruſticâ, princip.*

[d] Cato Major.

[e] Suet. *in Auguſt.* c. 39.

[f] *Appian,* l. 1. *de Bello Civili,* p. 382. B. Edit. *H. Steph.*

[g] *Vid.* Siracid. 29. 1, 2, &c. Pſal. 15.

[h] That Contribution-Money was called ἔρανος.

[i] *Vid.* Cicer. *de Offic.* lib. 2. *in fin.* See *Caſaubon*'s Comment upon the 16th Chapter of *Theophraſtus*'s Characters.

[k] *Add.* lib. 20. t. 2. l. 8. *D. in quibus cauſ. pignus tacite ccontrah.*

[l] See hereafter, Chap. 10. § 14.

[m] Among the *Perſians Uſury* is forbidden, but *Mortgages* allowed even under the *Lex commiſſoria,* Olear. *Itin.* Perſ. *L.* 5. *c.* 36.

[n] L. 2. c. 12. § 21.

the civil Law: for, according to them, the Uſury [4] is aſcertain'd and agreed upon beforehand: And the Damages allowed the Creditor, for what he might have made of his Money, are, among other Reaſons, demanded for failure of Payment at the time appointed, which ought to be ſtated according to the Loſs ſuſtain'd, be it what it will; but becauſe it would be difficult to prove and adjuſt it exactly, it is therefore generally [5] reduc'd to regular Intereſt [a] [b].

Since therefore 'tis lawful to demand Damages for tardy Payment, or becauſe we loſe by not having our Money paid in at the time appointed; why may we not bargain for ſomething certain beforehand, upon conſideration that our Money is in another Man's Power, whereas we were not oblig'd for his Benefit to venture the Loſs, or to neglect the Gain that might be made of it [c]?

XII. Laſtly, It being evident that [1] Men could not be found who would lend as much Money *gratis*, as human Neceſſities and Commerce (as carried on now adays amongſt moſt civiliz'd Nations) requir'd, ſeveral Shifts were found out and allow'd of to evade the Decrees of the canon Law againſt Uſury: Among which may be reckon'd the [d] Purchaſe of a yearly Income [e]; where, for ſo much Money, I have ſuch an immoveable Thing made over to me for the payment of it; out of which I receive a certain Rent for ever, or for ſuch a limited or unlimited Time, or for Life. And this Income may, upon Payment of the Principal, ſometimes be redeem'd, ſometimes not. Nay,

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[4] In Contracts of rigorous Right, the Engagements muſt be made exactly in the Forms. *Reſpondit* [*Africanus*] *pecuniæ quidem creditæ uſuras, niſi in ſtipulationem deductas, non deberi.* Digeſt. lib. 19. tit. 5. De præſcriptis verbis, Leg. 24. *Si pactum nudum de præſtandis uſuris interpoſitum ſit, nullius eſt momenti.* Paul. Sentent. lib. 2. tit. 14. A bare Agreement gives no Title to Intereſt in Juſtice, unleſs it be to Bankers, or Exchangers, to Communities, or ſuch as run great Hazards with their Money, and lend in a Way ſomething like it, or to ſuch as lend Wheat or Barley. Neither can any Thing be required, when we ſay only that we lend upon Intereſt, without ſettling what the Debtor ſhall pay. Such an Agreement was only valid with Bankers, and *Juſtinian*, who gave them that Privilege, ordain'd that they ſhall be look'd upon to lend at 8 *per Cent.* But for a long Time before that Emperor, Money might be lent at 12 *per Cent.* which was called, *Uſura Centeſima*, but not higher, except, 1. When it was lent at great Hazards; for the Laws preſcribed no Bounds, no more than in certain conditional Agreements. 2. In lending Proviſions; for a Law of *Conſtantine*, cited in the *Theodoſian* Code, allowed an Exaction of Three Buſhels of Corn, for Two lent. 3. When any one was fined a certain Sum by the Judges, and paid it not within two Months after the Sentence, he was obliged to pay Intereſt from that Time, at the Rate of 24 *per Cent.* if the Creditor ſummoned him to pay it, when three Months were ended; but it was by the Force of the Law, and not from the Agreement of the Parties. As for honeſt Contracts, a bare Agreement made on a ſudden empowers a Man to require Intereſt. See about this whole Matter Mr. NOODT, *lib.* 2. *c.* 3, *&c. lib.* 3. *c.* 1, 2, 3, 4, 5.

[5] The Words of the *Digeſts* are, *In ejuſmodi ſtipulationibus, quæ quanti res eſt, promiſſionem habent, commodius eſt certam ſummam comprehendere: quoniam plerumque difficilis probatio eſt, quanti cujuſque interſit, & ad exiguam ſummam deducitur.* Digeſt. lib. 46. tit. 5. De ſtipulat. prætoriis, Leg. 11. ------ When one owes a Thing in Specie, as the Uſe of it is determined, ſo the Damage which ariſes from a Delay in ſuch and ſuch a Caſe may be fixed, and ſo 'tis not commonly neceſſary to limit the Value at a certain Rate, which may be a Rule in all Caſes. The Creditor, for want of Payment at his Time, may ſuffer a Loſs many Ways, which the Debtor cann't imagine, and as to him may ſeem only fortuitous; ſo that all that the Creditor can prove to be his Due upon Account of Delay, is only the Intereſt of the Sum deſired. Mr NOODT, from whom this Remark is taken, *lib.* 2. *c.* 6. ſhews alſo *lib.* 3. *c.* 6. that while the *Roman* Commonwealth ſtood, no Intereſt could be demanded in Juſtice, for the Debtor's Delay of Payment, unleſs ſome Advance was agreed upon by Contract. But ſome Lawyers having introduc'd a Cuſtom chiefly in Matters of Companies, the Emperors enlarged it to all honeſt Contracts without Exception, as alſo to Legacies and Truſts. In Contracts of rigorous Right, there muſt be always an Agreement in Form, or nothing can be demanded, altho' a Proceſs be entred. In fine, if we add to this excellent Work of Mr. NOODT's, ſo many times quoted, the Treatiſes of the Learned SALMASIUS, entitled, *De Uſuris, De modo Uſurarum,* & *De Fœnore Trapezitico*, nothing more concerning the Hiſtory of Lending upon Uſury, the Phraſe and Deciſions of the *Roman* Law about this Matter can be deſired. See alſo J. VINCENT. GRAVINA's *Origines Jur. Civil.* lib. 2. p. 333, *&c.*

Mr. BARB. *NOTES on* § XII.

[1] Some, ſays Mr. LA PLACETTE, *ubi ſupra, chap.* 1. cann't live without Lending, and others have need of Borrowing. 1. If it were not allowed to take Intereſt, what would become of a great number of Perſons whoſe Eſtate is all in Money? They'd ſpend it in a few Years, and how then ſhould they ſubſiſt? 'Tis to no purpoſe to ſay, they ought to learn ſome Art or Trade, and apply themſelves to Husbandry or Commerce. This is quickly ſaid. But do we not really obſerve, that there are Labourers, Tradeſmen, and Merchants enough in the World? Are not Lands ſufficiently till'd throughout all *Europe*, unleſs it be in Places expoſed to the Ravages of War? And is it not plain, that there are Merchants and Tradeſmen more than enough, ſince many of theſe Profeſſions cann't get a Livelihood, and many of them that do, are forc'd to ſearch out new Inventions to excite and nouriſh Mens Vanity and Intemperance. 2. But (and this Conſideration renders Lending upon Intereſt more neceſſary) how many miſerable Men are there, who live only upon borrowing at Intereſt? What would become of many Merchants, whoſe Trade depends entirely upon Funds of borrowed Money? How many Citizens and Labourers, who are preſſed from time to time with want of an hundred Things, which they could not obtain any other Way? Could they find always Perſons ready to lend them what they want freely? This might be perhaps, if all Men were charitable, but ſince there are ſo few truly ſuch, and among thoſe that are, few are in a Condition to lend, whereas many more are in Neceſſity than can lend; it's plain that this Remedy has no Proportion to Mens Neceſſities: Nay, we may ſay, that what charitable Perſons can and ought to do freely, is not the hundredth, nay, not the thouſandth Part of what a great Number of Men are continually in want to borrow. So that it is of leſs Importance to Mankind that we ſhould be permitted ſometimes to lend upon Intereſt, than it is to confine that Permiſſion to certain Bounds, beyond which none may go. See alſo Mr. NOODT *De Fœn. & Uſur.* lib. 1. c. 6. Experience heretofore convinced an Emperor of the Neceſſity of Lending Money on Intereſt. *Baſil* the *Macedonian*, out of an inconſiderate Zeal, and ill-informed Piety, having abſolutely forbid it, *Leo* the Philoſopher was oblig'd to aboliſh that Ordinance, and allow Lending at 4 *per Cent.* knowing, ſays he, that his Predeceſſor's Prohibition was prejudicial to the State, becauſe thoſe that had Money would not lend it to thoſe that needed it, ſo that that Law was above the Attainments of the human Nature. *Propter paupertatem res illa non in melius (quem tamen finem Legiſlator propoſuerat) ſed contra in pejus vertit. Qui enim ante uſurarum ſpe ad mutuandam pecunium prompti erant, poſt latam legem, quod nihil lucri ex mutuo percipere poſſent, in eos qui pecuniis indigent, difficiles atque immites ſunt.* ------- *Propterea quod humana Natura ad illius* [*legis*] *ſublimitatem non perveniat, egregium illud præſcriptum abrogamus.* Novel. 83.

[a] *Vid.* l. 17. ſ. 3. l. 22. t. 1. D. *de Uſuris.* [b] Concerning this, *Salmaſius de Uſuris*, and Mr. *Placette de l' Interet*, are worthy to be conſulted. [c] *Add. Baco. Serm. Fidel.* c. 39. [d] *Emptio Cenſus annui.* [e] See Mr. *Barbeyrac*'s Firſt and Second Notes upon this Section.

ſometimes if the Thing given for Security happens to be loſt, the Perſon of the Debtor is reſponſible for it. But that ſuch a Purchaſe as this differs only in Name and Shew from *Uſury*, no Man is ſo blind as not to ſee [a].

Nay, in Conſideration of the Uſefulneſs of moderate *Uſury*, the [2] *Popes* themſelves permitted, under a ſpecious Title, *Mountains*, as they call them, *of Piety*; that is, they did not allow either Pledge or Intereſt to be taken for three Crowns lent to a poor Man; but for larger Sums Pledges might be taken for Security, and every Month ſome ſmall matter paid as Intereſt: and if the Pledge were not redeemed in a Year, it was to be ſold by *Auction*, and the Remainder, after Payment of the Debt, reſtor'd to the Owner. “ *Alex. Severus* lent publickly at 4 *per Cent.* but gave many poor People Money without *Intereſt* to buy Land, and was contented to be paid out of the Produce. *Vid. Lamprid.* Something of the ſame Nature (but that they part with nothing *gratis*, or without Security) is ſtill practiſed in *Lombardy*, ſo called becauſe formerly moſt of the Uſurers in *France* were *Lombards* and *Jews*, who afterwards were ſo odious as to be expelled the Kingdom.” *Vid.* Hen. Steph. *introduct. ad apolog. pro* Herodoto, *l.* 1. *c.* 6. After much Debate, *Uſury* was allowed of in *Holland*, as a Thing beneficial to the State, and even thoſe who took it were permitted to enter into holy Orders.

How much the Laws againſt *Uſury* are evaded by [b] [3] *dry Exchange* [c] (as they call it) is well known among the Merchants. To which may be referr'd that ſort of Contract, which is called in *Spaniſh*, *Mohatra* [d]. When a Man takes up Goods upon Truſt at a high rate, and immediately ſells them again to his *Creditor* at a low one. 'Tis more tolerable when Goods are bought dear, by reaſon that a long time is allowed for the Payment, and immediately ſold to a Third ſomething cheaper for ready Money: For hereby a Man may avoid the Neceſſity of taking up of Money at unreaſonable Intereſt: or, in the mean time, may make ſo much Gain, as to be well able to pay the Debt at the time appointed. And this is common in *Muſcovy* [e].

It is requiſite indeed, that private Men ſhould be hindred by Law from exacting what Intereſt they pleaſe, and that it ſhould be fix'd at ſuch a certain Rate. Yet a Man may fairly expect ſomething more when his Money is lent but for a ſhort time [f] [g].

The *Egyptian* Law [h] did not permit the *Principal* to be more than doubled by *Uſury*, and allowed the *Debtor*'s Goods to be ſeized upon, but not his Perſon: Whatever they got by their Labour, or any other juſt Title, was look'd upon as their Goods; but as for their Perſons they belong'd only to the Publick, to be diſpos'd of in its Service, according as they were beſt qualified for the Duties of War, or Peace.

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[2] They were formally allowed by Pope *Martin* V. *Extravagant. commun. lib.* 3. *tit.* 1. *De Empt. & Vendit. c.* 1. and by *P. Calixtus* III. *ibid. c.* 2. See Justinian's *Novels* 161. and Mr. Noodt's, *lib.* 1. *c.* 12.

[3] This is, when Payment ought to be made in the very Place where the Sum had been told, ſo that it is really a true Intereſt. It is oppoſed to real Exchange, which is divided into Minute and Local; Minute conſiſts in the Change of Species, when for Example, Silver is given for Gold, and Gold for Silver, for a ſmall Advantage. Exchange Local is, when one takes a certain Sum to return the like in another Place. See Mr. Placette about all this, in the laſt Chapter of his Treatiſe of *Intereſt*.

[4] The Reaſon of it is, and the Author ought to have mentioned it, that tho' the Intereſt ſeems exceſſive, yet it is a ſmall Matter to the Borrower, who uſually employs the Money to ſuch Uſes as produce a much more conſiderable Profit than he gives the Creditor for ſmall a Time. Further, beſides Sums that are borrowed for a little Time, there are alſo ſmall Sums, whoſe Intereſt, according to the common Rate, comes to nothing, and is not worth the Creditor's Trouble (See Mr. La Placette's Treatiſe, *c.* 22.) it may happen, that in that little Space, he may loſe the Opportunity of putting out his Money for a long time, or make ſome conſiderable Advantage of it, for which he would receive no manner of Recompenſe, if he received not greater Intereſt than he would receive of a Perſon who takes his Money for a longer time. In the Concluſion the Author recites a Cuſtom of the Inhabitants of *Cnoſſus* in *Candia*, § 4. above, to ſhew how they eluded the giving of Uſury. At that Place ſuch as borrowed Money at Uſe, took it by Force, that if they refuſed in earneſt to pay Uſe to the Creditor, he might have an Action of Aſſault and Battery, and cauſe them to be puniſh'd ſeverely. Before we conclude this Matter, let me add one Word of what is called Bottomry, ------ or Great Adventure, which conſiſts in Lending Money upon a Merchant's Ship, upon this Condition, that the Creditor loſeth his Money, in caſe the Veſſel and Goods, upon which it is lent, be loſt. As the Creditor runs great Hazards, he requires more Intereſt than ordinary, proportionable to the Dangers he is expoſed to. The civil Law allows it, and there is nothing to oppoſe it in the Law of Nature, *Digeſt. lib.* 22. *tit.* 2. *De nautico fœnore.* For the Danger to which the Lender is expoſed is capable of Valuation, and conſequently he may, on the one Hand, expoſe himſelf to it by the Mediation of a certain Price, and on the other, agree for the Price with them for whoſe Sake he runs the Hazard. In a Word, ſuch a Treaty hath nothing in it oppoſite to Juſtice, more than a Bargain of Aſſurance, of which we ſhall ſpeak in *Chap.* 9. § 8. See Mr. Noodt *De Fœn. & Uſur.* lib. 2. c. 7.

[a] *Add.* Fran. Hotoman. *obſ.* l. 2. c. 1. & Jo. Labard. *Hiſt. de Reb.* Gall. l. 6. p. 393.

[b] *Cambium Siccum.*

[c] Concerning this, ſee Mr. *La Placette*'s laſt Chapter of *Uſury.*

[d] *Vid.* Montaltii *Lit. provincial.* 8. & *ad eam* Wendrock. *not.* 3.

[e] *Olear.* Itin. *Perſ.* l. 3. c. 7.

[f] *Vid.* Leonis *Novel.* 84.

[g] See Mr. *Barbeyrac*'s Fourth Sect. of this Chapter.

[h] *Diodor. Sic.* l. 1. c. 79.

CHAP.

CHAP. VIII.

Of Partnerſhip.

I. *How many ways Partnerſhip may be begun.*
II. *Money and Labour are balanced ſeveral ways.*
III. *Irregular Partnerſhip.*
IV. *A Partnerſhip in all Goods.*

PArtnerſhip is a Contract[1] by which two, or more, join together their Money, Goods, or Labour, upon Agreement, that the Gain or[2] Loſs ſhall be divided proportionably between them[a]. And here, if every Man contributes equally, each muſt receive an equal Share in the Gain, or Loſs: but[3] if they contribute unequally, their Shares muſt be adjuſted according to the Laws of Geometrical Proportion[b]. And the ſame obtains, if two, or more, join[4] Labour; or one[5] Labour, and the other Money[c]; or each Party both Labour and Money[6].

II. Upon breaking of Partnerſhip, if each Party contributed only Money, 'tis plain upon a Diviſion, each muſt receive according to his Contribution. But if both[1] Money and Labour was contributed, it muſt be conſider'd after what manner the Collation was made: For when Labour is contributed on one Side, and only the uſe of Money on the other, he who contributed the Money does not admit the other to a Share in the Principal; but only to his Proportion of the Gain[2] that might be made of the Money and Labour join'd together. And, in this Caſe, as he that contributed only Labour has no Title to any Part of the Money, when they break off Partnerſhip; ſo the other alone, as Owner, is concern'd in the Riſque that the Money is expoſed to; and, in ſuch a Partnerſhip as this, not the Money itſelf, but the Riſque that it runs, and the Gain that may be probably expected from it, is compared with the Labour. And therefore when the Gain is to be proportion'd, we muſt not compare the Labour with the Principal (as if one having contributed Work to the value of 100*l.* and the other 1000*l.* in Money, the former were to receive only a tenth Part of the Gain) but to the Riſque and Hazard that the

Mr. BARB. *NOTES on* Chap. VIII. §I.

[1] *Grotius* believes it to be a mixt Contract; but ſee what is ſaid above, *c.* 2. § 10. We muſt obſerve that a Partnerſhip is contracted ſometimes tacitly, when, for Example, a Thing being bought in common, 'tis not parted, but without explaining themſelves further they enjoy it equally, each taking the Profit that ariſes, and contributing their Part in the neceſſary Expences for its Maintenance: *Societatem coire, & RE, & Verbis, & per nuncium, poſſe nos, dubium non eſt,* Dig. lib. 17. tit. 2. Pro Socio, Leg. 4. princ. See Mr. *Hertius*'s Diſcourſe, entituled, *De Societate facto contracta,* which is found in *Tom.* 3. of his *Commentat. & Opuſcula.*

[2] The *Digeſts* order, *Sicuti lucrum, ita damnum quoque commune eſſe oportet, quod non culpâ ſocii contigit.* But if the Loſs comes by the Fault of one of the Partners, he is reſponſible for it, and ſo he muſt not expect a Recompenſe of the Loſs which came by his Negligence, in not doing what he was oblig'd to by the Contract: For ſo the *Digeſts* appoint, *Si ſocius quædam negligenter in ſocietate egiſſet, in pleriſq; autem ſocietatem auxiſſet, non compenſatur compendium cum negligentiâ,* ibid. Leg. 26. See alſo *Leg.* 73. and about this whole Matter M. DAUMAT's Civil Laws in their natural Order, *Part* 1. *lib.* 1. *tit.* 8. As for Leg. 60. § 1. which our Author quotes, it contains a Deciſion very harſh and unjuſt; for it requires, that a Partner who has been hurt by his Servant, whom he purſued, and who belonged to the Partners, ſhould be cured at his own Expence; becauſe, ſays it, tho' he was engaged upon that Expence for the Partnerſhip, yet it was not done in the Partnerſhip: *Socius, cum reſiſteret communibus ſervis venalibus, ad fugam erumpentibus, vulneratus eſt; impenſam, quam in curando ſe fecerit, non conſecuturum pro ſocio actione, Labeo ait, quia id non in ſocietatem, quamvis propter ſocietatem, impenſum ſit.* But was it not in the Buſineſs of the Partnerſhip that he was hurt? The contrary Opinion ought to prevail with Reaſon; for there is another Law under the ſame Title, where 'tis ſaid, That if a Partner going a Journey about the Buſineſs of the Partnerſhip, falls among Thieves, who take away his Baggage, or Money, or hurt his Servants, he ſhall be indemnified at the common Charge: *Quidam ſagariam negotiationem coierunt: alter ex his ad merces comparandas profectus, in latrones incidit, ſuamque pecuniam perdidit: ſervi ejus vulnerati ſunt, reſque proprias perdidit: Dicit Julianus, damnum eſt commune, ideoque actione pro ſocio damni partem dimidiam agnoſcere debere, tam pecuniæ, quam rerum cæterarum, quas ſecum non tuliſſet ſocius, niſi ad merces communi nomine comparandas proficiſceretur.* Leg. 52. § 4. The Law here mentioned, which is the Lawyer *Pomponius*'s, is corrected by the following one of *Ulpian*; *Secundum Julianum tamen, & quod medicis pro ſe datum eſt, recipere poteſt. Quod verum eſt.* ibid. Leg. 61.

[3] *Ariſtotle*'s *Greek* is, Καθάπερ ἐν χρημάτων κοινωνίᾳ πλεῖον λαμβάνουσιν οἱ συμβαλλόμενοι πλεῖον, &c. Ariſt. Eth. Nicom. lib. 8. cap. 16. And the Words of the *Digeſts* are, *Conveniens eſt viri boni arbitrio, ut non utique ex æquis partibus ſocii ſimus, veluti ſi alter plus operæ, induſtriæ, pecuniæ in ſocietatem collaturus ſit.* See alſo *Leg.* 80. of the ſame Title.

[4] The Words of the *Digeſts* are, *Duo ſocietatem coierunt, ut Grammaticam docerent, & quod ex eo artificio quæſtus feciſſent, commune eorum eſſet.* Digeſt. ubi ſupr. Leg. 71.

[5] The Words of the *Inſtitutes* are, *Nam & ita coiri poſſe ſocietatem non dubitamus, ut alter pecuniam conferat, alter non conferat, & tamen lucrum inter eos commune ſit; quia ſæpe opera alicujus pro pecuniâ valet.* Inſtit. lib. 3. tit. 26. De Societat. § 2. See *Digeſt. ubi ſupr. Leg.* 29.

[6] As when two Merchants are Partners, and are both concerned in the ſame Buſineſs. *See* Leg. 52. § 4. *quoted Note* 2. *of this* §.

Mr. BARB. *NOTES on* § II.

[1] What the Author ſays of Money muſt be underſtood of Effects, Goods, and every Thing that is different from Labour, and whatever may be reckon'd to be the Stock of the Partners.

[2] Not more than he that lets Land to be tilled, makes the Labourer a Proprietor of the Lands, tho' he lets him part of the Fruits; or he that commits a Flock to a Shepherd, on condition that he ſhall have a Share in the Wool, Milk, and other Profits, muſt take part with him when the Partnerſhip is ended: *Si in coeundâ ſocietate ------ artem operamve pollicitus eſt alter, veluti quum pecus in commune paſcendum, aut agrum politori* (M. *Bynkerſhoeck* reads it, *Olitori.* Obſerv. 3. 9.) *domus in commune quærendis fructibus, nimirum ibi etiam culpa præſtanda eſt.* Digeſt. lib. 17. tit. 2. Pro ſocio. Leg. 52. § 2.

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[a] *Vid.* lib. 17. t. 2. l. 73. and l. 52. ſ. 3, 4. L. 60. ſ. 1. *D. pro Socio.*

[b] In Partnerſhip, the more a Man contributes, the more does he receive. *Ariſt. Nic.* l. 8. c. 16. In the ſame Senſe ought that in the *Digeſts* to be explained, *l.* 29. D. h. t. *If it be not mentioned what Share each Party contributed, they muſt be preſumed to be all equal.*

[c] *Vid. Inſtit.* l. 3. t. 26. *De ſocietate,* §. 2.

the Money is expos'd to, which if computed to be worth 100 *l.* each Party ſhall gain equally.

The beſt way, in this Caſe, is to rate the Riſque of the Principal and the Hopes of the Gain, according to the Intereſt that is generally given for Money. Suppoſing then this Intereſt to be 6 *l. per Cent.* if one Party contributes Labour worth 60 *l.* and the other 1000 *l.* in Money, they ſhall ſhare equally of the Gain.

But ſometimes the Labour and Money are ſo interwoven together, as to give him that contributed only his Labour, [3] a Share even in the Principal; the Labour of the one, and the Money of the other, being in a manner united into one Maſs. As when one lays out his Money upon unwrought Commodities, and another ſpends his Labour in working them up, and managing them. Thus, if I give a Weaver 100 *l.* to buy Wool, and he makes Cloth of it, computing his Labour at 100 *l.* 'tis manifeſt, that here both of us have an equal Intereſt in the Cloth; and when it is ſold, the Money muſt be equally divided: Nor ought I to ſubſtract the Money that I contributed at firſt, and then divide the remainder with him [a].

III. Beſides, 'tis not unjuſt to enter into ſuch a Partnerſhip, as that one Party may have a Share in the Gain [1], without being in danger of partaking of the Loſs [b]. But this is irregular, and a mixt Contract of Partnerſhip and Inſuring; and here [2] an Equality will be obſerv'd, if the inſuring Party receives a greater Gain than the other, in proportion to the riſque he runs in bearing the other harmleſs. But for one to partake [3] of the Loſs and not of the Gain, is repugnant to the very nature of Partnerſhip; for no Body enters into ſuch a Contract, but upon the proſpect of ſome Advantage [c].

IV. Sometimes People enter into Partnerſhip [1] for all they are worth [d]; in which Caſe each Party, according to his Condition and the Laws of good Husbandry, may take from the common Stock, as much as is neceſſary for the handſome Maintenance of him [2] and his [e]. But ſince few Mens Circumſtances will induce them to [3] continue long in ſuch a Partnerſhip as this [f], it would be convenient to agree at firſt, what Share of the Gain each ſhall pretend to at breaking off. Where *Grotius* [g] obſerves, that no regard ought to be had to what has been actually gain'd by this or that Man's Contributions, but to what might probably have been expected from them: For therefore it is that many join their Stocks together, that each may be admitted into a Share of what is gain'd by the Goods of others.

Now tho' no Man ought to have his Liberty ſo far intrench'd upon, as to be confined to a Partnerſhip

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[3] This takes place in other Things as well as Money, as when one allows Ground for a Building, on condition that he that builds on it, ſhall have a Moiety; or, as when one truſts a Flock to be fed, or a Servant to be fed or taught, on condition that if it be ſold at the End of ſome Years, the Money ſhall be divided among the Partners. *Sed ſi puerum docendum, vel pecus paſcendum tibi dedero, vel puerum nutriendum, ita ut, ſi poſt certos annos veniſſet, pretium inter nos communicaretur, abhorrere hæc ab areâ ------ ergo ſi quis areæ dominum non tranſtulerit, ſed paſſus ſit te ſic ædificare, ut communicaretur vel ipſa, vel pretium, erit ſocietas.* Digeſt. lib. 19. tit. 5.

Mr. BARB. *NOTES on* § III.

[1] The Words of the *Digeſts* are, *Contra Quinti Mucii ſententiam obtinuit, ut illud quoque conſtiterit, poſſe convenire, ut quis lucri partem ferat, de damno non teneatur.* Yet it muſt be underſtood, that in ſeveral Matters of Partnerſhip, if there be Gain on the one Side, and Loſs on the other, nothing muſt be called Gain, but what remains when Loſſes are deducted: *Quod tamen ita intelligi oportet, ut ſi in aliâ re lucrum, in aliâ damnum illatum ſit; compenſatione factâ, ſolum quod ſupereſt, intelligatur lucro eſſe.* Inſtit. ubi ſupra, § 2. See *Dig. lib.* 17. *tit.* 2. *Leg.* 29. § 1.

[2] So the *Digeſts* ſpeak, *Quod ita demum valebit --------- ſi tanti ſit opera, quanti damnum eſt. Plerumque enim tanta eſt induſtria ſocii, ut plus ſocietati conferat, quam pecunia: Item ſi ſolus naviget, ſi ſolus peregrinetur, pericula ſubeat ſolus.* Digeſt. ibid. But all that is ſaid here of the Equality of the Portions of Gain, ought to be underſtood with this Reſtriction, If it be not otherwiſe agreed; for then the Conſent of Parties ſupplies the Inequality of what each hath contributed of his own. *Et quidem ſi nihil de partibus lucri & damni nominatim convenerit, æquales ſcilicet partes & in lucro & in damno ſpectantur. Quod ſi expreſſæ fuerint partes, hæ ſervari debent. Nec enim unquam dubium fuit, quin valeat conventio, ſi duo inter ſe pacti ſunt, ut ad unum duæ partes pertineant, ad alium tertia.* Inſtit. ut ſupra, § 2.

[3] The *Digeſts* ſo order, *Ariſto refert Caſſium reſpondiſſe, ſocietatem talem coiri non poſſe, ut alter lucrum tantum, alter damnum ſentiret, & hanc ſocietatem Leoninam ſolitum appellare ------- Iniquiſſimum enim genus ſocietatis eſt, ex quâ quis damnum, non etiam lucrum ſpectet.* Digeſt. ut ſupra, § 2.

[a] Compare *Grotius,* l. 2. c. 12. ſ. 24.
[b] *Vid.* l. 29. ſ. 1. D. h. t.
[c] *Vid.* l. 29. ſ. 2. D. h. t.
[d] *Ibid.* ſ. 5.
[e] *Ibid.* leg. 73.
[f] *Vid.* l. 70. D. h. t.
[g] *D. L.*

Mr. BARB. *NOTES on* § IV.

[1] So the *Digeſts* ſpeak, *Societates contrahuntur ſive univerſorum bonorum, ſive negotiationis alicujus, ſive vectigalis, ſive etiam rei unius.* Digeſt, ibid. Leg. 5.

[2] *Si ſocietatem* (ſay the *Digeſts*) *univerſarum fortunarum ita coierint, ut quicquid erogaretur vel quæreretur, communis lucri atque impendii eſſet, ea quoque quæ in honorem alterius liberorum erogata ſunt, utrinque imputanda.* Ibid. Leg. 73.

[3] *Nulla ſocietatis in æternum coitio eſt.* ibid. Leg. 70. The *Roman* Lawyers ſay, that tho' a Partnerſhip hath been contracted with this expreſs Clauſe, Never to ſeparate; yet the very Nature of Society, which is the Source of Diviſions and Diſorders, if it be entirely free, requires, that it be permitted to each of the Partners to renounce it, when it ſeems good to him, provided he do it not at an unſeaſonable Time, and to the Prejudice of others. *Si convenerit inter ſocios, ne intra certum tempus communis Res divideretur, non videtur conveniſſe, nè ſocietate abeatur. Quid tamen ſi hoc convenit, nè abeatur, an valeat? Eleganter Pomponius ſcripſit fruſtra hoc convenire. Nam etſi non convenit, ſi tamen intempeſtive renuncietur ſocietati, eſſe pro ſocio actionem. Sed etſi convenit, nè intra certum tempus ſocietate abeatur, & ante tempus renuncietur, poteſt rationem habere renunciatio, nec tenebitur pro ſocio, qui ideo renunciavit, quia conditio quædam, quâ ſocietas erat coita, ei non præſtatur; aut quid ſi ita injurioſus & damnoſus ſocius ſit, ut non expediat eum pati?* Digeſt. ibid. Leg. 14. See the laſt Note of this Section. *Quas diſcordias materia communionis ſolet excitare.* Lib. 31. De Legatis & fidei commiſſis, 2. Leg. 77. § 20.

ſhip longer than he deſires; yet ſince a great [4] Degree of Fidelity is required among Partners, he ought not to break off unſeaſonably and to the detriment of others [a]. Upon this Point *Cicero* [b] diſcourſes very ſeriouſly [5]: *It is accounted*, ſays he, *a baſe thing to deceive a Partner in ever ſo ſmall a matter, and with reaſon: For he who enters into Partnerſhip does it in hopes of gaining to himſelf an Aſſiſtant: To whom therefore can he fly for Succour, that ſuffers from him on whom he depended? Thoſe Crimes are of the blackeſt hue, againſt which there is the leaſt guard: We may defend ourſelves againſt the Malice of others, but to an intimate Friend we lie open. For how can we provide againſt a Partner, whom we cannot ſo much as ſuſpect without violating our Duty? Well therefore did our Anceſtors judge him who deceiv'd his Friend in this Point, fit to be reckon'd amongſt the worſt of Villains* [6].

[4] So the *Digeſts* order, *Venit autem in hoc judicium pro ſocio bona fides.* Ibid. Leg. 52. § 1. *Cum in ſocietatis contractibus fides exuberet, &c.* Cod. lib. 4. tit. 37. Pro Socio, Leg. 3. *Socius ſocio utrum eo nomine tantum teneatur pro ſocio actione, ſi quid dolo commiſerit, an culpâ, i. e. deſidiâ, quæſitum eſt. Prævaluit culpæ nomine teneri eum, ſed culpa non ad exactiſſiman, ſed talem diligentiam, qualem rebus ſuis adhibere ſolet.* Inſtitut. ubi ſupra, § 9. *Tribonian* joins here two Laws of the *Digeſts*, *Pro Socio*, which do not agree together, *viz.* Leg. 52. § 2, & 58. See Mr. THOMASIUS's Diſcourſe, *De Culparum Præſtatione in contractibus*, c. 1. § 24. VINNIUS alſo owns, that the Reconciling of this Section with *Leg.* 33. of that Title of the *Digeſts*, *Depoſiti vel contra*, is a *Gordian* Knot. As for me, I have laid down a general Rule about all Contracts, wherein we have the Affairs or Goods of another in our Hands after any manner, that we ſhould act as we would do for ourſelves, and our own Intereſt, in Things that moſt nearly concern us. And this Practice is the more juſt, becauſe the *Roman* Lawyers ſay, that Partnerſhip is a kind of Brotherhood. *Societas jus quoddam fraternitatis in ſe habet.* Digeſt. Pro Socio. Leg. 63. princ. But as for ſuch Miſchances as no human Foreſight can prevent, neither of the Partners is reſponſible for them. *Damna, quæ in prudentibus* (it ſhould be read, as Mr. *Bynkerſhoek* obſerves, *Obſ.* 10. 10. imprudentibus) *accidunt, hoc eſt, damna fatalia, ſocii non cogentur præſtare*, Ib. Leg. 52. § 3.

[5] TULLY's Words are, *In rebus minoribus ſocium fallere turpiſſimum eſt --- neque injuriâ; propterea quod auxilium ſibi ſe putat adjunxiſſe, qui cum altero rem communicavit. Ad cujus igitur fidem confugiet, cum per ejus fidem læditur, cui ſe commiſerit? Atque ea ſunt animadvertenda peccata maxime, quæ difficillime præcaventur. Tecti eſſe ad alienos poſſumus, intimi multa apertiora videant neceſſe eſt; ſocium vero cavere quî poſſumus? Quem etiamſi metuimus, jus officii lædimus. Recte igitur majores eum, qui ſocium fefelliſſet, in virorum bonorum numero non putarunt haberi oportere.* Orat. pro Roſcio Amerino. Chap. 40.

[6] The *Digeſts* thus ſpeak, *Labeo ------ ſcribit, ſi renunciaverit ſocietati unus ex ſociis eo tempore, quo interfuit ſocii non dirimi ſocietatem, committere eum in pro ſocio actione. Nam ſi emimus mancipia, inita ſocietate, deinde renuncies mihi eo tempore, quo vendere mancipia non expedit, hoc caſu, quia deteriorem cauſam meam facis, teneri te pro ſocio judicio.* Digeſt. ubi ſupra. Leg. 65. § 5. of which ſee the reſt.

[a] *Vid.* l. 65. ſ. 5, *&c.* D. h. t. [b] *Pro Sext. Roſcio*, c. 40. *Add.* Quintil. *Decl.* 320.

CHAP. IX.

Of Contracts *depending on* Chance.

I. *Bargains mixt with Chance.*
II. *They are us'd, as well in Peace,*
III. *As in War.*
IV. *Contracts in laying Wagers.*
V. *Contracts in Play.*
VI. *Of Rafflings.*
VII. *Of Lotteries.*
VIII. *Of Inſurance.*

WE come now to ſuch Contracts as depend upon Chance; where the Parties refer themſelves to ſome [1] uncertain Event, and give Security to ſtand to, and to be determin'd by it. Some of theſe indeed have no relation to Price, yet moſt of them have; and therefore we think fit to diſcourſe of them all together in this Place.

II. Theſe Contracts may be either publick or private. The publick are ſuch as concern either War, or Peace. In Peace ſome Nations determine themſelvs by Lot [1] in chooſing Judges, in aſſigning Provinces, and in diſpoſing of Offices, when the Competitors, both in reſpect of their Right and their Abilites, are equal; for otherwiſe ſhould one have a better Right, his Right might be prejudic'd: Or ſhould another have greater Abilities, the Commonwealth might ſuffer by it. For as *Iſocrates* in *Areopag.* ſays, *pag.* 248. Ed. min. *Pariſ. Fortune governs the Lot.* [2] And *Callimachus* in *Hymn. Jovis*, v. 63, 64. *For a thing that each has an equal Title to, 'tis convenient to caſt Lots.* And *Philoſtr.* in vita *Apol. Tyan.* l. 3. c. 9. *Fortune has no Prudence, ſo that the worſt may be choſen by Lot.* In ſuch Caſes the Parties are ſuppos'd to enter into Compact to acquieſce without Complaint in the Determination of the Lot, as having voluntarily ſubmitted to it. And when a Superior uſes Lots about that which he might enjoyn of his own Authority, he is ſuppos'd to depart from his Right, and of his own accord to ſubmit himſelf to their Determination.

The Deſign of theſe Lots is not to ſearch into the hidden [3] Decrees of God, unleſs where he poſitively com-

Mr. BARBEYRAC's *NOTES on* Chap. IX. § I.

[1] Becauſe of the Uncertainty, he to whom the Event is not favourable, cann't reaſonably complain of the Loſs that has befallen him, and to which he ſubmitted before hand. 'Tis the general Law of theſe Sorts of Contracts, to which we may referr Bargains of uncertain Hopes, of which our Author treats *Chap.* 5. § 6. above. Mr. HERTIUS alſo places in the Number of Contracts which are hazardous, the Rents of Ground loſt, and Partnerſhip in all Goods, both in preſent Poſſeſſion, and future. See the *Parœmiæ Jur. German.* of the ſame Author, *lib.* 1. *c.* 43.

Mr. BARB. *NOTES on* § II.

[1] Concerning all theſe Matters, ſee *Hadrian Junius*'s *Animadverſ. lib.* 2. *c.* 5. of the enlarged Edition in 1708. *Tho. Gataker* ſpeaks more exactly and fully in his *Engliſh* Book, *Of the Nature and Uſe of divers kinds of Lots*, c. 4 & 5. where he treats of this Matter, both hiſtorically, and as a judicious Moraliſt.

[2] *Callimachus*'s *Greek* is, Ἐπ' ἰσαίῃ γὰρ ἔοικε πήλασθαι. See alſo *Juſtin.* L. 1. c. 10. n. 2. & L. 18. c. 3. n. 9, 10.

[3] They who believe that God is the Author of the Things effected by Lots, alledge the *Text* in the *Proverbs*, xvi. 33. *The Lot is caſt in the Lap* (*i. e.* in the hollow of ſome Veſſel) *but the whole Diſpoſal is of the Lord.* But according to the Language of Scripture, no more is meant by it, than that Men are not Maſters of the Effects wrought by Lots, as Mr. LE CLERC proves very well in his judicious Reflexions upon Mens good or bad Fortune in the Buſineſs of Lotteries, *&c.* c. 8. which the Reader would do well to peruſe throughly. See alſo *Gataker*, of the Nature and Uſe of Lots, *c.* 8. § 3, &c. And Mr. LA PLACETTE's Treatiſe *Of hazardous Games*, c. 2.

commands it [a], but to put an end to Strifes and Diſferences [b], or that a Perſon, who otherwiſe has Power to decide them by his own Authority, may avoid the *odium* of the Party againſt whom he decrees; and leave no room for a Complaint of the Injuſtice of the Sentence.

But in a Controverſy where the Party caſt is puniſhable by Law, 'tis abſurd to apply any thing of Chance; for no Man ought to be puniſh'd, unleſs Matter of Fact be evidently prov'd againſt him: Whereas a Lot, let it fall out how it will, can never be able to undo what has been done, & *vice verſa*; and therefore Lots are not capable of adjuſting ſuch Matters. But when a Multitude are in fault, and 'tis inconvenient for them all to ſuffer, then indeed the Criminals may be puniſh'd by Lot.

In private Affairs Lots are of great uſe, either in dividing [4] of Inheritances, or conferring upon one a Benefit, or a Burthen which cannot be divided, and yet which many have an equal Title to [c].

III. Nor are ſuch Pacts as theſe of leſs uſe in War, either when the Iſſue of the whole is thrown upon the Event of a Battle between both Armies [1], or between two or more choſen out of each ſide [d]: Or when ſome dangerous and honourable Poſt is to be aſſigned, for which many are equally qualified [e].

Indeed almoſt all ſolemn Wars, at leaſt after all Terms of Peace have been rejected, ſeem to ſuppoſe an Agreement between both Parties, that which Side ſoever ſhall have the good Fortune to be Conqueror ſhall have Right to give Laws to the vanquiſh'd [2]: and this is the Reaſon that no Party can ever urge as an Exception againſt any Treaty, that he was forced to it by Fear; for he who takes the Field, when the Controverſy may be decided otherwiſe, is ſuppos'd to commit the Deciſion of it to the Sword, and therefore cannot complain whatever Condition the Chance of it impoſes upon him. And this too is the Reaſon, that when they come to Articles, the Parties engaged are preſumed to ſtand upon equal Grounds as to the Juſtice of their Cauſe, and whatever Miſchief has been done on either ſide is forgiven, as ſuppos'd to have been done by Conſent.

Such a Covenant as this do they enter into, who decide their Quarrel by a Duel, and therefore he that kills, is not oblig'd to make Satisfaction to the other's [3] Wife and Children for the Loſs; for they join Battle by Agreement upon this Condition, to kill or to be kill'd. But ſince theſe Duels, when undertaken by private Men of their own Heads, directly thwart the End of civil Judicature, they are deſervedly reſtrained by ſevere Penalties. Formerly indeed they were allowed of (but abſurdly, and againſt the End of civil Government) either to clear a Man of a Crime objected, or to demonſtrate his Right in Conteſt [f]. Thus heretofore in *Germany* a Point of Law, whether the Uncle, or the Son of the elder Brother deceas'd, ſhould take place in the Father's Inheritance; was abſurdly left to the Determination of a Duel [g].

IV. Among theſe Contracts of Chance we may reckon [h] [1] Wagers [i], when two differ about ſome future or paſt Event, if not known to either Party, each laying down a certain Pledge, to be his, who ſhall happen to be in the Right. Theſe Wagers ſeem to be reciprocal Promiſes, and conditional Bargains; which are ſo far mixt with Chance, as not having their Event depending on the Parties. The Riddle indeed propos'd by *Sampſon* to his Friends, ſeems rather a Sport, than a Wager [k], it being a conteſt of Wit, whether he could propoſe a Thing with greater Obſcurity than they ſhould anſwer with *Acumen*. But his Friends play'd foul, in ſolving his Riddle, not by their own Ingenuity, but by the Treachery of his Wife. Though perhaps it was not ſo very fair in him, to make a private Fact, and not ſome common matter the Subject of his Riddle. For 'tis almoſt impoſſible to find out ſuch particular private Facts as thoſe, by gueſſing [2].

V. All Sorts of Plays [1], where the Parties contend for ſomething, carry with them a Covenant depending more or leſs upon Chance. And the more they admit of Ingenuity, Sleight, Cunning, or Strength, the leſs are they concern'd in Chance; and indeed are only ſo far dubious, as the degree of Strength or Dexterity is not as yet manifeſt, or, as ſome unforeſeen Accident may interpoſe [l], or as human Wit and

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[4] See *Pſ.* xvi. 6. For the other two Paſſages quoted by the Author, relate only to ſuch rare and extraordinary Occaſions, as God over-rules the Lots in; for every Tribe had his Portion of Land exactly in the Places where *Jacob* (*Gen.* xlix.) and *Moſes* (*Deut.* xxxiii.) had foretold that they ſhould be.

Mr. BARB. *NOTES on* § III.

[1] See *lib.* 8. *c.* 8. § 5. following. [2] See *lib.* 8. *c.* 8. § 1. following. [3] See *lib.* 3. *c.* 1. § 7. above.

Mr. BARB. *NOTES on* § IV.

[1] They are allowed by the civil Law, provided they are not uſed about Things unlawful and diſhoneſt; and he that wins them by fair Play, may recover them by Law. *Si quis ſponſionis causâ annulos acceperit, nec reddit victori, præſcriptis verbis actio in eum competit. —— Plane ſi inboneſta cauſa ſponſionis fuit, ſui annuli duntaxat repetitio eſt.* Digeſt. lib. 19. tit. 5. De Præſcriptis verbis, Leg. 17. § 5. See alſo *lib.* 11. *tit.* 5. *De Aleatoribus, Leg.* 3. Moreover, as Mr. TITIUS on *Lauterbach* obſerves, *Obſerv.* 294. when one lays a Wager about a Thing already done, the Wager is no leſs good, tho' one of the Contractors knows the Truth of it certainly. Indeed, whoever reſolves willingly to lay a Wager with any one without knowing whether he is ſure of what he maintains, or not, he muſt be thought to run the Hazard to engage a Perſon on the ſure ſide, and conſequently, if it ſo happens, muſt blame himſelf. And with great Reaſon he muſt do it, when one of the Wagerers declares that he is perfectly well informed of the Matter in Debate, and tells the other ſo, that he may not engage in ſo raſh a Wager. It is another Thing, when before the Wager is laid about an unknown Fact or Accident, one asks the other whether he knows any thing of it; for in this Caſe, if he ſeems to be ignorant of what he knows, merely to draw in the other to lay a Wager, he is guilty of Deceit, and ſo the Wager is void. See my Treatiſe of Gaming, *lib.* 2. *c.* 2. § 16. where this Queſtion is fully handled.

[2] See Mr. LE CLERC on *Judg.* xiv. 12, *&c.*

[a] See *Prov.* xvi. 33. [b] See *Prov.* xviii. 18. [c] Add. *Numb.* xxiv. 13. *Joſ.* xiv. 2. *Pſal.* xvi. 6. [d] Vid. *Grot.* L. 2. c. 23. ſ. 10. & l. 3. c. 20. ſ. 42. [e] Vid. *Hom. Il.* η. v. 171. [f] Vid. *Jur. Canon.* tit. 10. *De purgatione vulgari, & paſſim* Cod. *Legum antiquarum* Lindenbrogii, *ejuſq; Gloſſarium in Vocabulo* Campio & Duellum. [g] *Apud* Sigibertum Gemblacenſem *ad ann.* 942. [h] *Sponſores.* [i] See Mr. *Barbeyrac*'s firſt Note upon this Section. [k] *Judg.* xiv. 12, *&c.* [l] *Vid.* Virg. *Æn.* l. 5. v. 328.

Mr. BARB. *NOTES on* § V.

[1] I have ſearch'd this Matter to the Bottom in my Treatiſe of Gaming, Printed in 1709.

and Induſtry does not exert it ſelf ſo much at ſome times, as it does at others, Many are dependent both upon *Chance* and *Skill*, as *Gaming* at *Cards*, and the like; others are entirely at the Mercy of *Chance*, as *Dice* [2]. None of which are naturally unlawful; for it is by Conſent that we engage in them, and each Party ventures equally, and plays for Things that are in his own Diſpoſal. But becauſe the Publick is concern'd that no Man ſhould miſſpend his Eſtate; and a Man may be eaſily undone by Gaming [3], if he plays high [a]; at leaſt [4] much Time, which is a precious Thing, may be conſumed in it [b], and becauſe it is frequently the Occaſion of Quarrels [c], and ſeveral other [5] Inconveniences; it is therefore the Buſineſs of the Government to conſider, how far *Gaming* ſhould be permitted, and how high [d]; but generally ſpeaking, thoſe *Plays* ſeem moſt allowable, that admit leaſt *Chance*, and moſt Ingenuity, and *vice verſa*. Now in all ſorts of *Gaming* 'tis a ſtanding Rule, that no foul Play be made uſe of, [6] *For they that run in a Race are ſuppos'd to contend by Swiftneſs, not by Tricks; to endeavour at the Victory by Speed, not by laying on of Hands, or tripping up the Heels of their Adverſaries* [e].

VI. Of the ſeveral ſorts of *Gaming* that which we call [1] [f] *Raffling* is, when many contribute towards the Purchaſe of a Thing, and then leave it to Chance which one ſhall have the whole. In this there are two ſorts of Contracts; for in reſpect of him who expoſes his Goods, it is Selling; in reſpect of them to whom they are expos'd, it is caſting Lots for them. For, by Agreement, he whom Fortune favours is to have the whole, and the reſt are to be at the Loſs of what they contributed. The Rule here is, that the whole of the Money contributed ſhould equal, and not exceed the Value of the Commodity: And that every one of the Contributors ſhould have an equal Chance for it, in Proportion to their Contributions.

VII. Another ſort is, when a certain Number of Tickets, [1] *Benefits* and *Blanks*, are caſt into a Glaſs, and ſeveral, at certain Rates, buy the Liberty of drawing them with this Condition, that he who draws a *Benefit* ſhall receive the Value inſcribed upon it.

This ſomething reſembles our [g] *Lotteries*, and comes neareſt to that Sort of Contract, which we call the *Purchaſe of Hope*, tho' there be Hazard enough with it. The Rule here is, That the Price of all the Tickets ſhould not much exceed the Value of the *Benefits*; I ſay, *not much*, for Charges are to be conſider'd, and the beſt *Benefits* may happen to be drawn firſt, and if ſo, People won't be ſo forward to venture upon the remaining Tickets.

Such *Lotteries* as theſe are ſometimes ſet up to collect Money for publick Buildings, or for the Relief of the Poor; in which Caſe, the Price of all the Tickets together is generally much larger than the Value of the Benefits: which Overplus is in the Nature of Alms and Charity given after a free and chearful manner [h].

But, in fine, for an Equality in Gaming, it is not only requiſite that the Venture on each Side ſhould be equal: but alſo that the Danger of loſing, and the probability of winning ſhould bear Proportion to the Thing contended for; *v. g.* in a Game that depends upon Skill or Ingenuity, if one Man is twice as ſkilful as the other, it is fit he ſhould lay down a double Stake. So if ten lay down each of them a Guinea for him that throws higheſt, it may ſeem unreaſonable that he who ventures but one Guinea ſhould gain nine; but then we muſt conſider, that it is nine times more probable that he loſes, than he wins. Upon which Ground ſome [i] [2] think it a fooliſh thing to be afraid of

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[2] See Mr. PLACETTE's Treatiſe of Hazardous Games, *c.* 6. who cann't be ſuppoſed to be inclined to looſe Opinions. A learned *Engliſh* Divine a long time ago confuted thoſe of his own Profeſſion, who abſolutely condemned all hazardous Games, as in themſelves contrary to Chriſtianity, very fully. It was Mr. *Gataker*, in his forementioned Book of *Lots*, Chap. 6, 7, 8. and he has alſo, in Chap. 9. laid down ſuch Conditions as he thinks Gaming may be allowed on. This Book I ſaw not till my Treatiſe of *Gaming* was printed, otherwiſe I ſhould have had regard to ſo conſiderable an Authority. Was the vanity of hazardous Playing ever ſo great! for you compoſe yourſelves to be content to hazard your Money in the Gamehouſes. You carry your Pockets full of Piſtoles to loſe them at one caſt of the Dice. See the following Verſes:

[3] JUVENAL's Words are, -- *Alea quando*
Hos animos! Neque enim loculis comitantibus itur.
Ad caſum tabulæ, poſitâ ſed luditur arcâ.

[4] OVID's Words are theſe:

Quique alii luſus (neque enim nunc perſequar omnes)
Perdere rem charam, tempora noſtra ſolent.

[5] Nothing is more fine or true than the following Verſes of Mad. *Deſhoulieres*, which, tho' every where known, yet it may not be unpleaſant to read them here:

Pleaſures are bitter, when they are abuſed:
It is good to play a little to divert;
But we muſt let it only amuſe us.
The Player, at the firſt ſight,
Hath nothing human but his Appearance.
And further, nothing is ſo eaſy as to imagine
That he is an honeſt Man, and plays high.
The deſire of Getting, which haunts us Night and Day,
Is a dangerous Spur.
Tho' our Thoughts and Intentions be often good,
We begin by being deluded,
And conclude by being cheated.

See alſo the Sixth *ſerious and comical Amuſement*.

[6] CICERO's Words are, *Scitè Chryſippus, ut multa: Qui ſtadium, inquit, currit, eniti & contendere debet, quam maxime poſſit, ut vincat; ſupplantare eum quicum certet, aut manu depellere, nullo modo debet.*

Mr. BARB. *NOTE on* § VI.

[1] The Author ſays *Lotaria*, which I expreſs'd in my firſt Edition by *Lottery*; but it may be better rendred *Raffling*.

Mr. BARB. *NOTES on* §. VII.

[1] This I conceive is meant by *Olla Fortunæ* in our Author, tho' it cann't be exactly rendred in every Language, moſt Countries having ſome Terms proper to them. See my Treatiſe of Gaming, *lib.* 2. *c.* 2. § 11. where I oppoſe the Author of the *Art of Thinking*, who condemns Lotteries in general, as Arts of Cheating.

[2] This is all taken out of the *Art of Thinking*, Part 4. Chap. 16. tho' our Author quotes it not.

[a] *Juv.* S. 1. v. 88, &c.

[b] *Ovid.* Triſt. l. 2. v. 483, 484.

[c] The *Alcoran*, together with Wine, forbids thoſe Plays which depend on Chance, becauſe they adminiſter frequent Occaſions of Quarrelling, *Cap. de Menſa.*

[d] *Vid.* L. 11. t. 5. D. *de aleatoribus, & ibi juris Romani interpretes*, Phocius, Nomocan. *Tit.* 13. *c.* 29. Selden *de Jure, N. & G. ſec. Heb.* l. 6. c. 11.

[e] *Ambr.* Off. 3. c. 4. Which is taken from the Saying of *Chryſippus* in *Cic.* Off. 3. c. 10.

[f] *Lotoria.*

[g] *Olla Fortunæ.*

[h] *Add.* Martin Delrio *Diſquiſit. Magic.* l. 4. *c.* 4.

[i] This may be ſeen more at large in Mr. *Bouhour's Art of Thinking*, Part 4. Chap. 16. and the laſt, whence our Author has taken moſt of this Section.

Thunder, for of 2,000000 Men perhaps not one may periſh by it; and therefore not only the greatneſs of the Evil, but the probability of its not happening ought to be conſidered.

VIII. To theſe Contracts that of Inſuring bears ſome Affinity; when for a certain Sum a Man takes upon him the riſque that Goods are to run in Tranſportation from Place to Place, chiefly by Sea; which, if they happen to be loſt, the *Inſurer* is bound to make good. This Contract is null, if either the *Inſurer* knows for certain that the Goods be already ſafe, or the *Merchant* that they be loſt. For the Matter of this Contract is ſuppos'd to be a Loſs conſidered as uncertain. Whereas, if the *Inſurer* is certain that the Goods are arriv'd ſafe, he runs no Riſque; and if the *Owner* knows that they are loſt, he cann't demand another to run the Riſque of them; for what is not in Being cann't be liable to Riſque. As for the Price of ſuch *Inſuring*, it is to be ſtated by the common Rate, or by the Agreement of the Parties. Thus much is certain, that the more or greater the Dangers are, which the Commodity is expos'd to, the greater Rate may be demanded for *Inſuring* it; as if the Seas be infeſted by Enemies and Pirates, more may be demanded, than if only the Uncertainty of Tempeſts were apprehended. And in reſpect of them too, more in Winter than in Summer [a]. This Contract I have mention'd here, becauſe in reſpect of the *Inſurer* it chiefly depends on Chance. There is mention made in *Livy* [b] of an *Inſuring* which coſt nothing, for they who bought up Cloth and Corn to be tranſported to *Spain*, demanded, *That what was on Board ſhould be* inſur'd *by the Publick from the Danger of the Enemy and the Seas*; but what cheats were committed by this means we may read in the ſame Author [c] [d].

[a] *Add.* Loccenius *de Jure Maritimo*, l. 2. c. 5.

[b] L. 23. c. 49.

[c] L. 25. c. 3.

[d] See Mr. *La Placette's* Treatiſe of *Reſtitution*, B. 4. c. 15. where he treats of Inſuring.

CHAP. X.

Of acceſſory Bargains.

I. *Acceſſory Contracts of two Sorts.*
II. *Variety of additional Bargains.*
III. *An additional Bargain, if it's lewd, is void.*
IV. *Sometimes it diſorders Buſineſs.*
V. *Being preſently added, is valid, if other Things agree.*
VI. *Being added after ſome time, in the negative, is liable to an Exception.*
VII. *Being affirmative, how far 'tis good.*
VIII. *Of Truſting.*
IX. *A Surety cann't be engaged for more than the Debtor.*
X. *But he may be more ſtrictly bound.*
XI. *What Advantages the Law allows a Surety.*
XII. *Of Bails.*
XIII. *The uſe of Pawns.*
XIV. *A Pawn is either fruitful, or barren.*
XV. *Whether a Pawn may be gained by Uſe.*
XVI. *What is the difference between a Mortgage and a Pawn.*

HAving done with principal Contracts that ſubſiſt by themſelves, I come now to thoſe that are only acceſſory, and have no exiſtence, but as they are added to others. Theſe may be divided into two Sorts; for ſome are apply'd in order to add, or take away ſomething from the principal Contract, and theſe the Civilians call *additional Pacts*: others are added only as a Confirmation and Security to Contracts already compleated.

II. The *Roman* Lawyers [a] diſtinguiſh between ſuch *additional Pacts* as are added before, or immediately upon the entire completion of the principal Contract, ſo as in a manner to be part of it; and ſuch as are added ſometime after: Then they examine whether the Contracts, to which they are added, be ſuch as admit of Equity, or ſuch as are tied up to the rigour of the Law; and laſtly, whether they affect the eſſentials of the Contracts, or ſuch Things as naturally flow from them, or ſuch only as are accidental to them. Whereof the firſt are ſo neceſſary, as that no Contract can be without them; the ſecond generally proceed from the Contract, altho' they be not expreſt; yet ſo as they may be varied by the Parties without affecting the eſſence of it: the laſt have no dependence at all upon the eſſence of the Contract, but owe their Being purely to the pleaſure of the Parties. Moreover, they think it ought to be conſidered, whether theſe Pacts be added to increaſe, or to leſſen the Obligation.

Mr. Barbeyrac's *NOTES on* Chap. X. §. II.

[1] See above, Chap. 2. § 2. 8.

[2] Such is the Conſent of Parties, without which no Contract can be made. The expoſing of Goods, and ſetting the Price are particularly eſſential to a Bargain of Sale.

[3] 'Tis a natural quality of all Contracts, that each of the Contractors is anſwerable for what he is faulty: Yet it may be agreed, that he ſhall not be reſponſible at all, or that he ſhall be anſwerable more or leſs for any thing elſewhere done, by virtue of the nature of a Contract. See § 5. following.

[4] As when a Buyer engaged, that in caſe of Conviction, the Seller ſhall forfeit four times the Price of the Goods, or when they agree to give ſome Security, or to leave ſome Pledge in hand, *&c.* See § 5. following.

[5] See § 6, 7. following, and *Cujacius's* Obſervations 14, 28. *Franciſc. Hotoman's Quæſt. illuſtres* 36, 37. This Matter is much perplexed by the Interpreters, by reaſon of the ſubtle Diſtinctions which the antient Lawyers have confounded the Law with, and the Obſcurity diſperſed through the Fragments which we have of their Writings. See what Mr. Thomasius ſays in his Diſcourſe *De uſu practico accuratæ diſtinct. inter empt. cum pacto de retrovend. & contractum pignor.* Chap. 11. § 10.

[a] *Add. D.* lib. 2. t. 14. *de Pactis*, L. 7. ſ. 5.

III. Concerning all which we may form theſe following Concluſions: *I. A Pact ſo affecting the Eſſence of a Contract, as to make it unlawful, or againſt good Manners, is null.* For we have proved above, that [1] no ſuch Covenant can ſtand good. Thus if a Bride ſhould add a Clauſe to her Contract of Marriage, by which ſhe might be allowed the Uſe of other Men; or, if a Steward ſhould add it as a Condition, that he ſhould be permitted to imbezil his Maſter's Goods, they would neither be valid. So it would be abſurd for a Man to make a Bargain, and at the ſame time to proteſt that he is forc'd or frightned into it; or, for a Man in any Contract whatſoever to confeſs that he does not deſign [2] to deal honeſtly [a].

IV. *II. When the Pact ſo affects the Eſſence of the Contract, as utterly to change the Form of it, Regard muſt be had to the Intent of the Contractors.* For if they deſigned the Contract, according to the Import of the words in which it is expreſs'd, 'tis plain that the Pact which is repugnant to it muſt be null; for they cannot be ſuppos'd to will things, which are inconſiſtent and deſtructive of each other. Thus it would be ridiculous, if a Man ſhould pretend to buy, and yet add ſuch a Condition, as would make it impoſſible for him to receive the Commodity, and the other the Money; or, if he ſhould ſo let a Houſe, as to make over the Property of it to the Tenant; or to enter into Partnerſhip, ſo as to have neither the Gain nor the Loſs in common.

But if the Parties did really intend the Change, and miſtook only in the wording of it, or for ſome certain Reaſons choſe to ſpeak improperly, provided it be not againſt the Laws, it will ſtand good, and not be quaſh'd for the Impropriety of a Term [1] [b].

V. *III. Pacts which are added immediately upon the completion of the Contract, whether they concern the Eſſentials of it, or thoſe Things which naturally flow from it, or thoſe which are purely accidental to it, are valid, if they be not repugnant to Law.* For ſince both Parties are here ſuppos'd to have Power to diſpoſe of theſe Things, they muſt be oblig'd to what [1] they conſent to; thus, although it be [2] natural in buying and ſelling, that the Buyer be put in Poſſeſſion of the Commodity, yet the Parties by an additional Pact may order it otherwiſe [c].

Thus the Obligation to make good a Defect may be augmented or diminiſh'd, beſide what the nature of the Contract would otherwiſe admit of; and the ſame obtains in [3] *conſenſual Contracts* [4], if between the completion and the execution of them a Pact be added; for this is the ſame thing as if the Parties proceeded upon a new Contract.

The purchaſe of an Annuity ſeems to be ſuch a ſort of borrowing, as may be referr'd hither. For I receive Money upon Condition to pay ſuch a certain Man ſo much Intereſt as long as he lives, provided, that after his Death the Principal be my own; whereas otherwiſe the Nature of a Loan requires, that the Principal be return'd to the Creditor, or his Heirs.

VI. *IV. A Pact added to a Contract ſome time after its Completion, if it be negative and deſigned to take from the Obligation, and ſo made in Favour of the Debtor or Defendant, is valid.* Thus ſome time after a Debt has been contracted, the Creditor and Debtor may enter into Covenant concerning the putting off the Payment, the Changing the Place of it, the Species of Money, the forgiving the Intereſt, *&c.*

Mr. Barb. *NOTES on* § III.

[1] See what I have ſaid upon *lib.* 3. *chap.* 7. § 6. *note* 2.

[2] This is decided by the *Roman* Lawyers. *Illud non probabis, dolum non eſſe præſtandum, ſi convenerit: Nam hæc Conventio contra bonam fidem, contraque bonos mores eſt: & ideo nec ſequenda eſt.* Digeſt. lib. 16. tit. 3. Depoſiti, vel contra. Leg. 1. § 7. See alſo § 35. and *lib.* 50. *tit.* 17. *De regulis Juris, Leg.* 23.

Mr. Barb. *NOTES on* § IV.

[1] This muſt be ſuppoſed in a dubious Caſe, ſays Mr. Hertius here, who quotes this Maxim about it: *Contractus non tam nomine quam animo contrahentium æſtimantur,* as it is found in the *Digeſts, lib.* 19. *tit.* 2. *locati, conducti, Leg.* 15. § 4. but there is nothing like it, neither in that Law, nor two others, which the ſame Author points at afterward, *Digeſt. lib.* 16. *tit.* 3. *Depoſiti, &c. Leg.* 24, 26. where we only find ſome Examples, which may have a Reference in ſome manner to this Subject.

Mr. Barb. *NOTES on* § V.

[1] So the *Digeſts* ſpeak, *Contractus enim legem ex conventione accipiunt.* Digeſt. Depoſiti, *&c.* Leg. 1. § 6. *Vid.* Leg. 24, 26. § 1. Lib. 2. tit. 14. De Pactis, Leg. 7. § 5. Lib. 18. tit. 1. De contrahendâ empt. *&c.* Leg. 7. § 1. Leg. 79. & Inſtitut. lib. 3. tit. 26. De Societate, § 1, 2.

[2] We may here ſet down a Sale with a Clauſe of Commiſſion. *Addictio in diem,* and a Clauſe for leaving a Bargain, and one of taking Goods upon Trial, *i. e.* on Condition, if they don't agree, the Seller ſhall take them again. See above, *Chap.* 5. § 2. and 4. As alſo that Sort of Contract, by which one lends a certain Sum on a Loſt Fund, *i. e.* that he who hath received it on that Condition, ſhall pay Intereſt, either to ourſelves, during Life, or to another Perſon, as long as he lives; but after the Death of the Perſon nominated, then the Principal is his to whom it was lent: Whereas commonly, ſuch is the Nature of a Loan, that the Sum borrowed may be called in by him that lent it, or his Heirs, which laſt the Author mentions.

[3] See *Chap.* 2. § 6. above.

[4] The Words of the *Digeſts* are, *Ut conſtet in emptione, cæteriſque bonæ fidei judiciis, re nondum ſecutâ poſſe abiri ab emptione. Si igitur in totum poteſt, cur non & pars ejus pactione mutari poteſt? ------ ut quodammodo quaſi renovatus contractus videatur.*

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[a] *Vid. D.* lib. 16. t. 3. *Depoſ. vel contra,* L. 1. § 7. & § 35.

[b] *Vid. D.* lib. 18. t. 1. *de contrah. empt.* &c. L. 80. ſ. 3. lib. 19. t. 5. *De præſcript. verb.* &c. L. 4. & 6. & lib. 17. tit. 2. *pro Socio,* L. 5. l. 2.

[c] *Vid. D.* lib. 19. t. 1. *De act. empt. & vendit.* L. 11. ſ. 18.

Mr. Barb. *NOTES on* § VI.

[1] See above Chap. 2. ſ. 3. *Vid. D.* lib. 2. t. 14. *De pactis,* L. 7. ſ. 5. lib. 18. t. 1. *De contrah. empt.* L. 72.

VII. V. *By the Law of Nature, as far as bare Pact is capable of Action, a Pact added to a Contract ſome time after its Completion, although it increaſes the Obligation, and ſo turns in Favour of the Creditor or Plaintiff, may be valid.* For the Reaſon why the *Roman* Law denies it (*viz.* becauſe a bare affirmative Pact does not bear an Action) is out of the Verge of the Law of Nature [a]. Thus ſuppoſe I had bought a Commodity, which by the Bargain is to be delivered by ſuch a Day, if afterwards we covenant to have it deliver'd ſooner, there is no Reaſon but that I ſhould receive the Benefit of it. Or, ſuppoſe I let you my Houſe for two Years, and we afterwards by Conſent limit the Time to one, at the End of the Year you ought to quit Poſſeſſion; but then I can't demand the Rent that would be due for the other Year. And thus in Loan of Money, I don't ſee why the time of Payment may not be anticipated as well as put off by an [1] an additional Compact [b]; nay altho' no Allowance be made to the Debtor for this [2] Anticipation, yet he has no Injury done him, if he voluntarily ſubmits to it. But 'tis manifeſt, that his Obligation ought not to be increas'd againſt his Will, and therefore naturally as much as is added to him by this ſubſequent Pact, ought to be taken off ſomewhere elſe. Thus, if the Creditor will have me pay him at another Place, than that which we agreed upon, I on the other Hand can fairly demand an Agreement of ſo much as it is my Intereſt to pay it in the former. But 'tis againſt the Nature of bartering and chargeable Contracts, that any Pact ſhould be added to increaſe the Obligation ſo much on one ſide, as to make an Inequality; as if the Buyer and Seller ſhould agree upon ſuch a Price, being the true Value of the Commodity; and yet afterwards ſhould covenant, that the Buyer ſhould pay more than the Commodity is worth. Unleſs this be a mixt Contract of buying and giving, I can't ſee how the additional Price can be demanded [c].

VIII. Hither I think may be referr'd what we call a [d] Truſt, [1] when we make over to another the Property of a Thing upon Condition to have it reſtor'd again; which I mention among the Additional Pacts, rather than the principal Contracts, becauſe it is always added upon the Delivery of the Thing. And this ſeems to be call'd a [2] Truſt; becauſe, whereas otherwiſe, when the Property of a Thing is made over to another, he may diſpoſe of it as he pleaſes, and either keep it himſelf for ever, or part with it to another; by this additional Pact we ſeem to truſt to his Honour and Honeſty, that he will not uſe his Property otherwiſe than according to Agreement, and will be willing to part with it again upon Demand. And therefore the ſolemn Form of this Contract among the *Romans* ran, [3] *As honeſt Men ought to deal together, without Deceit.* And becauſe the Truſt was ſo very extraordinary, the Breach of it was therefore branded with a particular Infamy by the *Roman* Laws. "[4] There are Three private Concerns, upon the honeſt Diſcharge of which a Man's Reputation and almoſt his Life depends, A Truſt, Guardianſhip, and Partnerſhip, *Cic.* pro *Roſcio, c. 6.* If a Guardian ought to be faithful, if a Partner, if one entruſted with a Commiſſion, if one that has received a Truſt, *Id. Topicis.*

" He who by means of his Truſt has defrauded any one, is condemned immediately, *Id. pro Cæcinna, c.* 3. But in what Matters the *Romans* interpos'd this Truſt, you may meet with every where amongſt their Lawyers." [5] *De Fiduciario Patre,*

Mr. Barb. *NOTES on* § VII.

[1] This is called in one Word *Conſtitutum*, or *Pecunia conſtituta.*

[2] It has it in Effect, as appears by theſe two Laws, of which our Author quotes the Firſt; and by this we may obſerve that little Connexion there is between the Principles and the Determation of the *Roman* Law. *Si is, qui & Jure Civili & Prætorio debebat, in diem ſit obligatus, an conſtituendo teneatur? Et Labeo ait teneri* [*conſtitutum*] ------ *adjicit, vel propter has potiſſimum pecunias, quæ nondum peti poſſunt, conſtituta inducta: quam ſententiam non invitus probarem, habet enim utilitatem, ut ex die obligatus, conſtituendo ſe eadem die ſoluturum, teneatur. Sed & ſi citeriore die conſtituat ſe ſoluturum, ſimiliter tenetur.* Digeſt. ubi ſupra, Leg. 3. § 2. Leg. 4.

[a] In the Laws before-cited. [b] *Vid.* lib. 13. t. 5. l. 3. ſ. 2. D. *de conſtit. pecun.* [c] Compare *Arn. Vinnii tract. de pactis*, c. 9, *&c.* [d] *Fiducia.*

Mr. Barb. *NOTES on* § VIII.

[1] 'Tis the Definition that Boetius gives in his Commentary upon *Cicero*'s Topicks, cap. 10. *Fiduciam accipere dicitur is, cui res aliqua mancipatur, ita ut eam aliquando mancipanti remancipet.* "As for Example, ſaith he, If in a Conjuncture, when we fear that we ſhall be ſtript of our Goods, we pray ſome potent Friend to buy of us ſome Land, making him promiſe that he'll ſell it to us again at the ſame Price, as ſoon as the Danger is over." *Veluti ſi quis tempus dubium timens, amico potentiori fundum mancipet, ut ei, cum tempus,* &c.

[2] See J. Mesnard upon *Tully*'s Oration *pro Q. Roſcio Comœdo*, Chap. 6. in *Tom.* 1. of *Grævius*'s Edition, and *J. Vincent Gravin. Orig. Jur. Civil.* lib. 2. p. 448, 449.

[3] *Ut inter bonos bene agier oportet, & ſine Fraudatione*; *vid.* Ciceron. *de Offic.* L. 3. c. 17. & *in Topicis*, c. 10. & *ad Famil.* L. 7. Ep. 12.

[4] Cicero's Words are, *Si qua enim ſunt privata judicia ſummæ exiſtimationis, & pene dicam capitis, tria hæc ſunt, fiduciæ, tutelæ, ſocietatis. Æque enim perfidioſum & nefarium eſt fidem frangere, quæ continet vitam: & pupillum fraudare, qui in tutelam pervenit: & ſocium fallere, qui ſe in negotio conjunxit.* Cic. Orat. pro Roſcio Comœdo, Chap. 6. See alſo *pro Cæcinâ*, cap. 3.

[5] Moreover, This Head of Truſt hath Place in diverſe Sorts of Affairs, *viz.* making the Heir of a Family free, Poſſeſſion for a Time only, Guardianſhip, lending upon Pawns, and a firm Truſt. As to the firſt of theſe, among the Ancient *Romans*, if a Father would make his Son free, he muſt ſell him 3 times as a Slave, to a Perſon who promiſes him to ſell him to him again, who was therefore called *Pater fiduciarius.* After which the true Father having redeemed his Son, he enfranchiſeth him, and ſo his Freedom is effected. See Gaius's *Inſtitut.* 1. 6. and Rosinus's *Antiq. Rom.* lib. 9. cap. 10. But at length theſe pretended Sales were aboliſhed, and it was ordained that the Fathers ſhould appear alone, and declare to the Judges, that they renounced their Paternal Power over that Child that they made free. See *Inſtitut. lib.* 1. *c.* 12. § 6. See Mr. Thomasius's Diſcourſe *De quaſi-emancipatione Germanorum*, printed at *Hall* 1703. This Freedom produced a particular Effect as to the Succeſſion of Fathers to the Goods of their Children. About which ſee the *Inſtitutes, lib.* 3. *tit.* 2. *De legitimâ Agnatorum ſucceſſione*, § 8. and Code, *lib.* 8. *tit.* 49. *De emancipationibus liberorum, Leg.* 6. Of Lending upon Pawns, ſee Salmasius's Treatiſe of Uſury, *cap.* 4. & *de modo Uſurarum, cap.* 14. and Mr. Noodt's *Obſervat. lib.* 2. *c.* 7, 8. as alſo Mr. Thomasius's Diſcourſe *De Uſu practico accuratæ diſtinctionis inter emptionem cum pacto de retrovendendo, & contractum Pignoratitium*, Printed at *Hall* in 1707. c. 1. § 3. &c. 2. § 20. *&c.*

Patre, Vid. Caium, *Inſtit.* 1, 6. “A Truſt was contracted in Childrens ſucceeding to their Father's Goods”. *Vid.* lib. iii. t. 2. ſ. *ult.* Inſt. *de legit, agnat. ſucceſſ.* L. *ult.* lib. viii. 49. c. *de emanc. liber. de fiduciaria poſſeſſione. Vid.* Budæum *ad* l. 2. lib. i. t. 2. *D. orig. juris.* Greg. Tholoſan. *Syntag. juris* l. xxiii. c. 5. ſ. 2. *Vid.* Inſt. l. 1. t. 19. *De tutela fiduciaria. Vid.* Bachov. *ad* d. t. *Inſtit. De fiducia circa pignus contracta. Vid.* Iſid. *Etymol.* l. v. c. 25. Cujac. *ad* Pauli *recept. ſent.* l. 2. t. 13. *Sic & in fidei commiſſis inſtar fiduciæ intercedit. Vid. princ.* l. 2. t. 23. Inſt. *de fidei commiſſ. & ibi* Bachov. *&c.* We have an Example of this ſort of Truſt in *Livy.* L. xxxii. c. 38. “So *Alboinus* delivered up *Pannonia* to his Friends the *Hunns,* upon Condition, that if the *Longobards* ſhould ever have occaſion to return, they ſhould reſtore it back. *Vid.* Paul Warnefried. *de geſtis* Longobard, *L.* ii. *C.* 7. *Nabarzanes* (in *Curtius.* l. v. c. 9.) adviſes *Darius* to make over his Kingdom to *Beſſus* for a time, ſo as to receive it back again when Things ſhould be ſettled. *Hercules* having ſubdued *Sparta* placed *Tyndarus* the Father of the *Dioſcuri* in the Throne, which being his by Conqueſt, he entruſted with him, upon Condition that he would reſtore it ſafe and ſound to *Hercules*'s Sons. *Diod. Sic.* l. iv. t. 33. *Boetius* (in *Topic.* Cicer. *ubi ſupr.*) begins a Caſe with, *If a Man fearing the badneſs of the Times ſhould make over in Truſt a Farm to a powerful Friend, to return it, when Times ſhould mend.*” Philip, *when he ſaw that he muſt fight, raiſes Forces in all Parts, and being ſolicitous for the City of* Argos, *thought it beſt to put it into the hands of* Nabis *King of* Lacedemon *in Truſt, to be reſtor'd again, if he return'd with Succeſs : but if not, to be* [6] *kept for himſelf.*

Among the *Turks,* if a Man ſwears to put away his Wife, altho' he immediately repents of it, he is yet oblig'd to ſtand to his Oath ; but in order to recover her again, he enters into a Truſt with his Friend, and gets him to marry her, and immediately after to part with her. For, after a Divorce, unleſs the Woman be married again, ſhe cann't return to her firſt Husband [a].

But ſuch a Truſt as evades the force of the Law, ought not to be contracted ; as if I ſhould give a Man, who is free from Taxes, my Eſtate in Truſt, in order to cheat the Tax-gatherers.

IX. As for ſuch Pacts as are added by way of Confirmation and Security to Contracts already compleated, the moſt uſual is that by which one Man gets another to be bound for him, ſo as to be reſponſible, in caſe he ſhould fail. This perſonal Security is required in theſe three Caſes :

Firſt, Between Man and Man for the performance of ſomething valuable, which is call'd *Suretiſhip. Secondly,* In criminal Affairs, which is commonly called [1] *Bail. Thirdly,* [2] In publick Concerns, where Security is given by [3] Hoſtages.

For the right underſtanding the nature of Suretiſhip, we muſt look back to the laſt Section of the ſecond Chapter of this Book, to which we add, that being bound for another, we make our ſelves ſo far liable, as that if he does not pay the Debt, we muſt. But then recourſe may be had to the principal Debtor [4], and the whole, with the Charges, may be recover'd of him. Now ſince Suretiſhip is only an additional Confirmation to a Contract [5], the Surety cannot naturally be oblig'd to more than the Principal [b] ; ſo that if the Principal was obliged only Conditionally, the Surety cannot be obliged, unleſs the Conditions be made good, nor can he be confin'd to ſuch a Time or Place which the other was not obliged to. And whatſoever [6] Exceptions the Debtor might make, the

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[6] See above in Chap. 2. ſ. 6. *Vid. D.* lib. 2. t. 14. *de pactis,* L. 7. ſ. 6. *Vid.* Leg. 58. & lib. 18. t. 1. *De contrah. empt.* L. 72. t. 4. *De reſcindendâ vendit.* L. 1, 2. & C. lib. 4. t. 45. *Quando liceat ab emptione Diſcedere,* L. 1.

Mr. Barb. *NOTES on* § ix.

[1] See above, *lib.* 2. *c.* 4. § 18. and § 12. of this Chapter.

[2] See *lib.* 8. *c.* 9. § 12, 13. following.

[3] See *ibid.* § 6.

[4] The *Digeſts* ſay, *Fidejuſſor in judicio ſiſtendi cauſâ locuples videtur dari, non tantum ex facultatibus, ſed etiam ex conveniendi facilitate,* Digeſt. lib. 2. tit. 8. *Qui ſatis dare cogantur,* &c. *Lib.* 2. *princ.* But when once a Man is taken by us for a Surety, we ought to be ſatisfied, unleſs he become poor thro' ſome ſudden Accident. *Qui ex cauſâ improbat ab arbitro probatos, alios improbatos probat : multoque magis ſi ſuâ voluntate accepit fidejuſſores, contentus his eſſe debet. Quod ſi medio tempore calamitas fidejuſſoribus inſignis, vel magna inopia accidit ; cauſa cognitâ ex integro ſatiſdandum erit.* Ibid. Leg. 10. § 1.

[5] The Words of the Law are, *Fidejuſſores ita obligari non poſſunt, ut plus debeant, quam debet is, pro quo obligantur. Nam eorum obligatio, acceſſio eſt principalis obligationis : nec plus in acceſſorio poteſt eſſe, quam in principali re. At ex diverſo, ut minus debeant, obligari poſſunt. Itaque ſi reus decem aureos promiſerit, fidejuſſor in quinque rectè obligatur : contra vero obligari non poteſt. Item ſi ille purè promiſerit, fidejuſſor ſub conditione promittere poteſt : contra vero non poteſt. Non ſolum autem in quantitate, ſed etiam in tempore plus vel minus intelligitur, plus eſt enim ſtatim aliquid dare, minus eſt, poſt tempus dare.* Inſt. lib. 3. tit. 21. This Maxim is carried ſo far, that if the Surety hath anſwer'd a bigger Sum than what the Debt amounts to, he is obliged to no more. *Illud commune eſt in univerſis, qui pro aliis obligantur : quod ſi fuerint in duriorem cauſam adhibiti, placuit eos omnino non obligari : in leviorem planè cauſam accipi poſſunt. Propter quod in minorem ſummam rectè fidejuſſor accipietur.* Ibid. Leg. 8. § 7.

[6] The Words of the *Digeſts* are, *Ex perſona rei, & quidem invito reo, exceptio & cætera rei commoda fidejuſſori, cæteriſque acceſſionibus competere poteſt,* Digeſt. ubi ſupra Leg. 32. *Si is, qui fidejuſſorem dedit, ideo non ſteterit, quod Reipublicæ cauſâ abfuit, iniquum eſt fidejuſſorem ob alium neceſſitate ſiſtendi obligatum eſſe, cùm ipſi liberum eſſet non ſiſtere,* lib. 2. tit. 11. *Si quis cautionibus,* &c. Leg. 6. The Author quotes alſo Lib. 2. tit. 14. De pactis, Leg. 32. lib. 3. tit. 3. De Procur. & Defenſoribus, Leg. 51. lib. 14. tit. 6. De Senatuſc. Maced. Leg. 9. § 3. lib. 16. tit. 2. De Compenſationibus Leg. 4, 5. Inſt. lib. 4. tit. 14.

[a] Moncony's *Itiner.* Tom. 1. p. 465. compared with *Olearius* Itiner. *Perſic.* l. 5. c. 23.

[b] *Fidejuſſores ita obligari non poſſunt, ut plus debeant, quam debet is, pro quo obligantur,* &c. *Inſtit.* l. 3. t. 21. *de Fidejuſſoribus.*

[c] *Vid.* lib. 2. t. 11. *D. ſiquis cautionibus &* lib. 2. t. 14. L. 32. *D. de pactis,* lib. 3. t. 3. L. 51. *D. De procurat,* lib. 14. t. 6. L. 9. 3. *de SCto* Macedon. l. 16. t. 2. l. 4. l. 5. *D. De compenſ.*

the Surety can plead to his Advantage. [7] One that orders another to truſt a third Perſon, does the ſame thing as if he made himſelf a Surety; for by ſuch an Order he is preſumed to interpoſe his Credit. But if he gives Order for 1000 *l.* and the Perſon takes up but 500 *l.* he will ſtand reſponſible for no more than was taken up; for the meaning of the Order was, that he ſhould have Credit as far as 1000 *l.* But tho' the Surety cannot be obliged to more than the Principal, yet he may ſometimes [8] be obliged to leſs; as when he undertakes for only Part of the Debt, or for the whole, under certain Reſtrictions, or upon Condition that the time of Payment ſhould be prolonged, or a more convenient Place aſſigned for it.

The End and Deſign of Suretiſhip makes it appear, that the Surety ought to be a Man of Subſtance and Credit, and able to anſwer the Creditor's Sute, which indeed is ſuppos'd by the Creditor's Acceptance of him. And therefore *Vulcan* (in *Homer*. Odyſſ. viii. v. 352, 353.) when *Neptune* offer'd to be a Surety for *Mars*, replies, *That the Security was as bad as the Debt; for if* Mars *ſhould run away, how ſhould he be able to ſeize upon* Neptune *among the Gods?*

X. But yet it is not impoſſible but the Surety may lie under a greater and ſtricter Obligation than the Principal; for he interpoſes himſelf of his own Accord, the more to confirm the principal Contract, without whom the Creditor had not enter'd into it. And indeed Neceſſity forces ſome People to contract a Debt, but nothing but Generoſity, and an Oſtentation of Kindneſs, and a Confidence in his Riches engages the Surety in another's Concern. And therefore the Creditor has ſometimes more Reaſon to blame the Sureties, than the Principal; for it was upon their Account that he truſted at all, and they certainly are to be blam'd, who without the utmoſt Neceſſity derive a Burthen upon themſelves, which they ought to have known they were not able to bear. And therefore wiſe [1] Men every where diſſuade us from Suretiſhip, unleſs we would involve our ſelves in unneceſſary Evils [2]. The *Romans* kindly provided for the Eaſineſs of Women by the *Velleian* Decree [a]; and by the *Roman* Law the Principal ſatisfied the whole Debt [3] by giving up all he was worth, though not ſufficient to diſcharge the Debt [b]; [4] which Favour was not indulg'd the Surety [c]. For he was look'd upon as call'd in for the Relief of the Creditor, that in caſe [5] the Principal ſhould prove inſolvent, the Debt might be recovered of him. Tho' indeed this way of ſatisfying a Debt, by parting with all a Man is worth, is altogether unknown to the Law of Nature; unleſs common Humanity may plead, that if a Man be brought to want by ſome fatal Calamity, and not by Luxury or Idleneſs, it ought to ſuffice, if we ſtrip him of his Patrimony, and not proceed any farther againſt his Perſon.

Beſides, the [6] Surety may be more ſtrictly oblig'd than the Principal, in Caſe he takes upon him by Oath, or under a Penalty, what the other barely promis'd. Thus it is the Cuſtom in ſome Places, in default of Payment at the time appointed, to oblige the Sureties to appear at ſuch a certain Place, and not to depart thence, 'till [7] the Debt be ſatisfied, and this they call a *Pledge*. Tho' by reaſon of ſome Abuſes, which proceeded from it, it is now generally diſuſed.

IX. But

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[7] So the *Digeſts* order, *Adhiberi autem fidejuſſor tam futuræ quam præcedenti obligationi poteſt, dummodo ſit aliqua, vel naturalis, futura obligatio.* Digeſt. lib. 46. tit. 1. De fidejuſſor. *&c.* Leg. 6.

[8] *See* Note 2. of this §.

Mr. BARB. *NOTES on* § X.

[1] CHILON's *Greek* is, Ἐγγύα, πάρα δ' ἄτα. Diog. Laert. l. 1. p. 73. Prov. vi. 1, *&c.* xi. 15. xvii. 18. xxii. 26, 27. xxvii. 13. Eccluſ. xxix. 24, 27. *Be a Surety, but at your peril,* was the Saying of CHILON.

[2] The *Velleian* Law is ſet down in the *Digeſts*, *Velleiano ſenatuſconſulto pleniſſime comprehenſum eſt, ne pro ullo fœminæ intercederent. Nam ſicut moribus civilia officia adempta ſunt fœminis, & pleraque ipſo jure non valent: Ita multo magis adimendum eis fuit id officium, in quo non ſola opera nudumque miniſterium earum verſaretur, ſed etiam periculum rei familiaris.* Digeſt. lib. 16. tit. 1. Leg. 1. § 1, 2.

[3] They were only diſcharged for the preſent. Such a Ceſſion kept them indeed out of a Gaol, or releaſed them from it; but it did not hinder, but if afterward they got any thing, Payment of what was remaining after the Sale of the firſt Goods, might be demanded. It is true, that in this laſt Caſe, it was not allowed to impoveriſh the Debtor quite a ſecond time; he was only condemned to pay what he could, over and above a comfortable Subſiſtence. *Qui bonis ceſſerint, niſi ſolidum creditor receperit, non ſunt liberati. In eo enim tantummodo non beneficium eis prodeſt, ne judicati detrahantur in carcerem,* Cod. lib. 7. tit. 71. *Qui bonis cedere poſſunt,* Leg. 1. *Cum eo quoque qui creditoribus bonis ſuis ceſſit, ſi poſtea aliquid adquiſierit, quod idoneum emolumentum habeat, ex integro in id quod facere poteſt, creditores experiuntur. Inhumanum enim erat, ſpoliatum fortunis ſuis in ſolidum damnari.* Inſt. lib. 4. tit. 6.

[4] The Words of the *Inſtitutes* are, *Sane quædam exceptiones non ſolent his* [*fidejuſſoribus*] *accommodari. Ecce enim debitor, ſi bonis ſuis ceſſerit, & cum eo creditor experiatur: defenditur per exceptionem, ſi bonis ceſſerit. Sed hæc exceptio fidejuſſoribus non datur: ideo ſcilicet quia qui alios pro debitore obligat, hoc maximè proſpicit, ut cum facultatibus lapſus fuerit debitor, poſſit ab iis, quos pro eo obligavit, ſuum conſequi.* Inſtit. lib. 4. tit. 14. De Replicationibus, § 4. See more about the Ceſſion of Goods, in Mr. DAUMAT's civil Laws in their Natural Order. *Part.* 1. *lib.* 3. *tit.* 5.

[5] See *lib.* 3. *c.* 7. § 3. above.

[6] By the *Roman* Law, when one has anſwered for a Pupil in an Engagement contracted without the Allowance of his Guardian, or for a Prodigal, who is debarred of the Management of his Eſtate, or a Mad Man: In theſe and the like Caſes, where the Obligation of the Debtor was purely natural, and no Action lay againſt him, the Engagement of the Surety is nevertheleſs good and valid. MARCELLUS ſcribit: *Si quis pro pupillo ſine tutoris auctoritate obligato, prodigove, vel furioſo fidejuſſerit: magis eſſe, ut ei non ſubveniatur, quoniam his actio mandati non competit.* Digeſt. lib. 46. tit. 1. Leg. 25.

[7] *Obſtagium.* This was antiently in uſe among the *German* Princes, as Mr. HERTIUS obſerves, and gives ſome Examples of it. Mr. VITRIARIUS, in his *Univerſum jus Civile privatum,* lib. 3. tit. 21. § 9. teacheth us that the ſame Cuſtom is ſtill kept up in the Dutchy of *Holſtein.*

[a] D. Lib. 16. t. 1. L. 1. ſ. 1, 2. [b] *V. C.* Lib. 7. t. 71. L. 1. & *Inſtit.* L. 4. t. 6. *De actionib.* ſ. 40. [c] *V. Inſtit.* lib. 4. t. 14. *De Replicationib.* ſ. 4.

XI. But becauſe *Suretiſhip* is only an *Addition* to another Man's Debt, it is moſt natural for the *Creditor* to make his Demands firſt to the [1] *Principal*, and upon Failure there, to apply to the *Surety*. “ *This* the *Roman* Law calls “ *Beneficium Excuſſionis & Ordinis* [2]. The Condi- “ tion of a *Surety* deſerves Pity, for his Kindneſs “ ruins him, and his good Nature breaks him. “ But the *Creditor* cannot with any Face apply “ to the *Surety*, but when he cannot recover his “ Debt of the *Principal*, Quint. *Decl.* 273. [2].” And if the *Surety* pays the Debt, the *Creditor* muſt make over to him all the Right that he had againſt the [3] *Principal*; if that can be of more Service to him towards the Recovery of the Debt, than if he ſued in his own Name, eſpecially if any Pawn had been given for Security in Part, it muſt be given up to the *Surety*. But if ſeveral had bound themſelves for Debt, all jointly, and not each for the whole, in Failure in the *Principal*, the Burthen ought to be divided amongſt them, and each obliged to pay his [4] Proportion; unleſs one ſhould prove inſolvent, for then the Burthen muſt lie the heavier upon the reſt. For a Number of *Sureties* were therefore provided, that if this or that ſhould fail, the reſt might be *Security* to the *Creditor* [a]. [5] Thoſe who entirely take upon themſelves in their own Name another's Obligation [b], ſo as to be eſteem'd as *Principals* in the Eye of the *Creditor*, differ in ſome reſpect from *Sureties*. Whether ſuch as theſe can recover of the Perſon for whom they engaged, what they laid out in his Service, and what Method they ought to take to do it, is to be determined according to the nature of the Kindneſs; for this Act in them may be a *Free Donation*, or a *Commiſſion*, or a *Loan*, or a *Recompence*, or ſuch like. 'Tis uſual alſo for a *Surety* to provide for himſelf by [c] *Counter-Security*, whereby he may recover what he lays out for the Principal, if the *Principal* himſelf proves deficient [6]. The Perſon that gives this *Security* owes the ſame Obligation to the firſt *Surety*, as the firſt *Surety* owes the *Creditor*; and has the ſame Action againſt the *Principal*, as the firſt *Surety* himſelf had.

XII. As for *Bail* [d] or the Obligations that thoſe lie under, who engage for Criminals, 'tis obſervable that many of the Antients were of Opinion, that a Man was ſo far Maſter of his own Life, as to have Power by his bare Conſent to engage it for another, ſo far as even to forfeit it for another's Crime. *Andocides (orat. de myſter.)* relates, that *Manthiteus* and *Apſephion* ſat by the Altar humbly praying that they might not be put to the Rack, but that their *Bail* might be taken, which was no ſooner granted, but they mounted their Horſes, and fled to the Enemy; leaving their *Bail*, who were forced to undergo thoſe Tortures which they themſelves ought to have ſuffered. The Story of *Damon* and *Pythias* (whom *Diod. Sic.* in excerpt. *Pierefc.* calls *Phintias*) is well known as related by *Cicero* in *Offic. l.* iii. *c.* 10. Of whom *Manil.* Aſtr. l. ii. v. 1. ſays,

> *Et duo qui potuere ſequi vadimonia ſponſi:*
> *Optavitque reum ſponſor non poſſe reverti,*
> *Sponſoremque reus timuit ne ſolveret ipſum.*

Once Death was ſtrove for, 'twas a generous ſtrife;
Not who ſhould keep, but who ſhould loſe a Life
Was their Diſpute, contending to deny
Each other the great Privilege to die.
The *Surety* fear'd the *guilty Friend*'s Return,
The *guilty Friend* did his own Abſence mourn.

Mr. Creech.

Mr. Barb. *NOTES on* § XI.

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[1] See Justinian's Novels, 4. c. 1. *Ut creditores primo loco conveniant principalem.* Quinctilian's Words are, *Etiam cum iſtud periculum eſt ſponſoris, miſerabile eſt; bonitate labitur, humanitate conturbat* --------- *Non enim aliter ſalvo pudore ad ſponſorem venit creditor, quam ſi recipere à debitore non poſſit.* Declam. 273. But we ought to obſerve by the antient *Roman* Law, the Creditor had his Choice to take either the Principal or Surety, as he pleaſed. *Jure noſtro eſt poteſtas Creditori, relicto Reo, eligendi fidejuſſores, niſi inter contrahentes aliud placitum doceatur,* Cod. lib. 8. tit. 41. De fidejuſſoribus & mandatoribus, Leg. 5. See alſo *Leg.* 3. Mr. Hertius alſo ſays, that it was antiently a Cuſtom in *Germany*. But as for what he adds, that it was uſed among the *Jews*, he ought to have brought good Proofs, for the Text he quotes is nothing to the Purpoſe, as the Reader will be convinced by ſeeing it: *Take the Garment of him who is a Surety for a Stranger, and take a Pledge of him for a ſtrange Woman,* Prov. xx. 16. xxvii. 13.

[2] They are Terms uſed by the Interpreters, and not by the *Roman* Law itſelf. The Reaſon of the firſt is obvious: The other is taken from *Excutere*, which ſignifies in the *Roman* Law to ſeek whether any one be able to pay, and then to ſeize on him.

[3] The Law is, *Potuiſti ſane, cum fiſco ſolveres, deſiderare, ut jus pignoris, quod fiſcus habuit, in te transferretur; & ſi hoc ita factum eſt, ceſſis actionibus uti poteris: quod & in privatis debitis obſervandum eſt.* Cod. lib. 8. tit. 41. De fidejuſſoribus & mandatoribus, Leg. 11.

[4] By the *Roman* Law the Creditor might apply himſelf to either of the Sureties, as he pleaſed, and make him alone to pay; for it ſuppoſes all the Sureties to be obliged to pay the whole, which yet is not true, unleſs all the reſt prove inſolvent. But the Emperor *Adrian* ordained, that if, at the time of the Proceſs, the Sureties were ſolvent, the Creditor could demand of each no more than his Share. See *Inſtitut. Lib.* 3. *tit.* 21. § 4. And this conſiſted in what the Lawyers call *Beneficium Diviſionis.* See Mr. Noodt, in his *Probabil. Juris*, lib. 2. c. 1.

[5] This is what is called *Expromiſſor*; as for Example, *Digeſt. Lib.* 12. *tit.* 4. *De Condict. cauſâ datâ, &c. Leg.* 4. *& lib.* 50. *tit.* 17. *De diverſis regulis Juris, Leg.* 110. § 1. One ſingle Surety is call'd *Adpromiſſor.* See *Digeſt. l.* 45. *tit.* 1. *De verborum obligation. Leg.* 5. § 2. *& lib.* 46. *tit.* 3. *De ſolutionibus & liberationibus, Leg.* 43. This laſt Law will be quoted in the next Chapter § 1. Note 5. Nevertheleſs theſe two Terms, as well as *Fidejuſſor*, are ſometimes confounded by an Impropriety of Speech, common to all Languages.

[6] Our Author, as Mr. Hertius obſerves, confounds a ſubſidiary Security, call'd *Fidejuſſor ſuccedaneus,* with a Surety to indemnify, called *Fidejuſſor indemnitatis,* a Counter-Security, as alſo divers others have done, as appears by Mr. Thomasius's Diſcourſe *De fidejuſſore indemnitatis,* Printed at *Hall* in 1703. § 2. This ſubſidiary Surety is a ſecond Security, which anſwers for the firſt, and in reſpect to whom this laſt is look'd upon as a principal Debtor. The *Roman* Law calls him *Fidejuſſor Fidejuſſoris. Digeſt.* 46. *tit.* 1. *Leg.* 8. § 12. *& Leg.* 27. § 4. And the firſt Surety is called *Fidejuſſor principalis, ibid.* § 2, 4. As for the Surety of Indemnity, the Lawyers mean by him a Perſon that is not obliged purely and barely for the whole Debt, but only for ſo much as the principal Creditor has not paid, *i. e.* if he can recover only one part of his Debt, the Surety ſhall indemnify him as to the other. See *Digeſt. ubi ſupra, Leg.* 63. *& lib.* 45. *tit.* 1. *De verb. obligat. Leg.* 116.

[a] *Add.* Phæd. *l.* 1. *fab.* 16.

[b] *Expromiſſores.*

[c] *Fidejuſſor indemnitatis.*

[d] *Vades.*

[1] But that a *Surety* ſhould by his bare Conſent make himſelf liable to a Puniſhment, which otherwiſe ought to be inflicted on a Criminal, does not ſeem agreeable to thoſe Rules of *vindictive* Juſtice, which ought to obtain in human Societies; indeed if a Man knaviſhly interpoſes himſelf, that the Criminal may have an Opportunity of eſcaping Juſtice, he ought to ſuffer as much, as it is the Concern of the Magiſtrate that the other had not eſcaped his Hands; which may ſometimes be capital, eſpecially if he who thus eſcap'd be like to do more Miſchief [a].

Farther than this, ſuch a ſubſtituted Death is not lawful in the civil Court: For no Man has ſo much Power over his own Life, as to expoſe it at Pleaſure for no publick Advantage, but only to hinder another from ſuffering what he deſerves. Beſides, the end of Puniſhments would be fruſtrated by this means, for the deſign of them is either to amend the *Delinquent*, or to deter *others*; but the *Surety* is not the *Delinquent*, as having not by any Act of his derived the Guilt upon himſelf: And as for *others*, they will not be deterr'd from offending by ſeeing an innocent Man ſuffer, but will either be moved with Compaſſion, or ſtruck with Admiration of ſuch Love and Conſtancy, as does not refuſe even Death for the ſake of a Friend [b] [c].

It appears therefore that *Bail* can be no farther admitted in criminal caſes, than as a Security to the Magiſtrate, whoſe Duty it is to proſecute, that the Damages of the *Delinquent* ſhall be made good, or his Fine paid, or if he be abſent, that he ſhall make his Appearance, ſo that nothing in the mean time may be decreed againſt him, as if he were convict; or if he be in Priſon, that he may not be forc'd to plead in Chains. And even in thoſe Caſes, the beſt way is for the Magiſtrate to let the *Surety* know beforehand, what Security he expects from him, that ſo he may conſider whether his Circumſtances will permit him to venture ſo much upon the Honeſty of his Friend.

The Obligation that *Hoſtages* lie under, hardly ever taking place but in Leagues and civil Government, will be diſcuſs'd more conveniently hereafter. B. viii. c. 8. ſ. 6.

XIII. Another uſual way of *Security* is to give the *Creditor* ſome certain Thing in *Pawn*, till the Debt be paid; the deſign of which is not only, that the *Debtor* may be incited to a more ſpeedy Payment for want of his Goods [d], but that the *Creditor* [1] [e] in Caſe of Failure may have ſomething equivalent, and being in Poſſeſſion of the *Pawn*, need not to be at the Trouble and Expence of going to Law. And therefore the *Pawn* ought to be as much or more Worth than the Debt it ſelf. And ſince it is deſign'd for the *Security* of Debts, which bear either a *vulgar* or *eminent* Price, 'tis neceſſary that the *Pawn* ſhou'd have the ſame Faculty. So that we cannot approve of the *Egyptian* Cuſtom [f] [g] of *Pawning* the dead Bodies of their Parents, altho' whoever refuſ'd or neglected to redeem them, was proſecuted with the utmoſt Ignominy, and deny'd Burial after Death [2]. And for the ſame Reaſon it ſeems inhuman to ſeize upon the dead Body of a *Debtor*, that ſo his Relations might be ſhamed into a Payment of that which otherwiſe they were not oblig'd to.

By the way, 'tis worth obſerving, that in the Kingdom of *Pegu* a Man may *Pawn* his Wife and Children to his *Creditor*; but if the *Creditor* lies with either the Wife or the Daughter thus Pawn'd to him, he loſes his Debt, and is liable to no other Puniſhment [h].

XIV. Things given in *Pawn* are either ſuch as yield Increaſe, or ſuch as do not; as for the *former*, 'tis uſual to allow the *Creditor* [1] the Profits, or a

Mr. Barb. *NOTES on* § XII.

[1] See *lib.* 2. *c.* 4. § 17, 18.

Mr. Barb. *NOTES on* § XIII.

[1] The Words of the *Inſtitutes* are, *Pignus utriuſq; gratia datur, & Debitoris, quo magis ei pecunia credatur, & Creditoris, quo magis ei in tuto ſit creditum.* L. 3. tit. 15. See alſo about this whole Matter Mr. Thomasius's Diſcourſe, *De diſtinct. inter emptionem cum pacto retrovend. & contract. pignor.* cap. 2.

[2] Justinian forbad it under a rigorous Puniſhment, *Novel.* 60. *cap.* 1, & 115. *cap.* 5. § 1. as Mr. Hertius obſerves.

Mr. Barb. *NOTES on* § XIV.

[1] Called *Pactum* ἀντιχρήσεως, as the Author ſpeaks, and the *Digeſts* expreſs it thus, *Si* ἀντίχρησις, *id eſt, mutuus pignoris uſus pro credito, facta ſit, & in fundum & in ædes aliquis inducatur: eouſque retinet poſſeſſionem pignoris loco, donec illi pecunia ſolvatur; cum in uſuras fructus percipiat, aut locando, aut ipſe percipiendo, habitandove.* Dig. lib. 20. t. 1. De pignoribus & hypothecis, &c. Leg. 11. § 1. See Mr. Noodt's Obſervations, *lib.* 2. *c.* 9. Mr. Thomasius in his Diſcourſe *De Accuratâ diſtinct.* &c. c. 2. § 9, &c. maintains, that by the Natural Law, independant on the Civil, the Word Ἀντίχρησις is underſtood of itſelf, as containing the End of the Contract. It imports that the Creditor ſhall have the Benefit of the Fruits, be what they will, without giving any Account. We ſhall examine the Reaſons of that able Lawyer in the Place noted. The Uncertainty of the Produce of ſuch Things as are engaged, is a thing of great Weight; for, as *Cicero* ſpeaks in a Place quoted by Mr. Hertius, The Fruits of the Earth are always at the Mercy of the Winds and Tempeſts. *Totæ autem res ruſticæ ejuſmodi ſint, ut eas non ratio, neq; labor, ſed res incertiſſimæ, venti, tempeſtateſq; moderentur.* In Verrem, lib. 3. c. 98. & *ult.* See *Cod. lib.* 4. *tit.* 42. *De Uſuris, Leg.* 17.

[a] *V.* 1 Kings 20. 39.

[b] *Add.* Anth. Matth. *de crimin. ad l.* 48. *D. d. tit.* 14. *c.* 2. *ſ.* 13, &c.

[c] V. *Grot.* L. 2. c. 21. ſ. 11. n. 2.

[d] *Vid.* Lib. 13. t. 7. l. 35. ſ. 1. *De action. pignerat.* &c.

[e] *V.* Inſtit. *L.* 3. *t.* 15. *Quibus modis recontrahitur obligatio,* ſ. 4.

[f] *V.* Diodor. Sic. *L.* 1. *C.* 93.

[g] *V.* Herodot. *in* Euterp. & Lucian. *de* Luctu. *p.* 306, 307. Ed. *Amſt.*

[h] Gaſpar. Balb. *Itiner.*

certain proportion of them in lieu of Intereſt. As for thoſe which do not yield Increaſe, they generally bargain, that if they be not redeem'd by ſuch a Time, the Creditor ſhall have the Property of them [2]: And this is not naturally unjuſt, eſpecially if the Pawn does not exceed the value of the Debt, and the Intereſt of it; or if, provided it exceeds it, the overplus be return'd to the Owner. Tho' this the *Roman* Lawyers [3] never allow of [a]; for thus needy neceſſitous People might quickly be ſtript of all they were worth, through the Avarice of their Creditors, being often forc'd to leave in Pawn much more than the value of the Debt.

But it is reaſonable, that [4] if the *Pawn* be not redeem'd by ſuch a Time, it ſhould be look'd upon as ſold at a fair Rate ſtated then, or ſome time before, by ſome honeſt Man [b].

In ſhort, as the *Creditor* ought to reſtore the *Pawn* upon Payment; ſo while he has it in his Cuſtody, he ought [5] to look after it as carefully as his own, and if it may be the worſe for uſing, he ought not to put it to any Uſe, unleſs Leave be expreſly given him by the Bargain. And therefore if it receives any Damage, or happens to be loſt through his Fraud, or want of, at leaſt, common Diligence, he is obliged to make it good.

XV. It is a receiv'd [1] Opinion, that a *Pawn* depoſited can never become one's own by *Preſcription* [c]; and the Reaſon is, becauſe the Redemption of a *Pawn* is ſuch an Action as cannot be exerciſed often, but once only. Beſides *Preſcription* was firſt introduc'd to put an End to Sutes, which could not otherwiſe be determined, and to ſettle Property which would otherwiſe be uncertain. But in the Caſe before us there can be no Queſtion in whom the Property of the *Pawn* is, when I poſſeſs it as another's, and it evidently appearing upon what account he left it with me, I cannot preſume that he had ever relinquiſh'd it.

But yet the Caſe may ſo happen, as that the *Debtor* may fairly be debarr'd the Power of Redemption; as [d] if when he would have redeem'd it, he had been hindred, and has now paſſed it over in Silence ſo long, as to create a Preſumption that he never deſigns it; or if it be very much to the *Creditor's* Diſadvantage to have the Payment continually put off, it cannot be thought unjuſt in him to diſpoſe of the *Pawn* as his own; eſpecially if by length of Time the Value of the Money has been chang'd, ſo that the *Creditor* would receive leſs than he lent, ſhould he admit of a Redemption. As ſuppoſe a Man had lent another 1000 *l.* 100 Years ago, and had received in *Mortgage* a Farm, which was then worth the Money; in the mean time the Value of Money has ſunk half in half, and therefore now, if the *Creditor* be forced to receive back his 1000 *l.* he would receive only enough to purchaſe half the Farm; whereas, at the time of Contract it would have purchaſed the whole.

XVI. The *Roman* Lawyers diſtinguiſh between a *Pawn* properly ſo called, and a *Mortgage* [e]; the *former* is the actual Delivery of ſome *moveable*, the *latter* is the bare Aſſignment of ſomething *immoveable*, for Security of the *Debt:* For barely to aſſign over *moveables* as Security, without putting them into the Cuſtody of the *Creditor*, would be ridiculous; for they might be removed away, and ſo not

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[2] Theſe Reſtrictions are no ways neceſſary, according to Mr. THOMASIUS, *ubi ſupra* § 13, 14. The Debtor, ſays he, is ſuppos'd, in this Caſe, to ſell his Eſtate for the Sum lent; for which Reaſon he looked upon it himſelf as an Equivalent. And ſo after the Time is expired, the Creditor becomes full and irrevocable Proprietor of the Thing pawned, and 'tis the worſe for him, if he finds it leſs worth than the Money lent; as it is alſo juſt, that if he ſells it for more, he ſhould have the Benefit, at leaſt, if it be not otherwiſe agreed on, or the Laws of Charity do not oblige him to recede from his Right.

[3] See *Cod. lib.* 8. *tit.* 35. *De pactis pignorum, & de Lege Commiſſoriâ in pignoribus reſcindendâ.*

[4] The Words of the *Digeſts* are, *Poteſt ita fieri pignoris datio, hypothecæve, ut ſi intra certum tempus non ſit ſoluta pecunia, jure emptoris poſſideat rem juſto pretio tunc æſtimandam: hoc enim caſu videtur, quodammodo conditionalis eſſe venditio.* Digeſt. ubi ſupra, Leg. 16. § 9.

[5] *Ea igitur, quæ diligens Paterfamilias in ſuis rebus præſtare ſolet, à creditore exiguntur.* Digeſt. lib. 13. tit. 7. De Pigneratitia actione, Leg. 14. See Mr. NOODT'S *Probabilia Juris, lib.* 1. *c.* 4. *lib.* 4. *c.* 3. & *Obſerv.* 2. 13. But if without his Fault, the Pawn be loſt, or deſtroyed by a Miſchance, he ſtill preſerves his Right, who remov'd it only from the other Goods of the Debtor. *Quam* [*diligentiam exactam*] *ſi præſtiterit, & aliquo fortuito caſu rem amiſerit, ſecurum eſſe, nec impediri creditum petere.* Inſtitut. lib. 3. tit. 15. § 4. Mr. THOMASIUS *ubi ſupra*, § 17, 18. expreſſes himſelf a little differently, and ſuppoſes, as I think, without Neceſſity, that in Things that yield a Profit, the Right of the Creditor to the Thing pawned, is a kind of Property, tho' revocable.

Mr. BARB. *NOTES on* § XV.

[1] The Interpreters of the *Roman* Law are not agreed about this; and the common Opinion, for the moſt part, is, that Preſcription prevails in the Caſe of Pawns. See GROTIUS, *lib.* 2. *c.* 4. § 15. to which Place the Author alludes.

[a] *V.* C. L. 8. t. 35. *De pactis pignorum, & de lege Commiſſor. in pignorib. reſcind.* [b] *V. D.* L. 20. t. 1. *De pignorib. & hypothecis,* &c. l. 11. ſ. 1. & l. 16. ſ. 9. [c] *V.* C. L. 4. t. 24. *de Pigneratitiâ. Act.* l. 10. [d] Grot. *l.* 3. *c.* 12. *ſ. ult.* puts this Caſe. [e] *V.* Inſtit, *L.* 4 *t.* 6. *De actionib.* ſ. 7.

anſwer the End for which they were aſſigned [1]. This way of *Mortgage* is very uſeful among Subjects of the ſame State; for it being abſolutely neceſſary that they ſhould frequently borrow of one another, and as neceſſary that the Payment ſhould ſometimes be put off for a conſiderable Time, there would not be *moveables* enough for ſufficient Security; and it would be too hard to oblige the Borrowers immediately to part with their *immoveables*, as their Houſes, or Land [a]. And therefore it ſuffices to aſſign ſuch an *immoveable* for Security, as can't be taken away, and of which the Law at any time can give Poſſeſſion.

In the State of Nature ſuch *Mortgages* are needleſs; for if the *Debtor* refuſes Payment, the Poſſeſſion of the *Mortgage* aſſigned in Security muſt be detained by Force of Arms. Whereas in that State, without ſuch a particular Aſſignment, it is lawful to ſeize on any thing that belongs to the *Debtor*.

Mr. BARB. *NOTES on* § XVI.

[1] Their Words are, *Pignoris adpellatione eam propriè rem contineri dicimus, quæ ſimul etiam traditur creditori, maxime ſi mobilis ſit. At eam quæ ſine traditione nuda conventione tenetur, propriè hypothecæ adpellatione contineri dicimus.* Inſtitut. lib. 4. tit. 6. De Action. § 7. In fine, as to this whole Matter of Pawns and Mortgages, we may conſult Mr. DAUMAT's Civil Laws in their Natural Order, *Part* 1. *lib.* 3 *tit.* 1. See alſo Mr. NOODT's *Probab. Jur. lib.* 1. *cap.* 8. & *lib.* 4. *cap.* 10, 11. & *Obſ.* 2. 8. where he corrects ſome Laws, and there we may ſee, among other things, that according to the *Pretorian* Law, a Mortgage was made and concluded alſo by a ſingle Agreement.

[a] Compare *Exod.* xxii. 26, 27. *Deut.* xxiv. 6. *Job* xxii. 6. xxiv. 3. *Prov.* xx. 16. & *D. L.* 20. *t.* 1. *l.* 6, 7. *D. de Pignor.* &c. Diodor. Sic. *l.* 1. *c.* 79. *C.* lib. 8. t. 17. *L.* 8. *Authent. Agricultores quæ res pign obl'g. poſſ.*

CHAP. XI.

By what means Obligations *founded upon* Compact *may be diſſolved.*

I. *The moſt natural Way of diſſolving an Agreement is to perform the Things agreed on.*
II. *What if one pays a debt for one who knows not of it?*
III. *To whom muſt we pay?*
IV. *What muſt be paid?*
V. *To whom and by whom may Compenſation be made?*
VI. *Where it may be uſed.*
VII. *A Debt is paid by a Releaſe.*
VIII. *How an Obligation is made void by a diſagreement.*
IX. *The Knavery of one Party frees the other from his Obligation.*
X. *As alſo a Change of that Condition on which the Obligation was founded.*
XI. *How an Obligation ceaſes by Time.*
XII. *And how by Death.*
XIII. *Of Delegation.*
XIV. *Of Confuſion.*
XV. *Of Novation.*

WE come now to ſee by what means Obligations thus founded upon Compact may be diſſolv'd. The moſt natural Way is [1] the Performance of the Covenants; for that being done, the Obligation ceaſes of courſe. And here we may obſerve, that ſome Obligations are [2] ſo inherent in a Perſon, that they cannot be perform'd by any other [a]: Whereas ſome may be done by *Proxy*, it being all alike to the Party concern'd, by whom they be perform'd. Of ſuch a Nature are all thoſe Contracts which relate to common mercenary Work, ſuch as may be done as well by one Man as by another; as alſo thoſe which [3] concern *conſumable Commodities*, which if we do but get our ſelves poſſeſs'd of, it is indifferent by what Hand they come to us. In ſuch Caſes, altho' it be moſt natural for the *Debtor* himſelf, or ſome other by his Order, to pay and perform according to Agreement, yet the *Creditor* ought to acquieſce, if any other Man diſcharges

Mr. BARBEYRAC's *NOTES on* Chap. XI. § I.

[1] *Tollitur omnis obligatio ſolutione ejus quod debetur,* Inſtit. *L.* 3. *t.* 30. *Quib. mod. tollitur oblig. princip.* *See* Digeſt. *Lib.* 46. *tit.* 3. *De Solut. & Liberat.*

[2] See what is ſaid *Lib.* 1. *Chap.* 1. § 19. upon the diſtinction of a communicable and incommunicable Power.

[3] As when one gives another a Garment, or a Cheſt, *&c.* to make, for it implies, that the Taylor or the Carpenter ſhould do the Work themſelves, or procure it to be done by ſome other of their Trade; unleſs it be agreed, That he that takes the Work ſhould do it himſelf, or there be ſome great Inequality between his own Ability and the other Workman's, whoſe Aſſiſtance he uſes, *Si cui locaverim faciendum, quod ego conduxeram, conſtabit habere me ex locato actionem.* Digeſt. *Lib.* 19. *tit.* 2. *Locati conducti, &c. Leg.* 48. *Irene. Inter artifices longa differentia eſt, & ingenii & naturæ, & doctrinæ, & inſtitutionis. Ideo ſi navem à ſe fabricandam quis promiſerit, vel Inſulam ædificandam, Foſſamve faciendam, & hoc ſpecialiter actum eſt, ut ſuis operis id perficiat; fidejuſſor ipſe ædificans, vel foſſam fodiens, non conſentiente ſtipulatore, non liberabit reum.* Lib. 46. tit. 3. De ſolut. & liberat. Leg. 3.

[a] See above in B. 1. c. 1. ſ. 19.

[4] for the *Debtor*; I ſay, for the *Debtor*, for whoſoever pays [5] upon his own Account, and not the *Debtor's*, does not releaſe him [a]. But in caſe of *Suretiſhip*, if the *Principal* diſcharges the Obligation, [6] he releaſes both himſelf and the *Surety*. Whereas if the *Surety* pays the Debt, the *Principal* is indeed releas'd from the *Creditor*, but at the ſame Inſtant becomes indebted to the *Surety* [7]; even altho' this Payment was made without his Knowledge.

II. But if a Man pays a Debt for another without either being his *Surety*, or having his Order for it, can he recover what he has thus paid of his own Head? In which Caſe we muſt diſtinguiſh whether he made this Payment againſt the other's Will, or only againſt his Knowledge. In the *former* Caſe 'tis plain [1] he cannot recover it; For how can any one impoſe an Obligation upon me againſt my Will, which ought to be founded upon Conſent? But becauſe no Body is preſum'd to throw his Money away, we ought to conſider further, whether he deſign'd what he thus paid [2] as a Gift to the *Creditor*, or not: If he did; the *Debtor* is not concern'd in it: But if he did not deſign it as a Gift; we ought to ſuppoſe, that he did it to transfer the *Creditor's* Right and Title againſt the *Debtor* upon himſelf. And altho' the *Creditor*, at the Payment, knew not of his Deſign, but receiv'd the Money as paid in the Name of the *Debtor*; yet if he who paid it cannot recover it of the *Debtor*, the *Creditor* ought in Equity either to refund what he thus receiv'd, and ſtill preſerve his Action againſt the *Debtor*, or elſe to give up his Title to the other; eſpecially if he may be preſum'd to have made his Payment in hopes it would have been acceptable to the *Debtor*. Upon which account the *Roman* Law allows him [3] an *Action for Buſineſs done* [b]: But ſince the *Debtor* may put in his Exceptions, that it was not acceptable to him, and that he is not willing to owe this other Perſon ſuch a Kindneſs, his beſt way would be to [4] ſuppoſe that his *Creditor* has given up his Title to him, and to deal with him accordingly. But if a Man ſhould lay out any Expence upon another's Goods, without his Knowledge, he [5] may keep the Goods as a Pledge till the Expences be repaid him, unleſs the Improvement is capable of being taken away from them.

III. No Payment or Satisfaction of any Obligation ought to be made but to the *Creditor* himſelf, or whom he has order'd to receive it in his Name [1]; and if I pay another by Miſtake, the *Creditor's* Title nevertheleſs ſtands good; but

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[4] If the Debtor does not at all conſent. *Nec intereſt quis ſolvat: utrum ipſe qui debet, an alius pro eo, liberatur enim & alio ſolvente, ſive ſciente ſive ignorante debitore, vel invito eo ſolutio fiat.* The Reaſon is, ſay the Lawyers, becauſe he can do better for the Perſon who is ignorant of what is done for him, than the contrary. *Solvere pro ignorante & invito cuique licet: cum ſit jure civili conſtitutum, licere etiam ignorantis invitique meliorem conditionem facere.* Digeſt. Lib. 46. tit. 3. De ſolut. & liber. Leg. 53.

[5] For as the *Roman* Lawyers ſpeak in the Law, here quoted by our Author, What a Man pays in his own Name does not free the Debtor, *Dig. l.* 5. *tit.* 3. *leg.* 31. Moreover, we ought to obſerve, that according to the Stile of the *Roman* Lawyers, which is very ſuitable, and followed by our Author in this Place; the Terms, Debt, Creditor, Debtor, and Payment, do not only reſpect the Obligation of thoſe who owe a Sum of Money, or ſome other Thing capable of an Equivalent, but in general, thoſe Engagements which we may be under upon any other Account, as in a Contract of Hiring, or Truſting, &c. *Creditorum adpellatione non hi tantum accipiuntur, qui pecuniam crediderunt, ſed omnes, quibus ex qualibet cauſâ debetur.* Digeſt. Lib. 50. tit. 16. De verborum ſignif. Leg. 11. *Credendi generalis adpellatio eſt: ideo ſub hoc titulo Prætor, & de commodato & de pignore edixit: Nam cuicunque rei adſentiamur alienam fidem ſecuti, mox recepturi quid ex hoc contractu, credere dicimur,* Lib. 12. tit. 1. *De rebus creditis, &c.* Leg. 1. *Solutionis verbo ſatisfactionem quoque omnem accipiendam placet, ſolvere dicimus eum, qui fecit, quod facere promiſit,* Lib. 50. tit. 16. de verb. ſignif. Leg. 176. *See alſo*, Lib. 46. tit. 3. de ſolut. & liberat. Leg. 54.

[6] So the Law is, *Item ſi reus ſolverit, etiam ii, qui pro eo intervenerunt, liberantur. Idem ex contrario contingit, ſi fidejuſſor ſolverit; non enim ipſe ſolus liberatur, ſed etiam reus.* Inſtitut. ubi ſupra. *In omnibus ſpeciebus liberationum etiam acceſſiones liberantur; puta adpromiſſores, hypothecæ, pignora: præterquam quod inter creditorem & adpromiſſores confuſione facta reus non liberatur.* Digeſt. Lib. 46. tit. 3. De Solut. & Liber. Leg. 43.

[7] See *Digeſt. Lib.* 17. *tit.* 1. *Mandati vel contra Leg.* 29. & 40.

Mr. BARB. *NOTES on* § II.

[1] Eſpecially if the Debt were not very lawful or clear. See Mr. DAUMAT's Civil Laws in their Nat. Order. *Part* 1. *Lib.* 4. *Tit.* 1. *Sect.* 3. § 2. We may alſo conſult the reſt of that Title, where the whole Matter of Payments is handled.

[2] But that is not to pay for another, and ſo this Caſe is nothing to the purpoſe.

[3] The Author refers us to this Law, *Cum pecuniam ejus nomine ſolveres, qui tibi nihil mandaverat, negotiorum geſtorum actio tibi competit. Cum ea ſolutione debitor à creditore liberatus ſit: niſi ſi quid debitoris interfuit, eam pecuniam non ſolvi.* Digeſt, Lib. 3. tit. 5. *De negotiis geſtis,* Leg. 43. But there he only is ſpoke of, who pays at the Requeſt of the Debtor; whereas our Author is treating of the Caſe where payment is made againſt the Will of him whoſe Debt is acquitted; for it is certain, as Mr. HERTIUS obſerves, that by the *Roman* Law no Man could have an Action for Buſineſs done, againſt a Man for whom he has paid againſt his Will. See *Digeſt.* Lib. 3. tit. 5. *De negotiis geſtis,* Leg. 8. § 3. as alſo, *Lib.* 17. *tit.* 1. *Mand. vel contra,* Leg. 6. § 2. Leg. 40. & Cod. Lib. 2. tit. 19. *De negotiis geſtis,* Leg. 24. Here is ſome Confuſion in the Senſe, which makes one ſuſpect that the Author, or Printers, have left out ſome Words, if not a whole Sentence. See the next Note.

[4] The Author ſhould have ſaid, *Againſt his Will, and his Prohibition,* and he hath written unawates, *pro ignorante,* for *pro invito*; and perhaps he put the one for the other, if there be not a greater Omiſſion here, for the Word *ignorantis* is met with again in the next Sentence, and we cann't ſee why the Author ſhould paſs clearly from the firſt Member of the diſtinction to the laſt, and not particularly treat of this.

[5] See *Lib.* 4. *Chap.* 13. § 13. I don't ſee well what this Period does here, having no relation almoſt to the Subject.

Mr. BARB. *NOTES on* § III.

[1] The Words of the *Digeſts* are, *Solutam pecuniam intelligimus utique naturaliter, ſi numerata ſit creditori. Sed & ſi juſſu ejus alii ſolvetur, vel creditori ejus, vel futuro debitori, vel etiam ei donaturus erat: abſolvi debet.* Digeſt. Lib. 46. tit. 3. *De Solutionibus, &c.* Leg. 49.

[a] *Nam quod quis ſuo nomine ſolvit, non debitoris, debitorem non liberat. D. L.* 5. *t.* 3. *l.* 31. *princip.*

[b] V. L. 3. t. 5. *De negotiis geſtis,* l. 43. & *ult.*

then I may recover of the other what I thus paid him [2]. The *Creditor* is here preſum'd to be capable of managing his own Concerns [3], and to have a perfect Underſtanding of the Affair in hand. For otherwiſe it would be to throw Money away, rather than to make Payment of it.

IV. Beſides, the very Thing muſt be paid that was bargain'd for, and not another [1] in its ſtead [a]; it muſt be paid entire, [2] not mangled; not partially, nor piecemeal; at the [3] Time and [4] Place appointed: eſpecially if it be the *Creditor*'s Intereſt to have it paid *here* rather than *there*, and at ſuch a *Time* rather than at another; for the Time is part of the Price. Yet any of theſe Conditions may be ſuperſeded by a new Agreement, which the *Creditor* is ſometimes forc'd to comply with, through the Poverty or Knavery of the *Debtor*, being willing to receive Part rather than nothing, at another Place rather than no where, and after the Time expired rather than never. Tho' ſometimes Equity requires that the Payment be put off and accepted in Parcels, when it cann't be perform'd immediately, or all at once. Thus the *Athenians* having made a Vow to ſacrifice to *Diana* as many Goats as they ſhould kill Enemies, when they could not procure ſo many in the whole Country, they decreed to ſacrifice 500 every Year [b]. Sometimes too there is no other Way of ending the Sute, than by forcing the Debtor to pay an Equivalent.

'Tis manifeſt that the Creditor only can remit the Debt, and not his Servant or Steward, without his expreſs Order. But if the Debtor's Steward tranſacts with the Creditor, and compounds for leſs than the whole, the Gain does not redound [5] to the Steward, but to his Maſter; and it would be Theft and purloining in the Steward, if after having compounded with the Creditor, he ſhould bring the whole Debt in his Accounts, and put what he got by Compoſition in his own Pocket.

The Creditor is ſuppos'd to be ſatisfied, if he accepts of a Pawn as Payment, or takes it in Truſt till Payment be made, or if it be ſold, and the Price receiv'd in lieu of the Debt. And if a Man owes Money by ſeveral different Bonds, and [6] pays part, the Payment ought in Favour to be applied to the moſt burthenſome [c]. The Way which *Vitellins* [d] took to pay his Debts was very ſcandalous; when he went to *Germany* he was ſo intangled, that his Creditors would ſcarce diſmiſs his Perſon upon any Security; who a little after, when he was made Emperor, and return'd to *Rome*, hid themſelves. But he order'd them to be brought before him, and told them, *That he had reſtor'd them Safety for their Money*, and demanded back the Bonds and Inſtruments of Contract.

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[2] The Words of the *Digeſts* are, *Indebitum eſt non tantum quod omnino non debetur, ſed & quod alii debetur, ſi alii ſolvatur.* Digeſt. Lib. 12. tit. 6. *De condictione indebiti.* Leg. 65. § 9.

[3] So we cann't pay a Pupil without the Conſent of the Guardian; *Pupillo ſolvi ſine Tutoris Auctoritate non poteſt.* Digeſt. Lib. 46. tit. 3. *De Solut. & Liberat.* Leg. 6.

Mr. Barb. *NOTES on* § IV.

[1] See the Law quoted above, *Chap.* 7. § 1. *Note* 3. So that he who owes Money cann't, unleſs the Creditor agree to it, make over any Debt to him in payment: *Eum, à quo mutuam ſumpſiſti pecuniam, in ſolutum nolentem ſuſcipere nomen Debitoris tui, compelli juris ratio non permittit.* Cod. lib. 8. tit. 43. *De Solution. & Liberation.* Leg. 16. See what hath been ſaid *Chap.* 7. § 3. *Note* 1. and § 6, 7. upon the ſeveral Species in which a Payment of Money lent, may be made. See Mr. Thomasius's Diſcourſe, *De pretio affection. in res fungibiles non cadente*, Chap. 2. § 3, *&c.*

[2] At leaſt, if (as the *Roman* Lawyers ſay) there be not any ground to conteſt the other part of the Debt, for in this Caſe the Judge may and ought to oblige the Creditor to receive what the Debtor offers him without prejudice to the reſt: *Quidam exiſtimaverunt, neque eum qui decem peteret, cogendum quinque accipere, & reliqua perſequi: neque eum, qui fundum ſuum diceret, partem duntaxat judicio perſequi. Sed in utraque cauſa humanius facturus videtur Prætor, ſi actorem compulerit ad accipiendum id, quod offeratur: cum ad officium ejus pertineat lites diminuere.* Digeſt. Lib. 12. tit. 1. *De rebus creditis*, Leg. 21. Moreover, as it ordinarily behoves the Creditor to be entirely ſatisfied, he is not obliged to be contented with part of Payment, unleſs it be otherwiſe agreed on, *Quia ſæpe & ſolutio & exactio partium, non minima incommoda habet.* Digeſt. Lib. 10. tit. 2. *Famil. erciſcundæ*, Leg. 3. See Lib. 22. tit. 1. *De uſuris*, &c. Leg. 41. § 1. Lib. 20. tit. 1. *De pignor. & hypoth.* Leg. 19. *Vinnius* on the *Inſtitutes*, Lib. 3. tit. 30. *princip.* Num. 5. *& ſeq.*

[3] The Words of the *Digeſts* are, *Is qui certo loco dare promittit, nullo alio loco, quam in quo promiſit, ſolvere, invito ſtipulatore, poteſt.* Digeſt. lib. 13. tit. 4. *De eo, quod certo loco dari oportet*, Leg. 9.

[4] The Time was one part of the Bargain. See *Chap.* 1. § 10 above. Yet Payment may be made before the Time, a longer Time being granted ordinarily for the advantage of the Debtor, that he may diſcharge his Debt with leſs Inconvenience to him. *Quod certa die promiſſum eſt, vel ſtatim dari poteſt: totum enim medium tempus ad ſolvendum promiſſori liberum relinqui intelligitur.* Digeſt. Lib. 46. tit. 3. *De ſolut. & liber.* Leg. 70. Yet ſometimes the Term is fixed for the Creditor's Benefit, and in that Caſe he may refuſe Payment. See *Digeſts*, Lib. 46. tit. 1. *De verb. oblig.* Leg. 122.

[5] Mr. Hertius quotes, *Digeſt.* 17. *Tit.* 1. *Mandati vel contra*, *Leg.* 10. § 3. *Leg.* 20. and *Lib.* 26. *Tit.* 8. *De adminiſtratione & periculo Tutor. vel Curat.* Leg. 58. *princ.* But in the laſt he treats of Tutors and Curators, who trade with their Pupils Money, and in the two firſt of them who take upon them a Commiſſion freely, ſo that they cann't be applied, but by an Analogy or Accommodation, to what our Author ſays of them who are the Servants or Stewards of the Debtor, *Miniſtri aut Diſpenſatores.*

[6] That is to ſay, If, for Example, of two Debts one be contended and the other clear, the Payment ought not to be made to the firſt, but the laſt. In like Manner Payment ought rather to be made of a Debt, which, if it be not diſcharged, will bring ſome Trouble on the Debtor, or a Condemnation to Damages and Loſs, or concerns his Reputation, than of another from which the like Conſequences are not to be feared, and ſo of a Debt with a Security rather than without one; of a Debt which is ow'd in his own Name, rather than where he is only a Security; rather of a Debt for which he has given a Pawn or a Mortgage, than upon his bare Promiſe: rather of a Debt for which the Time is come, than for that whoſe Time is not come; rather of an old, than new Debt; rather of a real and ſingle Debt, than of a Conditional. *Quotiens quis debitor ex pluribus cauſis unum debitum ſolvit: eſt in arbitrio ſolventis dicere, quod potius debitum voluerit ſolutum: & quod dixerit, id erit ſolutum. Poſſumus enim certam legem dicere ei, quod ſolvimus. Quotiens vero non dicimus id quod ſolutum ſit, in arbitrio eſt accipientis, cui potius debito acceptum ferat, dummodo in id conſtituat ſolutum, in quod ipſe, ſi deberet, eſſet ſoluturus, i. e. in id debitum, quod non eſt in controverſia aut in illud, quod pro alio quis fidejuſſerat, aut cujus dies nondum venerat. Et magis quod meo nomine, quam quod pro alio fidejuſſorio nomine debeo, & potius, quod cum pœna, quam quod ſine pœnâ debetur ----- potior habebitur cauſa ejus pecuniæ, quæ ſub infamia debetur ------ quæ ſub hypotheca, vel pignore contracta eſt ----- vetuſtior contractus ante ſolvetur.* Digeſt. Lib. 46. Tit. 3. *De ſolut. & liberat.* Leg. 1. 4, 97.

[a] Vid. *Martial*, L. 6. Ep. 30.

[b] Xenophon περὶ ἀναβ. τῦ Κύρε. p. 178. *Otherwiſe concerning the Time of Payment that of* l. 105. *of* D. B. 46. tit. 3. De ſolution. &c. *us'd to be obſerv'd.*

[c] *V. D.* ubi ſupra, *l.* 1, 4, 97.

[d] *V.* Xiphilin. *ad ann.* 69.

V. The Obligation is ſometimes releaſed by [1] Compenſation, which is by oppoſing Debt to Debt, or when a Man ceaſes to owe me, becauſe I apparently owe him as much of the ſame Kind. For ſince as much (eſpecially in conſumable Commodities) is the ſame, and where the Debts are mutual, if I receive, I muſt immediately refund as much: Therefore to abridge ſuch needleſs Payments, 'tis moſt convenient for each Party to pay himſelf by retaining his own [a] [2]; eſpecially ſince there is no Paying and Receiving without ſome Trouble in it: And it would be very imprudent in me to pay firſt when I need not do it, and ſo to put it in the other's Power to be behind hand in his Payment to me [b].

But this Compenſation does not take place, but between thoſe who are Creditors and Debtors to each other; for [3] if I have ſo much due to me from a third Perſon, I cannot obtrude that upon my Creditor for Payment, unleſs this Third and he be join'd in ſuch a Partnerſhip, as to have all their Obligations and Rights in common; for then their Goods may be look'd upon as one and the ſame Patrimony. Nay, if they be Partners in on Sort of Commodity only, [4] Compenſation will take Place, if one be my Debtor and the other my Creditor for that Commodity; for ſo far they are to be eſteem'd the ſame Perſon. So, if I owe Money to him who is my Debtor's Heir; or, if the Creditor of him whoſe Heir I am, is indebted to me, [5] Compenſation may take Place. And thus I may oppoſe Debt to Debt, altho' my Creditor is againſt it; for with what Face can he demand me to pay him, when he declines paying me?

Since this Way of Compenſation cannot be put in Practice, but between thoſe who are mutually in Debt to one another, it follows, that I cannot oppoſe to my Creditor what he owes another, [6] whoſe Agent I am, without his expreſs Orders. For tho' a Man intruſts me with the intire Management of his Affairs, I am not therefore to reckon his Things as my own, and by that Means make Compenſation for my Debts; for perhaps he had rather have another Man his Debtor than me. Nor if I truſt my Affairs to another, do I thereby take his Debts and Obligations upon my ſelf; thus *v. g.* ſhould *Caius* enjoin me to exact his Dues of *Seius*, whoſe Debtor I my ſelf am; neither can *Seius*, without *Caius*'s Leave, compenſate his Debt with mine, and under that Pretence refuſe Payment (for what has *Caius* to do with my Debt?) Neither can I take the Debt upon me inſtead of *Seius*. So one that is indebted to a Minor cannot make Compenſation of that which the [7] Guardian owes him: nor can the Guardian releaſe his Debt by oppoſing it to that which his Creditor owes the Minor [c].

On the other hand, if one that is bound for another, be call'd upon for the Debt, [8] he may oppoſe by Way of Compenſation, not only what the Creditor owes to him, but alſo what he owes to the principal Debtor; and this even againſt the Knowledge and Will of the Principal: For ſince the Creditor cannot refuſe ſuch a Compenſation from the Principal himſelf, why ſhould not the Surety have the Advantage of it? And it would not be fair in the Principal to be againſt it, ſince he is oblig'd to repay what the Surety thus lays down for him.

VI. But in conſumable Commodities Compenſation does not regularly take place, but in thoſe of the [1] ſame Kind, and that too, not 'till the Time of Payment is come, or [2] paſt [d]; and therefore

Mr. BARB. *NOTES on* § V.

[1] The Words of the *Digeſts* are, *Compenſatio eſt debiti & crediti inter ſe contributio,* Digeſt. Lib. 16. Tit. 2. *De compenſationibus,* Leg. 1. *Si cauſa, ex qua compenſatur, liquida ſit, & non multis ambagibus innodata, ſed poſſit judici facilem exitum ſui præſtare,* Cod. lib. 4. Tit. 31. Leg. 14. § 1.

[2] The *Digeſts* ſo direct, *Unuſquiſque creditorem ſuum, eundemque debitorem, potentem ſummovet, ſi paratus eſt compenſare. Ideo compenſatio neceſſaria eſt, quia intereſt noſtra potius non ſolvere, quam ſolutum repetere,* Digeſt. *ubi ſupra,* Leg. 2, 3. *Dolo facit, qui petit quod redditurus eſt,* lib. 44. tit. 4.

[3] The *Digeſts* ſo order, *Creditor compenſare non cogitur, quod alii quam debitori ſuo debet: quamvis creditor ejus pro eo, qui convenitur ob debitum proprium, velit compenſare,* Digeſt. *de compenſationibus,* Leg. 18. § 1. See alſo Leg. 16. *princip. & Cod.* Lib. 4. Tit. 31. *De compenſationibus,* Leg. 9.

[4] So the *Digeſts* ſpeak, *Si duo rei promittendi ſocii non ſint: Non proderit alteri, quod ſtipulator alteri reo pecuniam debet,* Digeſt. Lib. 45. tit. 2. *De duobus reis conſtituendis,* Leg. 2.

[5] This hath Place by the civil Law, when the Heir will not enter upon the Inheritance, till an Inventory is made, becauſe he will not repreſent the Dead in all Things, but will only be obliged to expend ſo much as may be the Value of the Inheritance. See *Cob. Lib. 6. Tit.* 30. *De Jure deliberandi, Leg.* 31. § 4, 9. Upon the whole, a Compenſation is made at all Times, when the Debtors or Creditors come into the Rights or Obligations of a Third.

[6] For then is he *Procurator in rem ſuam,* as the *Roman* Lawyers ſpeak. *In rem ſuam Procurator datus, poſt litis conteſtationem, ſi vice mutuâ conveniatur, æquitate compenſationis utetur.* Digeſt Lib. 16. Tit. 2. *De compenſat.* Leg. 18.

[7] So the *Digeſts, Id quod pupillorum nomine debetur, ſi Tutor petat, non poſſe compenſationem objici ejus pecuniæ, quam ipſe Tutor ſuo nomine adverſario debet.* Digeſt. ibid. Leg. 23.

[8] The *Digeſts* ſay, *Si quid a fidejuſſore petatur, æquiſſimum eſt eligere fidejuſſorem, quod ipſi, an quod reo debetur, compenſare malit: ſed & ſi utrumque compenſare velit, audiendus eſt.* Ibid. *Leg.* 4. See the precedent Law.

Mr. BARB. *NOTES on* § VI.

[1] In Reality, the Compenſation ought to anſwer the Debt, for the Debtor is obliged to render the Thing in that Manner. *Cum quid mutuum dederimus, etſi non cavimus, ut æquè bonum nobis redderetur, non licet debitori deteriorem rem, quæ ex eodem genere ſit, reddere: veluti vinum novum pro vetere. Nam in contrahendo, quod agitur pro cauto habendum eſt. Id autem agi intelligitur, ut ejuſdem generis & eadem bonitate ſolvatur.* Digeſt. Lib. 12. tit. 1. *De rebus creditis, &c.* Leg. 3. As to the Quantity, altho' the Debt be on each ſide unequal, ſo that a Compenſation cann't be fully made, yet the Compenſation may make the Debt leſs, and ſo acquit him of the greatneſs of it. *Si conſtat pecuniam invicem deberi, ipſo jure pro ſoluto compenſationem haberi oportet ex eo tempore, ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, ejuſque ſolius, quod amplius apud alterum eſt, uſuræ debentur, ſi modo petitio earum ſubſiſtit.* Cod. Lib. 4. tit. 31. *De compenſationibus,* Leg. 4.

[2] So the *Digeſts* ſpeak, *Quod in diem debetur, non compenſabitur, antequam dies venit, quanquam dari oporteat.* Dig. Lib. 16. tit. 12. *De compenſat.* Leg. 7.

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[a] *V.* Grot. *l.* 3. *c.* 19. *ſ.* 15, &c.

[b] *L.* 2, 3. *D. d. l. Dolo facit, qui petit quod redditurus eſt.*

[c] *V. D.* ibid. *L.* 23.

[d] *V. l.* 7. *D. h. t.*

Things of a different Sort or Quality cann't be paid by Compenſation, as a Buſhel of Wheat for a Buſhel of Oats, or a Hogſhead of *Rheniſh* for a Hogſhead of *Port* Wine; nor Things of a different Species, as this Horſe for that Ox; nor of a different Kind, as a Sheep for a Gooſe; nor a Species for a Thing indefinite of the ſame Kind, or for an indeterminate Quantity, as *Bucephalus* for a Horſe, or a Veſſel of Oyl. Yet the *Roman* Lawyers admit of Compenſation, where the Particulars are not aſſign'd, but the ſame Sort and Quality is owing on each ſide, as if I had promis'd you a Horſe in general, and you happen to be Executor to one that leaves a Horſe to me in Legacy. But, yet even in the former Caſes, each Party may rate their Debt, and then pay them by Compenſation. And yet, where Debts are thus reciprocal, the Obligation is rather [3] ſuſpended, than taken away, by withholding what I owe another, till he pays what he owes me. But Work for Work, or Work for Goods, will not admit of Compenſation at the very Inſtant that it ought to be perform'd; for that would fruſtrate the very [4] End and Deſign of ſuch Contracts.

But if each Party releaſe the other, the Obligation ceaſes upon another Principle, *viz. Mutual Diſagreement*; ſo alſo if I ceaſe to be oblig'd, becauſe another, who ought firſt to perform his Part, omitted it, it is not by reaſon of Compenſation, but becauſe the Condition, upon which the Obligation was founded, does not appear. But if my Work has been neglected by the Party that had undertaken it, I may rate it, and ſo bring it into Compenſation. Nay, I can oppoſe to a Debt an equivalent Damage, or a Fine adjug'd to me for any Injury done by my Creditor. But if two Perſons be at Law, and while the Cauſe is depending, ſtrike up a Bargain, neither can oppoſe the Law-ſute, or the Charges of it, to the other [a]; *v. g.* ſuppoſe I am at Law with another for an Eſtate, and during the Sute ſell him a Houſe, he cann't impute to me as Payment the Eſtate, or the Expences he has been at about it; for the Eſtate does not as yet appear to be his, and the Nature of the Thing ſhews, that the Bargain was made without any Regard to the Cauſe depending.

As for that Sort of Compenſation, which cancels former Favours by ſubſequent Injuries, *Seneca* diſcourſes largely of it [b]. So alſo equal Injuries may, by Compenſation [5], be put up on both ſides, provided the Right of the Magiſtrate be not infringed.

VII. The Obligation ceaſes alſo when the Creditor, or he who has a Title to it, forgives it; for 'tis evident any Man may recede from his own Right, and when the Right has been made over to another, there too the Obligation ceaſes upon that other's forgiving it. And as at firſt I cannot ſtand oblig'd, if the other Party refuſes to accept of it; ſo neither can I continue bound, if he thinks fit to cancel the Bond. But this only in Caſe no Third Perſon is injur'd by it; for otherwiſe he alone cannot releaſe me, altho' I was immediately oblig'd to him only.

This Releaſe is perform'd either expreſly, or tacitly; to the former belongs what the Roman Law calls [1] *Acceptilatio*, an Acquittance or Diſcharge, by which the Perſon acknowledged himſelf to have receiv'd what indeed he had not; as alſo the [2]

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[3] This is a Term borrowed from the *Roman* Law, which allows Retention in ſeveral Caſes, where the Things due on both ſides are not of a ſort. See CUJACIUS's Obſervat. viii. 2. xv. 12. xviii. 10. *Vinnius* upon the *Inſtitutes*, Lib. 4. tit. 6. *De actionibus*, § 13. and Mr. NOODT's *Probabilia Juris*, Lib. 3. Chap. 9.

[4] For Actions are not capable of being put in the place one of another, as Things are; they cann't be reduc'd to an Eſtimation reſpectively, ſo that it be all one to a Perſon, whether he do what he hath promiſed or not, provided he be diſpenſed with, to do or give what he hath promiſed in his Turn; and likewiſe it be indifferent either to receive the Thing it ſelf which is due, or another of equal Value. So when any one engages to do any thing for us, we can depend upon nothing, becauſe he'll endeavour always to evade his Engagements under a pretence of ſome Compenſation due to him from us, and for which he will labour to get quit with us.

[5] The *Digeſts* thus ſpeak, *Si duo dolo malo fecerint, invicem de dolo non agent.* Digeſt. Lib. 4. tit. 3. *De dolo malo*, Leg. 36. *Viro atque uxore mores invicem accuſantibus, cauſam repudii dediſſe utrumque pronunciatnm eſt. Id ita accipi debet, ut ea lege quam ambo contempſerunt, neuter vindicetur. Paria enim debita mutua penſatione diſſolvuntur, Lib. 24. tit. 3. Leg.* 39. It appears by the firſt Law, That if in an Exchange, for Example, I have given a blind Horſe, and the other hath given me a lame one, we are quit. In like manner, If a Man hath ſtolen from another, and the other hath ſtolen from him again, there's nothing can be demanded from each other, provided that the Things ſtolen were of equal Value. *Quotiens ex maleficio oritur actio, ut puta ex cauſâ furtivâ cæterorumque maleficiorum, ſi de ea pecuniarie agitur, compenſatio locum habet*, Digeſt. Lib. 16. *De compenſationibus*, Lib. 10. § 2. The other Law imports, That if an Husband being deſirous to be divorced from his Wife, for her ſcandalous Behaviour, is accuſed by her, and convicted of the ſame Faults, or ſuch as are as contrary to conjugal Fidelity as thoſe he blames her for, neither of them may pretend to any Advantage to diſſolve their Marriage. This is juſt, but if Adultery be committed on both ſides, the Woman's Crime affords a much ſtronger Reaſon for their Separation: See *Chap.* 1. of the following Book. But 'tis not the ſame with puniſhments inflicted by the Laws, which are only ſome pecuniary Fines laid on the Parties. When two Perſons have committed a like Crime one towards the other, the Magiſtrate hath nevertheleſs a Right to puniſh them both. See *Digeſt. lib.* 48. *tit.* 5. Ad legem Juliam de Adulteriis coercendis, *Leg.* II, § 4. & XIII. § 5.

Mr. BARB. *NOTES on* § VII.

[1] The Law is, *Item per acceptilationem tollitur obligatio. Eſt autem acceptilatio, imaginaria ſolutio. Quod enim ex verborum obligatione Titio debetur, ſi id velit Titius remittere, poterit ſic fieri, ut patiatur debitorem hæc verba dicere: Quod ego tibi promiſi habeſne acceptum? & Titius reſpondeat, Habeo. Quo genere, ut diximus, tantum eæ ſolvuntur obligationes, quæ ex verbis conſiſtunt, non cæteræ*, Inſtit. Lib. 3. Tit. 30. § 1.

[2] The Words of the *Digeſts* are, *Eſt autem prodita ſtipulatio, quæ vulgo Aquiliana adpellatur, per quam contingit, ut omnium rerum obligatio in ſtipulatum deducatur, & ea per acceptilationem tollatur. Stipulatio enim Aquiliana renovat omnes obligationes.* Ibid. § 2.

[a] *As* Grotius *well obſerves, l.* 3. *c.* 19. *ſ.* 19.

[b] *Epiſt.* 81. *& de Beneficiis, l.* 6. *c.* 4, &c.

Stipulatio Aquiliana, which by a Sort of Novation, brought the Debtor to Articles of Agreement, and then releas'd him by a Diſcharge; all which tedious Forms and Circumſtances the Law of Nature knows nothing of, but makes the Obligation to ceaſe upon the bare Conſent of the Party ſignified [3].

Beſides, the Obligation is preſum'd to be [4] remitted, if I deſignedly deliver up (not in Truſt, or ſuch like) the Inſtruments or Deeds, without which the Debt cannot be made out [a]; but if I have ſeveral Inſtruments, and each of them is capable of proving the Debt, then [5] the Obligation is not ſuppos'd to be cancelled upon the Delivery of one only.

As for what the *Roman* Law obſerves, that by Delivery of the Deeds the Creditor is judg'd to enter tacitly into Compact not to demand the Debt; that Nicety is unknown to the Law of Nature, which ſuppoſes the Obligation cancell'd, not only by real Payment, but by the bare Remiſſion of it.

The Obligation is ſuppos'd to be tacitly forgiven, if the Creditor, directly or indirectly, hinders the Diſcharge of it: Thus if I bargain with a Man to do any certain Work, and am my ſelf to call upon him when I would have him perform it, my not calling upon him is preſum'd to be a Releaſe, as is alſo my ſubſtituting another to do it for him.

VIII. But as the former Methods take place, where one Party only is oblig'd; ſo where both are concern'd, if nothing be yet perform'd, the Obligation may ceaſe upon each Party's diſſenting and receding from the Bargain [1]; for 'tis natural that the contraty to that which cauſes the Obligation ſhould be capable of making it void, provided it be not of ſuch a Nature, as, when once contracted, never to be reſcinded; for no doubt a poſitive Law may, in certain Caſes, forbid that what has been once agreed upon ſhould be [2] retracted, altho' nothing yet be perform'd in it. But if part has been perform'd, and one Party done ſomething of his Duty, then 'tis plain [3] bare Diſſent is not ſufficient to take away the Obligation; which in this Caſe cannot be cancell'd, unleſs he who perform'd releaſes the other, or has amends made him ſome other Way [b].

IX. Moreover, an Obligation is releaſed, or rather broke off, by the Perfidiouſneſs of either Party; ſo that if one does not perform his Part, neither is the other oblig'd to make good his [c]: For when a Man takes upon him any Duty, not abſolutely and *gratis*, but upon the Proſpect of the other's doing ſomething on his ſide, the Obligation to make good his Undertaking is only conditional, as if he had ſaid, *I'll do this, in caſe you will firſt do that*. Now whatever is founded upon a Condition, falls of Courſe, if the Condition does not appear [1]. And therefore the ſuperſtitious Exactneſs of the *Indian*, if it be true, was more than he was oblig'd to; who, when another had taken away his Wife againſt all Right and Reaſon, would not however break off with him, becauſe he had taken a ſolemn Oath, that he would never, upon any Account, do any harm [d]. But this [2] holds only where the Non-performance lies on his ſide, who ought to perform firſt. How far, or whether the Fear, leſt, after I have done my part, the other ſhould not perform his, frees me from the Obligation, has been diſcourſed of before [e].

But if one Party has performed in part, and the Contract happens to be broke off before Completion, how ſhall he have Right done him? In this Caſe we muſt diſtinguiſh according to the va-

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[3] Whereas the *Roman* Lawyers affirm, That there is here a difference between real Contracts, Contracts of bare Conſent, Contracts by Writing, and verbal Contracts, or Stipulations, (ſee *Chap.* 3. § 6. above) there are none but the laſt, according to them, to which Acceptilation can be applied, as appears by this § of the *Inſtitutes*, *Quo genere, ut diximus, tantum eæ ſolvuntur obligationes, quæ in verbis conſiſtunt, non etiam ceteræ.*

[4] See the Law of the *Digeſts*, quoted above, *Lib.* 3. *Chap.* 6. § 2. *Note* 7.

[5] Several able Lawyers are of another Opinion, and that with Reaſon, as Mr. HERTIUS ſaith; for they draw Conſequences from what hath been done, rather than what hath not, and they preſume, that every wiſe Perſon will not do any thing but will have ſome Effect, and they cann't ſee what he can propoſe to himſelf, who gives up an obligatory Note (ſuppoſing that there be good Proof that the Bill was fairly given up) but that every Man ſhould believe that the Creditor would forgive the Debt, unleſs the contrary can be made fully to appear.

Mr. BARB. *NOTES on* § VIII.

[1] So the *Inſtitutes* direct, *Eæ obligationes, quæ conſenſu contrahuntur, contrariâ voluntate diſſolvuntur. Nam ſi Titius & Seius inter ſe conſenſerint, ut fundum Tuſculanum emptum Seius haberet centum aureis; deinde re nondum ſecutâ, id eſt, neque pretio ſoluto neque fundo tradito, placuerit inter eos ut diſcederetur ab ea emptione & venditione, invicem liberantur.* Inſtit. *ubi ſupra*, § 4.

[2] In Caſe of Marriage, for Example.

[3] As if in a Bargain of Sale, the Buyer hath already paid for the Goods, and hath not receiv'd them, or the Seller hath delivered his Goods, but hath not taken the Money. *Sed non poterimus eadem ratione uti poſt pretium ſolutum emptione repetita, cum poſt pretium ſolutum infectam emptionem facere non poſſumus.* Digeſt. Lib. 18. tit. 5. *De reſcindenda venditione*, &c. Leg. 2. *Ab emptione, venditione, locatione, conductione, cæteriſque ſimilibus obligationibus, quin integris omnibus conſenſu eorum, qui inter ſe obligati ſunt, recedi poſſe, dubium non eſt. Ariſtoni hoc amplius videbatur, ſi ea, quæ me ex empto tibi præſtare oporteret, præſtitiſſem*, &c. *conſentiremus nè quid tu mihi eo nomine præſtares*, Lib. 2. tit. 14. *De Pactis*, Leg. 58.

Mr. BARB. *NOTES on* § IX.

[1] Λύουσι γὰρ σπονδὰς οὐχ οἱ ἀμυνόμενοι, ἀλλ᾽ οἱ πρότεροι ἐπιόντες. Not thoſe that defend themſelves, but thoſe who are the Aggreſſors break the Truce. *Thucyd. Lib.* 1. *Chap.* 123. Edit. *Oxon.*

[2] So the Law is, *Nec adverſario tuo tranſactione uti concedendum eſt; niſi ea, quæ placita ſunt, adimplere paratus ſit*, Cod. Lib. 2. tit. 3. *De pactis* Leg. 22. *Fruſtra ſibi fidem quis poſtulat ab eo ſervari, cui fidem à ſe præſtitam ſervare recuſat.* Decretal. Lib. 6. tit. ult. *De regulis Juris*, Leg. 75. We know the common Maxim, *Frangenti fidem fides frangatus eidem.*

[a] *Lib.* 2. *t.* 14. *L.* 2. *D. de Pactis.* [b] *V. l.* 58. *D.* de Pactis, ubi ſupra. [c] *V. Grot. L.* 3. *c.* 19. *ſ.* 14. [d] *In Philoſtr. L.* 3. *c.* 9. *de vita Apollon. Tyanæi.* [e] *B.* 3. *c.* 6. *ſ.* 9.

riety of Circumſtances. For if I have perform'd what I ought, and the other refuſes to perform his part, I have a Right to force him to it by any lawful Means: But if after having perform'd part, I begin to be tired, and neglect to make an end of it, I cannot oblige that other to make any Allowance for my partial imperfect Performance, 'till I finiſh the whole according to the Agreement; nor can that trite Saying be objected here, that *no one ought to grow rich at the Loſs of another*, for no Regard is to be had to the Loſs which a Man by his own Fault brings upon himſelf [3]. And if he whom it concerns to have my part of the Covenant fulfilled, is the Occaſion why it is not, it is the ſame thing to me as if it was fulfilled. Nor if he ſhould afterwards repent of his Breach of Faith, and be willing to compleat his Contract, ſhall I be obliged to comply with it. For one Violation entirely breaks off the Contract, and frees the other from his Obligation; thus, ſhould I hire a Servant for a Year, and pay him his Wages beforehand, and, for no Fault of his, ſhould turn him off before the End of the Year, I ſhould not be able to oblige him to return me part of the Wages proportionable to the Remainder of the Time. Nay, if each Party has perform'd equally, yet even then, neither can break off the Bargain before the Time appointed: and if one ſhould give back, the other would have a Right to force him to compleat it; or to make as much Amends, as it was his Intereſt to have the Compact exactly perform'd.

X. Obligations alſo expire, when the [1] Perſon, in whom they are founded, changes [2]. Thus the Magiſtrate, having promiſed Protection to the Subject, is no longer oblig'd to it, than he continues in his Office: and the Subject having ſworn Allegiance to the Magiſtrate, is freed from the Obligation, if either *he* ceaſes to be a Subject, or the other to be a Magiſtrate. But ſuch an Alteration in the Subject Matter as would have prevented the Obligation, had it exiſted at the making of it, will not be ſufficient to diſſolve it afterwards, provided the Party be not thereby render'd incapable of performing it [3]. For unleſs Proviſion had been made at firſt for ſuch Accidents, the Right, which was irrecoverably given, ſhall continue firm, altho' perhaps *the other* be a little burthen'd by it. For he enter'd into Contract freely and of his own accord, and may thank himſelf for not having foreſeen thoſe Inconveniences, that might probably have been prevented. Thus when [4] a People have given up their Liberties to an Arbitrary Power, altho' afterwards they change their Minds, and ſhew a greater Inclination for another Form of Government, yet they cannot therefore ſhake off their Allegiance. And thus many, if they had known the Inconveniences of a married State, would never have embrac'd it; who yet having enter'd into the Bond, whatever happens, [5] muſt endure it.

XI. Time puts a [1] Period to thoſe Obligations which were limited to a Day; and if the Parties deſire to have them continued, they muſt covenant again *de novo*, which needs not always be done expreſly, but may ſometimes be tacitly perform'd [a]. But ſuch an Obligation as is void after ſuch a Time, and yet has no room to exert it ſelf in before the Time expired, is abſurd: As if I ſhould make my ſelf indebted to you 100*l.* for three Years, yet ſo as that you ſhall have no Right to demand it before the Time be lapſed; for vain is the Obligation that has no Effect before it expires, nor leaves any behind it after.

But it is another Thing, if I covenant, That unleſs you demand it within the Compaſs of three Years, it ſhall not be due: For that will be a Condition annex'd to the Obligation, which not ap-

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[3] The Words of the *Digeſts* are, *Qui operas ſuas locavit, totius temporis mercedem accipere debet, ſi per eum non ſtetit, quo minus operas præſtat.* Digeſt. Lib. 19. tit. 2. *Locati, conducti*, Leg. 38. *princip.* See alſo *Leg.* 19. § 9, 10.

Mr. Barb. *NOTES on* § X.

[1] See the next Chapter § 20. at the end. Mr. Hertius quotes a Law here, in which it is ſaid, That if one make a Promiſe to any one to give ſo much, either to thee or to another, and that other comes to be adopted, or baniſhed, or carried into Slavery, or changes his Condition in any other Manner, the Engagement is null, as to him, becauſe it contains a tacit Agreement or Condition, that he remain in the ſame State. *Cum quis tibi aut Titio dari ſtipulatus ſit, magis eſſe ait, ut ita demum recte Titio ſolvi dicendum ſit, ſi in eodem ſtatu maneat, quo fuit cum ſtipulatio interponeretur. Cæterum ſive in adoptionem, ſive in exilium ierit, vel aqua & igni ei interdictum, vel ſervus factus ſit: non recte ei ſolvi dicendem, tacite enim ineſſe hæc conventio ſtipulationi videtur, &c.* Digeſt. Lib. 46. tit. 3. Leg. 38. But ſuch a Change of State hath no Connexion with ſuch a Promiſe, but by Reaſon of the Niceties of the Civil Law.

[2] So a Perſon in Commiſſion, after his Commiſſion is expired, is not obliged any longer to him, whoſe Affairs he before was engaged to manage. It is the ſame with a Tutor or Guardian, in reſpect to his Pupil's Affairs. See *Digeſts, Lib.* 14. *tit.* 3. De inſtitoriâ Actione, *Leg.* 20. *Cod. Lib.* 5. *tit.* 37. De Adminiſtratione Tutorum vel Curatorum, &c. *Leg.* 26. and *tit.* 39. *Quando ex facto Tutoris, vel Curatoris Minores agere, vel conveniri poſſunt*, Leg. 1. Mr. Hertius quotes theſe Laws.

[3] See what Mr. Bayle ſays, in his Anſwer to the *Queſtions of a Provincial, Tom.* 1. *Chap.* 60. upon this Queſtion, Whether *Gebhard Truchſes* may juſtly take Poſſeſſion of the Archbiſhoprick of *Cologne*, ſeeing he has been married?

[4] This cann't happen in the Life of the firſt Prince, unleſs he has exceſſively abuſed his Power, and in that Caſe he from whom he keeps it hath a Right to put him out: but if after ſome Generations, the Alteration of the State, or the Genius of the Nation requires another Form of Government, why may not the People introduce it? The Publick Good, for whoſe Safety it is, or ought to be eſtabliſhed, makes here a tacit Condition or Exception, which obliges us not to judge of the Engagement of a People in a Body, with Relation to the Eſtabliſhment of a Sovereign Power, after the ſame Manner as we regulate the Engagements of private Perſons one to another. We ſhall ſpeak of the Grounds of my Aſſertion in another place.

[5] See the famous Mr. Bayle's Anſwer to the *Queſt. of a Prov. Tom.* 2. *p.* 40.

Mr. Barb. *NOTE on* § XI.

[1] See *Lib.* 7. *Chap.* 6. § 15. following. This Author, in his Abridgment *of the Duties of a Man and Citizen, Lib.* 1. *Chap.* 16. § 7. adds this Reſtriction, *Provided, that during the Time agreed on, he was in a Condition of requiring the Performance of the Engagements of the other Party.*

[a] Vide *L.* 14. *t.* 2. *l.* 13. *ſ. ult. D. Locati*, &c.

pearing, the Obligation will ceaſe; Thus 'tis uſual for a *Surety* to bind himſelf for ſuch a Term only, to oblige the *Creditor* to demand his Money betimes, and while the *Debtor* is able to pay, leſt otherwiſe he ſhould remain bound for ever.

XII. By *Death* thoſe Obligations expire, which were founded in the Perſon of the deceaſed; for the *Subject* being gone, the *Accident* muſt neceſſarily follow, and the Performance be render'd [1] impoſſible in Nature. But yet in *Japan* the *Bonzy* perſuade Men, That *thoſe who give them Money here ſhall receive ten-fold in the other World*: And upon this Account give their *Creditors* a Note under their Hand, which they keep carefully, in order to be buried with them [a]. But generally the Obligation that lay upon the deceaſed is communicated and continued to the Survivors; and this, either when the Survivor takes it upon him, of his own accord to preſerve the Reputation of the deceaſed, or for other Reaſons; or when the Goods of the deceaſed, being made over to the Heir [2] the Incumbrances alſo go along with them.

But if a Man dies, and leaves not enough to ſatisfy his Debt, the Creditor's Action ſeems to die with him; for what can any one do to a dead Carcaſe [3]? Tho' among the *Egyptians*, the *Creditors* uſed to bury the Bodies of their *Debtors* in their Houſes, which afterwards the Heirs of the deceaſed, if they were able, redeemed and interred honourably. Among whom too it was uſual for the Children to pawn their Parents dead Bodies; but if they did not redeem them again, they were treated with the greateſt Ignominy, and after Death were denied Burial [b].

XIII. By *Delegation* a Man ſubſtitutes his *Debtor* to his *Creditor* to make Payment for him [1]; or I make over to my *Creditor* the Debt another owes me: And here the *Creditor's* Conſent is neceſſary, but not the Conſent of the [2] third *Debtor*, whom, in this Caſe, I can make over unknown to him, and againſt his Will: For 'tis the ſame thing to whom a Man pays, but not the ſame from whom he is to demand a Debt.

XIV. There is no need to ſay much of *Confuſion*; for ſince the ſame Man cannot be his own *Creditor* and *Debtor*, it follows, if a Man becomes Heir to his *Debtor*, his Action ceaſes, [1] not finding an Object to exert it ſelf upon.

XV. [1] *Novation* ſeems to belong peculiarly to the poſitive [2] Civil *Law*, and not to the *Law* of *Nature* and *Nations*; for old Obligations may be alter'd by Conſent of Parties, as ſuppoſe that the Loſs of a Thing, thro' the Delay of the *Debtor*, ſhould not be imputed to him, that no Penalty or Uſury be demanded for Delay, that Pledges be reſtored, Sureties releas'd, the *Creditor*, for the future, declaring himſelf willing to depend entirely upon the Credit of the *Debtor*; but thoſe that deal according to the Simplicity of the *Law* of *Nature*, need not here ſuppoſe a new Obligation ſuper-induc'd upon the former; for indeed nothing is here tranſacted, but only the *Creditor* gives up part of his Right, or ſeveral Pretenſions are blended into one: But that one Action ſhould enjoy

Mr. BARB. *NOTES on* § XII.

[1] Vide *Val. Max. Lib.* 2. *Chap.* 6. *ſ.* 10. and *Pomp. Mel. Lib.* 3: *Chap.* 2. ſays of the Old *Gauls*; *The Management of their Concerns, and the Demand of their Debts were put off to the other World.*

[2] See *Lib.* 3. *Chap.* 1. § 11. and *Lib.* 4. *Chap.* 10. § 13. above.

[3] To which the Law of *Solon* has Regard, which forbids the Dead to be uſed contumeliouſly. Vid. *Plut. Solone, p.* 189. Vid. *Lib.* 47. *tit.* 10. *Lib.* 1. *ſ.* 4, 6. and *Lib.* 27. D. de injuriis, &c.

Mr. BARB. *NOTES on* § XIII.

[1] *Delegare eſt vice ſua alium reum dare creditori, vel cui juſſerit,* Digeſt. 46. tit. 2. *De novationibus, & delegationibus,* Leg. 11.

[2] It is by the *Roman* Law, *Delegatio debiti, niſi conſentiente, & ſtipulante promittente debitore, jure perfici non poteſt.* Cod. Lib 8. tit. 42. *De Novat. & Delegat.* Leg. 1. But our Author puts another Senſe upon the Term *Delegation*, than the Lawyers do; for he underſtands by it, the Tranſlation or Reſignation of a Debt, which in the *Roman* Law is looked upon as a kind of Sale, which a Man may make without the Conſent of the Debtor. *Nominis autem venditio, & ignorante, & invito eo, adverſus quem actiones mandantur, contrahi ſolet.* Cod. ibid. See alſo what Mr. HERTIUS ſays here, and Mr. WEBER, Profeſſor alſo at *Gieſſen*, in his Notes upon the *Abridgment*, *De Offic. Hom. & Civ.* printed in 1710. *Lib.* 1. *Chap.* 16. § 9.

Mr. BARB. *NOTES on* § XIV.

[1] So the *Digeſts* affirm, *Aditio Hæreditatis nonnunquam jure confundit Obligationem, veluti ſi creditor debitoris vel contra debitor creditoris adierit Hæreditatem.* Digeſt. Lib. 46. tit. 3. *De ſolution. & liberat.* Leg. 95. § 2. "Confuſion happens "there, where Right and Obligation meet, and joining in the ſame Perſon vaniſh by that means." The Examples produced by Mr. HERTIUS to ſhew that the Notion of Confuſion is of a more large Extent, concern only the Deciſions of the *Roman* Law, about which we may conſult Mr. TITIUS's *Jus privatum Romano-Germanicum, Lib.* 5. *Chap.* 16. § 9.

Mr. BARB. *NOTES on* § XV.

[1] The *Roman* Laws mean by it, an Act by which the Creditor and Debtor, without any new Cauſe change the Nature of a Debt, by adding ſome new Obligation to the old. *Novatio eſt prioris debiti in aliam obligationem, vel civilem, vel naturalem, transfuſio atque tranſlatio: hoc eſt, cùm ex præcedenti cauſa ita nova conſtituitur, ut prior perimatur. Novatio enim à novo nomen accepit, & à nova obligatione.* Digeſt. Lib. 46. tit. 2. *De novationibus, & delegationibus,* Leg. 1.

[2] Mr. TITIUS, *Obſerv.* 415. *on Puſendorf*, maintains the contrary; for he ſays, That Novation, as every other lawful Act, is made by the mutual Conſent of Parties, and in Conſequence of that Liberty which all Men naturally have, to determine and change, as they ſee fit, their Engagements one to another. See what Mr. HERTIUS ſays about it.

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[a] Vide *Bern. Varen. de relig. Japan. p. m.* 35.

[b] Vide *Diod. Sic. L.* 1. *c.* 92, 93. *Lucian. de luctu, p.* 306, 307. *Herod. Euterpe.*

one Privilege more than another, is entirely owing to ſome poſitive Law; for in the *Law* of *Nature* thoſe Things that are equally due, may be equally demanded. But, as for what the [3] *Roman* Law delivers concerning ſuch a *Novation* as is got by a Conteſt at Law (and which they call *neceſſary*, as they call the other *voluntary*) may be apply'd in ſome Reſpects to the *Law* of *Nature*; for he that [4] caſts his Adverſary, has an Action againſt him for what the Court adjudges, let the Merit of his former Cauſe be what it will: So when any Controverſy is decided by War, let that be as it will, after the War is at an end, not only the firſt Pretenſions may be demanded, but alſo that which was determined by the Peace [5].

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[3] In the *Digeſts*, *Aliam cauſam eſſe novationis voluntariæ, aliam judicii accepti, multa exempla oſtendunt.* Digeſt. *ubi ſupra*, Leg. 29.

[4] *Judicati actio.* See *Cod. Lib.* 7. *tit.* 54. De uſuris rei judicatæ, *Leg.* 3.

[5] To theſe ſeveral Ways of entring into an Obligation, our Author might have added another, *viz.* When a Thing which was due in Specie, as our Lawyers ſpeak, ſo that it cann't be diſcharged by an Equivalent, is deſtroyed, without any Fault of the Debtor, or by any Delay in returning it. The *Roman* Law gives an Example of a Slave who dies before he is put into the Hands of him to whom he was promiſed, or to whom he was bequeathed, by a Perſon to whom he was Heir. *Si ex Legati cauſâ, aut ex ſtipulatu hominem certum mihi debeas, non aliter poſt mortem ejus tenearis mihi, quam ſi per te ſteterit, quominus vivo eo eum mihi dares: quod ita fit, ſi aut interpellatus non dediſti, aut occidiſti eum.* Digeſt. Lib. 45. tit. 1. *De verborum obligationibus*, Leg. 23. ſee alſo 72. § 1. and 83. § 7. and *Cod. Lib.* 4. *tit.* 2. Si certum petatur, *Leg.* 9. and the *Jus privatum Romano-Germanicum*, by Mr. Titius, *Lib.* 5. *Chap.* 16.

CHAP. XII.

Of the Interpretation of Compacts and Laws.

I. *The Reaſon of the Order.*
II. *The Neceſſity of a right Interpretation.*
III. *The Words are ordinarily to be underſtood according to the common Uſage. And*
IV. *Words of Art according to the Art.*
V. *Conjecture is ſufficient, when Words are dubious.*
VI. *Or ſeem to contradict one another.*
VII. *Conjectures muſt be taken from the Matter treated on.*
VIII. *From the Effect, or*
IX. *From the Coherence, Original, and Place.*
X. *How the Senſe may be gathered from the Reaſon of them.*
XI. *Some Words have both a large and ſtrict Signification.*
XII. *Some Things are favourable, others odious.*
XIII. *Rules are to be made from theſe Diſtinctions.*
XIV. *An Example of Two who came to the Goal together.*
XV. *How this Order is to be interpreted. No Man muſt wage War without the Command of another.*
XVI. *Of theſe Words,* Carthage ſhall be free.
XVII. *A Conjecture when a Law muſt be enlarged.*
XVIII. *Of Tricks to evade a Law.*
XIX. *A Conjecture when the Law ought to be reſtrained upon the Account of ſome Defect in the Will of the Lawgiver.*
XX. *An Obſervation upon this Conjecture.*
XXI. *Or upon the Account of ſome Accident inconſiſtent with his Will, as where it is either unlawful.*
XXII. *Or too grievous in Reſpect of the Performance.*
XXIII. *What if two Laws are contrary one to another.*

SO much for Pacts in general, and partly in particular; let us now proceed to the Interpretation of them, for ſince in all Obligations certain *Signs* are made uſe of to expreſs the Minds of the Parties, and the Laws and Heads of the Contract; and ſince theſe *Signs* may ſometimes be taken in different Senſes, 'tis highly neceſſary to have ſome Rule to find out that which is true and genuine. Now altho' we deſign to treat hereafter of thoſe Pacts which preſuppoſe civil Government; and [1] moſt of what we have to ſay upon this Head has Relation to ſuch an Eſtabliſhment; yet ſince it would not be ſo convenient either to divide the Matter, or to reject the whole to the end of the Book, it will not, I hope, be thought ſo much againſt Method to treat of all together in this place, as *Grotius* [a] has done before me, who has handled this Subject with the utmoſt Nicety.

II. If then we conſider for what End *Obligations* are made, we ſhall find that every Man is

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Mr. Barbeyrac's *NOTES on* Chap. XII. §. I.

[1] The Originial is here obſcure, the Word *Pleraque* ſeeming to refer to *Pactorum*, and ſo it ought to be rendred, *The moſt of thoſe Pacts*; but then his Words are not true, for Laws are not properly Pacts, as our Author proves, *Lib.* 1. *Chap.* 6. § 2. and the contrary appears in this Chapter, for the Rules here laid down may be applied as well to Pacts as Laws.

[a] *Lib.* 2. *Chap.* 16.

bound to that which he intended, when he enter'd into the *Obligation*. It is here ſuppoſ'd that he enter'd into it freely, and of his own accord, and that the Matter is ſuch as he lay under no Conſtraint to perform it otherwiſe: And therefore I don't ſee how a Man can poſſibly be obliged farther than he himſelf intended; in this Senſe is that of *Cicero* [1] to be taken; *In* Obligations *regard is to be had not ſo much to the Expreſſion as to the intent of the Party.*

Farther, ſuch is the Nature of Man, that his internal Actions are not in themſelves viſible to another, and may differ from his external Signs and Actions: And yet we lie under a Neceſſity to diſtinguiſh clearly what every Man is obliged to, or what may lawfully be demanded of him; for there would be no ſuch Thing as *Obligation*, if any one might free himſelf, by affixing what Senſe he pleaſed to his *Signs*, and by pretending that he meant different from what others went away with. And therefore right Reaſon dictates that he, to whom the *Obligation* is made, ſhould have a Right to compel him, from whom 'tis due, to the Performance of it, in that Senſe which the right *Interpretation* of the *Signs* made uſe of importeth. For tho' the Man himſelf is chiefly concerned in what he meant; yet others muſt act by *Signs*; for elſe the Matter would be to no End or Purpoſe, which in Morality is abſurd. Conſonant to this was the old Form us'd in making Leagues, *Sine dolo malo, utique ea hic hodie rectiſſime intellecta ſunt; Without any fraudulent Deſign, according* [2] *to the Senſe which the Words at preſent bear.*

The true End and Deſign of *Interpretation* is, *to gather the Intent of the Man from moſt probable Signs.* Theſe *Signs* are of two ſorts, *Words*, and *other Conjectures*, which may be conſidered ſeparately, or both together [3].

III. As for Words [1], the Rule is, *Unleſs there be reaſonable Objections againſt it, they are to be underſtood in their proper and moſt known Signification; not ſo much according to Grammar, as to the general Uſe of them* [a] [2].

When *Tiberius* had us'd a Word which was not *Latin*, *Capito* ſaid, that, in Honour of the Emperor, it ought to paſs current for the future, altho' no body before him had made uſe of it: But one *Marcellus* reply'd, *That* Ceſar *might, if he pleaſed,* naturalize *Men, but Words he could not. Procopius* [b] having ſaid, *That the Emperor had rais'd an Army partly among his own Subjects, and partly among the Allies,* ſubjoin'd, *That formerly by the Name of* Allies *were meant only the* Barbarians, *who were not Slaves; for they were never conquered, but had obtain'd the Privilege of Citizens, with Arms in their Hands, and were ſo called from the* Alliances *which they made. But now there is none but may have a Title to this Name: The Way of the World is not to keep Words ſtrictly to that Senſe which they did originally bear; for Men change at Pleaſure the Things themſelves, little regarding by what Names they were firſt called* [c]. The *Locrians* [d] arriving at the extreme Part of *Calabria*, found that Country poſſeſt by the *Sicilians*, who alarm'd with their unexpected Arrival, receiv'd them, and ſtruck up a League in theſe Words, *That the* Locrians *ſhould preſerve an Amity with the* Sicilians, *and permit them to enjoy the Country in common with them, as long as they ſhould tread upon that*

Mr. Barb. *NOTES on* § II.

[1] Cicero's Words are, *Semper autem in fide, quid ſenſeris, non quid dixeris, eſt cogitandum. De Offic. Lib.* 1. *Chap.* 13. But theſe Words are a part of a large Paſſage, which are neither found in the moſt antient Editions, nor the moſt part of the Manuſcripts.

[2] This is well expreſſed, ſaith the Author after Grotius, in the Form of the Treaties of the antient *Romans, Ut illa palam prima poſtrema, ex illis tabulis cerâve recitata ſunt, ſine dolo malo, utique ea hic hodie rectiſſimè intellecta ſunt, illis Legibus Populus Romanus prior non deficiet.* Tit. Liv. *Lib.* 1. *Chap.* 24.

[3] That is to ſay, So that the Conjectures be drawn hither from the Words alone, or ſomething contained in them.

Mr. Barb. *NOTES on* § III.

[1] The Author ſuppoſes that ſuch as interpret Compacts and Laws, ſhould underſtand the general Rules of Criticiſm, which are abſolutely neceſſary to diſcover the Senſe of all Sorts of Words, whether delivered by word of mouth, or written. Such as theſe Maxims, for Example, 1. To underſtand a Man, who ſpeaks not diſtinctly, or has an Impediment in his Speech, we muſt be accuſtomed to hear him. As alſo to decypher a Deed, we muſt learn to read the Writing of him that made it. Whereupon the *Roman* Law determines, that if a Man at the Point of Death ſays, *I make my Servant* Cratinus (for *Cratiſtus) free,* and he is his only Servant, he ought to have his freedom according to the Will of the Teſtator. *Qui habebat ſervum Cratiſtum, teſtamento ita cavit: Servus meus Cratinus liber eſto. Quæro an ſervus Cratiſtus ad libertatem pervenire poſſit, cum teſtator ſervum Cratinum non habeat, ſed hunc ſolum Cratiſtum? Reſpondit, nihil obeſſe, quod in ſyllaba erraſſet.* Digeſt. Lib. 40. tit. 4. *De manumiſſis teſtamento,* Leg. 54. *princip.* Mr. Thomasius, *Inſtit. Juriſpr. Divin. Lib.* 2. *Chap.* 12. § 22. ſhewed me this Example. He alſo obſerves in § 25. following, That the Emperor *Juſtinian, Cod. Lib.* 1. *tit.* 17. *De veteri Jure enucl. &c.* forbids with Reaſon, *Leg.* 1. § 13. *Leg.* 2. § 22. *Leg.* 3. § 22. to uſe ſhort Writing in copying out Laws. And it were to be wiſhed that none had tranſgreſſed his Prohibition. 2. We ought to be well acquainted with the Language of him that ſpeaks or writes. 3. We ſhould know his Stile, and the Stile of the Time in which he wrote. 4. We ought to be acquainted with the Opinions and Cuſtoms to which he alludes. 5. We ſhould endeavour to diſcover his Sentiments and Diſpoſition, his Character, his Capacity, End and Intention. 6. We ſhould ſee if the Deed be not forged, nor any thing put to it or taken from it fraudulently; if there be no Fault crept into the Writing, either thro' the Miſtake of the Author, or Negligence or Ignorance of the Copier. For, to bring an Example of the laſt Caſe taken out of the *Roman* Law, "if the Clerk of a Notary hath falſly copied out the Heads of a Contract, it ſhall not tend to the Prejudice of him upon whoſe Account it is made." *Si Librarius in tranſcribendis Stipulationis verbis erraſſet, nihil nocere, quominus & reus, & fidejuſſor teneatur.* Digeſt. Lib. 1. tit. 17. *De diverſis Regulis Juris,* Leg. 92. 7. We muſt underſtand the Matter which is treated of. 8. Laſtly, There are a great Number of other Circumſtances which ought to be minded, and ſome of which are ſet down a little lower by our Author, but which may be better diſcovered by Uſe, and by reflecting upon particular Caſes, and upon every Paſſage, than by general Rules. See the Writers upon the Art of Criticizing, but chiefly the excellent Work of Mr. Le Clerc, entituled, *Ars Critica,* where we may find a compleat Syſtem of that uſeful and neceſſary Art. Mr. Thomasius, and others which he mentions in the forementioned Chapter of his *Juriſpr. Divin.* furniſhes us with ſeveral Examples, which relate to Compacts and Laws.

[2] Inſomuch that an antient *Roman* maintains, That *Tiberius*, as potent an Emperor as he was, could not make one foreign Word become a Denizen of *Rome*. Dio Cassius, *Lib.* 59. See above, *Lib.* 4. *Chap.* 1. § 6. and Themistius *Orat.* 23. *ſive Sophiſta, p.* 287. Edit. Harduin, upon the Word *Sophiſta,* as alſo Procopius *Hiſt. Vandal.* upon the Word *Allies.*

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[a] *Uſus, quem penes arbitrium eſt & jus & norma loquendi.* Hor. *Uſe is the true Standard of Speaking, Words are like Money, none will paſs but what has the publick Stamp upon it,* Quint. Inſtit. Orat. l. 1. c. 6. [b] *Hiſt. Vandal.* l. 1. [c] *The Signification of the Word* Sophiſter, *in proceſs of Time, changed like Money,* Themiſt. Orat. 23. [d] *Polyb. l.* 12. *c.* 4.

Earth, and wear thoſe Heads upon their Shoulders. Theſe Terms being agreed upon, the *Locrians* came to take the Oath, having firſt put *Earth* in their Shoes, and faſtned the *Heads* of Garlick upon their Shoulders, ſo as not to be ſeen. But when they had taken the Oath, they threw the *Earth* out of their Shoes, and the *Heads* of the Garlick from their Shoulders, and watching their Opportunity, fell upon the *Sicilians*, and drove them out of the Country. The *Bœotians* [a] made a League with the *Spartans*, and one of the Articles was, That they ſhould deliver up *Panactum*; which they did indeed deliver up, but firſt demoliſh'd it.

Leucippus [b] having borrowed of the *Tarentines* the Uſe of a Place *for a Day and a Night*, and not being willing to reſtore it, when they demanded it by Day, he put them off to the next Night; and when by Night, to the next Day.

When *Mahomet* took *Eubœa*, he told a certain Perſon that *his Head ſhould be ſafe*, but immediately cut him in two in the middle.

A petit Prince of the *Indies* fled to the King of *Perſia* for Protection, and when his Sovereign demanded him by his Ambaſſador, the *Perſian*, during the Audience, order'd him to be put in a Basket, and hung upon a Tree, and then deny'd that he was upon his Land [c]. Thus a certain Perſon deny'd poſitively that he had *laid Hands* on a Prieſt, for he had only *cudgell'd* and *kick'd* him. Thus *Tamerlan* having articled with the Gariſon of *Sebaſtia* that *no Blood ſhould be ſhed*, nevertheleſs ordered all the Priſoners to be buried alive. But theſe Quibbles, as they are too groſs and frivolous, ſo, as *Cicero* obſerves, inſtead of taking it off, they rather bind the Perjury upon the Conſcience [d].

IV. As for *Terms of Art*, which are [1] above the Reach of the common People, the Rule is, That *they be taken according to the Definition* [2] *of the Learned in each Art.* The *Logicians*, ſays *Cicero*, uſe not the ſame Words as other Men; they have Terms of their own, as indeed all other Arts have; *v. g.* the Word *Army*; ſuppoſe it had been ſtipulated between two Crowns, that one ſhould not paſs thro' the other's Territories with an *Army*, what Number of Soldiers would come under that Denomination? *Grotius* [e] defines an *Army* to be ſuch a Number as dares invade a foreign Country, or face an Enemy in the Field; for we find in all Hiſtories the open Actions of an *Army* oppos'd to what is done by Stealth in the Manner of Robbers: yet it cannot be ſo univerſally defined, how great a Multitude conſtitutes an *Army*, as to hold good at all Times, and in all Places: For both the Enemy's Strength, and our own, muſt be conſidered. If we have to do with a poor State, a ſmall Force may be eſteemed an *Army*, which yet againſt ſome flouriſhing Kingdoms would be deem'd little better than a handful of Foragers. And therefore when *Vegetius* [f] deſcribes an Army [3] to conſiſt of Legions and Auxiliaries, and a competent Number of Horſe to carry on a War, he does not deſcribe an *Army* in general, but as it was then amongſt the *Romans*; for an *Army* may be compos'd of only natural born Subjects, or of Allies and Foreigners only; or it may conſiſt of only Foot, or only Horſe. *Cicero* [g] tells us, that *Craſſus* denied any Man to be rich, who was not able to maintain an *Army* at his own Charge, which he [h] defines to conſiſt of ſix Legions, and a great Number of Auxiliaries. *Polybius* [i] ſays, the *Roman Army* generally contain'd 16000 *Romans*, and 2000 Auxiliaries; tho' ſometimes it did not amount to that Number. In the *Digeſts* [k], he who has one Legion under his Command, is ſaid to be General of an Army. Beſides, another Queſtion might be moved upon this Word; as, Whether the aforeſaid Article be violated, if one marches a great Number of Soldiers thro' the other's Territories, not in a Body, but in ſeparate Parties? Now ſince a Man may be ſaid to have an Army, either if he has all his Forces united together in one place, or has them ſo diſperſed as to be able to draw them together upon ſhort Warning, it ought to be farther conſidered, for what End this Article was made; for if it was only for our own Security, 'tis plain the Article is not violated by the *Army*'s marching in ſmall Bodies; but if it was for the Security of a Neighbour, ſuch a Paſſage as this breaks the Article. And the ſame may be applied to a *Fleet*, if in any Treaty it be provided, that no *Fleet* ſhall be ſuffered to paſs in ſuch a part of the Sea; for here not only the Number of Ships, but their Bigneſs and the maritime Strength of the People concern'd is to be conſider'd [l]. And ſo in reſpect of a *Fort* prohibited to be raiſed within ſuch a Diſtance; the Word may ſignify either a high and regular Fortification, or any fortified Place whatſoever, altho' conſiſting of low pitiful Buildings. And therefore, if the Deſign of the Article be to prevent any fortified Place from giving Umbrage to our Territories, 'tis plain that it is againſt the Treaty to throw up ſo much as a little Bulwark of Earth, with ſmall Huts to lodge Soldiers in [m].

But if [4] *Terms of Art* happen to be differently

Mr. Barb. NOTES on § IV.

[1] This is what Cicero obſerves about *Logick*, in the Paſſage quoted by our Author after Grotius. *Qualitates igitur adpellavi, quas* ποιότητας *Græci vocant: quod ipſum apud Græcos non eſt vulgi verbum, ſed Philoſophorum, atque id in multis. Dialecticorum vero verba nulla ſunt publica: ſuis utuntur: & id quidem commune omnium ferè eſt Artium*, Academic. Quæſt. *Lib.* 1. *Chap* 7.

[2] Unleſs he that ſpeaks underſtands neither any Art, nor the Terms of it; for then we muſt judge by the Connexion of a Diſcourſe, or ſome other Circumſtances, what Senſe he had in his Mind.

[3] His Words are, *Exercitus dicitur tam Legionum, quam etiam auxiliorum, nec non etiam Equitum, ad gerendum bellum multitudo collecta.* De re militari, *Lib.* 3. *Chap.* 1. Edit. *Plantin. Scriver.*

[4] This Reflection, as Mr. Titius obſerves, *Obſervat.* 419. is nothing to the Purpoſe, for he treats not of the Manner how one may expreſs himſelf clearly to make his Mind known, but only gives ſome Rules to diſcover another's, when 'tis darkly expreſſed.

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[a] *Thucyd. l.* 5. *c.* 42. *Edit.* Oxon. [b] *Strabo, l.* 6. *p.* 183. *Edit.* Genev. [c] *Olearius, Itin. Perſ. l.* 4. *c.* 30. [d] *Off.* 3. *c.* 32. Fraus enim adſtringit, non diſſolvit perjurium. [e] *Ubi ſupra.* [f] *De re militari,* l. 3. c. 1. [g] *Paradox.* 6. [h] *In the ſame place.* [i] *L.* 6. [k] *Lib.* 3. *t.* 2. *l.* 2. *ſ.* 1. D. de his qui not. infam. &c. [l] *To this belongs that of* Florus, *l.* 1. *c.* 11. *n.* 10. *Edit.* Græv. The Spoils of *Antium* are in being, which *Mœnius* fix'd in the *Forum*, having taken the Enemies *Fleet*, if it may be called a *Fleet*. For there were ſix Ships with Stems, and that Number then was enough to enter into an Engagement with. Add. *Alber. Gent. de jure belli, l.* 3. *c.* 20. [m] Add. *Alber. Gent. d. l. c.* 21.

defined by different Perſons, to avoid Quarrels, it will be convenient to expreſs in common Words in what Signification the Word under Debate ſhall be taken.

V. When a *ſingle Word* or *Sentence* is capable of ſeveral Significations, Conjectures are neceſſary to find out the true. Both of theſe Caſes the *Rhetoricians* call *ambiguous*. But the *Logicians* are more nice, who, if the Variety of Significations lies in a Word, call it *equivocal*, if in a Sentence, *ambiguous*. An Example of the *former* we meet with in *Tertullian* [a], who tells us that the Word *Woman* in 1 *Cor.* xi. 5, *&c.* ought to be extended to *Virgins* alſo. Altho' ſometimes it is oppos'd to *Virgin*, as in *Cicero* [b], *To Morrow ſhe will be a* Woman. [2] *Cicero* gives this Example of the *latter:* A certain Man had bequeath'd a Legacy in theſe Words; *Hæres meus vaſorum argenteorum pondo centum novercæ, quæ volet, dato. Let my Heir give his Mother in Law* 100 *Weight of Plate at Pleaſure.* Upon this the Lady demanded the fineſt and beſt wrought Plate: But the Heir interpos'd that the Choice was left to his *Pleaſure*. The Ambiguity had been avoided by the Addition of the Word *His* or *Her*. The *Roman* Law in ſuch a Caſe [3] gives the Legatee the *Option*, and indeed there is Reaſon for it. For had the *Option* been deſign'd to be left at the Diſcretion of the Heir, there had been no need of the Clauſe *at Pleaſure*. For if a Thing is enjoin'd me at large [4], and I have ſeveral Ways of ſatisfying the Obligation, 'tis left to my ſelf to chooſe which way to do it. But when a Clauſe is added concerning the Choice, 'tis deſigned in Favour of the Party which is to receive, that the other may not obtrude ſome pitiful, worthleſs Thing upon him [c].

As for the famous Deciſion of the Duke of *Oſſona*, Viceroy of *Naples*, who decreed the whole Inheritance to the Son againſt the Prieſts, who were left Heirs, with a Clauſe, *To give the Son what they would*; ſtrictneſs of Juſtice does not plead in Behalf of it, ſo much as the odious Covetouſneſs of that ſort of People, which are always hankering after other Mens Eſtates.

Another Inſtance we have in the Anſwer *Charles* V. gave the *French* Ambaſſador, when he demanded the Dukedom of *Milan*; *That which pleaſes my Brother the* French *King, pleaſes me alſo.* Which the Ambaſſador in great haſte gave his Maſter Advice of, as if he had gain'd his Point [d].

VI. Beſides, when we meet with a [e] *ſeeming Repugnancy* in the Terms, Conjectures are neceſſary to work out the genuine Senſe, by reconciling, if poſſible, thoſe Terms that ſeem to be repugnant. But if there be a clear evident Repugnancy [1], the latter Contract vacates the former: For no Man can will Contradictions, and it is the Nature of Acts, which depend upon the free Will of the Agent, or over which no Man has acquir'd a Right, to be diſclaim'd by a contrary Motion of the Will. And this Change of the Will, in order to annul an Act, is ſometimes required on one ſide only, as in making Laws, Wills, and Teſtaments, *&c.* and ſometimes on both ſides, as in Contracts, which, unleſs the Law interpoſes, cann't be diſſolv'd without the Conſent of both Parties [2]. From hence, by the way, it appears how *Lycortas* might have excuſed his Neglect, in not mentioning, when he went to renew the League between the *Achæans* and the King of *Egypt*, which, of the many Leagues that were between them, he would have renew'd: for he might have ſaid, that thoſe which were never broken needed not to be renewed, and in the renewing of thoſe which had been broken, he ought to be preſum'd to mean the laſt [f].

For an Inſtance of two Laws, that ſeem to thwart one another [3], *One enacts, That a Statue be erected in the* Gymnaſium *in Honour of the Perſon that kills the Tyrant: Another* ſays, *That no Woman's Statue ſhall be plac'd in the* Gymnaſium: *Now a Woman kills the Tyrant.* In this Caſe I ſhould judge in Favour of the Woman. For the Reaſon of the *firſt* Law was,

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Mr. BARB. *NOTES on* § V.

[2] CICERO's Words are, *Paterfamilias, cum Filium hæredem faceret, vaſorum argenteorum centum pondo Uxori ſuæ ſic legavit: Hæres meus uxori meæ vaſorum argenteorum pondo centum, quæ volet, dato. Poſt mortem ejus vaſa magnifica, & pretioſè clæata petit à Filio Mater. Ille ſe, quæ ipſe vellet, debere dicit.* Cic. de inventione, *Lib.* 2. *Chap.* 40. See *ad Herennium, Lib.* 1. *Chap.* 12. and *Quinctil. Lib.* 7. *Cap.* 9.

[3] The Words of the Law are, *Quotiens ſervi electio vel optio datur, Legatarius optabit, quem velit. Sed & homine generaliter legato, arbitrium eligendi, quem acciperet, ad Legatarium pertinet.* Digeſt. Lib, 33. tit. 5. *De optione vel electione legata.* Leg. 2. *princ.* § 1.

[4] 'Tis a Maxim of the *Roman* Law, *Cum illa aut illa res promittitur, rei Electio eſt, utram præſtet.* Digeſt. Lib. 23. tit. 3. *De jure dotium,* Leg. 10. § 6. See alſo *Leg.* 18. *tit.* 1. *De contrahenda emptione, Leg.* 25. *princip.* and *Lib.* 19. *tit.* 1. *De action. Empti & Venditi, Leg.* 21. § 6. Indeed it belongs to him only who lays the Obligation, to explain himſelf clearly and without Equivocation or Reſerve, as to what he requires of another. *Quidquid adſtringendæ obligationis eſt, id niſi palam verbis exprimitur, omiſſum intelligendum eſt. Ac fere ſecundum promiſſorem interpretamur: quia ſtipulatori liberum fuit verba laté concipere.* Digeſt. Lib. 45. tit. 1. *De verborum obligatione,* Leg. 99. And we may lay this down as a general Rule, That when there is in a Deed any Obſcurity or Dubiouſneſs, which cann't be cleared by the Intention of the Contractors, or any other Circumſtance, the Interpretation ought to be againſt him, who ought to have explained himſelf, or made the other have delivered himſelf fully. Inſomuch that he who is obliged, might and ought to ſpeak clearly, the other hath a Right to explain the Clauſe for his own Advantage. *Nec rurſum promiſſor ferendus eſt, ſi ejus intererit, de certis potius vaſis forte, aut hominibus actum.* Digeſt. ibid. So that all Obſcurities and Ambiguities in a Bargain of Sale, or Living, muſt be interpreted againſt the Seller or Landlord. *Veteribus placet, pactionem obſcuram, vel ambiguam venditori, & qui locavit nocere: in quorum fuit poteſtate Legem apertius conſcribere.* Dig. Lib. 2. tit. 14. *De pactis,* Leg. 39. See alſo *Lib.* 18. *tit.* 1. *Leg.* 21, 33. *Lib.* 50. *tit.* 17. *De diverſis regulis Juris,* Leg. 172.

Mr. BARB. *NOTES on* § VI.

[1] *Ubi duæ contrariæ leges ſunt, ſemper antiquæ obrogat Nova. Tit. Liv. Lib.* 9. *Chap.* 34. Where two Laws thwart one another the new one abrogates the old. Αἱ μεταγενέστεραι διατάξεις ἰσχυρότεραι τῶν πρὸ αὐτῶν εἰσίν. *Digeſt. Lib.* 1. *tit.* 4. De conſtitutionibus Principum, *Leg.* 4. See alſo the Canon Law in the *Decretals, Lib.* 1. *tit.* 3. De Reſcriptis, *Chap.* 3. and a Paſſage in *Plutarch*, which will be quoted *Note* 6. on § 9.

[2] See the foregoing Chapter, § 8.

[3] *Tyrannicidæ imago in gymnaſio ponatur: contra Mulieris imago in gymnaſio ne ponatur. Mulier Tyrannum occidit.* Quinct. Inſtit. Orat. *Lib.* 7. *Chap.* 7.

[a] *De velandis Virginibus,* c. 4. [b] *Apud Quinctil. Inſtit. Orat.* l. 6. c. 3. [c] *Add.* Auth. *ad Heren. l.* 1. *c.* 12. *Quint. Inſtit. Orat.* l. 7. c. 9. [d] *Marſelaer Legato,* l. 2. c. 39. [e] Ἐναντιοφάνεια. [f] *Vide* Polyb. *excerp.* leg. 41.

that the Youth which is train'd up to Valour in the *Gymnaſium*, ſhould by ſuch ſort of Honour be ſtir'd up to imitate brave Actions: The Reaſon of the *latter* is, becauſe the Virtues proper to Women are not generally the Object of Mens Imitation. But, in this Caſe, ſince a Woman has outdone her Sex, ſhe deſerves the rather to have her Statue put up in the *Gymnaſium*; for ſuch Bravery in a Woman would be a greater Incitement to Emulation in the Men. There is another Example in [4] *Cicero* de *Invent. Lib.* ii. *Cap.* 49. One Law ſays, *Whoſoever kills the Tyrant let him be rewarded as a Conqueror at the Olympick Games, and let him demand what he pleaſes of the Magiſtrate, and let the Magiſtrate grant his Requeſt.* Another Law runs thus: *Upon the Death of the Tyrant, let his five neareſt Relations be put to Death.* Alexander, *who had exerciſed Tyranny over the* Phereans *in* Theſſaly, *being kill'd by his Wife* Thebe, *She, for her Reward, demands her Son, whom ſhe had by the Tyrant. Some were of Opinion, that by the Law the Son ought to be put to Death* [5].

But ſometimes the ſame Law ſeems to claſh with itſelf; [6] as for Inſtance, the Law ſays, *That a Woman, who has been debauch'd, may chooſe either to marry the Man who has injur'd her, or to have him put to Death. Here is a Man that has debauch'd Two, whereof one chooſes his Death, the other demands him in Marriage:* In this Caſe, the Reaſon of the Law will decide the Buſineſs: For here the Law, by permitting the Woman to chooſe the Death of the Man, did not ſuppoſe that many would deſire it; but the Good of the poor Woman was herein conſulted, leſt ſhe ſhould for ever continue without a Husband; for the Man, after the Heat of his Love was over, might caſt her off, as not likely to deny others thoſe Favours which ſhe had ſo unlawfully granted him: nor would it be eaſy to find one who would willingly marry her that had been deflowred by another. And therefore ſhe that demanded the Man in Marriage ought to be preferr'd: For this anſwers beſt the Deſign of the Law, which had the Convenience of the Woman, rather than the Death of the Man in its Eye; and after this rate, one of them, at leaſt, will be provided with a Husband, whereas otherwiſe both will be forced to remain ſingle. Beſides, when there is as much to be ſaid on the one Side as on the other, the more favourable Sentence ought to prevail.

But ſometime the Words claſh in ſome particular Caſe, as in this Inſtance; there is a Law, [7] *That a Man, who has behaved himſelf honourably in the War, ſhall have whatever he demands; here are Two ſuch, who both demand the ſame Virgin; ſince both cannot be ſatisfied, which muſt be preferr'd?* I anſwer, He that made the Demand firſt. But if both demanded together, they muſt draw Lots; for tho' the Law gives an unlimited Liberty of demanding, yet it muſt be ſuppoſed to be reſtrain'd to thoſe Things which can conveniently be granted. Another Example is propos'd by [8] *Philoſtratus* in the Life of *Secundus. He that raiſes a Sedition, is to be hang'd; he that quells it, to be rewarded: The ſame Man both raiſes a Sedition, and quells it, and demands his Reward.* In which Caſe *Secundus* with good Reaſon argues thus, *Provided you firſt ſuffer Puniſhment for raiſing the Sedition, you ſhall then, if you pleaſe, receive the Reward for quelling it.* In ſuch Caſes as theſe, where Words are [9] evidently obſcure, we are forc'd to have recourſe to *Conjectures*.

Theſe *Conjectures* are ſometimes built upon ſuch good Grounds, as that the genuine Senſe forces itſelf upon us, even againſt the receiv'd common Signification of the Word. To this purpoſe is that Diſtinction of the *Rhetoricians* between the *Letter* and the *Deſign*. As for Inſtance, [10] *The Law makes it capital for any Foreigner to preſume to mount the Walls:* [11] *But in a Siege a Foreigner mounted the Wall, and beat down the Enemy that was ready to ſcale it.* Now the *Letter* is againſt the Foreigner, the *Deſign* for him; according to which no doubt Judgment ought to be given; for the *Deſign* of the Law was to prevent any Foreigber from mounting the Walls as a Spy; which Reaſon in the preſent Caſe ceaſes [a].

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[4] Tully's Words are, *Ex contrariis autem Legibus controverſia naſcitur, cum inter ſe duæ videntur Leges, aut plures diſcrepare, hoc modo: Lex eſt, Qui Tyrannum occiderit, Olympionicarum præmium capito, & quam volet ſibi rem à Magiſtratu depoſcito, & Magiſtratus ei concedito. Et altera Lex, Tyranno occiſo, quinque ejus proximos cognatione Magiſtratus necato. Alexandrum, qui apud Pheræos in Theſſalia tyrannidem occuparat, Uxor ſua, cui* Thebe *nomen fuit, noctu, cùm ſimul cubaret, occidit. Hæc filium ſuum, quem ex Tyranno habebat, ſibi præmii loco depoſcit. Sunt qui ex Lege Puerum occidi dicant oportere. Res in judicio eſt.* De Invent. Lib. 2. Cap. 49.

[5] They had done wrong, for beſides that the firſt Law was manifeſtly barbarous and unjuſt, the End was, without doubt, to deſtroy all that had any Relation to the Tyrant, as Men to be feared, or whom he might have for his Aſſociates; for there is all the appearance imaginable, that the Mother who had ſo much Courage and Zeal for the Publick Good, as to ſtain her Hands with the Blood of her Husband, would have had no regard to her Son's Life, if ſhe thought him to be of the ſame Temper as his Father.

[6] This is the Subject of Seneca's Fifth Controverſy: *Lex: Rapta raptoris, aut mortem, aut indotatas nuptias optet. Una nocte quidam duas rapuit: altera mortem optat, altera nuptias.* Moſt of the Declaimers, whoſe Fragments Seneca relates, would condemn the Raviſher to Death.

[7] I do not know from whence this Example is taken; the Law indeed is found in Seneca, *Controverſ.* 31. and in the *Exterpt. Controverſ. Lib.* 10. *Declam.* 2. As alſo in Aulus Gellius, *Noct. Attic. Lib.* 9. *Chap.* 16. but the reſt of the Caſe is altogether different.

[8] Philostratus's Words are, Ὁ ἄρξας στάσεως, ἀποθνησκέτω, ϗ ὁ παύσας στάσιν, ἐχέτω δωρεάν. ὁ αὐτὸς ϗ ἄρξας ϗ παύσας, αἰτεῖ τὴν δωρεάν. τὴν δὲ ὑπόθεσιν, ὧδε ἐβραχυλόγησεν. ἐκῶν, ἔφη, τί πρότερον; τὸ κινῆσαι στάσιν. τί δεύτερον; τὸ παῦσαι· δὸς ἂν ἐφ' οἷς ἠδίκεις, τιμωρίαν, τὴν ἐφ' οἷς εὖ πεποίηκας δωρεὰν, εἰ δύνασαι, λάβε. *Philoſtrat. de Vitis Sophiſtarum,* in *Secundo, Lib.* 1. *Cap.* 26. *Ed. Olear.* 1709.

[9] In the Examples of apparent Contradictions brought by our Author, the Terms are not obſcure; but, on the contrary, very clear. But the Intricacy proceeds from this, That they conclude not in themſelves the Exceptions which the Lawgiver would have made to the Law, if he had foreſeen certain Caſes which are drawn from ſome other Thing, than the Words taken literally, and in their full extent.

[10] Περὶ ῥητοῦ ϗ διανοίας; which the *Latins* render, *Ex Scripto & ſententia ſcripti:* or, as Quintilian, *Lib.* 7. *Cap.* 6. and the Author of the *Rhetorick,* dedicated to *Herennius,* Lib. 1. Chap. 11. *Ex Scripto & voluntate ſtatus.*

[11] Quintilian's Words are, *Peregrinus, ſi murum adſcenderit, capite puniatur. Cum hoſtes murum adſcendiſſent, peregrinus eos depulit. Petitur ad ſupplicium.* Quintil. *Lib.* 7. *Cap.* 6.

But we muſt take notice that ſometimes a *Repugnancy* is ſuppos'd, when indeed there is none, *viz.* when Words are taken in a larger Signification than the Speaker deſign'd them. A notable Inſtance of this we meet with in *Joſephus* [b]; where King *Zedechias* would believe neither *Jeremiah* nor *Ezekiel*, becauſe he thought they contradicted one another: for the *one* aſſerted that he ſhould be carried away into *Babylon*; the *other*, [12] that he ſhould never *ſee Babylon* with his Eyes. The two Prophets were very conſiſtent with each other; for he was carried away to *Babylon*, but his Eyes were firſt put out.

VII. *Grotius* has aſſign'd three *common places*, from whence we may trace out the Deſign, where the Words are obſcure or ambiguous, *viz.* The *Subject matter*, the *Effects*, and the *Circumſtances*.

As for the *former* [1] 'tis in the Mouth of every *Civilian*, That *Words ought to be underſtood according to the* Subject matter *of them* [c]; as [2] if a Man promiſes to defend you in the Poſſeſſion of the Goods you buy of him, his promiſe is not ſuppos'd to extend to any extrajudicial Violence [d]. I fanſy this Rule may be applied to the Vow of *Jephtha* in *Judges* XI. 31. and to that of *Agamemnon* in *Cicero* [e] who having vow'd to offer up to *Diana* the moſt beautiful Creature that ſhould be born that Year, ſacrific'd *Iphigenia*, who indeed was the moſt beautiful which that Year produc'd: But he who talks of ſacrificing is preſum'd to mean a *Subject* fit to be made a Sacrifice of [f].

So if a Truce be made for Thirty Days, it muſt be underſtood of *natural* Days conſiſting of Twenty four Hours: not of *artificial*, or the ſpace of the Sun above the Horizon. And therefore it was a frivolous Quibble of *Cleomenes*, who had made a Truce with the *Argives* for ſo many Days, but the third Night finding them ſleeping and unprovided by reaſon of the Truce, ſet upon them, and ſlew ſome, and took others; and when he was upbraided for his Perjury, denied that the Nights were comprehended in the Treaty [g]. In vain alſo did *Mycerinus* King of *Egypt* endeavour to convict the Oracle of Falſhood; for the Oracle foretold that he ſhould live no more than ſix Years: but he order'd Candles to be lighted up, and revell'd by Night as well as Day, as if by thus uſing the Night as Day he could make Twelve Years out of Six [h].

Thus the Word *Arms* denotes ſometimes the Weapons of War, ſometimes the Warriors themſelves, according as the *Subject matter* of the Diſcourſe directs. For if it be an Article, that neither Party ſhall uſe *Arms* againſt a Third, 'tis plain Soldiers or an Army is meant by it: but if upon the Surrendry of a Garriſon it be ſtipulated that they deliver up their *Arms*, not the Soldiers, but the Weapons are ſuppos'd by it [i].

The *Platæenſes* having promis'd to reſtore the *Theban* Captives, ought to have reſtor'd them alive, not dead [k]. For the Treaty was concerning [3] living Men, and not the Carcaſes of them.

It was a wretched Fetch of *Labeo's*, who having by the League a Title to half of *Antiochus's* Fleet, cut every Ship in two, and ſo depriv'd the King of his whole Navy [l]. Thus the [m] *Campanians* ſtruck up a League with their Enemies, and one Article was, that they ſhould have half their Arms reſtor'd them; but they cut each Weapon in two, and ſo deliver'd them half.

Xiphilinus [n] tells us of two Soldiers, who having got a Hogſhead of Wine amongſt their Plunder, and being commanded to divide it, cut it in Two with their Swords. *Rhadamiſtus* ſwore to *Mithridates*, that he would not either by Sword or Poiſon do him any Harm; but preſently after he ſmother'd him in his Bed [o].

VIII. *Secondly*, The *Effects* and the Conſequence do very often point out the genuine meaning of the Words. For where Words, if they be taken literally, are like to bear none, or at leaſt, a very abſurd Signification; to avoid ſuch an Inconvenience [1] we muſt a little deviate from the receiv'd Senſe of them [p]. And therefore it was abſurd in the *Athenians* [q], having promis'd to relinquiſh the Territories of the *Bœotianss* to deny the Ground that they had encamp'd upon to be the *Bœotians*. With the ſame Cavil did *Alexander* elude the Conditions that *Darins* propos'd to him. *Darius* had offer'd him all the Land that

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[12] See *Jeremiah* xxxviii. 17, *&c.* and *Ezekiel* xii. 13.

Mr. BARB. *NOTES on* § VII.

[1] The Words of the *Digeſts* are, *Quotiens in Stipulationibus ambigua Oratio eſt, commodiſſimum eſt, id accipi, quo res, qua de agitur, in tuto ſit.* Digeſt. Lib. 45. tit. 1. *De verborum obligationibus*, Leg. 80. See alſo *Lib.* 50. *tit.* 17. *De diverſis Reg. Jur.* Leg. 67.

[2] So the Code aſſures us, *Expulſos vos de fundo per violentiam à* Nerone, *quem habere jus in eo negatis, profitentes, nullam vobis adverſus eum, ex cujus venditione fundum poſſidetis, actionem competere probatis*, Cod. Lib. 4. tit. 49. *De actionibus empti & venditi*, Leg. 17. See other Examples, *Lib.* 19. *tit.* 2. *Locati, conducti*, Leg. 15. § 4. and Lib. 39. tit. 2. *De damno infecto*, &c. Leg. 49.

[3] So *Ovid* ſpeaks in the Paſſage quoted by our Author, but not mentioned from whom; *Hector erat tunc cum bello certaret, at idem Tractus ab Æmonio non erat Hector equo*, Ovid. de Triſt. Lib. 3. El. 11. v. 27, 28. *Sic Pericles cum quibuſdam hoſtium ita pactus legitur, ut ipſi* ferrum *deponerent; poſtea eoſdem pacti violati inſimulavit, argutatus eos non depoſuiſſe* fibulas ferreas *quas in laciniis veſtimentorum gerebant. Lex eſt, qui nocte cum* ferro *deprehenſus fuerit, alligetur: cum* annulo ferreo *inventum magiſtratus alligavit*, Quint. Inſt. Orat. Lib. 7. Cap. 6.

Mr. BARB. *NOTES on* § VIII.

[1] Thus the *Roman* Lawyers ſay, *In ambigua voce Legis ea potius accipienda eſt ſignificatio, quæ vitio caret: præſertim cum etiam voluntas Legis ex hoc colligi poſſit.* Digeſt. Lib. 1. tit. 3. *De Legibus, & Senatuſconſultis, &c.* Leg. 19. *Cicero* ſays again very well, *Nullam eſſe Legem, quæ aliquam rem inutilem, aut iniquam fieri velit*, De Invent. Lib. 2. Cap. 47.

[a] *Add.* l. 39. t. 4. l. 15. *D. de Publicanis*, &c.

[b] *Archeol. Jud.* l. 10. c. 10.

[c] *Vid.* lib. 45. t. 1. l. 10. *D.*

[d] L. 19. t. 2. l. 15. ſ. 4. *D. locati, &* l. 39. t. 2. l. 43. *D. damni infecti*, &c. L. 4. t. 49. c. l. 17. *de act. empt. & vend.*

[e] Off. 3. c. 25.

[f] *Add.* Everhard. *loc. legal.* 40. which is about the Subject-matter.

[g] *Plut.* Apopht. *Lacon.* p. 223. Such another Trick the *Thracians* uſed againſt the *Bœotians*, Strab. *l.* 9. *p.* 277.

[h] Herodotus, *Euterpe.*

[i] *Add.* Alber. *Gent. d. l. c.* 20.

[k] *Thucyd.* l. 2. *init.*

[l] Val. Max. *l.* 7. *c.* 3. tho' *Livy*, l. 38. c. 38. ſays nothing of the cutting of the Ships.

[m] Polyæn. *l.* 6. *c.* 15.

[n] *Epiſt.* Dion. *in* Caracalla, *ad ann.* 217.

[o] Tac. *Ann.* XII. 47.

[p] There is an Example of this in the League whereby *Lewis* XII. of *France*, took the City *Bolognia*, and its petty Prince *Bentivoglio*, into his Protection; which he afterwards cavilled at, in a manner very unbecoming a King. *Guiccard.* Hiſt. l. 5. p. m. 134. & p. m. 146.

[q] Thucyd. *l.* 4. *c.* 98.

lay between the *Euphrates* and the *Helleſpont*; to which *Alexander* reply'd, *He offers very liberally all on that ſide the* Euphrates, *where is it then that he ſpeaks to me? I am already beyond the* Euphrates; *and therefore the whole of the Dowry he offers is leſs than what I am already Maſter of: drive me hence, that I may be aſſur'd that what you offer is your own* [a]. As if it was the ſame thing to poſſeſs a Place by Force of Arms, and to poſſeſs it peaceably, and with the Conceſſion of the former Maſter.

Lewis XII. agreed with the *Pope*'s Legat, that the Biſhopricks void by the Death of the Biſhops in *France* ſhould be at the King's Diſpoſal. But a *French* Biſhop happening to die at *Rome*, the *Pope* immediately nominated a Succeſſor, and the *King* as ſoon another; which occaſioned great Differences. In this Caſe, were I Judge, I ſhould not ſcruple to pronounce in favour of the *King*; for to render an Office vacant, 'tis no matter in what Place the Incumbent dies: and if ſuch a Cavil had been admitted, the King's Right might have been invaded ſeveral ways [b].

At *Bolognia* it was enacted, that *Whoſoever drew Blood in the Streets ſhould be ſeverely puniſhed* [c]. Upon which Law a Barber was indited for opening a Vein in the Street, and it had like to have gone hard with him, becauſe it was added in the Statute, that the *Words ſhould be taken preciſely, without any Interpretation.* [2] In *Quinctilian* we have this Caſe, *A poor Man and a rich Man were Friends: The rich Man in his Will made another Friend his Heir, but bequeath'd to the poor Man as much as he in his Will had bequeath'd to him. The poor Man's Will is produc'd; by which it appears, that he had made the rich Man Heir of all; and therefore he demands the whole Inheritance. He that was the written Heir was for giving only ſo much as the poor Man was worth* [d]. And indeed, this is to be ſaid for the written Heir, that if he did not obtain the Cauſe, his being made Heir would have had no Effect. Which was the chief Reaſon why the *Falcidian* [3] Law, and [4] *Pegaſian* Decree aſſign'd the Heir a [5] *Dodrans* over and above; for ſo the Heir and Legatee were both provided for. As for the Interpretation of the Laws of the Land, that of *Cicero* [6] muſt every where take place: *All Laws*, ſays he, *ought to be referr'd to the Benefit of the Commonwealth, and ought to be interpreted according to the publick Advantage, not according to the Letter; for no one would have the Laws regarded for the ſake of the Laws themſelves, but for the ſake of the Commonwealth.*

IX. Beſides, *Thirdly*, it gives great Light to the Interpretation of obſcure Paſſages to compare them with others that have ſome Affinity with them; as to conſider what the ſame Author ſays [1] in another Place, where he handles the ſame Matter; or to [2] compare them with what goes before and follows in the Context. For in a doubtful Point the Author muſt be ſuppos'd to be conſonant to himſelf: And therefore, if [3] in one Place he has expreſs'd his Mind clearly, we ought to preſume, that he is ſtill of the ſame Mind in another Place, unleſs it expreſly appears that he has chang'd it. Thus if two Men ſhould bargain for Wheat, without mentioning the Quantity, it would be [4] an imperfect Bargain: But

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[2] Quintilian's Words are, *Pauper, & dives, amici erant. Dives teſtamento alium amicum omnium bonorum inſtituit hæredem: pauperi juſſit dari id quod ille ſibi teſtamento daret. Apertæ ſunt tabulæ pauperis: omnium bonorum inſtituerat hæredem. Petit totam divitis hæreditatem. Ille, qui ſcriptus eſt hæres, vult dare tantum, quantum in cenſum habet pauper.* Declam. 332.

[3] See *Lib.* 3. *Chap.* 4. § 5. *Note* 1. above.

[4] In the Time of *Nero*, in the Conſulſhip of *Trebellius Maximus*, a Decree of the Senate was made, That an Heir in Truſt, who was obliged to reſign to the Lawful Heir, ſhould be diſcharged of all the Debts and Diſburſements, which, as well as the Rights, Names, and Actions, ſhould paſs with the Goods to him, for whoſe advantage the Truſt was made. But ſince the Heirs thus put in Truſt, had little or no Advantage by the Inheritance, which they were to make over; and ſo ſcarce any one cared to trouble themſelves with a Truſt, it was ordered by another Decree of the Senate, in the Time of *Veſpaſian*, in the Conſulſhip of *Pegaſus*, That he that was obliged to reſign to the Heir, or another Party, ſhould keep a fourth Part. The Emperor *Juſtinian* united theſe two Decrees afterward, and called them by the Name of their Author, the firſt, *The Trebellian Decree*, and the other, *The Pegaſian*. The more antient Name, which was the *Trebellian*, remained only, and from thence it was called, *The Trebellianick Quarter*, or ſingly, *The Trebellianick*, *viz.* the fourth Part of the Inheritance which was to remain to the Heir who was to reſign. See the *Inſtitut.* Lib. 2. tit. 23. *De fidei commiſſariis hereditatibus*, &c. and the *Digeſts*, Lib. 36. tit. 1. *Ad Senatuſconſultum Trebellianum*; as alſo Mr. Daumat's civil Law in their Nat. Order, *Part* 2. *L.* 5. *tit.* 4.

[5] In all the Editions of the Original our Author has it, *dodrantem*; three Parts, inſtead of one in four, *quartam partem*. Yet we ought to obſerve, that in the *Roman* Law the *Trebellianick* fourth Part is called the *Falcidian*, becauſe the *Trebellianick* is much the ſame as to the Heir who is to reſign, as the *Falcidian* is, as to the true and real Heir. See *Digeſts*, Lib. 28. tit. 6. *De vulgari & pupillari ſubſtitutione*, Leg. 41. § 3.

[6] Cicero's Words are, *Omnes Leges, Judices, ad commodum Reipublicæ referre oportet, & eas ex utilitate communi, non ex ſcriptione, quæ in literis eſt, interpretari.* --------- *Neque enim ipſi* [qui Leges ſcripſerunt] *quod obeſſet, ſcribere volebant, & ſi ſcripſiſſent, cùm eſſet intellectum, repudiatum iri Legem intelligebant. Nemo enim Leges Legum cauſa ſalvas eſſe vult, ſed Reipublicæ, quod ex legibus omnes Rempublicam optimé putant adminiſtrari.* De Invent. Lib. 2. Cap. 38.

Mr. Barb. *NOTES on* § IX.

[1] It is a judicious Maxim in the *Roman* Law, That every part of a Law ought to be interpreted by the Tenor of the whole Law: *Incivile eſt, niſi tota Lege perſpecta, una aliqua particula legis propoſita, judicare, vel reſpondere.* Digeſts, Lib. 1. tit. 3. *De Legibus*, &c. Leg. 24. See alſo about *Compacts*, Lib. 45. tit. 1. *De verborum Obligat.* Leg. 134. § 1.

[2] The ſame Lawyers obſerve alſo, That we muſt explain one Law by another, the Antient by the New; and on the other ſide, the New by the Old, unleſs the laſt have manifeſtly abrogated ſomething preceeding. *Non eſt novum, ut priores Leges ad poſteriores trahantur* --------- *Sed & poſteriores Leges ad priores pertinent, niſi contrariæ ſint: idque multis argumentis probatur.* Digeſts, Lib. 1. tit. 3. *De legibus, &c.* Leg. 26. and 28. Further, Mr. Hertius makes a pleaſant Miſtake. As the Author ſays, *Cum illis* Locis *ubi idem de ſimili agit materia*; he quotes thereupon with a *for*, a Law, which imports, that when the Intention of the Contractor fully appears not, they muſt follow the Cuſtom of the Country where they treat: *Aut, ſi non appareat quid actum eſt, erit conſequens, ut id ſequamur, quod in regione, in qua actum eſt, frequentatur.* Digeſts, Lib. 51. tit. 17. *De Reg. Jur.* Leg. 34.

[3] Cicero obſerves well, That to diſcover the ſenſe of a Writing, we muſt examine the Works of the ſame Author, his Actions, Words, Opinions, and Converſation: *Qua in Sententia Scriptor fuerit, ex cæteris ejus ſcriptis, factis, dictis, animo atque vita ejus ſumi oportebit*, De Invent. *Lib.* 2. *Cap.* 40.

[4] The Words of the *Digeſts* are, *Imperfecta erit ſtipulatio* --------- *Si quod pondere, numero, menſura continetur, ſine adjectione ponderis, numeri, menſuræ ſtipulatus eſſem.* Digeſts, Lib. 45. tit. 1. *De verborum obligat.* Leg. 115. *princip.*

[a] Q. Curtius, *l.* 4. *c.* 11. [b] *F. Marſel.* Legat. *l.* 1. *c.* 38. [c] Everhard. *loc. legal.* 8. *ab abſurdo.* [d] *Declam.* 332.

if by their former Dealings it appear'd, that [5] ſuch a Sort and ſuch a Quantity was thought of and deſign'd, it is as good as if it had been actually expreſs'd [a]. This may be illuſtrated from *Homer* [b] in the Duel between *Menelaus* and *Paris*. They had agreed, that the Conqueror ſhould enjoy *Helen*; *Paris* being worſted, provided for himſelf by Flight, and *Agamemnon* proclaim'd *Menelaus* Conqueror, and that therefore *Helen*, according to Articles, ought to be his. And the *Poet* makes *Jupiter* of the ſame Opinion, who declares himſelf [c],

> Ἀλλ' ἤτοι νίκη μὲν ἀρηϊφίλου Μενελάου.
>
> *Brave* Menelaus *gains the Victory.*

Beſides, he that impoſes the Conditions muſt be the beſt Interpreter of them; for he on whom they are impoſed, has no Power of adding to them. But the Conditions (as *Hector* expreſs'd them) had no relation to Slaughter or Death, but to Victory only; for *Helen* was not to be adjudged to him that prov'd the better Man, but the Conqueror, and not he that ſlays the other is ſuch; for a Brave Man may fall by the Hands of a Coward. On the other ſide it might be argued, that in Decrees, Laws, Leagues, and Pacts, a latter Condition takes place [6] of a former: and that the laſt Condition that *Agamemnon* had added, was καταπέφνῃ, expreſſing the Death of the Conquer'd [d], and ſo *Priamus* ſeems to have underſtood, in ſaying,

> Jove *and the Gods eternal only know,*
> *Which of the Two is doom'd to Shades below* [e].

Beſides, the *former* Condition is included in the *latter*, for he that kills, conquers, but not *vice verſâ*. And therefore the Condition which *Hector* propos'd, *Agamemnon* did not annul, but explain'd [f]; did not change, but added to it that which was of the greateſt Moment, that the Victory ſhould conſiſt in the Death of the Adverſary; for that is undoubtedly Victory, whereas the other may bear a Diſpute: *As therefore where Laws are really repugnant, the Judges embrace that which is evidently clear, in preference to that which is obſcure; ſo we look upon that Pact to be better and more valid, which is deciſive of the Controverſy, and liable to no Exception* [7] [g].

X. But that which helps us moſt in the Diſcovery of the true meaning of the Law, is the *Reaſon* of it, or the Cauſe which moved the Legiſlator to enact it [1]. This ought not to be confounded with the *Mind* of the Law; for that is nothing but the genuine Meaning of it; for the finding out of which, we call in the *Reaſon* of it to our Aſſiſtance. And this is of the greateſt force, when it evidently appears that ſome one *Reaſon* was the only Motive that the Parties went upon, which is no leſs frequent in Laws than in Pacts. And here that common Saying takes place, that *The Reaſon ceaſing, the Law itſelf ceaſes.* But if ſeveral *Reaſons* concur together, and only one ceaſes, the others do not immediately expire, or become leſs able to ſupport the Efficacy of the Law. Nay, ſometimes the general *Reaſon* of the Thing ſeems to draw one way, and the *abſolute Will* of the Legiſlator another; and in ſuch a Caſe [2] the *Will* of the Legiſlator muſt de deem'd by the Subjects a *Reaſon*, which if it be but clearly ſignified, altho' not altogether ſo congruous to the Laws of Prudence, yet ſuffices to create an Obligation. From theſe Premiſſes may be rightly inferr'd, that a Preſent made [3] in Proſpect of Marriage may be revoked and demanded back, if the Marriage does not ſucceed; eſpecially if it ſticks on that Side to whom the Preſent was made. Tho' generally in ſuch Preſents as paſs among the Living, the Reaſon of them [4] has not the force of a Condition (unleſs it be expreſly mention'd) ſo as to make the Fact null, where that does not appear. And therefore the *Olynthii* were not unjuſt in refuſing to reſtore the Land which *Amyntas* King of *Macedon* had given them, when, being defeated by the *Illyrians*, he had had loſt all Hopes of defending his Kingdom [h].

Yet in ſome Caſes, the Law itſelf may ſuſtain the Place of a Condition [i]. And therefore *Cicero* [k], to the [5] Interdict which [l], amongſt others, had theſe Words in it, [6] *From whence you, or your Family, or your Agent*, &c. rightly argues:

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[5] And again, *Triticum dare oportere ſtipulatus eſt aliquis. Facti quæſtio eſt, non juris. Igitur ſi de aliquo tritico cogitaverit, id eſt, certi generis, certæ quantitatis: id habebitur pro expreſſo.* Ibid. Leg. 94.

[6] Plutarch's Words are, Ἐν τε δόγμασι ϗ νόμοις, ἔν τε συνθήκαις ϗ ὁμολογίαις, κυριώτερα τὰ ὕστερα νομίζεσθαι, ϗ βεβαιότερα τῶν πρώτων. *Plut.* p. 742. *D. Ed. Wech.*

[7] Plutarch's Words are, Ὥσπερ οὖν ἐν ταῖς ἀληθιναῖς ἀντινομίαις οἱ δικασταὶ τῷ μηδὲν ἀμφισβητήσιμον ἔχοντι προστίθενται, τὸ ἀσαφέστερον ἐάσαντες· οὕτως ἐνταῦθα τὴν ἀπερίφραστον ϗ γνώριμον τέλος ἄγουσαν ὁμολογίαν, βεβαιοτέραν χρὴ ϗ κυριωτέραν νομίζειν. *Idem.* pag. 743. A.

Mr. Barb. *NOTES on* § X.

[1] See what will be ſaid, § 19. *Note* 5. about the Caſes where the Law ought to be reſtrained, becauſe the Reaſon, which effectually determined the Lawgiver, or Contractors, takes not place.

[2] See how the Author explains this in his *Abridgment of the Duties of a Man and Citizen.* Often, tho' we ſee not the Reaſon of a Law, the Will of the Lawgiver is ſufficient to impoſe, on them that depend on him, an Obligation to conform to it. *L.* 1. *Chap.* 17. § 8. See alſo Mr. Thomasius's *Juriſprud. Divin.* Lib. 3. Chap. 12. § 151.

[3] See above in *Book* IV. *Chap.* 9. § 4. *Note* 6.

[4] So the *Digeſts* order, *Et generaliter hoc in donationibus definiendum eſt: multum intereſſe, cauſa donandi fuit, an conditio. Si cauſa fuit, ceſſare repetitionem. Si conditio, repetitioni locum fore.* Digeſt. Lib. 39. tit. 5. *De Donation.* Leg. 3.

[5] This is what is called *Interdictum.* See the *Inſtitutes*, L. 4. t. 15. and Francis Hotoman upon Cicero's Oration for *Cæcina*, *Chap.* 4. There are ſeveral ſorts of it, and this of which he treats is called, *Interdictum unde vi.*

[6] Cicero's Words are, Unde tu, aut Familia, aut Procurator tuus, *Cicero pro Cæcina*, *Cap.* 19.

[a] *De verb. oblig.* l. 94. *D. conf.* Ziegl. *ad* Grot. *d. l. ſ.* 7.
[b] Iliad. Γ. & Δ.
[c] Iliad. Δ. *v.* 13.
[d] *Homer.* Il. 3. v. 281.
[e] *Homer.* Il. 3. v. 309.
[f] *Ibid.* v. 91, 92.
[g] *Plut.* Symp. *l.* 9. *qu.* 13. *p.* 743. A.
[h] *V.* Diod. Sic. *l.* 15. *c.* 9.
[i] *Vid.* Cod. *l.* 8. *tit.* 56. *de revoc. donat.*
[k] *Orat. pro* A. Cæcina 19.
[l] *V.* Inſtit. *l.* 4. *t.* 15. & D. *L.* 43. *t.* 16. *De vi & de vi armata*, l. 1. *princip.*

altho' one Servant be not a [7] Family, yet if that one Servant diſpoſſeſſes me, 'tis plain I ought to be reſtored from the Reaſon of the Edict [a]. Nor is there any Difference whether my *Agent*, or any body elſe in my Name, diſpoſſeſſes another: He adds, the Reaſon is the ſame in this Caſe, whether your *Agent* (as the Word ſignifies one that manageth all your Concerns in your Abſence with full Power, as your Attorney or Subſtitute) or your Neighbour, or Client, or Freed-man, or any other diſturb me upon your Account and Intreaty [b] [8].

Another Inſtance of a Caſe which may be decided from the *Reaſon* of the Law [c] [9], *The Law is, that thoſe, who in a Storm forſake the Ship, ſhall loſe all; and the Ship and the Lading ſhall be theirs that ſtay in it. But in a very diſmal Tempeſt all forſake the Ship, except one ſick Man, who is not able to get out and eſcape; the Ship by chance comes ſafe to Port; the ſick Man ſeizes it as his; the Owner puts in his Plea againſt him.* Now the Reaſon of the Law was, that thoſe who had expos'd their Lives to ſave the Ship, ſhould have ſome Encouragement; but this the ſick Man cann't pretend to, who neither ſtay'd in the Ship upon that Account, neither contributed any thing to the ſaving of it.

XI. Beſides, the ſame Word admits of ſometimes a more *looſe*, ſometimes a more *ſtrict* Interpretation, which may happen upon ſeveral Accounts. Sometimes the Name of the *Genus* is peculiarly apply'd to one of the *Species*; as in the Words *Adoption* [1] and *Cognation* [2]. In the Names of Animals, where the Word is not of the *common Gender* [3], the *Maſculine* includes the *Feminine*, and *vice verſâ*. Sometimes Art gives a Term a larger Signification than common Uſe: As *Death* in the *Roman* Law is extended even [4] to Baniſhment, which in popular Uſe ſignifies only the Separation of the Soul from the Body. Hither may be referr'd the Ambiguity in the Words, *mine*, *thine*, *yours*, &c. which *Martial* [d] plays with;

> *Carmina Paulus emit, recitat ſua carmina Paulus:*
> *Nam quod emis, poſſis dicere jure tuum.*

You Verſes buy, your Verſes you recite:
For what you buy, that juſtly is *your Right*.

XII. Moreover, in Promiſes and Pacts, as alſo in Privileges, ſome Things are *favourable*, ſome *odious*, and others of a middle or *mixt Nature*.

Thoſe are *favourable* which carry an Equality along with them, or which equally oblige each Party, and which tend to promote the common Advantage; and the greater and the more extenſive the Advantage is, the better Title have they to *Favour*. Thoſe alſo are favourable which make for the Preſervation of Societies, and without which ſome Act would be to no End or Purpoſe. Beſides, to avoid an Inconvenience is more favourable than to gain a Convenience [1], and greater Favour is allow'd to that which makes for Peace, than that which makes for War; and a defenſive War is ſtill more *favourable* than an offenſive.

On the other ſide, thoſe are *odious*, which lay the Burden on one Party only, or on one more than the other; that alſo which carries a Puniſhment along with it; or makes any Act of no Effect; or changes any thing in former Conſtitutions; and ſuch as tend to the Deſtruction of Friendſhip and Society.

Thoſe that are of a *mixt Nature* (as ſuppoſe former Conſtitutions are changed, yet for the ſake of Peace) according to the Greatneſs of the Good, or the Change, are ſometimes *odious*, ſometimes

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[7] Cicero's Words are, *Si me Villicus tuus ſolus dejeciſſet, non familia dejeciſſet, ut opinor, ſed aliquis de familia. Rectè igitur diceres te reſtituiſſe? -------- Non enim alia cauſa eſt æquitatis in uno ſervo, & in pluribus: non alia ratio juris in hoc genere dumtaxat, utrum me tuus procurator dejecerit, is qui legitimè procurator dicitur omnium rerum ejus, qui in Italia non ſit, abſitve Reipublicæ cauſâ, quaſi quidam pene dominus, hoc eſt, alieni juris vicarius.*

[8] Indeed, as the Law to which the Author here refers us, imports, all Caſes cann't be expreſſed in Laws, they ought to be applied to Caſes perfectly alike, and where the ſame Reaſon takes place evidently. *Non poſſunt omnes articuli ſingillatim aut Legibus aut Senatus-conſultis comprehendi: ſed cum in aliqua cauſa ſententia eorum manifeſta eſt, is, qui juriſdictioni præeſt, ad ſimilia procedere, atque ita jus dicere debet.* Digeſt. Lib. 1. tit. 3. *De Legibus*, Leg. 12, 13. See alſo Leg. 27.

[9] So the Author *ad Herennium* ſpeaks, *Sit Lex, quæ jubeat, eos, qui propter tempeſtatem navim reliquerint, omnia perdere; eorum navim, ceteraque eſſe, ſi navis conſervata ſit, qui remanſerint in navi. Magnitudine tempeſtatis omnes perterriti navim reliquerunt, ſcapham conſcenderunt, præter unum ægrotum: is propter morbum exire & fugere non potuit. Caſu & fortuitu navis in portum incolumis delata eſt: illam ægrotus poſſidet; navim petit ille, cujus fuerat.* Cap. 11.

Mr. Barb. *NOTES on* § XI.

[1] Under the Term of *Adoption* is contained the Adoption properly ſo called, by which the natural Father releaſes his Son from under his paternal Authority, and transfers him to his Adoptive Father; and Abrogation is by which a Son, who has loſt his natural Father, and was under his own Power, ſubmits himſelf to him who is willing to become a Father to him. See the *Inſtitut. Lib. 1. tit. 11. De adoptionibus.*

[2] *Cognati* in the *Roman* Law is ſpoken generally of all the collateral Kindred, but more particularly *Cognati* are the collateral Kindred on the Mother's Side, and *Agnati* of the Father's Side. See *Inſtitut. Lib. 1. tit. 15. De Legitimâ Agnatorum tutela*, § 1.

[3] The Words of the *Digeſts* are, *Verbum hoc*, ſi quis, *tam maſculos quam fæminas complectitur.* Digeſt. Lib. 50. tit. 16. *De verborum ſignificatione*, Leg. 1.

[4] So the *Digeſts* ſpeak, *Deportatos enim mortuorum loco habendos.* Digeſt. Lib. 37. tit. 4. *De bonorum poſſeſſione contra tabulas*, Leg. 1. § 8. See above *Lib. 3. Chap. 6.* § 3. *Note* 5.

Mr. Barb. *NOTES on* § XII.

[1] Quinctilian's Words are, *Incommoda vitantis melior, quàm commoda petentis eſt cauſa.* Inſtit. Orat. Lib. 7. cap. 4. pag. 539. Edit. *Ludg. Bat.* 421. Edit. *Obrecht.*

[a] Vide *Cicer. ubi ſupra, c.* 19, & 20.

[b] Add. *Lib. 1. t. 3. l.* 12, 13. & *Lib. 27. de legibus.*

[c] *Which is put by the Aut.* ad Heren. *l.* 1. *c.* 11.

[d] *L. 2. Ep. 20. Id. l. 6. Ep. 12. Jurat capillos eſſe, quos emit, ſuos Fabulla; nunquid,* Paule, *pejerat?*

favourable; yet, *cæteris paribus*, *Favour* ought to take place [2].

XIII. Upon theſe Diſtinctions *Grotius* builds the following Rules.

1. *In Caſes that are* [1] *not* odious, *Words are to be underſtood according to the full Propriety of popular Uſe; and if in popular Uſe there be ſeveral Significations of the ſame Word, the largeſt is to be taken.* Thus ſometimes the *Maſculine* is to be taken for the *Common Gender:* as if Leave be given to kill any Game in ſuch a Foreſt, except *Bucks*, under that Name [2] *Does* alſo ought to be comprehended. In ſuch Caſes too an *indefinite* Word is to be taken [3] univerſally; as if it be ſtipulated in a Treaty, That the Captives ſhall be return'd on both ſides, it muſt be underſtood of all and every one of them. So *Cicero* [a] argues in the aforeſaid Interdict, that the Words, *From whence a Man has been ejected*, ought to be extended even to him who is hindred from coming to his own [4]. For this Senſe is not repugnant to the Nature of the Words; and in *Favour* a Man ought to be put in Poſſeſſion of his own; for to Diſpoſſeſs is to hinder one from continuing in Poſſeſſion [b], but a Man continues in Poſſeſſion, altho' he ſometimes goes out upon neceſſary Occaſions. And therefore it is the ſame thing whether a Man actually turns me out of my Houſe, or, while I am out upon neceſſary Buſineſs [5], hinders me from coming in [c]. From the Force of this Rule it is, that, in a doubtful Caſe, if it be a Matter of *Favour*, the Year begun is look'd upon as compleat, where another's Right is not injured by it [d]. And againſt this did *Caligula* [e] offend, in denying thoſe, whoſe Anceſtors had obtain'd the Freedom of *Rome* for themſelves and their Poſterity, a Title to it, unleſs they were their Sons, [6] affirming that *Poſterity* ought not to be underſtood beyond that Degree [f]. Yet I am afraid *Dido* made uſe of too *favourable* an Interpretation, who when ſhe had purchaſed ſo much Ground, as ſhe could cover with an Ox's Hide, cut the Hide into thin pieces, and ſo ſeiz'd upon more Ground than ſhe had really bargain'd for [g]. By the ſame Trick did *Ivarus* buy as much Land as he could en-

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[2] This Diſtinction of Things favourable and odious is equally uncertain and uſeleſs. The Definitions given them by Grotius and our Author have no Foundation; for the Promiſes and Compacts, as well as Privileges, devolving upon Things allowable and innocent, as we may here ſuppoſe, are all indifferent in their Nature, and by Conſequence ought not to be extended or reſtrained farther than the Intention of the Author requires. There are in theſe Definitions Things which do not well agree together: For we ſay, for Example, that what tends to the publick Advantage is favourable, and what contains any Trouble in it is odious, for we know, that the Infliction of Puniſhment makes for the publick Advantage. There are no Cauſes favourable or odious; for what they have of that Nature proceeds not from the Thing it ſelf, but depends only upon the Intention either of the Legiſlator, or Contractors, or Teſtator. In the *Roman* Law, for Example, the Liberty of a Servant (ſee the *Inſtit. Lib.* 1. *tit.* 6. *Quibus ex cauſis manumittere non licet*, § 2.) is a Thing favourable, as alſo the Portion of a Woman (ſee the *Digeſts Lib.* 23. *tit.* 3. De jure Dotium, *Leg.* 68, 70.) On the contrary, Second Marriages paſs for odious with moſt People (ſee *Novel. Juſtiniani* 2. *Chap.* 2. § 1.) I have alſo ſaid that this Diſtinction is uſeleſs: Indeed in the Examples alledged by our Author, the Interpretation which he gives, may either be given independently upon what he believes odious or favourable, or is directly contrary to his Rule. Mr. Titius, *Obſer.* 428, 429. See what ſhall be ſaid in the following Notes The Author whoſe Opinion I have related, follows Mr. Thomasius in this, none of whoſe Works I had ſeen when I put out my firſt Edition of this Book; ſee his *Juriſpr. Divin. Lib.* 2. *Chap.* 12. § 159, *&c.* and the Appendix following it, where he defends himſelf againſt the Profeſſor of *Hamburgh* named *Vincent Placcius*, who had criticized upon what he maintain'd, that he could not give a good Definition of favourable and odious.

Mr. Barb. *NOTES on* § XIII.

[1] That is to ſay, according to Mr. Thomasius, *ubi ſupra*, § 173. in Things of a mixt Nature, which are both favourable and odious. We muſt add, *Provided the favourable moſt prevail.*

[2] That's true, but that is not becauſe a Thing favourable is treated of, but by reaſon of the uſual Signification of the Word *Cervus*, i. e. a *Buck*. Mr. Titius obſerves very well, That when indeed we ſpeak of a Buck, or any other Creature in the Maſculine Gender, which is the more noble, it comprehends the Female as well as the Male, unleſs there be ſome Circumſtance which ſhews plainly that we ſpeak of the Male in Oppoſition to the Female. But I am not of the Opinion of that Author, who affirms, That according to the Opinion of Grotius and Pufendorf, the Word *Buck* is only applied to the Males. *Becauſe* (ſays he) *this Clauſe*, Except the Bucks, *imports a Change of what before it was wont to ſignify, and conſequently includes ſomething Odious.* This Change was made after the firſt Agreement, and not a Reſtriction added on a ſudden and in the Agreement itſelf, as that is, which is treated of in this Example.

[3] This is not becauſe a Thing favourable is treated of, but becauſe in ordinary Speech theſe indefinite Expreſſions are equivalent to univerſal, unleſs there be otherwiſe ſome Reaſon to reſtrain them, as there is not here. For why is it, that in a Treaty of Peace we would keep any Priſoner taken in War? According to the Principles of Grotius (as Thomasius obſerves) he that having the greater Number of Priſoners, would exchange them only Man for Man, for otherwiſe it would be a Thing odious, becauſe he would give more than the other. This laſt on his part affirms, That, according to the Agreement for Peace, he treated for the moſt favourable Thing, and ſo the Terms are to be underſtood in the moſt extenſive Senſe that they are capable of. Thus thro' the Contrariety of Reaſons, nothing is determined by theſe Terms *Favourable* and *Odious*. Moreover, it ſometimes leads us to an Interpretation plainly contrary to the Senſe of him that ſpeaks: As Mr. Thomasius ſhews by this Example, "Suppoſe (ſays he) a Magiſtrate forbids the Carriage of Corn out of his Country, under ſevere Penalties, and one carries out Meal." In this Caſe, according to Grotius's Rule, he that carries out Meal ought not to be puniſhed; for beſides that his former Liberty is abridged, the Prohibition is accompanied with a Puniſhment, and ſo a Thing abſolutely odious is treated of.

[4] This is determined in the *Digeſts: Si autem cum dominus veniret in poſſeſſionem, armati eum prohibuerunt, qui invaſerant poſſeſſionem, videri eum armis dejectum*, Lib. 43. tit. 16. *De vi & vi armata*, Leg. 3. § 8.

[5] The Words of the *Digeſts* are, *Sive autem corpore, ſive animo poſſidens quis dejectus eſt: palam eſt, eum vi dejectum videri. Idcircoque ſi quis de agro ſuo vel de domo proceſſiſſet, nemine ſuorum relicto, mox revertens, prohibitus ſit ingredi vel ipſum prædium: vel ſi quis eum in medio itinere detinuerit, & ipſe poſſederit: vi dejectus videatur: ademiſti enim ei poſſeſſionem, quam animo retinebat, etſi non corpore.* Ibid. *Leg.* 1. § 24. Beſides, what our Author ſays is ſufficient to ſhew, that we need not examine whether the Thing treated of is favourable or not, for the Senſe of the Words, *drive out*, may be proved by other Principles. Mr. Thomasius ſays here, that *all depends upon the Reaſon of the Law, for* (adds he) *the* Roman *Law would by it prevent all ways of private Perſons thus acting one by another.* *Francis Hotoman* nevertheleſs affirms, That *Cicero* is a little cavilling in the Buſineſs of *Cæcina*, as appears by his Notes on that Orator's Harangue before quoted. See Mr. Schulting's Diſcourſe, *De Juriſpr. M. Tull. Cicer.* pag. 283.

[6] Nothing is more common, than to underſtand by the Word *Deſcendents*, all thoſe who deſcend in the Right-line for ſeveral Degrees, without needing a favourable Conſtruction, to extend it farther than the firſt Degree. And the Determination of the *Roman* Law is poſitive, as to the Privileges granted a Perſon and his Deſcendents, as appears by the Law quoted by our Author, *Immunitates generaliter tributæ eo jure, ut ad poſteros tranſmitterentur, in perpetuum ſuccedentibus durant.* Lib. 50. tit. 6. leg. 4.

[a] *Orat. pro Cæcina*, c. 23. [b] Add. *l.* 3. *ſ.* 7. *D. h. t.* [c] Add. *L.* 19. *t.* 2. *l.* 29. *D. locati, &c.* [d] *V. Buſſier's Hiſt.* Franc. *l.* 19. *p.* 39. [e] *Suet. c.* 38. [f] Add. *L.* 50. *t.* 6. *l.* 4. *D. de jure immunitatis.* [g] *Juſt. l.* 18. *c.* 5. *Virg. Æn. l.* 1. *v.* 371. & *Cerda ad h. l.*

compaſs with the Hide of a Horſe, which he afterwards cut into ſeveral ſmall Thongs, and encompaſſed Land enough to build a City upon [a].

2. *In a Matter of* Favour [7], *if he that ſpeaks be learned in the Law, or ſpeaks by the Advice of thoſe that are, his Words are to be taken in the moſt comprehenſive Signification; ſo as not only to import as much as they do in common Uſe, but to include that Signification alſo which is uſed amongſt the Lawyers, or which the Civil Law has impos'd upon them.*

3. On the other hand; *Words ſhall be taken in a ſtricter Senſe than the Propriety requires, if otherwiſe Injuſtice or an Abſurdity would follow* [8].

4. *Altho' it be not abſolutely neceſſary for the avoiding Injuſtice, to take the Words in a ſtricter Senſe than their Propriety demands; yet if there be a manifeſt* [9] *Advantage in ſuch a Reſtriction, we ought to ſtop at the narroweſt Limits of their proper Signification, unleſs Circumſtances perſuade otherwiſe.*

5. *In an* odious *Matter a figurative Speech may be admitted* [10] *to avoid a Grievance*; thus in a Donation, or when a Man recedes from his Right, Words, altho' deliver'd at large, are uſually confin'd to thoſe Things only, which were ſuppos'd to be then thought of. And therefore *Cicero* argues right, that [11] tho' a Man bequeaths to his Wife all the Money he has, yet his Debts are not therefore bequeath'd unto her; for there is a great deal of difference between ready Money, and ſuch as is due upon Bonds. Thus *Aurelian*, when he ſet out on his *Eaſtern* Expedition, promis'd the People Crowns of two pounds Weight, if he return'd Conqueror: And when the People expected Crowns of Gold, which *Aurelian* [b] was neither able nor willing to beſtow, he gave them only Crowns of Bread [c]. Nay, tho' a Man expreſſes himſelf univerſally, if afterwards a particular Enumeration follows, the [12] Law won't allow any thing to be made over, but what was particularly expreſs'd. And when one Nation has ſtipulated to ſend another [13] Auxiliary Forces, it is ſuppos'd that they are to be ſent at the Expence of him to whom they are promiſed, unleſs it was expreſly otherwiſe agreed between them. And thus a League made for the Defence of a Dominion, when the Lord is in Poſſeſſion of it, does not extend to the Recovery of it, when he is ejected [d]. Sometimes the *Odium* of the Perſon juſtifies a *ſtrict* and almoſt quibbling Interpretation: Thus the Lady that betray'd the Capitol, and had bargain'd for her Pains to have what the *Sabines* carried upon their left Arms, meaning their Bracelets, was buried under their Shields [e] [14].

XIV. *Grotius* applies theſe Rules in a few Examples: As thus, *It is demanded, if a Reward be propos'd to him that firſt gets to the Goal, and two come in together, whether it be due to both or to neither?* Indeed the *firſt*, in this Caſe, may ſignify either him who out-runs all the reſt, or him whom none out-runs: And therefore if the Reward was only a Wager between the Parties, and both come to the Goal together, they muſt draw Stakes. And the ſame holds, if two Spectators, as is uſual, had laid a Wager on this or that Man's Head. But if the Reward was propos'd by a third Perſon to encourage their Induſtry, then thoſe who come in together ought to divide it, if it be capable of Diviſion; or elſe to enjoy it both together; or, if that cannot be, to draw Lots for it, or to run again; for 'tis hard that both ſhould be deprived of the Reward, becauſe neither was worſe than the other: Beſides, the Rewards of Virtue ought not to be confined to ſo *ſtrict* an Interpretation; and therefore it would be generous in the Patron to give the whole Reward to each that performs equally [f] [1]. But what *Auguſtus* gave the Robber *Coracota* (who having heard that ſuch a Sum of Money was laid upon his Head, ſurrender'd himſelf) proceeded rather from the Greatneſs of the Emperor's Soul, than that it was due from him [g].

XV. In the Treaty which put an End to the ſecond *Punick* War, there was a Clauſe, *That the* Carthaginians *ſhould not wage War, either in* Africa, *or*

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[7] But why ſhould not this have place in a Donation, for Example, which is a Thing odious, according to GROTIUS and our Author. The Donor knowing all the Force and Extent of the Terms which he uſes, may be ſuppoſed to uſe them without Reſtriction, unleſs there be ſome probable Reaſon to make us think he had ſomething leſs in his Mind, and in that Caſe 'tis not becauſe a Thing odious or chargeable is treated of, that the Signification of the Terms are reſtrained, but upon the Account of what the Donor's Mind was moſt probably, as our Author himſelf ſpeaks, a little lower, after GROTIUS.

[8] This and the following Rules are not peculiar to Things favourable, as is eaſy to obſerve. They concern all Acts done with Deliberation.

[9] GROTIUS ſays, *A manifeſt Equity, or Profit*; and the firſt Word is apparently omitted, either by the Careleſneſs of the Author, or Fault of the Printers. As for the Rule it ſelf, if Equity requires that the Signification of a Word ſhould be reſtrained, it is for that Reaſon, and not becauſe a Thing favourable is treated of. But Profit has no Influence here, farther than 'tis evident that the Lawgiver or Contractors would procure it.

[10] Provided, that there be Reaſon to believe, that he that ſpeaks would not ſubject himſelf or others to this chargeable Conſequence; for if he intends it, why ſhould we oppoſe his Deſign?

[11] CICERO's Words are, *Non ſi Uxori Vir legavit omne argentum, quod ſuum eſſet; idcirco quæ in nominibus fuerunt, legata ſunt; multum enim differt in arcâne poſitum ſit argentum, an in tabulis debeatur*. Topic. cap. 3. When he ſpeaks of his Money, he means not ordinarily his Debt, ſo the Senſe of the Teſtator is taken from the Signification of the Terms, and not from the Nature of the Legacies or Gifts themſelves.

[12] But then the Enumeration it ſelf ſhews, that he that ſpeaks did not take the univerſal Particle in its full Extent.

[13] In this Example 'tis clear, that the Promiſe to ſend Succours, does not contain, according to the ordinary Uſe of the Words, and common Practice, an Engagement to furniſh the Troops at his own Expence. So that, when a Thing favourable is treated of, it cann't be extended to an Agreement, unleſs it be explained in other Terms. As for the Example following, I cann't ſee why the Author alledges it here.

[14] See Mr. BUDDEUS's Diſcourſe, entitled, *Jurisprudentiæ Hiſtoricæ Specimen*, § 11, *&c.* among his *Selecta Juris Naturæ & Gentium*, where he examines this Caſe.

Mr. BARB. *NOTES on* § XIV.

[1] See Mr. THOMASIUS's Diſcourſe, *De Prioritate & Poſterioritate temporis dubiâ atque incertâ*, which are amongſt thoſe at *Leipſick*, *Chap.* 3. where the Queſtion propounded in this §, and ſeveral other curious ones are handled.

[a] *Apud Saxonem Gramm. l.* 9. *& Polyd. Virg. Hiſt. Angl. l.* 5:

[b] *See above in* B. 3. c. 5. ſ. 10. *and Mr.* Barbeyrac's *1ſt Note upon it.*

[c] *Which were called* Siliginei. Panis Siligineus, *White Bread. V. Fl. Vopiſcum in Aurel. c.* 35.

[d] Vid, *Guicciard. Hiſt. l.* 15. *p. m.* 433.

[e] *Tarpeia. V. Plut. Romulo, & Liv. l.* 1. *c.* 11.

[f] *V. Liv. l.* 26. *c.* 48.

[g] *Dio. Caſſ. l* 56.

out of Africa, *without Leave of the* Roman *People*[a]. Ought this to be underſtood of an offenſive War only, or of a defenſive alſo? Certainly only of an offenſive War; for otherwiſe that Clauſe would be *odious*, as inconſiſtent with the very Being of the State of *Carthage*. Beſides, 'tis hard to retrench one's natural Liberty, ſo far as not to permit him to defend himſelf againſt an Injury[b]. Nor was it the Deſign of the *Romans*[1] by this Clauſe to expoſe the *Carthaginians* to the Inſults of their Neighbours, or to render them entirely dependent upon their Arms for Protection; but only ſo to tie them up, as that they ſhould not enlarge their Territories, or increaſe their Strength by War. Indeed when the *Romans* made ſuch a League with *Antiochus*, they inſerted this expreſs Clauſe[c], *That if any Nation, againſt whom* Antiochus *by theſe Articles is debarred from waging War, ſhould ſet upon him firſt, he ſhould then have Liberty of Warring againſt them*[2].

XVI. The *Romans* promiſ'd the *Carthaginians*, that *Carthage ſhould be a free City*: And a little after demanded of them that they would demoliſh it, and build another at a greater Diſtance from the Sea; pretending that the Spot of Ground, upon which the City ſtood, was not *Carthage*[d]. Here tho' the Freedom which the *Romans* promiſ'd cann't be underſtood of a full and entire Liberty, that having already ſuffer'd no ſmall Diminution; yet, at leaſt, ſo much Liberty ought to be underſtood, as that they ſhould not be oblig'd, at another's Command, to deſtroy their native Country, and betake themſelves elſewhere. Indeed Liberty, or a Privilege of being govern'd by one's own Law[1], is the Attribute of a People, not of a City, as it conſiſts of Walls and Houſes; yet ſince it was ſaid that *Carthage ſhould be free* (not the *Carthaginians*, by which way of ſpeaking the *Romans* might have colour'd over their Cheat) the natural Meaning of the Words intimate, that the People ſhould enjoy their Liberty in the City *Carthage* that then was, and alſo that the Buildings themſelves ſhould be ſecure. *Polybius*[e] relates, that the Senate had promiſ'd, that *They ſhould have their Liberty, their Laws, all their Lands, the full Poſſeſſion of all their Goods, both publick and private*; and that the *Carthaginians* preſently ſuſpected why there was no Mention made of the City. But indeed 'tis evident, that the *Romans* here were guilty of more than *Punick* Perfidiouſneſs.

XVII. There are other Conjectures founded upon ſomething elſe than the Signification of the Words in which the Thing is expreſs'd, which make it neceſſary ſometimes to *enlarge*, ſometimes to *reſtrain* the Meaning. Yet it is obſervable, that we have oftner Reaſon to *reſtrain* than to *enlarge* it. For the Want of any one Cauſe is enough to hinder the Effect of a Thing, whereas all muſt neceſſarily concur to produce it: Thus, in ſuch Acts as create an Obligation, the Meaning muſt be *reſtrained*, if it appears that any one of the Cauſes be abſent; whereas to *enlarge* it, there muſt be a Concurrence of them all.

And this *Enlargement* is not ſo eaſily admitted here, as when I juſt now ſaid, that in a Matter of *Favour*, the Words may bear another, tho' leſs receiv'd Signification than uſual: For there (ſince the only uſe of Words is to expreſs one's Mind) ſuch a Senſe of the Words, not being entirely diſſonant to common Uſe, might probably have been in the Mind of the Speaker. But the Caſe before us ſuppoſes us to make Uſe of Conjectures, to prove that the Mind of the Speaker is ſuch as his Words won't admit of, and therefore we ought to be very certain of it.

Nor can a Law extend to a Caſe, which proceeds upon a Reaſon only like that which the Law is founded upon, for the Reaſon ought to be exactly the ſame. Nay even that is not always enough, for ſometimes the bare Will of the Legiſlator determines it ſelf at Pleaſure, even againſt or without Reaſon, and yet is ſufficient to produce an Obligation.

To juſtify then ſuch an *Enlargement*, we ought to be ſure that the Reaſon, under which the Caſe in Debate comes, was the[1] only Cauſe and Motive that induc'd the Legiſlator to enact the Law; and that this Reaſon has been conſider'd by him ſo generally, as that he would have apply'd it to the preſent Caſe, had he foreſeen it, becauſe otherwiſe the Law would have been uſeleſs or unjuſt.

Hither may be referr'd what the *Rhetoricians* ſay about *Reaſoning*, when a Thing, for which there is[2] no Proviſion made by any particular Law[f], is inferr'd, by a Parity of Reaſon, from a like Caſe which is provided for: or, as *Quinctilian*

Mr. Barb. *NOTES on* § XV.

[1] This Reaſon alone hath ſo great Force, that 'tis not neceſſary to alledge what the Clauſe contains hurtful or odious.

[2] *Si qui ſociorum populi Romani ultro bellum inferent Antiocho, vim vi arcendi jus eſto: dum ne quam urbem aut belli jure teneat, aut in amicitiam accipiat. Tit. Liv. Lib.* 38. *cap.* 38. "If any of the Allies of the *Roman* People ſet upon *Antiochus*, let him "have Liberty to repel Force by Force, provided he takes no City, either by the Right of War, or by Treaty." See alſo *Polyb. Excerpt. Legat.* 35. *cap.* 4.

Mr. Barb. *NOTES on* § XVI.

[1] As *Nicias* and *Themiſtocles* ſay in *Thucyd. Lib.* 7. *Chap.* 77. "Men make up the State, and not Walls and Ships without Men "in them." Ἄνδρες γὰρ πόλις, οὐ τείχη. Add. *Juſt. Lib.* 2. *cap.* 12. *n.* 14.

Mr. Barb. *NOTES on* § XVII.

[1] There is no Neceſſity that the Reaſon of the Law ſhould be ſingle, to authorize the Extent of it; for there is often more than one thing which cauſes Laws to be made, and in one and the ſame Thing ſeveral Ends may be propoſed, either equally, or ſo as ſome may be principal, and others ſubordinate. In this Caſe, if he that ſpeaks has equally propounded to himſelf diverſe Reaſons, which he had in View, they muſt all be joined in extending it, in ſuch a Manner, as the like Caſe, to which the Law may be extended by virtue of one of thoſe Reaſons, agrees with all the other. But when there is a principal one, there is no Neceſſity that the Caſe ſhould alſo agree to the other ſubordinate ones, as Mr. Thomasius obſerves, *Inſtit. Juriſpr. Divin. Lib.* 2. *Chap.* 12. § 90.

[2] See the Laws quoted above, § 10. Note 8.

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[a] *Liv. l.* 30. *c.* 37. *Polyb. l.* 15. *c.* 18. The like Article we find in the Peace which *Flaminius* gave to King *Philip*, *Liv. l.* 33. *c.* 30.

[b] Add. *Livy, l.* 42. *c.* 41.

[c] Add. *Livy, l.* 42. *c.* 23.

[d] Vid. *Appian. de Bello Punic.* p. 45. *Ed. Steph.*

[e] *Ex. Legat.* 142.

[f] Vid. *D. l.* 1. *t.* 3. De legib. *l.* 12, 13, & 27.

has it, *When a Thing not written is gathered from a Thing written:* which he illuſtrates by theſe Examples [3]. *To take a* Plough *in Pawn is not lawful, he takes the* Plough-ſhare. *The Exportation of* Wool *is prohibited, he exports* Sheep. *He that ſlays his Father muſt be ſew'd up in a Leathern Bag, he has ſlain his* Mother. *A Man ought not to be dragg'd out of his* Houſe *to Juſtice; he draggs him out of his* Tent [a].

Hither too may be referr'd the Caſe defended by *Lucian* [b]; the Law is, *Whoſoever kills the* Tyrant *ſhall be rewarded: A certain Man climbs into the Citadel to kill the* Tyrant, *but miſſing him, kills his Son, and leaves the Sword in the Body: The* Tyrant *coming in, and finding his Son ſlain, out of Grief falls upon the ſame Sword, and dies: He that ſlew the* Tyrant*'s Son demands the Reward, as the ſlayer of the* Tyrant. *Eraſmus* [c] takes the other ſide, yet certainly the Reaſon of the Law is for having the Reward given, not only to him who ſlays the Tyrant with his own Hand, but to [4] him alſo who is the immediate Occaſion of it [d]. Since there is no doubt but the Legiſlator would have decreed the Reward to him alſo, had ſuch a Thing come into his Mind.

The Law ſays, that whoſoever kills his Wife ſhall be put to Death; but a certain Man, being willing to get rid of his Wife, and at the ſame time to eſcape the Law, kept his Mule three Days without Water, and the fourth Day pretending to ride out for his Diverſion, put his Wife upon the Back of the Mule; who as ſoon as he came to the River, ran eagerly into it, and threw the Woman, who periſh'd in the Waters.

Thus the Brethren of *Joſeph* vainly thought, that they ſhould be guilty of a leſs Crime in throwing him into the Pit, where he muſt die of Hunger, than if they had actually cut his Throat [e].

It was ſtipulated between two neighbouring Nations, when there was no other ſort of Fortifications, That ſuch a Place ſhould not be Walled in; which therefore ought not to be enclos'd with ſo much as a Pile of Earth, if it evidently appear'd, that the Reaſon why Walls were prohibited, was to render it incapable of holding out againſt Force.

A Man leaves his Eſtate to *Titius*, after the Death of the Child his Wife was then big with: He thought his Wife had been with Child, but it proves otherwiſe; and therefore *Titius* has a fair Title to the Eſtate: For 'tis evident, that the Reaſon why the deceas'd did not abſolutely make *Titius* his Heir, was, becauſe he thought he might have a Child; and therefore had he known that no Child would have been born, he would have made him ſuch without any Condition [f] [5].

It would have been too hard, ſays *Lyſias* [g], *for a Lawgiver to have crowded into his Law all the Words of the ſame Signification, and therefore what he has expreſt of one, he is ſuppos'd to have underſtood of all the reſt.* Thus the Law, in *Exod.* xxi. 33. is rightly extended to every tame Animal, and the Word *Pit* to every Ditch [6].

XVIII. Beſides, it is of great Uſe to *enlarge* the Meaning, ſo as to leave no Room for any ſort of Cavils, and ſo to prevent [1] the Quirks, that crafty deſigning Men have found out to evade the Law [h]. Of theſe Cheats the *Roman* Lawyers make four ſorts; one by a Commutation of [2] Things, another by a Commutation of [3] Perſons;

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[3] QUINCTILIAN's Words are, *Hic ſtatus* [Syllogiſmi] *ducit ex eo, quod ſcriptum eſt, id quod incertum eſt: quod quoniam ratiocinatione colligitur, ratiocinativus dicitur* -------- *Quod in toto, idem in parte: Aratrum accipere pignori non licet, vomerem accipit* -------- *Quod in parte, idem in toto. Lanas vehere Tarento non licet, oves vexit* ---------- *Majoris pugnæ eſt ex ſcripto ducere quod ſcriptum non eſt.* Inſtit. Orat. l. 7. c. 8.

[4] As SENECA expreſſes it, *Herc. Oetæo, v.* 859, 860. *Quicquid in mortem trahit Telum eſt abunde, i. e.* "Whatſoever kills, "is Weapon ſufficient." But we ought to obſerve, that to a moral Imputation, it is not ſufficient, that what a Man has done, ſhould be, by Accident, the Cauſe of what happens, as *Eraſmus* very well proves, and it may have place here. See Mr. THOMASIUS's *Inſtit. Juriſprud. Divin. Lib.* 2 *Chap.* 12. § 98, 99. and what I have ſaid above at *Lib.* 1. *Chap.* 5. § 3. *Note* 4.

[5] SENECA ſays, *Scriptum Legis anguſtum eſt, interpretatio diffuſa eſt: quædam vero tam manifeſta ſunt, ut nullam cautionem deſiderent.* Senec. Controv. 27. See *Lyſias, Orat.* 10. *contra Theomneſt.* 2. *cap.* 2. and *Libanius Declam.* 31.

[6] QUINCTILIAN's Words are, *Nulla tanta providentia potuit eſſe eorum, qui leges componebant, ut omnes ſpecies criminum complecterentur. Nam & ſemper caventes Nequitia viciſſet; & Jus ita multiplex atque diffuſum eſſet, ut pro incerto haberetur ignotum. Fecerunt ergo, ut rerum genera complecterentur, & ſpectarent ipſam Æquitatem. Multa ergo invenientur frequenter, quæ Legum verbis non teneantur, ſed ipſa vi & poteſtate teneantur.* Quin. *Declam.* 331. "It was impoſſible for thoſe that made Laws, "to provide particularly againſt all ſorts of Crimes: For, after all their Care, Knavery would find out Evaſions; and the Law "would be ſo voluminous and confuſed, that inſtead of Uncertainty we ſhould lie in entire Ignorance. They therefore took care "to have general Heads, and to have regard to Equity. And therefore we frequently find Things, which are not expreſt in the "Letter of the Law, but yet come under the Force of it." See alſo *Cicero De Invent. Lib.* 2. *Chap.* 42. and *Orat. pro Cæcina* c. 18.

Mr. BARB. *NOTES on* § XVIII.

[1] The *Digeſts* ſay, *Contra Legem facit, qui id facit, quod Lex prohibet: in fraudem verò, qui, ſalvis verbis Legis, ſententiam ejus circumvenit. Fraus enim Legi fit, ubi, quod fieri noluit, fieri autem non vetuit, id fit: & quod diſtat* ῥητοῦ ἀπὸ διανοίας, *i. e.* dictum à ſententia; *hoc diſtat fraus ab eo, quod contra Legem fit.* Digeſt. Lib. 1. tit. 3. *De legibus, &c.* Leg. 29, 30.

[2] The *Digeſts* enact, *Sed ſi fraus ſit Senatuſconſulto* [Macedoniano] *adhibita, puta frumento, vel vino, vel oleo mutuo dato, ut his diſtractis fructibus uteretur pecunia, ſubveniendum eſt Filiofamilias.* Digeſt. Lib. 14. tit. 6. *De Senatuſconſ. Macedon.* Leg. 7. § 8. See alſo *Leg.* 3. § 3.

[3] See the *Digeſts, Lib.* 24. *tit.* 1. De donationibus inter virum & uxorem, *Leg.* 5. and *Lib.* 35. *cap.* 7.

[a] Vide *D. l.* 9. *t.* 2. ad Leg. Aquil. *l.* 7. *ſ.* 7.

[b] *In Declam. quæ inſcribitur Tyrannicida, Tom.* 1. *p.* 693, *&c.* Edit. *Amſt.*

[c] *In the Anſwer which he has made to* Lucian's Declamation, Tom. 1. pag. 914, *&c.*

[d] *Is there any difference whether you kill him your ſelf, or* afford *the* Cauſe *of his Death? ibid.*

[e] *Joſeph. Archæol. Jud. l.* 2. *c.* 3. Gen. xxxviii. 21, 22.

[f] *Add.* L. 5. t. 2. l. 28. D. de inoff. teſt. *In a Law many Things are excepted, though not expreſt; the Letter is narrow, but the Meaning extenſive; but ſome Things are ſo plain as to need no Exceptions,* M. *Senec. l.* 4. *contr.* 27. *What? was this provided for by the Letter? By no Means? Upon what therefore do we proceed? The Deſign. Which could it be apprehended without Speaking, there would be no need of Words, but becauſe it cannot, Words were found out, not to hinder, but to declare the Deſign,* Cic. pro Cæcin. c. 18. *Every thing is not expreſt in Writing, but ſome are evidently ſuppoſed to be tacitly excepted,* Id. de Invent. l. 2. c. 42. Lyſias, Orat. 10. c. 2. contr. Theomneſt.

[g] *Orat.* 1. *contr. Theom.*

[h] *As alſo to anſwer any Cavils whatſoever,* Vide *l.* 29. *l.* 30. D. de leg. ubi ſupr. & *D. L.* 10. *t.* 4. *l.* 19. ad exhibend. & *Lib.* 35. *t.* 1. *l.* 76. D. de condit. & demonſtrat. & *l.* 48. *t.* 5. *l.* 33. *ſ.* 1. *D. ad L. Jul. de adult.*

a third by Commutation of the [4] Contract; the laſt in the Way of [5] Contracting [a].

Licinius Stolo [b] having made a Law that no one ſhould poſſeſs above 500 Acres, he himſelf, nevertheleſs, purchaſed a Thouſand, and to palliate his Crime, made over half to his Son: For which Reaſon he was accus'd by *Popilius Læna*, and was the firſt that fell by his own Law; teaching us that no Man ought to preſcribe to others but what himſelf is willing to perform. *By the* Voconian *Law no Man can bequeath above half his Goods to a Woman; and therefore when a certain Man had made two Women joint Heirs, his Relations impleaded the Will* [c].

The *Rhodians* had a Right to Tribute from the Iſle of *Pharos*, but when the Receivers came to demand it, the Queen of the Place detain'd them under ſome pretence of Ceremony, 'till ſhe had caſt Moles into the Sea, and join'd *Pharos* to the Continent; and then ſhe drove them away, as having Commiſſion to levy Taxes upon Iſlands, but not upon the Continent [d].

The *Athenians*, when a certain Harlot, by Name *Leæna*, i.e. *Lioneſs*, had ſlain the Tyrant, for fear of profaning the Temple with the Statue of a Harlot, they erected the Effigies of the Animal whoſe Name ſhe bare [e].

The *Rhodians*, becauſe it was unlawful to pull down a Trophy, did therefore hide the Trophy, that *Artemiſia* had erected to their Diſgrace, by building a Houſe over it [f].

When the *Spartans* demanded to have the *Athenians* Decree, which hindred the *Megarenſes* from trading with them, aboliſh'd, and *Pericles* objected that the Law forbad any Decree of the People to be pull'd down; one of the Commiſſioners reply'd, *We do not deſire you to pull it down, but to turn it out of ſight, and that none of your Laws forbid* [g].

The King of *Portugal*, for certain Reaſons, forbad the Clergy the Uſe of Mules, but they pleaded their Privileges; upon which the King commanded all the Smiths, upon pain of Death, not to ſhoe any Mule; and ſo the Clergy quitted them of their own Accord [h].

Tiberius, becauſe it was eſteem'd unlawful to ſtrangle Virgins, order'd them firſt to be defiled by the Executioner, and then to be ſtrangled [i]. The *Corinthians* were forbidden by the Law to give away their Ships, and therefore they ſold them to the *Athenians* for five Drachms a piece [k].

By a Decree of the Senate, no Slave could be Evidence againſt his Maſter, and therefore *Tiberius*, a crafty Evader of the Law, gave each of the Slaves their Liberty, that he might make uſe of them againſt *Libo*, without breaking the Decree of the Senate [l].

Tiridates refus'd to lay aſide his Sword at *Nero's* Command, but put a Lock upon his Scabbard [m].

Robert Carncroſſe, a wealthy *Scotchman*, bought his Preferment of the King, who then wanted Money, and yet by a Trick eluded the Law againſt *Simony*; for he laid a great Wager with the King, that His Majeſty would not give him ſuch a Preferment [n].

In the Reign of *Philip* II. of *France*, the Biſhop of *Beauvais* appear'd in the Field againſt *Otho* IV; but to avoid ſhedding Blood, he fought with a Club, not a Sword: But did ſuch a Quibble excuſe the Prelate, or rather aggravate his Guilt [o]?

XIX. But ſometimes the meaning of the Words are to be *reſtrained*, and although *general* Terms be made uſe of, yet they ought to be taken with ſome Exception or Limitation [1]; either, *1ſt*, Becauſe of ſome Original Defect in the Will of the Speaker; or, *2dly*, [2] Becauſe of ſome Accident which happens inconſiſtent with his Deſign.

1. An Original Defect is in the Will; Firſt, *When an Abſurdity proceeds from it.* For no Man in

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[4] The Words of the *Digeſts* are, *Julianus, minoris factam venditionem nullius eſſe momenti ait.* Digeſt. ibid. § 5. See *Chap.* 2. § 10. *Note* 1.

[5] The Words of the *Digeſts* are, *Si, quum eſſem tibi contracturus, mulier intervenerit, ut cum ipſa potius contraham: videtur interceſſiſſe.* Digeſt. Lib. 16. tit. 1. *De Senatuſconſ. Velleian.* Leg. 8. Mr. Thomasius, *Inſtit. Juriſpr. Divin. Lib.* 2. *Chap.* 12. §. 102. ſays, There is no great Difference between the laſt ſort of Fraud and the preceeding. He obſerves alſo, that there are ſome ſorts of Frauds, that cann't be reduced to either of theſe Kinds.

Mr. Barb. *NOTES on* § XIX.

[1] Cicero's Words are, *Non ergo omnia ſcriptis, ſed quædam, quæ perſpicua ſunt, tacitis exceptionibus caveri.* Cicero *de Inventione*, Lib. 2. Cap. 47.

[2] Mr. Thomasius, *Inſtit. Juriſpr. Divin. Lib.* 2. *Cap.* 12. § 104, 105. finds fault with this Diviſion, as neither exact, nor juſt. "For, ſays he, every Interpretation ought to be made according to what the Perſon, who ſpeaks the Words, willed "and intended, at the Time when he ſpake or wrote them; and not before or after: And ſo it can never lawfully be founded "upon the Inconſiſtence of a Caſe which has happened after the Will of the Legiſlator or Contractors, thro' any Oppoſition, or "Original Defect in the Will. Moreover, Terms are ordinarily reſtrained, becauſe we preſume, that the Lawgiver or the Con"tractors have ſpoken no more than what was in their Mind, and never thought of the Caſe treated of. So that a Reſtriction "ſuppoſes always a Caſe happened ſince, which is not agreeable with the Will of him, whoſe Words we examine. Conſe"quently no Man can ſee how the Original Defect of a Will can be oppoſed to the Inconſiſtency of a Caſe, which happened "afterwards by the Will of the Lawgiver or Contractors." See alſo Mr. Titius on *Puſendorf, Obſerv.* 438. where he obſerves ſeveral Defects in this Diviſion of *Grotius*, which our Author has carefully followed.

[a] *L.* 8. *ſ.* 14. *D. ad SCtum Vellei.* [b] *Val Max. l.* 8. *c.* 6. *ſ.* 3. *Idem refert Plin.* 18. *c.* 3. [c] *Quinctil. Decl.* 264. Fraudes circa eludendam legem Papiam Poppæam memorat. *Suet. Auguſt. c.* 34. & *Tib. c.* 35. *in fin.* & *Tacit. An.* XV. 19. *The Trick that the* Romans *uſed to let fall the private Sacrifices, which otherwiſe would paſs over to the Heir, as an Incumbrance, with the Eſtate,* Salmaſius *gives an Account of,* ad Plauti Bacchi, Act. 4. Scene. 9. *voce* coemptionalem ſenem. [d] *Amm. Marcellinus, l.* 22. *c.* 16. [e] *Lactan. de falſa rel. c.* 20. [f] *Vitruv. de Architect. l.* 2. *c.* 8. [g] *Plut. Pericle.* [h] Sulpitius, *who had been againſt the Law to reſtore the* Baniſh'd *Citizens, having afterwards changed his Mind, was for it, but would not own it was the ſame Law he was before againſt; for he was not for the Return of the* Baniſh'd, *but of* Thoſe who were forced from their Country: *As if the Controverſy had been what Name they ought to have been called by, or as if all, who were forbidden the Uſe of Fire and Water, did not come under the Denomination of* Baniſh'd. Auctor ad Herenn. l. 2. c. 28. [i] Vide *Tacit. Ann.* 5. *c.* 9. & *Suet. Tiberio, c.* 61. [k] *Herod. Erato, p.* 230. Edit. *H. Steph.* Add. *L.* 44. *t.* 7. *l.* 54. *D. de obligat. & action.* [l] *Tacitus Ann.* 2. *cap.* 30. *Though* Dio *aſcribes the Trick to* Auguſtus, lib. 55. Critias *uſed a more impudent Cavil againſt* Theramenes. Xen. Gr. rer. l. 2. p. 275. *Edit.* H. Steph. *It was a poor Trick to avoid the Name of* Aleatores, *which was branded by the Laws, to call themſelves* Teſſerarii; *between which there is much the ſame Difference, as between a* Thief *and a* Robber; *as* Amm. Marcell. *ſays, l.* 28. *c.* 9. [m] *Xiphilin. Epit. Dion.* [n] *Buchan. rer. Scot. l.* 14. [o] *Buſſier's* Hiſt. *France. l.* 8.

his Wits can be ſuppoſed to will Abſurdities: And I am miſtaken, if upon this Principle, that noted Diſpute between *Protagoras* and *Euathles* [a] may not be decided; for altho' they agreed in general Terms, that the Maſter ſhould have no Right to his Reward 'till the Scholar had gain'd a Cauſe, yet when the Maſter had ſued for his Reward, and the Judges had given Sentence in Favour of him, the Scholar ought by no means to have defended himſelf by that Exception: For when they enter'd into Contract that was not thought of; and it is abſurd for any one to make ſuch a Pact as ſhould cut him off from any Poſſibility of obtaining what might be due to him by it. Something akin to this is that which they tell of *Ariſtides*, who had promis'd a Peny to him that ſhould tell him the Truth: To whom ſays a Sophiſt, *You will not give me the Peny.* What muſt *Ariſtides* do in this Caſe? if he gives it, he gives it to one that did not tell the Truth; but if he does not give it, he refuſes it to one that did. In ſuch Caſes as theſe, that Rule of the *Civilians* ought to be apply'd; that *In a general Diſcourſe the Perſon of the Speaker is always excepted.* And therefore *Epimenides* the *Cretan* cannot be prov'd a Lyar from his own Saying, Κρῆτες ἀεὶ ψεῦσται, *the* Cretans *are always Lyars* [b]. Nor can I approve of that of *Lucretius* [c],

> *Denique, nil ſciri ſi quis putat, id quoque neſcit*
> *An ſciri poſſit, cum ſe nil ſcire fatetur.*

> He that ſays, Nothing can be known, o'erthrows
> His own Opinion, for he nothing knows.
> So knows not that———
>
> Mr. Creech.

For he that ſays, *Nothing can be known* [4], profeſſes himſelf to know this one Thing, *That nothing can be known* [d]. In the Schools we have this Example of an Inconſiſtency [e], *A Man dream'd that there was no Credit to be given to Dreams.* Now whatever *Genius* had infus'd this Dream into him, deſign'd ſo much Credit ſhould be given to this, as that none ſhould be given to any other [f].

Beſides, *Secondly*, The Will is thought to be originally defective [5], *When the Reaſon ceaſes, which alone fully and efficaciouſly moved the Will*; for if the Reaſon of the Law be added, or if we be ſufficiently ſatisfied of it, the Thing is no longer conſider'd Simply, but as it comes under the Reaſon. An Example of this we have in the Law that forbids Patrons to lay an Oath upon their Bondmen not to marry, or to breed up Children, where it is added, that *although in the Law no Perſon* [6] *is excepted, yet it is to be underſtood of thoſe only who are capable of having Children; and therefore if a Man ſhould lay ſuch an Obligation upon an Eunuch, he would not come under the Penalty of the Law.* For the Reaſon of the Law was, leſt the [7] Patron out of Covetouſneſs ſhould put a ſtop to Propagation; which Reaſon in the Caſe of an Eunuch, ceaſes.

But, *Thirdly*, the Will is originally defective, *If there be a Defect in the Matter*: For the Matter which he is about, is always ſuppos'd to be in the Mind of the Speaker, although his Words ſeem to be of a larger Extent. Thus, if an Eſtate be given to a Man and his Heirs Male, his Grandſons by his Daughter are not ſuppoſed to be meant by it: for the Nature of ſuch a Settlement interpoſes, which plainly excludes Women, and the Deſcendents of them.

XX. Yet as to the *Second* Head *Grotius* remarks [g], *That under the Reaſon may be comprehended ſome Things which do not actually exiſt, but are conſider'd in a moral Poſſibility only; and when this happens, no Reſtriction muſt be admitted.*

The Meaning is, that a Covenant where the Parties had a certain Reaſon in View, as ſuppoſe the avoiding Danger, or an Inconvenience, does not only hold good in thoſe Caſes where ſuch Inconveniences would have follow'd, but in thoſe alſo where they may probably be ſuſpected: For Inſtance, ſhould two Nations enter into a Treaty that no Army or Fleet ſhould paſs within ſuch Limits, altho' the Reaſon of this Article be, that one ſhould not actually do the other any Harm, yet it won't be lawful to ſend an Army or a Fleet thither, although there be no Deſign of injuring the other. And thus, if the Law forbids that any one ſhould walk the Streets with Torches; tho' the Reaſon of the Law be to prevent any Miſchief from them, yet it would be no Excuſe for a

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[4] Very well. But if he has any good Reaſon why he believes that he knows nothing, he may make uſe of that very Reaſon to prove, that there are other Things which he may know, and conſequently 'tis falſe, that he knows nothing.

[5] Here again, according to Mr. Thomasius, we muſt diſtinguiſh, if there be one or more Reaſons, how it might happen, that the Legiſlator or Contractors could have more Things in View, and if, ſuppoſing he had ſeveral Reaſons, he that ſpeaks, had Regard to them on the ſame Account, or no. If divers Reaſons had an equal Force upon his Mind, ſo that one alone is neglected, we may reſtrain the Terms in which the Law or Bargain is conceived. But if there be one principal Reaſon, ſo long as that is in force, 'tis of no Importance, that one or ſeveral ſubordinate Reaſons may be offered to make it defective, a Reſtriction can have no place for that Reaſon only, but on the contrary, as ſoon as that Reaſon ceaſes, all the other loſe their Force. There is another Exception alſo, which makes a ſecond Head, from whence ſome infer a Neceſſity of reſtraining the Terms, which of themſelves extend to one certain Caſe (beſides what the Author, after Grotius, ſpeaks of in the following §, and above, § 10.) which is this, That 'tis not ſufficient that the Reaſon of the Law ceaſes in certain Caſes, which happen very rarely, but it muſt be of that Nature as to happen often. For Example, the Reaſon why a Child, who is not yet of Age, cann't be a good Witneſs, is becauſe he is not in a Condition to diſpoſe of his Goods with Diſcretion and ſound Judgment. If therefore there be any Child, whoſe Judgment is above his Age of Minority, which is a Prodigy, the Will of ſuch a Child is nevertheleſs null, according to the general Law. See Mr. Thomasius, *ubi ſupra*, § 153, 154. and what I have ſaid in my *Treatiſe of Games*, *Lib.* 3. *Chap.* 9. § 3.

[6] The *Digeſts* thus ſpeak, *Quamvis nulla perſona Lege excipiatur, tamen intelligendum eſt, de his Legem ſentire, qui liberos tollere poſſunt. Itaque ſi caſtratum Libertum jurejurando quis adegerit, dicendum eſt, non puniri patronum hâc lege.* Digeſt. Lib. 37. tit. 14. *De jure Patronatus*, Leg. 6. § 2.

[7] Thus, if a Freeman dies without Children, all his Goods, or at leaſt a part, return to his Patron, or him whoſe Slave he was, for ſo the Word *Patronus* ſignifies. See *Inſtit. Lib.* 3. *tit.* 8. De ſucceſſione Libertorum.

[a] *Apud. Gellium, l.* 5. *c.* 10. *Diog. Laert. l.* 9. § 56. *Apul. Florid. l.* 3. *Sext. Emp. adverſus Math. l.* 2.

[b] *See* Titus i. 12.

[c] *L.* 4. *v.* 471, 472.

[d] *He acts abſurdly, who ſays, He is ſilent; for by ſaying, He is ſilent, he is not ſilent; and ſo deſtroys his own Aſſertion,* Apul. Apol. p. 529. *Edit.* in Uſum Delph.

[e] *Lactant. l.* 3. *c.* 6.

[f] *So in the Example propos'd by* Gellius, l. 9. c. 16. *this Reſtriction ought to be made,* That the Law may not deprive Brave Men of their Reward.

[g] *L.* 2. *c.* 16. *ſ.* 25.

Man to ſay, that he would uſe them ſo carefully as to do no Harm with them [1].

'Tis alſo a Queſtion, whether Promiſes carry this tacit Condition along with them, *That Things continue in the ſame Poſture that they are?* Which in general is denied; for ſince this Condition is *Odious* [2], as being apt to render the Act null, it ought not eaſily to be preſum'd, if it be not actually added; unleſs it appears plainly that the preſent poſture of Affairs was included in that one only *Reaſon* which we have been talking of. For thus we frequently read in Hiſtory, that Ambaſſadors have return'd home without opening their Commiſſion, upon ſuch Revolutions, amongſt thoſe to whom they were ſent, as may be preſum'd to make void the whole Reaſon of their Embaſſy [a].

XXI. 2. That an Accident is inconſiſtent with the Deſign of the Perſon, may be made to appear; either, *Firſt*, From natural Reaſon; or, *Secondly*, From ſome Sign of the Will.

In order to make this Diſcovery from *natural Reaſon*, *Ariſtotle* [b] thinks that the *Underſtanding ought to be endued with a true Senſe of Equity, and the Will with an hearty Inclination to judge according to Equity* [c]. And he rightly defines [1] *Equity* to be a *Correction of the Law, where it is deficient, by reaſon of its being too univerſal*. Or, in other Words, *A dextrous Interpretation of the Law, ſhewing that ſuch a particular Caſe* [2] *ought not to be brought under it, becauſe an Abſurdity would follow*: Which may all be apply'd to *Wills* and *Pacts*, *mutatis mutandis*. And here *Grotius* [d] well obſerves, that *Equity* has no Place in the Law of Nature, ſince that Law does not ſpeak more univerſally than the Nature of Things requires. But yet that the Law of Nature, not as it is in it ſelf, but as it is [3] generally expreſt by Men, may want the Aſſiſtance of an *equitable* Interpretation: for Inſtance, when that Law ſays, that *Every Man ought to have his own*; we muſt in Equity qualify it with this Condition, that *he be in his Senſes*, and that *no ſuperior Right interpoſes*. For ſince, in Laws eſpecially, all Caſes cannot be foreſeen, or by reaſon of their infinite Variety expreſt [e] [f]; it is therefore neceſſary for them, whoſe Duty it is to apply particular Caſes to the general Decrees of the Law, to have a Liberty of excepting ſuch as are ſo peculiarly circumſtantiated, that the Legiſlator himſelf would have excepted them, had he been preſent, or had he foreſeen ſuch Caſes [g].

There is an Example in *Cicero*; it was a Law among the *Rhodians*, that if any Ship of Strength ſhould be found in the Haven it ſhould be confiſcated. A great Storm, notwithſtanding all the Seamen could do, drives a certain Ship into the *Rhodians* Haven: the Queſtor ſeizes upon it, and the Owner pleads, from the reaſon of the Thing, that it ought not to be confiſcated. Again,

The Law [4] forbids the Gates to be opened at Night, in Time of War; nevertheleſs a Man opens them, and receives in ſome Allies, who, if they had been kept out, would have been cut in pieces by the Enemy, which was encamp'd hard by [5].

However this Liberty muſt not be indulged too far, leſt any one ſhould raſhly make himſelf Judge of the Legiſlator's Deſign; for ſometimes he wills and commands that the very Letter of the Law ſhould be put in Execution. And therefore we ought to have Reaſon very evidently on our ſide, when we act counter to it; as we certainly have, when we find that the preciſe adhering to the Letter is unlawful, *i. e.* repugnant to the Law of God or Nature: For to ſuch, no Man can be oblig'd; indeed no Man in his Senſes can be preſum'd willing to oblige another to it [h].

Sometimes *Equity* is taken in another Senſe, as when any Cauſe is ſaid to have the Benefit of Equity, or the Rigour of the Law is allow'd to be ſoftned in Favour of the Criminal; for even private Men are ſaid to have Recourſe to *Equity*, when they don't ſo rigidly inſiſt upon their Right againſt their Adverſaries, but remit ſomething of it.

Laſtly, Cauſes are ſometimes ſaid to be left to

Mr. BARB. *NOTES on* § XX.

[1] See another Example of this Author's mentioning, *Lib.* 7. *Chap.* 6. § 11. following.

[2] 'Tis not becauſe the Condition is odious, but becauſe, if we ſuppoſe it included in every Engagement, there is ſtill ſomething which may be relied upon ordinarily with ſome Certainty.

Mr. BARB. *NOTES on* § XXI.

[1] His Words are, Καὶ ἔστιν αὕτη ἡ φύσις ἡ τοῦ ἐπιεικοῦς, ἐπανόρθωμα νόμου, ᾗ ἐλλείπει διὰ τὸ καθόλου. *Ubi ſupra, Lib.* 5. *Cap.* 14. See his *Magn. Moral. Lib.* 2. *Cap.* 1, 2. And a little Treatiſe of GROTIUS, *De Æquitate*, at the end of the laſt Editions of his Book *De Jure Belli & Pacis*.

[2] Equity, or an Interpretation according to Equity, hath a place in being extended, as well as reſtrained. And here we may apply in general, the Saying of an antient Poet:

---- -------------------------- ------ Καλὸν	Laws are a fine Thing without Contradiction;
Οἱ νόμοι σφόδρ' ἐστίν, ὁ δ' ὁρῶν τοὺς νόμους	But he that will apply himſelf nicely to the Letter of the Laws,
Λίαν ἀκριβῶς, συκοφάντης μοι φαίνεται.	Seems to me a Sycophant or Caviller.
Τὸ καλῶς ἔχον που κρεῖττόν ἐστι καὶ νόμου.	What is good, is better than the Law.

[3] The Author, thro' Miſtake, ſays here, *minus*, ſor, *nimis*, but it may be a Fault in the Printing, tho' it remains in the laſt Edition of 1706.

[4] *In quo genere* (ſays *Tully*) *non ſimplex voluntas ſcriptoris oſtenditur, quæ in omne tempus, & in omne factum idem valeat: ſed ex quodam facto aut eventu, ad tempus interpretanda dicitur ------- Ut in eum, qui, cum Lex aperiri portas noctu vetaret, aperuit quodam in bello, & auxilia quædam in oppidum recepit, ne ab hoſtibus opprimerentur, ſi foris eſſent, quod prope muros hoſtes caſtra haberent.* De Invent. Lib. 2. Cap. 42. See alſo *Cap.* 32.

[5] So the *Digeſts* again, *Quod quidem perquam durum eſt: ſed ita Lex ſcripta eſt.* Lib. 40. Tit. 9. *Qui & à quibus manumiſſi liberi non fiunt, &c.* Leg. 12. § 1. which is very hard, but ſo it is Written. See *Lex Wiſigothor. Lib.* 2. *Tit.* 1. *Chap.* 12. The Lawyers ſay alſo, that we cann't always know the Reaſons for which Laws are made, nor ought we always to enquire after them. *Non omnium, quæ à majoribus conſtituta ſunt, ratio reddi poteſt: & ideo rationes eorum, quæ conſtituuntur, inquiri non oportet; alioquin multa ex his quæ certa ſunt, ſubvertuntur.* Digeſt. Lib. 1. Tit. 3. *De Legibus, &c. Leg.* 20, 21. See Mr. NOODT's Obſervations, *Lib.* 1. *Chap.* 2. and Mr. LE CLERC's Reflexions upon it, in his *Biblioth. Choiſie, Tom.* 11. *p.* 222.

[a] Vide *Tac. Hiſt. L.* 2. *c.* 1. Where *Titus* upon *Galba*'s Death returns back. [b] *Nicom. l.* 5. *c.* 10. [c] Vide *D. L.* 47. *t.* 2. De furtis *Leg.* 61. *ſ.* 5. [d] *Ad Campanellæ Pol.* [e] *Xen. Hipparch.* To commit to Writing every thing that ought to be done, is as difficult as to know all future Things. [f] *See above*, Section 17. *towards the End.* [g] Vide *L.* 1. *t.* 3. *Leg.* 3, 4, 5, 6, 10, 11, 12, 13. *D. de leg.* [h] *Grot. ad Heſt. c.* 4, 15. Circumſtances are ſuch as render the obſerving of the Law a Breach againſt the chief Laws of Nature. Add. *V. Max. l.* 3. *c.* 7. *n.* 1. *c.* 8. *n.* 6.

Equity, when the Civil Law takes no Cognizance of them, or when the Nicety of the Law is not regarded, but the Thing is left to the Arbitrage of honeſt Men.

XXII. Moreover, a general Law ought to be reſtrain'd; if, altho' it be not abſolutely unlawful to ſtick to the Letter, yet upon weighing the Thing in Candour and Prudence, it appears to be too grievous and burthenſome, either in reſpect of the Condition of human Nature abſolutely conſider'd, or in regard of the Perſon and Thing in Debate, compar'd with the End of it. For ſome Things ſeem intolerable to Mankind in general, others to ſome certain Perſons; ſome Buſineſs is ſuch, as to take much Pains about it would be Folly. And an Exception againſt thoſe is ſtill the more reaſonable, if the Law be not only poſitive, and the Matter of it ſuch, as makes it probable, that the Legiſlator would not, at the great Inconvenience of the Party, demand the Obſervance of it; but alſo if the Neglect of it does not tend to the Diſhonour and Contempt of the Authority that enacted it [a].

And therefore, without doubt, 'tis a fooliſh piece of Superſtition in the *Abyſſines*, ſo to weaken themſelves by Faſting in Lent, as, for want of Strength and Courage, not to be able to reſiſt the Inroads of their Enemies; inſomuch that their Country has ſometimes been over-run at that Time without Reſiſtance [b].

Thus a Man that lends a Thing for a certain Time may demand it back before the Time expired, if in the mean while he happens to be in great Want of it himſelf; for by the Nature of ſuch a beneficial Act no Man can be preſum'd willing to oblige himſelf to his great Inconvenience.

So if a Prince has promis'd to aſſiſt his Ally with Forces, he may be lawfully excuſed, as long as he is in Danger at home, and wants thoſe Forces for his own Defence: For ſince every Prince is, in the firſt place, oblig'd to protect his own People, all the Promiſes, which he makes to Foreigners, are underſtood to extend no farther than the Safety of his own Kingdom admits.

And thus a Grant of Immunity from Taxes and Tribute ought to be underſtood of ordinary annual Taxes only, not of thoſe extraordinary Subſidies, which the urgent Neceſſity of Affairs may require, and which the Publick cann't ſubſiſt without. From hence it appears, that *Cicero* [c] is too free in ſaying, that *ſuch Promiſes are not to be kept, as are uſeleſs to the Perſons to whom they are made; nor if they be leſs beneficial to him, than prejudicial to the Maker.* For whether a Thing be uſeful, or not, to the Perſon to whom it is promiſed [1], it is not always for the Perſon promiſing to judge; unleſs he has Authority over him, or has him placed under his Care. Nor is any Prejudice or Burthen redounding to the Perſon promiſing, ſufficient to releaſe him from his Promiſe (for the Performance of every free Promiſe has ſome Burthen going along with it) but ſuch and ſo much as, according to the Nature of the Act, ought in reaſon to be preſum'd, excepted. As in the Example brought by *Cicero* [d], *If you had promiſed to appear immediately as Advocate for another, and in the mean time your Son falls dangerouſly Ill, it would not be a Breach of Duty not to perform what you have promiſ'd* [e].

XXIII. But, *Secondly*, There are alſo ſome Signs of the Will, from whence it may be certainly collected, that a Caſe ought to be excepted from the general Expreſſions of the Law; as when the Words of the Legiſlator in another place, though not directly oppoſite to the Law now ſuppoſed to be before us (for that would be a Contradiction) yet by ſome peculiar Incident and unexpected Event of Things, happen to oppoſe it in the preſent Caſe; or, which amounts to the ſame Thing, when there are two different Laws, which don't interfere, and which eaſily may and ought to be obſerved at different Times, but cann't both of them be ſatisfied, when by ſome Chance they call for our Obedience at the ſame Inſtant [f]. In this Caſe, we muſt obſerve ſome certain Rules to know which Law or Pact ought to give place to the other, where both cannot be fulfilled. *Grotius* lays down theſe:

1. *That which is only permitted gives place to that which is commanded* [g] [1]. For a Permiſſion includes a Liberty, but a Command carries along with it a Neceſſity of acting.

2. *That which ought to be done at this preſent time,* [2] *is preferable to that which may be done at any other time:* Or when, at the ſame time, I lie under two Obligations, whereof one cann't be ſatisfied but at this Inſtant, the other at any time hereafter; the

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Mr. Barb. *NOTE on* § XXII.

[1] But, as Mr. Fred. Gronovius obſerves, in a Note upon *Grotius*, 'tis no more than what Cicero means, for he ſpeaks of a Thing hurtful, in the Judgment of all Perſons of Underſtanding, and not only in the Imagination of him that made the Promiſe. It is certain, that in all Tully's Diſcourſe there is nothing that can hinder us from explaining his Notion in this Manner.

Mr. Barb. *NOTES on* § XXIII.

[1] That is to ſay, Commanded or forbidden. *Plus enim valet ſanctio permiſſione.* Auctor ad Herenn. L. 2. C. 10. See *Quinct. Decl.* 374. The Law which forbids is more powerful than that which permits. This is reſerved in the Power of the Magiſtrate: And one who forbids can do more than all who allow; For that which permits leaves us to our Liberty, whereas that which forbids binds us under a Penalty. *Nam id quod imperatur, neceſſarium: illud, quod permittitur, voluntarium eſt.* Cic. de Invent. Lib. 2. Cap. 49. Theſe laſt Words are part of a long Sentence, from whence Grotius takes all his Rules, which he draws up into a better Order. I will recite *Cicero*'s Words upon every Rule, as our Author does, but not quite thro'. It is true that he gives us the entire Paſſage at the end of the Chapter, but beſides he engages himſelf upon an uſeleſs Repetition; as he has placed it, it ſeems to contain ſomething new, whereas it is no more than the Reſult of what he has ſaid. Moreover, as Mr. Titius obſerves, *Obſerv.* 441. this Rule is true only when the Permiſſion is general, and the Commands or Prohibitions particular. For, ſays he, 'tis certain on the contrary, that a particular Permiſſion refers to a general Command, the Permiſſion in this laſt making an Exception to the Command, as in the firſt Caſe the Command reſtrains the Extent of the Permiſſion. There are, nevertheleſs, Caſes, where the Permiſſion and Prohibition are in one Senſe general, as the Terms alledged by *Ziegler* in his Notes upon *Grotius*, will ſhew, *pag.* 395. "It is permitted to every Citizen to have a Concubine, but forbidden every "Soldier to have a Woman in the Camp". The Prohibition is general, as to Citizens in the War.

[2] Cicero's Words are, *Deinde ex Lege utrum ſtatim fieri neceſſe ſit: utrum habeat aliquam moram & ſuſtentationem: Nam id, quod ſtatim faciendum eſt, perfici prius oportet.* Cicero, *De Inventione, Lib.* 2. *Cap.* 49.

[a] Add, *Grot. ad Mat. c.* 12. *v.* 3. [b] *Fr. Alvarez. Deſc. Æth. c.* 13. [c] *Off.* 1. [d] *D. l.* [e] Add. *Sen. de Benef. l.* 4. *c.* 35. [f] *Char. de la Sageſſe, l.* 1. *c.* 37. §. 5. [g] *A Command is of greater Force than a Permiſſion; for that which is commanded, is neceſſary; that which is permitted, voluntary.* Auth. *ad Heren. l.* 2. *c.* 10.

former ſhall be perform'd, the latter put off to ſome other Opportunity. From whence it follows, that no Man can be enjoin'd two Things, which cannot both be perform'd together, and which neither of them admit of Delay. From hence we may give an anſwer to the Enquiry of *Plutarch* [a], Why it was not lawful for the *Flamines Diales* to bear any other Magiſtracy? For ſince the Duties of the Prieſts were certain and ſettled, and the Duties of other Magiſtrates uncertain and not ſettled, the ſame Man, being both Prieſt and Magiſtrate, would not have been able to provide for Buſineſs of ſo different a Nature, if they happened to interfere in the ſame nick of Time: So that one muſt neceſſarily have been neglected for the Performance of the other. It ſeems that thoſe Prieſts had not found out the Secret of making an Honour and a Gain of the Prieſthood, and yet of throwing the Duty and Burthen of it upon their Curates.

3. *An affirmative Precept gives way to a* [3] *negative;* or when an affirmative Precept can't be ſatisfied but at the Expence of a Negative one, then the Performance of the affirmative ſhall be deferred or put off, 'till it ceaſes to claſh with the other which is negative. The Reaſon of this is taken from the Nature of the affirmative and negative Precepts: For the Obligation of theſe is perpetual, uniform, and equally binding; whereas thoſe preſuppoſe an Opportunity of being put in Execution; which is preſum'd not to offer it ſelf, if it can't be done without the Violation of ſome Law: And therefore Things, in ſuch a Poſture of Affairs, are eſteem'd morally impoſſible. Hence it is, that no Man can injure another, or break his Word, to promote the Advantage of a Friend, or to get wherewithal to be grateful, or generous: For 'tis a ſtrange ſort of Piety to ſteal Leather, and then give the Shoes in Alms to the Poor. *Mahomet* in the *Alcoran* forbids any one to give Alms of ill-gotten Goods. However, I can't ſay, that *Schach Abas* King of *Perſia* was in the right in diſpoſing of no Money ſo freely to charitable Uſes, as that which he had raiſed from the Stews; *For this*, ſaid he, *was paid willingly, whereas the other Taxes were extorted with Sighs and Groans from the Subject:* Yet, methinks, it was not ſo decent to pitch upon Money rais'd after that Manner for ſuch Uſes [b]. To this Head, in ſome Reſpect, belongs what *Leo* of *Modena* [c] tells us of the *Hebrews*, that whatſoever was forbidden the Men, was alſo forbidden the Women; but as for the affirmative Precepts, the *Rabbies* declar'd, that none of thoſe which were confin'd to a certain Time, oblig'd the Women, by reaſon of the Weakneſs of their Sex, and their living under the Government of their Husbands.

4. *In Covenants and Laws, which are in other reſpects equal* [4], *that which is particular and applicable to the preſent Caſe take place of that which is general.* For generals muſt be reduc'd to particulars, before they can be apply'd. As for what *Grotius* ſubjoins [5], *That a Prohibition, which has a Penalty annex'd, ought to take place of that which has none; and that which has a greater, of that which has a leſs*, is not ſo clear; for a Prohibition that has no Penalty, either fix'd or arbitrary, annex'd to it, is of no Force at all. And that Rule, *Of two Evils to chooſe the leaſt*, cann't properly be apply'd to moral Evils or Sins: For when it happens, that one of two Prohibitions muſt needs be violated, then that whoſe Violation is of leaſt Concern is ſuppos'd to be permitted; for Example, one Law is, *That no Man ſhall appear abroad in Arms on a Holy-day*; another, *That no Man ſhall ſtay at home upon hearing the Signal of a Tumult.* In this Caſe the latter is to be look'd upon as an Exception to the former; as if the Law had been, That no Man ſhould appear abroad in Arms on a Holy-day, unleſs he be commanded by the Magiſtrate in Caſe of a Tumult.

5. *When two Duties happen to interfere at the ſame Point of Time* [6], *that which is the more honeſt and profitable is to be preferr'd.* For the other Obligation is only upon Condition, that it can conſiſt with an Obligation of greater Moment.

6. *When two Covenants, one upon Oath* [7], *the other not, cann't be performed both together, the former ought to take place of the latter; unleſs the latter was added as an Exception and Limitation to the other*; for an Oath added to a Covenant excludes all ſuch Reſtrictions and tacit Exceptions, as are not neceſſary from the Nature of the Thing, and which, if there be no Oath, may be more eaſily admitted [d].

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[3] *Deinde utra Lex jubeat, utra vetet. Nam ſæpe ea, quæ vetat, quaſi exceptione quadam corrigere videtur illam, quæ jubet.* That Law which forbids, ſeems, by ſome ſort of Exception, to correct that which commands. *Cic. de Invent. Lib.* 2. *c.* 49. See above *Lib.* 1. *Cap.* 3. § 8. and *Lib.* 2. *Cap.* 6. § 2. and *Lib.* 3. *Cap.* 7. § 5. But we are to diſtinguiſh here, whether the Laws which forbid, or command, are general, or particular. See above, § 1.

[4] And again *Cicero* ſays, *Deinde utra Lex de genere omni, utra de parte quadam; utra communiter in plures, utra in aliquam certam rem ſcripta videatur. Nam quæ in partem aliquam, & quæ in certam quandam rem ſcripta eſt, promptius ad cauſam accedere videtur, & ad judicium magis pertinere.* Ibid. The more particular a Law is, the more does it ſeem to make to the Caſe in hand.

[5] In which he follows *Cicero*, as in the other Rules. *Deinde in utrâ Lege, ſi non obtemperatam ſit, pœna adficiatur, aut in utrâ major pœna ſtatuatur.* Ibid.

[6] *Primum igitur Leges oportet contendere, conſiderando, utra Lex ad majores, hoc eſt, ad utiliores, ad honeſtiores ac magis neceſſarias res pertineat. Ex quo conficitur, ut, ſi Leges duæ, aut ſi plures, aut quotquot erunt, conſervari non poſſint, quia diſcrepent inter ſe, ea maximè conſervanda putetur, quæ ad maximas res pertinere videatur.* Ibid.

[7] This Rule is true, if we ſuppoſe all things elſe equal; for if he treats of two Agreements directly oppoſite one to another, the laſt in Date ought to mention whether the firſt were upon Oath, or not; for if the Agreements were only different, a Particular is of greater Force than a General. Our Author following *Grotius*, blindly eſtabliſhes a Maxim here which he has confuted elſewhere. I mean, that Opinion of *Grotius*, in which he affirms, That an Oath added to a Promiſe produces a new and particular Obligation, by virtue of which a much ſtricter Interpretation is to be made of ſuch Engagements, than of thoſe that are made without calling God to witneſs. *Titius Obſerv.* 445. Mr. *Thomaſius*, who alſo rejects our Author's Maxim, *Inſtit. Juriſpr. Divin. Lib.* 2. *Cap.* 12. § 141. adds, That he knows not what theſe Words mean. Unleſs the Agreement without an Oath hath been annexed to another, by way of Exception or Limitation, and it were to be wiſhed, that he had brought ſome Example. I obſerve alſo, that our Author omits this Reſtriction quite, in his *Abridgment of the Duties of a Man and Citizen*, Lib. 1. Cap. 17. § 13.

[a] *Quæſt. Rom. in fin. p.* 291. *C.*

[b] *Olearius, Itin. Perſ. l.* 5. *c.* 31. *The Law which forbids is of greater Authority than that which commands; for every Law that forbids is therefore ſtronger, becauſe it corrects that which permits or commands*, Mar. Victorin. in exp. in 2. Rhet. Cic.

[c] *De Rit. Hebr. p.* 5. *c.* 5. *ſ.* 1.

[d] Medea *in* Euripides, ver. 743. *having deſired* Ægeus *to entertain her, and not to deliver her up, when her Enemies ſhould demand her, would needs have it confirm'd by Oath: Which* Ægeus *approved of, For ſo, ſays he, it will be the ſafer for me, if I can make ſuch an Excuſe to your Enemies.*

7. *An Obligation imperfectly mutual* [8] *gives place to one that is perfectly mutual, and binding on both ſides* [9]. Thus what I own upon Contract, ought to be paid before what is due from me upon free Promiſe, or upon Gratitude, or any ſuch Reſpect, if both cann't be perform'd together. And therefore *Phocion*, when he was ask'd a Largeſs for a certain Sacrifice, reply'd, *Ask the rich, for I ſhould be aſham'd to give to you, and not to pay this Man* (pointing to *Callides* the Uſurer) *what I owe him* [a].

8. *The Law of Generoſity gives place to the Law of Gratitude, cæteris paribus:* Altho' each implies an imperfect Obligation. For the Debt of Gratitude has more *Favour* to plead in its Behalf than that of Generoſity; for *that* requires that we ſhould give becauſe we have receiv'd; whereas *this* is built upon no ſuch Foundation. And therefore, in this Caſe, becauſe the Neceſſity of Gratitude interferes, the Object of Generoſity is ſuppos'd to be wanting. And this holds ſo far, that even Generoſity towards our own Relations, unleſs it be due upon ſome cloſer Obligation, gives place to the Duty of Gratitude.

9. *Where the Laws were made by ſubordinote Powers, that of the Inferior yields to that of the Superior, if both cann't be obey'd.* Thus we ought to obey GOD, rather than Man [b]. And the Command of a King carries more Weight with it, than that of the Maſter of a Family.

10. *The more noble, uſeful, or neceſſary the Matter of* one *Law is, than that of* another, *the greater Weight ought the Law to have with us.*

11. *The cloſer Tie there is between any Perſon and us, the more ought Obligations due to him, to outweigh thoſe due to others,* cæteris paribus [c].

Cicero [d] has a Paſſage very pertinent to the Matter in hand: *Contrary Laws*, ſays he, *admit of Diſpute, when two or more ſeem to claſh. As thus, one Law ſays,* That whoſoever kills the Tyrant, ſhall be rewarded as a Conqueror at the *Olympick* Games, and may demand what he pleaſes of the Magiſtrate, and the Magiſtrate ſhall grant his Requeſt. *Another Law enacts,* That upon the Death of the Tyrant his five neareſt Relations ſhall be put to Death. *Alexander*, who had exercis'd Tyranny over the *Phæreans*, was ſlain in the Night by his Wife *Thebe*, and ſhe, for her Reward, demanded her Son, whom ſhe had by the Tyrant. Some were of Opinion that the Son by the Law ought to be put to Death; the Thing may bear a Diſpute. *Now, in ſuch Caſes it ought to be conſider'd, which of the Laws conduce to greater,* i. e. *to more honeſt, more profitable, and more uſeful Ends. And that ought to be obſerved which has the greater Ends to ſupport it. Then we ought to conſider which Law was made laſt, for the laſt is of greateſt Obligation. Then which of the Laws commands, which permits only; for that which is commanded is neceſſary, that which is permitted, voluntary. Then which Law is penal, and which is enforced with the greater Penalty; for that ought to be moſt obſerved, which can be violated with the leaſt Impunity. Then which commands, which forbids; for that which forbids is often an Exception to that which commands. Then which ſeems deſign'd to bind in general, which in part only: Which to conclude in common ſeveral Things, which ſome particular one only; for that which binds in part, or ſome certain particular Thing only, ſeems moſt capable of being applied and brought into Court. Then by the Law what ought to be done immediately, and what admits of Delay; for that which cann't be put off, ought to be obey'd firſt.*

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[8] I wonder that our Author was not aware, that all theſe following Rules are contained in the fifth, of which they are only the Conſequences; and therefore he himſelf hath left out the three laſt, in his *Abridgment of the Duties of a Man and Citizen, Lib.* 1. *Cap.* 17. § 13.

[9] See the Explication of this Diſtinction, *Lib.* 3. *Cap.* 4. § 9. above.

[10] See Mr. Buddeus's Diſcourſe, entitled, *De comparatione obligationum, quæ ex diverſis hominum ſtatibus oriuntur*; in the *Selecta Jur. Nat. & Gent. pag.* 680, *& ſeqq.*

[a] *Plut. Phocione,* 745. *C. D.*

[b] *Act.* iv. 19.

[c] *Gal.* vi. 10. 1 *Cor.* viii. 13. 1 *Tim.* v. 7. *Cic. Off.* 1. *c.* 14, 15. Where he talks of the Degrees of Society.

[d] *L.* 2. *de Invent.*

CHAP. XIII.

Of the Way of deciding Controverſies in the Liberty of Nature.

I. *What is due to others is willingly to be performed.*
II. *In a State of Nature there is no Judge.*
III. *Controverſies, which cann't be decided by Conference, are to be referred to Arbitrators.*
IV. *There is a Covenant between an Arbitrator and the contending Parties.*
V. *Arbitrators, in a Doubt, are bound to judge by Law.*
VI. *Arbitrators are not to judge of the Poſſeſſion.*
VII. *Of the Mediators of a Peace.*
VIII. *What if Deeds be loſt.*
IX. *Of Witneſſes.*
X. *Of the Execution of the Sentence.*

By the Law of Nature every Man is oblig'd to perform, and to pay, of his own Accord, what by any Title is due from him; and if any one has deſignedly damag'd or offended another, the ſame Law moreover obliges that the Delinquent ſhould ſeriouſly repent, and give Security to live in Peace and Friendſhip for the future. And as this Repentance, where it is not extorted by Force, but proceeds from the Principle and Conſideration of Juſtice, is a ſufficient Indication of the Offender's Amendment: So on the other ſide, after ſuch Satisfaction is made, and Security given, the Party injured [1] ought to forgive him, and to live peaceably with him for the Time to come. And if a Man thro' Paſſion and a Deſire of Revenge refuſes it, he muſt be anſwerable for the Breach of the Peace, and the Conſequences of it [a]. For it is inhuman and brutiſh, not to be ſatisfied with any thing leſs than the Blood of the Offender: And when a Miſunderſtanding is once begun, to continue it on for ever. It was a curſed Speech of *Cato*'s [b], who, when he met a young Man juſt fluſht with the Ruin of his deceaſed Father's Enemy, took him by the Hand; and *Thus*, ſaid he, *ought we* [2] *to appeaſe the Ghoſts of our Parents; not with Kids, or Goats, but with the Tears and Deſtruction of their Enemies.*

II. But all Men are not of ſuch a happy Temper, as to be willing, of their own Accord, to perform their Duty: And beſides, ſeveral Controverſies may ariſe, concerning the Certainty and the Quantity of a Debt, and the rating of a Damage, the Competency and Exerciſe of certain Rights, the fixing Boundaries, the Interpretation of Pacts, and other Pretenſions; and yet *in the Liberty of Nature* [1] no Man can take Authority upon him to determine and compoſe ſuch Controverſies. Indeed *Hobbes* [c] makes every Man his own Judge in a State of Nature [d]; by which he can mean nothing elſe, but that he who has no Superior to govern him, may manage his Buſineſs as he pleaſes, and appoint Means for his Preſervation, according to his own Diſcretion. For if another Man ſhould take upon him to judge of my Affairs, yet, ſince he has no Authority to determine me by his Opinion, it will depend intirely upon my Will and Pleaſure, whether, or how far, I ſhall be concluded by him; and ſo ultimately the Management of my Actions will lie in my own Breaſt; which yet I ought to govern according to the Rules of Nature.

As to what remains; tho' every Man may, in that State, either neglect or defend his own Right, either put up, or return an Injury; yet he cann't, in his own Cauſe, give Sentence ſo as to oblige him, with whom he has the Controverſy, to ſtand to it. For tho' he deſigns never ſo juſtly, nay, tho' he proteſts upon Oath, that he decrees what ſeems to him to be right; yet ſince the other may have as great a Reſpect for his own Opinion, if they happen to diſagree, nothing can be done by reaſon of that Equality, which is eſſential to the State of Nature. *Almoſt all wicked Men think fit to be* [2] *Judges in their own Caſe*, Ariſt. Pol. iii. c. 9. [3] *No Mortal ever thinks an Injury againſt himſelf ſmall, moſt think them greater than really they are*, Saluſt. Catil. c. 51.

III. But yet the Law of Nature by no means allows, that every Man ſhould immediately fly to Arms, and put the Controverſy to the Deciſion of the Sword, before milder Methods have been attempted [1]. And therefore the Parties ought firſt

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Mr. Barbeyrac's *NOTES on* Chap. XIII. §. I.

[1] See *Lib.* 2. *Chap.* 5. § 19. above.

[2] See what Mr. Hertius ſays upon the Notions of the *Pagans* upon that ſort of Revenge, in his Diſcourſe, *De Hærede Occiſi Vindice*, Sect. 1. § 4. in *Tom.* III. of his *Opuſcul. & Commentat.*

Mr. Barb. *NOTES on* § II.

[1] In which Senſe that of *Thucydides*, *Lib.* 1. may be admitted; Βιάζεσθαι γὰρ, οἷς ἂν ἐξῇ, δικάζεσθαι οὐδὲν προσδέονται. *They that may uſe Force have no need to go to Law.*

[2] Aristotle's *Greek* is, Σχεδὸν δ' οἱ πλεῖστοι φαῦλοι κριταὶ περὶ τῶν οἰκείων.

[3] Salust's Words are, *Neque cuiquam mortalium injuriæ ſuæ parvæ videntur. Multi eas gravius æquo habuere.* Seneca, as Mr. Hertius obſerves, ſays, That every one in that Reſpect has a Royal Spirit in him. We deſire that all Things may be allowed us towards others, but are not willing others ſhould be permitted any thing towards us. *Regis quiſque intra ſe animum habet, ut licentiam ſibi dari velit in alterum, in ſe nolit.* De Irâ, Lib. 2. Chap. 31.

Mr. Barb. *NOTES on* § III.

[1] *Nam cùm ſint duo genera decertandi, unum per diſceptationem, alterum per vim, cumq; illud proprium ſit hominis, hoc belluarum, confugiendum eſt ad poſterius, ſi uti non licet ſuperiore.* De Offic. *Lib.* 1. *Cap.* 11. "There being two Ways of Conteſting, one "by Argument, the other by Force, and *that* being proper to Men, *this* to Brutes, Recourſe is to be had to the *latter*, when "the *former* is refuſed." See *Juſtin*, *Lib.* 8. *Cap.* 1. *n.* 4, &c. When, without trying to compoſe Matters amicably, Arms are taken up, then that of *Ovid* takes place, *Injuſtum rigido jus dicitur enſe.* Triſt. l. 5. El. 10. v. 43.

[a] *C. Pontius* in *Livy*, *l.* 9. *c.* 1. argues excellently to this Purpoſe.

[b] *Vide* Plutarch *in the Life of* Cato *the Elder*, *p.* 344. *E.*

[c] *De Cive*, *c.* 1. *ſ.* 9.

[d] *How far this is true, may be ſeen in* B. 2. c. 2. ſ. 3.

to endeavour, by ſome friendly Debate between themſelves or their Agents, to compoſe the Difference [a]. Indeed even after Arms have been taken up, and each Party, by the Calamity of War, has been induced to hearken to gentler Accommodations, we generally find that the Difference is at laſt adjuſted by Treaties and Negotiations. If the Thing and the Temper of the Parties admit of it, the Diſpute may eaſily be decided by *Lot* [b]. But if neither a Debate is able to put an End to the Controverſy, nor either Party thinks fit to truſt that to Chance, which each, in Reaſon, thinks to be on his ſide; the only Thing they can do, is to pitch upon an *Arbitrator*, and each bind himſelf to ſtand to his Award [c]. And here *Grotius* [d] well obſerves, that in a doubtful Caſe, altho' each Party ought to come to Terms, rather than go to War, yet the *Plaintiff* is more oblig'd to it than the *Defendant*; for the *Defendant's* Plea is the more *favourable* even in the Law of Nature.

IV. From the Deſign of appealing to an *Arbitrator*, it appears how he ought to be qualified. For therefore recourſe is had to him, becauſe a Man's Judgment, by reaſon of that natural Affection which every Man bears to himſelf, is ſuſpected to be partial in his own Cauſe [e]. Upon which Account the *Arbitrator* muſt take care not to ſacrifice Right to Affection, nor to be biaſs'd in Favour of one more than the other, any farther than the Merits of the Cauſe incline him. And if he behaves himſelf thus impartially, he ought not to regard the unjuſt Reſentments of him that is caſt. *Bias* [f] uſed to ſay, that *he had rather judge between thoſe that were his Enemies, than his Friends; for, in the latter Caſe, let him judge how he would, one of his Friends would turn his Enemy; whereas, if both were his Enemies, one probably would become a Friend.* And therefore it is manifeſt, that a Man who has any Intereſt in the Succeſs of either Party, ought not to be an *Arbitrator* between them; for fear he ſhould not be able to obſerve ſo exactly that Indifference and Impartiality which he ought [1].

From hence it follows, that there ought to be no Pact or Promiſe between the *Arbitrator* and the Parties, whereby he may be prejudiced in Favour of either of them [g]. Nor ought he to expect [2] any other Reward for his Sentence, than the Satiſfaction of having judg'd right. Abſurd therefore was the *Arbitrage* which *Maximilian* and the *Venetians* ſubmitted to *Leo* X. whilſt each of them privately tamper'd with him to declare of his Side [h].

Now altho' the contending Parties enter into Compact with the *Arbitrator*, about taking upon him his Office (for as no *Arbitrage* can be exerciſed without the Conſent of the Parties, ſo no one can be forced to be *Arbitrator* againſt his own Conſent) yet it is not from the Force of that Compact, that he becomes obliged to judge according to what he thinks is agreeable to the Laws of Conſcience and Equity; or they to ſtand to his Award. For the Law of Nature, which can receive no Enforcement from any Compact, obliges him to judge according to Juſtice; and they are obliged to ſubmit, without any Reſerve, to his Determination, becauſe otherwiſe the Deſign of going to an *Arbitrator* would be fruſtrated, and there would be no End of ſuch Appeals.

For ſuppoſe they ſhould agree to ſubmit themſelves to his *Arbitrage*, not abſolutely, but upon Condition that he ſhould decree according to Juſtice, how would they ever be able to decide the Matter? For the Parties, being ſuppoſed to be in a perfect Liberty of Nature, are as yet equal; and each has Power to enquire whether the *Arbitrator* has perform'd the Condition, in judging according to Juſtice. And therefore, if, after the Sentence be given, it ſhould ſeem unjuſt to either Party, or ſhould really be ſo, another Controverſy would ariſe about it; which ſince neither this *Arbitrator*, nor the Parties could be able to determine, it would be render'd neceſſary to apply to another. And if with this other they enter into the ſame conditional Compact, and a Doubt ſhould ariſe about the Juſtice of his Sentence alſo, they would be forced to apply to another for Relief, and ſo on *in infinitum*.

From hence it follows, that the Pact, which the Parties enter into, when they conſent to ſtand to the Award of an *Arbitrator*, ought to be conceiv'd ſimply, and not upon Condition that he pronounces Sentence [3] according to Juſtice; for elſe, as was ſaid before, there might be an Appeal from

Mr. Barb. *NOTES on* § IV.

[1] πανταχοῦ δὲ πιστότατος ὁ διαιτητὴς, ὁ διαιτητὴς δὲ ὁ μέσος. *Ariſt. Pol. l.* 4. *c.* 12. "An *Arbitrator* is every where to have a "Truſt repoſed in him." Upon the ſame Principle depended the Anſwer that *Amaſis* King of *Egypt* gave the *Æleans*, when they were to be *Arbitrators* in the *Olympick* Games, and had ſent to him to adviſe them, how they might perform the Office with greateſt Juſtice; *Let none of the* Æleans, ſaid he, *be concern'd in the Games.* Hither may be referr'd that ſcandalous Decree of the *Roman* People, who in the Controverſy between the *Aricinians* and the *Ardeates*, adjudged the Land to themſelves. *Livy, Lib.* 3. *Cap.* 72. *Add. Juſt. l.* 8. *c.* 3. *n.* 15. where is a like Example of *Philip* of *Macedon*, See Diodorus Siculus, *Lib.* 1. *Chap.* 95.

[2] Pliny gives this Commendation to *Trajan*, as to the Cauſes on which he gave his Sentence, *Nec aliud tibi ſententiæ tuæ pretium, quam bene judicaviſſe*, Plin. *Panegyr. c.* 80. *n.* 1. You had no other Reward of y our Determination than that you judged well.

[3] The *Digeſts* ſpeak to this Purpoſe, *Qualem autem ſententiam dicat Arbiter, ad Prætorem non pertinere, Labeo ait, dummodo dicat, quod ipſi videtur. Et ideo, ſi ſic fuit in Arbitrum compromiſſum, ut certam ſententiam dicat, nullum eſſe arbitrium*, Lib. 4. tit. 8. *De receptis, qui arbitrium receperunt, ut ſententiam dicant*, Leg. 19. *princ.* Whence it comes, that according to thoſe Lawyers, the Sentence of an Arbitrator ought to end the Matter entirely, and not to be remov'd to the Judgment of another Arbitrator. *Idem Pedius probat, nè propagentur arbitria, aut in alios interdum inimicos agentium transferantur, ſua ſententia finem controverſiæ eum imponere oportet.* Ibid. Leg. 32. § 16. Further, as to what concerns the Agreement of Parties, and the Qualities or Duties of Arbitrators, as to the private Affairs of the Members of the ſame State, we may conſult the whole Title which I have quoted, as alſo Mr. Daumat's *Civil Laws in their Natural Order, Part* 1. *Lib.* 1. *tit.* 14. and the *Publick Law* of the ſame Author, *Lib.* 2. *tit.* 7.

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[a] Vide *Grot. l.* 2. *c.* 23. *ſ.* 7.

[b] *V. eund. d. l. ſ.* 9.

[c] *V. Grot. d. l. ſ.* 8.

[d] *D. l. ſ.* 11.

[e] Vide *L.* 2. *t.* 1. *l.* 10. *D. de juriſdict. Plut. de adulat. & amic. diſcern.* Every one is the greateſt Flatterer of himſelf.

[f] *Diog. Laert. l.* 1. *ſ.* 87. *Aul. Gell. l.* 1. *c.* 3.

[g] *Compare* Hobbes de Cive, *c.* 3. *ſ.* 14.

[h] *Guicciard. Hiſt. l.* 11. about the end; and *l.* 12. *p. m.* 345.

one [4] *Arbitrator* to another, and from him to a third, and ſo on without End. Beſides, that there can lie no Appeal from the Arbitrator is plain, becauſe there is no ſuperior Judge to receive it, which obtains even in civil States, where the Parties by Conſent pitch upon an *Arbitrator*, provided the Cauſe be ſuch as it does not concern the Government to intermeddle with: And if any Country admits of ſuch an Appeal, it is by reaſon of ſome poſitive Law. Indeed, in ſome places, thoſe extraordinary Judges who have Cauſes laid before them, to be examined and decided out of hand, without the tedious Forms of Law, come under the Name of *Arbitrators*. And from theſe nothing hinders but that an Appeal may lie to a Superior.

But when we ſay that the Parties ought, right or wrong [5], to ſtand to the Sentence of the *Arbitrator*, it muſt be underſtood with ſome Reſtrictions. For tho' I cann't fly off, becauſe he decrees otherwiſe than I expected; yet his Sentence ſhall not bind me, if it manifeſtly appears that he tamper'd with the other Party, and receiv'd Bribes of him, and concerted Matters to my Diſadvantage. For he who evidently [6] takes part with either ſide, ceaſes to bear any longer the Perſon of an *Arbitrator* [a].

If it be thought fit to [7] refer a Cauſe to more than one, 'tis beſt to have an uneven Number; for elſe they may divide into equal Votes, and ſo leave the Buſineſs undecided.

V. Moreover, *Grotius* [b] would have it conſider'd, whether the *Arbitrator* be choſen as a Judge, or as having Authority more at large of giving Sentence, not according to the [1] Rigour of the Law, but according to Reaſon and Equity. For ſometimes both Parties appeal to the Law; and there the *Arbitrator*, as if he were a Judge, ought to weigh the Merits of the Cauſe, and to determine according to Law. Sometimes one Party only inſiſts upon the Rigour of the Law, and the other, in Favour and Compaſſion, deſires a Mitigation of it; or, in other Words, appeals to Equity: Where by *Equity* I don't mean that dextrous Interpretation of the Law, mentioned in the foregoing Chapter, which even a ſubordinate Judge ought to make uſe of: but an Abatement of the Rigour of the Law, upon the Dictates of Humanity, Charity, Compaſſion, *&c.* which none but the ſupreme Judge [2], or an *Arbitrator* choſen on purpoſe, has Authority to apply.

If it be doubtful under which of theſe two Qualifications the *Arbitrator* is choſen, he ought to ſuppoſe himſelf tyed up to thoſe Rules, which a Judge would be obliged to follow; for it is for want of a Judge and Judicature that he is called in: And, in a doubtful Caſe, we ought to take that ſide which is cleareſt [3]. Beſides, an *Arbitrator* cann't ſo eaſily act unjuſtly, if he has a limited, as if he has an abſolute Power delegated to him. Indeed to perſuade a Mitigation of the Rigour of the Law is properly their Buſineſs, who voluntarily, without entring into any Engagements, interpoſe as common Friends between the contending Parties.

Now as he that judges between Fellow-ſubjects, judges according to the *municipal* Laws of the Place; ſo he who judges between thoſe who acknowledge no common *municipal* Laws, ought to judge according to the Law of Nature; unleſs the Parties ſubmit their Cauſe to the poſitive Laws of ſome particular State.

VI. The ſame *Grotius* [c] obſerves alſo, that an *Arbitrator*, choſen by the ſupreme Authority, ought to take Cognizance of the Merits of the Cauſe, and not of the Poſſeſſion; for it belongs to the civil Law to determine that, whereas, by the Law of Nature, the Right of Poſſeſſion follows the Property. Concerning which my Opinion is, that altho' by the Law of Nature and Nations it does not ſeem neceſſary, that if a Man be turned out of Poſſeſſion he ſhould immediately be put in again, before the Merits of the Cauſe be heard, eſpecially if it can be immediately determined; yet, in many Caſes, the *Arbitrator* ought to make Enquiry who was in Poſſeſſion, that he may know whom it chiefly concerns to make out his

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[4] *Adeo ſummum quiſque cauſæ ſuæ Judicem facit, quemcunque elegit.* Plin. *Nat. Hiſt. Præf. ſ.* 47. "Every one makes him, "whom he has choſen, the chief Judge of his Cauſe." Ἢν δὲ τινὰς ἑκόντες αὐτοὶ συνθῶνται δικαστὰς, καὶ ἀνελόμενοι ἐπιτρέψωσι διαιτᾶν, οὐκ ἔτι δίδωσιν ὁ νόμος εἰς ἕτερον ἐφεῖναι δικαστήριον. Lucian *Abdicat. t.* 1. *p.* 715, *&c.* Edit. *Amſt.* "If any one pitches "upon thoſe to be Judges in his Caſe, whoſe Opinion he was not otherwiſe obliged to ſtand by, after having made the Choice, "he ought to ſubmit to their Determinations." From hence may be brought a Reaſon of that in QUINCTILIAN, *Declam.* 372. *Judicia tamen judiciis reſcindi non poſſunt.* "One Decree cannot make void another."

[5] This is ſaid formally in a Law, where the Arbitrators ſpoken of are oppoſed to another ſort of Arbitrators, to whoſe Judgment we are not bound to ſubmit, unleſs it be conformable to the Rules of Equity. *Arbitrorum enim genera ſunt duo, unum ejuſmodi, ut ſive æquum ſit, ſive iniquum, parere debeamus; quod obſervatur, cum ex compromiſſo ad arbitrium itum eſt; alterum ejuſmodi, ut ad boni viri arbitrium redigi debeat.* Digeſt. Lib. 7. tit. 2. *Pro Socio,* Leg. 76. See the following Laws.

[6] The Law of the *Romans* grants in this Caſe an Exception of Fraud. *Arbitrorum ex compromiſſo ſententiæ non obtemperant, ſi ſordes, vel evidens gratia eorum, qui arbitrati ſunt, interceſſit; adverſus filiam tuam agentem ex ſtipulatu, exceptione doli mali uti poteris.* Cod. Lib. 2. tit. 56. *De receptis Arbitris,* Leg. 3.

[7] So the *Digeſts* direct, *In impari enim numero idcirco compromiſſum admittitur, non quoniam conſentire omnes facile eſt, ſed quia, etſi diſſentiant, invenitur pars major, cujus arbitrio ſtabitur.* Lib. 4. tit. 8. *De Receptis, &c.* Leg. 17. § 6.

Mr. BARB. *NOTES on* § V.

[1] GROTIUS quotes here a Paſſage of *Seneca, De Benef. Lib.* 3. *Cap.* 7. where he does not treat of Arbitrators, but ſuch ſubordinate Judges, as the Prætor or Governor ordered for the Parties, who were obliged to follow the Forms preſcribed them ſtrictly, or the Maxims of Equity, according to which the Cauſe reſpected an Affair of ſtrict Juſtice, or of Honeſty. See Mr. NOODT's Treatiſe, *De Juriſdict. & Imperio,* Lib. 1. Cap. 13.

[2] This is what the Emperor *Conſtantine* expreſly ſpeaks of, in this Law quoted by Mr. HERTIUS: *Inter æquitatem juſque interpoſitam interpretationem nobis ſolis, & oportet, & licet inſpicere.* Cod. Lib. 1. tit. 14. *De Legibus, &c.* Leg. 1. See the preceding Chapter, § 21. *Note* 5.

[3] So the *Digeſts* ſpeak, *Semper in obſcuris, quod minimum eſt, ſequimur,* Lib. 1. tit. 17. *De Div. Reg. Jur.* Leg. 9.

[a] Vide *L.* 7. *t.* 2. *l.* 76, *&c. D. pro Socio.*

[b] Vide *Grot. L.* 3. *c.* 20. *ſ.* 46. *n.* 2.

[c] *D. l. ſ.* 48.

his Title. [1] For the Plaintiff ought to have very clear Proofs to ſupport his Pretenſions, whereas it is enough for the Defendant to confute the Arguments of his Adverſary; tho' ſometimes it may be convenient, over and above, to ſhew his own Title alſo. However 'tis not ſufficient for the Arbitrator to give Judgment concerning the Poſſeſſion only, for that is generally out of diſpute, and ſeldom brought before him; but his buſineſs is to examine into the Merits of the Cauſe, and by a final Determination to put an End to the Suit. But while the Cauſe is depending, no Innovations ought to be made; and, if the *Plaintiff* cann't make out his Pretenſions, Judgment ought to be given for the Party in Poſſeſſion.

VII. But *Mediators*, who, interpoſe between contending Nations, either preparing, or actually engaged in War, and endeavour, by their Authority and their Arguments and Intreaties, to bring them to Terms of Accommodation, are not properly *Arbitrators* [a]. Theſe having ſo pious a Deſign in hand cannot be obſtinately rejected, without the greateſt Inhumanity, even altho' they ſhould appear to be more intimately allied to either Party. For the other ſtill has Liberty either to accept or refuſe what they offer: And it is the chief Buſineſs of a Friend, where he cannot join in the Quarrel, to endeavour to bring it to an amicable Compoſition. Beſides, it is frequently the Intereſt of a Prince, to prevent War from breaking out between Nations; for ſome Sparks of the Fire, kindled in his Neighbourhood, may poſſibly reach him; and, beſides, it may be dangerous for him to have both, or either of the Parties entirely ruined; and therefore, as he values his own Safety, he ought to endeavour might and main to hinder the Flame from coming to a Head. And the more earneſtly ought *Chriſtians* thus to labour in compoſing Differences, becauſe even the *Alcoran* [b] (how ſenſleſs ſoever it be in other things) does wiſely in commanding, that if two *Mahometan* Nations go to War, the reſt ſhall interpoſe, and force the Aggreſſor to make Satisfaction, and after that oblige both to live in Friendſhip and Amity for the future.

'Tis certain, that if it be the Intereſt of ſeveral to have the Quarrel made up, they may enter into Compact jointly to labour for Peace; and if their Endeavours ſhould prove unſucceſsful, they may then mutually preſcribe to one another, how far each ſhall make himſelf a Party in the War. But this only, in caſe none of them has any Pre-engagement upon him to aſſiſt either of the Parties, in caſe of War; for ſuch an Obligation can't be limited by a Treaty made afterwards with a third Perſon.

Moreover, two or more, whom it concerns to have an End put to the War, after having weighed the Pretenſions of each ſide, may lawfully agree upon what Terms a Peace ought to be concluded, and then offer them to the Parties with a *Manifeſto*, that they will join Forces againſt him that refuſes them. For a Prince does not, by this Means, obtrude his *Arbitrage* upon another againſt his Will; nor decides another's Quarrel by his own Authority (both which are Enchroachments upon the Liberty of Nature) nor are thoſe Terms offer'd to the Parties ſo, as if they were oblig'd to comply with them. But ſince, by the Law of Nature, a Man may join Forces with him, who, he thinks, has receiv'd an Injury, eſpecially if the Conſequence of it is likely to redound to his Damage; by ſuch a Method as this he openly declares for Equity and Peace, that he is deſirous others would act fairly, and that he is not willing to enter into a War, before the adverſe Party has rejected the Propoſals of Peace [c] [1].

And this ſort of Mediation is the more commendable, if it puts an End to a War, that would prove deſtructive to one or both Parties; yet he, who makes himſelf a *Mediator*, ſhould take care that he be able to compel by Force, that Party which refuſes to ſtand to his Determination [d].

VIII. How the Form and Proceſs of a Debate before an *Arbitrator* is to be manag'd, common Senſe will beſt direct, according to the different Circumſtances of the Thing; for it would be impertinent to give tedious Directions how each Party ought to open his Cauſe, how to ſtate the Queſtion, how, after the Arguments on both ſides have been weighed, the Sentence ought to be pronounced: We need only obſerve, that if the Pretenſions on one ſide cannot be made out but by Deeds, and they happen to be loſt, the *Arbitrator* has nothing to do, but, with the Conſent of the other Party, to give him his Oath [1]: I ſay, *with the Conſent of the other Party*; for elſe, in the Liberty of Nature, no Man is obliged to put the Iſſue of his Cauſe upon another Man's Conſcience. It is alſo in the Power of the Parties to refer themſelves to the Deciſion of a Lot, or a [2] Duel, as has formerly been practiſed among many Nations.

However, I do not ſee how the [3] Loſs of my Deeds can extinguiſh my Right; indeed I cannot have Juſtice done me in the civil Court, being

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Mr. Barb. *NOTES on* § VI.

[1] So the *Digeſts* appoint, *Exitus controverſiæ Poſſeſſionis bic eſt, tantum, ut prius pronunciet Judex, uter poſſideat: ita enim fiet, ut is, qui victus eſt de poſſeſſione, Petitoris partibus fungatur, & tunc de Domino quæratur.* Lib. 41. tit. 2. *De adquirendâ, vel omittendâ poſſeſſione,* Leg. 35. Beſides, as there are ſometimes great Preſumptions for one of the Parties, Equity requires, if he hath been, for Example, diſpoſſeſſed by an unjuſt Force, he ſhould be again put in Poſſeſſion without a ſtrict Examination of the Petitioner, which may be long and intricate, that the Detainer, during that Time, may not enjoy peaceably the Fruits of his Force, and the Advantages of the Poſſeſſion. See Mr. Titius's *Obſerv.* on Lauterbach, *Obſ.* 1071.

Mr. Barb. *NOTES on* § VII.

[1] The Words of Velleius Paterculus are, *Feſtinationem itineris ejus* [Cæſaris] *aliquandiu morata Maſſilia eſt, fide melior, quàm conſilio prudentior; intempeſtivè principalium armorum arbitria captans, quibus ii ſe debent interponere, qui non parentem coercere poſſunt.* Lib. 2. Cap. 50. See Mr. Boecler's Diſcourſe, entituled, *Quies in turbis,* which is the 34 of *Tom.* 1. *pag.* 996, *&c.*

Mr. Barb. *NOTES on* § VIII.

[1] See *Lib.* 4. *Chap.* 2. § 21. aforegoing.
[2] See *Lib.* 8. *Chap.* 8. § 5. following.
[3] See *Lib*, 3. *Chap.* 6. § 16. aforegoing.

[a] Vide *Guicciardin. Hiſt. l.* 4. where is debated whether *Hercules* Duke of *Ferrara* ſhould perform the Part of an *Arbitrator*, or *Mediator*, between the *Venetians* and the *Florentines*.

[b] *Cap. de Clauſtris.*

[c] Vide *Livy*, *l.* 44. *c.* 19. at the End. *Juſtin. l.* 6. *c.* 6. *n.* 1.

[d] Vide *Vell. Paterc. l.* 2. *c.* 50. *Livy*, *l.* 9. *c.* 14.

not able to produce ſufficient Evidence; but, in the Liberty of Nature, 'tis enough to juſtify me in the Proſecution, if I be fully convinced of my Right, tho' I be not able to make out my Pretenſions to another [a].

IX. This Arbitrators have in common with Judges, that, in the Examination of Matters of Fact, they ought to ſhew themſelves equal to the bare Aſſeveration of each Party, *i. e.* when they contradict one another, to believe neither. But when Deeds [b], Arguments, and undeniable Inſtruments cann't be produced, they muſt then give Judgment according to the Teſtimony of Witneſſes [1].

And theſe Witneſſes ought to ſhew themſelves indifferent towards either Party, and not to let Favour, or Hatred, or Revenge weigh more with them than their Conſcience [c]. *Thuanus* [d] relates, that heretofore in *Great-Britain* an *Engliſh* Man could not be a Witneſs againſt a *Scot*, nor a *Scot* againſt an *Engliſh* Man, by reaſon of the Enmity between the two Nations: But *Cambden* [e] tells us, that this obtain'd only between the bordering *Scots* and *Engliſh*; ſo that if never ſo many *Engliſh* Men ſhould, with their open Eyes, ſee a *Scot* commit Murder, their Teſtimony would ſignify nothing, unleſs ſome *Scot* or other teſtified the ſame Thing.

And therefore as my Adverſary may refuſe to admit of my near Relations as Witneſſes [f]; ſo may I except againſt my profeſſed Enemies. Indeed ſometime Relations are excuſed upon a Principle of Humanity, for fear they ſhould be forced to offer Violence, either to their Affections, or to their Conſcience. And [3] therefore the *Roman* Law never obliged the Client to be Evidence againſt his Patron, nor the Patron againſt his Client [g]: But beſides this, there was another very good Reaſon why Servants ſhould not be allowed to give Evidence againſt their [4] Maſters [h]; for, as *Cicero* ſays, *If that which is done in our own Houſe, and among our ſelves, were permitted to be publickly expoſed and brought againſt us, the Maſter would be the Slave, and the Slave Maſter.* Indeed *Theodoric* [i] forbid the Abuſe of this Law by an Edict; for ſome bought up other Peoples Servants, who were conſcious of their Crimes, leſt they ſhould be brought as Evidence againſt them. Laſtly, it is very reaſonable, that [5] no Cauſe ſhould ſtand or fall by the Credit of any one ſingle Witneſs [k], not only becauſe one may more eaſily be deceived or corrupted than many, and there is no Falſhood ſo impudent, but may get the Aſſiſtance of one Witneſs [l]; but alſo becauſe an able underſtanding Judge may diſcover the Witneſſes to be falſe, by oppoſing to one another the Examinations of ſeveral [m], whereas one may eaſily be conſiſtent with himſelf; and altho' by this Means ſome Crimes muſt remain unpuniſh'd in this World, and ſome muſt loſe their juſt Right, who perhaps have but one Witneſs to ſupport it; yet this Inconvenience is not ſo great, as if every one's Life and Fortune lay at the Mercy of any one Man's Impudence and Villany; for 'tis better that a few guilty Perſons ſhould eſcape Puniſhment, than that many innocent ſhould ſuffer [n].

Yet *Selden* [o] obſerves, that againſt a *Gentile* the *Jews* admitted of one Witneſs as ſufficient. And *Grotius* [p] takes notice, that one Witneſs was enough, not to condemn, but to inform the Court, and, in pecuniary Matters, to put the Defendant to his Oath. At this Day, among the *Moors* the Evidence of two honeſt Men is ſufficient, but if the Witneſſes be ſuſpected, then twelve Perſons are required; for they think as much Credit may be given to twelve, let them be ever ſo profligate, as to two, be they ever ſo honeſt [q] [r]. The *Hebrews* admitted none to be Witneſſes, but ſuch as were of good Reputation; mad Men were excepted againſt, and Children, till they were thirteen Years of Age; and Thieves, even after they had made Reſtitution; thoſe too who lived by Gaming, and *Publicans* who exact more than their due, and ſuch as deal in thoſe Things which deſerve Stripes. Among the *Turks*, thoſe who have made

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Mr. BARB. *NOTES on* § IX.

[1] For as *Iſæus* ſays, *Orat.* 7. *p.* 504, 505. Ἀ τεκμήρια κρείττω τῶν μαρτυριῶν ἐστιν. "Arguments are better than Witneſſes." And, in *Orat.* 3. he ſhews, That in Matter of Inheritances particularly, *Deeds are preferable to Witneſſes.* Philo Jud. *de Decal*, *p.* 764. *Ed. Par.* "If Arguments and Writings be wanting, the Controverſy muſt be decided hy Witneſſes." See *Lex. Wiſigoth. l.* 2. *t.* 4. *c.* 3.

[3] There were, nevertheleſs, certain Caſes excepted, as well for the Criminal as for the Citizen. See Mr. NOODT's *Probabilia Juris, Lib.* 3. *Chap.* 5, 6. as alſo the Interpreters on CICERO's *Orat. pro Milione, Chap.* 22.

[4] *Pro Rege Dejotar. Chap.* 11. *Lucian* in *Aſino. Tom.* 2. *Page* 80. Edit. *Amſt.* "Servants muſt needs know both the Good "and the ill Things of their Maſters." There is ſuch another Paſſage in LYSIAS, *Orat. de ſacro Olivæ trunco. Plaut. Bacch. Act.* 4. *Sc.* 6. *ver.* 20, 21. I know I am a Slave, and therefore I am ignorant of even that which I know." See a Paſſage in ISOCRATES TRAPEZ. de fide quæſtionum, *pag.* 634, *&c.* and *Ariſtot. Rhet. ad Alex. Chap.* 17. Hither may be referr'd the Hiſtory, or rather the Fable, of *Avicenna*, in *Gabril. Sionit.* de urbibus & moribus Oriental. *c.* 3. See *Lex Wiſigoth. Lib.* 5. *Tit.* 4. *Chap.* 14. with which may be compared, *ibid. lib.* 3. *tit.* 4. *chap.* 10. and *lib.* 6. *tit.* 4. *chap.* 3. and *Capitulare Caroli, lib.* 7. *chap.* 280. Edictum Regis Theodor. *chap.* 48, 46, 101.

[5] So the *Code* orders, *Et nunc manifeſté ſaucimus, ut unius omnino teſtis reſponſio non audiatur, etiamſi præclaræ curiæ honore fulgeat.* Lib. 4. Tit. 20. *De teſtibus,* Leg. 9. § 1. See alſo the *Digeſts Lib.* 48. *Tit.* 18. De quæſtionibus, *Lib.* 20.

[a] Vide *Conneſtag. de Unione Luſitan. l.* 5. *p. m.* 222. To this Purpoſe is that of *Quinctilian*, Declam. 312. *The Condition of Man is miſerable, ſince it ſeems neceſſary to have a Witneſs for every thing we do: Truth has ſo little Power, and Faith ſo little Eſteem, as that ſcarce ſeems ſufficiently proved, which is atteſted by Two.* [b] Vide *Suet. Galb. c.* 7.

[c] -------------------- *cum ſint præmia falſi*
Nulla, ratam debet teſtis habere fidem. *Ovid Triſt. l.* 3. *El.* 10. *v.* 35, 36.

Add. *Lex Wiſigoth. l.* 2. *t.* 4. *c.* 12.
[d] *Lib.* 50. [e] *Ad. ann.* 1585. [f] V. *Ariſtot. Pol. L.* 2. *c.* 6. [g] *Plut. Romulo. Lex. Wiſigoth. l.* 5. *t.* 7. *c.* 11. [h] *Unleſs for Inceſt, as* Cicero *ſays,* Orat. pro Milone, c. 22. [i] *Edict. c.* 101. And therefore *Ariſtotle, d. l.* does well call it a fooliſh Law, *If the Accuſer brings a Multitude of his Relations as Witneſſes, the Accuſed ſhall be founa Guilty.* [k] *See* Numb. xxxv. 30. Deut. xvii. 6. *and* xix. 15. [l] *Plin. Nat. Hiſt. l.* 8. *c.* 22. [m] Vide *Suſan Hiſt. v.* 51. [n] *Val. Max. l.* 4. *c.* 1. *ſ.* 10, 11. [o] *De Jure N. & G. ſec. Heb. l.* 7. *c.* 6. [p] *On* Deut. xix. 16. [q] *What Qualifications are neceſſary for Witneſſes, may be ſeen in* L. 22. t. 5. l. 2, 3. *ſ.* 1, 2, 3, 4. 4, 5, 9, 14, 21, 23, 24. *D. de Teſtibus.* [r] *See above, in* B. 3. c. 6. ſ. 16.

a Pilgrimage to *Mecca* are equivalent to three Witneſſes[a]. [6] Add to this, that *one Eye-Witneſs is worth Ten that have the Fact by Hear-ſay only.* And therefore their Teſtimony is of no Weight which is built [7] upon the Authority of others.

But tho' the Oath of a Witneſs creates a great Preſumption of the Truth of what he aſſerts, yet, in the Law of Nature, nothing hinders but that a ſworn Witneſs may be convicted of Perjury; and, if he be ſo convicted, the Sentence founded upon his Teſtimony comes to nothing[b]: Yet it ſeems abſurd, that the Party concern'd ſhould be permited to make void the Evidence, by ſwearing on the other ſide; for this would not only lay open a great Gap for Perjury, but by reaſon of contradictory Oaths, the Controverſy would remain as uncertain as before. And therefore it is according to its uſual Sillineſs and Impiey, that the *Alcoran*[c] commands him who accuſes his Wife of Adultery, and has no Witneſs to prove it, to ſwear four times, and the fifth time to imprecate the Curſe of GOD upon himſelf, if what he affirms be not true. And on the other ſide, it allows the Woman to be clear, if ſhe denies the Charge four times upon Oath, and the fifth time with an Invocation of the Curſe of GOD.

X. As for putting the Sentence of the Judge in Execution, we need not ſay much; for in a State of Nature, if a Man does not of his own Accord perform what is due to me, I may, by all the Power that I my ſelf have, or my Friends can ſupply me with, force him to it. How far we may carry ſuch violent Proceedings ſhall be ſhewed more fully hereafter, when we come to diſcourſe of War. Only here we may obſerve, that in ſuch an Execution I not only acquire the Property of the Thing adjudged to me, when by any Method whatſoever I have got Poſſeſſion of it; but moreover, if I cannot get Poſſeſſion of the Thing it ſelf, I may ſeize upon any Thing of the ſame Value, the very Charges of the Execution being reckon'd in, ſo as to become the rightful Owner of it[d]. Indeed the Goods of a Debtor, who becomes ſuch either by his own Contract, or by the Thing it-ſelf, or by his Injuſtice, are look'd, upon, in the Law of Nature, as tacitly mortgaged for the Debt; and, if it be not diſcharg'd, may be juſtly ſeized for it; nor is the bare Detention of the Thing enough for the Creditor, for that frequently, has more Trouble than Profit in it; but he muſt alſo have full Liberty to diſpoſe of it as he pleaſes: For my Right is not ſatisfied, if inſtead of the Thing, with the Property of which I ought to be inveſted, I receive nothing but the Cuſtody of another Man's Goods; yet, in ſuch a Caſe, I ought to ſignify with what Deſign I make ſuch Seiſure, whether in order to extort from the Debtor my Dues the ſooner, or to take the Goods thus ſeized upon in part of Payment; indeed it ſeems but reaſonable to give the Debtor Liberty to receive his Goods, upon Payment of the Debt. But this Way of Execution is proper to the State of Nature, and has no place in a Civil Conſtitution[e].

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[6] *Pluris eſt oculatus teſtis unus, quam auriti decem.* Plaut. Trucul. *Act.* 2. *Sc.* 6. *v.* 8. " The Ears are leſs faithful than " the Eyes." *Lucian de Domo.*

[7] Οὗ χάριν κ̀ παρὰ τοῖς ἄριςα πολιτευομένοις ἀναγέγραπται νόμος, ἀκοῇ μὴ μαρτυρεῖν, ὅτι φύσει τὸ δικαςήριον αὐτῆς πρὸς τὸ δεκάζεσθαι ταλαντεύει. *Philo Jud. de Corrupt. Linguarum, pag.* 340. *B. C.* Edit. *Paris.* " In a well-regulated Commonwealth the Laws " take Care, that what is given upon hearſay ſhall not go for Evidence. For ſuch a Teſtimony is naturally liable to Corrupti- " on. The Eye is appriſed of the Things themſelves, and in a manner intermeddles with Buſineſs, and perceives all by " Light, by which every Thing is illuſtrated and diſcovered: but the Ear has leſs Credit, as having to do not with the Things " themſelves, but with Rumours, which do not always mind the Truth, *Id. de Judice. p.* 719.

[a] Vide *Chr. Richer. de moribus Turcarum.* [b] *The* Attick *Laws allow, that, after the Sentence, an Action of Perjury may be brought againſt the Witneſs, as is plain from* Demoſth. Orat. *in* Euergum, *in the Beginning. Add* Plat. de leg. l. 11. *about the End.* [c] *Cap. de Lumine.* [d] *For as* Grotius *obſerves,* l. 2. c. 7. ſ. 2. *Expletive Juſtice, when it cannot get the Thing it ſelf, demands an Equivalent, which morally ſpeaking is the ſame.* [e] Vide *L.* 41. *t.* 2. *l.* 5. *D. de acquir. poſſeſſ. L.* 47. *t.* 8. *l.* 2. *ſ.* 18. *D. de vi bonorum raptorum,* & *L.* 4. *t.* 2. *l.* 13. *D. quod metus cauſa,* & *L.* 48. *t.* 7, &c. *L.* 7, 8. *D. ad. l. Juliam de vi privata.*

OF THE LAW of NATURE AND NATIONS.

BOOK VI.

CHAP. I.

Of MATRIMONY.

I. *The Coherence.*
II. *Matrimony the Propagation of Mankind.*
III. *Whether there be an Obligation to marry.*
IV. *A wandring Luſt oppoſite to the Law of Nature.*
V. *Mankind not to be propagated but by Marriage.*
VI. *What Obligation may be laid on Men to marry by the Laws of Nations.*
VII. *What it is by the Law of Nature.*
VIII. *How far the Laws of Nations may order concerning Marriage.*
IX. *The diſorderly Marriages of the* Amazons.
X. *The Laws and Rights of a regular Marriage.*
XI. *Whence ariſes the Man's Power over the Wife.*
XII. *Whether it be beſtowed immediately by God.*
XIII. *Whether it neceſſarily implies a Power of Life and Death.*
XIV. *Whether Conſent, not Bedding, makes the Marriage.*
XV. *No Woman may marry more than one Husband.*
XVI. *Polygamy in uſe among many People.*
XVII. XVIII. *Whether it be repugnant to the Law of Nature.*
XIX. *The true nature of Marriage is for one Man and one Woman to be joined together.*
XX. *It is not lawful raſhly to part Man and Wife.*
XXI. *Adultery and wilful Deſertion make a Marriage void.*
XXII. *Whether an intolerable Ill-nature is a Reaſon for Divorce.*
XXIII. *The Opinion of ſome Men, about the Senſe of the Law of God about Divorce.*
XXIV. *Particularly of Mr.* Milton.
XXV. *Marriage requires ſuitable Qualifications of Nature.*
XXVI. *An Error concerning Matrimony.*
XXVII. *A marry'd Woman cann't rightly marry another.*
XXVIII. *Marriages with near Kindred, why forbidden?*
XXIX. *How it comes to paſs that Men are aſhamed of their Genitals.*
XXX. *Of Nakedneſs.*
XXXI. *The original of natural Shame.*
XXXII. *Marriages between Parents] and Children wicked.*
XXXIII. *The Opinion of the* Jews *about it.*
XXXIV. *Of the Marriages of Brothers and Siſters.*
XXXV. *Of the other Degrees forbidden.*
XXXVI. *Of ſecondary Wives.*

IT follows in courſe that we examine the Original and Nature of human Government, and that we [1] obſerve what Precepts of the Law of Nature and Nations do preſuppoſe it. But in as much as Government cannot otherwiſe be conceiv'd than between ſeveral Perſons, and ſince the Holy Scriptures inform us, that in the Beginning GOD Almighty created one only human Pair, the Original Parents of our Race; it may ſeem ne-

Mr. BARBEYRAC's *NOTES on* Chap. I. § I.

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[1] The Connexion is ſomething different, and perhaps better in his Abridgment *of the Duties of a Man and a Citizen*, lib. 2. chap. 2. where the Author follows the Notion, which he had before propounded: Lib. 1. Chap. 1. § 7. and ſays, That he paſſes to the Conſideration of the Acceſſory States; *i. e.* to them which are conſequent upon ſome human Act, which he reduces to four: *viz.* Marriage, the Relations of Father and Mother, Maſter and Servant, and the Members of a Kingdom.

neceſſary, [a] before we proceed in our Enquiry about Civil Power, to conſider the Relation of Matrimony; which being the Source of Private Families, does, by conſequence, ſupply Matter for the compoſing of all Sovereignties and States. For as the Body of Man is made up of divers Members, each of which conſider'd by it ſelf, hath likewiſe in ſome ſort the Appearance of a Body; ſo States are form'd out of leſſer Societies, of which ſome are call'd Simple and Primary, others Compound, and as it were Collegiate. Of the firſt Sort are three, according to the threefold Power of a Husband, of a Father, and of a Maſter. And theſe bear the Name of Simple, not becauſe they conſiſt of no more than two Perſons, as ſome maintain [a], but becauſe they are not compounded of inferior Societies. For why may not one Father have more Children, and one Maſter more Servants, and yet the Societies thus conſtituted be as truly ſimple, as if each Father had but a ſingle Child, each Maſter but a ſingle Servant [b]?

II. To go on then; ſo ſoon as Man was rendred obnoxious to Mortality, leſt the Duration of ſo noble a Species ſhould be confin'd to a ſingle Age, or ſhould require the conſtant Miracle of new Creations to preſerve it in Succeſſion, it pleas'd the moſt wiſe GOD to provide againſt theſe Inconveniences [1], by enduing the two different Sexes with a natural Power of Propagating their Kind. And leſt they ſhould forbear ſo neceſſary a Work, either out of Negligence, or upon Apprehenſion of the great Pain of Bearing, and the great Trouble of Educating their Off-ſpring; he implanted in each Sex a moſt paſſionate Love, a moſt ardent Propenſion towards the other, with a moſt deep and tender Affection for their Common Iſſue; that ſo they might not only willingly, but joyfully contribute their Service to the Preſervation and the Continuance of Human Race [c].

III. The firſt Point of Enquiry concerning Matrimony muſt be, Whether Men, in all reſpects fit for ſuch a Condition, lie under any Obligation of entring upon it? For about this Action, as likewiſe about others, to which Men are inclined by a natural Appetite, as Self-preſervation, and the Love and Education of Off-ſpring, many have rais'd a Scruple, as if they were not under the Care and Cognizance of the Law of Nature. For, ſay theſe Authors, what need was there of a farther Engagement to ſuch Performances, as the Senſitive Appetite, and Inſtinct did with ſufficient Strength incite and drive us to before? But indeed their Dependence on natural Inſtinct is ſo far from proving them to be uncommanded by the Law of Nature, that it rather argues a more peculiar and more earneſt Care in Nature to have them obſerv'd with the utmoſt Strictneſs, as the immediate Cauſes of the Safety and Welfare of Mankind; whilſt diſtruſting, as it were, the bare Force of Reaſon, ſhe aſſiſts and ſeconds it with ſo violent an Inſtinct, that Men cannot, without great Difficulty, bend the contrary way [d]. Where ſhould we find a Man [1] who would venture the common Vexation of Children, were he not led to deſire them, as well by a Natural Inclination [e], as by the ſober Advice of Reaſon? eſpecially ſince the means of obtaining them are ſuch, as would

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[a] Plato ſays, That if we will make good Laws, we muſt begin to regulate Marriages well. Γαμικοὶ δὲ νόμοι πρῶτοι κινδυνεύουσι τιθέμενοι, καλῶς ἂν τίθεσθαι πρὸς ὀρθότητα πάσῃ πόλει. De Legib. lib. 4. p. 835. *Edit. Wech. Ficin.* See alſo *Dion. Halicarn. Antiq. Rom. Lib. 2. Cap. 24. p. 91.* There is a Fragment of *Hierocles*'s, which deſerves, to be recited here, where that Phiſoſopher ſays, That nothing is more neceſſary to be treated on than Marriage, becauſe Mankind is born for Society, and Marriage makes the firſt and moſt ſimple of all Societies; for, adds he, there cann't be a City without Families, nor can any Family be compleat, unleſs the Head of it be marry'd. Ἀναγκαιότατός ἐστιν ὁ περὶ τοῦ Γάμου λόγος· Ἅπαν μὲν γὰρ ἡμῶν τὸ γένος ἔφυ πρὸς κοινωνίαν. Πρώτη δὲ καὶ στοιχειωδεστάτη τῶν κοινωνιῶν, ἡ κατὰ τὸν γάμον. Ουτε γὰρ πόλεις ἂν ἦσαν, μὴ ὄντων οἴκων· οἶκός τε ἡμιτελὴς μὲν τῷ ὄντι ὁ τοῦ ἀγάμου. τέλειος δὲ καὶ πλήρης ὁ τοῦ γεγαμηκότος. *Hierocles* De Nuptiis apud Stob. Serm. 65. p. 300. *Ed. Hier. Needham.*

Mr. Barb. *NOTES on* § II.

[1] Some Divines having quarrell'd with our Author for what he ſays here, he anſwers them thus in his *Specimen Controverſiarum circa jus Naturale,* &c. Chap. 3. § 7. When God, who knows all things, foreſaw that Man would inevitably become ſubject to Death, he diſpos'd things by this infinite Wiſdom from the Beginning after this manner: That diverſity of Sexes ſhould be of uſe both in the ſtate of Integrity, and of Sin: In the ſtate of Integrity, it was to raiſe up an holy Seed, to increaſe the number of the Worſhipers of God; but after they had ſinned, it was to propagate a corrupt Race, that Death which is the Conſequence of Sin, might not quite deſtroy Mankind in the ſpace of one Generation only; the Creator not judging it fit to form a new Root of Innocent Men, and chooſing rather, that the Earth ſhould be inhabited by a corrupt Generation, than remain a Deſert.

Mr. Barb. *NOTES on* § III.

[1] And would not the Women alſo reject it on their Part for many Reaſons? See Mr Bayle in his News Letters upon Mr. P. Maimbourg's Critical Hiſtory of *Calviniſm,* Let. 16. and Mr. Lock's Eſſay upon the Human Underſtanding. Lib. 2. Chap. 21. § 34.

[a] *Vid.* Joh. Frid. Horn. *de Civitate,* l. 1. c. 1. ſ. 2.

[b] In beginning thus with Matrimony, Plato himſelf is our Guide and Director. Let us hear his Managers of the Queſtion. LL. *l.* 4. Athen. *Come, tell me by all that's Good, what Point ought firſt to fall under the Legiſlator's Care? Will not Nature teach him to ſettle, before all things, by good Laws the Affair of Generation and the Origin of Mankind?* Clin. *Yes no doubt.* A. *But the Affair of Generation takes its Riſe from the Union and Community of Wedlock.* C. *It doth ſo.* A. *Why then, if Nuptial Laws be in the firſt place eſtabliſh'd, they cannot but have a good Influence on all the future Regulations of the State.*

[c] My Lord Bacon, *De Augment. Scient.* L. 7. c. 2. obſerves, that amongſt Animals the Pleaſure of Generation is greater than that of Feeding.

Providit ille maximus mundi parens,
Cum tam rapaces cerneret fati minas,
Ut damna ſemper ſobole repararet nova.

The wiſe Creator knew the World was frail,
And order'd quick Succeſſion to repair
Still with new Race the Breaches made by Fate.

---------- *Cœlibem vitam probet*
Sterilis juventus; hoc erit, quicquid vides,
Unius ævi turba.
Senec. *Hippol.* v. 465, *&c.*

---------Let our barren Youth
Experience their miſtaken Chaſtity,
And all you ſee muſt prove a ſhort liv'd Crow'd,
A People of a ſingle Age --------

[d] *Add.* Oppian. *Cyneget.* l. 3. v. 107, *&c.* Halieut. *l.* 1. *v.* 702, &c.

[e] *Vid.* Euripid. Medea *v.* 1090, *&c.* Hyppol. *coron.* v. 616.

appear both tedious and deſpicable to a wiſe Man, unleſs attended with ſome delightful Charm [a]? We acknowledge that there is a great Difference between *Inſtinct* and *Reaſon*, and that in moſt Caſes thoſe Powers take quite contrary Roads, and that therefore the Licentiouſneſs of the former is to be bridl'd, and controll'd by the Authority of the latter; which to compaſs and effect is an Argument of a great and worthy Soul. But altho' *Inſtinct* hath not in it ſelf the Force of an *Obligation*, yet it many times happens, that we may, by ſome ſuperior Engagement, be obliged to undertake a Performance which bare Inſtinct before inclined us to.

And hence we may infer the falſeneſs of that Poſition [b], which aſſerts, that a Mother who kills her Child to avoid publick Infamy, and ſo ſtifles her Inſtinct of Natural Affection, by another Inſtinct of Averſion to Shame, is not guilty of a Sin againſt the Law of Nature. For the Infant's Life was guarded by that Law, as well as by the Inſtinct of the Mother; and it was her Duty to have known, that her Diſgrace was an Evil which ought not to have been weigh'd againſt the Death of an Innocent, brought into the World by her free Conſent. If the Care of her Reputation was dearer to her than the Pleaſure of being a Mother, ſhe ought to have conſider'd this before ſhe chang'd her pure and ſpotleſs Condition. But afterwards, it would be barbarous Injuſtice to conceal the Sin of the Parent by ſacrificing the Child.

When Marriage is once contracted, in as much as the Gift of Fruitfulneſs is not conferr'd by human Power [c], a greater or a leſſer Number of Children equally anſwers the Obligation of *Nature*. Nor ſhould the Wife's Barrenneſs raiſe any Scruple in the Husband, as if he had been wanting in his Duty to the World [d].

IV. To carry on our Enquiries as clearly as may be, this in the firſt Place we take to be moſt evident, that all thoſe impure Pleaſures are repugnant to the Law of Nature, which aim at no other End than the Satisfaction of Brutal Luſt. For the more warmly the Appetite of Love ſtirs in human Breaſts, the more is Nature and Reaſon concern'd to provide, that the Irregularities of its Motions do not prejudice that *comely Order*, which is the very Life of Society; and that it be rather made to contribute to the Maintenance of Decency and Peace. Whence appears the moſt deteſtable Sinfulneſs of thoſe Pollutions which we ſo juſtly call *Unnatural* [1].

But the Sin of Uncleanneſs is not confin'd to thoſe groſs Degrees; many grievous Violations of *Chaſtity* there may be in what we are wont to term the ordinary way of Nature; and theſe happen as often as we purſue our Pleaſure, without regarding the only juſt End of it, the due Conſervation of our Race. It hath indeed been aſſerted, that many Nations of old thought it a part of natural Liberty to proſecute an amorous Entertainment, without being [e] tied by the Rules of Matrimonial Strictneſs. But 'tis ſufficiently manifeſt, that if all Men ſhould make a conſtant uſe of this irregular Freedom; human Society could not long ſubſiſt, either in a graceful, or in a quiet Condition [3]. And therefore, according to Biſhop *Cumberland*'s moſt true Rule

Mr. BARB. *NOTES on* § IV.

[1] PLINY ſpeaks of the two ſorts of infamous Copulations, as well as of the Abortions which Women cauſe by Medicines, to hide their unchaſt Lives, as Crimes unnatural, and more than beaſtly. *In hominum genere maribus diverticula veneris excogitata, omnia ſcelere naturæ; fœminis vero abortus. Quantum in hâc parte multò nocentiores, quam feræ ſumus!* Nat. Hiſt. Lib. 10. Chap. 63. ſee *Phocylides*, *Æſchines's Orat. in Timarch. Dio Chryſoſtom. Orat. de Pulchritud. Sadder*, *Port.* 9. *apud* Tho. Hyde, Martial Lib. 1. Epig. xci. In *Peru* (as *Garcilaſſo de la Vega* reports in his Hiſtory of the *Yncas*, Lib. 3. Chap. 13.) the Name of Sodomy was ſo abominable, that if any one in the heat of a Quarrel reproached another with that Vice, he liv'd in diſgrace all his Days: Yet it was ſo common among the *Greeks*, that *Plato (de Legibus*, Lib. 7.) found it very hard to baniſh it out of his Commonwealth. The *Turks* alſo, who otherwiſe deteſt it, allow it with ſuch fair Boys as they have made their Priſoners, as if War licenſed them to do what they liſt with them. *Scipio Ammirat. Diſc.* Lib. 5. Chap. 5.

[2] Mr. BARBEYRAC's Second Note upon this Section is chiefly contained in the Letters [d] and [e] following.

[3] The matter is clear in it ſelf, and will not bear Enlargement. Mr. THOMASIUS in his *Juriſpr. Divin.* Lib. 3. Cap. 2. had granted, that by the Law of Nature only it could not be prov'd that Beſtiality, Sodomy, wandring Luſts, *&c.* in a word, all Uſe of the natural Parts only for Pleaſure, is unlawful abſolutely; and that to prove it a Crime, recourſe muſt be had to the Laws of God which are purely poſitive and general: but that able Lawyer afterwards rectify'd his Opinion by diſtinguiſhing what's juſt from what's honeſt, and ſo in the main agreed with our Author. See his *Fundamenta Jur. Nat. & Gent.* Lib. 3. Chap. 2. § 6, 7, 21, *&c.*

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[a] *Add.* Val. Max. *l.* 7. *c.* 2. *ſ.* 1. *Extern.* Montaigne *Eſſays*, l. 3. c. 5. p. m. 137. Cartes *de Paſſion. Art.* XC.

[b] *Vid.* Graſwinkel *ad* Grot. *l.* 1. *c.* 1. *ſ.* 11.

[c] *Geneſ.* xxx. 1, 2.

[d] *Senec.* l. 2. Cont.. 13. *Fruitfulneſs doth not come at our Pleaſure, nor at the time fix'd for it in our Account; Nature is abſolutely at her own Diſpoſal; and not tied up by human Laws: Sometimes ſhe haſtens and outruns our Wiſhes; ſometimes ſhe proceeds ſlowly, and diſappoints them with her Delay. Nature doth not work by Form, nor is Chance confin'd to Rules and Preſcriptions. The Law may appoint a ſet Day, but Nature takes no notice of the Limitation.*

[e] Thus Mr. *Selden*, *De J. N. & G. ſec. Heb.* L. 5. c. 4. ſhews from the *Jewiſh Rabbies*, that before the *Moſaical* Law it was allowable for a Woman, not yet married nor betroth'd, to beſtow herſelf, either *gratis*, or upon Conſideration of a Reward, without the Confinement of Cohabitation. Whereas the ſucceeding Inſtitution abſolutely forbid circumciſed Perſons to uſe any Community of Bed, without entring on a married State: though if this were practis'd between a circumciſed Perſon and a Heathen, it was, in ſome Caſes, adjudg'd lawful. To which purpoſe they cite, *Deut.* xxiii. 18. *Levit.* xix. 29. *Geneſ.* xxxviii. 14, *&c. Add.* Grot. *ad* Geneſ. xx. 9. The Reaſon given by *Maimonides* for this Prohibition is, that the Contentions and other Evils, uſually occaſion'd by theſe irregular Liberties, might be avoided, and that Good of certain Notes and Diſtinctions of Families procur'd. 'Tis not neceſſary to appeal to the Teſtimony of Heathen Writers, yet ſee *Epict.* Enchir. *c.* 47. Plaut. Curcul. *Act.* 1. *Sc.* 1. *v.* 33, &c.

PH. *Quin leno hic habitat.* PAL. *Nemo hic probibet nec vetat,*
Quin quod palam eſt venale, ſi argentum eſt, emas.
Nemo ire qucnquam publica prohibet via,
Dum ne per fundum ſeptum facias ſemitam.
Dum tete abſtineas nupta, vidua, virgine,
Juventute, & pueris liberis; ama quod lubet.

PH. "As I take it, here lives my worthy Procuror. *PAL.* "We have a fair Market; if you bring Money in your "Pocket, you are free to buy any thing but prohibited "Goods. No Body hinders you from travelling in the "High-way, ſo long as you don't break Hedges and In"cloſures: and in the ſame manner ſo long as you re"frain from Wives, Widows, Virgins, Youth, and Free"men's Son's, you may e'en love as you liſt.

“ *That in which it is impoſſible for all Men to agree cannot be according to right Reaſon.*

Nor was the Command of Natural Law, as to this Point, ſo quite worn out amongſt thoſe very Nations, which allow'd a publick Security to ſuch Practices, as that they really approv'd of what they permitted, or abſolv'd the Actors from all Marks of Diſgrace. 'Tis a famous Aphoriſm of *Ulpian*, that a *Whore is Vile*, or Wicked, *by her Profeſſion*; and the *Romans* thought it a ſufficient Puniſhment to theſe looſe Ladies, to make them ſhew their Licenſe in Publick before the Magiſtrates, and thus to ſtand infamous on Record [b]. The Principle then, on which thoſe States and People proceeded, who conniv'd at ſuch youthful Diſorders, was, by the means of theſe publick Traders in Lewdneſs, to preſerve and guard the private Chaſtity of Virgins and of honeſt Matrons. In warmer Climates, the Extravagance of wild Gallants [c] might have injur'd the moſt ſacred Modeſty, had it not been diverted by a Tribe of forward Nymphs, who were proud of their Addreſſes, and met them in their irregular Deſigns. This, however, is manifeſt, that the ſame Nations which extenuated rather than defended theſe Immoralities, as no more than harmleſs Failings, and pardonable Slips of Youth, did yet, at the ſame time, aſſert in the higheſt Degree the juſt Honour of the Marriage-Bed, and eſteem'd Faithfulneſs to it, as a Mark of ſingular Sanctity and Goodneſs.

V. A diligent Obſerver of human Nature will eaſily diſcover how extravagantly Unreaſonable it is, that Mankind ſhould be propagated by Chance-Beds, without Confinement, and Rule [1]. Such a Life, they tell us, the People of *Attica* led before the time of *Cecrops*, cohabiting like a Herd of Beaſts, under no regard to Decency or Diſtinction. Whoever was made a Mother by ſo wide a Proviſion, preſented her Medly Off-ſpring to any one of the many Fathers who would be pleas'd to own and to accept it. When *Cecrops*, by the inſtitution of Matrimonial Laws, had baniſh'd this barbarous Cuſtom, he paſs'd, in Fables with the common People, for a kind of an *Hermaphrodite*; either becauſe he taught them to know their Fathers, as well as their Mothers; or becauſe, by the conjugal Tie, he incorporated as it were two in one [d]. Who is there that can pretend to be inſenſible how little Difference would be left between Beaſts and Men, ſhould the Ordinances of Marriage be univerſally cancell'd and repeal'd? Indeed the Beaſts would then have the Advantage of the Compariſon [e]. They are frequently obſerv'd to uſe ſome ſort of *Conſtancy* in their way of Love, and ſome Semblance of Conjugal Fidelity. And if the fair Miſtreſs raiſe a Quarrel in the Herd, 'tis only at certain Seaſons of the Year, when they feel a Warmth beyond their ordinary Temper. But Men would be perpetual Rivals; and human Race would be confounded and deſtroy'd by ſo wild a Method of its Preſervation. Again, How miſerably weak and helpleſs would be the Condition of the breeding Mothers? Or, if they weather'd out that Danger, how great would be the Trouble, how high the Charges of Education, above their ſingle Strength, or ſingle Fortune? It is plain, the Men would not be over-forward to aſſiſt them under either of theſe Burthens; not in the Firſt, unleſs they knew themſelves to have been the Cauſe of their Pain; not in the Second, unleſs they could be aſſur'd, that the Child to be provided for was their own. And 'tis not likely, that they ſhould be able to obtain any Certainty in theſe Points, without the regular Reſtraints of Marriage. For what *Ariſtotle* [f] reports of a Nation in *Africa* [g], where the Wives are held in common, but the Children diſtinguiſh'd and appropriated, by the Likeneſs of Features, is at beſt a very deceitful Method. Tho' indeed *Theocritus* [h] makes the Tokens of an Adultreſs τέκνα οὔποτ᾽ ἐοικότα πατρὶ, *Children unlike the Husband*; and *Horace*'s Wiſh for the *Roman* Chaſtity is, *Laudentur ſimili prole puerperæ*, “ Let the Women deſerve Commendation, for “ picturing the legal Father in the Child.

Laſtly, Since without Matrimonial Preſcriptions we cannot well ſuppoſe any ſuch thing as Families, nor without Families any publick States; and ſince therefore the whole Order and Harmony of civil Life is founded on theſe Regulations, it is moſt clear that were Men entirely releas'd from ſuch Bonds, they muſt live in an unſociable, ſeparate Condition, little better than Brutal. And therefore *Horace* ſhew'd his true Judgment in deriving the Calamities of his Country:

Mr. Barb. *NOTES on* § V.

[1] *Dionyſ.* Lib. 41. verſ. 382.

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[a] Of the Law of Nature, *c.* 5. *ſ.* 46. [b] Tacitus *of* Viſtilia, *Ann. L.* 2. *c.* 85. That Youth in *Quintilian* (Decl. 14.) was arriv'd at the higheſt Pitch of Impudence, who forms a publick Accuſation againſt his Miſs, for giving him a *Potion* that ſuppreſs'd his Love. Amongſt other of his Rants, this is one, *I had juſt enough to furniſh my ſelf with a moderate and ſparing Meaſure of unforbidden Joys, ſufficient for the Neceſſities of Life. Therefore inſtead of a Wife, I was content with a Miſtreſs, and with a ſingle Miſtreſs, which is a moſt certain Sign of Frugality and good Management in Pleaſure.* [c] *V.* Cicer. *pro* Cælio. *c.* 17, *&c.* *Epict.* Enchir. *c.* 47. *Add* Maſon. *in* Stobæus, *Serm.* VI. Grot. *in Math.* v. 27. The *Mahometans* allow Fornication with their Maids; which the more virtuous *Indians* do, in all Shapes, and on all Accounts, deteſt. *Plutarch (de Virtut. Mulier.)* reports, that among the People of *Chios*, for the ſpace of ſeven hundred Years together, there was no mention made of Adultery, or any other unchaſt Practice; though the Iſland was famous for Beauties. [d] Athenæus, *l.* 13. *c.* 1. [e] Quintil. *Inſtit. Orat.* l. 9. c. 2. “ Tho' *Dido* in *Virgil* complains of her late unhappy Match, “ yet her real Thoughts could not but break out, and ſhe declares in the midſt of the Lamentation, that a Life abſolutely with-“ out Marriage was the proper Condition of Beaſts, not of Men.

Non licuit thalami expertem ſine crimine vitam.
Degere more feræ? Æneid. 4. 550.

[f] *Pol.* B. 2. c. 2. [g] Who perhaps are the ſame that *Nicol. Damaſcen. (de Mor.* Gent.*)* calls *Limyrnii.* [h] *Idyl.* 17.

Fœcunda culpæ ſecula nuptias
Primum inquinavere, & genus, & domos:
Hoc fonte derivata clades
In patriam populumque fluxit. L. 3. Od. 6. V. [17, &c.

Firſt thoſe Flagitious Times
(Pregnant with unknown Crimes)
Conſpired to violate the Nuptial Bed;
From which polluted Head
Infectious Streams of crowding Sins began,
And thro' the ſpurious Breed and guilty Nation ran.

My Ld *Roſcommon.*

To all which Conſiderations we may add, that without a Succeſſor, in way of Marriage, no Man could be born to an Eſtate or Inheritance; and ſhould we take away theſe Advantages, human Life would be depriv'd of its chief Ornaments, if not of its neceſſary Supports. 'Tis remarkable what *Juſtin* [a] relates of the *Partheniæ* amongſt the *Spartans;* they were born, as the Irony of their Name imports, from promiſcuous and irregular Embraces, and being grown up to a Senſe of their Shame and of their Poverty, fearing to ſtarve at home thro' Defect of Paternal Fortunes, they were neceſſitated to leave their Country, and ramble abroad in a Body, to force a Maintenance and a Seat [3].

VI. In as much then as it appears evident, beyond Diſpute, that in order to the keeping up a comely and a regular Society amongſt Men, it is neceſſary, that the Propagation of human Kind ſhould be ſettled and limited by Matrimonial Conſtitutions; we are in the next place to enquire what Obligation particular Perſons, of proper Years and Abilities, have, to engage in a married State. And here we may firſt take a View how the Matter before us hath been order'd by the Laws of People and Governments, and then how far it ſeems to be determin'd by the bare Law of Nature. It was the Doctrine of the antient *Jews*, as Mr. *Selden* [b] informs us, that by the Divine Precept of *Increaſe and Multiply*, all their Males were bound to Marry before they had compleated twenty Years; unleſs upon account of ſome natural Defect, or becauſe they had devoted themſelves to a Life of Chaſtity, and conſtant Study of the Law. And this Command they ſaid extended to all the Poſterity of *Noah*. They added, that he who buried his Wife, without ſeeing a Son and a Daughter (and thoſe as *Perfect by Nature* as their Parents) had not yet fulfill'd the Precept. But that in caſe a Man's Son and Daughter were dead, and had left Children of both Sexes, the Grandfather was then free. That otherwiſe, upon Defect of Iſſue of either Sex, Men were oblig'd to contract new Marriages, ſo long as their Age would give them leave. And therefore, that if a Man had either taken a barren Wife, or one that was not yet old enough to be a Mother, he did not anſwer the Law, unleſs he took another immediately capable of *Bearing*. *Leo Mutinenſis* [c] obſerves farther, that altho' the bringing of a Son and Daughter into the World, ſeem'd to be ſufficient for the full Obſervance of that Divine Command, yet a Man of convenient Age and Strength was ſtill bound to ſeek a married Life, for the avoiding Fornication [d]. But whether this Injunction extended to Women, as well as to the Men, was a Point not very well ſettled and agreed amongſt them. It is moſt probable, that their Judgment was to this purpoſe, that the Women were not indeed oblig'd to any determinate Time, becauſe it is not in their Power to marry when they will; but that upon the firſt fair Offer made them, they ſtood engag'd to contribute their Aſſiſtance to the World. 'Tis a Saying amongſt the ſame Doctors, that *He who neglects the Precept about the Multiplication of Mankind, ought to be looked upon as a Murtherer* [e].

Many other Nations have, in their publick Inſtitutions, declar'd themſelves to the ſame Purpoſe [f]. *Plutarch* recites a Law of *Lycurgus*, by which it was Enacted, that old Batchelors ſhould be excluded from the ſolemn Sports and Dances of the Women; and that in the Winter Seaſon they ſhould go naked up and down the *Forum*, ſinging a Song in Diſhonour of themſelves, the Burthen of which was, that *They owned themſelves to be thus juſtly puniſh'd, for diſobeying the Ordinances of their Country.* And that, beſides all this, they ſhould have none of thoſe honourable Marks of Reſpect and Duty paid them, which the younger *Spartans* were otherwiſe oblig'd to pay to the elder. Upon this laſt account *Dercyllidas*, a Famous, but unmarried General, deſiring a younger Perſon, according to Cuſtom, to reſign his Seat to him at a publick Solemnity, the Youth refus'd, with this ſmart Reaſon, *Becauſe*, ſays he, *you have brought no Son into the World, who might hereafter give place to me* [a] At *Rome* the *Cenſors* ſomtimes impos'd a Mulct (for that Reaſon call'd *Uxorium*) upon ſuch Men as had grown old in a ſingle Life [b]. And good *Metellus* ſpeaks home to the Buſineſs, in *Gellius*, *Could we, my Country-men*, ſays he, *do altogether without Wives, we need not give our ſelves theſe unneceſſary Troubles. But ſince Nature hath ſo order'd Matters, that human Life can neither be very free and eaſy with them, nor poſſibly ſubſiſt without them, we ought rather to conſult our perpetual Safety, than our preſent Conveniency* [c].

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[3] Servius (*ad* 3. *Æn. v.* 551.) & Lactantius (*de falſ. relig. c.* 20.) vary ſomewhat in the Relation of this Story. Hither may be referr'd moſt of the common Arguments urged againſt PLATO's Community of Wives. *Add.* Stob. *Serm.* LXV. " *Cabas*, King of *Perſia*, having by a Publick Ordinance commanded the promiſcuous Uſe of Wives and Women, his Subjects " roſe in Rebellion and expell'd him the Kingdom. *Procop.* Hiſt. *Perſ.* l. 1. c. 5. *Agath.* l. 4. Plato *de LL. l.* 4. *p.* 835. *Every Man, who arrives at the Age of thirty Years, ought to chooſe him out a Wife; conſidering with himſelf, that Mankind is by a kind of natural Deſire prompted to a Purſuit of Immortality; there being no Perſon who is not Ambitious of keeping a perpetual Name and Memory with ſucceeding Ages. Now the Way by which human Race obtains an endleſs Duration, is by leaving an uninterrupted Courſe and Series of Poſterity. It cannot but be highly criminal, for a Man to rob himſelf of Immortality through his own Default; yet whoever neglects the Affairs of Marriage and Iſſue, voluntarily throws away his Title to this unvaluable Benefit.* CICERO (*de Finib.* &c. *l.* 3. *c.* 20.) obſerves, that in order to a Man's living as his Nature directs and enjoins, it is convenient, that he apply his Mind to the Choice of a Partner, and the Deſire of Poſterity. PHILIP BALDEUS (*de Idolat.* Ind. Gent. *p.* 2. *c.* 3.) reports of the People of *Benjin*, " that they look on it as the baſeſt Reproach to want Children: *Such a Per-* " *ſon* (they ſay) *is not worthy to ſee a Man firſt in a Morning.*

[a] L. 3. c. 4. [b] *De* J. N. & G. *lib.* 5. *c.* 3. [c] *De rit.* Hebr. *p.* 4. *c.* 2. [d] Plato (*de LL. l.* 11.) delivers the like Opinion, and adds, *One of each Sex is the leaſt Number of Children that ought to paſs for ſufficient.* [e] Yet the Sect of the *Eſſenes* amongſt them utterly forſwore the uſe of Women. *Vid.* Plin. *N. H. l.* 5. c. 17. Solin. c. 38. [f] Varro, *in Leg.* Mænia *apud* Nonium *in* Eunuchare. *He that deſtroys his Country, his greater Parent, is moſt inexcuſably guilty: And this every one does does ſo far as in him lies, who either diſables himſelf from being a Father, or defers to act as ſuch.* See the Sayings of *Muſonius*, *Hierocles* and *Antipater* in *Stob.* Serm. LXV. *Add.* Arrian *in* Epictet. *l.* 3. *c.* 7. *J.* Pollux *l.* 3. *cap.* περὶ ἀγάμων, mentions Suits at Law carried on at *Athens* and *Lacedemon*, againſt *Celibacy* and late *Marriage.*

It follows from the ſame Principles [2], that it is ſinful and unjuſt to emaſculate Perſons; at leaſt, without their Conſent. *Domitian* forbad the Performance of this Operation by an expreſs Law [d]. After which, thoſe who had ſo ridiculous a Deſign on themſelves, or on others, were oblig'd to aſk leave of the Emperor, or the Preſident of the Province [3]. Upon what account the Eaſtern Monarchs were ſo fond of employing Eunuchs in their neareſt Offices, may be ſeen in *Xenophon* [e]. To whoſe Reaſons, we may add this one farther, that the Prince could, without Envy or Offence, make himſelf Heir to theſe Childleſs Favourites, and ſo ingroſs all they had got in his Service [f]. Amongſt the *Jews*, an *Eunuch* was not permitted to be a Judge in any Caſe; upon the Opinion of their exceſſive Spitefulneſs and Cruelty. And, in the *Indies*, 'tis a common Saying, that *To caſtrate Beaſts makes them more tame and humble; but the ſame Experiment tried on Men makes them more Inſolent and Intolerable* [g] [h].

Some obſerve that *Eunuchs* were firſt made in thoſe Countries, where Polygamy was permitted; the Number of Men being ſuperior, or at leaſt equal, to the Number of Women. Others maintain that they owe their Original to the Right of War; when a Conqueror ſparing the Lives of thoſe he overcame, thought fit to put them into this unmanly Condition, that having loſt the Springs of private Intereſts and Affections, they might, with the more Security be truſted in his Service [4].

VII. If we conſider barely the force of *natural Law*, we ſhall conclude, that in as much as *Matrimony* is the great Source [1], and the main Foundation of a *Social Life* [i], Men are ſo far

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Mr. Barb. *NOTES on* § VI.

[2] See *Cod.* Lib. 8. tit. 58. *De infirmandis pœnis cœlibatus*, &c. & *Sozomen. Hiſt. Eccleſ.* Lib. 1. Chap. 9.

[3] *Vid.* Caſaubon. *ad* Sueton. *Domit. cap.* 7. & Juſtin. Mart. *Apol.* 2. *Add* Deuteron. xxiii. 1. Joſeph. *Antiq.* Jud. *Lib.* 4. *c.* 8. *Lib.* 27. *ſ.* 28. *D. ad* L. Aquil. *Novell.* 142. & *ib.* Dion. Godofred. *l.* 4. *ſ.* 2. *l.* 5. *D. ad* Cornel. *de Sicariis.* Euſeb. *Evangel. Præp. l.* 6. *c.* 8. *In* Syria *and* Oſroene *many caſtrate themſelves like the Prieſts of* Cybele. *But King* Abgarus *commanded the Hands of all thoſe, who had abuſed themſelves in this manner, to be cut off: after which Order, the Infamous Practice ceaſed in that Country.* Quintil. *Inſtit. Orat. l.* 5. *c.* 12. *For my own part, when I contemplate Nature, there is no Man who ſeems not more fair and comely to me than our Eunuchs*; who are thus abuſed, purely to render them more beautiful. *Providence can never be ſo negligent of its Work, as to let Infirmity paſs for Excellency: nor can that which would be Monſtrous, if produced by Nature, be Handſome if produced by Art. Let this Cheat, this feigned Alteration of Sex, delight the Votaries of Luſt; yet Vice and Immorality will never be able to gain ſuch an Empire, as to make that Good, which they make Coſtly and in Requeſt.* How *Hermotius* revenged himſelf on *Panionius*, who had thus diſmembred him. See HERODOT. URAN.

[4] See BRISSON. *Select. Antiq. Jur. Civil.* Lib. 2. Chap. 21. and Mr. BYNKERSHOEK's *Obſervat. Jur. Rom.* Lib. 4. Chap. 5. p. 355.

Mr. Barb. *NOTES on* § VII.

[1] CICERO fully owns it, and would have every wiſe Man to marry and have Children, as well as concern himſelf with the Government of the State. *Cum autem ad tuendas, conſervandoſque homines, hominem natum eſſe videamus, conſentaneum eſt huic naturæ, ut ſapiens velit gerere, & adminiſtrare Rempublicam, atque ut è naturâ vivat, uxorem adjungere, & velle ex eâ Liberos. De fin. bon. & mal.* Lib. 3. Chap. 20. See alſo PLATO DE LEGIBUS, Lib. 4. *p.* 825. PYTHAGORAS ſays, that we ought to bring Children into the World, that we may leave after us new Adorers of God. Ὅτι δεῖ τεκνοποιεῖσθαι, δεῖ γὰρ ἀντικαταλιπεῖν τοὺς θεραπεύοντας τὸν Θεόν, Jambl. de Vit. *Pythag.* Chap. 18. Num. 83. ſee alſo PLATO, ibid. Lib. 6. p. 773. as alſo HIEROCLES in *Stobæus. Serm.* 65. & 73. to engage Men to marry; and GATAKER on *Marcus Antoninus*, Lib. 8. § 31.

[a] Μὴ μείνῃς ἄγαμος, &c. Phocylides.

To live unmarried is to die unmourn'd:
Add to your Race; ſee Nature's Gift return'd.

[b] Valer. Max. *l.* 2. *c.* 9. Feſtus *in* Uxorium, & *ibid.* Joſ. Scal. *Plutarch* reports the ſame in his Life of *Camillus*. [c] *Poſidonius* called the *Myſians*, who admitted no Women amongſt them, ἀβίους, *Men without Life*, Strabo, *l.* 7. *p.* 205. Of the *Lex Papia Poppeæ*, ſee *Lipſ.* ad *Tacit.* l. 3. Ann. c. 25. & *Jacob. Godofred.* Which Law the *Chriſtian* Emperors repealed probably by Advice of the Church-men. *Vid.* L. 8. t. 58. C. *De infirmand. pœn. cœlibat*, & Sozomen. *l.* 1. *c.* 9. The Speech of *Auguſtus* in *Dion. Caſſius*, l. 56. is remarkable on this Subject. *Ælian. (V. H. l.* 6. *c.* 6.*)* recites a Law of the *Spartans*, enacting, that "If a Man had increas'd the Commonwealth with three Children, he ſhould be releas'd from keeping Watch; "with five, from all publick Duties and Charges." See likewiſe a long Paſſage of *Hierocles* in *Stobæus*, in Serm, 73.
[d] *Vid.* Sueton. Domit. *c.* 7. Statius, IV. *Sylv. ver.* 187, 188.

Qui fortem vetat interire Sexum.

Forbids the nobler Sex to feel Decay.

Add. Martial. *l.* 6. *Ep.* 2. [e] Cyropæd. *l.* 7. *p.* 116 Ed. *H. Steph.* [f] Heliodor. Æthiop. *l.* 8. *in fin. The Eunuchs are the Ears and Eyes of the* Perſian *Courts; who having neither Children nor Kinſmen to engage their Minds, depend entirety on him that employs them.* Claudian. *in* Eutrop. *l.* 1.

------- *Eunuchus nulla pietate movetur,*
Nec generi natiſve cavet.

-------- An Eunuch feels no Tie
Of Duty, Nature, or of Progeny.

[g] Heliodor. *l.* 9. *Eunuchs have ever a great deal of Jealouſy in their Temper; and therefore they make the better Keepers of Women; being then employed to hinder others from Pleaſures, which they are themſelves incapable of enjoying.* [h] *See* Grotius *upon* Deuteron. xvi. 18. [i] Plat. *de Leg.* Lib. 4. p. 835.

bound to enter upon it, as they ſtand engaged to all Duties neceſſary for the attaining of that End: yet Nature lays this Injunction on us in the manner of an Affirmative, Indefinite, Unlimited Command; ſo as not to oblige neceſſarily all Men, and at all times; but requiring due *Occaſion* before it exacts our Preformance. Now in fixing the *Occaſion* of Matrimony, we are not to reſt in the fitneſs of Age and of Ability, but are likewiſe to ſuppoſe that the *Match* offer'd us, is anſwerable to our Birth and Condition, and that we have both competent Wealth to maintain, and competent Prudence to govern a Family [a]. The Laws of the *Iſlanders* prohibit Marriage to Perſons of extreme Poverty [b]. Sometimes too it happens, that the Condition of the preſent Times, or the ſtrict Care of a Function incumbent on us, will not give us leave to think of changing our State of Life [c]. And therefore it is not only unneceſſary, but ſenſeleſs and ridiculous, that thoſe young Fools ſhould run a Marriage-hunting, who have neither Means nor Wit to keep a Family from ſtarving; and who, at the beſt, are only able to ſtock the Nation with a young Succeſſion of Beggars. Thoſe again deſerve not only Excuſe, but Commendation, who decline a married State, that they may with more Eaſe and Opportunity improve and cultivate their Minds, for the publick Service of the World. For ſince the two great Uſes of Matrimony are the Preſervation of Race, and the avoiding thoſe fouler Luſts which would ſtain and diſgrace human Society; ſo long as neither of theſe Ends is like to be prejudic'd, we ought not to blame a Reſolution of ſingle Life in ſuch Perſons as probably foreſee, that they ſhall be able thus to do more good to their Country, and to Mankind, than in another Condition. If therefore a brave and generous Soul ſhould either be inſenſible of the idle Stings of Love, or able eaſily to maſter and ſuppreſs them [d], and at the ſame time, capable of benefiting the World otherwiſe than by advancing its *Stock* and *Breed*; we cannot in reaſon imagine, that Nature lays any Obligation upon him to let the Charms of the fair Sex hinder or divert his worthy Deſigns [e]: Eſpecially ſince there are ſo very few, who can pretend to this Gift of Chaſtity; ſo that the World is in no Danger of coming to an untimely End by their Reſolution. Much leſs ought thoſe Perſons to fear Reproach and Cenſure, who having ſerv'd Mankind by a former Marriage, decline a ſecond Engagement for the ſake of their Children. Tho', on the other ſide [3], the Law of *Charondas*, in *Diodorus Siculus*, l. xii. c. xii. ſeems a little too hard, excluding all thoſe Men from the publick Councils of the State, who had brought a Mother-in-law into their Family. The Reaſon he gave for ſo ſevere a Decree was this, *He eſteem'd it impoſſible, that a Man ſhould be able to adviſe well for the Intereſt of his Country, who had been ſo far from conſulting the good of his own Children. If his firſt Marriage prov'd ſucceſsful, he ought to reſt ſatisfied with that Happineſs; if unfortunate, he could not be reckon'd in his Wits, for running on a ſecond Danger.* But indeed, a ſecond Marriage does not always prove injurious to the Children of a former Bed. And as to the other Part of the Objection, it may be eaſily retorted. We have ſomething like it in the old Greek Epigram,

Ἔιτις ἅπαξ γήμας, πάλι δεύτερα λέκτρα διώκει,
Ναυηγὸς πλώει δὶς βυθὸν ἀργαλέον.

He that eſcapes one Wife, and ventures on,
Courts a new Ship-wreck, when but half undone.

To which *Harry Stephens* has given this ingenious Anſwer,

Ὅστις ἅπαξ γήμας, πάλι δεύτερα λέκτρα διώκει,
Ὀυχ οὗτος μομφῆς ἄξιος οὐδεμιῆς.
Ἐι κακὴ ἡ πρώτη, τάχα δευτέρη οὐ κακὴ ἔσται,
Ἐι δ' ἀγαθὴ, ἀγαθὴν ἐλπίδα καὶ τότ' ἔχοι [f].

When a ſtout Widower tries the ſecond Hit,
'Tis hard to blame his Memory or Wit.
This may be Good, if one was bad before;
If Good, kind Heav'n may have as good in ſtore.

On the other hand, it ſometimes falls out, that beſides the general Ordinance of Nature, a Man may be obliged by a particular Reaſon to enter on a married State. As for Inſtance, ſuppoſe a Royal Family ſhould be reduc'd to one only Perſon, that Perſon is highly and peculiarly bound to ſeek an honeſt and lawful way of increaſing his Race, to hinder the Confuſion which muſt follow in the State, upon Default of Succeſſion; and becauſe, as *Euripides* [g] ſays, *Male Children are the Pillars of great Families.* And what we have thus ſettled, in regard to the Obligation of *Matrimony*, ſeems more agreeable to the Nature and Condition of Men, than the Rule which Biſhop *Cumberland* [h] lays down, and ſo largely inſiſts on, that *Since the Earth is now well ſtock'd, Men are left at their Liberty, to chooſe either a married, or a ſingle Life.*

VIII. From theſe Conſiderations Judgment may be made, how far the Laws of particular States have Power to ſtreighten, or to looſe, the natural Neceſſity of Marriage. And this in the firſt Place, is evident beyond Diſpute, that a civil Legiſlator may, by Virtue of his Sovereign Authority, conſtrain all his Subjects, who are capable by Nature, and have means of procuring a ſufficient Maintenance, to engage in Matrimony by ſuch a time. But to compel a Man to marry for the Propagation of a Race of Beggars, is equally Impolitick and Inhuman. Yet it looks more mild, in this Caſe, to enforce an Ordinance rather by Rewards to the Compliers, and Subſtraction of Benefits from the Recuſants, than by direct and poſitive Puniſhment. Of this ſort was the famous *Jus trium liberorum* [a] amongſt the *Romans*; and that *Spartan* Law mentioned by *Ariſtotle* [b] enacting, that *He who had increas'd the State with three Children, ſhould be free from the Trouble of keeping Watch; and he that had one above that Number ſhould ſtand farther exempted from all kinds of Burthens.* After the ſame manner *Strabo* [c] informs us, that the *Perſian* Kings propos'd a yearly Prize to thoſe who had been Fathers of moſt Children.

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[3] We know that moſt of the Fathers of the Church have much out-run themſelves on the Subject of ſecond Marriages, of which I have given ſeveral Examples in my Preface. We may alſo conſult Mr. HERTIUS.

[a] Plin. *l.* 1. *ep.* 14. *When I reflect on the common Cuſtom of the World, and the Laws of our State, which command us, in Marriage, to have a conſiderable regard to Wealth and Fortune, I think it is very proper to mention, that the young Lady's Father is Maſter of a very fair Poſſeſſion. And beſides this, the Hopes of a very fruitful Bed ought, in my judgment, to go a great way in determining our Choice, and to be reckoned amongſt the chief Conditions of a Bride.* Add. *Orat. M. Hortali. Tacit. An.* l. 2. c. 37.

[b] Arngrim. Jon. *Deſcrip. Iſland.* c. 8.

[c] *See* 1 Corinth. vii. 26.

[d] Ἐραστὴς τοῦ μὴ ἐρᾷν, as *Philoſtratus* ſpeaks, Apoll. *T. l.* 8. *c.* 3. *A lover of Abſtinence from Love.*

[e] *Add.* Arrian *in* Epictet. *l.* 3. *c.* 22. *p.* 311, 312. Ed. *Wolfii.* Corn. Nep. Epamin. *c.* 10.

[f] *Add.* Charron de la Sageſſe, *l.* 1. *c.* 42, & 46. *ſ.* 2, 3. Bacon's *Eſſay* 8.

[g] Iphigen. *in* Taur. *v.* 57.

[h] *De Leg. Nat.* c. 6. ſ. 9.

It is no leſs evident, that a Prince or State would act moſt ridiculouſly, as well as moſt unjuſtly, ſhould they in general forbid *Matrimony* to all their Subjects: Or ſhould they allow this Privilege to the Firſt-born only of every Family, and enjoin ſtrict Celibacy to all the reſt [d]. For it is impoſſible, that in ſo great a number, all ſhould be able to lead a Life of Severity and Continence. Nor would theſe Conſtitutions be a more merciful way of retrenching the exuberant Flood of Subjects, than the cruel practice of *expoſing Infants* ſo common in antient *Greece*, or the other of *procuring Abortion*, which *Ariſtotle* [e] himſelf adviſeth.

But if it appear upon common Reaſon or Experience, that any particular Office in a *State* can be more conveniently diſcharg'd by an Unmarried, than a married Perſon, the civil Laws may fairly reſtrain ſuch an Employment to Men that are content to live ſingly [1], and may oblige them to quit the Honour, when they change their Condition. Provided ſtill, that the Number of Men, privileg'd to forbear Matrimony by the Gift of Continence, be ſufficient to fill theſe Offices with a conſtant Supply. For it muſt not be ſuppos'd that the deſign of ſuch an Ordinance is either to licence irregular Luſts, or to do Violence to any Man's natural Temper; in as much as no Man is compell'd to act in this Capacity, who judgeth himſelf unfit for the Service. And it muſt be a farther Proviſo, that as to the great Buſineſs of Poſterity, due Care hath been taken of it another way, ſo that it may not ſuffer by theſe Reſtraints.

In the ſame manner, it is lawful to forbid an Ambaſſador, a General, or a Soldier, when ſent on a Long or Dangerous Adventure, to carry his Wife with him, in the Expedition [f].

Farther, ſince the natural Obligation to *Matrimony* is undeterminate, and admits of ſome Latitude, the civil Legiſlator may fairly fix the Age of the Perſons who ſhall be thus join'd together; or aſſign a Period taken from ſome other Conſideration. Thus in the *Lex Papia Poppæa* amongſt the *Romans* it was order'd, [2] that *no Woman under Fifty, ſhould marry a Man of Sixty; and no Man under Sixty, a Woman of Fifty.* Which we find afterwards repealed by *Juſtinian* [g]. So *Plato* [h] limits the time of a Man's being a Father, from Thirty to Fifty-five Years of Age, and of a Woman's being a Mother, from Twenty to Forty [i]. Amongſt ſome People, it was unlawful for a Man to Marry, before he had given ſome ſignal Proof of his Valour upon the Enemy. As *Strabo* tells us of the *Carmanians*, no one of whom was permitted to have a Wife, till he had taken off the Head of an Enemy, and preſented it to his Prince [k].

And, what is more, though Perſons are naturally free to marry whom they pleaſe, yet a Government, if it ſeem for the Intereſt of the State, may in ſome Caſes reſtrain and limit this Privilege; for inſtance, it may be order'd, that no Subject ſhall marry a Foreigner, none of the Nobility a Plebeian. *Arrian* in his Hiſtory of the *Indians* reports, that the ſeveral Orders of the People were forbid Marrying one into the other. A Huſbandman could not give his Daughter to an Artificer, nor an Artificer return the Compliment in the ſame manner [l].

Laſtly, it may be enacted by civil Powers, that Marriages ſhall not be contracted but with the intervening Conſent of publick Authority; eſpecially between Perſons of conſiderable Figure and Importance in the State. The force of which, and of the like Laws may amount to this Effect, that all Matches contrary to ſuch Injunctions ſhall either be declar'd Void, or ſhall be diveſted of certain Privileges, with which they would be otherwiſe attended. Thus, in *Livy* [m] we find the *Campanians* petitioning, “That “they might have the Liberty of marrying *Roman* Dames, and that, if they had formerly “been ſo happy, they might ſtill keep them unmoleſted; and that the Children, already born

Mr. Barb. *NOTES on* § VIII.

[1] See what Mr Bayle ſays in his Anſwer to the Queſtions of a Provincial, Tom. 1. p. 542, *&c.* about *Gebardh Truchſes*, Archbiſhop of *Cologne*; who, having married *Agnes de Mansfeld*, and embraced the *Lutheran* Doctrine; would have kept his Electorate and Archbiſhoprick.

[2] The Author doth not recite this Law exactly.

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[a] *Vid.* J. Lipſ. *Excurſ. in* Tacit. *Ann.* III. 25.

[b] Polit. *l.* 2. *c.* 7. Ælian. *Var. Hiſt. Lib.* 6. c. 6.

[c] *L.* 15. *p.* 504. *Ed.* Caſ. Herodot. *L.* 1. *p.* 36. *Ed.* H. Steph.

[d] *Vid.* Dig. *Lib.* 23. *t.* 2. *De ritu nupt.* Leg. 19.

[e] Polit. 7. *c.* 16.

[f] *Vid.* l. 1. t. 16. *D. de Offic. Proconſ.* Tacit. *Ann.* 3. 33, 34. Pliny (*l.* 6. *c.* 22.) reports of the People of *Taprobane*, “That, in their Choice of a King, they do not only require, that the Perſon be Good and Merciful, “but likewiſe that he be advanced in Age, and without Children; and if after his Admiſſion, he happens to obtain Iſſue, “they depoſe him from the Government, leſt the Kingdom ſhould become Hereditary, Solin. *c.* 66.

[g] *Vid.* Sueton. *in* Claud. *c.* 23. & Cod. *Lib.* 5. *t.* 4. *De nuptiis*, Leg. 27.

[h] Plato *de Rep. Lib.* 5. *p.* 657. Ed. *Wech.*

[i] *Add.* Ariſtot. *Polit.* 7. *c.* 16. & Michael Piccart, *ibid.* Tacit. Germ. *c.* 20.

[k] Strab. *l.* 15. *p.* 500. *Add.* Abrah. Roger. *de* Bramin. *p.* 1. *c.* 11.

[l] We find the ſame account in *Hieron. Oſor.* de Reb. Geſt. *Emanuel.* l. 2. & Montagne, *L.* 3. *c.* 5. *p.* 630. Ed. *Pariſ.* 1657. Fol.

[m] L. 38. c. 36.

"to them, might be acknowledged ſo, their juſt and lawful Heirs. And, in *Dionyſius Halicarnaſſeus* [a] we meet with a Decree of the Senate, upon the Commencement of a War with the *Latines*, "Giving leave, on both ſides, to the *Latin* Women, that had married *Romans*, and to the *Roman* Women that had married *Latines*, either to tarry with their Husbands, if they thought fit; or elſe to return into their proper Country, leaving behind them their Male Iſſue, and carrying with them their unmarried Daughters. The Effect of which was, that almoſt all the *Roman* Dames quitted their Husbands, and return'd to the City: whereas all the other Women, two only excepted, prefer'd their *Roman* Husbands to their *Latin* Friends [b].

IX. We are, in the next Place, to enquire by what Heads of Conditions, with regard to the Law of Nature, the Matrimonial Covenant is compleated; and likewiſe what Right accrues to both the Perſons from ſuch an Union. And here we ſuppoſe before-hand, that all Human Perſons, whether of one Sex, or of the other, are naturally equal in Right: and that no one can claim the Sovereignty over another, unleſs it be obtain'd by the free Act of one of the Parties. For though, in Strength of Body and of Mind, we are allow'd to have the Advantage of the *Fair Train*; yet this Superiority is not of it ſelf ſufficient to juſtify us in ſetting up for their Maſters and Governors. Therefore whatever *Right* a Man holds over a Woman, in as much as ſhe is by Nature his *Equal*, he muſt acquire, either by her Conſent, or by the Sword, in a juſt War. Yet ſince it is moſt natural, that Marriages ſhould be founded on mutual Good-will, the former way ſeems more proper for the winning of Wives, the other for the procuring of Slaves. And therefore, in thoſe Countries where it is uſual to marry their fair Captives, the Men lay aſide the ſevere Authority of Maſters, for a more gentle and more agreeable Sway [c].

If then, we ſuppoſe all Mankind thus plac'd in a Condition of natural Equality and Liberty, it may happen that a Woman, as well as a Man, ſhall deſire Iſſue peculiarly for herſelf, over which ſhe may preſide and command. Now to accompliſh this End, it is neceſſary, that a Covenant paſs between a Man and a Woman, for their *mutual Aſſiſtance in ſerving Poſterity*. If this Covenant be *Simple*, not join'd with any Agreement about conſtant Cohabitation, but reſpecting barely the Procreation of Children, it confers on neither Party any Sovereignty or Right over the other, except they may challenge on either ſide, the *promiſed Aſſiſtance*, with regard to *Poſterity*. And, in this Caſe, if it was expreſly intimated in the Covenant, that the Woman deſir'd Iſſue properly for her ſelf and her own Management, the Children ſhall be under the Government of the Mother. Such a kind of ſimple and irregular Marriage we may call *Amazonian*, if any Credit is to be given to the Stories of thoſe warlike Dames [d]. In the ſame manner, when *Thaleſtris* courted *Alexander* the Great [e], and, as ſome tell us, the Queen of *Sheba* King *Solomon*, the Off-ſpring could not fairly be reckon'd ſpurious, but, in their way, honeſt and legitimate. So Travellers report of the Inhabitants of the Kingdom of *Congo*, that their main Strength conſiſts in Companies of Women, who live by themſelves in certain Territories aſſign'd them by the Prince; and at ſet times chooſe ſome that they like beſt among the Men, for the ſake of continuing their Breed: If the Child prove a Boy, they ſend him back to his proper Father, if a Girl, they keep her in their own Train, and educate her under the Severity of Martial Diſcipline [f].

Now though it muſt be confeſs'd, that this kind of Coupling is Barbarous at leaſt, if not Beaſtly; yet, amongſt the moſt civiliz'd Nations, there are often to be found Inſtances of Marriages, in which either both Parties are declar'd *Equal*, or elſe the Husband is oblig'd to ſubmit to the ſupreme civil Authority of the Wife. As when a Queen, who enjoys a Crown in her own Right, takes a Husband, and yet retains her Superiority in the Government [g].

X. But we may take our leave of theſe irregular Matches, and proceed to examine thoſe which appear more ſuitable to the Condition of human Nature [1]. This then we take for granted, that the matrimonial Covenant ought to begin at the Man, not at the Woman, that the Courtſhip ſhould be us'd not on her ſide, but on his; this Method agreeing beſt with the Genius

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Mr. BARB. *NOTES on* § X.

[1] The Notion which the Antient Lawyers had of Marriage, was taken partly from their Idea of Friendſhip, and partly from the Relation, which they had conceived to be between a Father and his Daughter. See Mr. NOODT's curious Chapter in his *Probab. Juris.* Lib. 2. Chap. IX.

[a] L. 6. *init.*

[b] Senec. *de Benef.* l. 4. c. 35. *I promiſed you my Daughter in Marriage, afterwards you appeared to be a Foreigner; under that Character I may not enter into ſuch a Relation with you: The ſame Law which lays this Prohibition on me, protects me from the Cenſure.*

[c] Add *Deuteron.* xxi. c. 10, *&c.*

[d] *Vid.* Arrian. *de expedit.* Alexand. *l.* 7. *c.* 13. Procop. *H. G.* l. 4. Palæphat. *de fab. narr.* l. 1. c. 33. Jornand. *de Reb.* Getic. *c.* 8. Steph. Cleric. *Quæſt. Acad.* 2. Juſtin, *l.* 2. *c.* 4. *Diodorus Siculus*, l. 2. c. 45. reports, "That the Sovereign Dames oblig'd their Husbands to perform all the Servile Employments, even thoſe which, in other Places, belong particularly to the Maids." He tells us the ſame of a People in *Libya*, whom *Hercules* utterly deſtroyed, thinking it a Reproach to Mankind, *That a Nation ſhould be ſuffered to continue where the Government was in the weaker Sex*, l. 3. c. 53. & 55.

[e] *Vid.* Curtium, *l.* 6. *c.* 5.

[f] *Vid.* Edvard. Lopez, *de Regno* Congo, *l.* 2. *c.* 9. *Add.* Franc. Alvarez *Deſcript.* Æthiop. *c.* 133. *Iſaac Voſſ.* de *Nilo*, c. 19. *Michael Glycas*, Ann. *part* 2. tells of the *Agilæans*, "That amongſt them the Women bear Rule over the Men, and are very communicative of themſelves, without any Danger of their Husband's Jealouſy: that they till the Ground, build the Houſes, and perform all the nobler Labours of the other Sex.

[g] See the Articles of Marriage between *Philip* and *Mary* in *Thuan.* l. 13. *ad ann.* 1553. & 1554. Thoſe of *Mary* Queen of *Scots*, *ibid.* l. 20. *ad ann.* 1558. & l. 37. *ab init.* *Add.* Marian. *Hiſt.* Hiſpan. *l.* 24. *c.* 5. *Diodor. Sic.* l. 1. c. 27. mentions a Decree that paſſed among the *Egyptians* in Honour of *Iſis*, importing, "That the Queen ſhould enjoy a greater Degree of Power and Dignity than the King; and that, amongſt private Perſons, in the Nuptial Writings, the Wife ſhould be inveſted with the Command, and the Husband be obliged to obey." Add. *Guicciardini*, l. 6. p. 178. where he ſpeaks of the Government of *Caſtile* adminiſtred with joint Authority by *Ferdinand* and *Iſabella*.

and Character of both Sexes. For tho' it be, in many Places, uſual for the Relations of the Woman to make the firſt Offer to the Man, yet this is only to direct his Aim in the Attack, and to fix a particular Mark for his Addreſſes.

This Principle being ſuppos'd, it is clear, that the Man, when he makes his Suit, is deſirous of ſuch Iſſue as ſhall be true and genuine, not ſpurious or adulterous. And therefore we ought to abhor, as contrary to Reaſon and Nature, the licentious Practice of many Nations in this Point. Travellers tell us, that the King of *Calecut* hath two Wives, each of whom is conſtantly waited upon, with all Familiarity, by ten of the Idolatrous Prieſts; and that the King eſteems it an Honour to be thus abus'd; though he hath the Prudence, not to let his own Illegitimate Race ſucceed to the Crown, that Dignity being reſerv'd for his Nephews [a]. Indeed the Women are in that Country, for the moſt part, held in common [b]; whence it comes to paſs, that the Fathers neglect the Care of their Children, and all Inheritances deſcend by the Mother's ſide [c]. *Buchanan* [d], to the Diſcredit of his own Country, reports a Law of *Evenus*, or *Ewen*, the Third King of *Scotland*, by which it was order'd, that the firſt Night of a Nobleman's Marriage ſhould be the King's Fee; and that the Nobleman, beſides taking the ſame Liberty with the Commoners Wives, ſhould again command their Company whenever they pleas'd. Till *Milcolomb* the Third, at the intreaty of his Queen *Margarite*, chang'd this ſcandalous Indulgence into a Fine of half a Mark, to be paid by the Husband, in lieu of parting with his Bed the firſt Night [e]. At this time of Day, in the Kingdoms of *Pegu* and *Arraca*, at the Nuptial-feaſt, one of the Gueſts prevents the Bridegroom in his Addreſſes to the Bride; yet it is Capital for him to be catch'd a ſecond time, uſing the ſame Freedom [f].

We may conclude farther, that nothing is more repugnant to that Decency and good Order which ought to be kept up in the World, than to lead a wandring deſultory Life, without any fix'd Abode, without any certain Seat of one's Fortunes and Concerns [g]. The Education of the common Off-ſpring is then certainly carried on with moſt Convenience, when the Parents unite their Aſſiſtances to ſo good a Deſign; and their Minds are by theſe ſweet Pledges knit together in a ſtronger Band of Affection [h]. Beſides, a conſtant Cohabitation cannot but afford vaſt Delight and Satisfaction to an agreeable Couple: and then the Husband is by this means much more ſecure of his Wife's Chaſtity, than if they dwelt at a diſtance. Such Matrimony then, as is regular and perfect, conformable to natural Reaſon and to the Ends of civil Life, beſides the Covenant of Fidelity to the Bed [2], doth imply an Agreement on the Woman's ſide, that ſhe will conſtantly dwell with the Man, and unite in the ſtrict Society of a Family; as well for the Education of the Children, as for mutual Aid and Pleaſure [3] [i]. The Cuſtom amongſt the *Chineſe*, for the Women to bind their Feet ſo very ſtreightly, that they cannot go without great pain, ſeems to have been firſt introduc'd on this politick Account, that being diſabled from gadding abroad, they might be oblig'd to fix with the greater Application on the Care of Domeſtick Affairs [k].

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[2] See the Author's Abridgment of a *Man's and Citizen's Duty*. Lib. 2. Chap. 2. § 4.

[3] Mr. MONTAGNE ſpeaks well to this purpoſe: A good Marriage is a pleaſant Condition of Life, full of Conſtancy, Fidelity, and an infinite number of profitable and ſolid Duties, and mutual Obligations. Every Woman who has a true ſenſe of it, *Optato quam junxit lumine tæda*, Cat. would not be Miſtreſs of her Husband: if ſhe be entertained in his Affections as his Wife, ſhe is much more honourably and ſurely received. When he ſhall be in a Paſſion, or Hurry, as he muſt needs be; to whom would he rather wiſh ſome Diſgrace to befal, his Wife, or his Miſtreſs? If any Misfortune happen to him: to whom would he wiſh the greateſt? Theſe Queſtions have no doubt in a good Marriage. That we ſee ſo few good Ones, is a ſign of its great Price and Value. If it be well order'd and manag'd, there is no finer piece of Society. 'Tis to this Aſſociation, that this Saying is moſt fitly applied; *Homo Homini Deus, aut Lupus.* We muſt be endowed with the beſt Qualities to come into it. They that take this Affair in hand, and carry with them Hatred and Contempt, do unjuſtly and unprofitably. Marriage hath on her part, both Profit, Juſtice, Honour, Conſtancy, an equal and univerſal Pleaſure. Love is grounded on Pleaſure only; and is therefore more Dangerous, Lively, and Sharp. *Eſſays, Lib.* III. *Chap.* II. *Pag.* 630, *&c.*

[a] *Vid.* Aloyſ. Cadamuſt. *Navig. c.* 75. we meet with the like Account in *Ludov. Rom.* Navig. *l.* 5. *c.* 7. [b] *Vid* Pet. de Valle, *Itiner.* P. 3. Ep. 7. [c] The Practices of the *Colchians*, reported by *Busbequius*, in his third Epiſtle, are very filthy. [d] *Rer. Scotic.* l. 4. [e] *Id.* L. 7. *Polydor. Virg.* Hiſt. *Angl.* l. 10. *Comp.* Sueton. Caligul. *c.* 40. *&* Boxhorn. *Not.* [f] Ludovic. di Barthema, *Itiner.* p. 2. c. 11. Of the Inhabitants of *Caniclu*, ſee *Paul Venet.* l. 2. c. 38. [g] *Xenophon* had reaſon to call a Man's *Home* or his *Fire-ſide*, the ſweeteſt and the moſt ſacred Poſſeſſion that he enjoys. *Cyropæd.* l. 7. p. 116. Ed. *H. Steph.* *Add.* Ariſtot. *Oecon.* l. 1. c. 3. [h] *Geneſ.* xxix. 32. Lyſias, *Orat.* 1. *c.* 2. " So ſoon as ſhe " bore me a Child, I admitted her into the full Truſt and Care of all my Affairs; judging this the firmeſt Band that could unite " and engage us to each other.

Conciliat animos conjugum partus fere.
Senec. Herc. Oet. *ver.* 407.

" Children are commonly the means of uniting and endearing
" a married Pair.

[i] *Demoſthen.* in *Neær.* " The Reaſon of our taking Wives is to obtain Iſſue, and to ſee our Family Affairs under a faithful " Directreſs." *Add.* Xenoph. *Oeconom. &* Columell. *de R. R.* l. 12. *præfat.* [k] *Comp.* Martin. *Hiſt. Sin.* l. 3. c. 28. Plutarch. *Præcept. Conjugal.* " As Phyſical Humours and Qualities are ſaid to diffuſe themſelves whole through the entire " Maſs, ſo ought the Bodies, the Wealth, the Friends and Acquaintance of a married Couple to be thoroughly mixt and blended together. When the *Roman* Lawgiver forbid either of the Pair to give any thing to the other, the meaning was not to " exclude them from a Participation of Benefits, but to ſhew that they ought to hold all things Common between them." *Quintil.* Declam. 249. " Ye know that Marriages are the things which hold a Commonwealth together, which preſerve Race " and Iſſue, and confirm and regulate the Deſcent of Patrimonies and Inheritances, and maintain Domeſtick Safety and Peace. " Without this Security at Home, who would venture to travel into foreign Parts, or ſo much as take a Journey to a diſtant " Eſtate; to go on publick Embaſſies, or to engage in military Expeditions?" See *Montaigne*'s Eſſays, *lib.* 3. *c.* 5. *p.* 630, 631, 632. *Edit.* Pariſ. *Fol.*

From what hath been obſerv'd before, it appears why the Huſband, and not the Wife, ought to have the Privilege of chooſing their ſeat of Reſidence; for it is he that admits her into his Family, of which he himſelf is the Head and the Director. Though no Man, commonly ſpeaking, will be ſo hard as not to aſk his Wife's Conſent in this point; eſpecially if ſhe brought him a conſiderable Fortune.

It is farther evident, that without a Breach of the Matrimonal Contract, the Wife cannot againſt the Huſband's Conſent ramble abroad, lodge apart, or deny him reaſonable Favours, unleſs upon extraordinary Occaſion.

Upon the ſame Principles is founded that Preſumption in civil Law, that Children born in Lawful Wedlock are really the *Husband*'s, unleſs there appear ſome very ſtrong Argument to the contrary, ſufficient to overthrow the favour of the Preſumption [a]. The *Engliſh* Laws are particularly complaiſant to the fair Sex, obliging the Huſband to own a Child, born after he hath been abſent many Years, provided he hath been all the while within the Bounds of the Iſland [b]. And they ground this Indulgence on two Reaſons, firſt, becauſe the Wife hath ſolemnly given her Faith, that ſhe will be true, which ſhe is preſum'd not to have broken; and, ſecondly, becauſe it is in the Huſband's power to ſecure his Wife's Honeſty; and what Right or Power any Perſon enjoys, he is always ſuppos'd duly to exerciſe [c].

And hence, the Opinion of the Vulgar is not altogether unreaſonable, when they fanſy, that the Wife's diſhoneſty caſts ſome kind of ignominious Blemiſh on the Huſband [4]: As if, either out of Folly or Meanneſs of Spirit, he had neglected to uſe his Authority [d]. *Domitian* ſtruck a Gentleman's Name out of the Liſt of Judges, for receiving his Wife again, after he had put her away upon an Accuſation of Adultery [e]. Some give another Reaſon why a Mark of Shame ſhould be fix'd on this Misfortune; and that is, becauſe it looks diſgraceful in a Huſband not to be Maſter of thoſe good Qualities which might engage his Wife's Affection, and ſecure her Fidelity. A Man that lies under this unhappy Cenſure, and cannot conveniently redreſs the wrong which he ſuffers, would do well to conſider *Euripides*'s wiſe Aphoriſm, that

> ------ Ἐν σοφοῖσι γὰρ
> Τάδ᾽ ἐστι θνητῶν, λανθάνειν τὰ μὴ καλά.

It is a great Part of human Wiſdom, to cover thoſe things with Secrecy, which look ill if they come abroad [f].

Charron's [g] Remark will not, in all Caſes, hold ſtrictly good, that 'tis a vulgar Error and Folly to upbraid a Man with his Wife's Diſhoneſty; as if this were to make him ſuffer for the Crime of another, which 'tis not in his Power to prevent.

[5] It may not be amiſs, on this Subject, to throw in an occaſional Obſervation, that thoſe Marks of Reproach, which the common People fix on the Heads of ſuch unfortunate Huſbands, are no new Invention, nor confin'd to the Cuſtoms of our Weſtern World: For we read that the Emperor *Andronicus* caus'd the largeſt of the Stag's Horns he met with, to be faſtned on the Gate of the Market-place, on pretenſe to ſhew the Vaſtneſs of the Beaſts he had kill'd in Hunting; but really as a ſilent Rebuke to the Immorality of the City, and the Lightneſs of the Dames [h]. But as She cannot properly be called an Adultereſs who ſuffers in her Honour by Compulſion and Force [i], ſo to keep a Wife who hath been thus injur'd, doth not, in it ſelf, appear any way foul or reproachful [k].

XI. We are farther to examine, whether by the meer Law of Nature, from the Principal Contract of true and perfect Matrimony, there ariſeth any proper Sovereignty or Dominion of the Huſband over the Wife. Indeed in holy Scripture it is expreſly ſaid, that the *Will* or *Deſire* of the Wife *ſhall be to her Husband*, and that

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[4] It was one of PYTHAGORAS's Maxims, that care ſhould be taken, that Women ſhould not break their Nuptial Fidelity either through the negligence or ill-behaviour of their Husbands; Αἴ τε γυναῖκες μὴ νοθεύωσι τὸ γένος ὀλιγωρίᾳ καὶ κακίᾳ τῶν συνοικούντων. Jambl. de vitâ Pythag. Chap. 9 Numb. 48.

[5] If any one deſires to ſee more of this trivial Uſage, of which the Gravity of our Author would not permit him to ſay more, let him conſult SALMASIUS's Notes upon *Tertullian de Pallio*, p. 338, 339, &c.

Juvenilis ardor impetu primo furit;
Langueſcit idem facile, nec durat diu
In Venere turpi, ceu levis flammæ vapor:
Amor perennis conjugis caſtæ manet.
Senec. Octav. *v.* 189, &c.

" The Fire of Youth in Love's diſhoneſt Joys,
" At the firſt Blaze is Fury, Flaſh, and Noiſe;
" But ſpends in Smoak, and what it gave deſtroys.
" Whilſt the chaſt Paſſion of a lawful Dame
" Burns with a gentle, but an endleſs Flame.

[a] See above, *lib.* 4. *c.* 11. *ſ.* 10. & *vid.* Gell. *l.* 3. *c.* 16. Plin. *Hiſt. Nat.* l. 7. c. 5. Where he treats of the time of going with Child, which muſt be examin'd, before the Child brought forth is delivered to the Huſband.

[b] See *Chamberl.* Preſent State of *England*, p. 1. c. 16.

[c] 'Tis a ſaying of *Gyges* in *Herodot.* (*Clio* p. 3. Ed. *H. Steph.*) *Every one ought to keep an Eye on his own Concerns.* PLATO obſerves (in *Alcibiad.* I. *p.* 441. Ed. *Wech.*) " That the Wives of the *Spartan* Kings are publickly watched and overſeen by the *Ephori*, leſt any Heir ſhould be " obtruded upon the Crown, who is not truly of the Race of *Hercules*. Whereas in *Perſia* the King ſeems, in Ex" cellency of Nature, ſo much above his Subjects, that there is no Danger of counterfeiting his Strain: And therefore " his Wives are under no Guard, but that of their own Reputation.

[d] *Add.* Carteſ. *Paſſ. Art.* 169.

[e] Sueton. *Dom.* c. 8. So by the *Attic* Law, " A Man was reckon'd baſe and ſcandalous who kept his Wife, after he had diſcover'd her Diſhoneſty, *Demoſthen.* in *Nær. Add. Dig. lib.* 48. *t.* 5. *ad Leg.* Jul. *de Adulter.* leg. 2. ſ. 6. & leg. 29. *princ.* In TACITUS (Ann. *lib.* 2. *c.* 85.) *Labeo* the Huſband of *Viſtilia* was cited to give an Account why he had forborn " to ſee the Law executed upon his Wife, after ſhe had been openly convicted: and he could not otherwiſe excuſe him" ſelf than by pretending that the ſixty Days, which the Law allow'd him for conſidering time, were not yet expired.

[f] *Eurip.* Hippol. Coron. *Add.* Plutarch. *de Anim. Tranquil.* p. 467. E. F.

[g] L. 1. c. 39. n. 11.

[h] Nicet. Acominat. *de Imper.* Andronic. *l.* 2.

[i] *Vid.* Gratian. *Cauſ.* 32. *Qu.* 5. *c.* 2, &c.

[k] Yet we are to commend the Proceeding of *David* in 2 *Samuel* xx. 3.

He ſhall rule over her [a]. But this being enjoin'd the Woman by way of Puniſhment, ſeems to bear the Face of a *Poſitive Inſtitution.* To diſcover, then, how the Law purely natural directs in this Point, we may firſt obſerve, that to be bound to follow the Will of another in ſome certain Buſineſs, is not altogether the ſame thing as to be ſubjected to his Dominion; becauſe the former may reſult from a *ſimple Pact.* For there are many Pacts, eſpecially of this kind, *I give you this to do ſuch, or ſuch a thing; I do this, provided you will do ſo, or ſo for me*; in which it was at firſt in the Power of either Party to chooſe, whether he would enter into the Agreement, or not. Yet the Covenant being once conſented to on both ſides, one Party muſt follow the Will of the other (as to this particular Buſineſs) and not *vice verſa.* Whence it appears, that how far ſoever the Wife may be obliged to ſubmit to the Husband's Will in the Affairs proper to Matrimony, yet it doth not preſently follow, that he muſts needs have the ſovereign Command over her, in other Actions and Concerns.

Again, the End of Marriage is not like that of Commonwealths, the Defence and Security of Men (for how weak an Union, as to any mutual Safety, is that which conſiſts only of two Perſons?) but is directed wholly to the Propagation of Human Race. Therefore as a Commonwealth cannot be underſtood without a ſovereign Ruler, ſo it ſhould ſeem that Marriage, without any Superiority of Government, might ſubſiſt well enough under the common Force of Contracts, aſſiſted with the Engagements of Friendſhip and the Charms of Love. It muſt be confeſs'd, that a ſeparate Family hath ſomewhat in it much like a State or Community, which not regularly allowing of more than one Head, the Wife when ſhe is admitted into it, ought, one would think, to yield a full Submiſſion to the Lord and Director of the Society. But it may be urg'd, in Anſwer to this Objection, that a Family, if increas'd with a numerous Train of Servants, hath two Ends and Deſigns, one common, the other proper. The common End conſiſts in mutual Defence and Security, ariſing from the united Strength of ſo many Perſons. In this reſpect, tho' ſome ſupreme Sway be neceſſary, yet, in as much as the Wife is but little concern'd in that Affair, the Unity of the Family may be very well kept up, altho' ſhe be join'd to her Husband by no ſeverer Bands than thoſe of Affection and the Matrimonal Covenant. Thus we find the Patriarch *Abraham* exerciſing a Sovereignty over his Domeſticks, and yet treating *Sarah* with the kind Equality of a Siſter [b] [1]. Though, at the ſame time, her dutiful Behaviour towards him is highly commended in the holy Scriptures; and it is ſaid particularly, that ſhe call'd him Lord [c]. The proper or peculiar End of Marriage ſeems likewiſe attainable, without any Inconvenience, although neither of the Parties ſhould bear any ſuch abſolute Authority over the other, as muſt include the Power of Life and Death, and of the moſt rigorous Reſtraints; but the Ties of Friendſhip and the Obligation of the free Contract, may very well ſerve to hold Man and Woman together. Yet this Contract (the Husband having the better Part in the Terms and Conditions, and the additional Advantage of his Sex) ſeems to be form'd in the manner of thoſe Leagues and Covenants which we call Unequal; ſo that the Wife is bound to Obedience, and the Husband rather to Protection. Not that it is repugnant to the Law of Nature, for a Wife to be ſubjected to her Husband in the way of ſtrict Political Government. For the Fear of ſupreme Authority, and the Endearments of Conjugal Affection are really no more deſtructive of each other, than the Sovereignty of the Prince extinguiſheth the Love of the Subject. And this full Political Authority, as it may be acquired by any Husband, by means of a new Covenant annex'd to the Matrimonial Agreement, ſo we find it in ſome Nations, allowed to all Husbands in general, by Virtue of a publick Cuſtom or Conſtitution. *Ceſar* [d] tells of the Antient *Gauls*, that they had the Power of Life and Death, as well over their Wives, as over their Children. Amongſt the *Germans*, the Husbands were impower'd to execute the Puniſhment of Adultery; not as an Indulgence to their Rage and Reſentment, but as an Effect of their juſt Power and Command [e]. How the Caſe ſtood at *Rome*, *Gellius* thus informs us from a Speech of old *Cato's*. *A Husband (except after a Divorce) is a Judge, a Cenſor, and a kind of ſovereign Prince over his Wife: if ſhe acts any thing perverſly, or ſcandalouſly, he ſets a Mulct upon her; if ſhe drink Wine to Exceſs, if ſhe commit any diſhoneſty with another Man, he condemns her to a ſuitable Puniſhment.* Again, ſays that grave Senator, *ſhould you apprehend your Wife in the Act of Adultery, you might kill her without farther Proceſs or Trial; on the contrary, ſhould ſhe find you guilty of the ſame Crime, ſhe hath no Right to touch you with a Finger.* *Tacitus* hath recorded a later Inſtance of this antient Cuſtom [f]. He reports that *Pomponia Græcina* (Wife to the famous *Plautius*, who triumph'd for his Victories in *Britain*) *being accus'd as a Favourer of foreign Superſtition, was remitted to the Judgment of her Husband: And he, according to the old Inſtitution, calling an Aſſembly of her Relations, took ſupreme Cognizance of her Life and Honour.* We muſt not omit the moſt remarkable Practice of the *Saccæ*, a People of *Scythia*, among whom, as *Ælian* tells us the Story [g]; " When a Young Man " ſeeks him out a Wife, he is oblig'd, in the firſt

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Mr. Barb. *NOTES on* § XI.

[1] *Martial,* L. 8. Ep. 12. v. 3, 4.

Inferior matrona ſuo ſit, Priſce, marito,
Non aliter fuerint fœmina virque pares.

Should Manly Empire not controul the Fair,
Husband and Wife were an unequal Pair.

Plin. *Paneg.* c. 73. *Many worthy Men have been hindred from being Chief in the State, by their not being Chief in their own Families.*

[a] *Geneſ.* iii. 16. *Epheſ.* v. 22, *&c.*

[b] See *Geneſ.* xvi. 2, 5, 6. xxi. 10, 11, 12.

[c] 1 *Pet.* iii. 6.

[d] *De B. G.* l. 6. c. 19.

[e] *Tacit. Germ.* c. 19. What he ſays of their Power over their Servants ſee afterwards, *cap.* 3. *ſ.* 4.

[f] *Ann.* xiii. 32. *Add.* Euripid. Medea, *v.* 230, *&c.* Varren. *Deſcrip.* Japon. *lib.* 13. Lex *Wiſigothorum,* L. 4. t. 4. c. 3.

[g] *V. H.* l. 12. c. 38.

“ place, to engage her in ſingle Combat; and if he gets the better, he leads off his Captive in Triumph, and ever after acts the Sovereign over her: if the Victory fall on her ſide, ſhe is the Queen, and he the Slave. And this Contention is not deſign'd to endanger the Lives of the Combatants, but only to determine the Maſtery between them.

What Power the Husband hath over the Goods of the Wife, is likewiſe to be adjuſted, either by the Contract and Agreement of the Parties, or by the Deciſion of the Civil Laws. Theſe Engagements are to be ſtrictly obey'd in the ſeveral Points which they have ſettled; as for Inſtance, whether the Woman ſhall bring a Portion at Marriage; whether or no the Couple ſhall join Purſes, and mix their Effects in the Common Stock, whether the Husband ſhall have an abſolute, or limited Diſpoſal of his Wife's Fortune; and the like Queſtions.

Amongſt the *Japoneſe* the Women marry without Portions: Indeed, the Maids Parents, if of the wealthy Sort, ſend a Sum of Mony as a formal Preſent to the Bridegroom on his Wedding-day, but he preſently returns it in the ſame ceremonious manner; the reaſon they alledge for their Cuſtom is, that they may not give the Women an occaſion of Inſolence and Pride. And there they have this mortifying Proverb, *That a Woman, ſo long as ſhe lives, hath not ſo much as a Houſe that ſhe can call her own*: Before Marriage ſhe is a Dependent on her Father's Family, in Marriage on her Husband's, in Widowhood on that of her Children [a]. It was a Cuſtom with the old *Thracians*, that the faireſt of their Maids ſhould be expos'd to publick Sale, and be given in Marriage to the higheſt Bidder: On the other ſide, that thoſe whom Nature had been leſs kind to, ſhould expend their Fortunes to buy themſelves Husbands [b]. The *Aſſyrians* likewiſe diſpos'd of their Virgins in the way of Sale [c].

Where the Civil Laws have not defined theſe Matters, or where the Parties live in a State of Natural Liberty, the Husband and Wife may ſettle any ſuch Point as they pleaſe, by particular Contract.

XII. For the further Illuſtration of this Subject, it will not be amiſs to examine the Doctrine laid down by *Hornius* in his firſt Book *de Civitate* [d]. Firſt of all, he rejects the Opinion of thoſe who aſſert, that the Husband hath, by Nature, a Sovereignty over the Wife. And thus far we approve his Cenſure, if the Perſons, againſt whom he diſputes, did maintain the Husband's Sovereignty to be the free Gift of bare Nature, without any intervening Contract, or without the Wife's voluntary Submiſſion. For this indeed would be repugnant to the Natural Equality of Mankind; and a fitneſs or ability to govern, cannot, of it ſelf, confer a Right of Government.

Hence he proceeds to affirm, That *there can be no Sovereignty, publick or private, of one Perſon over another, but that which ariſeth from the expreſs Appointment and the moſt ſolemn Intervention of Almighty GOD.* Now as to this Poſition, we cannot but obſerve, that when Enquiries are thus made into the Origin and Fountain of Dominion, what we ſearch for is the neareſt, the immediate, and the ſecond Cauſe; the firſt and univerſal Cauſe of all things being ever preſuppos'd. And therefore, tho' it appear moſt evidently, that God hath commanded ſuch an Order to be introduc'd among Men, yet the main Queſtion will be ſtill behind, what Contracts are required to put Men in a way of conforming to the divine Precept. For he muſt have little Knowledge of Letters, who can imagine, that when we ſay God is the Author of ſuch or ſuch a moral Inſtitution, we mean that he produceth it, as he did at firſt the Heavens and the Earth, without the Intervention of any thing formerly created. That God expreſly order'd the making of the *Jewiſh* Tabernacle, is no manner of Reaſon why we ſhould not ſay, that the Workmen were the next and immediate Cauſe of the Fabrick. Thus although it be enjoin'd by the Divine Oracle, that the Woman ſhall be in Subjection to the Man, yet to make him actually and immediately her Sovereign, it is neceſſary, that ſhe promiſe Obedience to him by her own free Covenant. To ſay the contrary would not be leſs ridiculous, than to pretend, when God bids us *have Dominion over the Beaſts of the Earth*; that there is no need of our uſing any outward means to obtain it, as by Hunting, *&c.*

The Argument this Author afterwards makes uſe of is certainly moſt trifling and childiſh. *The Wife*, ſays he, *hath no ſuch thing as Conjugal Sovereignty, and therefore ſhe can confer no ſuch thing on the Husband.* As if, by the Agreement of ſeveral Perſons, a new moral Quality could not be produc'd, which did not actually exiſt before [1]. To conſtitute a Dominion, it is by no means neceſſary, that it muſt be firſt really poſſeſs'd by one Party, and then tranſlated on another (as phyſical Subſtances cannot be given away, unleſs they had before a full and formal Being) but this Superiority then ariſeth, when any Perſon diveſts himſelf of that Power of reſiſting another which his natural Liberty gives him, and engageth his Faith, that he will ſubmit, in all things, to the Will of him whom he thus chooſeth for his Governour.

Farther: Although in the Holy Scriptures the Subjection of *Eve* is ſaid to have been enjoin'd her as a Puniſhment for ſeducing her Husband; yet it doth not hence appear, that the Husband's Sovereignty, after the Fall, hath not for its neareſt and immediate ſecond Cauſe the Agreement between Man and Woman. For, ſince a neceſſity of Obedience doth not always include an unhappineſs of Condition (as the moſt bleſſed State of the holy Angels is not impair'd by their yielding the

Mr. BARB. *NOTE on* § XII.

[1] See what the Author ſays, *l.* 7. *c.* 3. § 4. following.

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[a] *Bern. Varen.* Deſcrip. *Japon.* c. 12.

[b] *Solin.* c. 15. Thus *Seuthes* in *Xenoph. Exp. Cyr.* Lib. 7. ſ. 20. *Edit.* Wells, *Oxon.* *If you have a Daughter, I'll fairly buy her after the Cuſtom of* Thrace. *Add.* Heraclid. *de Polit.* Mela, *lib.* 2. *c.* 2.

[c] Ælian. *V. H.* l. 4. c. 1. *Herodot. Clio.* Add what the *Roman* Laws deliver concerning the Prohibition of Donations between Husband and Wife. *Lib.* 24. *t.* 1. *D. De donat. inter Vir. & Uxor.*

[d] *Cap.* 1.

the ſtricteſt Service to God) the Puniſhment attending the Woman's Inferiority ſeems to be this, that ſhe bears the Yoak unwillingly, with inward Grudgings at her Station, and a Natural Deſire of Command. And therefore it is no Contradiction to ſay, that the Superiority of the Husband naturally ſprings from the Conſent of the Wife; and that GOD Almighty in way of Puniſhment to the Woman, hath made her Subjection troubleſome and uneaſy.

The following Diſtinction looks but like an impertinent Niceneſs, *Whatever Will, or whatever Voluntary Act we can now conceive in the Woman, belongs purely to the Act of contracting Marriage; and conſequently is to be underſtood of that Conſent and Approbation by which ſhe acquieſceth in the future Government of ſuch a particular Husband.* This is no more than to ſay, that the Husband's Sovereignty is not produc'd by the Conſent of the Wife, but being before eſtabliſh'd by GOD's Command, the Wife voluntary enters under it. As a Traveller doth not build his Inn, but freely makes uſe of it, when he findeth it built to his hands.

It is ſufficient in the whole to obſerve, that the Dominion of one Perſon over another, conſider'd as a Moral Entity, doth not exiſt without the Concurrence of ſome human Act, and cannot be underſtood without Subjection and Obedience: And that the Woman, for this reaſon, lies under no Obligation to obey, before ſhe hath by her own Conſent ſubmitted to the Rule and Authority of an Husband. And though that ſhe ſhould thus ſubmit herſelf, be indeed agreeable to the Divine Will, yet this doth not hinder, but that her own Covenant, and her Subjection conſequent upon it, are the immediate and neareſt Cauſe productive of the Husband's Power.

XIII. Nor can we grant what the ſame Author maintains, that the Husband, beſides the Command of the Family, and of Conjugal Affairs, is inveſted with an abſolute *Power of Life and Death, in which Right the Summ of his Authority conſiſts.* For though this Power be meant as it is unreſtrain'd by Civil Conſtitutions, and as it amounts not to a licentious Excuſe of Murther and Parricide, but to a lawful Authority of inflicting condign Puniſhment on capital Crimes: yet that *every Sovereingty, as it is ſeated in a proper Perſon, not precariouſly obtain'd, nor circumſcribed by a Superior, doth import the Power of Life and Death,* is an Aſſertion that we ſhould not be inclin'd to aſſent to, without very good Proof. Certainly the End of Matrimony requires no ſuch abſolute Authority. And if it be objected, that all grievous Enormities ought to be brought under Human Cognizance, we will only aſk, who ſhall puniſh a ſovereign Prince, or who the Father of a Family, living ſeparate from all civil Government? We confeſs, that if the Wife prove guilty of Intolerable Wickedneſs, ſhe may (in this Natural State) be expell'd the Houſe as an Enemy, and may be kill'd by the Right of War. And we have already granted [a], that even this moſt ſtrict political Power is not repugnant to the Nature of Marriage, though we are very far from allowing it to be eſſentially neceſſary.

XIV. We are oblig'd here to explain that common Maxim of the Lawyers, that [1] *Conſenting, and not Bedding, makes a Marriage.* Which will bear theſe two Senſes, that a Couple, whatever Freedom or Familiarity they may uſe [2], cannot be Husband and Wife, unleſs they have paſs'd their mutual Conſent to live in Wedlock [b]: Or, that ſo ſoon as both Parties are come to an Agreement, the Matrimonial Contract ought to be eſteem'd perfect, even before the Ceremony of the Bed. Our Judgment on this Point is this, that as it is requiſite to the full transferring of Propriety, that the Thing be plac'd under the Power of another, in ſuch manner, that he may diſpoſe of it at his Pleaſure; ſo to make a Wife, it ſeems neceſſary, that the Woman deliver her ſelf as it were into the Poſſeſſion of the Man, for the common Ends of Matrimony: But it is by no means eſſential to this Agreement, that the Bed begin it. It is ſaid *Rebecca* became *Iſaac*'s Wife after he had brought her into his Mother *Sarah*'s Tent [c]. And I queſtion whether we ought to call it Adultery, when a Woman betroth'd to a Man in his Abſence, but not *led home to his Houſe*, nor *given into his Poſſeſſion*, is bedded by another Perſon: although we ſuppoſe, that the former Engagement, as made by Proxy, had in the Eye of the Law the full Force of conſummated Marriage. On the other ſide, it would be abſurd to ſay, that *Tobias*'s Wife had not a Title to that Name the [3] three firſt Nights [d]. Or that our Women are not Wives, when the Prieſt hath perform'd the ſolemn Office, 'till the Evening-Diverſions of the Bride-Chamber.

According to the Opinion of the *Jews* [e], Conſummation, as well as Conſent, was, before the Law, required to the compleating of Matrimony. Yet, by their Law, Conſent alone render'd a Marriage valid [f]. *Grotius* obſerves [g], that no Proceeding was made in the Nuptial Affairs, 'till

Mr. Barb. *NOTES on* § XIV.

[1] So the Digeſts affirm. *Nuptias enim non concubitus, ſed conſenſus facit. l.* 35. *t.* 1. *De conditionibus & demonſtrat. Leg.* 15. *& de Regul. Juris. Leg.* 30.

[2] Or, as Quinctilian, *Decl.* 247. expreſſeth it, *Familiarities and Meetings without proper Rites can never make a Wife. Vid.* Can. 5. cauſ. 27. quæſt. 2. *& Cod.* Lib. 5. t. 5. l. 8. *de inceſt. & inutil. nupt. Leg.* 8.

[3] *The three firſt Nights.* The Hiſtory of *Tobias* mentions no ſuch thing. Moreover, the thing appears certain in it ſelf, if we ſuppoſe the Story true; for the Text ſays only, that after *Tobias* had driven away the Evil Spirit, they both of them ſlept that Night. *Chap.* viii. 10.

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[a] Sect. 11.

[b] And therefore *Æneas* pleads for himſelf in *Virgil,*

——————————— *Nec Conjugis unquam*
Prætendi tædas, aut hæc in fœdera veni.

I ne'er pretended to the lawful Claim
Of Sacred Nuptials, and a Husband's Name.
Æn. 4. v. 338, 339.

[c] *Geneſ.* xxiv. ver. *ult,*

[d] See *Tob.* viii. 10.

[e] *Vid.* Selden *de J. N. & G.* l. 5. c. 4.

[f] *Deuteron.* xxii. 23, 24. *Add.* l. 8. *C. de inceſt. & inutil. Nuptiis.*

[g] Ad. *Matth.* i. 18.

'till the Solemnity had been uſher'd in by the hearing of *Divine Service* in a publick Aſſembly: Which moſt religious and moſt decent Inſtitution, the *Jews* probably receiv'd from antient Tradition, and do ſtill obſerve; and from them, it was admitted into the Chriſtian Church. For this Reaſon, though at the ſettling of the Contract they oblig'd the Man to ſwear to preſerve the Virgin's Honour, 'till the Day of Marriage; yet for the greater Security, they ſhut her up from him in the *Apartment of the Women*, till the time of that finiſhing Ceremony [a].

XV. We are in the next place to enquire, whether by the Law of Nature the Matrimonial Bond be limited to a ſingle Man, and a ſingle Woman? Or, which is the ſame thing, whether Polygamy be naturally allow'd? Polygamy is of two Sorts; either when one Woman promiſcuouſly admits of many Men, or when one Man is at the ſame time join'd in Marriage to many Women. To the former kind belongs the famous *Platonical* Communion of Wives: A Cuſtom propos'd by *Plato* in Idea [b]; but really practis'd by [1] many Nations. *Diodorus Siculus* [c] reports of the *Taprobanians* in *India*, "That the Men did not confine themſelves to ſtrict Wedlock, but poſſeſs'd the fair Sex in common, and educated the Children (in whom they reckon'd themſelves all concern'd) with Care and Love. Nay, the Nurſes often chang'd their little Infants, ſo as to hinder them from knowing their own Mothers." *Ceſar* [†] tells us of the Antient *Britains*, *Ten or Twelve of them together have Wives in common amongſt them; eſpecially Brothers with Brothers, Fathers with their Sons.* But *every Woman's Children are attributed to him, who firſt married her, when a Virgin.* Where it is plain, that great Author cannot mean, that one Woman had, at the ſame time, ten or twelve Husbands, as Mr. *Selden*, amongſt others, imagines; but that ſo many Men having each of them married his proper Wife, afterwards agreed upon that friendly Way of poſſeſſing them. *Lycurgus*, as *Plutarch* [*] delivers, "Endeavouring to prevent the vain womaniſh Paſſion of Jealouſy, thought this the beſt Expedient, to allow honeſt Men the Freedom of each other's Bed: Laughing at thoſe who reſented, in ſo high a manner, theſe petty Injuries, as to purſue their Revenge by Murthers and War. He look'd on it as no indecent Cuſtom for a Man, ſtep'd into Years before his Wife, to recommend her to the Arms of a young and virtuous Friend; and, when there appear'd Hopes of having a Child by ſo good a Father, to challenge the Bleſſing to himſelf. On the other ſide, a good and upright Man, who eſteem'd a married Woman for her own Virtue, and for the Comelineſs of her Children, was encouraged to beg of her Husband, without Ceremony, the Favour of a Night's Lodging; *That he might tranſplant into his own Garden ſome Slip of ſo goodly a Tree.* Indeed *Lycurgus* was of Perſuaſion, that Children were not ſo much the Propriety of the Parents, as of the whole Commonwealth; and therefore he would not have them begotten by the firſt Comers, but by the beſt Men that could be found. He cenſured the Lawgivers of other States, who whilſt they ſpared no Pains or Charge in promoting and improving the Breed of their Dogs, and of their Horſes; yet, being themſelves Old and Infirm, ſhut up their Wives from other Men. Whereas a little Reflexion would have taught them, that the Virtues and Vices of Children, their Succeſs or Miſcarriage, do chiefly redound to thoſe who have the Care of their Education." And this Inſtitution of the *Spartan* Founder, the Hiſtorian judgeth to have been ſet on foot, φυσικῶς ϗ πολιτικῶς, *Agreeably to Nature and to Polity* [d].

The *Stoicks* [e] too were of Opinion, that wiſe Men ought to communicate their Beds, as well as their other Poſſeſſions: Becauſe by this means all eſteeming their Children their own, would love them with equal Tenderneſs; and there would be left no room for jealous Fears, no Suſpicion of Adultery or Diſhoneſty [f]. The borrowing and lending of Wives, amongſt the *Romans*, is a Practice much talk'd of by Authors [g]. *Solon*, in his Laws, permitted an Heireſs, whoſe Husband prov'd impotent, to call in the Aſſiſtance of his neareſt Kinſman [h].

Yet we are not to make the leaſt Doubt but that all theſe licentious Indulgences are repugnant to the Law of Nature [i]. For the natural and regular End of Marriage is, the obtaining of Children, whom we may with Certainty call our own. But what room can there be

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[1] Add. *Diod. Sic.* l. 2. c. 58. Of the *Icthyophagi*, l. 3. c. 15. Of the *Hylophagi*, l. 3. c. 24. Of the *Nomades*, c. 32. which are likewiſe mention'd by Strabo, l. 7. Of the *Garamantes*, vid. *Plin.* l. 5. c. 8. *Solin.* c. 43. Of the *Troglodytæ Agatharcid.* c. 30. *Pompon. Mel.* l. 1. c. 8. Of the *Agathyrſi*, *Herodot. Melpom.* p. 161. Ed. *H. Steph.* Of the *Gindani* and *Nomades*, ibid. Of the Inhabitants of *Thule*, Solinus reports (I know not with what Credit) that *They hold their Women in common, and are Strangers to fixt Matrimony*, c. 35.

[*] *De B. G.* l. 5. c. 14.

[†] Lib. 5. cap. 11. The ſame Cuſtom is mention'd, tho' not ſo diſtinctly, by Xiphilin. Epit. *Dion.* in *Ner.* in *Bonduica*'s Speech; and again in *Sever.* Strabo reports ſomewhat like this of the *Sabæans*: "Their Poſſeſſions (ſays he) lie in common to all of the ſame Blood and Family, but the eldeſt bears the chief Sway. One Wife ſerves them All: He that comes firſt hath Admiſſion to her Bed, placing his Staff before the Chamber-door: But the Nights ſhe paſſeth with the Eldeſt. They puniſh Adulterers with Death, and ſuch they eſteem every Intruder into another Family, *lib.* 16. *p.* 538. *Vid.* l. 11. p. 353, 354. de *Maſſaget.* & *Tapyr.* Of ſome Inhabitants of the Kingdom of *Calecut*, *Ludovicus Romanus* (*Navig.* l. 5. c. 8.) informs us, "That every Woman is at the ſame time married to Seven Husbands, who lodge with her by turns. When ſhe is brought to Bed, ſhe preſents the Child to which of the ſeven Fathers ſhe pleaſeth, and no Appeal ~~lies from~~ her Determination, *Vid.* &c Pet. *de* Valle *Itiner.* p. 3. Ep. 7. *Joan. Boem. de Mor. Gent.* l. 3. c. 7. reports of the *Lithuanians*, from *Æneas Silvius*, "That the Women, by Conſent of their Husbands, have their Sparks, whom they call Aſſiſtants of their Bed; whereas on the other ſide, for the Husbands to uſe the like Liberty, would be accounted highly infamous.

[a] Comp. *Geneſ.* xxiv. 67. *Deuteron.* xxi. 13.

[b] *Vid.* l. 5. *de Repub.* & Marcil. Ficin. *in Præfat.*

[c] L. 2. c. 58.

[d] The ſame Law is mention'd by *Xenophon*, *de Reb. & Leg. Lacedæmon.*

[e] In *Diog. Laert. Zen.*

[f] *Add.* Thom. Campanell. *de Civit. Solis.*

[g] *Vid.* Plutarch. Num. &c Cat. *Min.* So *Cato* is commonly ſaid to have lent his Wife *Marcia* to *Q. Hortenſius.* Vid. & *Lucan.* l. 2. v. 328.

[h] *Plutarch, Solon.*

[i] Comp. *Matt.* xxii. 25, &c.

for Diſtinction in this wild and confuſ'd Mixture? Again, The buſineſs of Nature not requiring ſo numerous a Concurrence, all theſe additional Helps and Services proceeded not from Neceſſity, but from Luſt. Beſides, a moſt material Objection againſt theſe Irregularities is, that the kind and endearing Titles of Relation are ſunk and extinguiſh'd in them. *Plato* [a] propoſeth by way of Remedy to this grand Inconvenience, that the civil Laws ſhall ſupply the Defect of natural Kindred; that all Perſons ſhall eſteem their Seniors in Age, as their Parents; their Juniors, as their Children; their Equals, as their Brothers and Siſters. But this is a moſt idle and vain Expedient; for to have *no certain* Father, *no certain* Child, *&c.* is, with regard to mutual Affection, the ſame thing as to have none at all. 'Tis well urg'd by *Lactantius* [b]: *If all,* ſays he, *are concern'd in every Child, who can love a Child as his own, when he muſt needs be ignorant, or at leaſt doubtful, whether it be his own, or no?* On the other ſide, *Who would reverence a Man as his Father, when indeed he is uncertain to whom he owes his Being? Whence it comes to paſs, that he muſt take a Stranger for his Father, and his Father for a Stranger.* And it was a good Anſwer to one, admiring there ſhould be no ſuch thing as *Adultery* heard of in *Sparta,* That *their very Matrimony was Adultery.* Farther ſtill; the main Difference betwixt the conjugal Union of Mankind, and the wild Freedom of coupling amongſt the Beaſts is, that the Wife engageth her Faith to be true to the Huſband's Bed. Which Engagement, if he voluntarily releaſe, and madly betray his own Honour to new Rivals, he is unworthy the Name, not only of a Huſband, but of a Man; and is to be look'd upon as a moſt vile Diſturber of human Decency and Society. As for the Excuſe of *Lycurgus,* and others of thoſe antient Lawgivers, that ſo fair a Soil as a young Wife ought not to lie fallow, under the Neglect of an unactive Huſband, their moſt ready and moſt honeſt Way of preventing ſuch Miſhaps, had been to prohibit Marriage between Perſons of improper Years. And then for the Point of *Jealouſy,* by it they muſt mean, either that ſenſeleſs Paſſion, which torments a Man's Head without good Suſpicion or Reaſon; or elſe a due and proper Vigilance and Caution, in order to the preſerving a ſpotleſs Bed: The former kind of Jealouſy, the moſt fooliſh, and the moſt miſerable Diſeaſe of human Minds [c], their Community of Wives could not cure; and the other being the juſt Effect of Reaſon and Prudence, it ought by no means to have taken away [2] [d]. Nor ſhall I ever be perſuaded, that to lay all Poſſeſſions in common, and to give each Man the Privilege of calling every Thing *his own,* is the ſureſt Method of preſerving Peace and Friendſhip in the World. Every one muſt indeed acknowledge, that it is much more for the publick Benefit to have a *State* fill'd with healthy and vigorous, than with diſeaſed and weakly Subjects; and at the ſame time, that the Parents Conſtitution hath a conſiderable Influence on the Child's. Yet, did this Rule hold true more generally than it doth, it were by no means worthy of ſo high Regard, as that in conſideration of it we ſhould diſſolve the ſacred Ties of Marriage, and ſhake the main Foundation of all good Order amongſt Men [e].

XVI. The other kind of *Polygamy* [f], and that which more properly claims the Name, being the joint Relation of many Wives to one Huſband, hath been the Practice of many Nations in antient and in modern Time. The *Moſaical* Law was ſo far from forbidding this

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[2] Mr. Bayle, in his News-Letters againſt *Maimbourg,* Lett. xvii. § 5. maintains ſtrongly, "That if we follow Reaſon, as diſtinct from Grace, and the Light of Faith, a Man need not more to ſcruple to lend his Wife than his Book, and "that without the ridiculous Fear of Cuckolding. Reaſon would rather adviſe a Community than Propriety of Wives." I own, that here, as well as in many other Things, Men, for the Good of Society, might, by a certain Inſtinct, which prevents the Uſe of Reaſon, be led to it. If Hunger and Thirſt did not often put us in mind of our Nouriſhment, we ſhould often forget, or neglect to ſatisfy that natural Neceſſity; and ſo the World might be unpeopled. In like manner, were it not for that unquiet, and raging Paſſion, called *Jealouſy,* which always attends the Love of a Woman, the Community of Women would be eaſily introduced, or at leaſt Huſbands for the moſt part would be very careleſs of the Honour of their Wives, and eaſy to permit them to communicate their Favours to others beſides themſelves. Not that Reaſon would incline them to it, but the contrary; becauſe, as Men are ordinarily made, there are few that conſult, or hearken to Reaſon, ſo that they muſt be led to their Duty by Senſe. With *Ariſtippus*'s good leave, as a Philoſopher (cited by Mr. Bayle, § 4.) he had very ſuperficial and popular Ideas. If he uſed his Reaſon but a little, he might have diſcover'd without Revelation, that Man is a Creature made for Society, and that no Society can ſubſiſt without Order, and that Community of Women (as Mr. Bayle owns) would breed Confuſion in civil Society; ſo that Men muſt not be judg'd of as Beaſts, by looking upon their Propagation, as a Thing abſolutely indifferent, and as to which every one may regulate himſelf only according to his own Fancy. In his Caſe 'tis certain, that a Woman ought to be a Common Good, as the Water of a River; and ſo it would be a ſordid Paſſion to be diſpleaſed, that another ſhould quench his Thirſt at the ſame Spring. But ſince, by God's Appointment, Man ought to propagate his Kind in a Manner ſuitable to a reaſonable and ſociable Creature, Jealouſy in it ſelf, and reduced to its juſt Bounds, is neither more unjuſt nor unreaſonable, than the Inclination, which leads both Sexes to join together; and we may ſay, that Nature hath wiſely put into Men that nice Humour, as a faithful Guardian of the Chaſtity of Women, which ſeveral Huſbands would little trouble themſelves for, and would have them looſed without it. All that is meant, is this, when a Woman is unfaithful to her Huſband, without any juſt Cauſe from him, Reaſon requires, that he comfort himſelf, and ſay with the Comedian,

If my Wife deceive me, ſhe ſhall lament it;
I've done no Wrong, and can't repent it.

They'll call me Fool not to revenge it.
But I ſhould be hardy to haſten my End.

[a] L. 5. *de Repub.* p. 658. A. Ed *Wech.*

[b] *Div. Inſtit.* l. 3. c. 20.

[c] *Vid.* Oppian. *Cyneget.* l. 3. v. 237, *&c.*

[d] Vid. *Senec. Herc. Oet.* v. 233, *&c.*

[e] The Argument which ſome are not aſham'd to bring from our Ways of promoting the Breed in Horſes, is too filthy and ſcandalous to deſerve a Refutation. Add *Ariſtotle*'s Diſcourſe againſt *Plato,* on this Subject, *Polit.* 2. *c.* 2. It is a worthy Saying of his in the ſame Work, *l.* 7. *c.* 16. *For Perſons who are truly and properly Man and Wife, to ſeek another Partner, and another Bed, ought to be reckon'd amongſt the vileſt and moſt infamous of Offenders.*

[f] Vid. *Grot.* l. 2. c. 5. ſ. 9.

Cuſtom, that it ſeems in ſeveral places to ſupport it [a]. And GOD, by the Prophet *Nathan*, reckons amongſt the peculiar Favours and Bleſſings he had beſtow'd on *David*, that *He had given him his Maſter's Wives into his Boſom* [b]. Mr. *Selden* [c] aſſures us, that the *Jews* eſteem'd it lawful for a Man to marry as many Wives as he pleas'd, provided he could maintain them, and yield a Supply in all things anſwerable to their Relation. Yet it was the Advice of their ſageſt *Rabbies*, that for the avoiding the Inconveniences of *Number*, no Perſon ſhould exceed *Four*, except the King. He that acted contrary to this Rule, was adjudg'd guilty of notorious Impudence, and of Diſobedience to the Inſtitutions of his Anceſtors. The *High Prieſt* was allow'd one Wife at a time, tho' he was not hindred from marrying another, in caſe of the Death, or Divorce of his firſt. By the Prohibition of *Deuteron.* xvii. 17. they were perſuaded, that their King ought not to go beyond Eighteen. If the Men of their Nation liv'd in a Country, where *Polygamy* was not tolerated, they thought them oblig'd to conform; as particularly in the *Roman* Empire, the Laws of which expreſly reſtrain'd them from the Uſe of ſuch a Liberty [d]. As for the modern *Jews*, we are inform'd by *Leo Mutinenſis* [e], That *thoſe of them who live in the Eaſt, ſtill keep up their antient Practice of Polygamy; whereas in* Germany *they are not allow'd this Privilege, and in* Italy *very rarely; and only in caſe a Man hath liv'd with his preſent Wife many Years without Iſſue* [f].

Tacitus [1] obſerves of the antient *Germans*; *They are almoſt the only People amongſt the* Barbarians, *who are contented with ſingle Marriages. Indeed ſome few Perſons of extraordinary Merit are advanc'd to the Favour of more Ladies than one; but then they are courted to this Liberty, not out of Luſt, but upon account of their ſingular Virtues and Worth.* Thus *Ceſar* [g] tells us of *Arioviſtus*'s two Wives, choſen out of different Nations.

The *Grecians*, according to their regular Frame and Conſtitution, admitted but of one Wife; yet we find in one of the *Athenian* Decrees an Exception to this purpoſe, That *to increaſe the Number of Men, at preſent deficient, it ſhall be lawful for any Perſon to have Children by another Woman, beſides her that is in a more ſtrict ſenſe, his Wife* [h]. And hence *Atheneus* [i] urging the Improbability of the common Story, that *Socrates* had two Wives, inaſmuch as this was contrary to the primitive Ordinance of *Cecrops*, and was not objected to him by the Comedians, who handled him ſo reproachfully on other Occaſions; at laſt concludes, that if the matter of Fact were really true, it muſt proceed from a particular Order of State, diſpenſing with the antient Strictneſs, by reaſon of the preſent Scarcity of Subjects. In *Gellius* [k], among the ſeveral Cauſes alledg'd, why *Euripides* ſhould get the Title of the *Woman-Hater*, this is brought as one, that he had two Wives together (*the* Athenian *Government at that time allowing it*) who made him quite weary of Matrimony, and quite out of love with the Sex. Amongſt the *Spartans*, we find in *Herodotus* [l], that when their King *Anaxandrides* refus'd to put away his Wife, on the account of Barrenneſs, he was compell'd by the Authority of the *Ephori*, to admit another to his Bed, who did not lie under the ſame Imperfection. Every Body knows, that the *Romans* were content, each Man with his ſingle Wife [m]. Yet *Suetonius* [n] reports, that it was once in *Julius Ceſar*'s Head, to introduce a Law, to give Men Licence to marry what Sort, and what Number of Wives they thought fit, for the better ſtocking the Commonwealth. *Socrates*, the Eccleſiaſtical Hiſtorian [o], reports of the Emperor *Valentinian*, that whilſt his Wife *Severa* was living, he admitted to the ſame Honour the moſt beautiful Lady *Juſtina*; and publiſh'd an Order through his whole Dominions, permitting every Man to follow his Example; *To have Two lawful Wives. Paulus Diaconus* [p] gives the ſame Relation; and *Zonaras* mentions the Emperor's Two Wives, though he ſays nothing of the Law enacted on that Occaſion. But in as much as the other Hiſtorians, *Ammianus*, *Zozimus*, and *Oroſius*, together with the Chriſtian Fathers, who ſo often diſcuſs the Queſtions concerning Matrimony, are abſolutely ſilent in this Point; *Baronius* [q] concludes the double Marriage of *Valentinian*, and the Law in Juſtification of it, to be perfect Forgeries.

Mahomet in his new Inſtitution allow'd of *Polygamy*; craftily accommodating his Doctrines to the Temper of the People, whom he intended to deceive. For as the Force of Love is ſtronger in the Men of thoſe Eaſtern Parts, ſo the Women, either by their natural Genius, or by the Power of Education, live in ſuch perfect Subjection to their Husbands, that their Jealouſies and Quarrels are ſeldom conſiderable enough to diſturb the Peace and Union of the Family. Yet the wealthier Men ſhut up their Wives in ſeparate Houſes, or confine them to diſtinct Towns, to prevent Diſſention [r]. *Boccaline* [ſ] will have this Indulgence to have been a Device, to diſpoſe Men the better for a Life of Slavery; whilſt dividing their Riches amongſt ſo large a Progeny, they muſt continually

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[1] Tacit. *de Mor. German.* c. 18.

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[a] See *Deuteron.* xxi. 15. xvii. 16, 17, & *loc.* Ambroſii, *apud* Gratian. *Cauſ.* 32. *quæſt.* 4. *c.* 3, 7.

[b] 2 *Sam.* xii. 8.

[c] *De Uxore Hebraic.* l. 1. c. 9.

[d] L. 8. *C. de* Jud. &c. *Add.* Selden. *de J. N. & G.* 5. *c.* 6.

[e] *De Rit. Hebra.* p. 4. c. 2. ſ. 2.

[f] Here Mr. *Selden* obſerves, that in the firſt Edition was added, *Iudulta tamen Romani Pontificis impetrato,* "Yet not without procuring the Indulgence or Diſpenſation of the Pope"; which Words are omitted in the *Paris* Edit. 1637.

[g] *De B. G.* l. 1. c. 53. n. 4.

[h] *Diog. Laert. Socrat.* l. 2. 26.

[i] L. 13. c. 1.

[k] L. 15. c. 20.

[l] *Terpſichore,* p. 190. Ed. *H. Steph.* Vid. *Potter Archæol. Græ.* l. 4. c. 11. p. 599.

[m] Vid. *Cod.* lib. 5. t. 5. l. 2. *de Inceſt. Nupt.* & lib. 9. t. 9. l. 18. *C. ad L. Jul. de Adult.*

[n] C. 52.

[o] L. 4. c. 26.

[p] L. 11.

[q] *Tom.* 4. *ad.* A. *Chr.* 370. §. 125.

[r] *Richer. de Morib. Turc.*

[ſ] *Ragg. di Parnaſſ.* Cent. 2. c. 68.

grow weaker, and more abſolutely at the Command of the Government. A Thought very ingenious indeed, and of refin'd Policy; and ſuch as probably never enter'd into *Mahomet*'s Head, who died ſo long a time before the Eſtabliſhment of the *Turkiſh* Tyranny and Empire. As for the *Indians*, Travellers inform us, that the chief Reaſon why ſeveral of their Princes have refus'd to imbrace the *Chriſtian* Faith, hath been becauſe, amongſt other Conditions, it was required of them, to admit no more than one Woman to their Bed [a].

XVII. Whether or no this Practice be repugnant to the Law of Nature, is a Point not fully ſettled amongſt the Learned. It ſhall be our Buſineſs to propoſe fairly the Arguments on both ſides, leaving the deciſive Judgment to be paſs'd by the Reader. Thoſe then, who maintain *Polygamy*, as we now underſtand it, to be in it ſelf agreeable to natural Law, argue in this manner: “ The regular End of Matrimony, that is, the “ Certainty of Off-ſpring, and the Benefit of “ mutual Aſſiſtance, is as well anſwer'd under “ theſe Allowances, as under the ſtricteſt Con- “ finement. It is an idle Objection, which ſome “ make, That *at this rate the conjugal Faith will* “ *not be reciprocal, a Condition which Reaſon it ſelf re-* “ *quires as eſſentially neceſſary to every Covenant.* For “ *mutual Faith* doth by no means ſuppoſe, that “ the Performances on each ſide muſt needs be “ equal. Nor doth the true Intent of Matrimony “ demand, that the Man ſhould confine his De- “ ſires ſo ſtreightly as the Woman. The Reaſon “ why one Woman ought to take up with one “ Man, being the great Danger of the Uncer- “ tainty of Iſſue; which Hindrance doth not lie “ in the way of the other Sex. Yet is not the “ Husband leſs oblig'd to make good his Faith to “ every Wife; which Performance conſiſts in the “ yielding her all due conjugal Help, Kindneſs, “ and Support. As for the main End of Mar- “ riage, the obtaining of Children, one Man is, “ in this reſpect, equal to many Women; at “ leaſt to ſuch as are Moderate and Virtuous [a]. “ And therefore it is chiefly Luſt and Intempe- “ rance which makes Women ſo averſe to *Poly-* “ *gamy*. Indeed, if a Wife, at her firſt Contract “ with her Husband, binds him under an Engage- “ ment to admit no Partners with her of his “ Bed (as *Laban* [b] bound *Jacob* in Behalf of his “ Daughters) ſuch a Covenant is faithfully to “ be perform'd [c]. Where no ſuch Condition “ is made, there the Wife ought to reſt ſatisfied “ with a competent Share in the Husband [d]. “ Nor doth ſhe in this Caſe ſuffer any Injury; “ for ſhe can have no more Right over her Huſ- “ band's Body, than what ſhe obtain'd by the “ Matrimonial Compact: But in that Compact “ ſhe receiv'd a Right only to a Part of the “ Man, and voluntarily agreed to this imperfect “ Poſſeſſion. And therefore ſhe hath only Rea- “ ſon to complain of her Husband, when, as “ *Plautus* [e] ſays, *He lets his own Field lie fallow to* “ *plough another Man's.* Nor doth this Allowance “ of *Polygamy*, as ſome object, reduce the Wo- “ men into the Condition of Slaves. Nor is it “ any Crime, to place the weaker Sex in an in- “ ferior Degree to the ſtronger, to whom they “ owe their Defence and Support [f]. The Rea- “ ſons alledg'd on the other ſide, taken from the “ fatal Effects of Jealouſy, the Danger of Do- “ meſtick Quarrels, the Hatred of the rival Mo- “ thers tranſmitted to their various Race, do not “ amount to a Proof, that *Polygamy* is naturally “ unlawful; but then the ſame Inconveniences “ appear, as in all, ſo eſpecially in *ſecond Mar-* “ *riages*, which no one will upon this account “ term unlawful. Nor are the Troubles and “ Misfortunes of this kind equal in all Places; “ but they are chiefly to be diſcover'd in thoſe “ Countries, where either the Women have too “ high and commanding Spirits, or the Men too “ low and ſervile. In many Nations the Wives, “ either by their natural Diſpoſition, or by Cu- “ ſtom and Education, pay a more ſtrict and “ quiet Obedience [g]. And beſides, it is no dif- “ ficult Task, for a Man of tolerable Prudence “ and Diſcretion, to keep the Family-peace a- “ mongſt ſeveral Women [h].

XVIII. Thoſe, who deny *Polygamy* to be agreeable to the Law of Nature, chiefly inſiſt on the Seventh Commandment in the *Decalogue*, *Thou ſhalt not commit Adultery*; which muſt be acknowledg'd to affect the Man, as well as the Woman, “ And therefore, ſay they, if the Prohibition “ lies on both Parties, the Husband muſt be guil- “ ty of Adultery, whenever he receives into the “ Covenant of Marriage, or into the Poſſeſſion “ of his Bed, another Woman, againſt the Con- “ ſent of *Her* to whom he firſt plighted his Faith, “ and gave the Power over his Body [i].

In return to this Argument, *Antonius Mattheus* [k], the *Civilian*, affirms, that Adultery cannot be committed, either by *Polygamy*, or between a married Man and an unmarried Woman [a], but only with another Man's Wife [b]. Nor will he allow every Violation of the Marriage-Covenant to be the Sin of Adultry: For we never call him an Adulterer, who maliciouſly forſakes his Wife, who refuſeth to give her Maintenance, and the like; yet ſuch a Man, without doubt, breaks his matrimonial Faith. He [1] adds, “altho' it be unjuſt in the Husband, to require a ſtricter Chaſtity of his Wife, than he practiſeth himſelf; yet this by no means proves the Sin on both ſides to be equal. For every one knows, that the Wife is, upon many Accounts, oblig'd to a much ſeverer Degree of Moderation and Purity; in regard, as well to the Modeſty of the Sex, as to the Danger of confus'd Amours, and of a ſuppoſititious Breed; as likewiſe to prevent the Scandal her Lightneſs would bring, not only on her own Family, but on the Government under which ſhe lives. For if it be reckon'd ſo very diſgraceful to be born of Parents, one of whom is a Native, the other a Foreigner, in ſo much that in moſt Countries a Name of Reproach is fix'd on Perſons of this motly Race; how much fouler an Infamy would it prove, as well to the whole State, as to particular Men, ſhould it be left uncertain, whether the Subjects are born in Adultery, or in lawful Marriage? In *Leviticus* [c] Adultery is defin'd, *The coming to another Man's Wife, the polluting another Man's Bed.* Nor can it on any account appear probable, that a Law againſt Adultery, directed to a People who actually uſed *Polygamy*, ſhould forbid this Practice, without declaring as much in expreſs Words. Thoſe Expreſſions of holy Scripture [d], and of the primitive Fathers [e], which ſeem to make the coveting, or deſiring another Man's Wife, to be Adultery, are to be underſtood in the ſame Senſe, as when he that *hates his Brother* [f], is ſtil'd a Murtherer.”

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[a] Add. *Abrah. Roger.* de *Bramin.* p. 1. c. 13. & *Alex.* de *Rhodes* Itinerar. *p.* 2. *c.* 11. *Add. Nouv. Memoires de la Chine.* Tom. 2. l. 4. & Will. Bosman's Voyage to *Guinea*, Lett. 19. & Mr. Bayle's *Nouvelles de Avril*, 1685. as alſo Lyserus's Book, entituled, *Polygamia Triumphatrix.*

[a] Eſpecially, if they imitate *Zenobia*, Queen of the *Palmyrenes*, who would not admit the Embraces of her Husband upon any other Account, than the obtaining of Children. *Trebell. Poll. in* xxx. *Tyran. cap.* 30.

[b] *Gen.* xxxi. 50.

[c] *Add.* Lib. 45. t. 1. l. 121. ſ. 1. *D. de Verb. Obligat.*

[d] See *Geneſ.* xxx. 15, 16. *Herodot. Thalia*, pag. 120. Ed. *H. Steph.* “ The *Perſian* Wives take their turns and Courſes with their Husbands.

[e] *Aſinar.* Act. 5. Sc. 2. *Add.* lib. 48. t. 5. l. 13. ſ. 5. *D. ad L. Jul. de Adult.* & *ad eam Grot. in Flor. Sparſ. ad Jus Juſtinian.* Women are ſeldom ſo very ambitious of Honour, as to be ſatisfied with the Excuſe which *Ælius Verus* (in *Spartian*) gave his Lady, when ſhe complain'd of his Miſtreſſes: *Give me leave,* ſays he, *to ſatisfy my Inclinations by ſome other means:* A *Wife* is a Name of Dignity, not of Pleaſure. *Add.* Plaut. *Mercat.* Act. 4. Sc. *ult. Gratian*, Cauſ. 32. Qu. 6. c. 2, *&c.*

[f] 'Tis a Saying of *Euripides* in *Supplic*, ver. 40. That *Women who are wiſe, will tranſact every Thing by Men.*

[g] *Vid.* Benzo, *Hiſt. Nov. Orb.* p. 1. c. 37.

[h] The Reaſons urg'd by *Dionyſ. Godofred.* (*ad* Lib. 1. t. 9. l. 7. *C. de Judæis*, &c.) will be found upon Examination, very ſlight and trivial.

[i] *Gratian.* Cauſ. 32. Quæſt. 5. cap. 15, 16, 23. Vid. *Bæcler.* ad *Grot.* l. 2. c. 5. ſ. 9. *Hobbes* hath made ſome kind of Reply to this, in his Sixth Chapter *de Cive*, ſ. 16. and in his 14th Chapter, *ſ.* 9. which we ſhall elſewhere take occaſion to examine in *lib.* 7. *c.* 1.

[k] *De Crimin. ad L. Jul. de Adulter.* c. 1. ſ. 13.

Others chooſe to anſwer thus, “The Commandment alledg'd doth indeed bind Men, as well as Women: And therefore for one Huſband to diſhonour another's Bed, is no leſs ſinful, than for a Wife to defile the Bed of her proper Husband. But then *Polygamy* doth not make the Husband guilty of this Treſpaſs againſt his Neighbour. It is true, if in the Original Contract between the Parties it was expreſly provided, that the Man ſhould transfer the whole Power over his Body to the Woman, then in caſe he brings an Uſurper to her Bed, whether under the Name of an Harlot, or of a Wife, he certainly violates his Faith given in the former Matrimony. But we have no ſuch Charge of Perjury to lay againſt him, if at the firſt Marriage he reſerv'd to himſelf the Liberty of adding a ſecond Conſort, as a Partner to her whom he then receiv'd. Nor can he be ſaid to defraud her, in as much as he bargain'd to allow her only a Share in himſelf.” To this it is reply'd, That *we muſt not ſuppoſe the Woman would thus conſent to her own Loſs and Injury, unleſs either compell'd by Force, or Fear, or moved by Weakneſs and Defect of Judgment; neither of which Cauſes are able to found a Right in the Man.* But the Aſſertors of the other Opinion will not grant, that there is any Injury in the preſent Caſe. “All the Right and Title, ſay they, that one Perſon can have to the Body of another, muſt ariſe from Covenant, and from the Conſent of that other Party. And conſequently, if ſo much be perform'd, as was fairly covenanted for, there ought to be no Complaint of Injurious dealing. It is no good Conſequence to ſay, that becauſe, in juſt and true Matrimony, the Huſband receives the full and perfect Poſſeſſion of the Wife; therefore the Wife obtains the ſame abſolute Title to the Husband. Nor will ſuch an unequal Covenant prejudice the natural equality of Mankind. For to ſalve this, it is not neceſſary, that the mutual Performances amongſt all Perſons ſhould be exactly alike: If ſo, it would be repugnant to the Law of Nature, that one Man ſhould be born a Prince, another a Subject, and both by virtue of an antecedent human Covenant, not made by themſelves, but by others. Will any one be ſo extravagant as to maintain, that 'tis a Breach of natural Equality, unleſs the Wife be allow'd her Turn of Governing, as well as the Husband? And there is the ſame Difference obſervable in the Care of the common Off-ſpring: How little Trouble doth this bring to the Father, in compariſon to the grievous Pains undergone by the Mother? Would it not be a moſt ridiculous Propoſal, for the Women of State to deſire a Part in the ſupreme Adminiſtration? And yet we muſt not ſay, that the Men are guilty of Injury and Tyranny for excluding the fair Sex from this honourable Privilege. Should any People be of ſuch a Temper, as to deſire the Eſtabliſhment of a ſtricter Government (which the bolder Patrons of Liberty are wont to call, the Treatment of Slaves) if they too freely indulge the Reins to the new Power, they act fooliſhly, and tranſgreſs that *ruling Prudence*, which is the beſt-lov'd Siſter of *natural Law*. So that to commiſerate the Condition of the Wives in *Turky, &c.* is as abſurd and impertinent, as to beſtow our Pity on Husbandmen and Artificers, and condoling with them, that they ſhould be ſo unfortunate, as to live in more uneaſy Circumſtances, than the Nobility. The Reaſon why a Husband cannot honeſtly admit another Man to partake of his Bed, is built upon a different Bottom. On the whole it may be concluded, that a Woman lies under no reſtraint of Conſcience, from agreeing to this Kind of Matrimony, in a Country where the Practice is publickly receiv'd. Eſpecially, ſince

Mr. BARB. *NOTE on* § XVIII.

[1] So the *Digeſts* ſpeak, *Periniquum videtur eſſe, ut pudicitiam vir ab uxore exigat, quam ipſe non exhibeat.* Lib. 48. tit. 5. *Ad Leg. Jul. de adulteriis coercendis,* Leg. 13. § 5.

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[a] S. 12.

[b] L. 6. ſ. 2. *D. h. t.*

[c] *Levit.* xviii. 20. xx. 10.

[d] *Matt.* v. 28.

[e] Produced by *Gratian,* cap. 3, 4, & 1. quæſt. 4. cauſ. 32. & c. 5. quæſt. 6. cauſ. *eadem.* C. 4, 10. *De eo qui cognov. Conſanguin. Uxor. ſuæ.*

[f] 1 *John* iii. 15.

" if it were in any degree Vicious, yet the bare " Force of the weaker Sex could never prevail " to the beating down a publick Cuſtom; nor " would all of them join in the Attempt: Some " being ever more kind and friendly than others, " and more unwilling to engage againſt the " Men [a]. The Example of the Heathens, " and of the *Mahometans* (who are allow'd four " Wives, and as many Concubines as they can " maintain) may indeed be of no great Force " in the Argument; becauſe it appears, that thoſe " People are guilty of many Violations of the " Law of Nature; but the Polygamy of the Fa- " thers, under the old Covenant, is a Reaſon, that " ingenuous Men muſt confeſs to be unanſwerable. " As to the Saying of the Apoſtle, 1 *Cor.* vii. 4. " it doth not ſeem to reach the primary Deſign " and Uſe of Matrimony, but only the ſecondary " and indirect End, *the avoiding Fornication*: which " End belonging in the ſame degree to the Man " and to the Woman, Humanity and Equity en- " join, that the ſame Proviſion ſhould in this re- " ſpect be made for both Parties; and then it " follows, that the Husband ought not to deny " his Wife conjugal Favours. But the communicating his Favours to others beſides her, doth not " here ſeem to be forbidden.

XIX. However it be, this is very clear and certain, that the moſt decent, the moſt proper, and the moſt peaceable Way of Wedding is, for *one to live contented with one.* This then is, without all doubt, to be eſteemed the higheſt, and the moſt perfect Kind of Matrimony; and the Laws and Conditions of it are moſt religiouſly to be obſerv'd, as well by the Husband, as the Wife [1][2][3]. It is worth remarking, that where ſeveral Wives are allow'd to one Man, he ſeldom fails to ſingle out a Beloved, whom in all reſpects he prefers to the reſt [b]. Thus Nature it ſelf ſeems, out of Multitude, to lead us into Unity. 'Tis a wiſe Obſervation that of *Saluſt* [4], *The Relation,* ſays he, *of a Son-in-law, is but ſlightly eſteem'd amongſt the* Numidians, *and the* Moors [5]: *And the reaſon is, becauſe they marry each as many Wives, as they think agreeable to their Fortune and Grandeur; ſome Ten, ſome more, and their Princes with a far wider Liberty. Thus the Mind is divided and diſtracted with Number, and all are deſpis'd, becauſe all cannot be lov'd* [c].

[6] *Grotius* [d] aſſigns theſe Reaſons for the

Mr. Barb. *NOTES on* § XIX.

[1] *Euripid. Andromach.* v. 464, *&c.*

Οὐδέ ποτ' ἂν δίδυμα
Λέκτρ' ἐπαινέσω βροτῶν,
Οὐδ' ἀμφιμάτορας κόρους,
Ἔριν μὲν οἴκων,
Δυσμενεῖς τε λύπας.
Τὴν μίαν μοι στεργέτω πόσις γάμοις
Ἀκοινώνητον εὐνὰν ἀνδρός.

------------------Ne'er will I commend
More Beds, more Wives than one; nor Children curs'd
With double Mothers, Banes and Plagues of Life.
Let each good Man poſſeſs his ſingle Bride,
And check the Intruſion of a Rival Dame.

Iſocrates Nicol. p. 59, 60. *Edit.* Pariſ. " I cannot but greatly condemn thoſe, who having entred upon a Married State for their " whole Life, neglect afterwards to ſtand to the Agreement; but giving a Looſe to their Pleaſures, injure thoſe dear Partners, " from whom they expect nothing but Kindneſs and Comfort. In other Bargains, they are wont to practiſe Juſtice and Honeſty, " and yet make no ſcruple to violate the nuptial Contract, which ought to be ſo much more ſtrictly obſerv'd than all others, as " it is of more ſacred Obligation, and of nearer and more important Concern."

[2] Plaut. *Mercat.* Act. 5. Sc. 1. v. 8.

Nam uxor contenta eſt, quæ bona eſt, uno viro;
Quî minus vir unâ uxore contentus ſiet?

A good Wife is contented with one Husband,
And why ſhould not an Husband with one Wife?

Plutarch. de Præcept. Conjugal. " They ſay, that a Cat, upon ſmelling certain Eſſences or Perfumes, is driven to Madneſs. " Did the ſame Effect hold in Women, ought not Men to abſtain from uſing ſuch Perfumes, rather than cauſe ſo great Misfor- " tunes for the ſake of a worthleſs Pleaſure? Why, the Diſhoneſty of a Husband is as likely a Means to throw his Wife into " Diſtraction, as the moſt offenſive Smell could be: And conſequently, it is moſt unjuſt, on the account of an idle Satisfaction, to " bring ſo grievous Affliction on an innocent Perſon; and not rather to preſerve the Nuptial-Bed uncommunicated and unſtain'd."

[3] *Clytemneſtra* in *Eurip. Electra,* v. 1035, *&c.*

Μῶρον μὲν οὖν γυναῖκες, οὐκ ἄλλως λέγω.
Ὅταν δ' ὑπόντος τοῦδ', ἁμαρτάνῃ πόσις,
Τἄνδον παρώσας λέκτρα μιμεῖσθαι θέλει
Γυνὴ τὸν ἄνδρα, χ' ἄτερον κλᾶσθαι φίλον.
Κἄπειτ', ἐν ἡμῖν ὁ ψόγος, λαμπρύνεται,
Οἱ δ' αἴτιοι τῶν δ', οὐ κλύουσ' ἄνδρες κακῶς.

Women are Fools: 'tis own'd; and by a Woman:
But when Men take Advantage of the Folly,
Slight home, and ſcout abroad for lawleſs Love;
No wonder if the Dames return the Wrong,
Seek out new Mates, and practiſe as they're taught.

[4] *Saluſt*'s Words are, *Etiam antea Jugurthæ filia Boccho nupſerat. Verum ea neceſſitudo apud Numidas, Mauroſque levis ducitur, quia ſinguli pro opibus, quiſque quam plurimas uxores, denas alii, plures alii habent, ſed Reges eo amplius. Ita animus multitudine diſtrahitur, nullam pro ſocia obtinet, pariter omnes viles ſunt.* In *Bell. Jugurth.* c. 82.

[5] Claudian *de Bello* Gildon, ver. 442. makes this Reflection on the ſame People of *Africa*:

------------*Connubia mille:*
Non illis generis nexus, non pignora curæ;
Sed numero languet Pietas.

------------A Thouſand nuptial Bands they wear,
Blood is no Union, nor their Race their Care;
But Love expires in Number.------------

[6] We may here add the Reflexions of the famous Mr. Bayle, in his News-Letters upon the Occaſion of *F. Maimbourg*'s critical Hiſtory of *Calviniſm*. It is certain from the Experience of all Countries, where Polygamy is allow'd, that the Peace of Families is not ſo great in them, as among Chriſtians. And as for thoſe Banterers, that would have Women to be taken upon tryal, and if Men did not like them, leave them: I anſwer them, That if this Liberty were permitted Husbands only, 'twould be unjuſt; and if it were granted to both Sides, the Husbands would be catch'd; for when they would keep to their firſt Market, their Wife would not agree to it, and ſo they'd ſee themſelves obliged to leave Things as they were, to avoid greater Trouble.---------As a Servant never does his beſt but for two or three of the firſt Weeks, ſo it would be in the Service of new Husbands, who take Wives upon tryal. Women would not paſs all their youthful Days in ſuch Tryals. This being ſo, our Banterers would get ſo little by it, that they'd find it the ſhorteſt and beſt way to keep to the Chriſtian Inſtitution, tho' there were no Command from God to authoriſe it. *Lett.* xxii.

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[a] *Iſaiah* iv. 1.

[b] *Geneſ.* xxix. 29. *Deuter.* xxi. 15. *Eſther* ii. 17. *Cant.* vi. 7, 8.

[c] To the ſame purpoſe *Amm. Marcellinus* (l. 23. c. 12.) ſpeaks of the *Parthians, Their Affection grows cool and languid, by the unbounded Variety they make uſe of in their Pleaſures.*

[d] *De Verit. Rel. Chriſt.* Procop. *Hiſt.* Vandal. *l.* 2. *Be Ye concern'd for your Children, ſay the* Barbarians, *who are chain'd to the Neceſſity of a ſingle Bed: As for Us, who, if we pleaſe, can have Fifty Brides together, we are in no fear of wanting Poſterity.* Eurip. Androm. *v.* 177, *&c.*

Reception of *ſingle Marriage* amongſt *Chriſtians*; *That the Wife, beſtowing herſelf entirely on the Huſband, may receive the equal return of his whole Heart and Affection: That the Family-Affairs may be carried on with more regularity under a ſingle Miſtreſs; and that many Mothers may not create Feuds and Quarrels amongſt the Children.* To which we may add, that after the ſufficient Multiplication of Mankind, *Polygamy* ought, amongſt all Nations of tolerable Civility, to be reſtrain'd on this politick Account, that by too great a Number of Children the nobler Family muſt in time be reduced to Poverty, the meaner to Beggary, and the *State* oppreſſed with an idle Swarm of baſer Populacy: which if not prevented and thrown off (as it cannot always be) will at length overturn all Order and Government, and ſink the Commonwealth under its own Weight [a]. We are told that the *Turks* themſelves, in the Point of Marriage, do not now take the ſame Liberty as they formerly us'd, and as their Law allows: The Cauſe of which alteration is, not perhaps ſo much the Increaſe of *beſtial Luſt* amongſt them, as their Experiences of the Inconveniences and Miſchiefs attending *Polygamy*.

XX. Another Controverſy, no leſs warmly manag'd, is, Whether Matrimony, by the Law of Nature be a *Society*, or Partnerſhip, capable of being diſſolv'd; and conſequently, Whether *Divorces* be by the ſame Law allowable? And here we ſhall take the ſame Courſe as before, to lay down the Streſs of what both Parties urge upon the Point, leaving the conſiderate Reader to paſs Judgment for himſelf. Firſt of all, it is taken for granted, that according to the common nature of *Covenants*, one Party cannot recede, unleſs the other hath either broken the Agreement, or elſe yielded his Conſent to this Releaſe. It will therefore be repugnant to the Law of Nature for either of the married Couple to depart from the other unconſenting, only for the Improvement of Condition, or Satisfaction of Humour, without being able to alledge any Breach of the matrimonial Pact on the other's ſide. Nor, can the [1] Indulgence of the *Roman* Law [b], in ſome Caſes of Partnerſhip, be brought to juſtify a Deſertion of this kind. For, beſides that the relinquiſh'd Party is moſt certainly *endamag'd* [2]; an Union enter'd into upon account of Gain, may much more eaſily admit of Separation, than this moſt ſtrict and ſacred Tie between Man and Wife. For in Marriage the Parties acquire a *Right* over the Bodies of each other, which ought not, on either ſide, to be taken from them againſt their Will. And indeed, tho' there ſhould be a mutual Conſent of the Parties, yet it would be both indecent and unſafe to allow the diſſolving of Marriage, without [3] very weighty Cauſe: In as much as this Liberty of frequent Divorces muſt exceedingly ſhock the Strength, and Credit of Families; and the Grace and good Order [4] of the whole Commonwealth [c]. And the ſame Reaſon will hold in *Eſpouſals*, which although no farther Progreſs hath been made in order to their Conſummation, yet ought not to be broken off by the Act and Motion of the Parties contracted, unleſs ſome extraordinary Occaſion fall out; or ſome of thoſe Conditions are found defective, on the ſuppoſal of which the Validity of the Covenant dependeth [d]. *Dionyſius Halicarnaſſeus* exceedingly commends the Inſtitution of *Romulus*, by which he order'd one ſort of Marriage [5], ſolemniz'd with the greateſt Ceremony, to be incapable of Divorces. *This Law* (ſays the Hiſtorian) *engaged the Wives* [6] *(who had no Re-*

Mr. Barb. *NOTES on* § XX.

[1] The Words are, *Sed etſi convenit, nè intra certum tempus ſocietate abeatur, & ante tempus renuncietur, poteſt rationem habere renunciatio.*

[2] They ſuppoſe on the contrary, that he that withdraws, doth it either becauſe the other Party hath broken ſome Condition, to which he was obliged by the Contract; or becauſe he hath ſuffered ſome Wrong. *Nec tenebitur pro ſocio, qui ideo renunciavit, quia conditio quædam, quà ſocietas erat coita, ei non præſtatur; aut quid, ſi ita injurioſus & damnoſus ſocius ſit, ut non expediat eum pati?* Digeſt. ibid.

[3] The very Nature and End of that Society proves, that it ought to continue a long time; for we marry not only to have Children, but to bring 'em up. Now a Woman is capable of Conception, and uſually finds her ſelf big a conſiderable time before a Child which is born, is able to provide for its Needs; ſo that the Husband ought to remain with her till her Children are grown up, and of Age to ſubſiſt, either of themſelves, or with ſuch Goods as he gives them. We ſee, that by the admirable Wiſdom of the Creator, this Rule is conſtantly obſerv'd by the Creatures deſtitute of Reaſon. Among the Beaſts, which feed on Graſs and Herbs, the Society of the Male and Female remains no longer than the time of Copulation; becauſe the Milk of the Dam is ſufficient to nouriſh the Young, till they can feed upon the ſame Herbs. But as to Lions, and other Beaſts of a Prey, ſeeing the Dam is not able to provide for her young Ones, the Male alſo hunts for them. We may obſerve the ſame thing in all Birds, unleſs it be tame Fowl, who live in ſuch Places as afford them plenty of Food. But tho' the Conjugal Union of the Husband and Wife continues longer than that of other Creatures, yet there is nothing in that Union (as I think) that can require them to remain together all their Lives, after they have brought up their Children, and put them into a way of Living: That depends, as all other voluntary Engagements do, upon the Contract of Marriage, unleſs they live in ſuch a State where the poſitive Laws command, that that Contract ſhould be for Life. *This is taken out of Mr.* Lock's *Treatiſe of* Government, Part. II. Cap. 7. § 2, *&c.* *See alſo* Algernoon Sidney's *Diſcourſe of* Government, Chap. 2. § 4. *in fin.*

[4] This would produce many Adulteries; for a Man, who in his Anger, or ſome other Paſſion, hath put away his Wife for a ſmall Cauſe, may be reconcil'd to her, when ſhe is married to another, and the Familiarity he has had with her, may eaſily afford him a means to maintain the antient Converſation in private. Beſides, were the Women left thus to the Humour and Inconſtancy of Men, what muſt Children ſuppoſe, when they ſee their Mothers expell'd for no Cauſe, or for Trifles? And how can they have any Reſpect afterward for them from whom they have receiv'd their Beings?

[5] The Ceremony was called, *Confarreation,* becauſe the married Couple, after a ſolemn Sacrifice had been offer'd by the Pontiff, who had join'd them with a ſet Form of Words, eat of the ſame Barley-Cake which had been uſed in the Sacrifice. *See* Lipsius *on* Tacit. Annal. *Lib.* 4. *Chap.* 16.

[6] Dion. Halicarnasseus's Greek is; Οὗτος ὁ νόμος τάς τε γυναῖκας ἠνάγκασε τὰς γαμετάς, ἅτε μηδεμίαν ἐχούσας ἑτέραν ἀποστροφὴν, πρὸς ἕνα τὸν τοῦ γεγαμηκότος ζῆν τρόπον, καὶ τοὺς ἄνδρας, ὡς ἀναγκαίου τε καὶ ἀναφαιρέτου χρήματος, τῆς γυναικὸς κρατεῖν. Lib. 2. p. 95. *Ed. Sylb.*

[a] It is a moſt barbarous Way which the People of *Angola* in *Africk* uſe, to get rid of their vaſt Stock of Men, occaſion'd by Polygamy, when they ſell their ſuperfluous Numbers to the *Americans* for Slaves.

[b] Digeſt. Lib. 17. t. 2. l. 14. *pro Socio.*

[c] Vid. *Val. Max.* l. 2. c. 9. ſ. 2.

[d] Add. *Gell.* l. 4. c. 4.

fuge, nothing to truſt to in Caſe of a Rupture) to *yield a ready Compliance to the Temper of their Huſbands: And it obliged the Husbands, on the other ſide, to uſe their Wives as a neceſſary Poſſeſſion, which they could not, on any account, throw up, or deſert.* And one may reckon among the chief Cauſes of the Decay and Corruption of the *Roman* State, their too frequent Practice of Divorces, either upon ſo ſlight Pretences, or upon none at all [a]. *Ammianus Marcellinus* reports of the *Saracens* what ſeems very agreeable to their barbarous Cuſtoms. *They hire Wives,* ſays he [b], *to ſerve a preſent Turn: And to make ſome ſhew and ſemblance of Matrimony, the Woman preſents her Mock-Husband with a Spear and a Tent; at the fix'd Day, ſhe may, if ſhe pleaſeth, break up and ſeek a new Mate. Varenius* [c] informs us, that the *Dutch*, now and then, contract this kind of Marriage in *Japan*; having liberty to releaſe themſelves at their leaving the Iſland. The like is practis'd in many other Parts of the *Indies*, and the Kingdom of *Perſia* [d]. How vile doth the *Roman* Liberty appear in *Juvenal* [e]?

Cur deſiderio Bibulæ Sertorius ardet?
Si verum excutias; facies, non uxor, amatur.
Tres rugæ ſubeant, & ſe cutis arida laxet,
Fiant obſcuri dentes, oculique minores;
Collige ſarcinulas, dicet libertus: & exi;
Jam gravis es nobis, & ſæpe emungeris; exi
Ocyus, & propera; ſicco venit altera naſo.

Theſe Truths with his Example you diſprove,
Who with his Wife is monſtrouſly in love:
But know him better: For I heard him ſwear,
'Tis not that ſhe's his Wife, but that ſhe's fair.
Let her but have three Wrinkles in her Face.
Let her Eyes leſſen, and her Skin unbrace;
Soon you will hear the ſaucy Steward ſay,
Pack up, with all your Trinkets, and away;
You grow offenſive both at Bed and Board;
Your Betters muſt be had to pleaſe my Lord.
Mr. **Dryden.**

For really, as *Claudian* [f] obſerves,

Fœmina cum ſenuit, retinet connubia partu;
Uxoriſque decus matris reverentia penſat.

A *Matron* for her fruitful *Bed* we praiſe:
And the *Wife's Charms* the *Mother's Awe* repays.

And how ſcandalous was that Law of *Charondas*, mention'd by *Diodorus Siculus* [g], giving Liberty to Husband, or Wife, after a Divorce, to chooſe a new Partner, provided they did not pitch on a younger than the former?

Beſides all this, to put away a Wife looks heinous in the Eyes of all the World, and loads the Woman with ſo much Reproach, that it would appear moſt Baſe and Unworthy to proceed in ſo ſevere a manner, unleſs upon ſome extraordinary Grounds and Provocation. And this may extend it ſelf as well to the Buſineſs of Contracts, as of the more ſolemn and perfect Marriage. Thus when *Radigis*, in *Procopius* [h]. having eſpouſed the celebrated *Brittia*, broke off the Match without being able to allege any Crime on her ſide; the Hiſtorian tells us, *She, unable to bear the Scandal, bent all her Thoughts and Reſolutions on Revenge. For Modeſty and Chaſtity are ſo highly priz'd, and ſo nicely regarded by theſe* Barbarians, *that a Woman turn'd off and deſerted moſt infallibly loſeth her Reputation, though her Virtue be really ſafe and unſtain'd.* It was a wiſe and rational Choice, when the Daughters of *Pollio* and *Agrippa*, "ſtanding for the Place of Governeſs over the *Veſtal Virgins*, the former Lady was preferr'd on this account; becauſe her Father and Mother had liv'd in a long and peaceable Marriage, without Separation; whereas *Agrippa*, on the other ſide, had filled his Family with Jealouſies and Diſſentions [9].

XXI. We are farther to examine, whether we may apply that to Matrimony, which holds good in all other Covenants, that in caſe the Heads and Conditions, eſpecially the chief of them, are broken on either ſide, the injur'd Party hath the Power of receding from the Agreement. And here we may venture to take the Affirmative Part, if the Queſtion be put concerning the neceſſary and eſſential Terms of the Contract. Thus the principal Deſign of Marriage is the procuring of Children, in order to the effecting which, it is requiſite, that there be the neareſt and moſt familiar Communication between Husband and Wife. And therefore if we regard barely the Law of Nature, either Perſon may quit and renounce the Relation, in caſe the other prove guilty of baſe [1] Deſertion, or of voluntary and obſtinate [i] Unkindneſs, as to the Affair of the Bed. This laſt Omiſſion would bear an Action of Law amongſt the Antient *Jews* [k]; and the *conjugal Debt* as well as others might be recover'd by Proceſs in open Court.

Again, the Intent of Marriage is not only that we may obtain Children, but that we may obtain ſuch as ſhall indeed be our own. "On this account,

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[9] Pub. Syrus's Latin is, *v.* 252, 425.

Habent locum maledicti crebræ nuptiæ,
Mulier, quæ multis nubit, multis non placet.

Many Marriages are next to many Curſes. A Woman that marries often, diſpleaſeth often. *Tacit.* Ann. 2. c. 86.

Mr. Barb. *NOTES on* § XXI.

[1] St. *Paul* allows a Diſſolution of Marriage, upon this account, 1 *Cor.* vii. 15. If an Unbeliever (either a Man or Wife of a Chriſtian) departs, let him depart; a Brother, or a Siſter, is not under an Obligation in ſuch a Caſe; *i. e.* he is not ſo bound to him, as either to recall him, or live without marrying.

[a] Senec. *de Benef.* l. 3. c. 16. *Who is now aſham'd of breaking the Nuptial Union, when ſo many Ladies of Eminence and Quality reckon their Years, not by the Number of Conſuls, but of Husbands; and are divorc'd in hopes of marrying, and marry in hopes of being divorc'd?* [b] L. 19. c. 3. [c] *Japon.* c. 13. [d] Olear. *Itin.* Perſ. l. 5. c. 22. Petrus de Valle *Itin.* P. 2. Ep. 17. [e] Sat. 6. v. 141, *&c.* [f] In *Eutrop.* l. 1. v. 72, 73. *Add.* Martial. *L.* 10. *Ep.* 41. [g] L. 12. c. 18. p. 83. Ed. *Rhodom.* [h] Hiſt. *Goth.* l. 4. [i] *Vid.* Plutarch. *Amator.* p. 769. & *in Solon.* p. 89. *Ariſtot. Oecon.* Lib. 1. c. 4. *Diog. Laert.* in *Pythag. Lactant.* l. 5. c. 23. *Gratian.* Cauſ. 3. Quæſt. 5. c. 1, *&c.* [k] *Vid.* Selden. *de Uxore Hebraica,* l. 3. c. 6, 7. *Montaigne's* Eſſays, *L.* 3. *c.* 5.

“ ſays *Joſephus*, *Moſes* abſolutely forbad Adultery; “ thinking it would be every way more happy, “ that the Husband ſhould keep the Poſſeſſion of “ his Bed ſecure and undiſturb'd, and that the “ Production of genuine Iſſue would be alike ad- “ vantageous to private Families, and to the pub- “ lick State. (*Antiqu.* III. 10.)

Nay, and after this End hath been provided for, every honeſt Man is willing to keep his Bed to himſelf, and doth not think it either decent or ſafe, to take Paſſengers a-board, though the Veſſel be firſt laden to his Deſire. Very few Huſbands have ſo high Notions of Courtlineſs and Complaiſance, as to be concern'd at *Ovid's* Cenſure, that,

Ruſticus eſt nimium, quem lædit adultera Conjux,
Et notos mores non ſatis urbis habet [a].

He that won't lend his Bed's a ſtingy Clown,
Unpractis'd in the Freedom of the Town.

It is therefore to be eſteem'd a juſt Cauſe of Divorce, if a Wife voluntarily expoſe her Honour to another Man. As on the other ſide, if ſhe be overcome by the Uſurper, in the way of Force and Violence, we can on no Pretence call her Virtue in Queſtion [b]. And though it be commonly reckon'd a more heinous Crime, to aſſault her Chaſtity thus, by main Strength and Power, than to enſnare or betray it by Flattery and Charms [2]; yet the Truth is, the former indeed offers the more grievous Injury to the Wife, but the latter to the Husband [c].

It appears then, that the reaſon why Adultery and wilful Deſertion are accounted ſufficient Cauſes of Divorce, doth not ariſe from any particular poſitive Law of God (as if theſe two Exceptions were added to that Ordinance which makes the Bond of Marriage perpetual) but from the common Nature of Covenants, which is ſuch, that when one Party hath broken the Agreement, the other is no longer oblig'd to keep it. And the Force of theſe Cauſes is ſo extenſive, as to juſtify the injur'd Perſon, not only in refuſing to cohabit with the perfidious Wretch, but likewiſe in paſſing to a ſecond Marriage; whatever the *Canoniſts* urge to the contrary. Indeed thoſe grave Profeſſors, when they are to gratify a Friend in this Point, do not ſcruple to find out a way of eluding their own Decrees, by declaring the former Marriage to have been originally null and void; an Evaſion which they can ground on many plauſible Scruples.

But altho' Marriage be chiefly enter'd into upon the Deſign and Hopes of Children, yet the bare Inability of either Party (otherwiſe fit for a Conjugal State) towards promoting this End, doth not ſeem a ſufficient Ground of Separation; in as much as it is a thing ſurpaſſing all human Power to beſtow the Bleſſing of Increaſe. Yet *Carvilius Ruga*, the firſt Man of the *Romans* that put away his Wife (523 Years after the building of the City) is reported to have taken his principal Motive from the Oath, which the Cenſors required of every married Man, in this Form, *Se habere Uxorem liberorum quærendorum cauſa*; That *he engaged in that Condition on the account of Iſſue* [d].

XXII. But the chief Point of the Controverſy on this Head is ſtill behind, and may be thus ſtated: According to the true regular way of contracting Marriage, the Wife conſents to a conſtant Cohabitation with the Husband, promiſing, according to her beſt Strength, to aſſiſt and comfort him, as well with Sweetneſs of Converſe, as with the Participation of Buſineſs and Cares; and engaging farther to be guided and directed by him, as the Lord and Governour of the Family. In requital for which, the Husband, on the other ſide, is obliged [1] to protect and defend his Wife, to treat her with Honeſty and Civility, and to pay her many other friendly Regards of the ſame kind. Now the Queſtion is, whether the ſignal and enormous Violation of theſe inferior Duties gives a full and fair Reaſon for a Divorce? And here, if we regard barely the Law of Nature, many venture to hold the Affirmative. For ſince a Father hath the Power of diſcarding an undutiful Son, who, at leaſt in natural Conſideration, ſeems more nearly related to him than a Wife; why may not he baniſh his Wife, as a rebellious Member of the Family, when her Manners are intolerable [2], and her Amendment deſpe-

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[2] 'Tis in this ſenſe the Law of the *Digeſts* is to be expounded: *Perſuadere autem eſt plus quam compelli, atque cogi ſibi parere.* As at [c].

[a] *Amor. l.* 3. & *l.* 4. v. 37, 38. *Martial*, L. 6. Ep. 90.

Mæchum Gellia *non habet niſi unum,* *Turpe eſt hoc magis, uxor eſt duorum.*	One Spark ſerves honeſt *Gellia* at a Time. But her two Husbands are a fouler Crime.

Add. *Abr. Roger* de *Bramin.* p. 1. c. 13.

[b] Add. *Valer. Max.* l. 6. c. 1. ſ. 2. *extern. Liv.* l. 38. c. 24. *Xenophon* in *Hieron.* p. 578. L. 48. t. 5. l. 13. ſ. 7. & 39. *princ.* D. *ad* L. Juliam *de Adult.* Ælian. *V. H.* l. 12. c. 47.

[c] L. 11. t. 3. l. 1. ſ. 3. *D. de Servo Corrupto.* To inveigle and perſuade is more than to force and compel.

[d] Vid. *Gell.* l. 4. c. 3. *Valer Maxim.* l. 2. c. 1. ſ. 4.

Mr. BARB. *NOTES on* § XXII.

[1] Thus *Achilles*, in *Homer*. Il. 9. v. 340, &c. ſpeaks;

Ἢ μοῦνοι φιλέουσ' ἀλόχους μερόπων ἀνθρώπων Ἀτρεΐδαι; ἐπεὶ ὅς τις ἀγαθὸς, ϗ ἐχέφρων, Τὴν αὐτοῦ φιλέει ϗ κήδεται.	The Wiſe and Good will cheriſh and defend The Partner of their Bed, their neareſt Friend; Their ſecond Self.------- --------

[2] The Law of THEODOSIUS and VALENTINIAN deſerves to be recited here. They alledge firſt, that the Marriage Bonds ought not to be broken without good Reaſon, in conſideration of Children. The Reaſons which they mention, and for which they allow the Uſe of that ſharp Remedy, but ſome times neceſſary, are theſe; If an Husband or Wife are convicted of Adultery, Aſſaſſinating, Poiſoning, or Treaſon; if they are Forgers of Wills, Sacrilegious, Thieves of any Sort, Harbourers of Robbers; if an Husband has to do with a Whore in his Wife's ſight; if a Woman goes to a Feaſt with unknown Perſons, without the Knowledge and Conſent of her Husband, and if ſhe lies abroad without very good Rea-

ſon

deſperate? Eſpecially if we reflect on the Remark of *Fulgentius*, that a *Wife, the nearer ſhe is join'd to Man by the Law, the more certainly ſhe proves to him, either Honey, by the Sweetneſs of her Temper, or Poyſon; by her froward and malicious Diſpoſition; being really, either a continual Comfort and Refuge, or a perpetual Plague and Torment.* An *honeſt Man*, ſays old *Simonides*, *can have nothing in this World better than a good Wife, nothing worſe than a bad One* [a]. On the other hand, in caſe the Husband treats the Wife with unreaſonable Severity, and denies her the Reſpect due to her Sex and her Relation, ſo as to ſhew himſelf, not ſo much a kind Partner, as a troubleſome and vexatious Enemy, it ſhould ſeem very equitable, that ſhe might be relieved by a Divorce [b].

Another Scruple immediately ariſeth upon this, Whether it be allowable, by the Law of Nature, on the account of intolerable Manners, or of barbarous Treatment, entirely to diſſolve the matrimonial Bond? or, Whether the other conjugal Duties, as the Propagation of Race, *&c.* may not ſtill be continu'd, though the cohabiting in the ſame Family be broken off? In as much as the former Covenant, bearing a regard to Children, ſeems to be Eſſential to Matrimony, the latter only Additional. Thus much then is certain, that ſeveral Pacts may be made between the ſaid Parties, under this Condition, That in caſe one of them ſhould be violated, the others ſhall nevertheleſs ſtand Good. Nay, one and the ſame Pact may be divided into many Heads, and Proviſion may be made, that although one of the Heads be tranſgreſs'd, yet the Parties ſhall proceed in performing the reſt. If the Marriage was contracted under ſuch a Form, it ſeems reaſonable, that the Wife, although ſhe hath by her unpeaceable Carriage forfeited her Title to a continual Cohabitation, yet may ſtill lie under the Force of that Part of the Covenant, which obligeth her to conſult Succeſſion. But, becauſe it is by no means probable, that ſhe, who is unfit for the firſt of theſe Privileges and Duties, ſhould with any Convenience be admitted to the other; that a Man ſhould deſire Iſſue by the ſame Woman, whom he is conſtrain'd to hate: and not rather entertain an abſolute Averſion to the Body, which lodgeth ſo froward a Gueſt: It is the common and regular Practice for the Parties to contract, by one and the ſame Agreement, for their living together, and for their mutual Care of Poſterity: And thus the two Conditions are in ſo cloſe a manner united and interwoven one with the other, that in caſe either be broke, both naturally fall aſunder. It is therefore contrary to the Law of Nature, that the Reaſon before alledg'd ſhould cauſe a Separation from Bed and Board, and yet continue ſome part of the Marriage Obligation, ſo as to hinder the Parties from diſpoſing of themſelves another way. Unleſs ſuch a Separation be enjoin'd only for a time as a Puniſhment to obſtinate Perverſeneſs, and to try, whether there is any probability of Reforming. For it is abſurd to ſay, that the Tie of a Covenant remains in force, whilſt no part of the Debt ariſing from that Covenant can, or ought to be diſcharg'd. And tho' we ſhould acknowledge, that the Party, who gave Occaſion to this Miſchief, is juſtly enough puniſh'd, yet the innocent Party is in the mean while injured, ſuffering thus for the Fault of another, and being oblig'd to live in a State of Celibacy, probably inconvenient, perhaps intolerable.

Thus far then, in the Conſideration of natural Law, the Man and the Woman are upon the ſame Ground. And for this Reaſon *Plutarch* [c] calls that Order of *Romulus*, σφοδρὸν, *very hard and ſevere*, which forbad a Woman to deſert and turn off her Husband, yet gave the Husband leave to diſcard his Wife, *either upon her poiſoning the Children, counterfeiting the Keys, or committing Adultery* [d]. Amongſt the *Athenians* we find either Party might upon ſufficient Cauſe, ſeparate [e] from the other: Though they diſtinguiſh'd theſe two kind of Divorces by different Names. For a Man to put away his Wife was term'd ἀποπέμπειν;

ſons, or is preſent at Plays at her pleaſure; if an Husband lays Snares for his Wife's Life, or ſhe for his; if an Husband beats his Wife. The Words of the Law are: *Solutionem Matrimonii difficiliorem debere eſſe favor imperat liberorum. Cauſas autem Repudii hâc ſaluberrimâ Lege apertius ſignamus. Sicut enim ſine juſta cauſa diſſolvi matrimonia juſto limite prohibemus, ita adverſâ neceſſitate preſſum, vel preſſam, quamvis infauſto, attamen neceſſario auxilio cupimus liberari. Si qua igitur maritum ſuum adulterum, aut homicidum, aut veneficum, aut certè contra noſtrum imperium aliquid molientem, vel falſitatis crimine condemnatum invenerit, ſi ſepulchrorum diſſolutorem, ſi ſacris ædibus aliquid ſubtrahentem, ſi latronem, vel latronum ſuſceptorem, vel abactorem, vel plagiarium, vel ad contemptum ſui, domûſve ſuæ, ipsâ inſpiciente, cum impudicis mulieribus (quod maximè etiam caſtas exaſperat) cœtum ineuntum, ſi ſuæ vitæ veneno, aut gladio, aut alio ſimili modo inſidiantem, ſi ſe verberibus (quæ ingenuis aliena ſunt) adficientem probaverit; tunc repudii auxilio uti neceſſariò permittimus libertatem, & cauſas diſſidii Legibus comprobare. Vir quoque pari ſine claudetur* --------- *nec ullo modo expellat Jugalem, niſi adulteram,* &c. --------- *aut extraneorum virorum, ſe ignorante vel nolente, convivia adpetentem, aut ipſo invito, ſine juſta, & probabili cauſa foris ſcilicet pernoctantem, vel Circenſibus, vel theatralibus ludis, vel arenarum ſpectaculis in ipſis locis, in quibus hæc adſolent celebrari, ſe prohibente, gaudentem,* &c. Cod. Lib. 5. tit. 17. *De Repudiis & Judicio de moribus ſublato,* Leg. 8.

[a] V- *Fulgent. Mythol.* lib. 1. *Simoniden inter Poet. Lyric.* Edit. *H. Steph.* p. 227. *Euripid. Oreſt.* v. 602, *&c.*

Bleſt is the Man, and ſweetly runs his Life
Where ſmiling Fortune ties the nuptial Band;
But he whom inauſpicious Hymen joins,
Wretched abroad muſt prove, and curs'd at home.

[b] Add. *L Theod.* lib. 5. t. 17. l. 8. *C. de Repud.*

[c] In the Life of *Rom.* p. 89. See Mr. *Dacier*'s Note upon the Place.

[d] *Euripid. Andromache.* v. 672, *&c.*

Whether the Man from a Diſloyal Dame,
Or the Chaſt Dame from an Injurious Man
Suffers Reproach; each finds a juſt Relief.
Him his own Strength can vindicate; and Her
Parents and Friends combin'd protect from Wrong.

[e] Potter. *Archæol. Græc.* lib. 4. c. 12.

for a Woman to quit her Husband, was ἀπόλειψις. The reaſon of this variation in Terms is manifeſt; the Woman was receiv'd into the Man's Family, and therefore ſhe could not properly ἀποπέμπειν, *ſend him away*, or move him out of the Houſe, tho' ſhe might, ἀπολείπειν, *forſake him*, and retire to a place of Eaſe and Security.

We have only this to obſerve farther, that upon whatever Reaſons Divorces are tolerated in a Commonwealth, it is highly expedient, that the Cauſe be heard and approv'd by the proper Magiſtrate; and that a Point of ſo very great weight and moment be not left to be decided by the private Conſcience and Diſcretion of the married Pair. For, the Reaſon which *Bodinus* [a] offers to the contrary, *Becauſe this publick way of proceeding muſt neceſſarily impair the Credit and Character of one of the Perſons*, doth not ſeem to conclude with any Force to the purpoſe [b].

XXIII. With regard to the divine Law, either as originally declar'd, or as renew'd by our Saviour, the Difficulty is much greater. This is evident, the *Jews* thought Divorces not only permitted, but commanded (in caſe the Wife diſpleas'd her Husband) by the 24th Chapter of *Deuteronomy*. And farther, there is a place in *Philo Judæus* [c] which ſeems to imply, that Barrenneſs was judg'd a ſufficient Cauſe for the like Separation. Nor are we to doubt but that the thing was frequently practiſed in that Nation, although their ſacred and profane Hiſtory, for more than 700 Years, have recorded none, or very few Inſtances of this kind. For it is not indeed the Cuſtom to regiſter, in publick *Annals*, Matters which are done according to general Uſe, but ſuch only as appear ſingular and extraordinary. In *Iſaiah* [d], and *Jeremiah* [e], amongſt the many Ways of repreſenting and reproving the People's Sins, we find Similitudes taken from a Divorce, as an Action very well underſtood by the Vulgar. *Joſephus* [f] takes Notice of it, as a thing very unuſual, and differing from the ordinary Law and Practice, that *Salome*, Wife to *Coſtobar*, Prefect of *Idumea* and *Gaza*, ſhould ſend a Bill of Divorce to her Husband; whereas, [1] regularly, it was not allowable for the Woman to leave the Man, unleſs he put her away: Excepting only one Caſe, when the Husband falſly reported, that his Wife did not prove a Virgin at their firſt Familiarity; here the Woman had her Choice, whether ſhe would ſtay, or depart; and the Husband, if ſhe choſe the former, was oblig'd to keep her [g]. *Joſephus* [h] reports the ſame of *Herodias*, *Ariſtobulus*'s Daughter, the Lady who was the Subject of St. *John Baptiſt*'s Reproof [i].

But, that our Saviour abſolutely took away this antient Liberty of Divorce, is the Judgment of moſt Divines; grounded on *Matth.* v. 32. xix. 8, 9, &c. *Mark* x. 4, 6, 12. *Grotius* [k] is of Opinion, that it was, from the Beginning, moſt pleaſing to GOD, that the Bond of Marriage ſhould be perpetual; but, whereas the Old-Covenant-Men were not oblig'd to this Strictneſs, our Saviour, under the new Covenant, ratified by an expreſs Law what was before moſt agreeable to the divine Will. Mr. *Selden*'s Explication [l] of the ſame Places of Scripture is to this purpoſe: "There were amongſt the *Jews* two Sects, the "*Sammeans* and the *Hillelians*, who maintain'd "contrary Notions on the Point before us. The "former aſſerted, That a Man ought not to quit "his Wife, unleſs upon ſome Diſcovery of Baſeneſs and Diſhoneſty: The latter, That any Diſlike taken of the Woman, was enough to juſtify a Divorce. Our Saviour then, as an Arbitrator between the two diſputing Parties, declares in Favour of the *Sammeans*; That it was "not Lawful upon ſlight Pretences, to diſſolve an "Union inſtituted by GOD himſelf; but only "upon the commiſſion of foul and ſcandalous "Crimes, comprehended, according to the Genius of the *Hebrew* Language, under the general Term of Fornication [m]. He adds, that amongſt the moſt antient Chriſtians, Adultery was not eſteem'd the only lawful Cauſe of Divorce: As appears from *L.* 8. *C. de Repudiis*, enacted by the moſt Religious of all the Emperours. 'Till by the Superſtition and the Corruption of the *Papal* See, the Bond of Matrimony was declar'd Indiſſolvable during the Life of the Parties. *Buxtorf* [n] hath endeavour'd to make out, contrary to the current of the *Jewiſh* Writers, that in the Words of *Moſes*, *Deuteron.* xxiv. 1. 2, 3, 4. this one Prohibition only is contain'd, "*That a* "*Man ſhall not receive again to his Bed a Wife which* "*he hath once put away*: But that the Cuſtom itſelf, of putting away Wives, is in that place, neither approv'd by *Moſes*, nor plainly condemn'd; "but left as it were indifferent. And, ſays he, the "Obſervation of our Saviour, that this Permiſſion was given by *Moſes*, *becauſe of the Hardneſs* "*of their Hearts*, ſufficiently makes it appear, that "the *Moſaical* Indulgence doth not amount to an "Approbation, but ſignifies only a bare Toleration, or Connivance, exempting from civil Puniſhment [o].

XXIV. Mr. *John Milton* [p], provoked, as it ſhould ſeem, by the Misfortune of his own Family, hath with great Pains endeavour'd to make out, that, even by the Principles of the *Chriſtian Religion*, *an intolerable Diſpoſition*, *a Diſ-*

Mr. BARB. *NOTE on* § XXIII.

[1] See 1 *Sam.* xxv. 44. and Mr. LE CLERC's Note upon it.

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[a] *De Repub.* l. 1. c. 2.

[b] *Add.* Plat. *de LL.* l. 11. p. 974. Ed. *Wech.* Charron *de la Sageſſe*, l. 1. c. 46. n. 12. Selden *de J. N. & G.* l. 5. c. 7.

[c] *De Leg. Special.* p. 782. B. Ed. *Pariſ. Herodot.* lib. 5. p. 190. Ed. *H. Steph.* the whole Paſſage runs thus; "Men who take Wives, being uncertain of their Fruitfulneſs, if, finding them afterwards to be "Barren, they do not diſmiſs them and force them to lead a ſeparate Life, are very excuſable; in as much as being won by a "long Familiarity and a Courſe of mutual Love, they cannot eaſily do Violence to thoſe Affections which are ſo deeply rooted "in their Minds. But they who chooſe Women of known Barrenneſs, ſeeking only, like Beaſts, to ſatisfy their luſtful Inclinations, are to be reckon'd amongſt the moſt impious Offenders, as contradicting and oppoſing GOD himſelf, who hath eſtabliſh'd the Laws of human Succeſſion.

[d] Ch. L. 1.

[e] III. 1. 6.

[f] *Antiq.* L. 15. c. 9.

[g] *Vid.* Phil. Jud. *de Special. Leg.* p. 789. D. Ed. Pariſ.

[h] *Ant. Jud.* L. 18. c. 7.

[i] *Matt.* xiv. *Mar.* vi.

[k] L. 2. c. 5. ſ. 9.

[l] *De Uxore Ebræa*, l. 3. c. 22.

[m] Vid. *Val. Max.* l. 9. c. 2.

[n] *De Sponſal. & Divort.*

[o] Add the excellent Diſſertation of *Grotius* on this Point, on *Matt.* v. 31, 32.

[p] In his Book of *the Doctrine and Diſcipline of Divorces.*

parity, or Contrariety of Mind, is a ſufficient Reaſon for Divorce; nay, *that Perſons, ſo unhappily pair'd are indeed under an Obligation to ſeparate.* We hope we ſhall not ſeem tedious, if we venture to run over his chief Arguments. In the firſt place, then, he lays down this Aſſertion to build upon; *God, in the firſt Ordaining of Marriage taught for what End he did it, in Words expreſly implying the apt and chearful Converſation of Man with Woman, to comfort and refreſh him againſt the Evils of ſolitary Life: not mentioning the Purpoſe of Generation 'till afterwards; as being but a ſecondary End in Dignity, though not in Neceſſity.* Now this Bottom we take to be falſe. When God was pleas'd to give Man a *Helpmeet for him* [a], and afterwards commanded the primitive Couple to *increaſe and multiply* [b], he did not hereby ordain two different Ends of Marriage; but the latter Words ſeem deſign'd to deſcribe the chief Fruit ariſing (through the divine Benediction) from the mutual Aſſiſtance firſt mention'd. And indeed, if the bare Delight of Converſation had been the principal Intent of the Creator, what need was there of a Difference in Sex? For take away the Procreation of Off-ſpring, together with the Pleaſures which by the Appointment of Nature ſweeten and recommend it, and Men alone would have been more agreeable Companions, and more able Aſſiſtants to each other. And thus we ſee, that Boys and old Men, thoſe who have not felt the Paſſion of Love, and thoſe who are paſt it, agree in preferring the Converſe of their own Sex to all the Charms and all the Entertainments of the Fair. But Mr. *Milton* ſeems to dream of ſome more delicate and more refin'd Pleaſures; and frames the Idea of a Wife ſuitable only to the Genius of a wiſe and learned Husband: He would have her able to be the Companion of his Studies, or to refreſh him with her Wit, when he comes from ſeverer Meditations, to compoſe his Cares with ſweet Diſcourſe, and charm away a melancholy Fit. Whereas although there is no conſidering Man, who would not infinitely prefer the Pleaſure of the Mind, to the ſhort and empty Gratifications of Senſe: Yet, it is ſo very difficult to find a Woman of this philoſophical and elevated Temper, that there is ſcarce any Man eminent for Wiſdom and Learning, who might not ſue for a Divorce, on this Pretence. And therefore, if there be any Perſon of ſo mortified a Spirit, as to think the continuing of his Name and Race ſo mean and worthleſs a Deſign, and who feels no Pains, that the Fair only can cure, he ſhould on all Accounts be adviſ'd to lead a ſingle Life: For, 'tis no wonder, if Coldneſs and Gravity prove ſo ill Companions for Charms and Beauty. Laſtly, whatever the Aſſertors of theſe Opinions pretend, 'tis impoſſible they ſhould give any other Reaſon, why the Converſation of Women was rather inſtituted as a Help for us, than that of Men like our ſelves; except, that Nature hath wiſely fix'd in the difference of Sex ſweeter Engagements, and more peculiar Propenſions. It may then, on the whole Matter, be the ſafer way not to endeavour the bringing this high and *Platonical* Strain of Notions into practice (but, conſidering the ordinary Temper and Capacity of the female Sex) to judge her a very convenient and proper Partner, who is able to ſuſtain a Share in the Concern of Children, both as to their Birth and Education, and in the Care of directing the Family; altho' ſhe be able to afford little Aſſiſtance in deep Speculations and in ſtudious Enquiries. *Juvenal's* [1] Advice hath ſomething in it beſides Satyr,

Non habeat matrona, tibi quæ juncta recumbit,
Dicendi genus, aut curtum ſermone rotato
Torqueat enthymema, nec hiſtorias ſciat omnes,
Sed quædam ex libris, & non intelligat: Odi
Hanc ego, quæ repetit volvitque Palæmonis artem,
Servatâ ſemper lege & ratione loquendi,
Ignotoſque mihi tenet antiquaria verſus,
Nec curanda viris Opicæ caſtigat amicæ
Verba: Solœciſmum liceat feciſſe marito.
Sat. *6.* v. 447, *&c.*

O! what a Midnight Curſe has he, whoſe ſide
Is peſter'd with a Mood and Figure Bride!
Let mine, ye Gods! (if ſuch muſt be my Fate)
No Logick learn, nor Hiſtory tranſlate;
But rather be a quiet, humble Fool:
I hate a Wife, to whom I go to School.
Who climbs the Grammar-tree, diſtinctly knows
Where Noun, and Verb, and Participle grows;
Corrects her country Neighbour, and abed,
For breaking *Priſcian's*, breaks her Husband's head.
Mr. Dryden.

Strabo [c] reports of the *Brachmans*, that *they never communicate their Philoſophy to their Wives: leſt, if they prove wicked, they ſhould divulge ſome Secrets which ought to have been conceal'd from the Profane; or, if they happen to be good, they ſhould deſert their Husbands. For the equal Contempt of Pleaſure and Pain, of Life and Death, is no good Principle to fit a Perſon for a State of Subjection* [d].

This Remark will hold good in general of Mr. *Milton's* Arguments, that they prove juſt nothing at all, in caſe it be apparent, that our Saviour declar'd Adultery to be the only ſufficient Cauſe of Divorce [e]. To ſeem hard in ſome particular Inſtance, is no Objection againſt the expreſs Words of a Law. We are not preſently for repealing thoſe human Conſtitutions, which appearing uſeful and beneficial to the Commonwealth in general, do yet turn to the Prejudice of one or two private Perſons: Becauſe theſe are look'd upon as Inconveniences which 'tis impoſſible to avoid.

Mr. Barb. NOTES *on* § XXIV.

[1] Juvenal there pleaſantly Laughs at the learned Women of his time, who falſly pretended to Arts and Sciences, or the Defects of that ſmall Number of Women, who are, or might be truly knowing.

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[a] *Geneſ.* ii. 18.

[b] *Ibid.* i. 28.

[c] L. 15. p. 490. Ed *Gen. Caſaub.*

[d] *Euripid. Hippol. Coron.* v. 640, 641.

--------From a Woman wiſe above her Meaſure
Protect me, Heaven.--------

[e] *Vid.* lib. 5. c. 12. ſ. 21.

The only Point he gains is this, that if the Saying of *Chriſt* will bear another Interpretation, it ſhould ſeem more agreeable to the Goſpel Clemency and Goodneſs, to follow a milder Senſe, than that which is at preſent receiv'd. The whole Strength of his Reaſons may be thus repreſented in ſhort. "Incorrigible Diſparity of Mind, or Stubbornneſs of Temper, rendering a Woman unfit to live in Society with ſuch a particular Man, and hindering the chief Benefit of Matrimony, mutual Help and Refreſhment, is a much weightier Cauſe of Divorce, than any natural Defect, any Diſtemper, any uncleanneſs of Body; which yet were allow'd as lawful Pleas by the *Jewiſh* Diſpenſation [a]. No Partnerſhip can *oblige* Perſons concern'd, in Contradiction either to the chief End of its Inſtitution, or to the Intentions and Hopes of both, or of either Member. Now it was the Deſign of the wiſe Creator, not to give Man a domeſtick Torment, but a kind Help to join with him, not only in the bringing of Children into the World, but in the Education of them, and in the whole Buſineſs of Life; which End intolerable Sowreneſs of Temper doth plainly pervert and deſtroy. It looks abſurd and unreaſonable, that the *Canon Law* ſhould without Scruple declare *Impotency* a ſufficient Cauſe of diſſolving Matrimony, and yet allow no Regard to the Manners and Diſpoſitions of the Parties: eſpecially ſince the former may immediately be diſcover'd; whereas 'tis uſual craftily to diſguiſe and conceal the latter, 'till the poor Man runs ignorantly into the Snare, whence he can never be releas'd. It is againſt the Law of Charity: nay, it is moſt barbarous and inhuman, to confine and chain down a Man to ſuch Miſeries as are not to end 'till his Death; and which would admit of an eaſy Cure, did not the Severity of this poſitive Ordinance ſtand in the way: in as much as God Almighty, in his Laws and Commands, ſeems to have mercifully accommodated himſelf to the Infirmity of human Nature. The Holy Scriptures preſcribe Matrimony, among other Reaſons, for the avoiding of Temptations to Incontinence. But now the Man who can find in Marriage no Reſt or Comfort to his Mind, who is perpetually teiz'd and diſturb'd by an untoward Partner, muſt needs be aſſaulted with ſtronger Temptations, than if he liv'd in Celibacy. For his Heart will be ever full of Diſcontent; and becauſe his Wife is ſo unpleaſing an Object, he will ſeek to beſtow his Love and himſelf elſewhere. *Maimonides*, amongſt the Reaſons of the Law about Divorce, aſſigns this for one, That the Peace and Tranquillity of particular Families might by this means be the more ſurely preſerv'd [b]. Which Reaſon affecting *Chriſtians* as much as *Jews*, it cannot ſeem probable that GOD deſign'd to lay a heavier Yoak on the former, than on the latter [c]. We are commanded in Holy Scripture to remove from us all Obſtacles of Piety: Amongſt the chief of which we may fairly reckon the Frowardneſs of an incorrigible and inſeparable Companion. It is repugnant to Nature, that two Minds directly oppoſite, and admitting of no Poſſibility of Union, ſhould be tied together in a Bond never to be broken. The Chriſtian Emperours [d] have declar'd it as their Judgment, that the Plotting of either Party againſt the *Life* of the other, is a good Reaſon of *Divorce*: and how many Mens *Lives* have been unhappily ſhortned by theſe continual Griefs and Diſcomforts? Marriage is a *Society*: But human *Societies*, inaſmuch as they are held together in a *Moral* Bond, conſiſt rather in the Union of Souls, than of Bodies. Should we ſay otherwiſe of Marriage, we ſhould degrade it below the coupling of Beaſts, in which we frequently obſerve ſome ſort of Affection and Good-will in the Mates to each other. When therefore the Soul doth not find in Matrimony that ſweet Agreement which it ſought, ſo ill-match'd a *Pair* live rather in the Miſery and Hardſhip of a Priſon, than in the Comfort of Society. Solemn Oaths, if either in themſelves improper, or tending to the Prejudice of a Third Party, are capable of a Diſpenſation; and hath not the Marriage-Covenant a good Right to the ſame Favour? Nor will it ſignify any thing to anſwer here, that unhappy Matches are laid on Men by Divine Providence, for the Tryal and Exerciſe of their Patience: For Diſeaſes and other Calamities are moſt certainly ſent from Heaven; and yet the Application of human Remedies was never forbidden in ſuch Caſes.

After this, he holds a long Diſpute concerning the *Permiſſion* of Divorce among the *Jews*. "For, ſays he, if it be in the Nature of the Fact *Adultery* for either Party, after a Divorce, to marry again, it follows that *Moſes* eſtabliſh'd *Adultery* by a ſolemn Law. But to imagin this of Inſtitutions which had God for their Author, would not only be abſurd, but moſt profane and impious.

He likewiſe reprehends thoſe Authors who affirm, that the *Jews* had not a *Law* of Divorce, but rather a *Diſpenſation*. "A *Diſpenſation*, he obſerves, is of two Kinds, either *properly* ſo called, or improperly. The latter is rather a particular and exceptive Law, abſolving and diſengaging from a more general Command, for ſome juſt and reaſonable Cauſe: as that mention'd *Numb.* ix. 6, *&c.* and *Deut.* xxv. *v.* 5. and that in *Leviticus*, of marrying the Brother's Wife, upon his Deceaſe without Iſſue. A Diſpenſation, properly ſo called, obtains only in particular Caſes rarely happening, and therefore not ſpecified in

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[a] *Deuteron.* xxiv. 1.

[b] So *Bodinus*, *De Repub.* l. 1. c. 3. affirms, *Never was any Law more juſt and holy than the Divine Ordinance of Divorces, either to curb the Pride of Women, or to reſtrain the Anger and Violence of Men.*

[c] Varenius *Deſcript.* Japon. *cap.* 12. reports of the *Japoneſe*, *Divorces are very frequent in this Nation, though the nobler Perſons ſtill keep the rejected Wife in their Family, and take care of her Maintenance and Support. On this account, the Women apply their Endeavours to diſcover their Husbands Temper and Humour, by which means they may in all things gratify and pleaſe them, and be ever laying new Engagements on their Minds. And being once thrown off, they diſſemble the Injury, and make not the leaſt Complaint, that by the Sweetneſs of their Converſation, and Readineſs of performing all kind Services, they may recover themſelves in their Affections.*

[d] See the Law already quoted in Sect. 22.

“ the Law, but left to the *Deciſion of Charity*, and to the Prudence of the Judges: As upon extreme Hunger, it was lawful for *David* and his Followers to eat the *Shew-Bread* [a]: So that this ſort of Diſpenſation is nothing elſe but the interpreting a Law according to Equity.

Here ’tis worth our Notice that he confounds Diſpenſation and Equity with each other; whereas there is really a wide Difference between ’em. But, as to the Argument, this is certain, whoever will maintain the *Jewiſh* Divorces to have proceeded in the way of Diſpenſations, it lies on him to prove, that there was then extant ſome general Law, declaring Matrimony not to be reverſible upon account of Manners and Temper; which Law muſt either have been a Branch of *Nature’s* Ordinances, or a *Divine Poſitive* Inſtitution. As for thoſe Words in *Geneſis* ii. 24. [b], and *thoſe two ſhall be one Fleſh*, ſome are of Perſuaſion, that they expreſs indeed a moſt ſtrict Partnerſhip, and ſuch as, to break off on a ſlight account, could neither be decorous nor advantageous to Mankind. But it doth not hence follow, that the Knot cannot be untied upon Reaſons which ſubvert the very End and Deſign of Matrimony: As it would be ridiculous thus to argue, *GOD joins Man and Wife together, therefore it is not in the Power of Man to join himſelf to whom he pleaſeth*: or, *therefore no human Covenant ought to intervene.* But what ought to be inferr’d is rather this: God joins the Parties by the Mediation of their Deed and Covenant; therefore it is his Will they ſhould not be ſeparated, unleſs that Covenant be on one ſide or the other tranſgreſs’d.

Mr. *Milton* proceeds to enquire into the Opinion of thoſe who aſſert, that Divorces were by the Divine Law *permitted* only, and not *approved.* This he takes to be an irreverent Reflection on Almighty God; in as much as it betokens Infirmity in a Governour, to allow his Subjects in any Practice, to which he does not really give his Approbation. And why muſt the *Jews* alone have been ſo notorious for *Hardneſs of Heart*, as not to be able to comply with the ſuppos’d primitive and general Ordinance, when ſo many *Chriſtian* Nations and Ages have yielded a ready Obedience to it?

On thoſe Words of our Saviour, *from the Beginning it was not ſo*, ſome thus deſcant: “ In the State of Innocence [2] human Manners were more perfect and excellent, than to give occaſion to any ſignal Trouble and Diſagreement: And therefore the Neceſſity of applying Divorce as a Remedy to unhappy Marriages, is a remarkable Evidence of the impair’d Condition of our Nature.

To conclude; Mr. *Milton* farther cenſures thoſe who alledge, that this Liberty of Divorce was therefore granted to the *Jews* by *Moſes*, becauſe they had been accuſtom’d to it in *Egypt*. For now, when the Weight of the *Egyptian* Yoak was ſtill upon their Shoulders, muſt needs have been the moſt proper time of teaching them to forget the Cuſtoms of that Country. As we ſee ſo many ſtrict and excellent Laws given them againſt *Idolatry*, which they had ſeen practiſed every Day, during their Servitude and Confinement.

But theſe Matters we leave undetermin’d, as not tending directly to our main purpoſe.

XXV. The neceſſary Qualifications required by the Law of Nature, in Perſons rightly contracting Matrimony, are a Fitneſs or Ability, both *Phyſical* and *Moral.* By the former we underſtand ſuch a Conſtitution of Body as is capable of attaining the chief End of Marriage, the Procreation of Iſſue [1]. Therefore ſuch Perſons as labour under a perpetual and incurable Impotency, ſuch as *Eunuchs*, and the like, ought not to aſpire to the conjugal Honour. It was certainly an unnatural Cuſtom in *Egypt*, to allow the *Eunuchs* Wives, becauſe they laid claim to ſome inferior Degree of uſeleſs Pleaſure [c]. And here a Doubt may ariſe, whether we can properly call it *Matrimony*, when an antient Couple are link’d together without any Proſpect of a Bleſſing from the Bed. *Dionyſius*, in *Plutarch* [d], when his aged Mother deſired him to beſtow a Husband upon her, replied, *It was in his Power to do Violence to the Laws of his Country, but not to the Laws of Nature* [e]. Yet in moſt Commonwealths theſe ſort of Matches are tolerated; in as much as the other End of Matrimony, mutual Aſſiſtance and Comfort, will hold as ſtrongly here as in any other Caſe [f]. Perhaps we ſhall not ſpeak improperly if we call theſe [2] *Honorary Marriages*, as we term thoſe Offices *Honorary*, in which a Title only is conferr’d, without Action or Buſineſs. *Nero*, when he deſerted his Wife *Octavia’s* Bed, excuſed himſelf with ſaying, *ſufficere ſibi Uxoria Ornamenta* [g], *He was contented with the bare Ornaments and Badges of Marriage*; in Alluſion to the *Triumphalia Ornamenta* [h], ſometimes beſtow’d on Perſons without the real Solemnity of a Triumph. The Caſe of *David* and *Abiſhag* [i] ſeems to fall under this imperfect Matrimony. Tho’ *Solomon*, in all Appearance

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[2] A fine Explication! As if Men had remain’d ſo long in a State of Innocence, as to make uſe of Divorce. Our Lord explains theſe Words very fully, when he ſays, *Mar.* x. 6. *God created Male and Female, that they twain might become One Fleſh, and be no longer twain, but One Fleſh*, i. e. the Creator intended, that Marriage ſhould be ſo ſtreight and faſt an Union, as never to be diſſolv’d but by Death, or by ſomething extremely contrary to the Nature of that Society, ſuch as Adulteries.

Mr. Barb. *NOTES on* § XXV.

[1] Sosimus, *l.* 5. *c.* 28. ſpeaking of the Empreſs *Mary*, Wife of *Honorius*, ſays, Καὶ τὸ παρ’ ἡλικίαν εἰς μίξιν ἐκδῦναι, φύσεως ἀδικίαν, ϗ ȣ̓δὲν ἕτερον εἶναι. *To put a Virgin in the Marriage-Bed before the proper Age, is no leſs than to do an Injury and Violation to Nature.*

[2] See the *Parœmia Juris Germanici* of Mr. Hertius, Lib. 1. Chap. 67.

[a] 1 *Sam.* xxi. 6. *Matt.* xii. 3, *&c.*

[b] See Mr. *Le Clerc’s* Comment upon the Place.

[c] Grot. *ad* Deuter. *c.* xxiii. *v.* 1. Geneſ. *c.* xxxix. *v.* 1.

[d] *In* Apophthegm. *p.* 175. *E.* Ed. Wech.

[e] *Quintil.* Declam. 306. p. 464. Ed. *Ludg. Bat.* *There may be ſome kind of Unchaſtity even in Marrying.* Idem Declam. 2. p. 23. in fin. *An old Husband is (often) the moſt humble Inſtance of Slavery; and is the more charm’d and overcome with the Magick of the Fair Sex, the colder his own Powers are in the Reception of it.* *Comp.* Val. Max. *l.* 7. *c.* 7. *ſ.* 4.

[f] V. *Lib.* 5. *t.* 4. *l.* 27. *C. de Nuptiis.*

[g] Sueton. Ner. *c.* 35.

[h] Sueton. Auguſt. *c.* 38.

[i] 1 *Kings*, 1.

pearance, eſteem'd the Marriage good and valid; in as much as he gave capital Judgment on *Adonijah*, for begging her for his Wife; becauſe this Attempt of marrying the King's Widow (which in the *Jewiſh* Conſtitution was accounted unlawful) ſhew'd he was driving on ſome Deſign againſt the publick Peace and Eſtabliſhment[a].

XXVI. It is farther ſuppoſed in *Matrimony*, as in all other Covenants, that the Parties contracting it have ſufficient Uſe of Reaſon; that there is no Error, no Flaw[b] in the Eſſentials, and that no unjuſt Fear is on either ſide occaſion'd. In this laſt Point, the *Jewiſh* civil Laws were very particular; by them, if the Woman was compell'd by Force or Fear, the Eſpouſals were revers'd; but not on the other ſide, if the Man alledg'd Compulſion, becauſe there could not be the ſame Preſumption of any Violence or Fright offer'd him: And if the Conditions had diſpleas'd him, he might afterwards have rejected her[c]. In like manner, if there were a Miſtake, either as to the Perſon, the Object of Conſent, or in any Quality, either relating to Matrimony it ſelf, or [1] ſerving as a Condition on which the Conſent was built (eſpecially in caſe of Guile or Deceit uſed on either ſide) the Contract was manifeſtly void. Thus a Wife pretending Virginity, and afterwards diſcover'd defective, was by the Divine Law, not only turn'd away from her Husband, but made liable to ſevere Puniſhments. Tho' the barbarous Nations appear not to have been over curious in this Point of Purity[d]. Thus, again, if a Man in the Covenant of Marriage expreſly inſerted a Clauſe, importing that he took ſuch a Woman for his Wife only in caſe ſhe were of Noble Blood, of ſuch a Fortune, or the like; he ſhall not be obliged to conſummate the Match till the ſuppos'd Condition be made appear. But if, neglecting to enquire into the Truth, he ſhall have proceeded to Conſummation, he ſhall by this Act be judged to have tacitly renounced the conditional Clauſe; and therefore if things do not afterwards come up to his Hopes, he hath no good Reaſon for *Divorce*. For the Contract did not run in theſe Terms, *If you do not bring me ſuch a Fortune I'll divorce you*; but, *if you do not bring me ſuch a Fortune, I'll not marry you*; which are manifeſtly different. He then, who in the Affair of Matrimony thus feels the Charms of the Portion more than of the Lady, is very ridiculouſly Senſeleſs, if he let the Buſineſs be finiſh'd before he hath good Security for that which was his chief Aim[e]. Much leſs ſhall it be lawful to break off a Match, or to forbear conſummating it, when a Man hath catch'd at the Bait of a ſuppoſed Fortune, without bargaining for any particular Summ. And therefore the *Ephori* in *Sparta* did very juſtly in fining the Gentleman, who having been contracted to *Lyſander*'s Daughter in her Father's Life-time, refuſed her, when that Great General was found to die in ſo poor a Condition[f].

What we have been offering holds good only, in *natural Law*. For it is in the power of civil States to enact, that no ſuch Clauſe, belonging indirectly to Matrimony, ſhall hinder or defer the due Conſummation of it.

XXVII. A *moral Ability* of contracting Matrimony is wanting in Women already diſpos'd of to other Men. For the Right of the Husband over the Wife continues ſo long as he doth not actually renounce it. Therefore to marry another Man's Wife, not duly looſ'd and ſeparated from him, is not only unlawful, but void, and ineffectual: Becauſe it was not in the Woman's power to make this ſecond Engagement, whilſt the firſt continu'd in force; and to cohabit with this new Husband, is to live in conſtant Adultery. For the ſame reaſon, in Countries where *Polygamy* is prohibited, a Man cannot without Sin proceed to another Marriage, whilſt he is held by the Bonds of a former.

By the *Jewiſh* Law it was criminal for a Man to take his Wife again, whom he had put away[g]. The reaſon of which Inſtitution no doubt was to prevent the frequency of Divorces on ſlight and petit Occaſions, by cutting off all Hopes of Re-union, when Paſſion ſhould grow cold[h]. Yet ſome, from *Jerem.* iii. 12. collect, that it was lawful to receive again the diſmiſs'd Woman, provided ſhe had not contracted a new Marriage.

It is remarkable in the *Turkiſh Alcoran*, that a Man is allow'd to take home his Wife, even after he hath three times diſmiſs'd her; but not unleſs ſhe has been in the mean time married to another, and been diſcarded by him likewiſe. The *Mahometans* eſteem this as the higheſt Infamy and Reproach, and therefore the famous *Bajazet* thought he could not beſtow a heavier Curſe upon *Tamerlain*, who ſent to defy him to War, than by replying, *If he does not come as he threatens, may he fetch his Wife back, after he hath three times ſent her off*[i]. It is another Precept of the *Alcoran*, that a Man who puts away his Wife, ſhall fix a certain Time, during which, it ſhall be un-

Mr. Barb. *NOTE on* § XXVI.

[1] See what Mr. Bayee ſays in his Anſwer to the *Provincial's Queſtions*, Tom. II. p. 40, *&c.* on the account of Madam *de Mazarin*.

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[a] Grot. *ad* Reg. *d. l. v.* 11, 17.

[b] See above in L. 3. c. 6. ſ. 11.

[c] Selden *de Uxore* Ebræa, *l.* 2. *c.* 4.

[d] See the Cuſtoms of the *Barbarians*, *Diod. Sic.* l. 5. c. 18. of the *Armenians* and *Lydians*, *Strab.* l. 11. of the *Babylonians*, *Herodotus* in *Clio*; of the *Thracians*, Idem *Terpſich.* of the *Adrimachidæ* and the *Naſomones*, Id. *Melpomen.* See *Ariſtippus*'s foul fancy in *Diog. Laert.* l. 2. Add *Boxhorn*'s Notes on *Sueton. Calig.* c. 40. towards the End. *Juſtin.* l. 18 c. 5. n. 4. *Paul. Venet.* l. 2. c. 37. of the Inhabitants of *Tebeth* and *Cathay*. *Conſtantine* the Great aboliſh'd the like Immodeſty amongſt the *Phœnicians*; as we are told by *Sozomon*, Hiſt. Eccleſ. *lib.* 1. *cap.* 8. *lib.* 5. *cap.* 9.

[e] Eſpecially ſince the Managers of Matches uſually anſwer the Character which we find in *Libanius* (*Progymn.* p. 6.) *They come armed with a great many ſtudied Flouriſhes and fine Sayings, and by leſſening what's preſent, and magnifying what's abſent, eaſily prevail on the kind and credulous.*

[f] *Vid.* Ælian. *V. H. lib.* 6. *c.* 4.

[g] *Deuteron.* xxiv. 4.

[h] Grotius (*ad. d. l.*) gives this Reaſon, *Becauſe ſuch a Practice looks like lending one's Wife to another Man, and might yield Shelter and Countenance to the moſt ſcandalous Debaucheries.*

[i] *V.* Laonic. Chalcondil. *l.* 3.

lawful for her to chooſe a new Husband: That he may thus uſe Deliberation in determining whether or no to take her again into Favour.

[1] *Joſephus* [a] mentions a *Jewiſh* Ordinance forbidding a Man to marry *Her* whom he hath perſuaded to leave her former Husband; ſince this Irregularity could not but breed high Diſcontents and Troubles. On the ſame good Reaſon are thoſe *Chriſtian* Canons founded, which deny an Adulterer the liberty of marrying the Woman whom he thus defiled [b]. In this Point *Euripides*'s [c] Obſervation ſeldom fails,

———The Wretch that ſtains another's Bed,
And takes the vile Adultereſs to his own,
Condemn'd to wed her for his Puniſhment,
Is wildly vain, if he expects ſhe'll prove
In her new Vows more chaſt than in her old.

XXVIII. Perſons allied within ſuch a Degree of *Blood*, or *Affinity*, are likewiſe under a Moral Incapacity of contracting Marriage [d]: in ſo much that it is not only from the Beginning unlawful to ſtrike ſuch a Match; but this Engagement, tho' actually concluded, is ever eſteemed Vicious and Defective. This is an Opinion generally receiv'd by all Nations of Manners and Civility; yet to aſſign a ſolid Reaſon for it, ſuch as ſhall flow, like other Precepts, from the ſocial Nature of Man, ſeems at firſt ſight a Point of no ordinary Difficulty. Some Enquirers are content to fly to the Abhorrence of human Affections in this Caſe. "All Perſons, ſay they, " who are not corrupted by ill Education, or " Wicked Habits, do find in their very Senſes, a " Repugnancy and Averſion to ſuch Impurities; " which is a plain Argument that thoſe Things " are prohibited by the Law of Nature." But indeed this repugnancy of Affections is not equally to be diſcover'd amongſt all People, nor always, even amongſt thoſe who pretend to the Art of Culture and Refinement; And when Authors urge it for a Reaſon, it would not be altogether abſurd to anſwer them, that the Abhorrence may perhaps ariſe not ſo much from any in-bred Principle, as from long Uſe and Cuſtom, which often counterfeit Nature. Nor in our Searches after *natural Law*, is it very ſafe to rely upon the bare Judgment of our Senſes and Affections; ſince at this rate we might conclude, that thoſe Things are by the ſame Law commanded, towards which our Senſes and Affections are carried on with a vigorous Inclination; whereas, on the contrary, it is manifeſt that thoſe Acts to which we are ſo violently prone, Reaſon and Nature do really diſallow.

Plutarch [e] enquiring why the *Romans* did not take Wives from amongſt their near Relations, thus propoſeth his Reaſons after his doubting manner. *Was it that they might ſpread their Kindred more widely, and increaſe the Number of their Alliances; giving Wives to ſome, and taking them from others? Or did they it, to avoid conjugal Diſcords? which, ſhould they ariſe between Perſons allied by Blood, would deſtroy not only the Love between Husband and Wife, but the very Principles of natural Affections* [f]*? Or, becauſe they knew the weaker Sex to ſtand in need of many Defenders, were they therefore unwilling to marry their Kinſwomen, that they might be ready to Aſſiſt and Protect them, if injur'd by other Husbands* [g]*?* The firſt of theſe Reaſons, *The ſpreading and improving of Alliances*, is confirm'd by the Approbation of St. *Auguſtin*, and of Biſhop *Cumberland* [h]. But on this way of arguing we may obſerve, that as an Act leſs *uſeful*, or *profitable*, is not always *unlawful*, ſo the *Profit* here alledg'd is not attainable by this only Method: In as much as a far greater Advantage may reſult from the quite contrary Practice; that is, if the neareſt Relations would ſtill match themſelves to each other, their Eſtate and Wealth would be hindred from paſſing out of the Family. And on this account in the Divine Law, *Numb.* xxxvi. 3. Women poſſeſs'd of an Inheritance in *immoveable Goods*, are commanded to take Husbands only from amongſt their Kindred; leſt the Land ſhould run out of one Tribe into another. Yet in caſe they would quit their Title to the Inheritance, they were allow'd to marry any Perſons of their own Nation. The Women of the Tribe of *Levi* were not concern'd in this Injunction, as being incapable of holding Land [i]. In *Peru*, during the Command of the *Yncas*, it was provided by Law, that every Man ſhould chooſe his Wife out of his own City, and his own Family: After the Marriage was concluded, a Houſe was built for the new Couple at the common Charge, and the neareſt Relations preſented them with Furniture [k]. It was one of the *Attic* Laws [l], that *Heireſſes* ſhould be taken in Marriage by their neareſt Kinſmen, to preſerve the Riches of their Anceſtors in the ſame Line [m]. But the ſeeming Hardſhip of this Ordinance was ſufficiently made amends for by another, which commanded, that if the Circumſtances of ſuch a young Woman were but very mean und inconſiderable, the next of her Kindred ſhould nevertheleſs be obliged to wed her, or elſe to give her a Fortune ſuitable to her Birth and Quality [n].

XXIX. In order to the ſettling of theſe Queſtions, it is in the firſt place neceſſary, we examine how it comes to paſs, that altho' the Propagation of ſo noble a Creature as *Man*, be in it ſelf a Work of Honour and Credit; yet amongſt

Mr. Barb. *NOTE on* § XXVII.

[1] This Law of *Joſephus* is not conſormable to Scripture, and the Tranſlation which our Author follows, doth not agree with the *Greek*.

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[a] *Jud.* Antiq. *l.* 4. *c.* 8.

[b] Gratian. *Cauſ.* 31. *qu.* 1. *c.* 1, 2, *&c.*

[c] Electra. *v.* 921, *&c.*

[d] Vid. *L.* 38. *t.* 10. *l.* 4. *ſ.* 3, 4, 5. *D. de gradibus & affinibus.*

[e] *Quæſt.* Roman. 108. *p.* 289. *D.*

[f] For Inſtance, becauſe there often happpen Quarrels between the Husband's Mother and his Wife, therefore a Man (according to this Argument) ought not to marry one that ow'd a natural Reverence to his Mother; *that is*, his Siſter.

[g] V. *Auguſtin* De Civitate Dei, *l.* 15. *c.* 16. cited by *Gratian.* Cauſ. 35. qu. 1. c. 1.

[h] De Leg. Nat. *c.* 8. *ſ.* 9.

[i] *Vid.* Grot. ad *Matth.* i. 16.

[k] Garcilaſſo de la Vega *Comment.* Reg. *l.* 4. *c.* 8.

[l] *V.* Sam. Petit. *in Leg. Attic.* L. 6. t. 1.

[m] Many Suits of Law falling out amongſt the Pretenders to theſe Heireſſes, the young Women got the Title of Ἐπίδικοι.

[n] We find a Law of *Charondas* much to the ſame Purpoſe, in *Diod. Sic.* l. 12. c. 8.

all civiliz'd Nations, as well the *Inſtruments*, as *Act* of this good Service, ſhould be guarded with ſo tender a Senſe of Modeſty, as nothing but a Face harden'd by habitual Wickedneſs can conquer, or ſuppreſs? To which purpoſe we have a moſt remarkable Story, recorded by *Plutarch* [a] and *Polyænus* [b], of the *Miletian* Virgins, who being, [1] by ſome ſtrange and unknown Cauſe, driven to a mad Deſire of hanging themſelves, and their Diſtemper admitting of no Stop nor Remedy; it was at length decreed by a ſolemn Law, that the Bodies of thoſe who diſpatch'd themſelves, in this deſperate way, ſhould be carried naked through the common Market. And by this means, whilſt the Fear of Death could make no Impreſſion on the Frenzy, the Senſe of Shame reſtor'd them to their Wits. It is farther remarkable, that whatever Nations, in antient, or modern Times, have entertain'd a Cuſtom of going naked, or of performing in open view the ſecret Affairs of Marriage, have been cenſur'd and condemn'd by the reſt of the World, as wild and barbarous [c]. Now the reaſon of all this is not ſo eaſy to come at. For as to the immediate Inſtruments of this Work of Nature, they lie under no Scandal of Deformity, and they ſerve to a great and worthy Deſign: And therefore, the *Egyptians* and *Athenians* paid religious Regards to them, in their myſterious Worſhip [d]. The Act it ſelf, as it is agreeable to Nature, ſo is it of abſolute Neceſſity, and every way proper for the producing of ſo brave and generous an Effect. And therefore, why ſhould the Exerciſe of it before others create more *Shame* in a Man, than *Eating* and *Drinking*; ſince the human *Species* can no more be preſerv'd without the former Means, than the *Individuals* without the latter? Nor will *Plutarch*'s Diſtinction ſatiſfy the Doubt. *There is no Pleaſure* (ſays he [e]) *which we can more innocently enjoy, than that which we receive from Food and Nouriſhment. All Men are agreed on this Truth, as they ſhew by their daily Practice. For they eat in full Company, and in open View; whereas in their Love-Affairs they ſeek the Shelter of the Night: Becauſe in theſe latter Ceremonies, to be publick and communicative is eſteem'd as brutiſh and unnatural, as to be private and ſecret in the former.* As to this Point of Openneſs and Secrecy, it was a ſevere Return which a *Scotch* Lady, in the Emperor *Severus*'s Time, gave *Julia Auguſta*, when reproach'd by her for the Cuſtom of holding Wives in Common amongſt the *Britains*; *We* (ſays ſhe) *obey the Neceſſities of Nature much better than You* Roman *Dames: for we do that openly with the beſt of our Men, which you do privately with the Worſt of yours* [f].

Neither do they thoroughly clear up the Matter, who have recourſe to the Holy Scriptures, where the natural Shame is recorded to have been the immediate Conſequence of the *Fall*. For the chief Queſtion ſtill returns, Why the Paſſion of Shame ſhould fix on theſe Parts for its peculiar Reſidence, when our Hands, and our Tongues are as readily diſpos'd to aid our ſinful Luſt, and diſorderly Deſires? Nay in as much as the primitive Tranſgreſſion came by the Act of *Eating*, one might imagine that this *Opinion of Impurity* ſhould rather faſten upon the Mouth as its original and proper Seat.

XXX. The Author of the Treatiſe *de Principiis juſti & decori*, touching on this Subject now before us, in the firſt Place lays down this for a Principle; *Every thing which cauſeth Shame is not a Sin, nor forbidden by the dictates of natural Law* [g]. He inſtanceth in Poverty, mean Cloaths, innocent Miſtakes, Deformity, and the like; which frequently put us to the Bluſh, tho' we can by no means lay any *moral Turpitude* to their Charge. “He proceeds to obſerve, that the reaſon why we would avoid ſuch things, is becauſe they are the Tokens of ſome Infirmity or Imperfection; from which Cenſures every Man deſires to keep himſelf at as great a diſtance as poſſible. In the ſame manner, altho' to diſcover the *Secrets* of the Body be not in it ſelf ſinful, yet a Man ought not certainly to uſe ſuch a freedom in open view, whenſoever it would prove an Offence and Blemiſh to natural Honeſty; which is very often the Caſe. A Man hath then only good reaſon to be aſham'd, when he poſſeſſeth or diſcloſeth ſuch Imperfections, as may make others juſtly deſpiſe him, whilſt appearing thus below the Character which he ſuſtains; To be ignorant of a Point of Learning is no Blemiſh in him who hath wanted the Benefit of Education; but one who hath made a long Pretence to Study, and yet can ſhew no Fruits of his Proficiency, may well be aſham'd of the Neglect. Plain Behaviour ſits decently enough on a Countryman, but would be a faulty Stiffneſs in a Perſon of Breeding. Thus then, he who uncovers in publick Sight thoſe Parts of the Body which the Cuſtom of the Nation bids

Mr. BARB. *NOTE on* § XXIX.

[1] See ſeveral Examples of the like Nature, in Mr. BAYLE's Anſwer to the Queſtions of the Provinc. *Tom.* 2. *p.* 92, 93. in the Margin.

[a] *De Virtute Mulier.* p. 249. C.

[b] *Strategem.* l. 8. c. 63.

[c] Thus *Pompon. Mela* reports of the *Moſſynians*, that their Love-Affairs are *promiſcuous and open*. And *Apollonius Rhodius* in *Argonaut.* l. 2. has left this Character of the ſame People;

The Manners and the Notions they purſue,
Are the reverſe of ours; in publick View
What we perform, or at the crouded Bar,
They act by Stealth, and make a ſilent Care:
But what our Modeſty at Home conceals,
Their Tribes proclaim, and every Street reveals.
Like Beaſts, beyond the Power of Shame to move,
Stretch'd on the Ground they ply their common Love,

Vid. Diod. Sic. *l.* 14. *c.* 31. & Xenophon. *Exped. Cyr.* l. V. Of the *Maſſagetans Herodot.* in *Clio*, towards the End; of the *Naſomones* in *Melpomen.*

[d] *Vid.* Diodor. Sic. *l.* 1. *c.* 88.

[e] Conviv. Sapient. *p.* 158. *F.*

[f] Xiphilin. *Epit.* Dion. *in* Sever. *Add.* Montaign's *Eſſays*, l. 2. c. 12. & Charron de la Sageſſe, *l.* 1. *c.* 22.

[g] *P.* 59, *&c.*

"him conceal, is an Offender againſt natural Honeſty and *Decorum* [a]. But he may take the ſame Liberty in a Country where the Men go naked; as ſuppoſe in the *Caribbies*, without the Imputation of Obſcenity, or of Sin [b]. Thus it is accounted Impudence to do ſome things in the Preſence of Strangers, without deſiring particular Leave, which we make no Scruple of practiſing before our Equals and our Acquaintance [c]. Thus a Teacher of Anatomy lays open ſuch Objects to our View, as it would not be decent for him ſo much as to name, were he not engag'd in his proper Buſineſs and Exerciſe. The ſame Judgment we are to make of the Point before us: "For altho' a Nation, which doth not cenſure theſe unſeemly Freedoms, muſt needs have caſt off all modeſty [d], and this is not without a grievous Sin in their Fore-fathers, from whom the looſe Opinion is deriv'd; yet the Cuſtom being once firmly eſtabliſh'd, and ſuch a Way of living exempted, by univerſal Conſent, from all Marks of Diſgrace, the whole People may then openly appear in the ſame Manner, and yet contract not the leaſt Guilt. In as much as they do not apprehend, or acknowledge in this Practice, any Imperfection, or Infirmity deſerving Shame; more than we do in the Cuſtom of our Women to go with their Faces unveil'd, which in ſome Countries would be reckon'd a ſcandalous Breach of Modeſty [e]. We may farther obſerve, that even in thoſe Nations where the appearing *Naked* is prohibited, the moſt ſecret Parts are ſometimes diſcloſed without Sin, as when they are recommended to the Care of Phyſicians, or when Surprize, or Neceſſity, in regard of Time, or of Want, hinders their Concealment; or when Children are wrapt in their Swadling-Cloaths. Becauſe, in theſe Caſes, the Mark of Impudence ceaſeth; the Diſcovery being made without any laſcivious Deſign [f].

In another part of his Work he repeats the ſame Argument; "The uncovering the ſecret Parts (ſays he) is not in itſelf foul, or indecent, but is only render'd ſuch by means of the Circumſtances; which Circumſtances are taken, either from the Luſt of others, or from their Honour or Worth, or from our own Reputation, which we are oblig'd to ſupport and preſerve. But in as much as the external Tokens of Reverence and Reſpect are capable of great Variation, many Actions are (by the ſame People) conſtrued as an Affront to our Neighbour, or a diſcredit to our ſelves, which, upon the change of Circumſtances, would appear harmleſs and inoffenſive. Upon the Approach of our Saviour, we find St. *Peter* [g] haſtning to gird on his Fiſher's Coat; whereas he was not aſham'd to work naked with the Companions of his Buſineſs. Becauſe the Dignity of *Chriſt*, and the Honour St. *Peter* ow'd him, requir'd a grave and modeſt Appearance and Carriage; which, in the Opinion of civiliz'd Nations, are inconſiſtent with Nakedneſs [h]. We tranſact many things in ſecret with Decency and Convenience, which if perform'd openly, would be reproach'd as Infamous; neither do we reckon it diſhonourable, to let the Company know on what account we retire. Laſtly, many Actions paſs unblam'd in *Men*, which would look inexcuſably impudent in the other Sex.

From St. *Paul*'s manner of Speech, 2 *Cor*. xi. 17. he infers, "That when upon the Formality of begging Pardon, or deſiring Leave of others, we ſay, or do a thing fairly, or civilly, which would otherwiſe be rude and indecent; the Impropriety here doth not affect the Thing abſolutely conſider'd in it ſelf, but depends wholly on the Circumſtances, which if taken away, leave no Ground for Cenſure: For all that is here done, is that the other Party waves and remits the Reverence, which was owing to him. He judiciouſly inſerts this Caution, *provided, that by the general Cuſtom of the Nation, all Men are allow'd to indulge each other in theſe petit Liberties.* For otherwiſe particular Perſons do by no means wipe off the Blemiſh, when they give themſelves a mutual Diſpenſation in ſuch Points: As a Company of wild Sparks could not avoid Shame and Reproof, ſhould they, by joint Conſent, go naked in a Place of Manners and Civility. Laſtly, He makes no doubt but that our firſt Parents, before they ſinn'd, had, in reſpect of Shame [1], the innocent Inſenſibility of Children: But that im-

Mr. Barb. *NOTE on* § XXX.

[1] This is a falſe Suppoſition; for what ſhould *Adam* and *Eve* be aſham'd of, when they alone were in the World, and made one for the other by the Creator? When then the ſacred Hiſtorian ſays, They knew that they were naked; it ſignifies only in the Stile of the Eaſtern People, Their Conſcience accus'd them for the Sin they had committed, in eating of the forbidden Fruit. See Mr. Le Clerc upon *Gen*. iii. 7. The Example of Infants, alledg'd by Mr. Velthuysen, ſhews, that Shame is only the Effect of Education and Cuſtom, wiſely eſtabliſh'd to prevent diverſe Inconveniences.

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[a] *A Woman* in this Caſe, as *Herodotus* expreſſeth it, *L*. 1. *p*. 3. *Ed*. H. Steph. *when ſhe throws off her Garments, lays aſide her Modeſty with them.* [b] In ſome Parts of *Abyſſinia*, the Women go quite naked, without having any irregular Influence on the Men, *Franc. Alvarez* Deſcript. *Æthiop*. c. 32. *Add*. J. Leri. *Hiſt*. Amer. *c*. 8. & Rochefort *Deſcript*. Inſ. Antill. *pt*. 2. *c*. 9. If I miſtake not, amongſt ſome of the *Indians*, to go with the Waſte cover'd, fell under the ſame Penalty as Adultery. [c] And ſince *Claudius* did not put out the wiſe Edict, which was ſo long under his grave Deliberation (*Claud. Suet*. c. 32.) we ſtill make a Scruple of offending the Company with ſome kind of Sounds, which we reckon not quite ſo improper Muſick when we are alone. *Add*. Diogen. Laert. *in vitam* Metrol. *l*. 6. [d] Since amongſt all civiliz'd People, it hath been, even in Death, a Care εὐσχήμως πεσεῖν, *to fall in a decent and modeſt Poſture.* [e] Plato (*in* Diog. Laert. 3.) ſpeaking of unwritten Laws, proceeding from Cuſtom, inſtanceth in Τὸ μὴ γυμνὸν προϊέναι εἰς τὴν ἀγορὰν, *not to appear naked in publick Places.* [f] A *Pigmy* might well be aſham'd of his Size amongſt a People of larger Dimenſions; yet in his own Quarters he is not affected with the Diſgrace.

-------*Ubi tota Cohors pede non eſt amplior uno*: Where the whole Troop make but a Foot in height.

Sir *Tho. Herbert* (Travels, *p*. 21.) reports of Women amongſt the *Caſars*, that if you give them any thing, they uncover all, in way of Civility. [g] *John* xxi. 7. [h] Hence amongſt the *Romans*, Sons, grown up to the Condition of Men, never bath'd with their Parents, nor Sons-in-Law with their Fathers-in-Law, *Val. Max*. l. 2. c. 1. ſ. 7. So in *Livy*, L. 3. c. 26. The Deputies command *L. Quintius*, whom they found ſtripp'd at his Country-Work, to hear the Orders of the Senate in his *Gown*. In the ſame manner, within our own Houſes, and in private, we are not aſham'd of the meaneſt Apparel, which yet we could not appear in at a Wedding, or ſolemn Meeting, without great Indecency and Offence. See *Matth*. xxii. 12.

mediately after their Offence, this guilty Paſſion ſeiz'd upon their Mind, by which they apprehended their Nakedneſs to be indecent, as we, when we grow up to Years of Reaſon, make the ſame Judgment. His Inference from the whole is this, "That no *Degrees* of Marriage are forbidden by "the Law of Nature; tho' to abſtain from ſome "is moſt agreeable to natural Honeſty [a].

XXXI. For our part, tho' we do not think this way of arguing ought altogether to be condemn'd, yet we chooſe to fix the *Shame*, now under our Examination, principally on theſe two Reaſons; Firſt, becauſe Man is a Creature of high and proud Conceits, fondly deſirous of Honour and Grace, and abhorring any thing that ſeems to leſſen him in theſe reſpects. Now through thoſe Out-lets of our Body Nature caſts off the uſeleſs Relicks of what we eat or drink: and theſe Relicks we have a great Averſion to, not only upon account of that *Uncomelineſs*, but in as much as they ſeem to upbraid us with our mean Condition, whilſt the greateſt Delicacies of Taſte, by being once receiv'd within us, are ſo vilely chang'd and corrupted. And hence our lofty Imagination engageth us to be very induſtrious in concealing ſo manifeſt Tokens of our Infirmity [b]. [1] *Nature* (ſays *Tully* [c]) *ſeems to have had a moſt kind regard to the Dignity of our Body, by expoſing only thoſe Parts to ſight, which appear beautiful, comely, and agreeable; and by covering and concealing thoſe which would be foul and offenſive, if laid open to view, and ſerve us only for the meer Neceſſities of our Being. This exquiſite Diligence, which Nature hath ſhewn in the human Fabrick, Men have imitated in their modeſt Cuſtoms and Manners* [d].

Our ſecond Reaſon is, ſince our Affections being deprav'd and corrupted by the *Fall*, our irregular Luſts endeavour violently to make a Sally through thoſe Paſſages; and ſince the due Reſtraints, and the legal Methods of *Propagation*, are the very Hinges on which human Order and Society ſeem to turn; *Nature*, to preſerve her own Dignity, and to cut off, as much as poſſible, all Occaſion of looſe Deſires, hath invented this Paſſion of *Shame*, engaging Men carefully to cover and to guard thoſe weak *Places*, leſt lying continually open, they ſhould tempt and invite the Enemy; and reſtraining the Purſuit of unlawful Pleaſures, whilſt Modeſty confines the Exerciſe of thoſe which are lawful, to the Privacy of Darkneſs and Retirement. Hence our firſt Parents, after the perfect Harmony of their Affections was diſorder'd and impair'd, when they found the unreaſonable Inclination of Senſe, vigorouſly ſtriving to force a way through thoſe defenceleſs Parts of the Body, could not but conceive the deepeſt Shame at this wretched Diſcovery of their own Imperfection; which, in ſome meaſure, to diſguiſe and conceal, they had recourſe to the [2] Shelter of Apparel. That this Original *Shame* of Nakedneſs ſhould, amongſt many Nations, ſeem to have been quite ſubdu'd and effaced, was probably the Effect of Neceſſity: when Men being driven on uninhabited Coaſts, and having worn out their preſent Garments, found no Supply of new ones, nor yet wanted them, by reaſon of the kind Temper of the Climate. Thus their *Shame* dropt off by degrees with their Cloaths; or perhaps they expreſs'd, for a little time, ſome Marks of it in wearing a thin Covering round their Middle, which ſoon left them quite naked.

It's farther obſervable, that our *Shame* is ever increas'd to a high degree, by the Preſence of thoſe Perſons to whom we naturally owe a Reverence, or towards whom we ought to carry our ſelves with Gravity and Caution; ſuch as are eſpecially our Parents, and our Children. So that he who cannot be hereby deterr'd from daring to offer, under theſe awful Reſtraints, the open Freedom and Familiarity of the conjugal State, is fairly judg'd to have an invincible Forehead, and to be well prepar'd for the Commiſſion of the greateſt Villanies, being poſſeſs'd with harden'd Impudence, [3] *The moſt violent Diſtemper of human Minds*, as it is term'd by the wiſe Tragedian [e].

Mr. BARB. *NOTES on* § XXXI.

[1] TULLY's Words are, *Principio, corporis noſtri magnam Natura ipſa videtur habuiſſe rationem, quæ formam noſtram, reliquamque figuram, in quâ eſſet ſpecies honeſta, poſuit in promtu; quæ partes autem corporis, ad Naturæ neceſſitatem datæ, adſpectum eſſent deformem habituræ ac turpem, eas contexit, atque abdidit. Hanc naturæ tam diligentem fabricam imitata eſt hominum verecundia. Quæ enim Natura occultavit, eadem omnes, qui ſanâ mente ſunt, removent ab oculis, ipſique neceſſitati dant operam ut quam occultiſſimè pareant; quarumque partium corporis uſus ſunt neceſſarii, eas neque partes, neque earum uſus ſuis nominibus appellant: quodque facere turpe non eſt, modo occultè, id dicere obſcœnum eſt. Itaque nec aperta actio rerum illarum petulantia vacat, nec orationis obſcœnitas.*

[2] The Original Hebrew may be explain'd as if the ſacred Hiſtorian had ſaid, That *Adam* and *Eve* made themſelves a kind of Cabin, to hide themſelves in, after they were ſenſible of the Fault they had committed. See Mr. LE CLERC upon *Gen.* iii. 7. For theſe irregular Deſires, of which our Author ſpeaks, could not yet be thought to have place in them, unleſs we will ſay, that the Love, which *Adam* and *Eve* had one for another, was unlawful after they had ſinned. See the Note upon the foregoing §.

[3] The *Greek* is,

Ἀλλ' ἡ μεγίστη τῶν ἐν ἀνθρώποις νόσων
Πασῶν ἀναίδεια. ---------

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[a] *Compare* Montaign's *Eſſays*, l. 1. c. 35. & Charron de la Sageſſe, *l.* 1. *c.* 6. & 14.

[b] *See* 1 Cor. xii. 23, 24.

[c] Offic. *l.* 1. *c.* 35.

[d] This ſeems to be taken out of *Xenophon*. Apomnem. *l.* 1. where *Socrates* is ſpeaking of Providence. *Add.* Ambroſ. *Offic.* l. 1. c. 18. *Herodotus* (*Euterp.* p. 64. towards the End) reports of the *Egyptians*, that *They eat their Food in the publick Streets; but retire Home when they have Occaſion to get rid of it; upon this Principle, That whatever was foul and indecent, yet neceſſary, was to be perform'd at Home in ſecret, and every thing which was not foul, Abroad.* Yet we may remark (by the bye) that the ſame People were jeſted upon, for tempering their Clay with their Hands, and their Bread with their Feet. In *Sadus*'s *Perſick Roſary* (c. 8.) this Reaſon is given why the Ring ſhould be worn on the Left-Hand, tho' leſs Honourable than the Right; *Becauſe the Right-Hand is a ſufficient Ornament to itſelf.* Aloys Cadamuſt (*Navig.* c. 10.) tells us of the *Azenagians*, the Inhabitants of *Senega*, that *They are as much aſham'd of their Mouth, as of any other Part of the Body; and therefore they ordinarily go with a Cover upon it, which they only take off on the account of Eating. They take it for a kind of Sink always ſending out Stench and Naſtineſs.* Leo Africanus (*l.* 1.) gives much the ſame Relation, and by him the People are call'd *Senegates.*

[e] Eurip. Medea, *v.* 471, 472. Huart (*Tryal of Wits*, C. 1.) gives another Reaſon for this Modeſty, which we have not leiſure now to examine.

XXXII. This Shame or Modeſty may be aſſign'd as one of the principal Cauſes, why we eſteem Marriages between Kindred, in a direct Line, to be forbidden by the *Law of Nature*: eſpecially ſince there never did, and probably never will any ſuch Caſe happen, as ſhall render theſe Matches *neceſſary* for the Preſervation of human Race [1] [a]. And with regard to this Reſtraint, we are to expound the Reaſon urg'd againſt thoſe Marriages by *Grotius*: [b] *The Son* (ſays he) *being ſuperior by the Law of Matrimony, could not pay to his Mother, if at the ſame time his Wife, that Reverence which Nature requires; no more could the Daughter, in the like Caſe, to her Father; becauſe, altho' the conjugal Pact would keep her ſtill his inferior, yet ſo near a Familiarity muſt needs prejudice her natural Duty* [2]. For take away the Force of this Original Modeſty, and it will not appear ſo very abſurd, for a Mother to marry her own Son; ſince it is agreeable enough, that a Huſband ſhould pay Reſpect and Honour to his Wife on account of her extraordinary Virtue, Wiſdom, or Birth. *Tacitus* obſerves of his Father and Mother in law (*Agricola* and his Lady) *vixerunt mirâ concordiâ per mutuam charitatem & invicem ſe anteponendo:* They liv'd in *wonderful Agreement, thro' the Engagements of* mutual Affection, *and by their kind Care of giving each the* Preference *to the other*. Much leſs inconſiſtent would it be, for a Woman to pay to the ſame Man the Duty of a Daughter, and of a Wife, did ſhe not find a Reſtraint from the above-mentioned Principle.

The Reaſon alledg'd by *Socrates* in *Xenophon* [c], appears very poor and inſipid, as if nothing deſerv'd Blame in theſe Matches, but the great difference of Age, the effect of which muſt either be Barrenneſs, or ſuſpicious and unreſembling Iſſue: For are there not many Marriages in which the Years of the Couple ſtand at as wide a diſtance as thoſe of Parents and their Children?

We cannot on this Head, but recommend the chaſte and pious Regard of the *Roman* Laws, which out of Reverence to the bare Name of a *Father*, allow'd no Man to marry [3] his *Adopted* Daughter, tho' all the Right of Adoption had been formally taken off and revers'd [d]. And the Emperour *Claudius* acted much beyond his ordinary Capacity, when a Woman refuſing to acknowledge her Son, and the Arguments appearing dubious on both Sides of the Cauſe, he oblig'd her to a Confeſſion of the Truth, by ordering the young Man to demand her in Marriage [e].

Some have attempted to ſhew the high Indecency of ſuch a Practice, from the ſtrange Confuſion it would cauſe in the quite contrary Names and Titles of Relation. Thus *Myrrha* argues with herſelf in *Ovid*,

Nec, quot confundas & jura & nomina ſentis?
Tune eris & matris pellex & adultera patris?
Tune ſoror nati, genetrixq; vocabere fratris [f]?

Mr. Barb. *NOTES on* § XXXII.

[1] Mr. Le Clerc ſuppoſes, that the common uſe of *Sodomy*, which they had been brought up to, might contribute much to this, for he proves very well that they could not be carried to it by this Motive, that Mankind ſhould not periſh. See his Note on *Gen*. xix. 31.

[2] Grotius does not mean ſo: He only ſpeaks of a Reſpect which is inconſiſtent with Inferiority, or at leaſt with the Equality which Marriage introduces. It ſeems, as if God by *Moſes*, the *Jewiſh* Lawgiver, had given us that Reaſon, when he commanded, *Levit*. xviii. 7. *Thou ſhalt not uncover the Nakedneſs of thy Father, or of thy Mother, ſhe is thy Mother, thou ſhalt not uncover her Nakedneſs.* Beſide, Marriage being inſtituted for the Propagation of Mankind, it is not convenient that any one ſhould be married to a Perſon to whom he gave a Being, either mediately or immediately, and ſo the Blood return again, as we may ſay, to the Fountain from whence it came. Laſtly, beſides that no good Reaſon can be given to juſtify Marriages in the aſcending and deſcending Line: If theſe ſort of Marriages were not abhorred, every Family almoſt would become, as I may ſay, a Stew, and there would be but little Union in Families, from whence would ariſe infinite Diſorders, and very troubleſome Inconveniences. This I think is all that can be ſaid to prove that this ſort of Inceſt is contrary to the Law of Nature as well as the civil Law. See the *Inſtitut*. Lib. 1. tit. 10. § 1. So far is the Reaſon which our Author ſo much depends on, from having that Weight which he imagines, that it has no Foundation, ſince, as I have already obſerved, the Shame of which he ſpeaks is the only Effect of Education and Cuſtom. Beſides, he is not aware that this Reaſon is not good but with reſpect to them who uſe Cloathing; for thoſe People who go Naked, not being ſenſible of any Impreſſions of Shame, as he himſelf owns; according to his Principle, Inceſt would not be unlawful in thoſe Countries, becauſe it would be no Obſtacle to that Reſpect which Children ought to have to them that gave and preſerved their Lives.

[3] The Words of the *Digeſts* are, *Quinetiam nefas exiſtimatur, eam quoq; uxorem ducere, quæ per adoptionem filia neptiſq; eſſe cœperit, in tantum, ut, etſi per emancipationem adoptio diſſoluta ſit, idem juris maneat.*

[a] And therefore the Daughters of *Lot* (*Geneſ*. xix. 31.) were too forward in their Concluſion. Though *Grotius* is of Opinion, that they thought their Practice abſolutely blamleſs, having heard that it was uſual with their Neighbours the *Arabians*, as it was likewiſe with the *Perſians*.

[b] B. 2. c. 5, ſ. 12. n. 2.

[c] Apomnem. *l*. 1.

[d] *Vid. L*. 23. *t*. 2. *l*. 55. *princip. D. de ritu nuptiarum.*

[e] Sueton Claud. *c*. 15.

[f] *Metam*. 10. *v*. 346, &c. So *Oedipus* in *Seneca* (Phœniſs.) *v*. 134, &c.

Avi gener patriſque rivalis ſui,	Son-in-Law to his Grandfather, Rival to his Father,
Frater ſuorum liberorum, & fratrum parens.	Brother to his Children, and Father to his Brothers.

Thyeſtes in the *Agamemnon* of the ſame Poet, *v*. 34, *&c*.

------- *Verſa eſt natura retro*	------- I've turn'd the Courſe of Nature back,
Avo parentem ------- *patri virum,*	Confounded all Relations, wildly mixt
Natis nepotes miſcui.	The Names of Father, Grandfather, and Son,
	Huſband, and Grandſon.

Ibid.	*Per ſcelera natus, nomen ambiguum ſuis,*	Conceiv'd in ſinful Love, and born a Riddle;
	Idem ſororis natus & patris nepos.	Puzzling his Friends to fix his doubtful Name,
		Son to his Siſter, Grandſon to his Father.

We meet with what follows amongſt the antient Epitaphs;

Herſilus *hic jaceo, mecum* Marulla *quieſcit,*	Here *Herſilus*, and next in deep repoſe
Quæ ſoror & genetrix, quæ mihi ſponſa fuit.	*Marulla* lies, his Mother, Siſter, Spouſe.
Vera negas, frontem trahis, hæc ænigmata Sphingis	Start not, or frown to ſee the *Sphinx* renew;
Credis? Sunt Pythio *vera magis* Tripode.	The *Pythian Tripos* never told ſo true.
Me pater è nata genuit, mihi jungitur illa,	Shamed by her Sire, ſhe weds their common Son,
Sic ſoror & conjux, ſic fuit illa parens.	And blends the three Relations into one.

Canſt thou be call'd (to ſave thy wretched Life)
Thy Mother's Rival, and thy Father's Wife?
Confound ſo many ſacred Names in one;
Thy Brother's Mother, Siſter to thy Son?
Mr. DRYDEN.

And *Philo Judæus* [a] inveighing againſt the *Perſians*, who allow'd the Marriages between Mother and Son, thus expreſſeth himſelf: *Nothing could have been invented more groſly Impious; to abuſe the Bed of the deceaſed Father, which claim'd a moſt religious Reſpect; to pay no Reverence to the Mother; to have the ſame Man become her Husband and her Son; on the other hand, to ſee the Mother aſſume the Name of a Wife; to hear their common Children call'd the Brothers of their Father, and the Grandſons of their Mother.*

No leſs unnatural and deteſtable is the Cuſtom of the Iſle of *Ceylon*, where a Father, when he hath provided a Match for his Daughter, foreſtalls the Husband in the Office of the Bed; giving this ridiculous Reaſon, that *'tis but juſt he ſhould gather the Fruits from a Tree of his own Planting* [b].

XXXIII. The *Jews*, in this Point, had recourſe, not ſo much to Natural Reaſon, as to the Original Prohibition of GOD. They taught, that from the Beginning of the World, ſix Kinds of Conjunctions were Divinely forbidden; with a Mother, or Mother-in-Law, with another Man's Wife, with a Siſter by the ſame Venter, with a Male, and with a Beaſt. And all this (except the Caſe of a Siſter) they deduce from thoſe Words in *Gen.* ii. 24. *Therefore ſhall a Man leave his Father* (that is, ſay they, the Bed of his Father, and conſequently ſhall abſtain from his Mother-in-Law) *and his Mother* (that is, he ſhall obſerve Decency and Diſtance towards his proper Mother) *and ſhall cleave to his Wife* (thus both Males are excluded, and Women Married to other Men) *and they two ſhall be one Fleſh*; therefore unnatural Deſires towards Beaſts are here likewiſe forbidden, in as much as 'tis impoſſible for Man and Beaſt to make one Fleſh. This is Mr. *Selden*'s Account of their Doctrine [c]. It was a very ſtrange and ſingular Fanſy of theirs, which the ſame Author reports [d], that a *Gentile* becoming a Proſelyte of Juſtice, immediately loſt all Relation to his *Gentile* Friends, of what Nearneſs and Degree ſoever. Thus, if ſeveral Perſons of the ſame Family, as ſuppoſe a Mother with a Daughter, were admitted together into the *Jewiſh* Communion, they imagined that their Right of Kindred ſtraight expired, and that they ought to live as Perſons entirely diſengag'd from each other. For by this Act of embracing and acknowledging their Religion, they conceiv'd Perſons to be abſolutely regenerated, and put into the Condition of Infants [e]. Thus their new Man having extinguiſh'd all the Ties that were upon him from his firſt Nativity, lay, in that reſpect, under no reſtraint or Limitation as to Marriage. And this Notion they pretended to found on the divine Law. Yet, by the Traditions of their Wiſe-men, a Proſelyte was forbidden to marry his Mother, his Daughter, or his Siſter, tho' a Proſelyte as well as himſelf. And if any Perſon, during his Continuance in *Paganiſm*, had wedded into ſuch Degrees, at his Converſion he was oblig'd to releaſe himſelf by Divorce. The Caſe was not the ſame with a Slave, when receiv'd into their Worſhip under that Condition. For as they imagin'd him likewiſe to have no remaining Alliance of Kindred, or Blood; ſo farther, they judg'd it no Sin for him to paſs beyond the above-mentioned Bounds of Marriage, which confin'd all Freemen, as well *Gentiles*, as *Jews*. The Reaſon of this difference was, becauſe they eſteem'd a Servant as No-Body, in civil Conſideration: And thus the State was not concern'd in regulating ſuch inferior Marriages, but they were confirm'd or diſſolv'd, at the Maſter's Pleaſure. Yet the *Roman* Laws enjoin the ſame decent Regard to Kindred [f] in the Marriages of Slaves, as of free Subjects.

'Tis remarkable what Travellers report of the *Chineſe*, that they decline marrying Women of the ſame Name with themſelves, tho' not allied to them by Blood. And that, on the other hand, provided their Names be different, they never regard any nearneſs of Birth between Husband and Wife; ſo that a Niece and an Uncle is a very allowable Match [g].

XXXIV. We are now to examine the other Degrees of Conſanguinity, thoſe in a tranſverſe Line; and afterwards to paſs on to the Caſe of Affinity. To begin with Brothers and Siſters; there is commonly ſo very remarkable a Modeſty between them, that they are unwilling to be, at the ſame time preſent in a Place, where the Endearments of Love and Courtſhip are carrying on: Nay, it may be obſerv'd, that Brothers themſelves are uſally averſe to talking with each other on theſe Points of Pleaſure, tho' only in Sport and Jeſt [h]. Yet the Reaſon why we cannot poſitively affirm that Marriages, in the firſt Degree, are of themſelves repugnant to the Law of Nature, is this; becauſe as the Origin of Mankind is recorded in the holy Scriptures, ſuch Matches muſt neceſſarily have been made between the firſt Children of our firſt Parents. For it is by no means to be ſuppos'd, that GOD would appoint ſuch a Caſe in which the Law of Nature could not but be violated; and yet we ſee him commanding the Propagation of Kind, and at the ſame time providing no other way of performing that Duty, beſides theſe Contracts between Brothers and Siſters. Nor can we ſay that the Creator lay under any Obligation of forming one only human Pair. Some have expreſs'd great Contempt of this Argument, as raſh and impertinent, but their Cenſure will be of little Force, 'till their Reaſons are more conſiderable. They tell us, *GOD was pleaſ'd Mankind ſhould draw their Deſcent from one Head, that He might eſtabliſh a firm Alliance amongſt them on the ſcore of their Kindred.* But would not the Alliance have been ſufficient, ſhould ſeveral Pairs have been at firſt produced, all having the ſame Nature, and the ſame immediate Author of it? And would not they have been able, by Intermarriages, to keep up the near Relation amongſt their Poſterity? They urge farther, that if the Beginning of human Race had been otherwiſe ſettled, *Wars muſt have immediately followed, and the World have periſh'd in its Infancy.* But of what Conſequence is this Objection, when, even according to the eſtabliſh'd Method, we ſee one of the firſt Brothers falling by the Hands of the other? Therefore the Prohibition of theſe Marriages ſeems to have taken its riſe from ſome poſitive Ordinance [a]: The Ground and Occaſion of which might be, Firſt, the great Modeſty diſcoverable between Parties thus related; and, Secondly, this Conſideration, that in as much as their Circumſtances engage them to live together in a free and unobſerv'd manner, were they farther allow'd to unite in a wedded State, too frequent Opportunities would be offer'd of Adultery, and other ſhameful Diſorders [b].

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[a] Philo Jud. *de Leg. Special. p.* 778. C. Ed. *Par.*

[b] And the ſame vile Excuſe is alledged for his Inceſt by *Chaegehan* in *Bernier*'s Deſcription of the Empire of the *Mogul.*

[c] *L. V. c.* 1, 2.

[d] C. 16.

[e] *Tacitus* ſeems to have obſcurely hinted at this Opinion, when, in his Character of the *Jews*, he ſays, *Thoſe who paſs over to their Profeſſion, uſe the ſame Cuſtoms; and one of the firſt Leſſons which they are taught, is to deſpiſe the Gods, to lay aſide all Duty and Regard to their Country, utterly to neglect and undervalue their Parents, Children, and Brothers.* Hiſt. l. V.

[f] *Vid. l.* 2. *ſ.* 1. *D.* unde cognati. *l.* 8. *l.* 14. *l.* 2, 3. *D. de* ritu nuptiar. *l.* 22. *de* reg. juris. Selden *l.* V, *c.* 16.

[g] *Vid.* Martin. *Hiſt.* Sinic. *l.* 1.

[h] For which *Plato* aſſigns this Reaſon (*de* LL. *l.* 8. *p.* 912. A. *Ed.* Wech.) *That all the Talk of the World lies that way; Perſons, in their very early Age, hearing theſe Doctrines ever inſinuated, ſometimes in Jeſt, ſometimes in more ſerious Application; and particularly in the Tragedies on the Stage, where Narrations are commonly made, that ſuch vile Wretches, as* Thyeſtes, Oedipus *or* Macareus, *who have committed Inceſt with their Siſters, were ſeen in a terrible Manner to be their own Executioners. Simplicius* on *Epictet.* c. 47. ſpeaks to the ſame Purpoſe. *Since Law and Cuſtom have forbidden the Familiarity of Brothers and Siſters, the Inclinations are no leſs powerfully ſuppreſſed, than if the Command of Nature it ſelf had laid this Reſtraint upon them; except when Perſons are tranſported with Frenzy, and tortured by the Furies of a wicked Conſcience. Comp.* Charron de la Sageſſe, *l.* 2. *c.* 8. *ſ.* 6.

It may contribute to the Illuſtration of this Point, to reflect again on the Opinion of the antient *Jews*, as collected by Mr. *Selden* [c] [1]. They therefore, amongſt theſe ſix Kinds of Conjunctions originally forbidden by GOD, reckon the Marriage of a Brother with his Siſter by the Mother's Side. But they add, that this Command did not exerciſe its Force till Mankind being ſufficiently multiplied, Plenty of other Women might be had, and there was no need of breaking in upon this Degree. 'Tis an old Tradition with the Eaſtern People, that all *Adam*'s Children, except *Seth*, were Twins, and that it being neceſſary amongſt them for a Brother ſtill to marry his Siſter; yet they carefully abſtain'd from Siſters of the ſame Birth. Farther, the *Jews* believ'd a Siſter, by the Mother's Side, to be more cloſely allied to her Brother, than if by the Father's only. (And thus *Deuteronomy* xiii. 6. *Thy Brother the Son of thy Mother*, is emphatically ſpoken, as a nearer Degree of Relation.) They thought the primitive Command affected only Siſters in the former Senſe, not in the latter; for theſe they judg'd might be taken for Wives by the pureſt of the *Gentiles*, thoſe who obſerv'd the Precepts of *Noah*, and govern'd themſelves by the Law of Nature and of Nations. And hence, they ſay, it came to paſs that *Abraham* married his Siſter *Sarah*; no Reſtraint being yet laid, in that Particular, from the poſitive Law. For leſt any ſhould imagine, that the Term of Siſter is there put for any Kinſwoman, the Patriarch himſelf explains his own meaning, *Truly*, ſays he, *ſhe is my Siſter, for ſhe is the Daughter of my Father, but not the Daughter of my Mother* [d]. Yet that ſuch Matches were not uſual in thoſe Countries, is evident from this, that *Abraham* imagin'd he ſhould avoid being taken for *Sarah*'s Husband, if ſhe pretended to be his Siſter. Unleſs we are rather inclin'd to ſay, that he hoped they would take the Word in the fulleſt and moſt vulgar Senſe, for the Siſter by both Sides.

A Difficulty ariſeth on this Subject, from 2 *Sam.* xiii. 13. where *Tamar* anſwers her Half-Brother *Amnon*, ſoliciting her to his Bed, *Speak to the King, for he will not withhold me from thee.* Here on the one Side, it is not probable that *Tamar* was ignorant of the divine Law, which expreſly forbids the Marriage of a Brother and Siſter by the ſame Father, as well as by the ſame Mother. And on the other Side, it would have been in vain for her to think of finally eſcaping the Violence of her Brother's Paſſion, by depending on this Reſerve, that whatever ſhe might ſeem to promiſe him, he could not at laſt wed her, without a maniſeſt Violation of the divine Command; which yet is *Joſephus*'s Opinion [e]. The *Jewiſh* Doctors therefore give this Anſwer to the Caſe before us. They ſuppoſe *Maacah*, the Mother of *Tamar* and *Abſalom*, to have been taken Captive by *David*, in the War againſt the King of *Geſur*, and to have born him *Tamar*, whilſt ſhe continued a *Gentile*, and *Abſalom*, after ſhe was made a Proſelyte. Since then they were perſuaded that Perſons, by embracing their Religion, were releaſ'd from all former Kindreds; and becauſe the Child of an *Iſraelite*, by a *Gentile* Wife, follow'd the Mother, not the Father, and was likewiſe reckon'd a *Gentile*; they concluded that *Tamar*, when ſhe became a Proſelyte, loſt all the Relation ſhe had to *Amnon*, during her *Gentile* Condition; and that accordingly ſhe believ'd ſhe might be given in Marriage to him, without tranſgreſſing the divine Ordinance; her Nearneſs of Blood being extinguiſh'd in her Regeneration.

To touch on the Cuſtoms of other Nations in this Affair, we find *Byblis* in *Ovid*, complaining that the Laws of Marriage ſhould be ſtricter amongſt Men than amongſt the Gods;

[1] See Mr. *Barbeyrac*'s 1ſt, 2d and 3d Notes upon § xxxii. of this Chapter.

[a] *Add* Cumberland *de L. N. c.* 8. *ſ.* 9. Selden *de J. N. & G. l.* 5. *c.* 1. & 8.

[b] *Vid.* Ovid *Metamorph.* IX. *v.* 458, 535, 558, *&c.*

[c] *L.* V. *c.* 11.

[d] *Geneſ.* xx. 12. *Vid.* Grot. *ad loc. dict.*

[e] *Antiq.* Jud. VII. 7.

——— Dii nempe ſuas habuere ſorores.
Sic Saturnus Opim junctam ſibi ſanguine duxit;
Oceanus Tethyn, Junonem rector Olympi.
Metam. IX. *v.* 496, *&c.*

In *Homer* [a] the Daughters of *Æolus* are repreſented as married to his Sons. *Theocritus* [b] commends King *Ptolemy* and his Queen, for reſembling the Matches of the Gods, in being Brother and Siſter. *Lucian* [c] reports the ſame of *Mauſolus* and *Artemiſia*; in *Arrian* [d], *Hidreus*, the *Carian*, is ſaid to have married *Ada* his Siſter. Amongſt the old *Peruvians* the *Yncas* alone were permitted to marry their Siſters, and all other Men forbidden to take the ſame Liberty [e]. On the other hand, the *Romans* abhorr'd this Practice as moſt odious and unnatural. *Plutarch* [f], giving the reaſon why the Women, in that Nation, ſaluted their Relations with a Kiſs, hath left this Remark, *When the Laws had prohibited the Marriage of near Relations, they yet allow'd them to proceed to this innocent Expreſſion of Love; and this became a mutual Pledge and Mark of their Alliance. For in antient Times the* Romans *abſtain'd from wedding their Kinſwomen, in any Degree of Blood; as they at preſent forbear their Aunts and their Siſters. It was late before the Marriage of Couſin-Germans was diſpens'd with* [g].

The *Athenians*, by the Conſtitution of *Solon*, might marry thier Siſters by the Father's ſide, not by the Mother's. Thus *Plutarch* [h] relates a Match between *Themiſtocles*'s Son and his Daughter by another Wife. *Demoſthenes* [i] reports the ſame of his Grandfather. *Cornelius Nepos*, in his Life of *Cimon* [k], obſerves that General to have made the like Marriage, which, he ſays, *Was agreeable to the* Athenian *Cuſtoms* [l]. Yet there is a Paſſage, in the Oration of *Andocides* againſt *Alcibiades*, which ſeems to overthrow all this: *Reflect*, ſays he, *upon the Examples of our Anceſtors; with what Bravery and what Wiſdom they proceeded, when they ſent ſo great a Man as* Cimon *into Baniſhment, for violating the Laws, in taking his own Siſter to his Bed* [m]. *Plutarch*, in *Cimon*'s Story, delivers himſelf with no Certainty on this Point; he tells us, *Some cenſur'd him for uſing too much Liberty with his Siſter, tho' only in Sport: Others affirm'd, that the matrimonial Contract had really paſs'd between them, and that the reaſon was, becauſe the young Lady, on account of the Poverty of the Family, could not find a Husband abroad.*

The *Lacedemonians*, on the contrary, married their Siſters by the Mother's ſide, not by the Father's; as *Philo Judæus* [n] informs us.

It appears from *Plato* [o], that he eſteem'd Matrimony between Brothers and Siſters lawful; in as much as he forbids it only in the aſcending or deſcending Line of Kindred.

Amongſt the *Egyptians*, *Diodorus Siculus* [p] obſerves, this kind of Marriage was eſtabliſh'd by an expreſs Law, and was grounded on a ſuperſtitious Conceit, that the ſame Practice had ſucceeded fortunately with *Iſis*. *Achilles Tatius* [q] reports the ſame Cuſtom of the *Phœnicians*.

Others of the Antients declar'd an abſolute Diſlike of this Freedom. It is one of *Phocylides*'s Precepts [r],

Μηδὲ κασιγνήτης ἐς ἀπότροπον ἐλθέμεν εὐνὴν,

Nor climb thy Siſter's interdicted Bed.

And indeed that theſe Matches were very unuſual through all *Greece*, may be gather'd from *Hermione*'s Speech in *Euripides*, where ſhe thus upbraids *Andromache*,

Τοιοῦτον πᾶν τὸ βάρβαρον γένος, &c. v. 103, *&c*

Thus the *Barbarians* with inceſtuous Love,
Fathers their Daughters, Sons their Mothers wed,
Brothers their Siſters; and no Law reſtrains
Their ſinful Paſſion.---------

Or if they were once permitted in *Greece*, it is certain they grew entirely out of uſe with Poſterity; as that Paſſage of *Sextus Empiricus* [s] ſufficiently proves; *The* Egyptians *contracted Marriage with their Siſters, which, amongſt us, is diſallowed by Law.* The ſame Author ſays in another place [t]; *In our Country we eſteem it contrary to all Right and Decency, to make a Wife of a Mother or of a Siſter* [u]. Yet he chargeth both thoſe Practices on the *Perſians*; as do likewiſe *Strabo* [x], *Laertius* [y], *Curtius* [z], and *Lucian* [a]. Tho' the Anſwer given by the Judges to *Cambyſes*, in *Herodotus* [b], plainly ſhews, that the wiſer Men, even in the *Perſian* Nation, were of a very different Opinion.

It may not be improper to conclude our Search into the preſent Controverſy, by returning to the *Jews*. They then, in their Prohibition of Marriage between Brothers and Siſters, thought it made no difference whether the Siſter, in ſuch a Caſe, came by Adultery, or by a lawful Bed: nay, if ſhe was born of a Mother-in-Law, in a diſhoneſt way, the Rule held againſt her in this reſpect [c]: Though, otherwiſe, as to the Crime of Inceſt, they held it could only be committed by *Matrimony*, not by Adultery, nor by unmarried Pollution. Thus, amongſt them, he did not paſs for an Inceſtuous Perſon, who had defil'd a Mother and her Daughter, but he only who had actually wedded both. Thus too a Man might marry her whom his Father, Brother, or Uncle, had been too familiar with, tho' he could not wed his Mother-in-Law, nor his Uncle's Widow, nor ſo much as his Brother's Relict, unleſs in the extraordinary Caſe of his dying without Iſſue [a]. And ſo on the other hand, a Man might take her to Wife, whoſe Mother, Siſter, Grandmother, Aunt, Daughter, or Niece he had corrupted. It is true, by the Traditions of their Rabbins, theſe Marriages were judg'd unlawful; yet the contracting Party was only corporally puniſh'd, and the Contract ſtill allow'd to ſtand good. From all which we may infer, that the *Jews*, in ſtating the Notion of Aſſinity, held it to proceed not from a bare Nearneſs of Blood, unleſs caus'd in a regular and matrimonial way [b].

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[a] *Odyſſ.* 10.
[b] *Idyll.* 17. towards the End.
[c] *Dial.* Diogen. & Mauſol.
[d] *De Expedit.* Alexand. *l.* 1.
[e] Garcilaſſo *de la Vega*, l. 4. c. 9.
[f] *In* Qu. Rom. *p.* 265. C.
[g] See the Reaſon, *ibid.*
[h] *In* Themiſtocl. *in fin.*
[i] *Contra* Eubulid.
[k] C. 1.
[l] See *Bœcler*'s Notes on this Place.
[m] To this agrees *Athenæus*, l. XIII. c. 21.
[n] *De leg. Special.* p. 779. E. Ed. *Pariſ.*
[o] *De* LL. *l.* 5.
[p] L. 1. c. 27.
[q] L. 1.
[r] V. 170.
[s] Pyrrhon. Hypotyp. *l.* 1. *c.* 14. *p.* 31.
[t] L. 3. c. 24.
[u] *Add.* Selden. *de J. N. & G.* l. 5. c. 11.
[x] L. 15, *p.* 505. *Ed*, Gen. Caſaub.
[y] *In Proœm.*
[z] L. 8. c. 2. ſ. 19.
[a] *De* Sacrific. *p.* 364. *Edit.* Amſt.
[b] Thalia, *Add.* What is related of the *Thraſcians*, the Inhabitans of Mount *Libanus*, I know not with what Credit, by *Leon Rachwolf*, Itin. Oriental. *l.* 2, *c.* 15. *in fin.*
[c] *Add.* l. 54. *D. de Ritu Nupt.*

Nicetas Acominatus reports, that the Emperour *Andronicus Comnenus* having a Deſign of joining in Marriage *Alexius* and *Irene*, both inceſtuouſly begotten on *Theodora*, and conſulting his Judges on this Point, one of them gave his Opinion that *The Parties being illegitimately born, were not to be eſteem'd of Kin to each other, but had loſt all Right and Alliance of Blood; and were in the Condition and Diſtance of Strangers.* But the Hiſtorian cenſures theſe Judges, as Men of greedy and ſordid Tempers, who made a Gain of diſpenſing with GOD's Commands, and would ſell their Voices for the Feaſts and Favour of great Perſons.

XXXV. As for the other Degrees, forbidden [c] in *Leviticus* xviii. it will be ſtill more difficult to find a Reaſon why they ſhould hinder Marriage, on the bare Conſideration of the Law of Nature. Though it muſt be own'd, that ſuch Matches have been condemn'd and deteſted by many Heathens. St. *Paul* [d] calls it *Such Fornication as is not ſo much as named amongſt the Gentiles, that a Man ſhould have his Father's Wife. Phocylides* [e] ſets it down as one of his Moral Leſſons.

Μητρυιῆς μὴ ψαῦε γε δεύτερα λέκτρα γονῆος,
Μητέρα δ᾽ ὡς τίμα τὴν μητέρος ἴχνια βᾶσαν.

Make not thy Father's injur'd Bed diſgrace
Thy Step-dames Vows; but with Reſpect confeſs
A Mother her, that fills thy Mother's Place.

The Story of *Stratonice* is well known, whom *Seleucus* her Husband gave away to his Son *Antiochus*, when the young Prince was fallen in Love with her beyond Cure. It was a remarkable Saying of *Seleucus* on this Occaſion, that *if his Wife expreſs'd an Abhorrence of ſo unuſual a Practice, he begg'd his Friends to inform her, that whatever Action was pleaſing to the King, and beneficial to the Publick, ſhe ought to eſteem right and juſt* [f]. Yet *Appian* [g] doth not ſtick to call this Love of *Antiochus*, ἀθέμιστον πάθος, *A ſinful extravagant Paſſion.* It [1] is ſaid to be the ordinary Cuſtom amongſt the *Tartars*, for a Son to marry his Mother-in-Law, when left a Widow by his Father [h].

The antient *Jews*, as *Grotius* obſerves [i], founded the Prohibition of theſe Degrees chiefly on two Reaſons: Firſt, on *that natural Modeſty which hinders Parents from holding Familiarity with their Iſſue, either by themſelves, or by ſuch Perſons as are in Blood, or Aſſinity, neareſt to them.* Which Argument, as it is of good Force in the aſcending and deſcending Line, ſo, in as much as the Shame there alledg'd is exceedingly weakened, and almoſt brought to nothing in the collateral Kindred, eſpecially beyond the ſecond Degree, it can here by no means amount to a Precept of the Law of Nature. Yet are we to eſteem thoſe civil Conſtitutions moſt juſt and well grounded, which extend the Prohibition to a wider Compaſs; on purpoſe, as it were, to fence in and ſecure thoſe Degrees which the Dictate of Nature, or the poſitive Ordinance of GOD had before forbidden. Their ſecond Reaſon was, *Leſt too great occaſion ſhould be offer'd to Fornications and Adulteries between Perſons thus related, and conſtantly converſing with Freedom together, if ſuch Pieces of Wantonneſs might be made good by the Remedy of Marriage.* This Argument, like the former, is ſufficient to give Occaſion to a *poſitive* Law, not to evince any Precept of Nature. The *Jews* apply it well, to account for that ſeeming Difficulty in the xviiith of *Levit.* where the marrying an Aunt is forbidden, and not the marrying a Brother's Daughter, though both ſeem equally diſtant in Degree. For they obſerve, that young Men frequenting the Houſes of their Grandfather and Grandmother, and ſometimes dwelling with them, are very much in the Company of their Aunts; whereas they come not ſo often to their Brother's Houſes, nor have there the ſame Privileges and Freedoms. Yet the latter of theſe Degrees was eſteem'd unlawful by the *Romans*, as appears from the Caſe of *Claudius*, when deſigning to marry *Agrippina* [k].

Many there are notwithſtanding who aſſert, that in the Place of *Scripture* but now mention'd, not ſuch particular Perſons are forbidden, but in general all ſuch nearneſs of Degrees: whoſe Arguments, were there occaſion, might perhaps find an Anſwer.

Thoſe who maintain that all the Degrees, mention'd in the xviiith Chapter of *Leviticus*, are likewiſe repugnant to the Law of Nature, urge the Words of the 24th Verſe, *For all theſe Abominations have the Men of the Land done which were before you, and the Land is defiled.* "For, ſay they,

Mr. Barb. *NOTE on* § XXXV.

[1] The *Pythagoreans* mightily approved the old Laws of the States of *Greece*, by which it was forbidden to have any Amorous Converſation with a Mother, Daughter, or Siſter, and to ſatisfy his Deſires with any Woman whatſoever in a Temple, or in the ſight of the World; for, ſay they, it is good and profitable to put as great an Obſtacle to it, as poſſible. Ἐπαινεῖσθαι δὲ αὐτοῖς ἔφασαν, καὶ τὰ τοιάδε τῶν προϋπαρχόντων νομίμων ἐν ταῖς Ἑλληνικαῖς πόλεσι, τὸ μήτε μητράσι συγγίνεσθαι, μήτε θυγατρί, μήτε ἀδελφῇ, μήτε ἐν ἱερῷ, μήτε ἐν τῷ φανερῷ, καλόν τι γὰρ εἶναι, καὶ σύμφορον, τὸ ὡς πλεῖστα γίνεσθαι κωλύματα τῆς ἐνεργείας ταύτης. Jamblich. in Vit. Pythag. § 210.

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[a] *Comp.* l. 1. ſ. 3. *D. de* Concubin. *l.* 4. *ſ.* 8. *D. de* Gradib. & Affin.

[b] Selden. *ibid.*

[c] V. *Grot.* L. 2. c. 5. ſ. 13, 14.

[d] 1 *Corinth.* v. 1.

[e] V. 168, 169.

[f] Plutarch *in* Demetr. *p.* 907. *Ed.* Wech.

[g] *In* Syriacis, *p.* 127 *Ed.* H. Steph. *Add.* Senec. *Controverſ.* l. 6. *Decl.* 7. Valer. Max. *l.* 5. *c.* 7. *ſ.* 1. *Ext.* Cicero, *pro* Cluent. *c.* 6. expreſſeth a grievous Abhorrence of Marriage between a young Man and his Wife's Mother, *O incredible Villany of a Woman,* ſays he, *and never heard of till this time in the World! Add. D. L.* 23. *t.* 2. *l.* 12, 15, *&c. De ritu Nupt.*

[h] Haython. *de* Tartar. *c.* 48. Paul. Venet. *l.* 1. *c.* 15.

[i] In the Places abovecited.

[k] *V.* Tacit. *Ann.* XII.

“ in as much as every Tranſgreſſion preſuppoſeth a Law, thoſe *Gentiles* in contracting ſuch Marriages muſt needs have violated, either ſome natural Law, or ſome divine poſitive Ordinance univerſally binding Mankind: The latter is hardly to be made out, and the former muſt therefore be admitted. To this Mr. *Selden* [a] anſwers, that the Word [3] *theſe* is to be reſtrain'd to thoſe Sins which the Heathens were capable of committing. And as an Argument that it doth not extend to every Particular there mention'd, he obſerves, that one Caſe there prohibited [b] is the marrying of two Siſters together, which could not be before vicious, having been practiſed by ſo righteous a Man as *Jacob*. (Though to this Remark of Mr. *Selden* it might well be added, that the Quarrels and Emulations between thoſe Siſters, *Jacob*'s Wives, was probably the Reaſon of this poſitive Prohibition.) In the ſame manner *Amram*, *Moſes*'s Father, married *Jochabad* his Aunt; another of the Degrees here forbidden [c].

By the *Turkiſh Alcoran* [d], a *Muſſulman* is reſtrain'd from wedding his Mother, his Step-dame, his Daughter, his Siſter, his Aunt, his Niece, his Nurſe, his Foſter-Siſter, his Wife's Mother, his Wife's Daughter by a former Husband, his Son's Wife, two Siſters, a Daughter to a Woman whom he hath abuſed, and, laſtly, another Man's Wife, unleſs taken for a Slave in War [e].

[4] It may not be from the purpoſe to obſerve, that many have imagin'd the Force of Affinity to ceaſe, on the Death of the Perſon in whom it was founded. It is a ſaying of *Euripides* [f].

> ------ *New Affinities efface the old.*

Iſocrates [g], ſpeaking of a Gentleman who had married his Aunt, ſays, *He took ſo much Delight and Satisfaction in my Father's Friendſhip, that loſing my Aunt without Iſſue by her, he took my Father's Couſin-German for his ſecond Wife, to keep up the Affinity between our Families* [h]. *Florus* [i] tracing out the Cauſe of the Quarrel between *Cæſar* and *Pompey*, obſerves, that upon the Death of *Julia*, Daughter to the former, and Wife to the latter, the Band being broken aſunder which had ſo long held them together, they ſoon diſcover'd their mutual Jealouſy, and appear'd the moſt violent of Rivals. *Marriages*, ſays *Philo* the *Jew* [k], *are the Ties and Engagements which unite the Families of Strangers; and when they are diſſolv'd, the Affinity breaks off with them.*

XXXVI. It will be convenient to add a Word or two about thoſe inferior, or ſecondary Wives in uſe amongſt ſome Nations: Such as do truly plight their Faith to their Husband, and are united to him in the ſtricteſt manner of Society; yet ſo as that upon account of their unequal Condition, or Birth, or for other Reaſons, they are not admitted to the full Honours of their Character, nor acquire the ſame Rights for their Children, as other lawful Mothers [l]. Of theſe Mr. *Selden* [m] hath treated at large; and from him it appears, that their Difference from juſt and proper Wives is introduc'd purely by poſitive Law, or by the particular Covenant of the Parties, who to the principal matrimonial Pact may add any thing at their Pleaſure, which doth not contradict and overthrow it. The chief Reaſons on which this Practice ſeems to have been founded are theſe, the Preſervation of noble Families, the Fear of injuring former Children [n], and laſtly, the avoiding of thoſe great Expences, which a Wife, in the higher or more perfect Degree, might challenge by the Cuſtom of the State. In order to the keeping up of great Families, it is convenient that they marry into equal Fortunes and Honours: For the better procuring of which it hath been enacted, in many Commonwealths, that in caſe a Man take a Wife beneath himſelf, the Marriage ſhall not have all thoſe Effects and Privileges, which it would otherwiſe, in courſe, enjoy. And then again, nothing more weakens a Family, than the diſmembring of an Eſtate into too many Parts; wherefore to prevent this Misfortune, ſome have thought it proper to take up with theſe ſecondary Wives, whoſe Children, if their Portions are not over large, have yet no Reaſon to complain. And as to the third Point, he is a notorious Fool, who makes himſelf a Beggar to maintain the Pride and Grandeur of a Wife.

On the whole, it is clear how injuriouſly we deal with theſe inferior Wives, if we allow them no better a Title than the vile Name of Concubines [1]. For Concubines are properly ſuch, as exerciſe conjugal Freedom without conjugal Faith, and differ only in Degree from common Strumpets: Nor do they exempt themſelves from the Scandal by entring into a private Engage-

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[3] This critical Remark, alledg'd by Grotius before § 14. deſtroys the whole Syſtem of them who ground your Divine poſitive general Laws upon it; though they cann't ſhew, how they have been publiſh'd to all People.

[4] Yet among the *Tartars*, on the contrary, Fathers marry their deceaſed Sons with the deceaſed Daughters of ſome other, and imagin, that by that Poſthumous, or rather Imaginary Contract, the Parents of that Son, or Daughter, contract a true Alliance or Affinity. *Marc. Paul. Venet.* Lib. 1. Chap. 58.

Mr. Barb. *NOTE on* § XXXVI.

[1] See Cujacius *Obſerv.* Lib. V. Cap. VI. where he treats of the Notion that the *Romans* had about them, and ſhews us, how they were look'd on as Concubines,

[a] L. 5. c. 11.

[b] *Levit.* xviii. 18. Upon which place conſult *Grotius.*

[c] We meet with ſome remarkable Things concerning the Degrees of Conſanguinity amongſt the *Indians*, in *Abr. Roger.* de *Bramin.* p. 1. c. 12.

[d] Chapt. of Wives.

[e] *Add.* Selden. *de J. N. & G.* &c. l. 6. c. 11.

[f] Med. *v.* 76. *& in* Oreſt. 1083.

[g] In *Æginetic.*

[h] Cicero *pro* Quint. *c.* 6. *The Affinity could by no means be broke off, whilſt the Children were alive*, Idem *Philipp.* XI. c. 4. concerning *Dolabella*, who had formerly married his Daughters; *And this Gentleman, O ye heavenly Powers, was once my Friend!*

[i] L. 4. c. 2. n. 13.

[k] *De Legat. ad* Caium. On the other ſide we are told of the *Tartars*, that amongſt them 'tis an uſual thing for different Parents to make Matches between their deceas'd Sons and Daughters; fanſying that by this poſthumous way of Marriage, a Relation is no leſs contracted between their ſurviving Friends, than if they had actually celebrated their Nuptials in their Life-time.

[l] *Vid.* Selden. *de J. N. & G.* l. 5. c. 7.

[m] V. *Grot.* l. 2. c. 5. ſ. 15.

[n] So in *Julius Capitolinus* towards the end, the Emperor *Marcus*, upon the Death of his Lady *Fauſtina*, took the Wife of his Procurator for a Concubine, *Ne tot liberis ſuperinduceret novercam, That he might not bring ſo numerous a Family of Children under the Power of a Mother-in-Law.*

ment, and confining their diſhoneſt Service to a ſingle Perſon [a]. But the Faith of the Marriage-Bed is infinitely more ſacred and ſolemn, than to be brought into Compariſon with the ſtricteſt of theſe illegal Compacts, founded on the baſe Proſpects of Lucre or of Luſt [b].

Busbequius [c] remarks ſomewhat very particular of the *Turkiſh* Emperours, that after *Bajazet*, none of them enter'd into juſt and proper Matrimony. *For he, after his Defeat by* Tamerlain, *falling together with his Wife into the hands of the Victor, took no part of the Barbarous Treatment more to heart, than the Affronts and Diſhonours put upon the Sultaneſs before his Eyes. In regard to this Accident, his Succeſſors abſtain from conjugal Engagements; and as to the Affair of Iſſue, make uſe of Women in the Condition of Slaves, who are not capable of ſuffering ſo much Injury and Diſgrace. But indeed the* Turks *in general pay no leſs Affection and Kindneſs to their Sons by Concubines or Harlots, than to thoſe who are born of their legal Wives; nor have the former any leſs Degree of Right to the Goods and Eſtate of their Father.*

Abbas, King of *Perſia*, took another way of preventing theſe Indignities: For, carrying with him into the Field all his Female Train, he commanded the Eunuchs, that had the Cuſtody of them, to cut off the Heads of all his Wives, in caſe he loſt the Battle [d].

The *Chineſe*, when they deſpair of obtaining Iſſue in juſt Marriage, have recourſe to the Remedy of Concubines; eſteeming it the moſt miſerable thing that can befal a Man, to be at a loſs for Children, who might mourn at his Deceaſe, and perform the decent Honours of his Burial [e].

We have only this Obſervation to add, that as the publick Laws of Commonwealths are wont to inveſt other Contracts with certain Rites and Solemnities, upon want of which they paſs for invalid in civil Cognizance; ſo in ſome States there are ſuch Ceremonies annex'd to Matrimony, as if omitted make it illegal, or at leaſt deprive it of ſome Effects which would otherwiſe have ſprung from it, according to the local Cuſtoms and Conſtitutions [f]. Now although the Law of Nature be a Stranger to theſe Formalities, yet inaſmuch as it commands all Subjects to obey the Ordinances of the Government under which they live, it would be idle and ridiculous for ſuch Perſons, as have not the Power of making or of reverſing civil Laws, to plead the Indifference of natural Law in the preſent Caſe.

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[a] *Vid. Ælian. V. H.* l. 10. c. 18.

[b] Yet ſometimes we meet with the Word *Concubina* in no diſgraceful Senſe. *Vid.* L. 32. t. 3. l. 49. ſ. 4. D. *de Legat.* and L. 5. t. 27. l. 3. C. *de natural. liberis*, *Concubinage* is call'd *unequal Marriage*. *Add.* Godofred. *ad loc. dict.*

[c] Epiſt. 1.

[d] *Petrus della Valle* Itin. *P.* 2. *Epiſt.* 5.

[e] *Martin.* Hiſt. *Sin.* l. 6. c. 1. p. 201.

[f] V. *Conſtitut. Sicul.* l. 3. t. 20.

CHAP. II.

Of paternal Power.

- I. *The common Opinion of the Original of paternal Authority.*
- II. *According to* Hobbes, *the original Power over Children is in the Mother.*
- III. *And from her is derived to others.*
- IV. *On what Reaſon paternal Authority is grounded.*
- V. *How far the Father has more Right than the Mother.*
- VI. *How great the Power of the Father is, as ſuch, over his Children;*
- VII. *Both in their Infancy and Childhood.*
- VIII. *How far Children are capable of being govern'd at this time.*
- IX. *Whether a Father may ſell his Son.*
- X. *Of the Obligation of Children made free.*
- XI. *What Power Fathers have over their Children, out of civil Societies;*
- XII. *What Power in civil Societies.*
- XIII. *How this Power is loſt.*
- XIV. *Whether Children ought to have their Parents Conſent to their Marriages.*

CHildren are the proper Fruit of Matrimony; as they are likewiſe the proper Subjects of paternal Dominion, that moſt antient, and, at the ſame time, moſt ſacred Kind of Government; by Virtue of which the Children are engaged to acknowledge the Superiority, and to reverence and obey the Commands of their Parents. The Origin of this Power, *Grotius* [a], and moſt Writers refer to the Act of Generation, by which the Parents do, in ſome meaſure, reſemble the divine Creator, whilſt they make a Perſon really exiſt, who before had no Being. But in as much as both the Parents equally contribute to this ſignal Benefit, they ſay that both originally acquire a Right over their Iſſue; but that, in caſe they contend for the Sovereignty, and by reaſon of their contrary Commands cannot both be obey'd together, [1] the Father's Authority is to carry the Precedence; not only on the account of the Advantage he hath in Sex, but likewiſe becauſe the Mother herſelf is placed under his Direction and Sway.

Mr. BARBEYRAC's *NOTES on* Chap. II. § I.

[1] QUINCTILIAN expreſſes this very well in this Paſſage of his, *Declam.* VI. quoted in part by GRONOVIUS: *Duo* [*Pater & Mater*] *unum vocabamus, videamus, quò ire debuerit. Poteram quidem fortiter dicere, Pater juſſi. Hoc nomen omni Lege majus eſt----------Neceſſe habuit parere---------Sint ſanè jura paria, ſedeat medius inter duos Judex: Non comparabo Perſonas, quamvis apud omnes Gentes plus juris habeat Pater: Sit ſanè Natura communis, non imputabo, quod nomen dedi, quod familiam, quod impenſas,* &c.

[a] L. 2. c. 5. ſ. 1.

II. Mr. *Hobbes*

II. Mr. *Hobbes* [a] takes another Road in tracing out this *paternal Rule*: “Tho’, ſays he, this be a true Conſequence, *A Man is the Father of another, and therefore hath the Dominion over him*; yet it is not ſo clear and manifeſt as to ſhew its own Neceſſity, as thoſe do where one of the Terms is included in the Definition of the other; but muſt be made out by other Arguments and Proofs. Beſides, ſince all ſovereign Power, if regularly eſtabliſh’d, is indiviſible, ſo that no one can, at the ſame time, ſerve two Maſters, unleſs in Subordination; and ſince two Perſons concur to the Act of begetting, that Act ſhould ſeem an improper Foundation for Sovereignty; which may therefore be more conveniently deduc’d from a State of Nature, in the following Method. During ſuch a State every Man hath a Liberty of practiſing againſt every Man, what he thinks may conduce to his own Preſervation: [1] and conſequently the Conqueror is the Lord and Maſter of the conquered. Whence we may infer, that by the Law of Nature the Right of governing an Infant is firſt in the Power of the Mother; who, if ſhe reſolve to nouriſh and breed him up, [2] as ſhe is in Duty obliged to do, is ſuppos’d to do it upon this Condition, that he ſhall not prove her Enemy when grown up, *i. e.* that he ſhall pay Subjection and Obedience to her. (According to his Hypotheſis, thoſe are mutual *Enemies*, who are neither ſubject one to the other, nor own a common Maſter.) “For it is by no means to be preſum’d that I would give a Perſon Life, on purpoſe to put him in a Capacity of growing up to my Prejudice, and of gaining ſtrength in time to repay my Kindneſs with Hoſtility. Thus therefore a Woman becomes, at the ſame Minute, a Mother and a ſovereign Miſtriſs. Nor is the Excellency of Sex a ſufficient Argument why we ſhould attribute this Right of Governing to the Huſband, rather than to the Wife: For the Inequality is not ſo great between them, as that the Man can immediately eſtabliſh his Rule over the Woman without Oppoſition; but, in a State of Nature, he muſt fairly win her by a Courſe of War. Farther, [3] the Woman, by carrying the Child ſo long about her, and nouriſhing it with her Subſtance, [4] doth certainly contribute, if not the moſt noble, yet the moſt laborious and troubleſome Share to the Production of Iſſue [b]. Laſtly, in as much as in a State of meer Nature, where no Commonwealths and no Families are ſuppoſed, ’tis impoſſible to know who is the Father of the Child, but by the Mother’s Aſſeveration; it follows that the Child belongs to whom ſhe pleaſeth, and therefore primarily to her ſelf. On which account it was enacted by the *Roman* Conſtitution, that Iſſue brought forth without Matrimony [c] ſhould follow the *Venter*, or the Mother [d].

III. From the Mother this Dominion, according to Mr. *Hobbes*, may paſs to other Perſons ſeveral ways: “Firſt, if the Mother renounce her Right by *expoſing* the Child; the Perſon who finds, and breeds him up, ſhall enjoy the ſame Right which the Mother had over him before. “For the Life which the Mother at the firſt gave him, ſhe, as far as ſhe is able, takes away again by this Act of expoſing him: And conſequently the Obligation he had to her, for her former Kindneſs, is entirely cancell’d by this Injury. “On the other ſide, to the Perſon who ſav’d and educated him, he owes all poſſible Returns, and ought to acknowledge him, both for his Parent and his Maſter [e]. Here, though we ſhould grant that ſuch a Child ought ſtill to preſerve an Inclination of paying Duty [1] to his Mother, and, upon her Sorrow and Repentance, to return

Mr. Barb. *NOTES on* § II.

[1] Our Author elſewhere has confuted this Principle of Mr. Hobbes. See *B.* 1. *c.* 6. *ſ.* 10. and *B.* 2. *c.* 2. *ſ.* 5, *&c.*

[2] Mr. Buddeus ſets down this *(as is certainly her Duty to do)* as Mr. Hobbes’s Opinion, but it is plainly contrary to Mr. Hobbes’s Notion, as the Courſe of his Reaſoning makes it evident; and Mr. Hobbes explains himſelf without Reſerve, *De Cive*, Chap. 9. § 2. where he ſays, that a Mother may either bring up or nouriſh her Child, *SUO ARBITRIO ET JURE*, at her own pleaſure. See alſo his *Leviathan*. In general, our Author mixes his own Notions and Arguments too much with Mr. Hobbes’s, without Diſtinction, which ought to be carefully obſerved.

[3] This is our Author’s Reaſon, tho’ Mr. Buddeus attributes it to Mr. Hobbes in the Place before quoted.

[4] This our Doctors and modern Phyſicians will not allow, as moſt Men know.

Mr. Barb. *NOTE on* § III.

[1] Theſe are our Author’s Words to the end of this Section, and agree with his Principles, only we muſt add, that what he ſays of the Mother, muſt equally be applyed to the Father.

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[a] *De Civ*, c. 9.

[b] *Quintil.* Declam. 338. *It is otherwiſe in the Caſe of the* Men, *who are made Parents by a ſhort and tranſient Pleaſure, and are endear’d to their Children only by that outward Satisfaction. But the* Mothers *love with a much ſtronger Paſſion, remembring their ten Months Trouble, their long Courſe of Cares and Dangers.* It is a ſaying of *Medea*, in *Ennius* (or rather in *Euripides*, v. 250, 251. from whence it was borrowed) *I had rather be Three times under the Sword, than once under the Hands of the Midwife.* Yet they tell us of the Women of *Paria* in *America*, that they bring forth without any Pain or Weakneſs, and immediately after their Delivery return to their ordinary Work and Employment. Much the ſame is reported of the Women of *Chili*; and ’tis added, that the *Spaniſh* Dames, if they live there any conſiderable time, contract the ſame Hardineſs. *Oreſtes* in *Eurip.* v. 552, *&c.* when it makes for his Cauſe, gives his Father much the Advantage of his Mother.

> My Father planted me, and his fair Dame
> Was but the Soil that bred and brought me forth,
> More tied I judg’d my ſelf to ſuccour Him
> That gave me Life, than Her that gave me Food.

[c] See hereafter Section the Fifth.

[d] By the Law of the *Lycians*, if a Free-Woman married a Slave, the Children were adjudg’d Free: but if the greateſt Man in the State wedded a Foreigner or a Strumpet, the Iſſue was accounted baſe and ſervile. The ſame People took their Names from the Mother, not from the Father, *Herodot. Clio*, p. 44. Ed. *H. Steph.*

[e] Thus *Admetus* ſpeaks in *Euripides*, *Alceſt.* v. 666, *&c.*

> So far I died as Death was in Your Power:
> And if a kind Deliverer hath reſtor’d me
> To Light and Life, I own him for my Father;
> And boaſt to be the Comfort of his Age.

Liban: Orat. 13. *A Man who takes another out of the Water, where he was ready to periſh, may well be eſteem’d a Father by the Perſon he hath preſerved.*

in ſome meaſure, under his old Relation and Subjection; yet he cannot do this otherwiſe than with the Conſent and upon the Reſignation of his Educator, to whom all his Charges, *&c.* are to be refunded. And this ſeems to be the only Caſe in which it is poſſible to acquire Rule over a Man by Seizure or Occupancy.

Secondly, ‘ If the Mother were made a Captive in War, the Iſſue born to her belongs to the Perſon who took her; as her other Goods and Poſſeſſions. But here it muſt be obſerved, that the Right and Power of the Conqueror, over the Iſſue of his female Captive, is quite of another kind than that which ſhe, as a Mother, before enjoy'd.

Thirdly, “ If the Mother be her ſelf a Subject in any Commonwealth, the ſupreme Governour there hath Dominion likewiſe over her Child. Where we are again to remark, that the Power of the civil Governour is very different from that of the Parents: And that it doth not preſently follow, that the Mother's Authority muſt be extinct, and as it were ſwallow'd up in the chief Ruler's; but in ſome States 'tis only limited and reſtrain'd, in others 'tis left almoſt perfect and entire.

Fourthly, “ If a Woman enter into an Agreement of living with a Man, under this expreſs Condition, that the Man ſhall be Lord and Sovereign, then the Children born to them both ſhall belong to the Man, upon the Score of his Sovereignty over the Mother. But, if the Father be the Mother's Subject, the Children likewiſe fall under her Command; otherwiſe the bearing Iſſue would be a Prejudice to her Supremacy. And in general, if the Society between the Man and the Woman be ſuch a regular Union, as gives one the Dominion over the other, the Children owe Subjection to the Ruling Parent. But, if in a State of Nature, a Man and Woman contract to cohabit in ſuch a manner as to be independent on each other's Rule, the Children ſhall fall to the Mother, unleſs it was expreſly order'd otherwiſe in the Bargain. For the Mother may, by Covenant, diſpoſe of her Right as ſhe pleaſeth. Thus they tell us of the antient *Amazons*, that they agreed with the Men of the neighbouring Countries, to whom they had Recourſe for Iſſue, to ſend back the Males, and only to preſerve the Females to themſelves. But in Commonwealths, if a Man and a Woman engage by Contract to cohabit, the Children are the Subjects of the Man: Becauſe in civil States all the domeſtical Sovereignty belongs to the Fathers of Families, by whom the States were founded and eſtabliſh'd, and who, we may be ſure, were willing to ſettle the Point in Favour of themſelves. Such a Contract between a Man and Woman in a Commonwealth, if it be made in ſolemn Form, and according to the Laws of the Place, is call'd *Matrimony*. But in caſe the Parties bargain only for Concubinage, or for a leſs ſolemn kind of Cohabitation, the Children ſhall then fall either to the Father or to the Mother, according as the civil Conſtitutions have determin'd.

IV. *We*, in this, as in other of the like Points, have recourſe, in the firſt place, to Almighty GOD, the univerſal Cauſe and Author of Things; and yet we think it a very lawful Attempt, to ſearch farther into the ſecond Cauſes and immediate Inſtruments. For as to that which ſome pretend, that *All Sovereignty, which one Man obtains over another, is communicated to him by God, as it were in the manner of a divine Commiſſion, and that all human Power is purely by Delegation*; we take it to detract from the Honour of God, although the Perſons, who have ſuch Sentences commonly in their Mouths, ſpeak with a great Appearance of Piety. For he who exerciſeth a delegated Power, hath the ſame Power altogether with him from whom he receives it; only with this Difference, that the former poſſeſſeth it only as *borrow'd*, the latter as *his own*. But it would betray very low and unworthy Thoughts of the infinite Majeſty of Heaven, to conceive that the ſame Species of Sovereignty is enjoy'd by God and Man [a].

Having premiſed this Caution, we go on to the main Buſineſs before us. And, firſt of all, we think it may be ſettled as an undoubted Truth, that the Act of Generation doth yield an Occaſion to the acquiring a Right over the Child, which ſhall hold good, not only againſt other Perſons, who have not the ſame Claim of Parentage [b], but likewiſe againſt any Pretenſion that can be made in behalf of the Child it ſelf. We ſay an *Occaſion*; becauſe we are not perſuaded that [1] *Generation* alone is ſufficient to give a full Dominion over human Iſſue. For altho' our Children be indeed made of our Subſtance, yet in as much as they become Perſons like our ſelves, and our Equals, as to all thoſe Rights

Mr. Barb. *NOTES on* § IV.

[1] It is certain, that, as our Author will prove a little lower, Education is the immediate Foundation of paternal Power, and the mutual Duties of Father and Child. But we muſt not exclude Generation, which, to ſpeak Truth, is the firſt Foundation of all Engagements to a Father, and conſequently of his Power. Indeed, how comes it to paſs, that a Father and Mother are obliged above all others to bring up the Child that is born of them? 'Tis in my Judgment, becauſe they have join'd together in a natural Act appointed by God for the Propagation of the Species, and ſo are, or ought at leaſt to be, engag'd tacitly to bring up the Fruit they have produc'd; for that implied, that it was the Motive of that Conjunction; and tho' perhaps they then propounded only to ſatisfy their Deſires, 'tis ſufficient that the very Nature of the Thing, which they cann't truly be ignorant of, allows us to preſume upon that Engagement. This is ſo true, that our Author endeavouring to prove, that Fathers and Mothers ought to bring up their Children, hath ſaid above, *Lib.* 4. *Chap.* 11. § 4. that by bringing them into the World, they are engag'd to take care, ſo long as they depend on them, to preſerve that Life they have given them. We may here apply what *Crito* ſays to *Socrates* in the Dialogue of *Plato*, that bears his Name: Ἢ γὰρ οὐ χρὴ ποιεῖσθαι παῖδας, ἢ συνδιαταλαιπωρεῖν καὶ τρέφοντα καὶ παιδεύοντα, *i. e.* Either get no Children, or reſolve to maintain them, what Trouble and Charge ſoever you are at for their Education and Support. *Tom.* 1. *p.* 45. *Edit. Serr.*

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[a] See *Matth.* x. 28.

[b] That as he who is Maſter of a Thing, is likewiſe Maſter of the Fruits or Profits of it; ſo he who is Maſter of the Body whence the Child proceeds, ſhould have the firſt Step or Title towards obtaining a Sovereignty over the Child it ſelf.

which naturally accrue to Men; before we can render them unequal to us, or ſubject them to our Dominion, it ſeems neceſſary for us to ſeek out ſome other Title: Eſpecially ſince in the Method of bringing a Child into the World, the Parents have no little Regard to their own Pleaſure and Satisfaction; and therefore cannot rate the Kindneſs at ſo vaſt a Price, and ſet it ſo highly on the Child's Score, as to demand back, in Conſideration, a full Subjection and Obedience, whether the Child be willing, or no. It is a Saying of *Lactantins* [a], *He that begets a Son, hath no Power to make him be conceiv'd, to make him be born, to make him live: Whence it appears, that he is not ſo properly the Author of his Son's Being, as the Inſtrument.*

The Right then of Parents over their Children ſeems to be founded on theſe two Titles or Claims: Firſt, it ariſeth from that Duty which Nature (in enjoining Man to be a ſociable Creature) lays on them to take care of their Off-ſpring; ſhe having at the ſame time, to ſtir up their Diligence, wiſely implanted in them a moſt tender Affection towards theſe little Pictures of themſelves. For take away from the Parents all Care and Concern for their Childrens Education, and you make a ſocial Life an impoſſible and unintelligible Notion. But this Care cannot duly be exercis'd, unleſs the Parents have Power to direct and govern the Actions of the Child, in order to the procuring his Benefit and Safety, which he himſelf, through Defect of Years and Judgment, is incapable of apprehending and of providing for [b]; and conſequently Nature doth hereby enjoyn Parents actually to make uſe of ſuch a Power and Dominion, ſo far as it is neceſſary to the Accompliſhment of ſo important a Work. For whoever obligeth a Perſon to the Proſecution of an End, is, at the ſame time, ſuppos'd to have given him Authority to apply all Means that ſhall appear requiſite for its Attainment. And this Power of the Parents, reſulting from the Duty lying on them to provide for their Iſſue, dorh neceſſarily create in the Children an Obligation to ſubmit themſelves to their Parents Direction, without which Act of Submiſſion the former Benefit cannot be obtain'd, and the Authority is to no Purpoſe.

Secondly, The Sovereignty of the Parents ſeems likewiſe to be built on the preſumed Conſent of the Children, and conſequently on a tacit Pact. For, as the Parent, by the very Act of breeding up the Infant, doth declare himſelf ready to fulfil the Obligation of Nature, and to conſult, ſo far as in him lies, the well educating of his Charge; ſo the Infant, on the other ſide, tho' on account of the imperfect Force of Reaſon, he cannot expreſly promiſe thoſe reciprocal Duties, which anſwer to the Parent's Obligation, yet by virtue of this Care, imploy'd by the Parents about him, he contracts as firm an Engagement towards them, as if he gave his full and expreſs Conſent [c]. And this Engagement begins to exert its Power ſo ſoon as he arrives at the Knowledge and Apprehenſion of any thing that his Parents have done for him. It being fairly preſumed, that had he, at his coming into the World, been furniſh'd with the Uſe of Reaſon, and made capable of underſtanding that his Life could not be preſerv'd, without the kind Proviſion of his Parents, join'd with their Command over him, he would gladly have yielded Obedience on ſo commodious Terms. Which Conſent of his, [2] being rationally ſuppoſed, hath the ſame Validity as if it had been openly declar'd [d]. In the ſame manner, as a Perſon, who hath had any Buſineſs perform'd for him by another, in his Abſence and without his Knowledge, is ſuppoſed by a kind of ſilent Covenant to contract an Obligation of refunding the Charges. It is clear therefore, that the Power which Parents have over a Child, is then actually conſtituted, when they apply themſelves to nouriſhing and educating him, and rendring him, ſo far as they are able, a uſeful Member of human Society.

[3] Some indeed have maintain'd, that the Obligation between Parents and Children can by no means be deriv'd from their tacit Conſent and Covenant, upon this Argument: *Conſent, whatever the Subject or Occaſion of it be, doth not take place, except in Actions that were free before the Conſent paſs'd; but now it is not a matter of Freedom in the preſent Caſe, for the Parties to perform the mutual Duties of Education on the one ſide, and of Obedience on the other.* But this way of Reaſoning cannot weaken what we here aſſert. For it doth not imply the leaſt Contradiction, for a Duty to ariſe at the ſame time from a Precept of the Law of Nature, and from tacit Conſent and Pact. It is not certainly free for a Man not to obey GOD; yet GOD hath been pleas'd to enter into Covenant with his faithful Servants. A Subject is no doubt oblig'd to perform all due Offices in the State under which he lives; and yet, when he is to be liſted in the Military Order, not only his Conſent is required, but his Oath. And thus, why may we not as well affirm, that whilſt the Parent actually undertakes the Education of the Child, the Child's tacit Conſent is to be underſtood? the Effect of which Conſent amounts to this, that he ſhall not afterwards have Reaſon to complain, that the Parents Authority was obtruded upon him againſt his Will, and without ſufficient Grounds and Title.

V. When the Queſtion is carried farther, and it is demanded to which of the Parents this Right over their Iſſue doth moſt properly belong, a Diſtinction or two will decide the Point: For the Perſons concern'd, either live under ſome Commonwealth, or not; and again, the Parents either are, or are not, engaged to each other by Covenant. Without the Bounds of a Commonwealth, or in a State of natural Liberty, if the Parents were not united by any laſting Contract, the Child is under the Care and Command of the Mother. Becauſe, in ſuch a Condition of Life, it being as probable that one Man ſhould be the Father as another, the Mother can only determine the Controverſy; at leaſt, the thing cannot be otherwiſe known, with ſo much Truth and Certainty, as Matters of Fact demand [a]. On this Principle, the *Roman* Laws award to the Mother Iſſue begotten [1] in common [b]. But if a Covenant hath paſs'd between the Parents, by which they ſettled theſe Affairs, it will appear thence, which of the two is to bear Rule over the Children; for that two Perſons ſhould both hold the ſupreme Authority over a third, without Subordination or Diviſion, is no regular Practice. This Covenant then between the Parties, either terminates in the bare Procurement of Iſſue, or it includes farther the Sovereignty of the Man over the Woman, and ſo falls in with juſt Matrimony; where no doubt the Command over the Children is lodg'd in the hands of the Father. But in Covenants of the former kind, though they uſually take their Beginning from the Man, who ſeeks Children for himſelf, not for her, and conſequently bargains to have the Rule and Diſpoſal of them; yet it may ſo happen, that quite contrary to this Order, the Woman calls in the Man for an Aſſiſtant to her deſign of Iſſue; not the Man the Womam. This was the Caſe with the antient *Amazons*; and is ſtill with any ſovereign Princeſs, that marries without quitting her Rights; the Man being here not ſo properly a King, as the Husband of a Queen. Nor ought we to think that Pacts of this Sort are therefore repugnant to the Law of Nature, becauſe in them, one of the Couple ſeems to renounce that Care of the Children, which Nature hath equally laid on both the Parents: For the Precept of Nature, in this Point, doth not preciſely require that both Father and Mother ſhall apply themſelves, in the ſame ſtrict Degree, to the Work of Education; but is ſatiſfied if by Compact the main Charge be committed to either. In the ſame manner, as the Mother is not ſo neceſſarily oblig'd to give her Infant Suck, but that ſhe may make uſe of a Nurſe [c]: and as the Father acts upon good Prudence, when he delivers his Children into the Hands of able Inſtructors, for the forming of their Mind and Manners.

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[2] This Suppoſition is equally ill grounded, and ſuperfluous. We cann't preſume a Conſent of a Child who is not in a Condition, either to give it, or refuſe it. The Author alſo here, as well as elſewhere, confounds a preſumed Conſent with a tacit one. See what I have ſaid above in my Note upon *Lib.* 3. *Chap.* 6. § 2. In that alone, that Nature puts Infants into ſuch an Eſtate, wherein they have an abſolute need to be help'd and directed by others, and charges Fathers and Mothers with that Care; it ſufficiently impoſes upon the Firſt an Obligation to ſubmit to the Power of the Latter.

[3] It is JAMES THOMASIUS, the Father of the preſent Mr. THOMASIUS, in his Diſcourſe, *De Patriâ Poteſtate*, § 49.

[a] *Divin. Inſtit.* l. 5. c. 18. [b] See *Sirac.* VII. 23. XXX. 1, *&c.* [c] *Add.* L. 3. t. 5. l. 2. D. *de negot. geſtis.*
[d] *Com.* Senec. *Conſol. ad* Marciam. *C.* 18. *in fin.*

But in civil States, which for the moſt part have been erected by the ſtronger Sex, as the Men in common Courſe are the Heads of the reſpective Families, ſo the private Dominion over the Children belongs to the Father [2]; ſo that here, the Mother's Commands are in themſelves little better than Counſels, and borrow their full Force of obliging, from that Share of Power imparted by the Husband to his Wife. For as it is generally found convenient to admit the Woman to a Part in the Government and Direction of the Family; ſo the Father's Power over the Children doth by no means exclude the Mother's inferior Authority and Care. Not but that the Conſtitutions of particular Commonwealths may ſettle this Matter otherwiſe, as ſhall be judg'd expedient. *Peter della Valle*, in his Travels [d] informs us, that amongſt the Inhabitants of *Babylon* or *Bagdet*, the ſupreme Power over the Sons is held by the Father, and over the Daughters by the Mother.

If, upon the Father's Deceaſe, the Government of the Family remain with the Mother, it is but juſt that ſhe exerciſe the ſame Authority over the Children which the Father formerly enjoy'd [e]. And in Caſe ſhe marry a ſecond Time, and the new Husband be intruſted with the Care of his Predeceſſor's Children, they are to pay him the like Reverence and Duty as was challeng'd by their proper Father. Yet we are told a very odd Cuſtom of the *Chineſe* in this Particular, that if a Wife, after ſhe hath buried one Husband, proceed to a ſecond Match, her Children ſend her off, covered only with a ſingle Garment, as an ignominious Mark of her light Diſpoſition; and the Reaſon of the Cuſtom is, that according to the Inclination of that People, the Children cannot bear a *Father-in-Law*, much leſs reſpect and obey him [f].

VI. The next Step we take, muſt be to enquire how far this Power of Parents over their Children extends; or what are the proper Bounds and Meaſures of it. And here it is neceſſary to diſtinguiſh, firſt between thoſe Fathers of Families, who live under no publick Government, and thoſe, who are the Subjects of a Common-

Mr. Barb. *NOTES on* § V.

[1] *Vulgo concepti* (ſay the *Digeſts*) *dicuntur, qui patrem demonſtrare non poſſunt, vel qui poſſunt quidem, ſed eum habent, quem habere non licet, qui & ſpurii appellantur. Lex Naturæ hæc eſt, ut qui naſcitur ſine legitimo Matrimonio, matrem ſequatur, niſi Lex ſpecialis aliud inducit.* Lib. I. Tit. I. *De Statu Hominum.* Leg. XXIII, XXIV.

[2] By the *Roman* Law Wives had no Authority over their Children, although Ulpian ſeems to attribute ſome to them, *Digeſt. Lib.* XXVII. *Tit.* X. *De Curatoribus furioſo, &c.* Leg. 4. *Pietas enim Parentibus, etſi inæqualis eſt eorum poteſtas, æqua debetur.* See about this Mr. Noodt's Obſervations, *Lib.* 2. *Chap.* 15.

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[a] *Comp.* L. 3. t. 1. ſ. 31, 32. *Inſtit. de rerum diviſ.* & L. 41. t. 1. l. 7. ſ. 13. D. *de acqui. rer. dom.*

[b] The *Egyptians* followed a contrary Opinion. *They accounted none of their Sons ſpurious, although born of a Slave; imagining that the Father alone was the Author of the Generation, and that the Mother contributed no more than Place and Nouriſhment.* Diodor. Sic. *l.* 1. *c.* 80. *p.* 72. Ed. *Rhodom.* To the ſame purpoſe ſpeaks *Theages*, the *Pythagorean*, in his Treatiſe of *Virtues*, *The Father produceth the Form, and the Mother only ſupplies the Matter. Opuſcula Mythol. Eth. & Phyſ.* Printed at *Amſterdam* in 1688. *p.* 683, 684.

[c] The contrary Opinion is maintain'd by *Plutarch*, de *Educat. &c.* and by *Phavorinus* in *Gell.* l. 12. c. 1. Add *Ferdinand Pinto*'s Travels, *chap.* 54. where he tells us how Strict and Religious a Point the *Japoneſe* eſteem it, for a Mother to give her Infant Suck, In the *Alcoran*, the Women are commanded to perform this Office to their Children for the two firſt Years.

[d] P. 1. *Epiſt.* 17.

[e] Comp. *Gen.* xxi. 21, with xxiv. 4.

[f] Neuhof. *in Legat.* p. 281.

wealth: And again, between that Power, which the Father holds, as he is a Father, and that which he bears, as he is the Head of a ſeparate Family. The Power which a Father enjoys, on the bare Score of his being a Father, inaſmuch as it accrues to him as a neceſſary means of diſcharging the Obligation towards his Iſſue, which Nature lays upon him, muſt conſequently be ſo great, as ſufficiently to anſwer and effect that Deſign. Now the Obligation, or Duty of a Father, as ſuch, chiefly turns on this general Performance, that he duly educate his Children; that is, nouriſh, protect, inform, and govern them, in order to the rendring them uſeful to themſelves and others, till they are able to conſult their proper Benefit, and are grown Maſters of their own Wills and Actions. (For, as to the Act of begetting, that is not ſo properly a *Part* of the paternal Duty, as the *Occaſion* of it.) Parents ought to apply more Diligence and Caution in fulfilling this Obligation, the more Truth there is in that [1] ſaying of *Plutarch* [a], *Good Inſtitution is the Fountain and Root of all Honeſty and Virtue.* Eſpecially if they take this Obſervation of *Plato* [b] along with it, which commonly holds true; *Perſons*, ſays he, *who are naturally endued with the moſt excellent Wits, if they happen to be ſpoilt in the Breeding up, commonly prove the very worſt of Mankind. Can you think that all thoſe barbarous Villanies, all that horrid Wickedneſs, which we ſee in the World, proceed from mean and lazy Diſpoſitions, and not rather from brave and generous Spirits perverted by ill Education? Or do you ſuppoſe, that a natural Weakneſs and Feebleneſs of temper does ever prove the Cauſe of any very great Good, or very great Miſchief* [c]?

It is plain then, that the Power of the Father doth by no means reach to ſo extravagant a Degree, as that he may deſtroy the Child whilſt in the Mother's Belly [d], unleſs the Mother muſt otherwiſe infallibly periſh [e], or after the Birth [2] *expoſe* or make away with it, much leſs after the increaſe of Growth and Years. For altho' it be very true, that the Infant hath his Riſe and Original from the very Suſtance of the Parents, yet he is immediately plac'd by Nature, [3] in a Condition of Equality with them [f]; at leaſt ſo far as to be capable of receiving *Hurt* and *Injury* [g]. Therefore the Opinion deliver'd by *Ariſtotle* in his Politicks [h] is to be exploded as unjuſt and inhuman. *As to the expoſing and the preſerving of Children*, ſays he, *let it be order'd by Law that nothing lame or defective be ſuffer'd to grow up. If any Nation think it not allowable to* expoſe *their Infants, there certain Bounds are to be ſet to the Number of Births; and if the Buſineſs of Generation happen to exceed the due Limits, it will be convenient to procure Abortion, before the* Fœtus *is arriv'd at Life and Senſe; for ſuch a Period of its Growth is to determine, whether the Act of deſtroying it be harmleſs, or ſinful.* *Lycurgus* did not expreſs more Mercy in his *Spartan* Diſcipline. We learn from *Plutarch*, that, *when a Child was born, it was not left to the Parents Choice to preſerve and nouriſh him. But he was carried immediately before an Aſſembly of the Seniors, who conſidered and ſurveyed him. If they found his Limbs ſtrong and well ſet together, they order'd he ſhould be bred up: But the weakly and miſhapen Infants they adjudg'd to be carried away and thrown into a kind of Whirl-pool near the Mountain* Taygetus; *as if to live, when Nature had provided them ſo infirm or ſo unſightly a Body, could neither be for their own Good and Credit, nor for the Advantage of the Commonwealth* [i]. Indeed this unnatural Practice

Mr. BARB. *NOTES on* § VI.

[1] PLUTARCH's Greek is, Πηγὴ γὰρ καὶ ῥίζα καλοκαγαθίας, τὸ νομίμου τυχεῖν παιδείας. PLATO's Greek is, Καὶ τὰς ψυχὰς οὕτω φῶμεν τὰς εὐφυεστάτας, κακῆς παιδαγωγίας τυχούσας, διαφερόντως κακὰς γίγνεσθαι; ἢ οἴει τὰ μεγάλα ἀδικήματα, καὶ τὴν ἄκρατον πονηρίαν, ἐκ φαύλης, ἀλλ' οὐκ ἐκ νεανικῆς φύσεως τροφῇ διολλυμένης γίγνεσθαι, ἀσθενῆ δὲ φύσιν, μεγάλων οὔτε ἀγαθῶν οὔτε κακῶν αἰτίαν ποτὲ ἔσεσθαι. Further, we may find ſeveral excellent Precepts about the Education of Children in *Plutarch*'s Treatiſe before quoted, as alſo in MONTAIGN's Eſſays, *Lib.* 2. *Cap.* 8. of the Affection of Fathers to their Children. In CHARRON, of Wiſdom, *Lib.* 3. *Cap.* 14. but eſpecially in that excellent Treatiſe of Mr. LOCK, which has been ſeveral times printed, but the beſt Edition is in 1708. becauſe the Author has made ſeveral Additions to it, to which Mr. COSTE, who has tranſlated it into *French*, has added ſeveral excellent Notes in diverſe Places.

[2] This deteſtable and inhuman Cuſtom was very common heretofore among the *Grecians* and *Romans*. See Mr. NOODT's *Julius Paulus*, where he ſifts this Matter to the bottom. The Law of the *Digeſts*, quoted by our Author, where the Lawyer *Paul* condemns this abominable Cuſtom, as contrary to the Rules of Humanity, Civility, and natural Juſtice, tho' 'twas not puniſh'd by the civil Laws; deſerves to be ſet down here at length. *Necare videtur, non tantum is, qui partum perfocat, ſed & is qui abjicit, & qui alimonia denegat, & is qui publicis locis miſericordiæ causâ exponit, quam ipſe non habet.* He kills a Child, not only, who ſtrangles it, but he that caſts off all Care of it, and denies it Food, and he that lays it in a publick Road, that it may find that Mercy from others, that he is wholly devoid of. *Digeſt.* Lib. 25. tit. 3. *De agnoſcendis, & alendis Liberis, &c.* Leg. 4. See about this, *Chap.* 8, *&c.* of Mr. NOODT's Treatiſe before quoted.

[3] See above, *Lib.* 1, *Cap.* 1. § 7.

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[a] *De Liberor. Educat.* p. 4. B. Ed. *Wech.* [b] *De Republ.* l. 6. p. 676. Ed. *Wech.* [c] *Idem de LL.* l. 7. calls a Child, *A Creature more intractable than a Beaſt.* Liban. *Declam.* 20. *Education is one of the higheſt Goods of human Life.* Horat. *L.* 4. *Ode* 4. *v.* 33.

Doctrina ſed vim promovet inſitam,
Rectique cultus pectora roborant:
Utcunque defecere mores,
Dedecorant bene nata culpæ.

But Learning feeds the in-born Flame.
And Culture gives great Souls a firmer Frame:
If Generous Morals once decline,
Baſeneſs and Vice attaint the nobleſt Line.

[d] *Vid.* L. 47. t. 11. l. 4. *D. de extraordin. crim.* & L. 48. t. 8. l. 8. *D. ad* L. Cornel. *de* Sicariis, & tit. 19. l. 38. ſ. 5. *D. de pœnis.* [e] *Vid.* Ant. Matth. *de crimin. ad* l. 47. D. t. 5. ſ. 5. Grot. *in Flor. Sparſ. ad* l. 39. *D. de pœnis.* [f] See B. 1. c. 1. ſ. 7. [g] *Plin.* L. 9. Ep. 12. *So uſe your Fatherly Power as to remember that You are Your ſelf a Man, and the Father of a Man.* *Vid.* Philo Jud. *de Special. Leg.* p. 794, 795. Ed. *Pariſ.* Lactant. *Div. Inſtit.* l. 6. c. 20. *Diod. Sic.* l. 1. c. 77. *Add.* Grot. *ad Exod.* xxi. 22. *Leg. Wiſogoth.* l. 6. t. 3. c. 7. Selden. *de J. N. & G.* l. 4. c. 1. It is a moſt abſurd and moſt barbarous Cuſtom which they practiſe in *Formoſa*, where it is reckon'd ſcandalous for the Women to conceive before their Thirty fifth or Thirty ſixth Year. And if they breed ſooner than that time, by miſerable Pains and Beatings they procure *Abortion.* [h] L. 7. c. 16. (21.) [i] I know not whether we may venture to credit the Account given by *Diodor. Sic.* l. 1. c. 80. of the Method taken by the *Taprobanians*, to make Experiment of the Temper of their Children.

of *expoſing* Infants was ſo frequent and almoſt ſo univerſal a Cuſtom with the Antients, that *Strabo* [a] mentions it as ſomething very particular in the *Egyptians*, that *they breed up all their Children* [b]. So *Dionyſius Halicarnaſſeus* [c] ſets it down as a remarkable Opinion of the *Aborigines*, *They refuſe to make away with any of their Infants, thinking this one of the higheſt and moſt execrable Villanies.* And *Tacitus*, in his Account of the *Jews* [d], makes their Abhorrence of this *Cruelty* one part of their Character [e].

Nor doth it appear reaſonable to extend the paternal Authority, as ſuch, to the *Power of Life and Death*, even in the Caſe of Faults committed; but rather to fix its Bounds within the Exerciſe of moderate Correction: Becauſe its whole Care and Buſineſs is taken up about ſo tender an Age, as can ſcarce be imagin'd capable of ſuch grievous and incurable Offences, as demand capital Puniſhment [f]. It ſeems the more proper way of proceeding, when a Child of obſtinate and incorrigible Perverſeneſs rejects and deſpiſeth his Father's kind Labours on his account, to caſt him off, as unworthy of all Care and Notice. And thus to *abdicate*, or *diſinherit* a Son, may paſs for the ſevereſt Penalty that a Father, *by virtue of his being a Father*, can inflict [4].

VII. Of this *paternal* Power ſtrictly taken, we muſt underſtand that Place of *Grotius* [g], where he divides the Age of Children into three Periods: Firſt, "Of imperfect Judgment and Choice; Secondly, When they have attain'd to Maturiry "of Judgment, but ſtill remain as Members of "their Father's Family, and have not undertaken "the ſeparate Management of their own Affairs; "Thirdly, When they have left their Father's "Family, either to join themſelves to ſome other, "or to erect one of their own. Which Diſtinction *Ziegler* ſeems to have condemn'd on no very good Reaſon. For though, as he obſerves, the Holy Scriptures [h] preſs the Duty of Obedience on Children, without making any ſuch Difference, yet they do by no means forbid that grown Perſons ſhould be treated in another way of Management than Infants; nor do they require that a Son, when arriv'd at a State of Diſcretion and Maturity, ſhould ever remove out of his Father's Houſe. "During the firſt Period of Age, then "(ſays *Grotius*) all the Actions of the Children "ought to be regulated and directed by their Parents; for he who cannot govern himſelf, falls "of courſe under the Government of another; "and the Parent, according to Nature, is the moſt "proper Perſon to exerciſe this Authority over the "Child.

VIII. It is here made a Queſtion, whether a Child, under this imperfect Period of Reaſon, be by the Law of Natute capable of *Propriety*, or of being the Maſter of any Goods or Poſſeſſions, in ſuch manner as to exclude the Claim of his Parents? On which Point it may be proper to diſtinguiſh between Goods gotten by private Induſtry, and thoſe which are left or made over by the Liberality of others, as in Legacies, Donations, *&c.* In that tender Age, what can a Child be ſuppos'd to get by his own Induſtry? Certainly not ſo much as his Parents have laid out on his Education. This therefore the Father may fairly challenge, in requital of his Pains and Charges. For tho' he were oblig'd indeed, by the Law of Nature, to ſupport and maintain his Off-ſpring, yet he was not, in the leaſt, prohibited to make what Fruit and Advantage he could of his Labour. One might as well ſay, that Parents are forbidden to take any Delight or Comfort in their Children; a Satisfaction ſo very great, that moſt, who are ſo happy as to enjoy it, eſteem it invaluable, and beyond all Compenſation or Equivalent [i]. For the ſame Reaſon, it would be a high Degree of Impudence, for a Son, in his State of Minority, to require a Reward for the Service he does his Father. 'Tis a wiſe Saying of *Sophocles* [k],

Good Children ſhould forget the Toils they bear
To help their Parents [1].

In *Peru* the Children were obliged to aſſiſt their Parents with their Labour, till the Age of five and twenty [l].

In the other Caſe, when any thing is to be transferr'd on the Child, in way of Gift or Legacy, at firſt view ſuch a Donation may ſeem invalid, becauſe Acceptance is a neceſſary Condition required in the Receiver, which cannot be perform'd without deliberate Conſent, and therefore not without the full uſe of Reaſon. But becauſe it would be an intolerable Hardſhip to make Children incapable of theſe Advantages, on account of their Immaturity, when for that very Reaſon they have more need of the Aſſiſtance of others, it is moſt agreeable to Equity, that another Perſon ſhould *accept* this Bounty in their Name, and ſhould likewiſe have the Goods in Charge, till the Children are capable of being their own Managers. And for this Truſt no Man is ſo fit as the Father. Whence it appears, that it is by no means natural for the Father to acquire a *Property* over a Poſſeſſion of this kind, tho' it be very equitable, that he take not only the Care,

[4] See what we have ſaid, *Lib.* 4. *Cap.* 11. § 7, 11.

Mr. Barb. *NOTES on* § VIII.

[1] The Greek of *Sophocles*,

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Οὐδ' εἰ πονεῖ τις, δεῖ πόνων μνήμην ἔχειν.

[a] L. 15. [b] Add *Diodor. Sic.* l. 1. c. 80. [c] L. 1. p. 13. [d] *Hiſt.* l. 5. [e] Yet *Curtius*, l. 9. c. 1. reports that the *Spartan* Cuſtom was practis'd by ſome of the *Indians*. *They bring up their Infants*, ſays he, *not at the Pleaſure of the Parents, but according to the Order and Direction of Officers appointed to ſuperviſe this Affair; who command all ſuch Children to be kill'd, as they find either extremely ſlow and heavy, or uſeleſs and defective in any Part of the Body.* *Strabo*, l. 15. gives the like Account of the *Catheans*. It is common, amongſt the *Chineſe*, for the Parents to kill their Children, eſpecially the Females, without falling under Cenſure or Puniſhment. And, holding the Tranſmigration of Souls, as moſt other People of the Eaſt do, they think they do them a Kindneſs, by preparing their way to a happier Birth and a more advantageous Condition. [f] Thus the *Roman* Youths, whilſt they wore the *Prætexta*, were not liable to Fines and Amercements, but receiv'd corporal Correction. *Plin.* N. H. *l.* 9. *c.* 23. [g] L. 2. c. 5. ſ. 2. [h] *Epheſ.* vi. 1. *Col.* iii. 20. [i] *Vid.* Senec. *Conſol. ad* Marciam *c.* 12. [k] In *Oedip. Colon.* p. 289. Ed. *H. Steph.* [l] *Garcilaſſo de la Vega*, l. 4. c. 19.

but the Profits of them, as Helps towards maintaining the Child, till arriv'd at proper Years of Inheritance. And hence too we may diſcover the juſt and ſolid Grounds of thoſe Diſtinctions, in the *Roman* Law, between the [2] *Peculium Profectitium, Adventitium*, and *Caſtrenſe* of Children; the Stock or Wealth they get by labouring under their Parent, by the Bounty of others, and by the Military *Pay*.

IX. Another Enquiry that may be rais'd on this Subject is, Whether the paternal Power and Duty can be made over by the Father to a Subſtitute? On which Point we are to know, that altho' the Father's Authority and Obligation took their Occaſion and Riſe from a [1] Perſonal Act, which is incapable of being transferr'd [a], yet this doth not hinder him from recommending his Office to a Deputy, the Advantage or Neceſſity of the Child ſo requiring. But then he would do well to keep *Plutarch*'s Advice always in mind: *Thoſe Parents*, ſays that wiſe Author, *do juſtly deſerve Cenſure, who having committed their Sons to the Care of Maſters and Inſtructors, never trouble themſelves to make Trial of their Proficiency. This is a very ſcandalous Miſtake in Education They ought, at proper Diſtances of Time, to enquire into the Boy's Parts and Improvement, and not to place all their Hopes in the Faith of a mercenary Teacher. Beſides, the Maſter himſelf will by this means be engaged to uſe more Diligence and Application, when he finds that ſo frequent a Judgment will be paſs'd on his Pains.*

Farther, it is not, in the leaſt, repugnant to the Law of Nature, for a Father to reſign his Child to be adopted by ſome other honeſt Perſon, when 'tis likely to prove to the Child's Advantage [b]. But that he ſhould pawn, or [2] ſell his Child, Nature ſeems not to allow in any Caſe; except when he cannot otherwiſe feed and ſupport him. For then he ought rather to ſell him into ſome eaſy Servitude, whence there is Hope of being releas'd, than to let him periſh with Hunger. *Ælian* [c] hath recorded a memorable Conſtitution of the *Thebans* to this purpoſe: *No Man, under Pain of Death, ſhall expoſe an Infant, or caſt him out into an uninhabited Place. But if the Father be reduced to extreme Poverty, the Law directs him to carry the Child, immediately after the Birth, to the Magiſtrate, who upon receiving an eaſy Price ſhall deliver it, whether Male or Female, to another Perſon, taking Security of the Buyer that he ſhall honeſtly breed up the Infant, and for his Pains ſhall take its Service when grown to Man or Woman's Eſtate.* The Defence of which Law is grounded on this Rule, that Nature is ſuppos'd to give us a Right to every thing, which appears abſolutely neceſſary to our fulfilling her Commands. [3] In the ſame manner the Emperour *Conſtantine* [d] permits a Father, in the Caſe of extreme Want [e], to ſell his Son or Daughter, ſo ſoon as they come into the World, leſt they ſhould otherwiſe ſtarve; yet ordering, at the ſame time, that whoever would repay their Price to the firſt Buyer, ſhould have the Power of redeeming them into Freedom [f]. And when, in an Edict of *Theodorick*, and a Law of the *Wiſo-Goths*, we find a Prohibition againſt *Selling Children for the ſake of Food* [g]: it is meant of Food for the Occaſions of the Parents, not for the neceſſary Suſtenance of the Children. Yet *Romulus* granted Parents a very unreaſonable Privilege, when, as *Dionyſius Halicarnaſſeus* [h] informs us, *He allow'd a Father to make Money, by ſelling his Son Three times; thus giving him more Authority over his Son, than over his Slave. For a Slave once ſold, and then obtaining Liberty, is ever after at his own Command and Diſpoſal. But a Son, tho' twice ſold, and twice recovering his Freedom, return'd under his Father's Dominion, and was not exempted from it till he had paſs'd the third Sale. Numa* in ſome meaſure ſoftned the Rigour of this Law, by excepting from Sale thoſe Sons who had contracted Marriage, provided they had done it by their Father's Orders, or with his Conſent. The *De-*

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[2] We call a *Peculium*, the Goods, that a Slave, or Son hath gotten of his own; what a Son hath gotten by War, or his Father, Mother, and other Relations have given him, while he follow'd that Buſineſs, belong abſolutely to him; ſo that he can diſpoſe them, as his own Goods, as he ſees fit, and his Father hath nothing to do with them. This is call'd *Peculium Caſtrenſe*. See *Digeſt*. Lib. 49. tit. 17. 'Tis the ſame with that which a Son has gotten in any other Employment, where he has a Salary from the Publick, and this is called *Peculium quaſi Caſtrenſe*. See *Cod*. Lib. 3. tit. 28. *De inofficioſo Teſtam.* Leg. 37. This is *Peculium Militare. Peculium Civile*, or as the *Code* expreſſes it *Paganum*, conſiſts in the Goods, which a Son gets, who is not in publick Buſineſs, either by his Induſtry, or by ſome Gift, or Will, or by his Attendance upon the Laws, or by managing a Thing, of which his Father has only the Profits. This the Interpreters call *Peculium Adventitium*. Or in the Advantage that a Son makes of the Goods of his Father, or by their means, and this was abſolutely in the Diſpoſal of the Father, and is call'd *Peculium Profectitium*. See the *Inſtit*. Lib. 2. tit. 9. *Per quas perſonas cuique acquiritur*, § 1. and Mr. Daumat's civil Laws in their natural Order, *Part*. 2. *Lib*. 2. *tit*. 2. § 2.

Mr. Barb. *NOTES on* § IX.

[1] Libanius's Greek is, Οὐ γὰρ τὸ παρ' ἐμοῦ σε γεγενῆσθαι δυνατὸν λυθῆναι νόμῳ.

[2] Theſe Quotations might have been put into a Note.

[3] This Law of *Conſtantine* is the ſecond, and laſt in the Title of the *Code* before quoted. The Words are, *Si quis propter nimiam paupertatem, egeſtatemque, victûs causâ (i. e.* for the Life of the Child, not of the Parent) *filium, filiamve ſanguinolentos vendiderit, venditione in hoc tantummodo caſu valente, emptor obtinendi ejus ſervitii habeat facultatem: Liceat autem ipſi qui vendidit, vel qui alienatus eſt, aut cuilibet alii ad ingenuitatem eum propriam repetere, modò ſi aut pretium offerat, quod poteſt valere, aut mancipium pro ejuſmodi præſtet.*

[a] *Liban*. Declam. 20. p. 523. *Edit*. Morell. *No Law can recall the Act of a Father, and cauſe him not to have begotten.*

[b] *Add*. Gell. *lib*. 5. *cap*. 19. *Euripides, Ion*. v. 1535, 1536.

If *that* Friend want a *Fortune*, 'tis but fair
He give his Son to *this* who wants an *Heir*.

[c] *V. H*. l. 2. c. 7. [d] *V. C*. l. 4. t. 2. [e] V. *Grot*. l. 2. c. 5. ſ. 5. [f] *Cap*. 94, 95. *in Edict*. Theodoric. & *leg*. Wiſigoth. *l*. 5. *t*. 4. *c*. 12. [g] *V. C*. l. 4. t. 2. [h] L. 2. c. 27.

cemviri durſt not quite take it away, but left it to wear off by gradual Diſuſe [4], till it was at length expreſly revers'd in the *Code*. Yet the old Cuſtom was ſtill kept up of ſelling a Son three times, tho' only in way of Fiction and Formality, at the Ceremony of giving him his Freedom. Tho' this too was afterwards taken off by *Juſtinian* [a]. It appears from *Plutarch* [b], that amongſt the *Athenians*, at leaſt before *Solon*'s Time, a Father was allow'd to ſell his Son for the Payment of his own Debts [5]. And we are lately told of the *Muſcovites*, that a Father makes this advantage four times, after which the Son is releas'd from his Authority [c]. The *Chineſe* make a frequent Practice of ſelling thoſe Children, whom they think they ſhall not be able to maintain; but with this good Condition, that any of them ſhall have the Privilege of buying themſelves into Freedom, at the ſame Rate at which they were firſt ſold.

X. [1] In order to our underſtanding what Power the Father hath over the Son, during the ſecond Period, in our Diviſion of Age, we muſt remind our ſelves of what was before ſlightly hinted, that Fathers are inveſted with another kind of Sovereignty, as they are the Heads of their reſpective Families. Now this Authority is different, according as the Perſons live either within, or without the Limits of a Commonwealth. Separate Families, as they very much reſemble States and Kingdoms, ſo they are govern'd by their Heads, in a Way bearing ſome Proportion to regal Power. For we are not willing to give them abſolutely the Name of *Civitates*, as [2] Mr. *Hobbes* hath done [d]; becauſe Families and publick States are inſtituted on

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[4] We find a Law in the *Code* made by *Diocleſian* and *Maximinian*, where it is ſaid, That Fathers ſhall not have any Power to put their Children under the Authority of any other, either by ſelling them, or Gift, or Pawn, or any other manner, nor under a Pretence of Ignorance of him, who has either of thoſe ways got him into his Power. *Liberos à Parentibus, neque venditionis, neque donationis titulo, neque pignoris jure, neque alio quolibet modo, neque ſub prætextu ignorantiæ accipientis in alium transferri poſſe, manifeſtiſſimi juris eſt*, Lib. 4. tit. 43. *De Patribus, qui filios ſuos diſtraxerunt*. Leg. 1.

[5] Comp. *Matth.* xviii. 25. 2 *Kings* iv. 1. *Philoſtratus*, in vit. *Apoll. Thyan.* l. 8. c. 3. p. 401. Ed. *Morell.* reports of the *Phrygians*, *That 'twas an ordinary thing with them to ſell their own Sons; and not to regard them, if they happen'd to be led Captives into Slavery*. Add. *Plutar. Lucull.*

From theſe Places it appears, that among the *Jews* a Debtor, who found himſelf unable to pay, might become a Slave to his Creditor with his Children; or might ſell himſelf and Children. See Mr. Le Clerc upon *Lev.* xxv. 39. and *Deut.* xv. 12. Laſtly, there was printed in 1708. a Book intitled *Diſſertatio Juridica, De Jure patrio, Auctore Abrah. à Kerkraad*, where we may find a Collection of all that this Author has put into his Lectures, about the *paternal Power*, principally in relation to the Cuſtoms and Notions of the *Romans*. It may ſerve as an Hiſtorical Dictionary upon this Subject.

[a] L. 8. t. 48. l. *ult.* C. *de Adoption.* [b] *In vit.* Solon. [c] *Sigiſm. Baro* in *Herberſtein.* *Add.* Olear. *Itin.* Perſic. *l.* 3. *c.* 6. [d] *De Cive*, c. 5. ſ. 12.

Mr. Barb. *NOTES on* § X.

[1] The Three following Paragraphs are otherwiſe plac'd in the Original, This is the Eleventh, the next the Twelfth, and the Third the Tenth. Our Author, without any Reaſon, as appears from his Abridgment, *De Officio Hom. & Civ.* ſpeaks of the Third Age of Children before he treats of the Second.

[2] Since Mr. Hobbes, an *Engliſh* Knight of the ſame Nation, named Robert Filmer, hath publiſhed a Book, entitled, *Patriarcha*, to prove, that all Government ought to be Abſolute and Monarchical, and for a Foundation of his Opinion aſſerts, That the paternal Power is the ſame as royal Authority, and is entirely Deſpotick. Algernoon Sidney in his Treatiſe of *Government*, and Mr. Lock, in the firſt Part of his Work upon the ſame Subject, have quite overthrown the Conſequences, which Filmer has drawn from his falſe Principles. Mr. Sidney has not dwelt long upon it; but Mr. Lock having taken pains in his Second Part to overthrow the Principle itſelf, we have thought it convenient to give an Abridgement of the Reaſons he there gives. Firſt then, this able Writer obſerves, that all the Obligations that Infants have, being founded on Generation, to which the Mother concurs, and contributes as much at leaſt, if not more, than the Father, it follows, that both of 'em have an equal Right and Power over thoſe who ſpring from their Union. So that to ſpeak exactly, we ought to call that Authority the Power of the Parents, and not of the Father, as we do ordinarily, ſince the Impropriety of the Expreſſion might be an Occaſion for Men to imagin, that all the Authority over the Children reſides only in the Father. The Laws, which God hath given both to the *Jews* and *Chriſtians*, do plainly contradict this Miſtake. *Honour thy Father and thy Mother*, Exod. xx. 12. *Children, obey your Fathers and your Mothers*, Eph. vi. 1, 2. This is the uniform Language of the old and new Covenant. From whence it follows, that the Power which they have over their Children cann't be a Foundation for monarchical Government. But, ſuppoſe we grant that, it will not thence follow, that Kings have an abſolute and deſpotick Power, becauſe the paternal Power is not ſo, as will appear from the Conſideration of its Nature and Extent. All the Rights of the Father and Mother conſiſt in governing their Children, till they are able to govern themſelves by the Laws, which are the Rule of the Parents Conduct, and in a certain Honour, which they owe their Parents, till they are of Age to underſtand and practiſe the Law. Altho' all Men are naturally equal, and every one is born free, *i. e.* has a Right to diſpoſe of his Perſon, Actions, and Goods, as he ſees fit, according to the Laws under which he lives. None of *Adam*'s Poſterity found himſelf in this State, when he came into the World. The Defect in the Uſe of their Reaſon, and the Impoſſibility that Children are in to preſerve themſelves, and provide for their Wants, obliges them neceſſarily to ſubmit to the Direction and Power of their Father and Mother, who by the Law of Nature are tied to maintain and bring them up, not as their own Work, becauſe they contributed to their Production only as bare Inſtruments, but as the Work of the Creator, to whom they muſt give an Account. If a Child never attains to ſuch a competent degree of Reaſon, as to be able to order himſelf aright, as it happens to ſuch as are born Innocents and Lunaticks, he depends always upon the abſolute Will of the Father and Mother; but this is rare, and out of the common Courſe of Nature. So that the Bonds of Subjection of Infants are like their Swadling-Cloaths, and their firſt Garments, which are only neceſſary upon the account of their tender Years. When they come to the uſe of Reaſon, their Age removes them from their Father's Juriſdiction, and makes them Maſters of themſelves; ſo that then they are equal to their Father and Mother, in reſpect to that State of Liberty, when a Pupil becomes equal to his Guardian, after the Time of his Minority, appointed by the Law. The Liberty of Children, become Men, and the Obedience of their Father and Mother before that, are not more inconſiſtent, than is, according to the moſt zealous Defenders of Monarchy, the Subjection that a Prince is under, during his Minority, in reſpect to the Queen-Regent, his Nurſe, his Tutors, or Governours, with the Right he hath to the Crown, which he inherits from his Father, and the Authority of a Sovereign, with which he ſhall one Day be inveſted, when his Age will render him capable to manage it himſelf, and govern others. It is otherwiſe ſo true, that the paternal Power doth not appertain to the Father by any particular Privilege of Nature excluſive of the Mother; and that he is but in the quality of a Governour or Tutor of his Children; that if he abandons them, and renounces all paternal Kindneſs to them, he deprives himſelf of the Power he hath over them, which is ſo inſeparably annex'd to the Care that he ought

on different Ends and Deſigns, and conſequently many Parts of civil Sovereignty are excluded from this private Dominion. And indeed Mr. *Hobbes* himſelf elſewhere confeſſeth [a], that *A Family is not properly a Commonwealth, unleſs it be of that Power, by its own Number or other Opportunities, as not to be ſubdued without the Hazard of War.* Yet Family Rule, in this ſeparate Condition, ſo nearly approacheth to the Legiſlative Authority, as to have the Power of Life and Death in Criminal Caſes, as likewiſe the Management of Arms, and the Care of Leagues and Alliances. This Dominion of the Father over the Children, now grown up, is eſtabliſh'd by tacit Compact; the Father extending his Commands beyond the Affair of Education, and the Children freely putting themſelves into a State of farther Obedience. For the Laws of Equity and Gratitude direct, that a Son ſhould yield his Strength and Service chiefly to him, to whom he owes all that he now is or enjoys; till ſuch time as with his Father's Conſent he be releas'd from the Subjection.

XI. But after the erecting of Commonwealths, of theſe Rights which before belong'd to Fathers of Families, ſome were contracted, others quite taken away. Yet ſo much Authority was almoſt in all places allow'd, as appear'd ſufficient for Educating the Children: Except that even this was much retrench'd under *Plato*'s National Government; and in the *Perſian* Conſtitution, if we admit *Xenophon* for a true Hiſtorian [b]. In many Nations the Privileges of Family Rule were little impair'd. Thus at *Rome* the Fathers had the Power of Life and Death over their Children, which they exercis'd in a kind of Judiciary manner, calling a Council of their Relations and Friends, and cauſing Sentence to be executed according to their Determination [c]. *Juſtinion* [d] calls this Right *Proprium Civium Romanorum, Particular to the* Roman *Citizens*, and not pretended to by other Men; for which Poſition *Bodinus* [e] hath fallen heavily upon him; alledging that the *Perſians* and antient *Gauls* [f] made uſe of the ſame: And that the Abrogation of it in the *Roman* State was the Cauſe of

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ought to take of them to nouriſh and bring them up, that it paſſes from him to the Perſon who brings up an expoſed Child; for the ſingle Act of Generation is a ſmall thing, if we go no farther. In certain Places of *America*, when a Man and Wife part, which happens there often, the Children go along with the Mother; and are not theſe Children indiſpenſibly obliged to obey the Mother, as much as thoſe who among us loſe their Father in their Non-Age? And can we ſay, that a Mother can preſcribe ſuch Laws to her Children, as ſhall be perpetually obliging, and by which ſhe may diſpoſe of all that belongs to them, and conſtrain them under ſome corporal Puniſhment, to conform themſelves implicitly to her Will? Certainly a Father and Mother can diſpoſe of their Goods as they ſee fit, when they put their Children into a Condition of ſubſiſting of themſelves; but the Power they have, as the Authors of their Being, doth not extend ſo far, as to be Maſters of their Lives, Liberties, and Goods, whether they have gotten them by their own Induſtry, or are beſtow'd on them by others. God himſelf allows Children to withdraw themſelves from the Parents Juriſdiction, when he ſays, *Gen.* ii. 24. *Matth.* xix. 5. *Eph.* v. 31. *That a Man ſhall leave his Father and Mother, and be joined to his Wife.* But tho' Children as ſoon as they come of Age to ſee what the Laws of Nature and Civil Society, of which they are Members, demand of them, are not obliged to violate thoſe Laws to pleaſe their Parents, yet they are bound to honour their Father and Mother, as the Inſtruments which God made uſe of to give them Life, and acknowledge the Care they have taken in their Education. They ought to have for them a particular Eſteem, Affection, and Reſpect, and ſhew them in all their Diſcourſe and Behaviour; do or ſay nothing that may offend them, or trouble them in the leaſt, defend them, aſſiſt them, and comfort them by all poſſible and lawful Means, and conform themſelves to their Will, when it may be done without any great Inconvenience to them. There is no Perſon of any Age, Rank, or Dignity, that can exempt a Child from theſe Duties towards them, from whom he hath receiv'd his Life, and to whom he has ſuch great Obligations; but he is not for all that bound to pay them an abſolute Obedience and Submiſſion. The moſt powerful Monarch ought to obey his Mother, tho' he is not to follow her Will in the Government of his State, or royal Family. We ought therefore to diſtinguiſh well between theſe two ſorts of paternal Right, *viz.* of directing a Child till he comes to the uſe of his Reaſon, and that which requires only Reſpect and Acknowledgment. The firſt is really only a Duty to Fathers, rather than a Power; the Authority which it gives ends with the Wants of the Child, and when it is moſt in force, it may be alienated in ſome ſort; as when a Father truſts the Care of his Son's Education to another; for by putting him into that Perſon's Hands, he diſcharges him of a great part of the Obedience due to himſelf and his Mother. But as to Reſpect and Acknowledgment, nothing can releaſe a Child from it; and the Mother has as good a Right to require it as the Father; ſo that if the Father orders his Son, not to honour his Mother, the Son ought to diſobey his Father. This Duty may be more or leſs enlarged, according as the Father or Mother has taken more or leſs Care, and ſhew'd more or leſs Kindneſs to the Child. But it can never be entirely aboliſh'd; and in civil Societies themſelves, Fathers and Mothers preſerve their Right to require it, as well as to order them in their Education, inſomuch that every Subject has not only as much paternal Power over his Children, as a Prince has over his; but alſo the Sovereign himſelf ought to have as much Reſpect to his Father and Mother, as the meaneſt of his Subjects has to his. Hence it appears that Sovereignty and paternal Power are two different things, which have neither the ſame Foundations, End, nor Extent. 'Tis true, that as ſeveral Perſons cannot live together without ſome Order, and ſome ſort of Government, ſo we may eaſily conceive, that in the firſt Ages of the World, when any Family was about to withdraw itſelf, and ſettle in a Place uninhabited, the Father became, as it were, the Prince over his Children, tho' at the Age of Diſcretion; but it ſeems as tho' that Authority were conferr'd by the expreſs or tacit Conſent of the Children, who could find nothing more advantageous to them, than to put themſelves under the Government of their Father only, and give him the Right, which every one naturally has, to execute the Laws of Nature. They were accuſtomed from their Infancy to be guided by their Father, and leave their little Quarrels to him; and 'twas natural for them to continue their Subjection to his Direction and Authority, when they were become Men. Who could they better chooſe for their Governour than He, who after he had given them Life, had carefully nouriſhed and brought them up, and ſhew'd them ſo much Kindneſs? If then Fathers became Kings of their Families by this means, 'twas not by virtue of their paternal Power. And tho' royal Authority actually began by the Fathers of Families, it does not follow, that the Right of Sovereignty is founded on the paternal Power, and conſequently belongs to the Prince, and the Prince only, ſince it is evident from the higheſt Antiquity, that Fathers were the only Perſons in Families that offer'd Sacrifices. *This is an Extract of Mr.* LOCK's Part 2. *of his Treatiſe of* Government; *and we ought to remember this, when our Author treats of the* Original of ſovereign Power.

[a] *Leviath.* c. 20.

[b] *De Educat.* Cyri, *l.* 1.

[c] Vid. *Val. Max.* l. 5. c. 8. ſ. 2. 3, 5. Senec. *de Clement* l. 1. c. 15. 'Tis a Saying of *Turnus* in *Livy*, l. 1. c. 50. *That there can be no ſhorter way of deciding a Point, than between the Father and the Son; becauſe, if the latter oppoſe or diſobey the former, he is to expect the Plagues of Divine Vengeance.*

[d] *Inſtit.* L. 1. t. 9. ſ. 2. *De Patria Poteſtate.*

[e] *De Repub.* l. 1. c. 4.

[f] So *Cæſar* Comm. *de B. G.* l. 6. c. 19. And ſome Footſteps of that antient Cuſtom remain'd till the Year of *Chriſt* 1301. amongſt the People of *Bourdeaux*, by whoſe Laws, Fathers and Husbands had ſupreme Power of Life and Death over their Children and over their Wives: And if a Husband happened to kill his Wife in any Violence of Anger or Grief, upon declaring his Repentance by a ſolemn Oath, he was diſcharg'd without Puniſhment.

many Troubles and Miſchiefs. *Connanus* [a] is of the ſame Judgment; and *Dionyſius Halicarnaſſeus* [b] is produced as an able Patron of the Cuſtom. Some, on the other hand, engage chiefly in the Defence of the Emperor's Words, confidently affirming, that no other Nations allow'd the Fathers ſo extended a Power over their Children as the *Romans*; amongſt whom it had indeed no Meaſure or Reſtraint. And in this Senſe they interpret the Diſcourſe of *Dionyſius*, which was before alledg'd on the other ſide. Others ſay the Emperor's Meaning was this; that the paternal Power in *Rome* was attended with certain Attributes and Properties, which it had not in other Parts of the World: As for Inſtance, if a *Roman* ſuffer'd either the *Minima capitis Diminutio*, or the *Deportatio*, *The loweſt Degree of forfeiting Liberty*, or *the being tranſported*, he loſt his fatherly Rule; whereas it was never the Cuſtom to deprive a Man, by thoſe Puniſhments, of any Privilege he poſſeſs'd by the Law of Nature and of Nations. And they farther argue, that ſince all *juſt Matrimony* is founded on *civil* Conſtitutions; this Power of the Father being the Conſequent of that Union, muſt derive its Force from the ſame Principle [c]. But perhaps the eaſieſt way of clearing that Paſſage in *Juſtinian*, is to keep to the Terms of *Civium Romanorum*, and to expound them ſtrictly, in Oppoſition to all other Perſons who were not *free Subjects*, and who had not the ſame Authority over their Children.

Thoſe Founders of Commonwealths, who left the Fathers in Poſſeſſion of their old natural Rights in ſo wide an Extent, ſeem to have proceeded on theſe Conſiderations: That the Reſpect, paid by the Children, might be thus rais'd to the higheſt Degree of Awe and Veneration; that the Fathers were the moſt likely Perſons to know their Childrens Faults, keeping them generally under their Eye; and, that at the ſame time, their natural Affection would probably reſtrain them from abuſing this Power to unjuſt Violence; the Exerciſe of it falling on an *Age* which requires Clemency rather than Cruelty. Thus *Phineus* obſerves in *Diodorus Siculus* [d], *No Father will ever ſhew an Example of very ſevere Puniſhment on his Son, unleſs his natural Tenderneſs be overcome by the Greatneſs of the Crime.* And *Sopater*, ſpeaking of the ſame unlimited Authority, *The Law*, ſays he, *thus order'd, well knowing how upright a Judge a Father muſt needs prove over his Children* [e].

On the other ſide, thoſe Legiſlators who took off this Rigour of paternal Sovereignty, probably did not want their due Motives. They might have obſerv'd ſome Fathers making a very ill Uſe of their Power, when tranſported by the [1] Extravagance of Paſſion beyond all Nature and Juſtice. Again, they thought this Privilege altogether needleſs, ſince the Magiſtrates were ſufficient for the Puniſhment of capital Offenders. They might likewiſe eſteem it a great Hardſhip, that a Father ſhould be compell'd, in Contradiction to his own Wiſhes and Affection, to pronounce Sentence of Death on his Son [2], tho' juſtly convicted.

By the *Jewiſh* Law [3] it was one part of the Father's Power to cancel and make void the Vows of his Son, or of his Daughter. The reaſon of which Conſtitution was not only for fear the Children, in their imprudent Age, ſhould ruine their own Fortunes by raſh Donations, mov'd by a falſe Appearance of inconſiderate Piety: But likewiſe leſt they ſhould imbezel their Father's Goods on the ſame ſcore, or hinder themſelves from doing him the Service they ought. So that the reſtraining Authority, in this particular, did not ariſe purely from the poſitive Ordinance, but had a Foundation in natural Reaſon; it being a known Principle, that no Perſon, under the Subjection of another, can with any Force or Effect diſpoſe of thoſe things, with regard to which he is under Government. As for that Law in [4] *Deut.* xxi. 18, *&c.* about ſtoning the rebellious Son, which in it ſelf appears ſo rigid, Care was taken to ſoften it, as far as poſſible, in the Interpretation. Thus they held that it did not extend at all to the other Sex; and that the Males, in two Periods of their Age, ſtood excuſed from its Force: when they were not arrived to the Maturity of Reaſon, and when they had left their Father's Family, and ſet up for Directors of their own Affairs. And then, the Words of the Accuſation running, *This our Son is rebellious, he is a Glutton, or a Drunkard*; there was a great Difference of Opinion how much the young Man muſt have waſted in theſe Exceſſes, before he could be proceeded againſt in this ſevere Method. They farther obſerv'd it to be requiſite, that both the Parents at the time of the Charge ſhould be alive; otherwiſe, the

Mr. Barb. *NOTES on* § XI.

[1] *Liban.* Declam. 33. p. 762. Ed. *Morell.* Μὴ γὰρ ἱκανὸν οἴεσθε, ὦ ἄνδρες δικασταὶ, δεσμὸν εἶναι τὴν φύσιν· ἀλλὰ κρατεῖ μὲν ὡς τὰ πολλὰ, ὅταν δὲ τὰ νοσήματα τῆς ψυχῆς ἐρρωμενέστερα γένηται, διακόπτεται· καὶ ὁ πατὴρ ἄλλο τι φαίνεται, τῆς ψυχῆς ἀναγκάζοντος πάθους. *Do not imagin that the Bond of Nature hath, of it ſelf, ſufficient Force and Strength: Indeed for the moſt part it holds firm and good; but any more violent Diſorder of Mind is able to break it aſunder; and a Father tranſported with Paſſion, lays aſide that Name and Relation, and acts quite another Part.*

[2] *Add.* Ælian. *V. H.* l. 1. c. 34. *Val. Max.* l. 5. c. 9. ſ. 4. *Add.* Charron de la Sageſſe, *l.* 1. *c.* 43, 47. *Libanius* Declam. 35, *To do any thing againſt one's Children is the ſame as to undergo it one's ſelf.* The Sentence which the Men on this ſide bring from *L.* 48. *t.* 9. *l.* 5. *D. ad* L. Pompeiam *de Parricid.* *The Power of a Father conſiſts in Affection, not in Rigour*, contributes nothing to their Purpoſe. For *Adrian* had then baniſh'd a Father for killing his Son as they were hunting, on account of Adultery with his Mother-in-Law. And the Father is there juſtly cenſur'd for taking off the Offender in a villanous and treacherous Manner, when he might have call'd a Council of Friends, and ſentenc'd him to capital Puniſhment by virtue of his domeſtical Juriſdiction. Or it is enough to ſay, as to that Paſſage, that it is an Emblem of the good *Trebonianus*'s merciful Temper, who was the Author of it. See Mr. Spanhemius's *Orbis Romanus*, Exercit. 2. Chap. 23.

[3] See *Numb.* xxx. 4, *&c.* with Grotius and Le Clerc's Notes thereon.

[4] This Text makes nothing for our Author's Purpoſe; becauſe 'tis probable that the Sentence was inflicted by the Judges, as Mr. Le Clerc proves againſt Grotius,

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[a] *Comment. Jur: Civil.* l. 2. c. 13.

[b] L. 2. p. 96, 97. Ed. *Lipſ.*

[c] This is the Judgment of *Mæſtertius de Juſtitia* Rom. *LL.* c. 27.

[d] L. 4. c. 45. p. 247. Ed. *Rhod.*

[e] *Add.* Ælian. *V. H.* l. 1. c. 47.

Son might have had ſome Fortune left him, ſufficient to make Compenſation for the Expence of his Vices [a].

Amongſt the preſent *Japoneſe*, the Father hath the moſt abſolute Power of Life and Death over his Children.

From theſe and other Conſiderations it appears, how we are to underderſtand that Rule laid down by *Grotius* [b]: *In the ſecond Period*, ſays he, *when the Childrens Judgment is ripe and perfect, thoſe Actions only of theirs are ſubject to the Command of the Parents, which immediately contribute to the well ordering of the Father's or Mother's Family: It being but equitable that every Part ſhould conform in promoting the Benefit of the Whole. In other Reſpects, the Children have a moral Liberty of doing whatever their own Judgment recommends; yet ſo that they are ſtill bound to take all poſſible care to pleaſe their Parents; tho' ſhould they take contrary Meaſures, the Force of this Duty will not reach ſo far as to render their Actions invalid.* Theſe Words then are to be reſtrain'd to the Power of Fathers of Families, as now eſtabliſh'd in moſt Chriſtian States; where the chief Buſineſs of it is taken up in Matters relating to Education. And 'tis indeed but juſt, that if the Children deſire to be ſupported at preſent by their Father's Wealth, and to ſucceed to it hereafter, they ſhould freely obey his Pleaſure, while enjoining nothing abſurd, or indecent. If, without ſufficient Cauſe, they refuſe thus to comply, it cannot be expected but that the Parents ſhould withdraw all farther Care and Expence on their account, and declare them Diſinherited. Yet here too it hath been the Care of civil Laws to provide that Parents ſhall not inhumanly diſcard their Children, upon every Fit of Humour and Paſſion, without ſolid Reaſon. Thus *Plato* [c] allows not a Father to caſt off his Son without the Conſent of the other Relations [d]. And, in general, as it belongs to the Wiſdom of publick Governments to ſettle the Rights of private Perſons, in Subordination to the common Benefit and Honour; ſo it hath been uſual with moſt Legiſlators, to prevent all Abuſes of this Power, whether tending to the publick Damage, or to the unjuſt Oppreſſion of the Children. For Inſtance, a Father is oblig'd, as far as his Abilities will reach, to render his Childern uſeful Members of civil Society [e]: And ſince there is ſuch a Variety of Callings, ſo many different Ways of Living, it is very reaſoable that the Children, in chooſing their Profeſſion, ſhould be ſway'd by their Father's Judgment and Authority, provided he propoſe nothing contrary to Honeſty and Decorum; eſpecially in caſe he ſupply them with Money for carrying on of ſuch Deſigns. Yet it would be, at the ſame time, a Breach of Wiſdom and Juſtice, to compel Children to a Method of Life, to which their Genius is utterly averſe; and a horrid Villany, to drive them to ſuch a Profeſſion as is either baſe and ſinful, as the waiting on the Stews; or intolerable to the common Temper of Mankind, as Celibacy without the Gift of Continence, and the Confinement of a monaſtick Vow.

XII. In the third Period of Age, when the Children have left their Father's Family, and are releas'd from his Command, they are perfectly at their own Diſpoſal, yet ſtill retaining the Debt of Reverence and Duty, which is of perpetual Obligation, ariſing from thoſe antecedent Merits of their Parents, which can never be cancell'd or repaid [1] *Plato* [f] is admirable on this Argument. *Juſtice requires*, ſays he, *that we endeavour to ſatisfy our greateſt and oldeſt Debt, our Debt to our Parents. Every one ought to be fix'd in his Perſuaſion, that whatever he poſſeſſeth belongs to thoſe from whom he receiv'd his Birth and Education, and ought, ſo far as is neceſſary, to be ſpent in their Service. To them therefore he is freely to afford his Goods of Fortune, of Body, and of Mind; as if he had only borrowed them from their Kindneſs, and was now to reſtore them in their Age, when they had the greateſt Occaſion for them; gratefully remembring the Cares and Pains they long ſince underwent on his account. Nor ought we to expreſs our Reverence to our Parents in Actions only, but in all our Words and Converſation. We are oblig'd to yield to their Paſſions, and to the common Effects of them; ever conſidering what juſt Reaſon a Parent hath to reſent the leaſt Injury or Diſreſpect from a Child* [g]. He proceeds with the ſame Wiſdom, in adviſing what Honours and Services ſhould be paid to Parents after their Deceaſe; that we ought to grace their Reliques with a decent Monument, and purſue all Methods and all Occaſions of making their Memory ſacred. The *Chineſe* are remarkable in this Point of Duty; a Perſon engag'd in the greateſt Affairs of the Court, upon the Loſs of a Parent leaves his Office, if not Military, and retires Home to ſpend three Years in Privacy and Mourning. The Reaſon of their fixing this Period of Grief was, becauſe the firſt three Years of our Life we give our Parents the greateſt Trouble [h]. Amongſt

Mr. BARB. *NOTES on* § XII.

[1] PLATO's Words are, Γονέων δὲ μετὰ ταῦτα τιμαὶ ζώντων, ὡς θέμις, ὀφείλοντας ἀποτίνειν τὰ πρῶτά τε καὶ μέγιστα ὀφειλήματα χρεῶν πάντων πρεσβύτατα. νομίζειν δὲ ἃ κέκτηται καὶ ἔχει, πάντα εἶναι τῶν γεννησάντων καὶ θρεψαμένων πρὸς τὸ παρέχειν αὐτὰ εἰς ὑπηρεσίαν ἐκείνοις κατὰ δύναμιν πᾶσαν, ἀρχόμενον ἀπὸ τῆς οὐσίας· δεύτερα τὰ τοῦ σώματος· τρίτα τὰ τῆς ψυχῆς· ἀποτίνοντα δανείσματα ἐπιμελείας τε καὶ ὑπερπονούντων ὠδῖνας παλαιὰς ἐπὶ νέοις δανεισθείσας· ἀποδιδόντα δὲ παλαιοῖς ἐν τῷ γήρᾳ σφόδρα κεχρημένοις· παρὰ δὲ πάντα τὸν βίον ἔχειν τε καὶ ἐσχηκέναι χρὴ πρὸς αὑτοῦ γονέας εὐφημίαν διαφερόντως----------------θυμουμένοις τε οὖν ὑπείκειν δεῖν, καὶ ἀποπιμπλᾶσι τὸν θυμὸν ἐάν τ' ἐν λόγοις ἐάν τ' ἐν ἔργοις δρῶσι τὸ τοιοῦτον ξυγγιγνώσκοντα ὡς εἰκότως μάλιστα πατὴρ υἱεῖ, δοξάζων ἀδικεῖσθαι, θυμοῖτ' ἂν διαφερόντως. τελευτησάντων δὲ γονέων ταφὴ μὲν ἡ σωφρονεστάτη, καλλίστη------τοῦ δὲ μὴ παραλείπειν μνήμην ἐνδελεχῆ παρεχόμενον, τούτῳ μάλιστ' ἀεὶ πρεσβεύειν. Read Mr. LE CLERC's Notes on *Exod.* xx. 12. and *Deut.* v. 16.

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[a] *Grotius* in *Deuteron.* xxi.

[b] L. 2. c. 5. ſ. 3.

[c] *De LL.* l. 11. p. 973.

[d] *Add.* Quintil. *Declam.* 9. Senec. *Contr.* 1. 9.

[e] And therefore it was one of *Solon*'s Laws, That a Child ſhould not be bound to maintain a Father, who had bred him up to no Art or Profeſſion, *Plutarch.* in *Solon.*

[f] *De LL.* l. 4. p. 832, 833. Ed. *Wech.*

[g] *Vid. de LL.* XI. p. 975. *Arrian. Epictet.* l. 2. c. 10. *Remember you are a Son; and that it belongs to your Duty to think your Father's Good, in all reſpects, your own: To yield Obedience to all his Commands; never to defame him to others; nor to do or ſay any thing that may turn to his Prejudice or Inconvenience; to yield and give place to him on all Occaſions, and to aſſiſt him with your utmoſt Power.* Oppian. *Halieut.* L. 5. v. 89.

Πατρὶ δὲ γηράσκοντι νέον σθένος υἷες εἰσίν,
Sons are new Strength to a decaying Sire.

[h] Neuhof. *in Legat.* More Signs of their Mourning may be found in *Martinius*'s Hiſt. *Sin.* l. 1. *in* Imp. 8.

the ſame People the Son ever makes uſe of a lower Seat than his Father, and placeth himſelf at his ſide, not over againſt him. And indeed, that Children can never requite the Kindneſs of their Parents is a Truth in every Body's Mouth [2]. Though *Seneca* [a] hath for Oppoſition's ſake, endeavour'd, in a long Diſpute, to prove that a Son may ſometimes even outdo a Father in Benefits: And *Alexander*, provoked once with ſome Complaints againſt his Mother, could not forbear ſaying, that *She made him pay very dear for his nine Months Lodgings* [b]. But how vaſt ſoever the Merits of our Parents be acknowledg'd, this is certain, that it will not bear them out in impoſing an unlawful Command; and therefore it was a brave Reply of the ſame Prince to the ſame Mother, urging him to put an innocent Perſon to Death, and reminding him of the Pains ſhe had undergone for his Sake: *My good Mother*, ſays he, *demand ſome other Reward for your Trouble; the Life of a Man is too precious to admit of any Equivalent* [c]. Mr. *Hobbes* [d] is of Opinion, that this filial Reverence ariſeth not only from the Law of Gratitude, but likewiſe from the Force of a tacit Compact; it not being preſumed that he who releaſeth another from his Rule and Dominion, intends ſo far to make him his Equal, as not to reckon it to him as a Favour: But a Perſon, thus diſmiſs'd from Subjection, is ever ſuppoſed to promiſe, that he will conſtantly pay his Benefactor all thoſe external Marks, at leaſt of Honour and Eſteem, which Superiors are wont to receive from their Inferiors.

Yet it was, no doubt, a Strain of Superſtition in the *Jews*, when they would not allow a Son to let his Father Blood, to open a Sore for him, or to draw a Thorn out of his Fleſh [e].

Amongſt thoſe who live in a Commonwealth, it may happen, that upon account of ſome Office or Dignity born by the Son, the Father ſhall be oblig'd to do him Reverence, yet not ſo as to quit his Prerogative of private Reſpect [3]. Thus *Fabius Maximus* commended the Action of his Son the Conſul, who, as *Fabius* came riding towards him at a publick Meeting, ordered him to alight and make his Approaches to him on Foot [f].

Whether this perpetual Duty and Obligation of Children, remaining after their Father's Power is expired, ariſe from the Act of Generation, or from the faithful Care and Labour of Breeding them up, is a Controverſy that hath divided learned Men. Thoſe who contend for the former, are wont to tell us, that the Kindneſs of giving Life is not only, in its ſelf, the greateſt good that can be beſtow'd, but is likewiſe the Occaſion of all others; and that, by this Action of conferring a Being, the Parents do, in ſome meaſure, reſemble the Almighty Creator. Some, again, give their Judgment in favour of Education; as that which properly makes a Man deſerve his Name, and which is not perform'd without a long and difficult Courſe of Application and Expence. They illuſtrate their Opinion by this Obſervation in Nature, that amongſt Brute Creatures the Male is not diſcover'd to have the leaſt Regard for the Young which he begets, and the Dam's Tenderneſs ceaſeth with her Care, when they are able to provide for themſelves; whereas the Affection between human Parents and Children is perpetual: which muſt needs be a Token that the great Dearneſs on the one ſide, and the Obligation to Duty on the other, do not chiefly reſult from that Act of the Parents which they exerciſe in common with Beaſts, but from their peculiar Diligence in forming and managing their Off-ſpring, in order to a Life of Decency and Society. *Ariſtotle* is cited in Defence of the former Notion, *A Father*, ſays he [g], *is the Cauſe of the Son's Exiſtence (which ſeems the greateſt of Benefits) and of his Nature and Inſtitution.* And again [h], *Men ſtand engaged in the higheſt Degrees of Friendſhip and Piety towards the Gods, and towards their Parents. For, from theſe they receiv'd the nobleſt of all imaginable Goods, their Being and Education.* On the latter of which Paſſages we may remark, that although the conferring of Life be firſt named, yet it is not expreſly compared with the other Benefit. *Philo Judæus* [i] is produced on the ſame ſide; it is a Saying of his, *We can never return our Parents equal Favours; ſince we can't repay, in the ſame manner, their Kindneſs of firſt bringing us into the World.* And thus too, the Father in the Declamation [k]; *We firſt produced you out of our own Life and Subſtance, and opened to your Proſpect this vaſt Scene of divine and human things. We made you capable of ſeeing and of enjoying the Sea, the Earth, the unwearied Courſe of the Stars, the Heavens with all their ſacred and ſhining Glories.*

Yet we cannot but deliver it as our Perſuaſion, that the Benefit of Educating is a much ſtronger Ground and Spring of filial Obligation, than the other of Begetting. *Plato* [l] ſeems to countenance this Opinion, *Parents*, ſays he, *ought either not to have brought their Children into the World, or not to refuſe any Pains in training and inſtructing them.* In another place [m] he introduceth *Demodocus* thus ſpeaking of his Son; *The Act (of planting ſhall I call it? or) of begetting my Son, was the eaſieſt imaginable; but the breeding him up was a Task of Difficulty and*

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[2] *Ariſtot.* Ethic. ad *Nicom.* 8. 16. Οὐδὲν γὰρ ποιήσας [υἱὸς] ἄξιον τῶν ὑπηργμένων δέδρακεν, ὡς ἀεὶ ὀφείλει. No Perſon can fully return the Benefits of his Parents; but he who ſerves and reſpects them to his utmoſt Ability, may be pronounced Honeſt and Juſt. *Vid.* Xenoph. *Apomn.* l. 2. p. 431, 432. Ed. *Steph.* Stobæ *Serm.* 77.

[3] *Nam, quod ad jus publicum attinet, non ſequitur* [*Pater*] *jus poteſtatis.* V. D. *L.* 36. *t.* 1. *Ad Senatus Conſultum* Trebell. *l.* 6. *princip.*

[a] *De Beneficiis*, l. 3. c. 29, 30, *&c.*
[b] Arrian. *de reb. geſt.* Alex. 7.
[c] *Amm. Marcellin.* l. 14. c. 10. *Add.* Gell. *l.* 2. *c.* 7.
[d] *De Cive*, c. 9. ſ. 8.
[e] *Conſtant. L' Empereur* in *Babakama*, c. 8. ſ. 3. *Add.* Selden. *de J. N. & G.* l. 7. c. 2.
[f] Plutarch. *Fab, & in Apophthegm.* Valer. Max. l. 2. c. 2. ſ. 4. *Add.* Bœcler *in* Grot. l. 2. c. 5. ſ. 6.
[g] *Ethic.* VIII. 13.
[h] *Ibid.* c. 14.
[i] *Allegor.* l. 1. p. 58. *in fin.* & l. 2. p. 62. D. Ed. *Pariſ.*
[k] *Quintil.* V.
[l] *In* Crito. *p.* 34. *B.*
[m] Theag. *init.*

Trouble; *ever filling me with Fears on his account.* And *Socrates*, in the ſame Dialogue, declares it as his Judgment, *I know not any Buſineſs in which a prudent Man ought to ſhew more Caution and Diligence, than in forming his Son's Mind to Goodneſs and Virtue* [a]. So the Father pleads in *Quinctilian* [b], *I do not now*, ſays he to his Son, *ſet to your Score theſe vulgar Favours of lending you Life, and Light, and Liberty; but whatever Bravery you have ſhew'd, whatever gallant Action you have perform'd, this I charge upon you as my Merit; 'tis my Strength with which you have conquer'd. That Soul of yours, ſo unſhaken, ſo undaunted under the greateſt Dangers, had its Riſe and Original from mine. It hath been my long employment to render you a Man of Abilities and Courage; in your early Years by my Precepts, and ſince, by my Example* [c]. It is not indeed eaſy to imagine or allow, that a Parent hath conferr'd any conſiderable Benefit on his Child, ſhould he caſt him away when he firſt comes into the World [4]; or afterwards entirely neglecting his Culture and Education, ſhould let him grow up like a Beaſt, to lead a Life uſeleſs to others, and ſhameful to himſelf [d]. *Juvenal's* [5] Reaſoning is very juſt and true,

Gratum eſt quod patriæ civem, populoque dediſti,
Si facis, ut patriæ ſit idoneus, utilis agris,
Utilis & bellorum & pacis rebus agendis.
Plurimum enim intererit, quibus artibus, & quibus
Moribus inſtituas.———— *(hanc tu*

The State and People will your Zeal commend,
In giving that a Man, and theſe a Friend;
If fit to aid the publick Good; if ſkill'd
In rural Labours, or the martial Field,
Or grave Debates of Peace. Th' important Stake
Now waits your Care, what early ſteps you take;
What Scheme of Arts or Manners is deſign'd,
To fix his Pains, or cultivate his Mind.

[6] *Ariſtotle* himſelf (who was cited to countenance the other ſide of the Queſtion) hath left this Saying on Record [e], that *Parents, who take Care to ſee their Children duly inform'd and inſtructed, deſerve much higher Honours, than thoſe who barely lend them a Being: the latter make them capable of living, the former of living honeſtly and happily.*

Nor doth that Conſequence, on which the other Opinion is built, ſeem to hold; *Life is the greateſt Good; therefore the Act of the Parent in giving that, is the moſt fit and proper to raiſe an Obligation in the Child.* For before I can charge any Action of mine on another, as a conſiderable piece of Merit, it is neceſſary that I know to what Perſon I do the Kindneſs, and whether it will certainly reach him. Again, it will be convenient for me to reflect and conſider, whether I really intended the thing as a Favour; how much it ſtood me in; whether I undertook it more for the ſake of doing Good to the other Party, than for my own Pleaſure, or Uſe; whether I was engaged in the Performance upon Reaſon and Deliberation, or was drawn to it by the Force of Paſſion, or Allurements of Senſe: Laſtly, whether the Action be capable of benefiting the other Perſon, without the Addition of ſome farther Services. Whoever diligently weighs theſe ſeveral Points of Enquiry, will be eaſily inclin'd to acknowledge, that the Kindneſs of Educating is much more proper to found an Obligation, than the vulgar Office of Begetting.

Yet we do by no means approve of all that *Seneca* hath urged on this Head, in his Diſcourſe of Benefits [f]. For he is not to be born with, when he calls the Life of a Man, whom GOD hath endued with an immortal Soul, a *Thing common to us with the wild Beaſts, with the ſmalleſt, and with ſome of the fouleſt of Creatures*; and, *the Happineſs of Flies and of Worms.* But ſome Parts of his Argument may be admitted without Cenſure. [7] *Look*, ſays he, *upon my Nativity, as it appears barely in it ſelf, and you will find it to be a ſhort and uncertain Favour, a Subject lying equally open to Good and Evil. No doubt it was my firſt Step to all the Benefits I enjoy, but it was not therefore the greateſt, becauſe the firſt; nor, becauſe the greateſt, without it could never have been.* And again, *barely to live is the leaſt Degree toward living well. I would thus talk with my Father: Suppoſe, as you firſt gave me my Life, ſo I had ſaved yours: in this I ſhould certainly exceed your Kindneſs, for I conferr'd my Favour when you was ſenſible from whom you received it, and I to whom I did it; and then, I did not conſult my own Pleaſure, at leaſt not my Pleaſure alone, in the Performance. Would you conceive how ſmall a Boon you beſtow'd on me in my Birth? Fanſy your ſelf to have immediately caſt me out to periſh naked and helpleſs; in this Caſe your Act of Begetting me had been a manifeſt Injury. From all which I infer, that the Acquaintance of my Father and Mother had proved but a ſlender Kindneſs to me, had it not been follow'd with other good Offices which ratified and confirm'd it* [a].

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[4] Senec. *de Benef.* l. 3. c. 31. *Vis ſcire, quam non ſit magnum beneficium, vitam ſic dare? Expoſuiſſes; nempe injuria erat genuiſſe. Quo quidem colligo, minimum eſſe beneficium, Patris Matriſque concubitum, niſi acceſſerint alia, quæ proſequerentur hoc initium muneris, & aliis officiis ratum facerent. Non eſt bonum vivere, ſed benè vivere.*———*Tu me mihi rudem & imperitum dediſti: ego tibi filium, qualem genuiſſe gauderes.*

[5] *Sat.* 14. v. 70, *&c.* He alſo ſpeaks well to this purpoſe. *Sat.* 7. v. 184, *&c.*

Quanticunque domus, veniet, qui fercula doctè
Componat; veniet, qui pulmentaria condit.
Hos inter ſumtus ſeſtertia Quintiliano
Ut multum, duo ſufficient: res nulla minoris
Conſtabit Patri, quam Filius.————

[6] *Solon* hath left us this wiſe Law, *Plutarch* in vita *Solon.* Ὁ γὰρ ἐν γάμῳ παρορῶν τὸ καλὸν, οὐ τέκνων ἕνεκα δῆλός ἐστιν, ἀλλ' ἡδονῆς, ἀγόμενος γυναῖκα, τόν τε μισθὸν ἀπέχει, καὶ παρρησίαν αὐτῷ πρὸς τοὺς γενομένους οὐκ ἀπολέλοιπεν, οἷς αὐτὸ τὸ γενέσθαι πεποίηκεν ὄνειδος. That he that contemns the Honeſty and Sanctity of Marriage, and deſires Women only to ſatisfy his Deſire, and not to have Children, has this Reward, that he has no Right over the Children that proceed from ſuch a Conjunction, whoſe Life he has made an Eternal Diſgrace.

[a] Euripid. Hecub. *Good Inſtitution is the Spring of Virtue.*

[b] *Declam.* 258.

[c] *Add. Declam.* 278. & Phædr. *Fab.* l. 3. fab. 15.

[d] *Si res nulla minoris conſtet patri, quam filius; If his Son ſtands him in the leaſt Charge of any thing he poſſeſſeth.* By the Law of *Solon*, in *Plutarch*, Children baſely born were not oblig'd to maintain their Parents. The Reaſon of which Exception was grounded on this Conſideration, that he who forſakes the honeſt way of Marriage, plainly ſhews that he ſeeks a new Partner, not on the account of Iſſue, but of Pleaſure; and therefore his Vice is his Reward; and he can by no means complain of any Ingratitude in ſuch Children, becauſe he hath injured and diſgraced them by making their very Nativity a Reproach. *Add.* Vitruv. *l.* 6. *Præfat.*

[e] In *Diog. Laert.* It is worth obſerving in *Martinius* Hiſt. *Sin.* l. 4. c. 2. what mighty Reſpect and Veneration the *Chineſe* pay to their Maſters; who, as *Juvenal* ſays, ought to be *Parentis loco*, to be honour'd and obey'd as ſecond Parents. The ſame Hiſtorian, *l.* 6. *c.* 1. reports, That the Son, in *China*, never riſeth to a higher Degree of Honour than what had been formerly born by the Father; and if, for his ſignal Services to the State, he be advanced farther, the Dignity, with which he is to be inveſted, is firſt to be preferr'd, by a kind of poſthumous Promotion, on his deceas'd Father: That People eſteeming Duty with Reverence to Parents, the firſt and chiefeſt of Virtues.

[f] L. 3. c, 30, *&c.*

XIII. Laſtly, As the Father ought not, without weighty Reaſons, to expel the Children his Houſe; ſo they on the other hand ſhall not, according to the regular Courſe, paſs into another Family without his good Leave. Yet in caſe they have juſt Grounds for their Departure, and yet cannot prevail on their Father's Perverſeneſs to give Conſent, I ſhould be of Opinion, that their Duty doth not hinder them from removing, ſo as to concert their own Affairs, contrary to his Humour; eſpecially when they freely reſign all future Dependence on him, for their Fortune and Inheritance. For as civil Conſtitutions do wiſely countenance and ſtrengthen the Authority of Parents, ſo they are not wont to encourage impertinent Obſtinacy and Moroſeneſs. Nor doth it ſeem to be in the Power of thoſe who are Heads of ſeparate Families, to retain their Children, when they have reaſonable Occaſion to remove; inaſmuch as, in regular Commonwealths, it is not uſual to deny a Free-Subject the Liberty of tranſplanting himſelf, when tied to Reſidence by no particular Obligation.

XIV. To the ſame Head belongs that common Queſtion, Whether Children may diſpoſe of themſelves in Marriage againſt the Conſent of their Parents [b]? For the Solution of which we ought carefully and diſtinctly to conſider what is incumbent on Children by Virtue of their natural Duty; and what on account of the Obedience which attends their State of Subjection: and again, what Rights belong to Fathers ſtrictly, as ſuch; what as they are the Heads of Families. Paternal Power, as ſuch, we have already obſerv'd to be juſt ſo great as is ſufficient to the Government of the Children, till able to be their own Managers. This therefore does not ſeem to extend it ſelf ſo far as to the reverſing of a Matrimonial Contract: An Affair ſuppoſed to be carried on by Perſons of mature Age and Reaſon. Indeed the Duty of filial Piety and Reverence requires, not only that the Children apply themſelves to their Parents for Advice in theſe Proceedings, but likewiſe that they may make a Conſcience of oppoſing ſo awful Directions [c]. Yet if they happen to break their Duty in this Point, it doth not follow that the Act muſt be null and void. For an Obligation to hear and to reſpect Another's Advice, doth not preſently diveſt a Man of the Power to govern his own Concerns. *The Liberty of a Son*, as [1] *Quintilian* obſerves, *if it be at all allowable, is ſo in the matrimonial Affair: For who can love by the Eyes, or by the Rules of another?*

But what ſhall we ſay of that other Power, which the Fathers hold as they are the Heads of Families? Its true, in many Commonwealths, the Laws have variouſly reſtrain'd the Liberty of Marriage. Thus, in ſome Places, no Perſon of the Royal Family can contract, without the King's Approbation; ſuch Matches often proving of very conſiderable Conſequence to the Publick. In *Japan* the Prince chooſeth Wives for his Nobles [d]. In ſeveral Countries Marriage Con-

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[7] Senec. *de Benefic.* Lib. 3. c. 30, 31, 34. *Sed vide, ne illud verius ſit æſtimari, an id quod potui, & id quod feci, meum ſit, mearum virium, meæ voluntatis. Illud quod natus ſum, per ſe intuere quale ſit: animadvertes exiguum & incertum, & boni malique communem materiam: ſine dubio primum ad omnia gradum, ſed non ideò majorem omnibus; quia primum.--------Puta me vitam pro vita reddidiſſe. Sic quoque munus tuum vici, cùm ego dederim ſentienti, cùm ſentiens me dare: cùm vitam tibi non voluptatis meæ cauſâ, aut certè per voluptatem dederim.-------Ego vitam dedi ſtatim illâ uſuro: tu neſcituro an viveret.-----Paternum munus & ſimplex eſt & facile ---------In quo conſortem habet, in quo ſpectavit Legem patriam, præmia Patrum, domus ac familiæ perpetuitatem, omnia potius, quam eum cui dabat.*

Mr. Barb. *NOTE on* § XIV.

[1] Quintil. *Declam.* 270, 376. *Nuſquam tamen libertas tam neceſſaria, quàm in matrimonio.-------Quis enim amare alieno animo poteſt?*

[a] A little after he ſtiles Generation a *Vulgar Benefit*; the Office of a Father, *Eaſy, ſlight, and of little Value*; *regarding any thing elſe, rather than the future Perſon to be produced.*

[b] V. *Grot.* l. 2. c. 5. ſ. 10.

[c] *Non æquum eſt pugnare, pater cui tradidit ipſe,*
Ipſe pater cum matre, quibus parere neceſſe eſt:
Virginitas non tota tua eſt: ex parte parentum eſt.
Tertia pars patri data, pars data tertia matri;
Tertia ſola tua eſt: noli pugnare duobus,
Qui genero ſua jura ſimul cum dote dederunt. Catullus, 60.

'Twould be Rebellion to reſiſt thoſe Arms
On which your Parents have beſtow'd your Charms.
Your Virgin Jewel is not all your own,
A third each Parent claims, a third alone
Remains to you; forbear with Two to Fight,
Who, in their Portion, give the Son the Right.

Thus *Hermione* moſt dutifully ſpeaks in *Euripides*, *Andromach.* v. 987, 988.

------ My Marriage is my Father's Care,
His Judgment guides my Choice.-------

And *Xenophon Cyrop.* L. 8. tells us that *Cyrus* would by no means engage in Nuptial Affairs without the Conſent of his Parents.

[d] Varen. *Deſcript.* Japon. *c.* 12. *Add. Conſtit.* Sicul. *l.* 3. *t.* 21.

tracted between a Subject and a Foreigner, between a Noble Perſon and a Commoner, are declared void. But as in all States and Governments, a Liberty of marrying and of removing is ever ſuppos'd, except where there is either an expreſs Law to the contrary, or a Cuſtom equivalent to a Law; ſo in ſeparate Families, where moſt of the Reaſons fail, on which the civil Conſtitutions, about this Affair, are built; the Father of the Family doth not ſeem to have a Right of prohibiting or of reverſing his Childrens Marriage, when not defective in any thing but his Conſent: provided ſtill, that they are willing immediately to leave his Houſe; for it would be unreaſonable to bring a Perſon to live under his Eye whom he profeſſeth to diſlike [a]. Yet if a Father ſee his Authority ſlighted by his Children, without very ſufficient Grounds for their Non-compliance [b], he may, as a Puniſhment of that Neglect, exclude them from all preſent Benefits and all future Expectations [c].

What Rights thoſe Fathers of Families, who live not in a ſeparate Condition, but under ſome Commonwealth, do in this reſpect enjoy, muſt be diſcover'd by the Cuſtoms and Conſtitutions of different Nations. Amongſt the *Japoneſe*, Marriages are intirely directed by the Parents, or, if they are dead, by the next Relations [d]. And in *Peru*, under the antient Government of the *Yncas*, all Matrimony engaged in, without the Parents Approbation, was declared null, and the Children illegitimate [e]. This in general is certain, that as the Laws of a particular Country may pronounce a Contract invalid, either becauſe defective in Form, or becauſe tranſacted between Perſons to whom ſuch particular Agreements are prohibited; they may, in like manner, ſuſpend the Validity of Marriage without the Conſent of the Parents; ſo that if deſtitute of this neceſſary Condition, it ſhall paſs in civil Eſtimation for null and inſignificant [f]. For the Agreement of the Parties to cohabit like Man and Wife, can no more render Matrimony good, when contrary to Law, than the Bargain of a Minor and the Delivery conſequent upon it, both undertaken without his Guardian's Influence, can effectually and irrevocably paſs away his Eſtate. Though Parents are to be admoniſh'd, that when the Government allows them ſo high a Prerogative, they ſhould be very cautious, and very merciful in putting it in Execution [g].

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[a] *Geneſ.* xxvi. 34, 35.

[b] Vid. *L.* 23. *t.* 1. *l.* 12. *ſ.* 1. *D.* De Sponſal.

[c] *Vid. Leg.* Wiſogoth. *l.* 3. *t.* 2. *c.* 8. *Leg.* Burgundion. *t.* 13. *c.* 5.

[d] Varen. *Deſcrip.* Japon. *c.* 12.

[e] *Garcilaſſo De la Vega*, l. 6. c. 36.

[f] *Vid.* L. 23. *t.* 2. *l.* 2. *D. De Ritu Nuptiarum*, & *L.* 48. *t.* 5. *l.* 7. *D. ad* L. Jul. *De Adulter.*

[g] *Add.* Bœcler. & Ziegler. *ad* Grot. *l.* 2. *c.* 5. *ſ.* 10.

CHAP. III.

Of a Maſter's Power.

I. *What is the Relation of Maſter and Servant.*
II. *Servitude was not ordained by Nature.*
III. *Nor by God immediately.*
IV. *The Original of Servitude ſeems to have been from Contract.*
V. *War made the number of Servants greater.*
VI. *What is the Duty of Captives to their Maſters.*
VII. *They are almoſt of the ſame Nature with other Goods.*
VIII. *Yet an Injury may be done them.*
IX. *Of the Children of Servants.*
X. *The Inconveniences of Servitude.*
XI. *How many ways a Servant may become free.*

AS the Husband and Wife (whence proceeds the common Off-ſpring) make the principal Parts of a Family; ſo Servants come in for inferior, ſecondary Members, to bear the Burthen of common Labour and Buſineſs. Now theſe being uſually treated in a way of ſeverer Diſcipline, give Occaſion to the forming of a new Species of Government on their account; different from that which is exercis'd over Children, who demand a milder and more indulgent Sway. Yet we are perſuaded, that neither this Society, between Maſter and Servant, can claim the Name of a Commonwealth or civil State, as Mr. *Hobbes* [a] is inclined to call it; not only becauſe it generally conſiſts of fewer Perſons than are neceſſary for mutual Preſervation, in a Condition of natural Liberty; but likewiſe becauſe a Maſter furniſheth himſelf with Servants, not ſo much for the ſake of reciprocal Defence, as that by means of their Labour, he may, in a more ample and more convenient manner, diſcharge his Domeſtick Affairs.

II. As to the Original of this kind of Society, we muſt, in the firſt Place, diſcard that old Opinion which makes Nature her ſelf to have actually eſtabliſh'd the Relation of Maſter and Servant amongſt Men. [1] It is true, we diſcover a ſtrange Variety of Parts and Capacities. To give one Inſtance for all; we obſerve ſome Perſons of ſo quick and piercing Sagacity, as to be able always to apprehend their own Intereſt and Benefit, and, at the ſame time, of ſuch Vigilancy, as to proſecute their Affairs by their own free Motion, without the Admonition or Compulſion of others. Some again are of ſo heavy Diſpoſitions, as not to ſee their own Advantage, any farther than they are guided; being much fitter for the Labours of the Body, than the Imployments of the Brain; and farther, ſo given over to Supineneſs and Sloth, as unleſs they are forced and drag'd to Application, they can manage no Concern with tolerable Care; nor ſo much as ſave or ſpend by the Direction of their own Judgment. The latter Kind are thoſe whom *Ariſtotle* calls Slaves by Nature; not that Nature by her own immediate Act ſets them in ſuch a Conditon of Bondage, without any human Deed or Covenant intervening: but becauſe by forming them with ſo much Diſadvantage in their Frame, ſhe hath rendred it more convenient for them to live under abſolute Subjection and Controul, than to undertake the Government of their own Proceedings [b]. It was a Saying of *Ageſilaus*, that *the* Aſiaticks *were the worſt of Free-men, and the beſt of Slaves:* which *Paſſienus* turn'd upon the Emperor *Domitian*, when he obſerv'd, that *there was never a better Servant, and never a worſe Maſter* [c].

III. *Hornius*, in his firſt Book *De Civitate* [d], jars upon the old String, in contradicting the general Opinion of the [2] Lawyers, who derive the Origin of Servitude from the Law of Nations. He ſays, *The Manner only of this Inſtitution is to be refer'd to the Practice of Mankind; a Cuſtom having prevail'd amongſt moſt People, to impoſe ſuch a Condition upon their Captives in War. But we ſhould always diſtinguiſh the Cauſe of the Society, from the Cauſe of the Sovereignty; the latter not being deducible from Cuſtom, nor from the Law of Nations, but being eſtabliſh'd by GOD himſelf. For ſince all Victory is from GOD, and by his Providence the Conqueror gets into his Hands the Perſon of the Enemy, it follows, that the Life of the Captive might immediately be taken away: But ſince Humanity would ſcarce have ſuffer'd, that the Victor ſhould always exerciſe this Rigour on an unarm'd and ſuppliant Perſon, it was thought convenient to forbear Execution, and to retain his Power over the Priſoner, who might thus be of good Uſe in the Affairs of Life.* But

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Mr. BARBEYRAC's *NOTES on* Chap. III. §. II.

[1] This Opinion is confuted at large, *Lib.* 3. *Chap.* 2. § 8. What our Author adds here, is an Abridgment of what he has there ſaid, to which it is better to refer the Reader.

[2] Their Words are, *Servitus autem eſt conſtitutio Juris Gentium, quâ quis domino alieno contra naturam ſubjicitur. Servi autem ex eo appellati ſunt, quod Imperatores captivos vendere, ac per hoc ſervare, nec occidere ſolent: qui etiam mancipia dicti ſunt, eo quod ab hoſtibus manu capiuntur. Servi autem aut naſcuntur, aut fiunt: naſcuntur ex ancillis noſtris: fiunt autem Jure Gentium, id eſt, ex captivitate; aut Jure Civili, cùm liber homo major viginti annis ad pretium participandum ſeſe venundari paſſus eſt.* Inſtit. Lib. 1. Tit. 3. *De Jure perſonarum*, § 2, 3, 4. We ſee that our Author makes two things the Cauſes of Servitude, *viz.* Poverty and Force,

[a] De Cive, *c.* 5. *ſ.* 12.
[b] *V. ſupra L.* 3. *c.* 2. *ſ.* 8.
[c] Tacit. *Ann.* 6. *c.* 20.
[d] L. 1. c. 3.

indeed, as the Occaſion of Mens engaging in War was ever partly their own Defence, and partly the Vindication of their Rights; ſo upon their obtaining the Victory, when they thought good to ſpare the Lives of the conquer'd, it was at their Pleaſure, either to put them in a State of Slavery, or only to keep them in Hold till ſuch time as by Ranſom or Compact they ſhould be deliver'd. All which Privileges and Proceedings, together with the Authority over Perſons thus brought into Subjection, were not immediately appointed by GOD himſelf, but were approv'd by him upon human Inſtitution. Nor is that Aſſertion true, "The Victor ſtill retains that Power of Life and Death over the Captive, which he once procur'd; and conſequently, his Right is the ſame, before he receives him into Fealty and Service, and after he governs him as a Part of his Family. For theſe are quite different things. The conquering Party may, by the Right of War, diſpoſe how he pleaſeth of his Priſoner, either kill him or ſave him: but this was never before term'd the *Power of Life and Death*, which denotes a lawful Authority of inflicting capital Puniſhment, in caſe of an antecedent Crime. Laſtly, what the ſame Author lays down, "That all Sovereignty, of what kind ſoever, imports a Power over the Life of the Subject, and therefore we muſt not ſeek for Diſtinctions in the Power it ſelf, but in the Exerciſe of the Power; and by conſequence, the Authority of the Husband over the Wife, of the Father over the Children, of the Prince over the People, is one and the ſame with that of the Maſter over the Servant; except that the ways of Treatment are more kind and gentle in the former Inſtances, than in the laſt; is an Argument, that we can by no means prevail with our ſelves to allow.

IV. In our Judgment, the Origin of *Servitude* ought thus to be traced out: In the early Ages of the World, when Men began to quit their primitive Plainneſs and Simplicity, to cultivate the Method of Living, and to enlarge their Fortunes and Poſſeſſions, it is very likely the wiſer and richer Sort invited thoſe of leſs Parts, and leſs Wealth, to aſſiſt them in their Buſineſs, for Hire. Afterwards, when both Parties found their Benefit in this way of proceeding, the meaner Tribe were by degrees perſuaded to join themſelves perpetual Members to the Families of the greater; under theſe Conditions, that the latter ſhould engage to ſupply Food and all Conveniences of Living, and the former ſhould bind themſelves to undertake all proper Labours and Imployments, as their Patrons ſhould direct. So that the firſt riſe of Servitude is owing to the voluntary Conſent of the poorer and more helpleſs Perſons, and is founded upon that common Form of Contract, *Do, ut facias; I promiſe to give you conſtant Suſtenance, upon Condition you aſſiſt me with your conſtant Work.* What Power *Nature* allows a Maſter over Servants of this kind, may be eaſily diſcover'd from the Ends of forming ſuch a Society [1]. He may enjoin them what Task he pleaſeth, [2] in Proportion to their Strength and Skill. He may likewiſe correct [3] their Sluggiſhneſs, by ſuch Methods of Severity as are moſt likely to prevail on their particular Diſpoſitions; tho' he cannot, on this ſcore, proceed to capital Puniſhments: ſo that the higheſt Degree of Penalty he can inflict on their Idleneſs, is to expel the lazy Drones from his Family, and leave them to their own beggarly Condition. Nor

Mr. BARB. *NOTES on* § IV.

[1] GROTIUS, *Lib.* 2. *Chap.* 5. § 30. diſtinguiſhes Servitude into 1. Perfect, and 2. Imperfect. The firſt he there treats on, the other is only for a certain Time, or on Condition, or for certain Things, according to certain Rules, or by the Laws of the Country, or by the Agreement of the Perſons concerned: See the Examples alledged by him. I ſhall content my ſelf in reciting only what our Author ſpeaks in his Abridgment of the Duties of a Man and Citizen, *Lib.* 2. *Chap.* 4. § 2. about hir'd or domeſtick Servants. The Maſter, ſays he, owes his Servant the Wages agreed on, and the Servant is oblig'd to do the Work faithfully for which he is hired by his Maſter. Farther, as in this Contract, the Condition of the Maſter is more advantageous than that of the Servant, the Servant ought to reſpect his Maſter according to his Station in the World, and when thro' Malice or Negligence, he diſcharges his Buſineſs ill, his Maſter may correct him with Moderation, but not inflict any corporal Puniſhment on him, unleſs it be inconſiderable, much leſs put him to Death by his own Authority. Mr. TITIUS, *Obſervat.* DXXIX. affirms nevertheleſs, that this Chaſtiſement, as moderate as our Author ſuppoſes it, is not a direct Conſequence of the Rights of a Maſter over his Servant; for beſides, ſays he, that ſuch a Permiſſion ſeems what ought not to be allowed to Maſters in any well-govern'd State, the End of the Relation does not naturally require, that a Maſter ſhould have ſo great a Power over his Servant; 'tis ſufficient that the Servant be oblig'd, ſome way or other, to make good the Damage he has cauſed thro' his own Fault. But if he has deſerv'd Blows for doing ſome Wrong, or Injury to his Maſter, his Maſter doth not inflict them by way of Puniſhment, for that belongs only to the Magiſtrate, but by a Right of War, which allows us to revenge the Injury done us with Moderation. But yet our Author, in all this Matter, without doubt ſuppoſeth, that no Servant or Slave is bound to obey his Maſter, if he command any thing contrary to the Law of Nature, or the Nation he lives in. See GROTIUS, *Lib.* 2. *Chap.* 26. § 3.

[2] We ought to obſerve, that one of the principal Reaſons for the Inſtitution of the Sabbath, was to procure Eaſe to Servants and Slaves: See GROTIUS, *Lib.* 3. *Chap.* 14. § 1. and Mr. LE CLERC's Notes on *Exod.* xx. 10. and *Deut.* v. 14.

[3] See GROTIUS, *Lib.* 3. *Chap* 14. § 4. where to ſpeak by the bye, there is a falſe Quotation about Slaves, *Thou ſhalt not oppreſs thy Servant, nor rule over him with Rigour,* Lev. xxv. 17. 43, 53. and not out of *Deut.* xv. 17, 45, 53. and likewiſe the firſt words, which are at *ver.* 17, are not ſpoken of Slaves, for there it is ſaid, *You ſhall not oppreſs one another,* and 'tis ſpoken upon the account of ſelling of Lands, which the Lawgiver forbids, upon any Pretence whatſoever, longer than the Year of Jubile. The ſame Fault is found § 2. Num. 2. where *Deut.* 18. is quoted for *Lev.* 25. But to return to our Subject. We ought to obſerve theſe two Laws chiefly, *viz. Exod.* xxi. 20, 21, and 26, 27. The firſt imports, That if a Maſter beats his Servant that he die, he ſhall be puniſhed as a Murderer, but if he lives only a day or two, the Maſter ſhall be exempted from that Puniſhment: And the Reaſon is becauſe if the Slave dies not preſently, 'tis to be ſuppoſed, that the Maſter had no Deſign to ſlay him, and ſo 'twas thought a ſufficient Puniſhment to loſe what his Slave had coſt him, and his Service, which he might have had of him, which is meant, as Mr. LE CLERC expounds them, by theſe words, *For the Slave was his Money.* The other Law requires, That if a Maſter has ſmitten the Eye of his Servant, that it periſhes, or his Tooth, he ſhall let him go free as a Satisfaction for that Loſs; which without doubt hath place, when the Damage is more conſiderable, with greater Reaſon: See the ſame Commentator.

doth it appear, that he can tranſmit them to another Maſter, without their Conſent; they being really in the Capacity of [4] *perpetual Mercenaries*, or *Hirelings*, working for the Advantage of him that imploys them, whilſt continuing in that State, but not at his diſpoſal, when obliged to leave it. Laſtly, if Perſons, in this limited Order of Servitude, commit any grievous Offence againſt the Members of another Family, their Maſter cannot, even on this account, proceed to take away their Life. Yet leſt he ſhould engage himſelf in Quarrels, by defending their Injuries and Crimes, he is allow'd, or rather he is oblig'd to expel them his Houſe; which is a kind of delivering them up to Puniſhment. But if they prove guilty of any heinous Practice againſt the Maſter himſelf, and his Family, he may then juſtly kill them; yet not by Virtue of his Sovereignty, but as *Enemies*, by the Right of War [a].

And according to theſe Meaſures, the Condition of Servants, and the Power of Maſters are, for the moſt part, [5] deſcribed in the Old Teſtament.

V. The Convenience of diſcharging inferior Offices and Labours, by the Hands of others [b], being thus found out; in ſucceeding times, when Wars grew frequent in the World, it paſs'd by degrees into a Cuſtom, to indulge Captives with Life and corporal Liberty, upon Condition that they ſhould yield perpetual Service to the Conqueror [1]. Thus *Diodorus Siculus* [c] reports of the antient *Egyptian* King *Seſoſtris*, that he perform'd all his publick Works by the Help of Captives; fixing this Inſcription on the Temples which he built, *None of the Natives have here imploy'd their Labour*. Now theſe Slaves of War were of courſe treated with ſeverer Diſcipline, being ſuppoſed ſtill to retain ſome Sparks of hoſtile hatred. Beſides, an Act of Cruelty was judg'd ſomewhat excuſable, when practis'd upon thoſe who had formerly made an open Attempt on the Life and Fortune of their preſent Maſter; and the Licenſe in this Point improv'd ſo far, that it was eſteem'd a harmleſs matter to kill them, either in Violence of Paſſion, or upon committing any Offence [d]. This Privilege being once introduc'd, was extended, tho' upon leſs Pretence, to the Children of the Vaſſals; and to their Slaves, if they happen'd themſelves to be *inferior Maſters*. Yet in ſome Commonwealths, it was quite taken off by publick Decrees, and in others very much abridg'd and reſtrain'd. The primitive Inſtitution therefore of Servitude was not founded on War, but on voluntary Conſent; tho' the Chance of War ſupplied Occaſion, not only to the increaſing the Number of Slaves, but to the rendring their Condition more hard and grievous [e].

VI. Let us ſee how Mr. *Hobbes* [f] derives the Sovereignty of Maſters, and the Subjection of Servants, from his *State of War*. And, firſt, we muſt diſcard that fundamental Error of his, that from the Condition of Nature, which he calls a War of every Man upon every Man, there can reſult to any Perſon a Right of invading another, and of reducing him into Servitude upon gaining the Victory. Yet thus much is Senſe; that as, by the Right of War, an Enemy may fairly be kill'd; ſo the Conqueror may, if he pleaſeth, give him his Life, upon his Promiſe of perpetual Service. In which Contract and Compoſition, the Good which the vanquiſh'd receives, is the Security of his Life, which, by the Right of War, might have been taken away; and the Good which he engages to bring to the Victor, is his Service and Obedience, and thoſe, as far as poſſible, *abſolute*. For he that obligeth himſelf to perform the Commands of another, before he knows the Particulars, is bound, without any Limitation or Exception, to do all that the other Party ſhall enjoin. Tho' the Law of *Humanity* affords ſome Relief and Temper to this rigorous Juſtice [g].

Farther, Mr. *Hobbes* [h] rightly obſerves, that not every Captive in War is thus ſuppoſed to covenant with the Conqueror. For ſome do not obtain an abſolute Grant of Life, but a temporary Reprieve to ceaſe at the Conqueror's Pleaſure; which was the Caſe of thoſe whom the *Romans* preſerv'd to adorn their Triumphs, and to entertain their Amphitheatres. Nor is ſo much Truſt and Credit given to every Captive, as that his Maſter ſhould venture to leave him ſuch a Degree of *natural Liberty*, as might enable him, were he ſo inclined, either to run away, or to refuſe working, or to attempt any Miſchief or Damage againſt the Family. Such a One therefore per-

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[4] *If thy Brother be waxen poor, and ſells himſelf to thee, thou ſhalt not conſtrain him to ſerve, as a Slave, but he ſhall be with thee, as an hired Servant, or a Sojourner to the Year of Jubile*, Lev. xxv. 39, 40. CHRYSIPPUS, as SENECA tells us, did ſay, That a Slave is a perpetual Servant. *Servus, ut placet Chryſippo, perpetuus mercenarius eſt*. De Benef. *Lib.* 3. *Chap.* 22.

[5] *Exod.* xxi. 21, *&c.* *Deuteron.* xv. 17, 43, 53, *&c.* *Sirac.* xxiii. 25, *&c.*

Mr. BARB. *NOTE on* § V.

[1] See BUSBEQUIUS's *Epiſt.* 3. & CHRISTOP. RICHERIUS, *de Moribus Orientalium.* As to the Original of this Cuſtom, 'tis an Aſſertion of PLINY's, that *The* Lacedemonians *invented Servitude* (l. 7. c. 56.) which cannot be admitted, except in one of theſe two Senſes, either that they were the firſt in *Greece* who introduced this Practice, or that they made Slaves of their Countrymen the *Grecians*, as well as of the *Barbarians*, when taken in War. The former Senſe is favour'd by that Place of HERODOTUS (*Erato,* towards the End) where ſpeaking of the Iſland *Lemnos*, its being ſeiz'd by the *Pelaſgians*, he adds, *Neither they nor any other of the* Grecians *had then Slaves.*

[a] Yet after another Manner than the Old *Germans*, who kill'd their Slaves, as *Tacitus* ſays, *Not out of Diſcipline and Severity, but pure Heat of Paſſion.*

[b] Hence *Ariſtole* (Polit. 3.) calls a Servant, Ὄργανον πρὸ ὀργάνων.

[c] L. 1. c. 56. p. 52. Ed. *Rhodom.*

[d] *Add.* Grot. *l.* 3. *c.* 7. *ſ.* 3.

[e] *Add.* Bœcler *ad* Grot. *l.* 2. *c.* 5. *ſ.* 27.

[f] De Cive, *c.* 8. *ſ.* 1.

[g] *Vid.* Grot. *l.* 3. *c.* 14.

[h] *Ubi ſupra*, ſ. 2, 3, 4.

forms Service, not upon account of mutual Faith and Contract, or by virtue of a moral Tye, but upon meer Force, like brute Creatures; being kept in Fetters, or under cloſe Confinement. The Obligation therefore of a Slave of War towards his Maſter, doth not ſpring from the bare ſaving his Life, nor deferring his Death; but is built on his Exemption from Chains and Impriſonment. By this Act the Maſter expreſſeth ſo much Confidence in him, as to leave him poſſeſs'd of corporal Liberty; by which means, if no moral Bonds and Engagements had paſs'd between them, the State of War would ſtill continue; and the Slave might not only make his Eſcape, but might fairly ſlay his Preſerver [a]. From all which it is clear, that there is a great Difference between thoſe Slaves who are ſecur'd in Priſons, Work-houſes, and the like, and thoſe who are tied by Covenant to their Maſter: the former ſerving not out of Duty, but to avoid Puniſhment; and conſequently, not acting againſt the Law of Nature, ſhould they either run off, or aſſault their Maſter's Life. For to hold a Perſon in Chains, or Durance, is a Sign, that we do not think him ſufficiently enſured to us by any Obligation, or moral Reſtraint.

Yet that Aſſertion of Mr. *Hobbes* cannot paſs for Truth, that *the Maſter hath altogether the ſame Right over the Slave, whom he thus keeps in Bonds, and him whom he holds only by Articles; in as much as his Right over both is ſupreme.* For that kind of hoſtile Privilege, which the [1] Victor reſerves to himſelf over his Priſoner, is a different thing from his proſper Sovereignty: Since by means of the former the Captive may, at any time, be deprived of his Life, under Pretence of the State of War, from which he ſeems to be not yet perfectly exempted; whereas the higheſt Degree of ſovereign Rule or Dominion doth not directly include a Right over the Life of the Subject, except on a criminal Account.

VII. But altho' *Dominion*, which is properly the Right of governing another's Perſon, when eſtabliſh'd with the free Conſent of the Subject, cannot regularly be transferr'd without his good-liking; Men having uſually peculiar Reaſons why they chooſe to ſubmit to this Perſon rather than any beſides: yet in thoſe kinds of Dominion which are grounded upon Force, it hath been ever judg'd allowable for the Sovereign to alienate them by his own ſole Will and Act. Yet ſo long as the Subjects enjoy any Remains of Liberty, we cannot in Strictneſs ſay, that the Men themſelves are thus alienated or made over, but only the Right of governing them, as being join'd with ſome Uſe or Advantage. Every Sovereign may indeed, as Mr. *Hobbes* [b] remarks, ſay of his Subject, *Hic meus eſt*; *This Man is my Property*: yet 'tis in a quite different Senſe that we call a Thing our own. For by the former Expreſſion I mean no more, than that I, and none elſe, have the Right of governing ſuch a Perſon; yet ſo as to be my ſelf under ſome kind of Obligation to him, and not impower'd to exerciſe that Right upon him, in an unlimited abſolute manner. But, on the other ſide, the Property I claim over a Thing, implies a Right of uſing, ſpoiling, and conſuming it, to procure my Advantage, or to ſatisfy my Pleaſure; ſo that what way ſoever I diſpoſe of it, to ſay it was my own, ſhall be a ſufficient Excuſe. It muſt be confeſs'd, that although the Law of Humanity doth by no means allow us to extinguiſh all Marks of primitive Equality in a Slave, who, whatever he may have formerly deſign'd, is now in a Condition of Peace and Kindneſs with us, ſo as to uſe him in the ſame manner as a Beaſt or inanimate Creatures, towards which we cannot ſtand under any Engagement; yet the barbarous Cruelty of many Nations hath proceeded ſo far, as to reckon their Slaves in the Number of their Goods and Poſſeſſions, and to treat them not in a way of Sovereignty, but of arbitrary Violence, [1] calling them their own in the ſame Senſe, as their Cattle. Amongſt theſe People, if a Maſter perform'd the leaſt Good towards his Vaſſal, he did it purely for his own ſake, leſt he ſhould ſuffer by loſing him; and the poor Wretch was pitied only upon account of his Price [c]. But all this is not enough to prove what Mr. *Hobbes* affirms, that *whatſoever the Slave poſſeſs'd before his entring on that Condition, doth then fall to his Maſter*: which can be admitted only in this qualified Senſe, *that as much as the Slave was, before his Captivity, able to get by his Work, ſo much his Maſter may now claim, and oblige him to make good.* When a Man voluntarily engageth in Servitude, he may indeed deliver up his little Poſſeſſions, as well as himſelf, into his Maſter's Power. But there is no conſtant neceſſity of thus proceeding. And as for thoſe Perſons, who in antient Times ſold themſelves into Slavery, it is probable, that they retain'd not only the Price given, but likewiſe their former Goods, at leaſt, in the manner of their *Peculium*; *ſo as to have themſelves the Property and Management of them, though their Maſters had the chief Advantage*; or elſe, that they ſurrendred them up to their Children, or aged Parents, whom before they were obliged to maintain. Tho' indeed the [2] *Jewiſh*

Mr. BARB. *NOTE on* § VI.

[1] The Captive having deſerv'd to loſe his Life, as we ſuppoſe, 'tis no Injury to him to make him a Slave; and if he finds his Slavery more unſupportable than Life is ſweet, he may procure his Death at any time, by diſobeying his Maſter; as Mr. LOCK ſays in his ſecond Treatiſe of *Government*, *Chap.* IV. § 23. in the Original.

Mr. BARB. *NOTES on* § VII.

[1] In the *Roman* Law, a Runagate Slave is ſaid to rob himſelf. *Ancilla fugitiva quemadmodum ſui furtum facere intelligitur, ita partum quoque contrectando, furtivum facit.* Digeſt. *Lib.* 47. *Tit.* 2. *De Furtis*, Leg. 60. See alſo *Cod.* Lib. 6. Tit. 1. *De Serv. fugit.* Leg. 1. and *Quinctilian.* Declam. VI. The poor Man, that by the Chance of War had been made a Captive and Slave, had reaſon to ſay, *Meipſum perdidi*; *I have loſt my ſelf.*

[2] *Vid.* Selden. *De J. N. & G. ſec. Hebr.* l. 6. c. 7.

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[a] See *Lock*'s Treatiſe of civil Government, *c.* 3. *ſ.* 2.

[b] *Ubi ſupra*, ſ. 4.

[c] *Add.* Dio. Chryſoſt. *Orat.* 15. *De Servitute*, p. 241. Ed. *Morell.*

Doctors held it unlawful for a Man to ſell himſelf, except under danger of Starving. Amongſt the *Romans* it was a known Trick with Sharpers, to ſuffer themſelves to be ſold, for the ſake of going Sharers in the Price: And for their Puniſhment they were condemn'd to real Servitude. The Sham was this; *Caius*, ſuppoſe, pretended *Seius* to be his Slave, and accordingly offer'd him to Sale, tho' indeed a Freeman: *Seius* being, upon Bargain, to receive a good part of the Gain, conſented to the Proceeding. But the Man being once paſs'd off to the Cuſtomer, and the Price deliver'd; a third Perſon was ſuborn'd to claim *Seius* in the Court as a Freeman, by preferring an *Action* againſt the Purchaſer; who (*Caius* being, in the mean time, ſlipt out of the way) was thus doubly gull'd of his Money, and of his Man [a].

If a Man be compell'd to Servitude by the Right and Courſe of War, the Goods which are taken with him ſhall be the Victor's. But thoſe which are not taken with him ſhall be as if he were naturally dead: At leaſt till ſuch time as he recovers his Liberty. Thus much is moſt certain, that what the Slave gets during his Servitude, he gets for his Maſter. For to whom any Perſon fully belongs, to him ſhall belong whatever that Perſon can procure or produce. And in this Senſe Mr. *Hobbes* ſays truly enough, that *the Slave hath nothing which he can retain as his own, in Prejudice to his Maſter's Title.* Yet what his Maſter peculiarly aſſigns or allows him for Management or Uſe, he may keep and defend, againſt his Fellow Servants; as Victuals, Cloaths, Lodgings, Vails, and the like [b].

VIII. When the ſame Author [c] adds, that *a Slave cannot be injur'd*, the Words are not fit to be receiv'd without much favourable allowances, large abatements, and Limitations. The Argument which he makes uſe of, *the Slave having ſubjected his Will to the Will of his Maſter, whatever the latter does, is done with the Will of the former, and therefore can be no Injury to him*; only proves thus much, that the Slave ought not to complain, whatever Work is enjoin'd him by his Maſter, provided it lie within the Compaſs of his Strength, tho' never ſo contrary to his Inclination: No more than a Subject can pretend he is unjuſtly dealt with, when an abſolute Prince doth not manage things to his good liking. That this *Subjection of Will* amounts to nothing more, we will elſewhere fully evince. In other Matters, who will deny but that it is an Injury to a Slave, to ſet him a Labour above his Ability; [1] to beat him for not performing ſuch an impoſſible Task; or to deny him neceſſary Food [d]? The *Jews* were ſo inhuman, as to think themſelves not obliged to furniſh a *Gentile* Slave with Cloaths, or Victuals, tho', at the ſame time, they exacted from him the hardeſt Services, with all imaginable Cruelty [e]. The reaſon of this barbarous Rigour might probably be, becauſe they had themſelves ſuffer'd the like Treatment in *Egypt* [f]. And as for that Command in *Leviticus* xxv. 43. prohibiting Severity, they confined it to Perſons of their own Nation. The *Romans* in their Cuſtoms and Laws, as to the Point of Food, expreſs'd more Kindneſs [g]. It was a noted Saying of *Cato's*, that *to quarrel with Servants about their Bellies, looks ſcandalouſly mean* [h]. Yet, in other Reſpects, the *Roman* Maſters were remarkably unmerciful: As in ſelling their Slaves, when grown aged and unfit to Work; a Practice which *Plutarch* [i] juſtly cenſures, upon this Argument, that *it is natural for Men to expreſs ſome kind of Clemency and Beneficence, even to brute Creatures*, which have undergone Labours for our Advantage [k]. On the whole, *Ariſtotle's* reaſoning will ever hold good; *We owe*, ſays he, *ſome Friendſhip even to a Slave; not as he ſtands in that Relation, but on the account of his being a Man: Since there is a common Right, which each Perſon may claim in regard to every other Perſon, with whom he is capable of partaking in Laws, or Covenant* [l].

Mr. BARB. *NOTES on* § VIII.

[1] We ought always to remember, that they are Humane Creatures: *Theano's* Greek is, Ἵνα μήτε διὰ τὸ κόπον κάμνωσι, μήτε ἀδυνατῶσι διὰ τὴν ἐνδείαν, εἰσὶ γὰρ ἄνθρωποι τῇ φύσει. To the Quotations of the Author may be added what *Petronius* makes *Trimalchion* ſay, *Amici, & ſervi homines ſunt, & æquè unum lactem biberunt, etiamſi illos malus fœtus oppreſſerit*, Chap. 71. upon which the Commentators have heaped up many Authorities. But the *Jews* believed, that they were not oblig'd to uſe any Kindneſs to Slaves, except of their own Nation: See *Selden de Jure Nat. & Gent.* &c. *Lib.* 6. *Chap.* 8. Further, Our Author in his Abridgement of the Duties of a Man and Citizen. *Lib.* II. *Chap.* 4. § 5. ſays, That if we ſell or alienate a Slave in any other manner, we ought not deſignedly, and without his deſert, to put him into the Hands of ſuch as will uſe him inhumanly. I will alſo add here, that there was a Law among the *Greeks*, which allowed Slaves, when they were uſed hardly by their Maſters, to require that they might be ſold to ſuch as would uſe them better: See *Plutarch de Superſtit. & Pollux. Lib.* 7. § 13. The Emperor *Antoninus Pius* commanded much the ſame thing in a Law above quoted, *Digeſt. Lib.* 1. *Tit.* 6. *Leg.* 2.

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[a] We have an Inſtance of this Trick in *Plautus*, Perſ. *Act.* 4. *Sc.* 4. & 9.

[b] *V.* Plin. *L.* 5. *Epiſt.* 16.

[c] *Ubi ſupr. ſ.* 7.

[d] *Theano* (*Epiſt.* 3. *in Opuſc. Mythol. &c. p.* 746.) makes it neceſſary to the juſt uſe of Servants, that *They be neither broken by Labour, nor by Want.*

[e] *Vid.* Selden. *de J. N. & G. ſec. Hebr.* l. 6. c. 8.

[f] *Exod.* v. 13, 14.

[g] *Vid.* L. 1. t. 6. l. 1. ſ. 2. *D.* De his qui ſui vel alien. jur. ſunt. & *L.* 7. *t.* 6. *l.* 1. *ſ.* 3. *C.* De Latin. Lib. Toll.

[h] *Plut.* in *Cat.* M.

[i] *Ibid.*

[k] Plaut. (Menæchm.) *If you are deſirous of keeping a Slave ſecurely, you muſt tie him to you with large Commons. You may eaſily pin down a Fellow's Noſe to a full Table. Juvenal* (Sat. 14. v. 125.) cenſures the Miſer, that

Servorum ventres modio caſtigat iniquo,	With ſcanty Meaſure ſhrinks his Servants Guts.

It was a commendable Decree of *Claudius*, which *Suetonius* mentions (c. 25.) *When certain Perſons had expoſed their ſickly and crazy Slaves, in the Iſland of* Æſculapius, *being weary of providing for their Cure; he ordered all thoſe who had been thus expoſed, to be declared free, and not to return to their old Maſters, if they happened to recover: at the ſame time Enacting, that ſuch Perſons as choſe rather to kill their Slaves, than thus to diſpoſe of them, ſhould be held guilty of Murther.* We meet with the ſame Account in *Dion. Caſſius*, l. 60.

[l] Ethick. *ad* Nicom. 8. 13. *Add.* Oeconom. *l.* 1. *c.* 5. Senec. *De Ira*, *l.* 3. *c.* 4. *De Clement.* l. 1. c. 18. & *Epiſt.* 47. Arrian. Epictet. *l.* 1. *c.* 13.

As the other Rights of Fathers of Families hath been moderated and reſtrain'd by national Conſtitutions; ſo it hath happened to this Authority over the Slaves, which, in different Countries, we find more or leſs reſtrain'd. But where it remains abſolute and unlimited, we muſt ſuppoſe it not to have been thus appointed by *civil* Ordinances, but to have been paſs'd by, and left as it formerly ſtood, before the Erection of Commonwealths. Yet it is obſervable, that the Laws of ſome States do encourage the Cruelty of Maſters, and impoſe greater Hardſhips on the Slaves, than the Law of Nature permits, under the moſt abſolute Command. We have a famous inſtance of this in the *Roman* Cuſtom, of dragging the whole Family to Puniſhment, when the Maſter happened to be kill'd: Which *Caſſius* in *Tacitus* [a] endeavours to defend, by Arguments drawn from Uſe and Convenience. The Emperor *Adrian*, in ſome Meaſure, leſſen'd this Severity, by decreeing, That upon ſuch a Misfortune, not all the Slaves ſhould be arraign'd for Murther, but thoſe only who were ſo near in the Houſe, as to be able to hear and apprehend the Miſchief [b].

IX. About the *Off-ſpring of Slaves* there are two Points of Enquiry, Whether it neceſſarily follows the Mother? And whether it aſſumes the ſame Condition of Servitude? As to the former Queſtion, it is a Rule in the *Roman* Laws, which holds of Slaves as well as of Beaſts, that *Partus ſequitur ventrem* [1], *the Birth goes along with the Bearer.* This *Grotius* [c] judgeth not to be altogether conſonant to the Law of Nature, in caſe the Father can by ſufficient Tokens be diſcovered. "For, ſays he, ſince we may obſerve, "even in ſome brute Creatures, that the Sire, "as well as the Dam, expreſſeth a Care for the "young; we may hence infer, that both have "an equal Intereſt in their common Iſſue: and "therefore if the municipal Laws are ſilent in "this Point, the Father's Claim is as good as the "Mother's [d]. But we do not think this Argument of any Force; having before made out, that the original Right over the Child is in the Mother; and only transferr'd to the Father, according to the Tenour of the matrimonial Covenant.

As for the other Difficulty; ſince in a Condition of perfect Slavery, not only the Works, but the Perſons belong to the Maſter, their Children will likewiſe fall under his Dominion, as every thing elſe which they produce [e]. Now why the *Maid*'s Maſter ſhould have a better Title in the Caſe, than the *Man*'s, there are ſeveral Reaſons to be given. As firſt, conſidering the Life and Familiarity of Slaves, to point out the true Father, might prove a Matter of Difficulty [f]. Again, the Mother is, on account of her *Burthen*, rendred for ſome time, unfit to perform her uſual Work; and conſequently brings a Loſs and Prejudice to her Maſter, which ought thus to be repair'd. To which we may add the common Maxim, that *Things planted belong to the Proprietor of the Soil* [2]. If the Maſter himſelf have Iſſue by his Female Slave, the Condition of it ſhall be ſuch, as either his Pleaſure, or the Laws of the Country ſhall determine. And by them likewiſe Judgment is to be paſs'd on a Child, which was conceiv'd by the Mother, whilſt in a State of Servility, but born after ſhe had obtain'd her Freedom; or *vice verſâ.* Tho' Humanity ever inclines to the favourable ſide, and declares [3] for the Child's Liberty [g].

It is eaſy to ſhew, that the Maſter doth no *Injury* to his Slave's Off-ſpring, [4] by dooming it to the ſame Subjection. For ſince the Mother

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Mr. BARB. *NOTES on* § IX.

[1] *Partum Ancillæ Matris ſequi conditionem, nec ſtatum Patris in hac ſpecie conſiderari, explorati juris eſt,* Cod. Lib. 3. tit. 32. *De Rei vendicatione,* Leg. 7. See alſo *Lib.* 7. *tit.* 16. *De liberali cauſâ,* Leg 42. And about Beaſts, what is ſaid above, *Lib* 4. *Chap.* 7. § 4.

[2] See above in B. 4. c. 7. ſ. 5.

[3] The *Roman* Law agrees here with the Laws of Humanity; for it requires, that the Child be Free, if the Mother be ſo when it is born, tho' ſhe conceived it, when ſhe was a Slave; and, on the contrary, if ſhe were Free, when ſhe conceiv'd, the Child was Free, tho' the Mother was a Slave, when it was born; it being unreaſonable, that the Child (as JUSTINIAN ſays) ſhould ſuffer the Misfortune which happened to the Mother, while it was in her Womb. *Sufficit autem liberam fuiſſe Matrem eo tempore, quo naſcitur, licet ancilla conceperit. Et è contrario, ſi libera conceperit, deinde ancilla facta pariat, placuit, eum, qui naſcitur, liberum naſci: quia non debet calamitas Matris ei nocere, qui in ventre eſt.* Much more, when the Mother was a Slave at the time of Conception, if ſhe was made free while ſhe was big, and again became a Slave, the Child muſt be accounted Free. *Ex his illud quæſitum eſt, ſi ancilla prægnans manumiſſa ſit, deinde ancilla poſtea facta peperit, liberum, an ſervum pariat? Et* Martianus *probat, liberum naſci: ſufficit enim ei, qui in utero eſt, liberam Matrem vel medio tempore habuiſſe, ut liber naſcatur. Quod & verum eſt.* Inſtitut. Lib. 1. tit. 4. *De Ingenuis.*

[4] Mr. BUDDEUS (in his *Philoſ. Pract.* Part. 2. Chap. 4. Sect. 12. § 5. and Chap. 5. Sect. 6. § 12.) affirms, That this is unjuſt, and that the Children that are ſo born, are obliged only to acknowledge him their Mother's Maſter. I ſhall leave it to the Reader to examine whether the Reaſons of that able Profeſſor are ſtrong enough to overthrow GROTIUS's and our Author's; eſpecially as this laſt has laid them down with a Temper in his Abridgment of the Duties of a Man and Citizen, *Lib.* 2. *Chap.* 4. § 6. where he ſays, *It is evident, that theſe Children of a Slave being reduced to Servitude by their unhappy Birth, their Maſter can have no reaſon to uſe them worſe, than perpetual Mercenary Servants.*

[a] *Ann.* 14. c. 45.

[b] *In* Spartian. *Add. L.* 29. *t.* 5. *D. de* Senatuſconſulto Silaniano. *Conf.* 1 *Sam.* xxvi. 16. The *Scythians* put out the Eyes of their Slaves, as we are told by *Herodotus, Melpon.* in the Beginning.

[c] L. 2. c. 5. ſ. 29.

[d] *Vid. Edict, Reg.* Theodoric. *c.* 67.

[e] Add. *Grot.* ad *Exod.* xxi. 4. where he ſhews, that the Marriages of Slaves were diſannull'd at the Pleaſure of their Maſters. *Xenophon (Oeconom.)* laying it down for one Rule, that Servants ſhould not wed without their Maſter's Conſent, gives this Reaſon for it; becauſe *As thoſe who are Good, do by this means grow more Loving and Faithful, ſo thoſe who are Bad, improve in Knavery.*

[f] *Vid.* Plaut. Caſin.

[g] *Plato* thus diſpoſeth of Servile Iſſue *(LL. l.* 11. *p.* 975. A.) *If a Female Slave bear a Child to another Slave, or to a proper Freeman, or to one that hath been ſet at Liberty, the Child ſhall belong to her Maſter. If a Maſter, or a Miſtreſs, be convicted of having a Child by their proper Slave, the Father and the Child ſhall, in the former Caſe, be driven to another Country by the Woman; in the latter Caſe, the Mother and the Child ſhall be baniſh'd by the Magiſtrates.*

hath nothing of her own; 'tis impoſſible ſhe ſhould maintain the Child, but with her Maſter's Goods. And in as much as the Maſter is obliged to furniſh ſuch an Infant with Food, and other Neceſſaries, long before he is capable of making any Requital for his Labour; and ſince, when he firſt begins to Work, his Pains are ſcarce equivalent to his daily Maintenance, he cannot eſcape *Servitude*, unleſs by the Maſter's particular Diſpenſation. And this Reaſon will hold, not only whilſt he is ſuppoſed to continue, as it were, in the Maſter's Debt, but ever after; becauſe the Condition, on which the Maſter firſt undertook to keep him, was, that he ſhould perform perpetual Service: and, to this Condition he is preſumed to have yielded a tacit Conſent; eſpecially if it be conſider'd, that his very Birth is owing to his Maſter's Favour; who, by the Right of War, might have put his Parents to Death. And as for that *natural Freedom*, with which all Men are in common inveſted, it then only takes place, when no Act or Agreement of our ſelves or others, hath rendred us obnoxious to a State of Inferiority.

And thus we ſeem to have clearly ſtated the Caſe of Children born to *perfect* Slaves, ſuch as were Captives in War, and thence reduced to this Condition. As for thoſe of the other Kind, who engage themſelves in Servitude by their own free Motion, if there be no expreſs Law or Covenant to the contrary, Equity and common Favour incline to this Reſolution concerning them; that the Food of their future Iſſue is contained, or implied, in their own Maintenance, which their Maſter owes them as a juſt Debt: and conſequently their Children are not involv'd in a neceſſity of Slavery [a].

X. Let us, in the next place, examine what Inconveniences do really attend a State of *Servitude*, which, in the Opinion of moſt People, paſſeth for the greateſt Miſery incident to Mankind, and ſuch, as one ought rather to die than endure [b]. The full Sum and Notion then of *perſonal Servitude* amounts to this; that a Man, for the ſake of Food, and the other Neceſſaries of Life, ſhall lie under an Obligation to perpetual Labour; which if taken in its true natural Extent, extracted from the barbarous Cruelty of ſome Maſters, and the unreaſonable Rigour of ſome Laws, doth not imply any extravagant Degree of Hardſhip and Severity. For that perpetual Obligation is well requited by a perpetual certainty of Maintenance, for which thoſe who work by the Hire, are often at a Loſs, either through want of Buſineſs, or wilful Idleneſs [c]. Some have thought, and not altogether without reaſon, that the [1] Prohibition of Slavery among *Chriſtians* hath chiefly occaſion'd that Flood of thieving Vagrants, and ſturdy Beggars, which is uſually complain'd of. Tho' there are *States* which have, in a great meaſure, put a ſtop to this Nuiſance, by erecting publick Workhouſes, and compelling lazy Raſcals to a Life of Honeſty and Induſtry [d].

Mr. *Hobbes*, in his Book *De Cive* [e], ſtating the Difference between Liberty and Servitude, expreſſeth himſelf to this purpoſe: "Liberty is nothing elſe but the abſence of all Impediments of Motion. Thoſe Impediments may be either *natural* and external, or *moral* and arbitrary. With regard to the former kind, Things are ſaid to be more or leſs *free*, as they have more or leſs ſpace to move in; as a Man in a wide Priſon is more at liberty, than another under cloſe Confinement. And thus a Perſon may be *free* to proceed one way, and not *free* to proceed another: as when a Traveller is hindred, by Hedges and Mounds, from diverting out of the Road into the Corn-fields or Vineyards. This Species of Liberty may be term'd *phyſical* or *corporal*; in which Senſe all Servants and Subjects are *free*, who do not ſuffer Bonds or Impriſonment. Moral Impediments do not *abſolutely* hinder Motion, but by *Accident*: that is, by our intervening Choice, whilſt we judge it better for us to abſtain from ſuch a Motion, than to perform it. Thus a Paſſenger in a Ship is not reſtrain'd from throwing himſelf headlong into the Sea; yet, if he be in his Senſes, he'll think a ſafe Cabin preferable to a Leap amongſt the Waves. In like manner, whatever Penalties are denounc'd againſt any Action, a Man that fears not the Danger, ſticks not to break the Command. And this is that intrinſick Liberty of the *Will*, inſeparable from it, which Slaves no leſs than all other kind of Subjects enjoy. We muſt ſearch therefore elſewhere to diſcover a Difference. And firſt, altho' ſcarce any Maſter is ſo ſevere, as to hinder his Servant from doing thoſe things which are neceſſary for the Preſervation of his Life and Health, which are the chief Objects and Purſuits of human Care; yet Free-

Mr. BARB. *NOTES on* § X.

[1] There are ſome that affirm, that Slavery is not quite aboliſh'd among Chriſtians. Mr. THOMASIUS ſays, he has proved it in his publick Lectures on the Inſtitutes (*Not. in Huber. de Jure Civitatis*, p. 396.) and he publiſh'd in 1701. a Diſcourſe, *De Hominibus propriis Germanorum*, which proves it in reſpect to *Germany*, where he affirms nevertheleſs, that the manner of Servitude hath been different from the Cuſtoms of the *Romans*. Mr. HERTIUS has a Diſcourſe alſo upon theſe *Homines proprii* in *Tom.* 2. of his *Comment.* and *Opuſcula*.

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[a] *Comp.* Bœcler. *ad* Grot. *l.* 2. *c.* 5. *ſ.* 29.

[b] Roſar. Perſic. Sadi. *Cap.* 1. *It is better to ſit down feeding on one's own Bread, than to ſtand waiting at another's Table in a golden Girdle.*

[c] *Vid.* Arrian. Epictet. *l.* 3. *c.* 26. *p.* 257. Lucan Pharſ. *l.* 3. *v.* 152.

Non tibi, ſed domino gravis eſt, quæ ſervit egeſtas

Want in a Slave turns to the Maſter's Loſs.

Add. Grot. *l.* 2. *c.* 5. *ſ.* 27.

[d] *Add.* Bodin. *De Repub. l.* 1. *c.* 4. Busbeq. *Epiſt.* 3. *p.* 118.

[e] *C.* 9. *ſ.* 9.

“ men are, for the moſt part, allow'd to provide for themſelves in theſe reſpects, with more Plenty and more Eaſe, than Perſons of that low precarious Condition, whoſe Conſtitution often ſuffers by their hard Fare, and unreaſonable Labour [2]. Again, Freemen do in this ſhew their eminent Advantage above Slaves, that they are admitted to the more honourable Offices in Families and Commonwealths; and that they poſſeſs Superfluities in a far larger Meaſure. Both which Privileges are wonderfully pleaſing to Men of lofty Spirits and Deſigns. For the Trouble of Buſineſs is ſoften'd and ſweeten'd by the Honour and Credit of an Imployment; and to ſwim in Affluence, is ever eſteem'd a moſt valuable Happineſs; as well, becauſe we ſeem by this means to be well provided for, againſt all future Accidents and Occaſions; as becauſe our Life will thus paſs the more ſmoothly, and we ſhall have larger Ability of doing Kindneſſes, and gaining a numerous Party by our Benefactions. But the main Diſtinction of all is this, that free Subjects are only engaged to obey the ſupreme Power, and the general Laws of the State, and fearing no Puniſhment, but what is by them particularly denounced, in all other things they follow their own Fanſy with full Delight and Satisfaction. But Slaves are obnoxious to the private Commands, and to the coercive Power of their fellow Subject, and are compell'd to bear his Humour, though the moſt froward or imperious; which is the greateſt Hardſhip, by reaſon of their near Abode, and frequent Intercourſe with their Maſter. And to render their Bondage ſtill more grievous, the publick Laws do ſeldom afford them Relief againſt their Maſter, unleſs in Caſes of moſt barbarous Severity and Cruelty. The more ſoft and gentle a Man's Nature is, the more muſt he be afflicted under theſe uneaſy Circumſtances [a]. We may add, that the Yoak of Servitude is much the more galling on account of human Pride; which encourages every Man to think himſelf worthy of Command; and thus when the Slave eſteems himſelf altogether as fit, if not fitter, to bear Rule than his Maſter, he fanſies that Fortune hath done him a mighty Injury, and deſires on any Terms to change his Condition [b].

XI. A Slave may obtain Freedom ſeveral ways: As firſt, if his Maſter formally releaſe him; for what Right the Slave before transferr'd on his Maſter, the Maſter may reſtore to him again. Though it be cuſtomary, in many States, that the Slave, thus releas'd, ſhall ſtill yield ſome kind of Duty and Reverence to his Maſter [c]. In caſe the Maſter own'd a Superior, he cannot otherwiſe beſtow Liberty, than in a way conſiſtent with the Rights of that Superior, and with the publick Laws. Secondly, if his Maſter renounce and diſcard him: which, in Commonwealths, is reckon'd a kind of Puniſhment; and differs not from Manumiſſion or formal conferring of Liberty, in the Effect, but only in the Manner and Deſign. In both Caſes the Maſter reſigns his Right; but in the former, by way of Reward; in the latter, by way of Puniſhment: for that it is a real Grievance and Affliction to loſe a wealthy and convenient Maſter, even free Servants are often ſenſible. Thirdly, in caſe a Slave be made a Captive, whether alone, or together with his Maſter, his new Servitude extinguiſheth his old. But if the Maſter be only made a Captive, the Slave falls into the ſame State and Condition as he would do, were his Maſter naturally dead, at leaſt till ſuch time as the Maſter be reſtored to Liberty. Fourthly, a Slave may be releas'd upon uncertainty of a ſucceeding Poſſeſſor [d]; as ſuppoſe his Maſter dies without making over his Right to any other; becauſe then he is under no Engagement of performing Service. For no Man is ſuppoſed to ſtand obliged, unleſs he can know the Perſon to whom the Debt is to be paid. But whether a Man, thus releas'd, can claim the Privilege of a free Subject in a Commonwealth, is a Queſtion that the particular Laws and Cuſtoms muſt determine. Some tell us, that amongſt the *Turks*, the Act of ſetting a Slave at Liberty will hold good only againſt his old Maſter, but that any other Perſon may again compel him into Service. Another Caſe when a Slave may be releas'd, upon the uncertainty of a ſucceeding Poſſeſſor, is, if his Maſter dye, either in a natural or civil Senſe, without an Heir. For the Goods of ſuch a Man are adjudg'd derelict, and paſs to the firſt Seizer; yet his Slave cannot be forced into a new Service by the ſame Claim. Things may be laid hold on by any Man, if no other hath already a Right over them; but Perſons cannot be challeng'd by any other Title, than what ariſeth from their own Conſent, or from ſome antecedent Deed, in which they are concern'd. And therefore, that Right being now extinct, which the Victor by War obtain'd over his Slave, natural Liberty returns: And this, although the Diſpoſition of the Perſon ſhould make it more proper for him to continue in Servitude; for the Fitneſs of a Man's Temper, or Inclination can by no means give another a Right of dragging him into Bondage, nor is it always lawful for me to force a Perſon upon that which is really for his Intereſt and Advantage. Fifthly, When a Slave, not by way of Puniſhent [1] or on account of any preceeding Offence, is thrown into Irons, or otherwiſe deprived of corporal Liberty, he is by this Act releas'd from his former Obligation by Compact; for his Maſter is ſuppoſed to take off his moral Bonds, by thus impoſing natural. It is inconſiſtent with Covenant, not to believe the Party covenanting, and that Faith cannot be violated, which was not given. And hence a Slave under this Treatment may, if Opportunity favour him, without incurring the leaſt Guilt, make his Eſcape.

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[2] It is a Saying of Tully (De Orator. *l.* 2. *c.* 6.) *Mihi liber eſſe non videtur, qui non aliquando nihil agit. I don't look upon him as properly Free, who hath not ſometimes the Privilege of doing nothing.*

[a] Yet there is a great Difference in Maſters. In *Terence (Eunuch.* Act. 3. Scen. 2. v. 33.) a gueſs is made from the Slave, that his Maſter is poor and miſerable. But on the other ſide, as *Juvenal* obſerves (Sat. 5. v. 66.)

Maxima quæque domus ſervis eſt plena ſuperbis;
Great Famlies are plagued with haughty Slaves.

[b] In *Xenophon (Cyropæd.* l. 8.) *Chryſantas* ſeems to eſtabliſh ſome ſuch kind of Difference. *In the ſame manner,* ſays he, *as we think it reaſonable to be obey'd by thoſe under our Command; let us yield a ready Obedience where it is our Duty. Yet there ſhould be this Difference between Subjects (as we are) and Slaves, that whereas thoſe are compelled to their Labour and Service, we ought to perform our Devoirs with Readineſs and willing Compliance. Add* Dion. Chryſoſt. *Orat.* 14. *De Servitute.*

[c] *Lex* Wiſigoth. *l.* 5. *t.* 6. *c.* 17, & 21.

[d] *Vid.* Grot. *l.* 2. *c.* 9. *ſ.* 1.

Mr. Barb. *NOTE on* § XI.

[1] We muſt take great notice of this Reſtriction, for it may ſerve to rectify Mr. Hobbes's Notions, eſpecially if he were of that Opinion, which another Author of that Nation charges him with, *Richard Cumberland, De Legibus Naturæ* Chap. 9. § 14. See what has been ſaid above, *Lib.* 3. *Cap.* 6. § 9. and *Chap.* 7. § 5. Our Author has borrow'd all this Paragraph of *Hobbes*.

OF

THE LAW of NATURE AND NATIONS.

BOOK VII.

CHAP. I.

Of the Cauſes and Motives inducing Men to eſtabliſh civil Societies.

I. *Introduction.*

II. *Man naturally loves himſelf more than Company.*

III. *Yet the love of Company does not immediately infer the love of civil Society.*

IV. *Many Vices in Man prejudicial to civil Union.*

V. *Whether civil States aroſe in the World by natural Conſequence.*

VI. *Whether Indulgence was the Cauſe of civil Eſtabliſhments.*

VII. *The true Origin of civil Government.*

VIII. *The bare reverence of the Law of Nature not ſufficient to ſecure the Peace of Mankind:*

IX. *Nor the ſole force of Arbitrators; or of Covenants.*

X. *Difference in Opinion greatly prejudicial to the Peace of the World.*

XI. *Men need a much more ſevere Reſtraint, than the Law of Nature only.*

AFTER thoſe which are term'd Primary Societies [1], we come now to treat of a Commonwealth [a], which is the laſt and moſt perfect Form of Society, and that whereby the beſt Proviſion is made for the Safety of Mankind, ſince their Increaſe. What induced Men to quit their primitive way of living, in ſeparate Families, will be evident, upon our Enquiry into the Nature of civil Society, and the Diſpoſition of thoſe who compoſe it. For the better Illuſtration of which, it will be of great Uſe to examine the Accounts that are commonly given of this Matter.

II. And here the Generality have recourſe to the peculiar Frame of human Nature, by which Man is ſuppoſed to be ſo ſtrongly inclined to a civil State, that he would neither be willing nor able to live without it. This they confirm by Arguments drawn chiefly from the Miſeries of a ſeparate Life; the weariſome Condition of Solitude; the Ends of Speech, which would be loſt without Company; the natural deſire of Converſation; the Advantage of uniting together; and the like: which we have before [b] alledg'd, to prove Man a ſociable Creature, from the relation that there is between Society [1] and

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Mr. BARBEYRAC's *NOTE* on Chap. I. § I.

[1] See above in B. 6. c. 1. ſ. 1.

§ II. [1] This is not the immediate Cauſe of the forming of civil Societies, as it appears by what our Author ſays at the third Section, and in the long Note on the ſeventh; yet it is certain, that Mankind naturally love Society: and he himſelf proves it in his ſecond Book. But if any one has a mind to ſee a larger and more exact account of this Matter, as alſo ſome Thoughts quite new, and expreſs'd in the moſt lively and juſteſt Manner in the World; he need only read a Book tranſlated from *Engliſh*, and printed at the *Hague* in 1710. entituled, *Eſſai ſur l'uſage de la Raillérie & de l'Enjoûment dans les Converſations qui roulent ſur les matieres les plus importantes*, p. 94, &c.

[a] *Civitas.*

[b] B. 2. c. 3. ſ. 15.

the nature of Man. Mr. *Hobbes* [2] on the contrary repreſents Man as a ſelfiſh Animal, whoſe Kindneſs chiefly terminates in his own Perſon and Intereſt [a], and whoſe Love for Society and other Men is Secondary, being entertain'd with a View of ſerving his own Pleaſure or Profit by their Aſſiſtance [3]. For no one (as he argues) was ever determin'd in the Choice he made of another's Company, by the bare Conſideration of his being a Man, but by ſome Proſpect of Honour or Advantage from his Acquaintance, preferable to what he could expect from the Acquaintance of any beſides. This he endeavours to illuſtrate, by deduction from particular Societies. "They who unite in a Body for the promoting of Traffick, are led to it purely by the Hopes of advancing their Goods more in Conjunction with others, than they could by their private Induſtry: and whatever diſappoints, or puts an end to theſe Hopes, prevails with all, but Fools or Madmen, to put an end likewiſe to the Society. So where any are joint Commiſſioners in a publick Office, they contract a ſort of Law Friendſhip, implying in it more of mutual Fear than Love; and conſiſting rather in Forms and Ceremonies, than in any ſincere Union of Minds, and Combination of Affections. So that ſuch Men may ſometimes bandy together in a Party or Faction, for the ſake of carrying on ſome private Ends; but to a generous and diſ-intereſted Friendſhip they are commonly utter Strangers. Nor will any one of theſe, if he dare rely on his own ſingle Strength for accompliſhing his Aims, ever trouble himſelf about Aſſociates. Again, when Perſons meet upon the common Deſign of paſſing the Time away pleaſantly, 'tis a mighty Satisfaction that each takes in making himſelf and the Company merry: in which he cannot ſucceed without expoſing the Faults or Follies of other Men, in Caſes ſuppoſ'd not to reach himſelf. (For prudence would never allow him to cenſure that in another, of which he was not himſelf acquitted in his own Conſcience; according to *Juvenal*'s Rule;

" *Loripedem rectus derideat, Æthiopem albus* [4].

" Let him cry filthy Black whoſe Skin is white;
" And Bandy-legs, who treads himſelf upright.)

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Therefore, for any one to deride others, is, in effect, to declare his Contempt of them in reſpect of himſelf, and a certain malicious Deſign of ſetting off his own Luſtre by their Blemiſhes. Even with them who keep within the Bounds of innocent Mirth and inoffenſive Raillery, there is none but aims more at his own Satisfaction, than that of other Men: nay, ſuch as make a Profeſſion of diverting thoſe about them, mean nothing more than, by ſhewing their Wit, to recommend themſelves to the Company. Beſides, moſt Men have naturally an itching Deſire to be examining, cenſuring, and expoſing the Words and Actions of others; which, if they have frequent Occaſion of gratifying, they look upon it as a notable Ingredient in the Pleaſure and Happineſs of Life. And this Humour 'tis a difficult thing to ſuppreſs, or keep within Compaſs, by the Proviſion made againſt it by Laws and Penalties [b]. Laſtly, ſuppoſe ſome, that pretend to more Knowledge and Wiſdom than ordinary, met together to confer about Matters of Learning; each Man is for preſcribing his own Opinion to the reſt, and finding his Abilities or Authority diſputed, reſents it as the moſt heinous Affront. Whence it plainly appears, that all Society, or Intercourſe, between ſuch Men, is founded on the Deſign either of ſupplying their Wants, or of gratifying their Vanity, or of finding Diverſion and Entertainment. The ſame is aſſerted upon another Argument, taken from the Definition of the Will, and of what is good, honourable, and profitable. Societies are introduced among Men by their voluntary Conſent. Now where there is an Act of the Will, there is of neceſſity an Object of that Act; which Object is always ſome ſuppoſed good to the Agent. For be a thing never ſo good in it ſelf, yet if it be not ſo likewiſe with reſpect to us, it loſes all its Influence on our Powers of acting. Thus, for Inſtance, did Matters go never ſo well with the King of *Perſia*, I ſhould not look upon my ſelf as having any Share in his good Fortune. All good is attended with ſome Pleaſure, either of the Mind alone, or of the Body in Conjunction with it. That of the Mind is either the Paſſion of Glory, or what may ultimately be reſolv'd into ſuch a Principle. That which affects the Body is Profit: which proves all Society to have firſt commenced upon the

Mr. BARB. *NOTES on* § II.

[2] *De Cive*, c. 1. ſ. 2.

[3] Here we may obſerve, as well as in other Places, that our Author agrees with the Sentiments of Mr. *Hobbes*,

[4] Sat. 2. v. 23.

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[a] *Iſæus*, Orat. 2. No Man values others more than himſelf. *Euripides*, *Medea* v. 85, 86.

--------------------------All agree
In this firſt Maxim of Philoſophy:
That Love begins at Home.--------

Iſocrates, *de Pace*, p. 285. *Ed.* Pariſ. *In my Opinion, 'tis the common Deſire of Mankind to advance their own Profit; and their common Labour to poſſeſs more than thoſe about them.*

[b] *Arrian. Epictet.* l. 2. c. 22. "Suppoſe in a Diſpute who was the chief Philoſopher, One ſhould tell you, he heard a judicious Friend ſay, that you were certainly the Man: Would not your Heart ſwell with the ample Teſtimony, and enlarge its Dimenſions at the blaſt of Fame? But what if another Ill-natur'd Critick ſhould give ſuch Inſtructions as theſe; *Why do you loſe your time in hearing this Pretender to Wiſdom? What does he know? Perhaps he has learn'd his firſt Principles, but I will venture him for getting a Step farther:* Why, you'd be Thunder-ſtruck with this mortifying Sound; you'd be put to't to keep your Colour; and would have only Spirit enough to ſay, *I'll ſhew him what a Man he has affronted, and what a Philoſopher he has under-rated.* Add. *Charron de la Sageſſe*, l. 1. c. 36. ſ. 6.

"Score either of Profit or Glory; that is, upon account of Love to our ſelves, excluſive of all others. However 'tis certain, that Glory cannot be a laſting Foundation of Society for any number of Men; becauſe, in Glory, as in Honour, where the Title to it is general, there is in effect no Title at all: the very Nature of Glory conſiſting in the Opinion of ſome Advantage [5], which, upon Compariſon, we appear to have above the reſt of the World. Neither does our joining in Society with others give us any farther occaſion of Glory, than our Alliance with Men of great and extraordinary Virtues, may ſeem to argue a Parity of Worth in our ſelves. For otherwiſe a Man is valued in Proportion to that Ability he has of ſupplying his own Wants, without depending on the Aid of his Fellows [6]. It muſt be confeſſed, that by mutual Aſſiſtance the good of human Life is highly promoted. Yet to have the Service of other Men at our Command, would ſeem much more eaſy and agreeable: As amongſt the other Conveniences and Helps of Living, that is ſtill prized above the reſt, which ſerves to more Purpoſes, and is purchas'd, or preſerv'd with leſs Coſt and Trouble. Whence we may conclude, for certain, that Man would be more inclin'd to Empire than to Society; that is, would much rather command abſolutely, being himſelf exempted from all Obedience, than be oblig'd to any ſuch exchange of good Offices, as ſeems to be required in a ſociable Life: were it not that he is reſtrain'd from acting after ſuch an arbitrary manner, by the Danger which he apprehends from ſo violent Reſolutions [a].

III. But altho' it cannot from hence be concluded (as we have before obſerv'd [1]) that Man is not by Nature a ſociable Creature; yet allowing him a natural Deſire of Society, ſince this may be gratified by the primary Societies already deſcribed, this infers not his Deſire of civil Society, any more than his general Love of Employment beſpeaks his Affection for that of a Scholar, in particular. [b] *Ariſtotle* ſays, *That Man may be rather term'd a conjugal Animal than a civil; as a Family, in Neceſſity as well as in Time, is antecedent to a Commonweath; and as the Propagation of Race is the moſt common Labour of Animate Beings.* This is what Mr. *Hobbes* proves in the following manner. Civil Society conſiſts not in a bare Aſſembly of Men; but in an Aſſembly combined together by mutual Leagues and Covenants. The Force of theſe Covenants ignorant People and Infants do not at all apprehend; nor is their Uſe diſcover'd by thoſe who never felt the Miſchief of living without them. So that the former are utterly incapable of inſtituting a civil State, as being ignorant of its Nature; the latter are wholly regardleſs of it, as not being any way ſenſible of its Benefit, or at beſt they live under it in a manner, that teſtifies no Eſteem of its Excellence and Worth. And therefore all Men being born Infants, are by Birth unqualified for civil Society, and ſo a great Number of them remain to their dying Day: And the reſt are formed and adapted to it by the Force of Diſcipline, not of Nature. Neither is the Credit of this Doctrine ſhaken by that known Maxim of *Ariſtotle*, that *Man is born*, or *is by Nature, a political Creature.* For, ſometimes, affirming a thing to be ſuch or ſuch by Nature, we denote it to be actually endow'd with ſome Quality, without any antecedent Act of his own, or of any one elſe, by which the Quality might be introduced. In which Senſe a Fiſh is endued with the Faculty of Swimming, a Bird of Flying, and an Oak of bearing Acorns. Sometimes the ſame Expreſſion ſignifies a fitneſs in the Thing to receive ſome Perfection by Culture and Diſcipline; the Reception of which *Nature* ſeems to intend, or at leaſt to approve, as agreeable, or, however, no ways repugnant to its Temper and Frame. Thus, a Horſe has the natural Faculty of prancing, which an Aſs has not; a Parrot of prating; a Field of bearing Corn, and a Hill Vines; a Man of diſcourſing, and of learning divers Arts and Sciences: In which Senſe, alſo, we ſhall hereafter demonſtrate him to be a political Creature, notwithſtanding his being born an Infant; ſince we are wont to take our Meaſure of what does, [c] or does not, agree to Man by Nature, from what he appears to be in his grown Eſtate, and under his full Uſe of Reaſon [2]. *Ariſtotle*

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[5] See B. 8. c. 4. ſ. 11.

[6] See the Hiſtory of Calviſius Sabinus in Seneca's Epiſt. 27.

Mr. Barb. *NOTES on* § III.

[1] B. 2. c. 2. ſ. 7, *&c.* and C. 3. ſ. 16, *&c.*

[2] That is (according to our Author's own Obſervation) that the Words *by Nature* do not here import the actual Exiſtence of ſome Quality in a thing, with which it is endow'd by Nature, independent of any antecedent Act or Operation of his own, or of any other elſe; but only an aptneſs or Diſpoſition to receive certain Perfections, by Improvement and Education, with which Nature deſigns to adorn it, or which at leaſt ſhe ſeems to approve of, as being agreeable, or however not contrary to its Make and Conſtitution. Beſides, we muſt obſerve, that Ariſtotle *ſometimes* uſes the Words ζῶον πολιτικὸν in a large and general Senſe, to denote ſimply a *ſociable Creature,* or *one made for* Society, and not ſtrictly for *ſuch a one as has a natural Inclination for Society,* and is exactly by Nature framed and fitted for it. The word *ſometimes* is an Addition of mine: I know not whether I have in this cloſely followed my Author, but thus he ought to have expreſs'd himſelf at leaſt: For in the Paſſage which himſelf has quoted in the beginning of this Paragraph, it evidently appears that ζῶον πολιτικὸν is a *Creature made for civil Society,* ſince 'tis oppos'd to ζῶον συνδυαστικὸν, *or a Creature made for the Society of Marriage.*

[a] *Arrian. Epict.* l. 3. c. 21. "No Creature is engaged with ſo deep an Affection to another's Perſon, as to his own Profit: whatever ſtands in the way of this, whether Father, or Brother, or Son, or Lover, or Beloved, he hates and rejects with Curſes and Scorn. For ſo has Nature appointed, that the ſtrongeſt Charm ſhould be our own Intereſt. This is our Father, our Brother, our Kinſman, our GOD. Wherefore if we refer to one and the ſame End, our Profit, our Piety, our Honeſty, our Country, our Parents, and our Friends; all are ſecured. But if we meaſure our Profit by one Standard, and our Friends, our Country, our Relations, our Juſtice it ſelf by another; in this Caſe, Profit turns the Scale, and all other Conſiderations ſink and are out-weighed. For *I* and *Mine,* are words which never fail to draw the animal Nature after their Charm. *Did you never obſerve* (ſays he a little before) *Whelps playing and fawning upon each other as the very Patterns of Love and Affection? But would you know how long-lived this Endearment is? The Experiment will coſt you no more than a Bone.* Tully, *Off.* 3. *That every Man ſhould procure the Neceſſities of Life, for himſelf rather than any beſides, is an allow'd Privilege, and ſuch as natural Inclination does by no means oppoſe.* [b] *Ad Nicom.* l. 8. c. 14. *Vid.* Digby *de Origine Mundi,* c. 9. ſ. 8, *&c.* [c] *Vid.* Cumberland *de LL. Nat.* c. 2. ſ. 2.

ſays in the ſame Work [a], that *a Man is by Nature a* political Creature, *and therefore would deſire the Company of others, though he did not ſtand in need of their Aſſiſtance.* But now his Affection for *civil Government* can never be inferr'd from the bare *deſire of Company*; ſince this, as was obſerv'd, may be equally gratified by *primary* Societies, ſuch as may well be ſuppos'd without admitting a Commonwealth. So again, the Philoſopher [b] proves Man to be a *political Creature* from the Reaſons of Speech, which elſe had been aſſign'd him to no Purpoſe: whereas, the uſe of Speech is not confin'd to a Commonwealth; Men having lived and converſed together, long before the Inſtitution of Government. In like manner, is to be underſtood that Paſſage in his firſt Book of *Ethics* to *Nicomachus* [c]: *That Good may deſerve the Name of* perfect, *which appears to be* ſufficient; *and that we call* ſufficient, *which anſwers not only to the Wants of a ſingle Man in a ſolitary Life, but thoſe of our Parents, our Wife, our Children, our Friends, and fellow Subjects:* Ἐπειδὴ φύσει πολιτικὸς ἄνθρωπος, *Becauſe Man is by Nature a political Creature.* And yet, there is room for the ſeveral Relations of Parents, Children, Wife, and Friends, without ſuppoſing a Commonwealth.

IV. For the clearing up of this whole Matter, we ought to conſider, what that Condition is which Men enter into, upon their erecting a civil State; what Qualities they are which may entitle them to the Name of *political Creatures*; and laſtly, what there is in their Frame and Conſtitution which ſeems (if we may ſo ſpeak) to indiſpoſe them for a *Civil* Life. Firſt then, whoever enters into a *Community*, diveſts himſelf of his natural Freedom, and puts himſelf under Government, which, amongſt other things, comprehends the Power of Life and Death over him, together with Authority to enjoin him ſome things to which he has an utter Averſion, and to prohibit others, for which he may have as ſtrong an Inclination; ſo that 'tis poſſible he may often, in obedience to this Authority, be oblig'd to ſacrifice his private Good to that of the publick. Whereas, were Man to follow his natural Inclinations, he would be ſubject to no Body, but live wholly at his own Diſcretion, and make his private Satisfaction and Intereſt the ſcope of all his Actions. Some weighty Motives there muſt needs have been, and ſuch as amounted almoſt to Neceſſity, that could perſuade him to overcome theſe ſo very ſoothing Deſires. Man, therefore, firſt embraced civil Society, not as led to it by the Biaſs of Nature, but as driven by the Fear of greater Evils. The name of *political Creatures*, or good Members of a State, may be truly applied to thoſe who promote the common Welfare to the utmoſt of their Power, and freely prefer it to any private Conſideration; nay, and even meaſure their private [1] Good by the Relation it bears to that of the publick; and, laſtly, at all times, demean themſelves with Kindneſs and Courteſy to their Fellow-ſubjects [d]. But no one, now, is ſo little acquainted with human Nature, as not to know how ill-qualified the Generality are for diſcharging ſuch a Part, it being evident, that very few do acquit themſelves in all Points of their Duty; that Nothing, beſides the Fear of Puniſhment, could keep the greater Number in any tolerable Order; and that very many continue all their Life long, *impolitick Animals*, or, which is the ſame thing, evil Subjects. Nay, it may be affirm'd, that no Creature is more fierce and unruly than Man, or expoſed to more Failings, which tend to the Diſturbance of Society. Beaſts ſometimes contend about their Food, and then 'tis only in the Caſe of Scarcity; ſometimes again they enter the Liſts, at the Inſtigation of their Luſt, which yet has only its Seaſons of returning. But be they of never ſo ſavage a Diſpoſition, they ſeldom expreſs it againſt their own Kind. Whereas Men quarrel with Men, not only as excited by the Stings of Hunger, and by a Luſt ſo vigorous as never to be out of Seaſon, but by other Vices and Paſſions, unknown to Beaſts, and often repugnant in Nature one to the other. Of theſe, the chief are an endleſs Thirſt after Things ſuperfluous [e], and Ambition, the moſt pernicious of all Evils; of which, as no Creature ſeems to have any Senſe, excepting Man, ſo he has the moſt lively and tender Senſe imaginable: while, in the mean time, 'tis the Pri-

Mr. Barb. *NOTE on* § IV.

[1] That is to be underſtood in a *negative Senſe*, and not always in a *Poſitive*; I mean, that if a thing is but in the leaſt prejudicial to the Welfare of the State, a Subject ought to forbear doing it, what private Advantage ſoever he might make of it to himſelf. But for all that, there may be ſome things that a particular Member may make an Advantage of, which are neither prejudicial nor ſerviceable to the State; and in that Caſe, why ſhould he not mind his private Intereſt? 'Tis in this Senſe, that we muſt take the following Paſſage of Cicero *de Offic.* Lib. 3. Chap. 27. *Poteſt autem quod inutile Reipublicæ ſit, id cuiquam civi utile eſſe?* Can a good Citizen think that advantageous to himſelf, that is prejudicial to the State?

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[a] L. 3. c. 8. p. 345.

[b] *Polit.* l. 1. c. 2.

[c] *C.* 5.

[d] *Arrian. Epictet.* l. 2. c. 10. *What then is the Duty of a good Citizen? That he meaſure nothing with reſpect to his own private Advantage; that he conſult about nothing, as if releas'd and disfranchis'd from the reſt of his Kind. But, that he ſo behave himſelf, as the Hand or Foot, if they were endued with Reaſon, and underſtood the Order of Nature, would never entertain any other Motion or Deſire, than what was directed to the good of the whole Body. Herodotus* obſerves of the *Perſians* in *Clio*, that thoſe who ſacrificed amongſt them, did not put up Petitions for themſelves and their own private Happineſs; but in behalf of the whole Nation, and of the King in chief.

[e] *Saluſt* in *Catilin*, "The Love of Money, and afterwards, that of Empire were the ſource of all our Miſchiefs. Covetouſneſs ſubverted Fidelity, Probity, and other worthy Endowments of Soul; introducing in their ſtead, Pride, Cruelty, Profaneneſs, together with a common Sale and Market of all things. Ambition engaged its numerous Votaries to put up falſe Colours; to have one thing in their Mouth, and another in their Mind; to meaſure Friendſhips and Enmities, not by Reality, but by Advantage; and to endeavour more the keeping a good Face, than an honeſt Heart,

vilege of Brutes to be moved at nothing, but bodily Sufferings. Add to this, that quick Reſentment of Injuries, and eager Deſire of Revenge; an Evil leſs common and leſs active in Brutes. And, what is worſt of all, Men purſue the Ruin of each other with ſo much Induſtry, that of all the Miſchiefs to which human Condition lies open, the moſt Part are owing to their own Malice. Nor may it unreaſonably be aſcribed to the peculiar Care of divine Providence, that Men advance to Maturity ſo much ſlower than Beaſts; to the End that they may, by length of time, be in ſome meaſure broken of their fierceneſs and haughtineſs of Temper, and brought to an Accommodation with different Diſpoſitions. Otherwiſe, ſuppoſing Man to be put immediately in Poſſeſſion of his full Strength, the Foreſt could ſhew nothing ſo untractable [a]. What Mr. *Hobbes* [b] obſerves, concerning the Genius of Mankind, is not impertinent to our preſent Argument: that all have a reſtleſs deſire after Power; not becauſe they really wiſh to be advancing ſtill to higher Degrees of Command, or that they may not, in their own Temper, be ſatisfied with a moderate Portion of it; but becauſe they have no way of being ſecured in the Poſſeſſion of what they already enjoy, but by farther Acquiſitions: the old Stock being ever ſpending, and therefore ever requiring new Supplies. And this End being accompliſh'd, there again ſucceeds a freſh Deſire, either of Fame by new Conqueſts, or of eaſe and ſenſual Pleaſure. Moreover, Competition for Riches, Honour, Command, or any Prerogative and Power above others, inclines to Contention, Enmity, and War: the way, by which any one Competitor may arrive at his Hopes, lying through the Death, or Defeat of his Rival. It may farther be urged, that whereas in Brutes of all Kinds, there appears viſibly a great Affinity of Deſires and Propenſions; with us, there is not more Diverſity of Men, than there is of Opinions and ways of living; each of which is cry'd up, with a wonderful Perverſneſs, by the ſeveral Patrons of them, in Preference to all beſides: a Thing ſufficient, of it ſelf, to make Diſturbances in any Multitude, who are to unite in a Society [c]. So far it is therefore from true, that Man is by Nature a *political Creature*, or by Birth is fitted for the Diſcharge of *civil Duties*; that 'tis as much as can be done, to train up ſome few, by long Diſcipline, to a tolerable Behaviour in this Reſpect [d]. Not to mention the Vices of the vulgar Sort (who are the greater Part of Mankind) ſo often enlarged upon by other Authors [e]. So that a thorough Knowledge of human Malice and Fraud, in order to the avoiding and diſappointing them, makes up a very conſiderable Part of civil Prudence [f]. From what has been ſaid may be ſufficiently gather'd the Senſe and Import of this Expreſſion, that Man is by Nature a *political Creature*: by which is meant, not that all and each of us are fitted by Nature for ſuſtaining the Part of good Citizens; but that ſome, at leaſt, by the Force of Inſtruction and Diſcipline, may be ſo formed as to acquit themſelves well, under that Character; and that ſince Men have increas'd and multiplied, civil Societies are abſolutely neceſſary to their Safety; for which as they are by a natural Principle engaged to provide, ſo they have the ſame natural Obligation to enter into regular States and Governments, the chief Benefit of which Inſtitutions is, the habitual Exerciſe of an orderly, decent, and friendly Life.

V. *Hornius* [g] calls a Commonwealth *the Work of Nature*, and accounts for its Riſe in a natural way: As, that the firſt Pair, from whom deſcended the whole Race of Mankind, were united by the Bonds of conjugal Love, and their Children by thoſe of natural Affection, to them and to each other; that theſe Engagements founded a Family, which by conſtant Increaſe from new Births, with that Love of Society implanted in Men by Nature, and improved by Neighbourhood and Alliance, at length furniſh'd out a civil State; it being abſurd and ſenſeleſs to imagine, that Men were once diſpers'd in Woods and Deſerts, and there led a Vagabond Life like the Brutes about them. But admitting the Origin of Commonwealths, according to this natural Account; yet to exclude all Compacts, and all other Motives from a Share in their Inſtitution, is no leſs irrational than to ſay, that becauſe a Seed grows up to a Tree, and becauſe a Tree is cut out into Planks and Beams, and theſe, rightly framed and compacted together, compoſe a Ship, therefore a Ship is the Work and Product of Nature; without allowing the Labour of the Artificer, or any other particular Cauſe, to conſpire in erecting that ſort of Fabrick. We therefore readily acknowledge it for falſe and fabulous, whatever is fanſied of a great Number of Men firſt aſſembled together, then diſpers'd into Woods and Deſerts, and after that reunited into one Commonwealth. But then their Opinion is better grounded, who ſuppoſe Mankind, from the primitive Couple, or from four Families after the Deluge, to have fallen immediately into the Order of civil State. For, however a Father might keep his Children under his Care, and the ſame common Roof, till ſuch time as they came to Years of Maturity: yet ſince, in thoſe firſt Ages of the World, they lived altogether on Tillage and Paſturage, when Children were married, the Father had no Reaſon to detain them longer. On the contrary, we are inform'd by Scripture, that it was uſual for them, when arrived at an Age proper for taking the Care of a Family upon them, to ſeparate and chooſe out new Habitations; eſpecially while the World was yet unſtock'd, and while the Pleaſantneſs of the Scene invited them to diſtant Quarters [a]. Nor was it peculiar to *Sicily* of old, to have ſuch Inhabitants as *Homer* [b] deſcribes;

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[a] See *Proverbs* xiii. 24. xxiii. 13, 14. *Eccleſ.* xxx. 1, &c. 12.

[b] *Leviath.* C. XI.

[c] *Euripid. Phœniſ.* v. 502, &c.

If what is Good, or Beauteous, always bore
The ſame conſpicuous Marks to mortal Eyes,
Men would be Friends, the World a peaceful Scene.
But Name and Species only join us now:
Differing in things, and claſhing in Deſires.

[d] Plato *de LL.* l. 6. p. 864. Ed. *Wech. We affirm Man to be a mild and tractable Creature. And indeed, if, beſides the Happineſs of Nature and Birth, he obtains the Benefit of good Inſtitution, he becomes moſt gentle, lovely and divine. But upon ill or inſufficient Education, he grows the fierceſt Animal of all that the Earth breeds.* Ariſt. *Pol.* l. 1. c. 2. *in fin. As Man, if rightly perfected, is the beſt and nobleſt of living Creatures, ſo, if eſtranged from Law, and Juſtice, and Virtue, he is the worſt and moſt contemptible.* Idem. ad *Nicom.* l. 2. c. 1. *in fin. 'Tis not an indifferent Matter whether a Perſon has been thus or thus accuſtom'd from his Youth: but rather 'tis a Point of the greateſt Conſequence, and upon which all depends.* Ibid. *l.* 7. *c.* 7. *in fin. A Man, left to himſelf, would do a thouſand times more Miſchiefs than a Beaſt.* Add. *Senec.* Epiſt. 103. *Polyb.* l. 17. c. 13. *As Men exceed other Creatures in Craft and Cunning, ſo they may many ways render themſelves the vileſt of all that breathe. Other Animals being govern'd wholly by bodily Pleaſure, are by that alone led into Failings and Diſorders: but Mankind, who are diſtracted with Variety of Opinions, offend as often through Perverſeneſs of Judgment, or raſhneſs of Thought, as through Frailty and Imperfection of Nature.* Lactantius *de Ira Dei*, c. 12, *What could be more fierce and cruel than Man, if living under no Reſtraint of a Superior, he might evade or deſpiſe the Authority of Laws? Plutarch* in *Cicer.* p. 884. D. Ed. *Wech. Were Power added to Paſſion and Inclination, Man would be the wildeſt thing living.*

[e] *Add.* Mornay *de Ver. Relig. Chriſtianæ*, c. 16.

[f] See *Bacon*'s Adv. of Learning *B.* 8. *c.* 2.

[g] *De Civitate*, l. 1. c. 4. ſ. 6.

> Τοῖσιν δ᾽ οὔτ᾽ ἀγοραὶ, &c.——
>
> *No Councils they, nor Courts of Juſtice hold,*
> *But on ſome Mountain's Top in Caves grow old.*
> *Each o'er his Wife and Children Empire bears,*
> *And none beyond his Cave extends his Cares.*

There is, it is granted, a natural Affection between Brethren; yet not ſuch as excludes their Deſire of living rather upon the Level, than with any Diſtinctions of Superiority amongſt them; neither ſuch as does convince us, that their Friendſhip could not be long-lived enough, ſuppoſing their Effects to be diſtinct and ſeparate. So that, according to this Account, the Propagation of Mankind muſt rather tend to the increaſing their Diviſion, than to the uniting them in Society. But when the wiſer Part began to conſider, that, by their aſſembling into one Body, the Inconveniences attending ſeparate Families might be removed, they hereupon thought it not ſufficient to agree together upon entring upon the ſame Covenant, and ſubmitting to the ſame common Power, unleſs, for their better Convenience and Security, they likewiſe agreed to contract their Dwellings, and, for the future, confine them to the ſame Place. And, in this Senſe are we to interpret thoſe Authors, who ſuppoſe Men, from being diſpers'd about in the Woods, to have been afterwards aſſembled and united together by the firſt Founders of civil Government.

VI. Some make the Wants and Neceſſities of Men to be the principal Cauſe of their framing political Societies; upon a Proſpect of living in better Faſhion and greater Plenty, when united together, than they could poſſibly do in a Condition of Solitude. In which Account thus much is certain, that were Men left alone, each to ſhift for himſelf deſtitute of all Help from others, no Creatures could be more exquiſitely miſerable. On the other ſide, 'tis undeniable, upon the Inſtitution of Commonwealths, human Life grew refined to a Degree of Luxury and Delicacy [c]. But notwithſtanding this, it ſeems evident to us, that Neceſſity was not the ſole, or the principal Cauſe of Commonwealths, howſoever *Plato* [d] may favour that Opinion: Since the Arts of making Wine, of providing Cloaths, and of turning Ground to Paſture and Tillage, being even then known, while Men lived as yet in ſeparate independent Families; there ſeems already to have been a ſufficient Proviſion made for all the Neceſſaries of Life [e]. For let us ſuppoſe a Father of a Family poſſeſs'd of a large Portion of Land, and well ſtock'd with Servants and Cattle, what could ſuch an one want for his Support? What, at leaſt, that might not be ſupplied by the means of Commerce [f]? In like manner, as it is now uſual, for different Nations to import from each other any ſort of Commodities, for Uſe and Pleaſure; without thinking it neceſſary for that Purpoſe, to unite together under the ſame Government and Conſtitution. And Inſtances may be given of People living for many Ages, under civil Eſtabliſhments, in a Condition no way ſuperior, for Plenty and Abundance, to that of the Fathers of Families in antient Time [g]. So that all that mighty Plenty and Luxury, which now reigns in ſome Parts of the World, ſeems to derive its Origin from great Cities, rather than from Commonwealths.

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[a] See *Geneſ.* xiii. 5, 6, 9.

[b] *Odyſſ.* L. 9. v. 113, *&c.*

[c] Lactantius, *de Opif. Dei*, c. 4. n. 20, 21. *If each Man alone had ſufficient Strength to ward off all Dangers, and ſtood in need of no Aſſiſtant: what Society would there be in the World? What mutual Reverence or Reſpect? What Order? What Reaſon? What Humanity? What would be more vile than Man? What more extravagant? What more fierce and cruel? But now while each ſingle Perſon is poor and indigent, and cannot ſubſiſt without the help of his Fellows, all deſire Society for Ornament and Defence of common Life.*

[d] *De Repub.* l. 2. p. 598, &c. Ed. *Wech.*

[e] See *Geneſ.* xiii. 2. xxiv. 35.

[f] *Vid.* Cornel. Nep. *Attic.* c. 13.

[g] Who therefore might make the ſame Boaſt with him in *Valerius Flaccus*, l. 6. ver. 330.

> *——————— Nec mœnia nobis*
> *Veſtra placent, feror Arctois nam liber in arvis,*
> *Cuncta tenens mecum: omnis amor jacturaq; plauſtri*
> *Sola; nec hac longum victor potiere rapina:*
> *Aſt epulæ quodcunque pecus, quæcunque ferarum.*

> I your Impriſonment of Walls diſdain,
> Who live a Freeman on our northern Plain.
> Of little Wealth I boaſt, but what I wear;
> And if the Plough goes well, ſhall never die with Care,
> No other Prize can tempt a Victor's Toil:
> Nor ſhall this long remain an envied Spoil.
> Nature purveys for me; the fierceſt Beaſt
> True Veniſon yields, and every Flock a Feaſt.

Becauſe, in the Cities, the meaner People, having no Income from Cattel or Land, are forced (for a Livelihood) upon improving divers Arts and Inventions. Which, likewiſe, are not a little promoted by a Sort of Vanity, common to great Towns, of vying one with the other in Dreſs and Finery, and thereby of running out into Extravagance; for the Support of which more Trades are intended, than for the Relief of Man's real Neceſſities: which yet civil Life could very contentedly be without [1].

VII. Therefore the true and leading Cauſe, why the Fathers of Families would conſent to reſign up their natural Liberty, and to form a Commonwealth, was thereby to guard themſelves againſt thoſe Injuries, which one Man was in Danger of ſuſtaining from another [1]. For as nothing, next to Almighty God, can

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[1] See our Author's Diſſertation *De Statu Hominum Naturali*, ſ. 6.

Mr. BARB. *NOTES on* § VII.

[1] This is the Opinion of Mr. DE LA BRUYERE (in his *Caracteres* at Chap. *du Souverain & de la Republique*, p. 319.) "'Twas the Injuſtice, *ſays he*, of the firſt Men, that was the Original and only Source of War; and that put them under the Neceſſity of ſubmitting to ſome Power that might ſettle and eſtabliſh their Rights and Pretenſions: For if "they would have been contented with their own, and not have invaded the Rights of their Neighbours, the World "would have enjoy'd an undiſturb'd Peace and Liberty." Mr. BAYLE (in his *Nouvelles Lettres à l' occaſion de la Critique generale du Calviniſme de Maimbourg*, Lett. XVII. Sect. 2.) adds to theſe ſome cloſer Reaſons. 'Tis worth the while to relate his Words. "'Tis not to be ſuppos'd, *ſays he*, that Mankind, at the beginning of Societies, had any great "regard either to the good or evil to come. They had no other Thoughts than to remedy the Miſchiefs they had "experienc'd, or which they look'd upon to be near at Hand. -------- I cannot perſuade my ſelf, that Communities were "form'd, becauſe Men foreſaw, by conſulting the Ideas of Reaſon, that a ſolitary Life would be no Honour either to "their own Species, or to their Creator, or to the World in general. 'Twas the *preſent Satisfaction, and the approaching "Hope of living ſecurely*, or elſe *Force*, that produced the firſt Commonwealths; without Mens having had in view "Laws, Trade, Arts, Sciences, the enlarging of States, and all the other things in which the Beauty of Hiſtory "conſiſts. They did not foreſee theſe Conſequences at the Beginning, and tho' they had foreſeen them by the Light of "an Underſtanding free from Paſſions, it would not have touch'd 'em in the leaſt. -------- Mankind are too cold and re- "miſs, when they are ſpurr'd on by nothing but Reaſon; and the Affairs of *human Societies* would have been but in "a very ſad Condition, had Men been tempted to have liv'd together only upon this Conſideration; *that it is not rea- "ſonable for a Creature proper for Society, to live in Solitude.* As the nature and frame of our Conſtitution is, 'tis only "by the means of *Senſe* that we muſt be wrought on and determin'd". We cannot, in my Opinion, but approve of theſe judicious Reflections: And that the original of States and Empires is partly to be attributed to *Force*, is what we may with great Probability conclude, from the manner in which the Holy Scripture ſpeaks of *Nimrod* the moſt antient King, and the firſt Conqueror we have any account of. *This* Nimrod, ſays *Moſes*, *began to be a mighty one in the Earth: He was a mighty Hunter before the Lord; wherefore it is ſaid*, Even as *Nimrod* the mighty Hunter before the Lord. *And the beginning of his Kingdom was* Babel, *and* Erech, *and* Accad, *and* Calneh, *in the Land of* Shinar, *Gen.* x. 8, 9, 10. The very Name of *Nimrod* may give us to underſtand ſo much, ſince it is deriv'd from a Word which in *Hebrew* ſignifies *to rebel*, and in *Arabick to be obſtinate, fierce, inſolent*, as Mr. LE CLERC has obſerv'd. 'Tis probable, that before this Off-ſpring of *Cuſh*, there was no Family but what liv'd in an entire independent State; ſo that the Members, of which it was compos'd, were ſubject to no Body but to their *Chief* or *Father of a Family*. But when *Nimrod*, contemning paternal Authority, ſet himſelf up as a *Sovereign* over People, who either wanted Strength or Courage enough to oppoſe him, or elſe who choſe rather to ſubmit to his Power than expoſe themſelves to worſe Inconveniences, by going to ſettle in ſome diſtant place; then a ſort of *Kingdom* was form'd. And therefore our Author is too indeterminate, and too imperfect in his Notions, in maintaining that it was only the fear of being injur'd and inſulted that gave Birth to all *civil Societies*. The very Cauſes of this fear, as Mr. TITIUS obſerves (Obſervation DXLVII. Numb. 3, 4.) were not in thoſe Days ſo great, as neceſſarily to induce Men to form *Political Governments*. For why could they not then have been able to have ſufficiently provided for their Quiet and Safety, by ſeveral of 'em joining together in Treaties and Confederacies, for the defence of each other againſt ſuch as ſhould pretend to moleſt them in the Enjoyment of what they had purchaſed by their Labour and Induſtry? Theſe Treaties and Alliances being founded on the mutual Advantages of the Parties concern'd, each would have been induc'd to have obſerv'd 'em by his own proper Intereſt; as our Author ſays himſelf a little farther in the ninth Section. This is ſo very true, that a long time after Mankind began to increaſe and multiply, there were Nations, that for ſeveral Ages liv'd without Laws, without Magiſtrates, or without any form of Government. See GRONOVIUS's 2 Note upon GROTIUS, Lib. 1. Cap. 1. Sect. 1. Nay, even to this Day there are ſeveral Examples of it to be found among the People of *Africa* and *America*. See *la Continuation des penſées diverſes* of Mr. BAYLE, Artic. cxviii. Beſides, thoſe who refer the Riſe and Settlement of all States to one general and uniform Principle, ſuch as ſome ſuppoſe *Fear* to be, others the Neceſſities and *Occaſions of Life*, others ſome other Motives (See *Lactantius Inſt. Divin.* Lib. 6. Cap. 10. *Numb.* 13, *&c. Edit. Cellar.* and *Tacitus* Annal. Lib. 3. Cap. 26.) ſeem to ſuppoſe that in the firſt Ages of the World, ſeveral *Fathers of Families* met together, to conſult in what manner they might moſt commodiouſly provide for their Security, or for their Neceſſities; and that upon mature Deliberation, they agreed that it was abſolutely neceſſary for 'em to form among themſelves a *civil Society*. Now this Notion is not agreeable either to Hiſtory, or to common Experience, which demonſtrate that all human Inſtitutions of Government had but ſmall Beginnings; that they are at firſt very rude and defective, and that it is by degrees, and in a long Series of time, that they arrive to any tolerable Perfection. But tho' one could find out, in the Monuments of Antiquity, ſome Footſteps of ſuch an Aſſembly; it would be mighty difficult to ſuppoſe, that *theſe Fathers of Families* did immediately form an Idea of *civil Societies*, and did foreſee and nicely weigh the Advantages and Inconveniences of it. This is a thing that requires a long Experience, and it is very unlikely that the Plan of ſo beautiful a Building was deſign'd and finiſh'd all at one time; ſince even now that it has been form'd ſo many Ages ago, the generality of Mankind know nothing of its Uſe, its Structure, or its Beauties: it being a Knowledge that even Perſons, who have had ſome Education, do not attain to but by Study and Experience. Our Author himſelf (in his *Introduction to the Hiſtory of the States of* Europe, Chap. 1. Sect. 3.) acknowledges that the firſt Governments were very ſmall and very defective, and that the different parts of *Sovereignty* were not eſtabliſh'd but by little and little, and one after another. In my Opinion, there is not Reflexion enough made here upon the *Simplicity* of thoſe Times in which *civil Societies* began; and it ſeems to me, that it is the poſture of Affairs at preſent that our Author had his Mind fix'd upon too much. The World not being as yet very full of People; and Senſuality or Luxury not having as yet infinitely increas'd the Wants, or rather the Deſires of Mankind; every one could eaſily get enough to ſatisfy himſelf, and nothing but the moſt exceſſive and unruly Malice in the World, could induce a Man to take away his Neighbour's Goods by force. Beſides, tho' Ignorance and Ruſticity are not, without Diſpute, the Parent of Virtue and Regularity, nor were thoſe of *the golden Age*, certainly, better than the People of the ſucceeding Ages (as Mr. LE CLERC has ſhewn us in his Comment upon *Heſiod's Theogony*, v. 211.) yet ſince they were not in thoſe times Maſters of any great *Cunning*; and the Rules and Stratagems of War, together with thoſe deſtructive Inſtruments that make up what is wanting in the ſtrength of the Body, and render the Wickedneſs of Mankind more bold and enterpriſing, were not yet found out, 'twas no difficult matter to ſecure themſelves againſt Inſults, eſpecially by ſeveral joining together in a defenſive Alliance

be more beneficial to Man, than Man himſelf; ſo nothing is able to work him greater Miſchief; as *Cicero* ſhews at large in his ſecond Book of *Offices*, cap. 5, *&c.* Now Man being infeſted with various Evils, has found out for each a proper Remedy. Sickneſs and Diſeaſe he prevents or removes by the Succours of Phyſick; Hunger, by tilling and manuring the Ground; againſt the Severities of Weather he is defended by Houſes, Cloaths, and Fire; and by Weapons or Stratagems, againſt the Fury of wild Beaſts. But for redreſs of thoſe Evils, which Men, at the Suggeſtion of depraved Nature, delight to bring upon each other, they had recourſe to themſelves, as the ſureſt Defence, by joining together in one Body, and erecting a civil Society [a]. And when they were once reduced to ſuch Order, as to be ſecure from mutual Injury, they muſt of courſe enjoy a greater Share of thoſe Benefits, which it was in their Power to confer upon each other [2]. And this Account is ſeconded by thoſe who deduce the Original of Commonwealths from *Fear*. By which we are not to underſtand the violent Diſorder of one in a Fright and Conſternation; but only a wary Proviſion againſt future Evils. Of which *Ariſtophanes* [b] rightly obſerves, Ἡ εὐλάβεια σώζει πάντα, *Caution preſerves all things.* And by this Expoſition of the word *Fear* we avoid all the Force of what is objected, that, had Men been really afraid of each other, they would have been ſo far from uniting together in a civil State, that they would not have endured each other's Sight, but one flying this way, and another that, would thereby have remain'd in a perpetual Separation. As if *Fear* implied in it nothing but *Flight*, and not alſo *Diffidence*, *Suſpicion*, and *Caution*. Nay, this is one Property of being afraid, the providing againſt the probable Grounds of Fear. Thus, going to ſleep we ſhut the Doors, for fear of Thieves; when they are ſhut, our Apprehenſion is over. We go armed in a Journey for fear of Robbers; and being well armed, fear no more. To which Purpoſe *Thucydides* [c] obſerves, that the Cuſtom of wearing Swords, which was generally receiv'd in the barbarous Nations, continued likewiſe among ſome People of *Greece*, by the Neceſſity of antient Times; when as yet they had no Walls to defend them from Enemies abroad, and could not

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liance. It will, perhaps, be objected, that if People had not in thoſe Days a great deal of Cunning in carrying on an Attack, neither had they more in making a Defence; and that therefore things were ſo far upon an equal Foot. But to me it ſeems, that generally ſpeaking, to find out new Ways and Methods of attacking, requires infinitely more Art and Ingenuity than to defend ones ſelf. There is ſuch an Inſtrument, or ſuch a Stratagem, againſt which it is eaſy enough to be provided; and which a Perſon that is but moderately prudent, will with the leaſt Difficulty render the Deſign uſeleſs and ineffectual, and tho' the Contrivance of it coſt a great deal of Labour; and tho' abundance of Care and a particular Dexterity be requir'd to manage it. In the firſt Ages, a Ditch, a ſtrong Wall, ſome large Maſtiff-Dogs were a Rampart and a Guard ſufficient for a Man's Security. If we do but conſider how long they were formerly in taking a Place, even after Battering-Rams and other Warlike Engines, often pretty well contriv'd, that the Antients made uſe of, were found out, tho the Fortifications were but very indifferent: If we do but obſerve, that even now-a-days, ſince the Invention of Artillery, the Beſieg'd have much the Advantage of the Beſiegers; I am certain we ſhall be oblig'd to conclude, that in the Simplicity of the firſt Ages, an Attack muſt be, without Compariſon, more difficult than a Defence; and that therefore a Government had no ſuch preſſing Occaſions to unite the Forces of ſeveral for their common Security. What we have to offer in this Matter is, That in proportion as Mankind increas'd, *civil Societies* were form'd by degrees for different Reaſons, more or leſs imperfect according to the Times, and according to the Abilities of the Founders. Mr. TITIUS (*as above*, Numb. 6.) conjectures, and 'tis probable enough, that it was the Craftineſs of ſome ambitious Mind, ſupported by Force, that gave Mankind the firſt Plan of Governments; and what I have obſerv'd with reſpect to *Nimrod*, ſeems to favour this Thought. Such a *Body Politick* being once form'd, ſeveral afterwards join'd themſelves to it upon different Motives, others form'd new ones upon the ſame Model: When there were ſeveral of 'em inſtituted, thoſe who had hitherto liv'd in a natural Independency, fearing to be inſulted and oppreſs'd by theſe riſing States, reſolved alſo to form the like, and to chooſe themſelves a Chief. At firſt theſe petty Kings were little more than for the determining of Diſputes, and for the commanding of Armies. This appears by the Hiſtory of the Judges, and of the firſt Kings of the *Iſraelites*, and by what HERODOTUS relates of *Dejoces* King of the *Medes*, Lib. 1. p. 26, 27. *Ed. H. Steph.* ſee alſo HESIOD THEOGON. verſ. 85, *&c.* & *Oper.* & *Dier.* verſ. 38, 39. And therefore it is that there were ſometimes ſeveral Kings among one and the ſame People, as Mr. LE CLERC has not fail'd to remark and to prove from the Teſtimony of HOMER, who mentions ſeveral Kings of the *Pheacians*, Odyſs. Lib. 8. verſ. 40, 41. He alſo quotes a fine Paſſage of DIONYSIUS HALICARNASSEUS, from whence it appears, that the Abuſe which Kings made of their Power, oblig'd People to eſtabliſh *Ariſtocratical* or *Democratical* Government. Κατ' ἀρχὰς μὲν γὰρ ἅπασα πόλις Ἑλλὰς ἐβασιλεύετο, &c. "At firſt all the Cities of *Greece* were govern'd by Kings, but not *arbitrarily* as barbarous Nations were, but according "to the Laws and Cuſtoms of the Country; ſo that he was eſteem'd as the beſt King, who was the moſt juſt and the ſtricteſt "Obſerver of the Laws, and who never departed from the Cuſtoms of the Country. This is what HOMER means, when "he ſtyles Kings, *Men that do Juſtice*. The little Monarchies thus limited, ſubſiſted a long time upon that Foot, as among "the *Lacedemonians*; but ſome Kings beginning to abuſe their Power, and to govern by their Fanſy, rather than according to "the Laws; the generality of the *Greeks* would not endure it, and therefore aboliſh'd this form of Government." *Antiq. Rom.* Lib. 5. Cap. 74. Ed. *Oxon.* I will here add a Paſſage out of *Iſocrates*, where this Orator having a deſign to compliment the *Athenians*, ſays, that he will go back to the time, ὅτ' οὐκ ἦν οὔτε δημοκρατίας, οὔτ' ὀλιγαρχίας ὄνομα πω λεγόμενον· Ἀλλὰ μοναρχίαι καὶ τὰ γένη τῶν Βαρβάρων, καὶ τὰς πόλεις Ἑλληνίδας ἁπάσας διῴκουν. "When the Name of neither *Democracy* nor *Ariſtocracy* "was in Being; but *Monarchy* was the only Government both among barbarous Nations, and among all the States of *Greece*." *Panathenaic*, p. 443, 444. Ed. *Pariſ. min.* See alſo the Commentators on the beginning of JUSTIN's Univerſal Hiſtory; and what is farther ſaid, in *Chap.* 5. *Sect.* 4. of this Book; Mr. LOCKE has likewiſe treated of the Origin of *civil Societies* in his ſecond Treatiſe of *civil Government*, Chap. 7, *&c.*

[2] The Remainder of this Section is taken from our Author's Abridg. *de Offic. Hom. & Civ.* l. 2. c. 5. ſ. 7.

[a] The *Perſians* took the true way of demonſtrating this; who had a Cuſtom, upon the Death of their King, to live the five enſuing Days without any Law; to the end, *That finding, by Experience, the miſerable Effects of Anarchy, the Slaughter, the Rapine, and if there be any thing worſe, that accompanied ſuch a Condition, they might be engaged in a firmer Allegiance to their Sovereign for the future*, Sext. Empir. *adv.* Mathem. *l.* 2. *p.* 70. Ed. *Genev.* To the ſame purpoſe may be applied ſome of the Reaſons, which according to the Account of *Herodotus*, B. 1. induc'd the *Medes*, living before in independent Villages, to inveſt *Dejoces* with the regal Authority over them.

[b] *In Avibus*, p. 532. Ed. *Lug. Bat.*

[c] L. 1.

meet together without ſome Fears and Jealouſies at home. Remarkable likewiſe is that Speech of *Pyrrhus* to the *Athenians*, recorded by *Plutarch* in his Life; when being permitted to enter the City, and offer Sacrifice to *Minerva*, upon his returning thence, he ſaid, "That for "his part, he retain'd a grateful Senſe of their "Kindneſs, and the Confidence they repoſed in "him; but adviſed them, *not to open their Gates, if they were wiſe, to any King for the future.* Civil Communities, even in the times of profoundeſt Peace, do yet fortify their Towns, guard their Frontiers with Troops, and fill their Granaries with warlike Stores; all which would be an unneceſſary Expence, did not they apprehend ſome Danger from their Neighbours: of whom, after theſe Precautions, they are no longer afraid. So that 'tis the natural effect of Fear, to find out Remedies againſt it ſelf. And, in like manner, becauſe Men were afraid of each other, they ſupplied each other with Relief, by joining in a civil State. Of the Force and Efficacy of which thoſe Authors ſeem to have a deep Senſe, who affirm, that, *In Caſe there were no Courts of Juſtice in the World, Men would deſtroy and devour each other* [a]. And indeed, that Men have abundant reaſon to apprehend and fence againſt mutual Danger, we have in another place [b] [c] fully made out: Which is no leſs true for what *Hornius* objects, *That the Fathers of Families for many Ages lived together on Terms of Equality, without the fear of any ſuch pretended Invaſion on their Rights: and that Ambition was but of late growth amongſt Men; coming in after the Inſtitution of Commonwealths, and then giving occaſion to the Diſtinctions of Honour and Dignity.* As if it were not Ambition, which occaſioned the firſt Murther in the World; when *Cain* was enraged, that his Brother's Offering ſhould find more Acceptance with God, than his own [d]! Beſides, Ambition is but one Root of thoſe Evils, which ſpring in like manner from Perverſeneſs of Temper, and Competition of Deſires. Of which, even in thoſe plain and primitive Ages, the former produced that ſavage and brutiſh Fierceneſs in the Race of the Giants; the latter occaſioned Strife and Diſſenſion betwixt the neareſt Relations [e]. In the Breaſts of Kings, Ambition, 'tis true, reigns with greater Violence, and tranſports them to Actions more bloody and cruel; yet we may trace ſome Footſteps of the ſame Paſſion in Shepherds and Ruſticks [f]. *Hornius* proceeds to obſerve, That, in thoſe early times, *to provoke others with Words or Blows, would have proclaim'd a Man's Folly as well as his Malice: becauſe this would have given a Right to the Party thus provoked, to take the firſt Opportunity of killing him. Again, there could be no hopes of Booty amongſt People as yet unacquainted with Wealth, and poſſeſſing no other Stores but thoſe of Fruits, plenty of which was to be had in other places, with little Pains, and no Danger.* As if the Proſpect but of moderate Gains were not, with bad Men, Temptation enough to do wickedly! Or as if Thefts and Robberies were not as common of Old, as they are at this Day, amongſt People living wholly on Graſing and Tillage! Not to ſay, that the Occaſion of founding Commonwealths was not only to protect Men from Robberies, but alſo from any Injuries, which they might be capable of offering or receiving. What he afterwards affirms is very true, that, *Let the Suſpicions of another's miſchievous Deſign be never ſo well grounded, this will not juſtify an Attempt upon him, by way of Prevention.* And that Right and Power of all over all, with which Mr. *Hobbes* inveſts Mankind in his State of Nature, ought to be extended no farther than right Reaſon allows of; amounting only to this Senſe, that Man, in a State of natural Liberty, has a Right to imploy againſt all Perſons, all ſuch means for his Preſervation, as Reaſon judges neceſſary for him to uſe, and dangerous to let alone. Wherefore to carry our Caution farther than right Reaſon ſhall preſcribe, is doubtleſs a Breach of the Law of Nature. So that he, who on any uncertain Fears kills the Perſon he is afraid of, when he might as conveniently have eſcaped from him, muſt be adjudged guilty by the ſaid Law. Whence they appear to be certainly in the wrong, who imagine that this Principle juſtifies Rapines and Robberies, upon ſuch as are not open and profeſs'd Enemies. For Robbery and Rapine plainly denote ſuch Means, as ſound Reaſon can never judge neceſſary to a Man's Preſervation, but ſuch as are rather made uſe of to ſerve the Ends of Avarice and Cruelty: it being never alledg'd in Plea for Robbers, that they ſpoil Men of their Goods in their own Defence. That other Expreſſion ſeems very ridiculous; *Suppoſing Hatred and Diffidence to have reign'd never ſo much amongſt Men, yet this could never be ſaid to have happened purely for the ſake of Commonwealths:* for Men did not therefore hate or diſtruſt one another, purpoſely that they might conſtitute a civil State; but they therefore conſtituted a civil State, becauſe they diſtruſted or hated one another. And tho' we ſhould allow, as fully as can be deſired, that while the Hatred of one Perſon extended only to ſome few, who were diſagreeable to him, he might at the ſame time love and favour all others, or at leaſt not be enraged againſt them; yet if each Man had but his ſingle Foe, this alone were enough to fill the World with Hatred and Diſſenſion. 'Tis therefore a vain Attempt to aſcribe the Original of Communities to *the Accidents of Neighbourhood, and the natural Increaſe of Mankind by Generation.* This laſt indeed affords a conſtant Supply, whence civil Bodies are ſtock'd and maintain'd: in like manner, the former might perhaps give Occaſion for Neighbours to join themſelves to the ſame Community, rather than to divide. But the Cauſe which firſt moved Men to eſtabliſh Societies, is by no means deducible from theſe Grounds.

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[a] *Comp.* Hobbes *de Cive*, l. 1. ſ. 2.

[b] B. 2. c. 2. ſ. 6, 12.

[c] V. *Grot.* l. 1. c. 4. ſ. 4. n. 2.

[d] *Geneſ.* iv. 4, *&c.*

[e] See *Geneſ.* xiii. 7. xxvi. 15, 20, 21.

[f] *Vid.* Virg. *Eclog.* 3. *v.* 25, *&c.* *Eclog.* 7. Theocrit. *Idyll.* 5. & 8.

VIII. Nor has any One reaſon to imagine, that a bare Reverence of the Law of Nature, which prohibits indifferently all ſorts of Injuries, could ever have been able to ſecure the whole Body of Mankind (as conſider'd in a State of natural Independency) from mutual Prejudice. Some there are (it muſt be confeſs'd) with whom Honour, Juſtice, Faith, and Innocence are ſo much in eſteem, that they would not violate theſe Rules, tho' ſure of Impunity. Many alſo may be well repreſented by that Character which we find in *Ariſtotle* [a]: *Who refrain from Injury upon a Principle of Fear (it being difficult to wrong others, without being likewiſe wrong'd by others) and who are therefore unwilling either to do wrong, or to receive it* [1]. Now, were all Men of this Temper, the Eſtabliſhment of civil Communities might not appear ſo very neceſſary a Work. But, on the contrary, what Numbers are there, who make light of breaking through the moſt ſacred Ties of Duty, whenever invited to injure others by the Proſpect of ſome Gain to themſelves, and the Hopes of eſcaping, by Force or Fraud, from the Hands of the injured Parties? Not to diſtruſt ſuch Men as theſe, would be voluntarily to expoſe our ſelves to their Wickedneſs and Inſolence. *Parum tuta per ſe ipſa probitas eſt*, ſays *Salluſt* [b], *Unguarded Honeſty is but an undefenſible Hold.* But as it is the part of Prudence to keep a watchful Eye on bad Men, and to make an early Proviſion againſt their Attempts; ſo is that Aſſertion of Mr. *Hobbes* [c] unreaſonably harſh, wherein he affirms, *That the Hope of any Man's Security and Preſervation conſiſts in his being able, by his own Strength and Cunning, either openly or ſecretly to be beforehand with his Neighbour in Miſchief.* Indeed the generality of Men are ſo far corrupted, that wheresoever there is appearance of greater Advantage from the Tranſgreſſion of Laws, than from the Obſervation of them, they make no Scruple to tranſgreſs them: According to that of *Plato* [d]; *Whoever conceives it in his Power to do unjuſtly, readily does ſo: each Perſon concluding Injuſtice to make much more for his private Intereſt, than Juſtice could do.* Yet to reproach all Mankind with this perverſe Diſpoſition, is carrying the Point and the Cenſure too far. Nay, by the Confeſſion of Mr. *Hobbes* himſelf [e], ſome modeſt Natures there are in the World, that do not aſſume to themſelves more than they leave to others; always having their Eye on that Rule, *To do as they would be done by.* How any one, upon Pretence of providing for his own Security, could ruſh upon the Oppreſſion and Ruine of ſuch innocent and excellent Perſons, I muſt, for my part, own my ſelf at a loſs to underſtand. Nor can it ever be, that right Reaſon ſhould warrant my going to kill or oppreſs another, of whoſe Deſigns to do me hurt I have not had very particular Indications: there being, till then, many better ways left open of compoſing Matters amicably. For, as to that Pravity of Nature and Diſpoſition, which is common to the whole Race of Men, and which therefore admits of various Degrees, we cannot, on the account of it alone, conclude a Man an open and profeſs'd Enemy. 'Tis own'd therefore, that as to the Diſcharge of natural Duties from others to me, I cannot have it, in a State of Nature, ſo well ſecured, as under civil Government: yet neither is it left in ſo miſerable an Uncertainty, as that hereby I muſt be obliged, or may be permitted, to treat all Men in a hoſtile Manner. For, while I find my own Strength to be equal or ſuperior to another Man's, and while that Man, by Word or Deed, teſtifies a Deſire of living peaceably with me, and by real Proofs confirms the Truth and Sincerity of that Deſire; what reaſon have I to account him my Enemy? or how can the bare Suſpicion, that all this Friendſhip is but Counterfeit; or that in time he may come to alter his Mind, give me Authority to aſſault him by way of Prevention? And the Truth of this will appear more evidently, if we look upon the Practice of entire and independent States and Governments, which are, with regard to each other, in a State of Nature. Here all Men agree in judging it a Crime for one Nation, by ſecret Stratagem or open Force, to attack another (as yet not known by any Exchange of good or bad Offices, nor engaged in Friendſhip and Alliance by Covenant or overt Act) only becauſe there is no common Power preſiding over both, by which the other State, if attempting any injurious Deſigns, might be reſtrain'd and puniſh'd. Which clearly proves againſt Mr. *Hobbes* [f], that the *Law of Nature is not* altogether *dumb* even *in a State of Nature:* tho' indeed there is much greater Security of having this Law obey'd, under civil Government; where the Power of the Magiſtrate is at hand, to compel thoſe who are wanting in returns of Kindneſs and Peace. But, notwithſtanding all this, thus much Prudence ſuggeſts to us, that we ſhould not only provide, by a timely Defence, againſt the open and profeſs'd Malice of wicked Men; but that we ſhould likewiſe eſteem the Goodneſs of others, not infallible and immutable. And to anſwer all theſe Ends, no ſuch univerſal Safeguard, as *civil Society*, could be invented or conceiv'd.

IX. Moreover, altho' the Law of Nature direct us, in caſe any Difference ariſe, to adjuſt it amicably amongſt our ſelves, or refer it to the Arbitration of others; yet neither thus would the common Peace be ſufficiently ſecured. For with the ſame Eaſe, that we diſpenſed with our ſelves in breaking the other natural Rules, we might alſo ſlight this of appealing to Arbitrators, and ſo have immediate recourſe to Arms. Beſides, ſuppoſing two Men had by Conſent referr'd their Differences to a third

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Mr. Barb. *NOTES on* § VIII.

[1] This Paſſage is not to the purpoſe, reſpecting only Covetouſneſs: Our Author has expreſs'd himſelf more to the point, in his Abridgment *De Officio Hom. & Civ.* l. 2. c. 5. ſ. 8.

[a] *Ad.* Nicomach. *l.* 4. *c.* 3. *p.* 46. *C. Ed.* Pariſ.

[b] Adherbal *in Bell.* Jugurth. *c.* 14.

[c] *De Cive*, c. 5. ſ. 1.

[d] *De Repub.* l. 2. p. 593. Ed. *Wech.*

[e] *De Cive*, c. 3. ſ. 27.

[f] *De Cive*, c. 5. ſ. 2.

Perſon; yet were either of the Parties diſſatisfied with the Deciſion, it were no hard Matter for him to renounce and reject it; in caſe he found his own Strength ſufficient to ſhelter him from human Puniſhment: eſpecially ſince the Arbitrator is not endued with any Authority and Command, by Virtue of which he might oblige the Parties to ſtand to his Sentence. Therefore, in a State of natural Liberty, Prudence will adviſe us, that we rely not too much on the bare Faith of others; but that we believe the Obſervation of all Compacts to be then beſt aſcertain'd, when either they are grounded on the mutual Advantage of the Parties, or when 'tis in our Power to force thoſe with whom we treat, to be juſt and honeſt. But where Perfidiouſneſs is encouraged by Hopes of Profit, and not reſtrain'd by Fear of Puniſhment, there it were Madneſs to think, that bare Covenants ſhould be able to warrant our Safety. This appears from the Practice of all Nations; who when they break off their Alliance with one State, ſtrengthen themſelves with the Friendſhip of another: by which Act they do not preſently condemn themſelves of Treachery, in thus ſeeking for Protection to the Faith of others; but, in as much as Communities are chiefly guided by Intereſt, in fixing their Alliances, they do but ſubſtitute an advantageous League in the room of one which was either unprofitable, or dangerous. And 'tis under theſe Reſtrictions and Mitigations only, that we can any ways admit of Mr. *Hobbes*'s [a] Poſition, that *Covenants founded upon mutual Faith, in a State of Nature, are invalid.* For tho' it be plauſibly enough ſaid by *Livy* [b], that *all Men are ambitious of being credited; and that, to repoſe Faith in them, is with moſt Men a Tye upon their Fidelity*; yet 'tis the ſafer Courſe, in a State of Nature, to think upon that vulgar Saying;

> Πίςει χρήματ᾽ ὄλεσα, ἀπιςίῃ δ᾽ ἐσάωσα,
> *Theogn.* ver. 830.

Undone by Truſt; and by Diſtruſt preſerv'd.

X. Again, there is another reaſon why the Law of Nature cannot be able, of it ſelf, to enſure the Peace of Mankind. For this is the Caſe of natural Liberty, that each Man, as he places his Defence and Safety in his own proper Strength; ſo as to the means of obtaining that End, and the whole Management of his Actions, he purely conſults and follows his own private Judgment. And what a wide Difference there is between Men in this reſpect, no one can be ſo ignorant, as not to have made part of his Obſervation [1]. Few there are of ſo happy and noble a Temper, as to have, at the ſame time, that piercing Sagacity, which may diſcern what is for the laſting Advantage of all Men in general, and of each in particular; and that Strength and Firmneſs of Soul, which may conſtantly purſue what has been prudently foreſeen. The greater Number are, on account of their natural Dulneſs, impoſed upon by groſs Error, in the likeneſs of Reaſon. Others are hurried by the Violence of their Paſſions, whereſoever the Gratifications of Luſt, or the falſe Appearance of Advantage ſhall draw them. Now in ſo endleſs a Diverſity of Opinions and Deſires, what Hopes can there be of Peace and Agreement: whilſt every Fool is as ſtrongly conceited of his own way, as the wiſeſt Man is convinced of his; and the former will no more ſubmit to the latter, than the latter will condeſcend to be inſtructed by the former? Since therefore Reaſon alone, according to the Tenor which we find it to hold in particular Perſons, is inſufficient to compoſe theſe Differences in Judgment; other Means are to be uſed, by which an agreeable Union and Harmony of Mind may, in ſome Degree, be obtain'd [2].

XI. In fine: altho' it be evident to all Men, that by breaking the Law of Nature they exceedingly obſtruct their own Happineſs (the Promotion of which depends on the Aſſiſtance of others) and bring many grievous Evils and Dangers on themſelves; tho' Nature has likewiſe imprinted it on the Minds and Conſciences of Men, that ſuch as act contrary to her Decrees, by lightly invading and harming their Neighbours, ſhall not, in the laſt Event, go unpuniſh'd [c]: laſtly, tho' the Benefits that would redound to them from their obſerving natural Precepts, and the Evils which they incur by tranſgreſſing them, are a manifeſt Argument, that it is better for Men to live kindly and ſociably, than otherwiſe: yet would not all this be enough to procure the ſettled Peace of Mankind. And that, becauſe the Multitude act not by rational Motives, but by wild Impulſe, miſtaking Paſſion for Reaſon; chiefly thro' the Fault of Cuſtom or Education, which ſtifle and ſuppreſs the Force of inward Reflection. As alſo, becauſe the greateſt Part of Mankind are wholly intent upon the preſent, without any Care or Thought of the future; and are commonly moved by thoſe Objects which thruſt themſelves upon their Senſes, while thoſe of a higher and nobler Nature are too refined for their Affections, and too remote for their Deſires. Whence it comes to paſs, that the dread of human Puniſhment is with too many more prevalent, than that of

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Mr. BARB. *NOTES on* § X.

[1] Mr. BRUYERE in his Character of Man, has this, "If a Man ask why the whole World does not make one ſingle Nation, nor ſpeak the ſame Language, nor live under the ſame Laws, nor agree in the ſame Uſages and Worſhip? I anſwer, that, conſidering the variety of Mens Humours, the difference of their Taſtes, and the contrariety of their Judgments, 'tis ſtrange that even ſeven or eight Perſons can live amicably under the ſame Roof, within the ſame Compaſs, and compoſe one ſingle Family.

[2] The latter part of this Period is taken out of our Author's Abridgment, *De Officio Hom. & Civ.* B. 2. c. 5. ſ. 8.

[a] *De Cive*, c. 2. ſ. 11.

[b] *L.* XXII. 22.

[c] Claudian. *D.* IV. *Conſulat.* Honor. *v.* 104.

Extruite immanes ſcopulos, attollite turres,
Cingite vos fluviis, vaſtas opponite ſylvas;
Non dabitis murum ſceleri.----------

Heap Rocks and Towers the vaſt Aſcent to win;
Let Floods ſurround, or Foreſts hem you in;
All Nature is too weak a Fence for Sin.

divine Vengeance; which yet ought to hold the ſovereign Place in our Fears. Becauſe, the Juſtice of Providence is for the moſt part ſlow, and the Methods of it ſecret and retired [a]: Which, with bad Men, is an Argument, that the Calamities, which ſometimes attend Impiety, ariſe from other Cauſes [b]; eſpecially, when they find, that the worſt amongſt them often abound in thoſe things, which the vulgar take for the Meaſure and Standard of Happineſs, while the good are oppreſs'd with many Afflictions, ſufficient to perſuade the Wicked and Fooliſh, that Virtue has little Power, unleſs in making Men miſerable. Thus *Plutarch* [c] obſerves: *When Judgment is immediately executed on a Crime, it ſtops thoſe Men in the Courſe of their Wickedneſs, whom Succeſs would have encouraged to proceed. For nothing does ſo much enfeeble the Hopes, and deject the Mind of the oppreſſed, as the Reſpite and Delay of divine Vengeance; and nothing more increaſes the Cruelty and Inſolence of their Oppreſſors. And with this very Proſpect it is, that the Wicked encourage and hearten themſelves in Villany; that the Fruit of their Crimes they ſhall receive in Hand, but the Puniſhment in Reverſion, and at a great Diſtance from Enjoyment.* It may farther be added, that the Stings of Conſcience, preceding a villainous Act, are not ſo fierce and raging as thoſe which follow after, when what is once done, we find paſt our Skill to undo [d]: and that the Voice of Reaſon, which could not be heard in the hurry and tumult of our Paſſions, when theſe once begin to cool and ſettle, will ſound moſt forcibly in our Breaſt [e]. *In like manner,* ſays the wiſe Author but now cited [f], *as Malefactors, when led to Execution, carry each their Croſs; ſo does Sin, out of every Offence, frame its own Torments: that moſt ingenious Artiſt of a miſerable Life! ſuch as is not only confounded with Shame, but diſtracted with Horrors, Convulſions, Remorſe, and all the Tumults of a troubled Mind.* But becauſe theſe inward Torments make no Impreſſion on Senſe, they have ſo much the leſs Efficacy towards reſtraining the growth of Wickedneſs in others. Mr. *Hobbes* [g] is in the right, when he tells us, that *Scarce any human Action can be aſſign'd, which is not the beginning of ſo long a Chain of Conſequences, as our foreſight ſeldom reaches to the end of. The pleaſant and painful Accidents of Life are ſo firmly link'd together, that he who receives the Pleaſure, is at the ſame time obliged (whether he apprehends it, or not) to accept of the attending Pain. Thus the abuſe of Power is puniſh'd by the Power and Violence of others; Intemperance, by Diſeaſes,* &c. *and theſe are what I call natural Puniſhments.* Yet the generality of Men, either through defect of Judgment, or vehemence of Paſſion, are commonly hindred from giving theſe Conſiderations due weight. Wherefore there remain'd no way of laying ſo powerful a Reſtraint on human Corruption, as what is now afforded, ſince the Inſtitution of civil States. *Plutarch* [h] ſeems to have forgotten himſelf, when he cenſures *Colotes* for the following Aſſertion: *They who firſt regulated Life, compoſed Laws, ſet up Governments, and Magiſtrates over Cities, and enforced Obedience to their Directions, were certainly the Perſons who deliver'd us from Trouble and Tumult, and eſtabliſh'd Peace and Safety in the World. Take away theſe Engagements; and we ſhould live like wild Beaſts, and hardly forbear to devour the next we meet.* For that grave Writer, who reprehends this way of ſpeaking, could have no very deep Inſight into human Nature and Diſpoſition, if he imagin'd, that, upon reverſing the Laws of all civil Communities, the Honour and Safety of Mankind could be preſerv'd by the wiſe Rules of *Parmenides, Socrates, Plato,* or *Heraclitus.* And, tho' we ſhould never ſo freely ſubſcribe to *Ariſtippus*'s Boaſt [i], who, when aſk'd, What Advantage Philoſophers had above other Men? replied, *Were there a general Repeal of all Laws, we ſhould continue to live as regularly and peaceably as we do at preſent*; yet, what would become of the far greater Number; who, if left to themſelves would fanſy Luſt and Paſſion the beſt Reaſon and Philoſophy? Rather therefore, let this be the final Deciſion of the Caſe; *Qui ratione traduci ad meliora non poſſunt, metu contineantur* [k]: *'Tis fit, that they whom Reaſon cannot perſuade to do better, Fear ſhould reſtrain from doing worſe.*

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[a] 'Tis an Obſervation of *Cæſar*, that *Divine Providence, to ſtrike Men with a deeper Senſe of Affliction, by a ſudden Change from proſperous Affairs, ſometimes grants to thoſe, whom it intends exemplarily to puniſh for their Wickedneſs, the more fortunate Succeſs, and the longer Enjoyment of Impunity,* De B. G. *l.* 1. *c.* 14. *n.* 5.

[b] *Add.* Eccleſiaſt. viii. 11.

[c] De Sera Numinis Vindicta, *p.* 548. D. E.

[d] Curtius VIII. 2. *Nature ſeems unkind in leaving Men under this great Weakneſs and Diſadvantage, that generally they conſider things leſs before they do them, than after they have done them.*

[e] *Plutarch* De Ser. Num. Vindict. *p.* 555. E. *When a Man, out of Avarice, Envy, Ambition, or ſenſual Delight, has committed ſome heinous Wickedneſs, and after the violent Thirſt of his Deſire is cool'd and appeas'd, takes time to reflect, that what he propos'd of Profit, Convenience, or Satisfaction in any kind, has left him utterly diſappointed, while the baſe Impreſſions and horrid Tyranny of Sin remain in full Force; muſt neceſſarily be brought to this Perſuaſion, that when for the ſake of empty Glory, or unworthy Pleaſure, he broke through the moſt ſacred, moſt beautiful and excellent Rules of Mankind, he at the ſame time, filled his miſerable Life with Shame and Diſquiet.*

[f] Ibid.

[g] Leviath. *c.* 31. towards the end.

[h] Againſt *Colotes,* p. 1124. D.

[i] *In* Heſych. *De Vir. Illuſtr.*

[k] Quintil. *Inſtit. Orat. l.* 12. *c.* 7.

CHAP.

CHAP. II.

Of the inward Structure and Conſtitution of civil States.

I. *Men only are a ſufficient Defence againſt the Wickedneſs of Men.*
II. *To this End it is neceſſary that many ſhould join together.*
III. *Thoſe who join in this manner ought to agree in their Reſolutions.*
IV. *The Difference between the Polities of Bees and Men.*
V. *An Union of Wills and of Strength neceſſary to a civil State.*
VI. *This Union produced by intervening Covenants.*
VII. *The firſt Covenant, with the Decree following upon it.*
VIII. *The ſecond Covenant, giving the final Perfection to a civil Eſtabliſhment.*
IX. *The Reaſon for which* Hobbes *will acknowledge but one Covenant.*
X. *This Reaſon inſufficient.*
XI. XII. Hobbes's *Arguments anſwer'd.*
XIII. *A civil State, how defined.*
XIV. *In a Monarch, the Will of the Prince is the Will of the State.*
XV. *Under other Forms of Government, according to the regular Courſe, the Community is concluded by the Votes of the major Part.*
XVI. *This Rule admits of a Limitation.*
XVII. *Of Equality of Votes.*
XVIII. *Of joining or dividing Suffrages.*
XIX. *How many Perſons at leaſt are requiſite to a ruling Council.*
XX. Civis, *or a Member of the civil State, who may properly be ſo term'd.*
XXI. *Subordinate Bodies, of how many kinds,*
XXII. *Inveſted with what Rights and Privileges.*
XXIII. *Of unlawful Bodies, and Factions.*
XXIV. *The peculiar Duties incumbent on the Members of civil States.*

IT follows now, that we enquire more exactly into the inward Structure and Conſtitution of civil States. That Men therefore might render themſelves ſecure againſt the Wickedneſs of others, ſo far as the Condition of their Nature will admit, no other Expedient could have been invented but this, that each Perſon ſhould provide a ſufficient Guard about him; by means of which the Deſigns of others might appear ſo dangerous in the Execution, that they would think it their ſafeſt Courſe, rather to refrain than to engage, rather to keep the Peace, than to be the Challengers and Aggreſſors in a War. For the malicious Inclinations of Men, and their ready Diſpoſition to their Neighbour's Hurt, cannot any way be more effectually kept under, than by ſetting before their Eyes ſome preſent Danger, which muſt certainly fall on him that ſhall dare to aſſault another; and by taking away all Hope and Proſpect of Impunity. Now ſuch a Defence or Aſſiſtance as this, can by no means be afforded by any fortified Place, whether it derives its Strength from Nature, or from Art: For to lie thus continually in Hold, is to be a perpetual Priſoner; nor would it be eaſy for a ſingle Man to defend his Poſt. But if he let in others to help him, there will be a Danger from them likewiſe, and he will ſtand in need of a new Protection. Some kind of Aid might indeed be expected from Arms; but not to ſuch a Degree, as that one Perſon alone ſhould be able to promiſe himſelf any long Security from hence, againſt numerous Oppreſſors. So too, the Defence which might be made by brute Creatures, is very ſlender and uncertain, and by no means capable of ſhielding us from Dangers of this Nature. For tho' we meet with a Story of two Dogs, that perform'd military Service againſt the *Americans* [a] [1]; and tho' the Emperor of *Ceylon*, in his royal City of *Candy*, is reported to have a Life-Guard, as it were, of an hundred Elephants, which go their rounds upon the nightly Watch, and are the publick Executioners of Criminals: Yet many Men muſt join in teaching and training them, e'er they can be made fit for theſe Employments. It remains therefore, that againſt the Dangers which might be apprehended from Men, Men alone could afford an agreeable Remedy, by joining their Forces together, by interweaving their Intereſts and Safety, and by forming a general Confederacy for their mutual Succour [b].

II. But it is manifeſt, that the joining together of two or three, or a few Perſons, muſt neceſſarily prove inſufficient for this Defence; becauſe, then, the leaſt Addition, on the ſide of the Invaders would turn the Scales, and carry them on to certain Victory; and therefore would encourage and embolden them to begin the Aſſault, by promiſing not only Impunity, but Succeſs. So that to obtain the Security of which we are now in ſearch, it is requiſite, that the Number of the Confederates be ſo great, as that the Advantage of a ſmall odds, on the Enemy's ſide, ſhall not viſibly determine the Iſſue of the War; and conſequently, that this League and Union be made by a conſiderable Multitude. Hence *Plato* [c] demands ſuch a Number of Subjects in his Commonwealth, as ſhall be able to repel their Neighbours, when they prove Injurious, and to ſuccour them, when they are oppreſs'd. From what has been offer'd this

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Mr. BARBEYRAC's *NOTES on* Chap. II. § I.

[1] See MONTAIGN's Eſſays, B. 2. c. 12. p. 336. See alſo *an account of the Iſland of* Ceylon, by *Robert Knox*. Book II. Chap. I. to which may be added, that according to STRABO, the antient *Gauls*, in their Wars, made uſe of *Engliſh* Dogs, as well as thoſe of their own Country. *Geogr.* Lib. 4. p. 305. Ed. *Amſt.* ſee other Examples in *Pliny*, Hiſt. Nat. lib. 8. cap. 40. *Poliæn. Stratag.* Lib. 4. cap. 2. ſect. 16. Lib. 7. cap. 2. ſect. 1. *Ælian.* Hiſt. Animal. Lib. 7. cap. 38. *Pollux* Lib. 5. ſ. 47. Ed. *Amſt. Spartian. in vit. Caracall.* cap. 6.

[a] Gomara, *Hiſt. Gener.* Ind. *Occid.* 44, & 65.

[b] *Comp.* Hobbes *De Cive, c.* 6.

[c] *De LL. l.* 5. *p.* 845. E. *Ed.* Wech.

this farther Remark may be drawn, that the juſt Meaſure of any State ought to be taken from the Proportion it bears to the Strength of thoſe about it. And therefore thoſe Communities, which were heretofore look'd on as ſufficiently large, when Mankind was divided into a prodigious variety of diſtinct Governments, are too little ſince the forming of mighty Empires. *For*, as Pliny obſerves[a], *Bodies, however high and towring, ſenſibly diminiſh, when ſet in Compariſon with thoſe that overtop them.*

III. To proceed: 'Tis no leſs neceſſary, that the Multitude united on this account, do agree about applying the means for the Attainment of the deſired End. For otherwiſe, how numerous ſoever they may be, yet if they conſent not in uſing the beſt Methods for effecting the common Security, but reſolve to manage each his own Strength according to his own Fanſy, the Deſign will come to nothing: Becauſe, being divided in Opinions, and moving contrary ways, they will not help, but hinder one another. Or, to ſuppoſe the beſt, if they ſhould once happen to agree well enough about the Undertaking of a ſingle Action, either upon ſudden Impulſe, or upon Counſel and Deliberation, led on by the Hope of Victory, of Booty, or of Revenge (as may ſometimes be obſerved, in the mad Diſorders of popular Tumults[b]) yet afterwards, either by the Difference of their Tempers and Judgments, or by that Envy and Emulation, which is natural to moſt Men, or through Lightneſs and Inconſtancy, they will be ſo torn aſunder, as that, for the future, they will have no manner of Inclination, either to afford their mutual Succour, or ſo much as to keep the Peace amongſt themſelves[c]. And conſequently theſe united Bodies, which are form'd of a great Number of Perſons, are of all the moſt unlikely to hold for any long time; unleſs they are kept together by ſome general Fear, reſtraining them from quitting a Reſolution at their Pleaſure, which they have once by Agreement taken up. Whence it follows, that the bare Conſent of a Multitude, tho' confirm'd by Covenant, cannot give us that Security, which we now ſeek after; or, that 'tis not enough, for many Perſons to enter into a Confederacy of mutual Aſſiſtance, and to promiſe on both ſides, that they will direct their Strength, and all their Actions towards this End, and towards the common Good. But 'tis ſtill neceſſary, that ſome farther Tye be laid upon them, that they who have once conſented, for their general Benefit, to be peaceful and helpful to each other, may be hindred, by ſome Fear, from drawing back and diſagreeing, when they find their private Advantage claſhing with the publick.

IV. For the Illuſtration of this Point, Hobbes [1] examines ſtrictly the Nature of ſome inferior Animals, which after a ſort do appear likewiſe to maintain Society among themſelves; of which kind, the moſt remarkable are the Ants and the Bees[2]. For theſe Creatures, tho' void of Reaſon, by which they might engage in Compact, and ſubmit to Government; yet by joining Conſent, that is, by deſiring and declining all the very ſame things, do ſo direct their Actions towards the common Good, as that their petit Confederacies are liable to no Differences or Diſſentions. Why it ſhould happen otherwiſe with Mankind, and why a conſiderable Multitude ſhould not be able to live amicably together for any time, without the Reſtraint of civil Authority, is a Queſtion not unworthy our Debate. The Reaſon then, for which the wiſe Appointment of Nature hath join'd theſe little Creatures, rather than others, in publick Bodies, ſeems to be this; that they continue all the Winter, and are ſtill nouriſh'd after their ordinary manner, whereas moſt other Inſects, during that Seaſon, either periſh, or are preſerv'd without any external ſupply of Food. Now theſe Winter-Stores may be much more conveniently brought together and laid up, if many join their Service, than if each labours apart from all the reſt. Whence 'tis evident, that the Communities form'd by theſe Creatures have a quite different End from that of human and political Societies; tho' we may diſcover in them ſome reſemblance of a Communion of Goods, whilſt they labour all for the ſame general Stock, and afterwards do all receive their Maintenance from it. *Hobbes* offers this farther reaſon of the difference, that all the Government of theſe Animals is nothing but an univerſal Conſent, or, many Wills directed to the ſame Object, not one arbitrary Will, as in civil States: he means, that each of them, in particular, conſpires with the reſt to work together, and to treaſure up their Proviſion in the ſame Heap; and that all their Wills are not reduced into one ſovereign Will, as in politick Bodies; ſo that what a ſingle Ruler, or a governing Council determine, ſhould paſs for the Will of all in general. The main Cauſes why, in theſe Creatures, which live by the guidance of no ſuperior Faculty than Appetite and Senſe, the bare agreement of Inclinations ſhould be ſo laſting, and ſo effectual, as to ſtand in need of no other Aſſiſtance, ſeems to be theſe that follow: 1. Men are continually in competition for Honour and Dignity, whereas theſe Creatures are not: And conſequently, that Envy, Hatred, and Emulation, which flows from this Spring amongſt the former, is not to be diſcover'd amongſt the latter. 2. The natural Appetite of the Bees, and that Faculty, which we may call the Judgment of their Senſes, are exactly uniform, and are carried on toward the publick Good, which in them differs not from the private. *Whatever is not good for the Hive* (as *Antoninus*[d] obſerves) *is not good for the Bee.* To ſee their Hives full and flouriſhing, is their whole Wiſh and Deſire. But amongſt Men, *So many Heads, ſo many Wits*: and ſcarce any thing is look'd on as truly Good, which doth not afford the Poſſeſſor ſomewhat ſingular and extraordinary above his Neighbours. 3. Creatures, which have not the uſe of Reaſon, neither ſee nor fanſy that they ſee any Defect in the Adminiſtration of their common Societies [1]; in as much as they erected them not with the Guidance of Judgment, but by the bare Inſtinct of Nature, and have not the Art of comparing them with others. Again, not one of the Bees ever entertains a Deſign of forming her Comb in any other, than the common ſexangular Figure; whereas, in human Polities, there are very many, who, thinking themſelves wiſer than their Fellows, are diſguſted with the preſent Condition, and are for introducing a Change in the Government. And according to the Difference of Judgments, ſeveral of thoſe Projectors are for ſetting up ſeveral Models, or for reforming things each in his own way, the Conſequence of which muſt be the Diſtraction of the State, and, in the Iſſue, a civil War. 4. Theſe Creatures, tho' they have ſome Uſe of Voice, in making known to one another their Deſires, at leaſt, when their Affections are more warmly rais'd; yet they want that Art of diſguiſing things in the falſe Colours of Speech, which is neceſſarily required to the diſturbing the Minds and Paſſions of Society: This being the Inſtrument, by which what is Good is repreſented, either under a greater or a leſs Degree of Goodneſs, than it really hath; and what is Evil is in the ſame manner, either aggravated, or extenuated; or, perhaps both are painted with a quite different Face from what they truly bear. But now, the Tongue of Man is often us'd for a kind of Trumpet of War and Sedition; which is able, not only to propoſe falſe Rules of living and of acting, but alſo, with fair Gloſſes and much inſinuating Language, to recommend them to Others, and thereby to render their Minds utterly averſe to the Genius of a peaceful and ſocial Life. On which account it was not without Juſtice ſaid by the Comedian [2], of the eloquent *Pericles*, that *he thunder'd and lighten'd, and confounded all* Greece. 5. Irrational Creatures cannot diſtinguiſh between Contumely, or Contempt, and real Damage; or rather, they have no Senſe at all of Contempt. Therefore, whilſt they find the Neceſſities of their own Bodies ſupplied, they commence no Quarrel with their Fellows. But of Men, thoſe are the greateſt Diſturbers of the Commonwealth, who enjoy the greateſt Opportunity of being eaſy. Nor do they engage in Contentions about their Honour or their Reputation, till after they have gain'd an abſolute Victory over the Force of Hunger, or the Injuries of Weather. Laſtly, the Agreement of theſe Creatures is *natural*; but that of Men only *federal*; that is, artificial, or rather moral; held together by no other than moral Ties, which do not in the leaſt extinguiſh the natural Difference of Mens Inclinations, the Roughneſs of their Tempers, and the Power which they have of taking quite contrary Meaſures. To all which we may add this farther Conſideration, that in the Kingdom of the Bees there is no ſovereign Authority properly ſo call'd [3] (tho' this be the very Life and Soul of a Community) for which reaſon their Monarch is not arm'd with a Sting. And therefore 'tis the greater Miracle of Nature, that

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[a] *Panegyr.* c. 61. n. 2.

[b] *Vid.* Tacit. *Annal.* I. *c.* 32.

[c] Compare the Diſcourſe of *Polybius*, on the Vices of the *Athenian* Commonwealth, *l.* 6. *c.* 45.

[d] *L.* 6. *ſ.* 54.

Mr. Barb. *NOTES on* § IV.

[1] *De Cive*, *c.* 5. *ſ.* 5.

[2] *V.* Virgil. *Georg.* 4.

> ——*Rege incolumi, mens omnibus una;*
> *Amiſſo, rupere fidem.*——

> Their Prince ſecure, one common Mind they bear;
> But, him once loſt, with wild Diſtraction jar [a].

Yet here it ought to be well obſerv'd, that the Compariſon, thus purſued, between the two Multitudes, one of Men, the other of Bees, hath been alledg'd to no other End, but to ſhew why, in a great Body of Men, deſtitute of the Advantages of civil Government, no long Agreement or good Underſtanding can reaſonably be expected. But we would by no means be thought to inſinuate, as if theſe Inclinations, in which the Seeds of Diſcord are contain'd, were found to be of equal Force and Efficacy in each particular Man; or, as if ſound Reaſon did not, from the bare Conſideration of human Nature, ſuggeſt ſuch Arguments, as muſt engage and command Men, rather than any other Animals, to follow Concord and mutual Kindneſs. And therefore our Deſign in this Matter is not in the leaſt thwarted by a learned Author [b], who hath undertaken to retort theſe ſix Reaſons of Mr. *Hobbes*, by ſhewing, that as Man naturally loves Honour, ſo Honour is the natural Reſult of good Actions; that he more perfectly underſtands the Force of the publick Good, in ſecuring his own private Intereſt; that he enjoys the Gift of Reaſon, which equally diſpoſeth him, as his Lot ſhall fall, to govern or to obey; that he hath the Art of enlivening and adorning his rational Faculty, by ſetting an Edge and a Grace upon it, with the moſt proper Expreſſions; that he apprehends himſelf to be under the Guidance of a Law, by the Power of which he diſtinguiſheth a down-right Injury, from a Damage offer'd without Injury; laſtly, that Agreements made amongſt Men are not only ſtrengthen'd and confirm'd by Nature for a long Continuance, but do likewiſe receive from Art, as the Aſſiſtance of Nature, many Defences againſt leſs uncertain Dangers, and, by means of Writing, a Duration beyond the Age of Man. The Argument doth not at all affect *us*, unleſs it could make out, that a numerous Body of Men, united under no common Government, might not be diſturb'd by a very few: As likewiſe, that all Men are judicious and wiſe, and do, after the cleareſt manner, apprehend the Dictates of ſober Reaſon, and have utterly diſabled all their evil Affections and Deſires. He certainly erects a civil State upon no better than a ruinous Bottom, who makes too large Allowances to the Modeſty and Ingenuity of Mankind; and meaſures the Integrity of others, eſpecially of the loweſt Rabble, by his own.

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[1] The Government among ſuch Creatures is but pretended and Chimerical. See *Algernoon Sidney*'s Diſcourſe of Government, *c.* 2. ſ 8.

[2] *Ariſtoph.* Acharn. ver. 350. *Plin.* L. 1. Ep. 20. n. 17, *&c.* Ed. *Cellar.*

[3] Tho' by a kind of Miracle in Nature, the whole Hive diſperſe themſelves, aſſoon as their King leaves them. V. *Senec.* DeClementia, L. 1. c. 4, & 19.

[a] V. *Virgil.* Georg. L. 4. v. 212, *&c.* Add. *Xenophon. Cyropæd.* l. V. c. 1.

[b] Bp. *Cumberland* de L. N. c. 2. ſ. 22.

V. But what that is which we may depend upon, as ſufficient for the long keeping together the Conſents and Inclinations of an united Multitude, will eaſily appear to one that throughly examines the common Bent and Genius of Mankind. Now in this there are two Vices to be diſcover'd, which eſpecially hinder any Number of Perſons from long continuing in the ſame general Deſign. One is, the great Variety of Inclinations and Judgments, about diſcerning what is moſt expedient for the common End: To which there is join'd, in many Men, a Dullneſs of apprehending which, of ſeveral Means propos'd, is more advantageous than the reſt; as likewiſe, the obſtinate Stubbornneſs in defending what they have once, right or wrong, happened to embrace. The other general Vice is a ſluggiſh Coldneſs in Buſineſs, and an Averſion to doing willingly what we know to be for our Intereſt; when we are under no neceſſary Force, which might drive us on, if we hung back, and oblige us, whether we will or no, to the Performance of our Duty. The former of theſe Evils may be remedied, by uniting in a perpetual Bond the Wills of all the Parties, or by ſo ordering things, that in all Affairs relating to the common Good of the Society, there ſhould be but one Will to govern their Proceedings. The latter, by conſtituting ſome Power, which ſhall be able to inflict a preſent and ſenſible Puniſhment, on thoſe who oppoſe or hinder the publick Benefit. *Tully* [a] hath a remarkable Saying to this Purpoſe: *They obſerve* (ſpeaking of the *Ariſtotelians*) *that even the Paſſion of Grief was not conſtituted by Nature, without our great Uſe and Advantage; that Men taken in Offences might be heartily troubled at the Correction, the Reproof, the Ignominy, which they undergo. For they, who can bear Infamy and Reproach without Concern, ſeem to have obtain'd the Privilege of ſinning with Impunity.*

Now the Union of Wills could not poſſibly be compaſs'd in any of the following ways: Either that by a natural Conjunction the Wills of all the Parties ſhould be amaſs'd into one; or that one Perſon only ſhould exert his Will, and all the reſt ſuppreſs theirs; or that the natural Diſagreement of Inclinations and Contrariety of Deſires ſhould by any means whatſoever be abſolutely taken away, and combined in perpetual Harmony and Concord. The only Method then, by which many Wills may be conceiv'd as join'd together, is at leaſt this; that each Member of the Society ſubmit his Will to the Will of one Perſon, or of one Council; ſo that whatever this Perſon or this Council ſhall reſolve, in Matters which neceſſarily concern the common Safety, ſhall be deem'd the Will of all in general, and of each in particular. For when I have made over my Power to another, his Act and Choice is interpreted as mine [b].

So again, as to the other Remedy propos'd, 'tis impoſſible to conſtitute ſuch a Power as ſhall be formidable to the whole Multitude, by natural Means; that is, by transfuſing the real Strength of all and each of them into one Perſon, ſo as to leave all the reſt utterly weak and impotent. But one Man can thus only be ſuppoſed to poſſeſs the Strength of all, when the whole Body, and every particular Member, have obliged themſelves to uſe and apply their Strength, as he ſhall judge expedient. When this Union of Will and of Forces is once compleated, thence at laſt ariſeth what we call a Commonwealth, or civil State, the ſtrongeſt of all *moral Perſons*, or *Societies*.

What hath been offer'd may perhaps be more diſtinctly underſtood, if we conſider, that by the Submiſſion of their Wills, made on the part of the Subjects, their *natural* Liberty of Choice is not extinguiſh'd; by virtue of which they are ſtill able, *de facto*, to reſume what they once gave, and to deny and withdraw their Obedience which they promis'd: As likewiſe, that the Strength and Power of the Subjects are not by any natural Conveyance transferr'd really on the Sovereign, as if, for Inſtance, the Strength, which lay in the Shoulders of all the Subjects, ſhould be removed to the Prince's Shoulders; and conſequently that both the Wills and the Strength of thoſe who are govern'd, are, as we may ſay, turn'd into the Scales, and render'd conformable to the Governour's Pleaſure, only by theſe two *moral Weights*, which we come now to examine. The firſt is taken from their own Act and Covenant, by which they engage their Allegiance: And this receives all poſſible Force from the Command of GOD, and from the ſacred Authority of an Oath; both which are ſo much the more effectual in over-ruling Mens Minds, the more carefully the Parties have from their Childhood been educated with good Diſcipline and Inſtruction, and the more Knowledge they have obtain'd of the Neceſſity and Uſefulneſs of civil Government. But they, who, through the extreme Pravity of their Mind, reſiſt the Force of this Weight, whilſt they either fooliſhly imagine Government to be a Stratagem found out for the vexing and oppreſſing of all others, to ſatisfy the tyrannical Pleaſure of a few; or elſe are overcome with a heavy Liſtleſsneſs, rendring them averſe to the voluntary Performance of what their Duty requires; theſe, we ſay, are drawn to obey their Superiors, by that other Weight which we have ſtill in reſerve; that is, by the Fear of Puniſhment, and by external Compulſion. Farther, ſince he who compels Another, ought to ſurpaſs him in Strength, and ſince that Strength, by which Governours exceed the Force of private Perſons, ariſeth from hence, that the Subjects are ever ready to apply their united Power, as they ſhall be commanded; hence 'tis evident, that the Ability, which Rulers have to compel and reſtrain evil and diſobedient Subjects, is owing to the Obedience of the Good. Now, that the greater Part of a Nation's Strength ſhall always be in the Hands of the Sovereign, 'tis eaſy for him to effect [1]; provided that he firſt obtain'd his Crown by lawful Means, and that he expreſſeth any tolerable Care and Endeavour towards the Diſcharge of his Truſt. For as he may ever reaſonably hope, that the Majority of the Subjects will be mindful of the divine Command, and of their Oath of Allegiance and Fealty; ſo 'tis indeed ever the Intereſt of the larger and better Part of the People, that the State ſhould remain ſecure and undiſturb'd, that the lawful Government ſhould be maintain'd in its due Privileges and Authority. But beſides all this, Governours have ready at Hand certain uſeful Engines, which afford a vaſt Addition to their Power; ſuch as are good Fortreſſes and a ſtanding Force, engaged to the Prince by more than ordinary Ties; by means of which Aſſiſtances, a Multitude, how numerous ſoever, may be reduced to Obedience, eſpecially if they want Arms, and are ſcatter'd at a wide Diſtance, through the ſeveral Parts of the Country; and in caſe the Sovereign uſeth due Caution, to hinder his People from bandying into Factions.

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[a] Tuſc. Quæſt. l. IV. *c.* 20.

[b] *A good Man ſubmits his own Judgment and Choice to the Governour of the Univerſe, as good Subjects do to the Laws of the State.* Arrian. Epictet. *l.* I. *c.* 12. *p.* 118.

VI. That the Union, which we have been thus explaining, may be more throughly apprehended, we are to know, that many natural Perſons, before they cloſe into one moral Perſon, whatever they act, and whatever Obligations they take upon themſelves, they act and undertake in their ſingle Capacities, ſo that the Number of the Actions and Obligations is equal to the Number of the natural Perſons. And tho' often, when we would denote many independent Men, we uſe the Word *Multitude*, which ſeems to imply ſome kind of Unity; yet if we conſider more exactly, this Term is not one of thoſe which we call *collective* Words, or ſuch as ſignify an united Body, compoſed of many Individuals, as thoſe other Names of an *Army*, a *Navy*, an *Aſſembly*, a *Senate*, and the like; but really imports no more than a bare Number of things in general, without ſpecifying whether they be of the ſame or different kinds, whether they be united or diſpers'd. And therefore, properly ſpeaking, a *Multitude* of Men is not one compound Body, but many ſeparate Perſons, each of which hath his own Judgment, and his own Will to determine him in all Matters that ſhall be propoſed. For which reaſon, if we thus conſider a *Multitude*, and then abſtract it from the particular Man, of whom it conſiſts, we cannot aſcribe to it, in this general Notion, any one Action diſtinct from thoſe of the private Perſons, or any peculiar Pivilege or Right. Hence ſuppoſe a Man to be in a *Multitude*, or to have many other Men about him, not join'd in a common Society; ſhould moſt, or ſhould all the reſt of theſe perform any Act, or engage in any Compact, while he alone enters his Diſſent to the Buſineſs, or, negatively, doth not any way approve or partake of it, the ſaid Act or Compact ſhall on no account affect his Perſon. So that, on the whole, to join a Multitude, or many Men, into one *compound Perſon*, to which one general Act may be aſcribed, and to which certain Rights belong, as 'tis oppoſed to particular Members, and ſuch Rights as no particular Member can claim ſeparately from the reſt; 'tis neceſſary, that they ſhall have firſt united their Wills and Powers by the Intervention of Covenants; without which, how a Number of Men, who are all naturally equal, ſhould be link'd together, is impoſſible to be underſtood.

VII. The Nature and the Number of thoſe Covenants, by the Mediation of which a civil State is compacted, may be diſcover'd by the following Method of Enquiry. Let us conceive in our Mind a Multitude of Men, all naturally free, and naturally equal, going about voluntarily to erect themſelves into a new Common-wealth: Here it will be neceſſary, firſt of all, that they covenant each with each in particular, to join into one laſting Society, and to concert the Meaſures of their Welfare and Safety, by the publick Vote (tho', in a Compact of this Nature, 'tis the moſt uſual way, for particular Perſons, to reſerve to themſelves the Liberty of departing, if they ſhall ſee fit [2].) This Covenant may be made either abſolutely or conditionally. The firſt is done, when a Man engageth himſelf to ſtick to this Society, whatever Form of Government ſhall afterwards be approved of by the major Part: The latter, when the Perſon engaging adds this Clauſe, provided ſuch a Form ſhall be introduced, as is agreeable to his private Judgment. Farther, when this Covenant is to be tranſacted, 'tis requiſite that all and each of them give their Conſent. He that ſhall diſagree, tho' he may happen, for ſome time, to continue in the ſame Place with the reſt, yet ſtands without the Bounds of the riſing State, nor is obliged by the Vote of his Fellows, tho' the greater Number, ſo as to be under any Neceſſity of joining himſelf to the new Eſtabliſhment; but he remains under his natural Liberty, in which it ſhall be lawful for him to provide for his private Security, according to his own Meaſures. But after ſuch a Society, repreſenting the firſt Rudiments and Beginnings of a State, hath been united in the manner deſcribed, it is then farther neceſſary, that a Decree be made, ſpecifying what Form of Government ſhall be ſettled amongſt them. For before this Point is adjuſted, 'tis impoſſible they ſhould take any regular Step towards maintaining the Safety of the Publick. Now when Matters are come to this Iſſue, they who join'd themſelves in the Society upon abſolute Terms, ſhall, if they deſign to continue longer in the Place where the Society is fixed, be bound by the Agreement of the Majority, to acquieſce in the Form eſtabliſh'd, tho' their own Opinion more incline to ſome other Model. For, by adding no Exceptions to the Covenant, they are preſum'd to have, in this reſpect at leaſt, ſubmitted to the Will of the greater Number; from whom it can with no manner of reaſon be expected, that they ſhould quit their own Judgment, to comply with a few that obſtinately ſtand out. But on the other hand, they who entred themſelves in the Society upon Conditions, unleſs they expreſly conſent to the Government reſolv'd upon, ſhall not become Members of the new State, nor be concluded by the Vote of the Majority.

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[1] Mr. *Le Clerc* (in his Additions to *Moreri*'s Dictionary, at the bottom of the Article of *Calvin*) ſays, That Princes who have but a moderate ſhare of Integrity, may be almoſt ador'd by their Subjects.

[2] See hereafter in B. 8. c. 11. ſ. 2.

VIII. After the Decree hath paſs'd, to ſettle the particular Form of Government, there will again be Occaſion for a new Covenant, when the Perſon or Perſons, on whom the Sovereignty is conferr'd, ſhall be actually conſtituted; by which the Rulers, on the one hand engage themſelves to take care of the common Peace and Security, and the Subjects on the other hand to yield them faithful Obedience; in which likewiſe is included that Submiſſion and Union of Wills, by which we conceive a State to be but *one Perſon*. And from this Covenant the State receives its final Completion and Perfection. But now, if the Form eſtabliſh'd ſhould happen to be a Democracy, this latter Covenant doth not ſo manifeſtly appear; becauſe the ſame Perſons are in different reſpects Sovereigns and Subjects: Whereas every Covenant requires two diſtinct Parties. Nor doth the different Reſpect ſeem a ſufficient Diſtinction; as, for Inſtance, when the ſame *Titius* is ſaid to be a Father, a Son, a Husband, a Son in Law, a Father in Law, a Merchant, *&c.* for here if this *Titius*, as a Merchant, ſhall promiſe any thing to the ſame *Titius*, as a Father, there is no Covenant in the Caſe. We are therefore to underſtand, that, in a popular Government, the particular Members and the Sovereign Aſſembly are not only diſtinguiſh'd by different reſpects, but are really different Perſons (tho' not of the ſame kind) who have diſtinct Wills, diſtinct Acts, and diſtinct Rights from each other. For the Will of particular Men is not immediately the Will of the People; nor can what particular Men ſhall happen to do, be conſtrued as the People's Acts, or *vice versâ*. Again, particular Men neither enjoy the Sovereignty, nor any Part of it, but 'tis lodg'd in the Body of the People. For to have a Part of the Sovereignty, and to have a Vote in that Aſſembly in which the Sovereignty reſides, are two different things. So that hitherto there ſeems to be no reaſon why we may not ſuppoſe a Covenant to paſs between the general Aſſembly, and the private Members of the State. One thing indeed there is, which may be urged, with ſome Colour, to the contrary: 'Tis, that ſuch a Covenant would be of no manner of Uſe; becauſe each Man by giving his Conſent to the ſetting up of a Democracy, is, at the ſame time, preſumed to have ſubmitted his Will to the Will of the major Part; and beſides, the Love that he hath for his own Perſon and Fortunes, ſeems to lay a ſufficient Neceſſity on any Man to labour with his utmoſt Ability for the publick Good, with which his own private Welfare is inſeparably united. However, altho' it may not perhaps be altogether ſo neceſſary in Democracies, as in other Governments, that this Covenant, or mutual Engagement for performing the reſpective Duties of Sovereign and Subject, ſhould be openly and expreſly made; yet 'tis abſolutely requiſite, that we ſuppoſe it to have paſs'd by tacit Agreement. For whether we look on the firſt Decree, for the Eſtabliſhment of the Democracy, as the bare Act of many Wills conſpiring in one Deſire, or as the Covenant of each Man with each, to this Purpoſe, *I will ſubmit my Will to a general Aſſembly for us all, upon Condition you will do the like*: Yet from all this, thus ſtrictly conſider'd, there can no other Obligation ariſe, but what follows, that every Perſon ſhall be bound to acquieſce in this particular Form of Government, ſo long as 'tis not alter'd by univerſal Conſent. But now the Subjects in a popular State are certainly under a farther Obligation. For firſt, each Member is bound to ſtand to ſuch Decrees and Commands as ſhall proceed from the general Aſſembly; and then again, they are engaged, every one in particular, to contribute each his utmoſt Service to the State, and to prefer the publick Good to his own private advantage [a]. Otherwiſe, on what Pretence ſhould any Man be puniſh'd, for not giving Attendance at the publick Councils? Since then ſuch an Obligation is evidently diſcover'd, there muſt of Neceſſity be ſome Principle whence its Origin is derived; and this can be nothing elſe but the Covenant of which we have been now diſcourſing.

But, if the Society agree to erect an Ariſtocracy, or a Monarchy, then this latter Covenant is far more viſible. For upon creating the Senate, or the Prince, both Parties interchange their mutual Faith, and mutual Performances thence ariſe, as their neceſſary Duty. In as much, as after the Sovereignty hath been once conferr'd and receiv'd, the Prince or the Senate, no leſs than the Subjects, ſtand bound to diſcharge certain Offices, with which they were not before concern'd: The People, before the paſſing of this Covenant, being no more engaged to obey one Man, or one Council of Men, than that Man, or that Council of Men were engaged to undertake the Care of the Publick. But now, from what Principle could this mutual Faith and Obligation to Duties, which were not required before, take their Riſe, but from Covenant?

What we have hitherto deliver'd, concerning the two Covenants, and the one Ordinance or Decree, may be illuſtrated by that Account, which *Dionyſius Halicarnaſſæus* [1] gives us of the firſt Settlement of the Monarchy in *Rome*. For here, firſt of all, a Number of Men flock together, with Deſign to fix themſelves in a new Seat; in order to which Reſolution a tacit Covenant, at leaſt, muſt be ſuppoſed to have paſs'd amongſt them. After this, they deliberate about the Form of Government, and that by Kings being preferr'd, they agree to inveſt *Romulus* with the ſovereign Authority. And this holds too in the Caſe of an *Interregnum*, during which, the Society being held together only by the prime Compact, it is frequent to enter the Debate about the Frame and Model of the Common-wealth [a].

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[a] In *Thucydides*, a Member of a Democratical State, unacquainted with publick Affairs, is ſtyl'd an *uſeleſs Citizen*, l. 2. c. 40. *Ed. Oxon.* *Socrates*'s Diſpute with *Charmides* in *Xenophon*, Memorab. *l.* 3. *p.* 486.

[1] B. II. in the Beginning.

We ought carefully to obſerve, that this Method of producing and conſtituting a civil State, by the means of two Covenants and one Decree, is the moſt natural, and what agrees in general to every kind of Government [1]. Yet a Monarchy may ſometimes happen to be conſtituted by one Covenant alone; as ſuppoſe many Perſons, without any antecedent Agreement amongſt themſelves, ſhould at the ſame or a different time, each Man for his own Perſon only, ſubject themſelves to a ſingle Maſter, almoſt in the ſame manner as an Army, which is form'd out of Strangers and Mercenaries, who come from all Parts to offer their Service. So again, they who join themſelves to a Community already eſtabliſh'd, have need of one Agreement only, by which they, on their own part, petition to be admitted into the State; and on the other part they who repreſent the State, upon Security given for their Obedience, admit and receive them.

It would be an unjuſt Suſpicion, in any Perſon, to imagine that what we have offer'd about theſe Covenants, in making them the Cauſe and Foundation of a civil State, is purely our own arbitrary Fiction; becauſe the firſt Riſe of moſt Govrnments is unknown, or at leaſt we do not certainly apprehend them to have been compoſed and cemented after the manner here deſcribed. For 'tis certain every State once had its Beginning [2]. But now, before the fixing of any State, the Perſons, of whom it was to conſiſt, could not be united to each other, by the ſame Ties as they are after the State is actually ſet up; nor could they yet be ſubject to thoſe, to whom afterwards they owe Subjection. And ſince we cannot underſtand, how either this Union, or this Succeſſion could be made, without the Covenants or Agreements before mentioned, it is neceſſary that the ſaid Agreements muſt tacitly at leaſt have paſs'd in the Inſtitution of Common-wealths. Nor is there any thing to hinder, but that the Original of ſome things, not committed to the Monuments of Time and Hiſtory, may be traced out by the Diſquiſitions of Reaſon.

IX. It may be worth our while, on this Occaſion, to examine with particular Strictneſs the Opinion of Mr. *Hobbes*, who, in the Generation of States, acknowledgeth no more than one Covenant of each Man to each Man; frequently repreſenting and declaring, that there paſſeth no Covenant between the Prince, or the Senate, and the Subjects. Indeed, we may eaſily gather from the Deſign of his Books of Policy, which is clearly diſcover'd in the *Leviathan*, the Reaſon that put him upon this Aſſertion.

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[a] See the Debate of the *Perſian* Nobles in *Herodot. Thalia*, p. 121, *&c.* and of *Brutus* and his Aſſociates, in *Dionyſ. Halicarn.* l. 4.

[1] Mr. *Buddeus* (in his *Practical Philoſophy*, Part 2. c. 4. ſ. 13 § 4.) ſays, *that Philoſophy teaches us the ſame concerning the Origin of States; but, if we conſult Hiſtory, we ſhall ſcarce find one Example of any State that has been form'd by ſuch expreſs Compacts.* And indeed (as Mr. *Titius* remarks, *Obſerv.* DLV) the firſt *Covenant* and the general *Decree* relating to the Form of Government, had nothing to do with the Eſtabliſhment of all Civil Societies, not even of thoſe that appear'd the earlieſt in the World, which (as I have obſerv'd in the firſt Note on the ſeventh Section of the preceding Chapter) plainly owe their Riſe to the Cunning and Management of ſome ambitious Mind, ſupported by *Force*. In that Caſe, Subjects did not make any Covenant among themſelves, but only treated every one for himſelf, with him to whoſe Government they ſubmitted: And much leſs, had the new *Comers*, who afterwards join'd themſelves to ſuch Society, when there was already an acknowledg'd *Sovereign*, any Buſineſs to treat with any other elſe but him, as our Author himſelf owns. As for thoſe, who afterwards join'd themſelves ſeveral of 'em together with an Intention to leave the Independency of a State of Nature, and to form a new *Civil Society*; we muſt acknowledge, that they were oblig'd to engage themſelves, the one towards the other, for ever to unite their Forces together for their mutual Preſervation and Security. But beſides, that this *Covenant* was rather *tacit* than *expreſs*; it was only made but for a Time, and in view of a ſecond, with reſpect to which it was what *Scaffolds* are with reſpect to the Structure they ſerve for the bulding of. So that we may ſay, that the reciprocal *Covenant* between Sovereign and Subjects is what properly conſtitutes a *State: A Covenant* which is the Foundation of all Government, tho' it is often only *tacit*.

[2] ‘It is not at all to be wonder'd at, ſays Mr. *Locke* excellently well, in his ſecond Treaiſe of Civil Government, Chap. vii. Sect. 101, *&c.* that Hiſtory gives us but a very little account of Men that liv'd together in the ſtate of Nature; the Inconveniency of that Condition, and the want of Society no ſooner brought any number of them together, but they preſently united and incorporated, if they deſign'd to continue together. And if we may not ſuppoſe *Men* ever to have been in *the State of Nature*, becauſe we hear not much of them in ſuch a *State*, we may as well ſuppoſe the Armies of *Salmanaſſer* and *Xerxes* were never Children, becauſe we hear nothing of them till they were imbodied in Armies. Government is ever antecedent to Records, and Letters ſeldom come in among People, till a long Continuation of Civil Society has, by other neceſſary Arts, provided for their Safety, Eaſe, and Plenty. And then they begin to look after the Hiſtory of their Founders, and to ſearch into their Original, when they have out-liv'd the Memory of it. For 'tis with Commonwealths as with particular Perſons; they are commonly ignorant *of their own Births and Infancies*: And if they know any thing of their Original, they are beholden for it to the accidental Records that others have kept of it. And thoſe that we have of the beginning of any *Polities* in the World, excepting that of the *Jews*, where God himſelf immediately interpos'd, are all either plain Inſtances of ſuch a Beginning as I have mention'd, or at leaſt are manifeſt Footſteps. He muſt ſhew an Inclination to deny matter of Fact, who will not allow that the Beginnings of *Rome* and *Venice* were by the uniting together of ſeveral Men *free and independent of one another*, among whom there was no Superiority or Subjection: And if *Joſeph Acoſta*'s Word may be taken, he tells us (Lib. 1. Cap. 25.) *that in many parts of* America *there is no Government at all: There are great and apparent conjectures*, ſays he, *that theſe Men*, ſpeaking of thoſe of Peru, *for a long time had neither Kings nor Commonwealths*, but liv'd in Troops, as do this *Day in* Florida, *the* Cheriquanas, *thoſe of* Brazil, *and many other Nations, which have no certain* King, but as occaſion requires either in Peace or *War, they chooſe their* Captains as they pleaſe. And I hope thoſe who went away from *Sparta* with *Palantus* mention'd by *Juſtin*, Lib. III. Cap. IV. will be allow'd to have been *free Men independent of one another*, and to have ſet up a Government over themſelves, by their own Conſent. See *Algernoon Sidney upon Civil Government*, Chap. III. Sect. XXV, XXXIII.

His principal Aim was to oppoſe thoſe ſeditious and turbulent Spirits, who in his time labour'd to bring down the regal Power to their own Model, and either utterly to extinguiſh, or to render it inferior to the Subjects. To cut off from theſe Men their ordinary Plea for Rebellion, which was, that there is a reciprocal Faith between the Prince and the People, and that when the former departs from what he engaged by Promiſe, the latter are releas'd from their Obedience; as alſo to hinder reſtleſs and factious Perſons from interpreting every Action of their Prince, which ſuited not with their own Humour, as a Breach of his Faith; he reſolves to deny that there is any ſuch thing as a Covenant between Subjects and their Sovereign. And having undertaken to maintain, that every Monarch, properly and truly ſuch, hath an abſolute and unlimited Power; it follow'd of courſe, that he ſhould exclude all Covenants or Compacts from this Affair, becauſe theſe ſeem to be the chief Inſtruments of reducing Authority to Bounds and Rules. But now, although it highly concerns the Intereſt of Mankind, that the regal Power ſhould be kept ſacred and inviolable, and be ſecured from the impertinent Cavils of thoſe buſy Deſigners, who are always plucking at it; yet this Conſideration doth by no means make it neceſſary for us to deny what is as clear as the Light, and to acknowledge no Covenant, in a Caſe where there is certainly a mutual Promiſe for the Performance of Duties not before required. Whilſt I voluntarily ſubject my ſelf to a Prince, I promiſe Obedience, and engage his Protection: On the other hand, the Prince, when he receives me as his Subject, promiſeth his Protection, and engageth my Obedience. Before this reciprocal Promiſe, neither was he bound to protect me, nor I to obey him, at leaſt by any *perfect* Obligation. And who will pretend to ſay, that an Act of this kind doth not fall under the Head of Covenants? Nor is this Covenant uſeleſs, becauſe they, who by their own free Choice appoint a King over themſelves, ſeem before-hand to have entred into an Agreement for the advancing ſuch a particular Perſon to the Throne. For as the bare Election, without the Acceptance of the Party elected, confers on him no Power over the reſt; ſo 'tis plain enough, from the Nature of the Buſineſs, that they who freely put themſelves under the Power of another, deſire he ſhould, in the Exerciſe of that Power, purſue the End for which it was given him: And that he receiv'd the Power on this Condition, that thoſe who conferr'd it on him ſhould not, by his means, miſs of their Aim. They who create a Sovereign therefore, as they at the ſame time promiſe whatever the Nature of Subjection requires; ſo, on the other part, engage him to endeavour the procuring of all thoſe Benefits, for the ſake of which civil Governments are introduced. And what can we call this but the entring into Covenant?

X. Nor, upon admitting this Covenant between Prince and People, do thoſe Inconveniences, to which Mr. *Hobbes* ſeems to have had an Eye, neceſſarily follow. This indeed is common to all Covenants, that they lay upon Men an Obligation to ſome certain Performance. But then, there is the greateſt Difference imaginable between thoſe Covenants, in which one of the Parties doth, at the ſame time, put himſelf under Subjection to the other, and thoſe, in which neither Party requires, with reſpect to the other, any Superiority or Command. Thus the Right of a Maſter over his Servant, at leaſt over ſuch an one as freely enters into that Condition, depends upon Covenant; and in the ſame manner the Authority of a Father over him that offers himſelf to be adopted, and the Command of a General over his mercenary Troops. And yet this doth not hinder, in the leaſt, but that in all theſe Caſes there is a Right of governing on the one ſide, and an Obligation to Obedience on the other: Nor may the Party in Subjection throw off the Yoak, when his Superior's Command proves diſagreeable to his own Humour [a]. For, in all theſe Covenants, which do not include a Submiſſion of Will and of Strength, ſome certain Duties are ſpecified, to be mutually perform'd on the inward Principle of Conſcience; and when either Party refuſeth voluntarily to fulfil his Engagement, there remains no Redreſs, but either from War and Violence, or from the Compulſion of their common Lord. But in Covenants, where one of the Parties is made ſubject to the other, the latter may, as he thinks fit, preſcribe what ſhall be done by the former; and hath likewiſe a Power of forcing his Compliance, in caſe of Refuſal; whereas the former Party cannot, on any account, be ſaid to hold the like reciprocal Power over him. Wherefore a Governour cannot be tax'd with Breach of Covenant, unleſs he either utterly abandon all Care of the Publick, or take up the Mind and Carriage of an Enemy towards his own People, or manifeſtly, and with evil Deſign, recede from thoſe Rules of Government, the Obſervation of which was, by the Subjects, made the neceſſary Condition of their Obedience. And 'tis very eaſy for one in Authority to avoid and eſcape all thoſe Imputations, provided he will but conſider, that the higheſt of mortal Men are not exempt from the common Laws which attend their Fortune and Condition, and that as *Pliny* [b] obſerves, *No Prince was ever himſelf deceiv'd, who had not before deceiv'd others.* Laſtly, that Prince muſt either be extremely vicious, or extremely weak and impolitick, who cannot ſo order Matters, as that it ſhall be always the Intereſt of the greater, or the ſtronger Part of the People to ſee him preſerv'd in his Perſon and Government. And it may be a ſtrong Motive to him, to apply his beſt Endeavours towards the compaſſing this good End, if he barely reflect on that Saying in *Livy* [c];

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[a] Xiphilin. *Epit.* Dion. *in* Neron. *All Sovereign Force and Authority, when conferr'd by a private Perſon, paſſeth immediately from the Giver, and holds good againſt him in the Hands of the Receiver.*

[b] *Paneg.* c. 66. *in fin.*

[c] L. 8. c. 21.

Is it to be imagin'd, that any People, or ſo much as any ſingle Man, will continue longer than they needs muſt, in a Condition which is grievous and uneaſy to their Mind? If then the Majority of the People find it their Intereſt to ſtand by their Prince, and to defend the publick Adminiſtration as lodg'd in his Hands; as they cannot but do, if he guide his Councils with Juſtice and Wiſdom, then his Fortune reſts upon a Bottom. He that cannot compaſs thus much is fitter for any other Imployment, than for Sovereignty and Command.

XI. Let us proceed to weigh more particularly the Reaſons urg'd by Mr. *Hobbes* in favour of his Opinion. And here, firſt of all, we think it very inconvenient, that he ſhould go about to derive the Obligation of Subjects towards their Sovereign, from *ſuch a Covenant by which each Man obligeth himſelf to each of his Fellows, that he will not reſiſt the Will of that Perſon, to whom he hath yielded himſelf to be govern'd* [a]. Indeed, they who have agreed amongſt themſelves, to confer the Sovereignty on a certain Man, are preſumed to have agreed likewiſe, that they ſhould all ſubmit their own Will to his Will; or, that, in the Management of the Commonwealth, his Will ſhould repreſent the Will of them all. Nor is it unuſual to ratify ſuch a Conſent about conferring the Sovereignty, as alſo the Terms under which it is conferr'd, by the mutual Covenants and Oaths of the People. Yet to agree about inveſting ſuch a Perſon with the Government, and to confirm their Inveſtiture by interchanging their Faith one with another, are two different things. But to go farther, there's no Abſurdity in ſuppoſing, that Subjects ſhould mutually engage their Faith to yield Obedience to their common Prince; as we know, there are ſuch Covenants in which all engage for each, and each for all. Yet there is no Neceſſity, but that this may entirely be omitted, and in Fact 'tis ſeldom practis'd. When a Stranger is incorporated into a State, he ſwears Allegiance to the Sovereign: But he is now here required, ſo far as we can diſcover, to contract with the other Subjects about paying this Allegiance. Laſtly, it would be a thing of very dangerous Conſequence, to build our Obligation to our Prince on a Covenant with each of our Fellow-ſubjects, which would import as follows, *I transfer my Right upon the King for your ſake, that you for my ſake may transfer your Right upon him alſo.* For at this rate every Subject will ſeem to make the Obedience of every other Fellow-ſubject the neceſſary Condition of his own: And conſequently, if any one happens to violate his Engagement, all the reſt ſtand releas'd from theirs. And this Reaſon alone ſhews what Neceſſity there is that each Subject ſhould be bound to his Sovereign in his own Perſon. without any Dependence on the Obedience of others; to the end, that how uneaſy ſoever one or two perhaps appear under their Confinement, the Sovereign may make uſe of the united Strength of all the reſt, in reducing the Rebellious to their Duty.

No leſs incongruous is that Aſſertion of Mr. *Hobbes* to this Purpoſe; *That the Obligation to obey the ſupreme civil Power doth not ariſe immediately from the Covenant, by which particular Perſons give up all their Right to the State; but only mediately from hence, that without Obedience the Right of Sovereignty would have been vain and inſignificant, and, by Conſequence, no Commonwealth would have been form'd* [b]. What need of this winding and turning, when he might have gone on in the ſtraight Road? The Reaſon, which moved him to this Poſition, is certainly idle and frivolous. He proceeds upon a tacit Suppoſal, that things agreed to by Covenant cannot lawfully be refuſed; whereas a Prince may lawfully command his Subject, what the Subject may as lawfully diſobey; as if the King ſhould order me to kill my ſelf, or himſelf, or my Father, though judicially condemn'd: Wherefore, in his Opinion, the Obedience of Subjects is to be drawn from ſome other Principle, than from any Compact with the Sovereign. But now, we maintain, that the lawful Power of the Prince, and the Duty of the Subjects do exactly and compleatly anſwer one to the other: And therefore we deny, that, in any Caſe, the Subject can lawfully refuſe what the Prince lawfully enjoins. For he can lawfully enjoin no more, than what really is, or, at leaſt, is judg'd to be agreeable to the End for which civil Communities were firſt eſtabliſhed. If either, through evil Deſign, or through unwiſe Counſels, he attemps any thing contrary to this End, the Act ſhall on no account be eſteem'd lawful. But whether the Subjects may reſiſt all ſuch unreaſonable Injunctions, is properly another Queſtion, and ſhall be diſcuſs'd in another place. Mr. *Hobbes*'s Inſtances are of no weight in this Point. For, if the Prince might lawfully command any of thoſe Actions, which he mentions; that is, if the Performance of ſuch a thing, by a Subject, ſhould ſeem conducive to the Good of the Commonwealth, the Subject could not lawfully refuſe to comply [c]. And, on the other ſide, if the Commands were void of all Juſtice and Reaſon, and the Subject ſlain for not performing them; no Man in his Wits will ſay, that ſuch an one was lawfully put to Death.

As to what he affirms in the ſame Chapter [d]. That the Right of a Sovereign is conferr'd on him by the People, in the way of *Donation*;

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[a] *De Cive*, c. 5. ſ. 7.

[b] *Ibid.* c. 6. ſ. 13.

[c] See *Judges* IX. 54. 1 *Sam.* XXXI. 4. *Zonaras*, Part III. reports, that when *Theophilus* the Emperor upon the Loſs of a Battle, ſtood almoſt benumm'd with Fear, and would not ſtir out of the Field; *Manuel*, with his Sword drawn, accoſted him to this Purpoſe, *Unleſs you follow me, I am reſovl'd to kill you on the ſpot; for 'tis better you ſhould loſe your Life, than that you ſhould fix a Mark of the higheſt Diſgrace on the* Roman *State, by falling into the Hands of the Enemy.* At which Threats the Emperour, with ſome Unwillingneſs, awaken'd from this Lethargy, and following his Guide, got off ſafe. The Poet *Quint. Calab.* l. 13. obſerves,

A Prince ſhould rather *fall* amongſt the Brave,
Than wear the Badges of a *Royal Slave.*

[d] *Sect. ult. in fin.*

this is not ſo much as conſiſtent with his own Notions. *Donation* he himſelf allows [a] to be the transferring of Right from one Party to another, without the like Return. But now when a Prince is inveſted with the Sovereignty, there is a mutual transferring of Right, or a reciprocal Promiſe. The Subjects engage to be obedient, the Prince to take care of the Commonwealth, to which Duties neither of them ſtood bound, before this Act paſſed between them. For, as before the Government was conferr'd on ſuch a Perſon, the reſt of the Society might have oppoſed or reſiſted his Command, though they afterwards appoint him for their Sovereign; ſo he on his part, if they had demanded his Care or Protection, might likewiſe have reſiſted them; that is, might have denied thoſe Performances, as things which they had no Right to require of him [b].

XII. The other Set of Reaſons, which he makes uſe of [c] to overthrow all Compacts between Prince and People, will appear to be no leſs weak than the former. In the firſt place, he undertakes to prove that democratical States are conſtituted, not by Covenants between each Man and the whole People, but between each Man and each Man. His Argument is: ‘Becauſe, in every Covenant, the Parties covenanting muſt exiſt antecedently to the Covenant it ſelf. Whereas before the Settlement of the State, the *People* cannot be ſaid to exiſt, as being not one compound moral Perſon, but only a Multitude of Individuals. And then again, after the State is ſettled, to enter into ſuch a Covenant would be to no Purpoſe; becauſe the Will of the People includes in it the Will of any private Subject, to whom the People muſt be ſuppoſed, in this Caſe, to engage their Faith; ſo that they may releaſe themſelves when they pleaſe, and, by Conſequence, are actually free. But now 'tis manifeſt, that there's a Medium between theſe Suppoſitions. Before the Settlement of the State, many Men are not indeed a *People*, that is, a democratical Community: Therefore no Covenant can be made with them as ſuch. And ſo too, after the State is ſettled, a Covenant of this Nature would in one ſenſe be in vain; that is, 'twould be in vain, for one or two particular Subjects, to make a private Compact with the People about the publick Adminiſtration: For he that hath once given his Conſent to the introducing a Democracy, is preſumed to have thereby obliged himſelf to obey ſuch Decrees, as ſhall proceed from the Majority of the People; which Obligation muſt needs ſuffer Prejudice from any particular Covenant. But, ſtill in the very Act of conſtituting a popular State, a mutual Covenant may, and really doth, paſs between the People and the private Members; the Nature of which we have already explain'd. A Man might argue, with juſt as much Reaſon and Conſequence, that a Husband cannot poſſibly have entred into any Covenant with his Wife: Becauſe before Marriage ſhe was not his *Wife*; and after Marriage, 'twould be in vain to come to a Covenant; the Woman's Will being then put under Subjecton to the Man's. Whereas in the very Act of taking or chooſing ſuch a Woman for a Wife, a Covenant might paſs between the Parties. *Epicurus*'s Fallacy about Death was a piece of Sophiſtry much of the ſame Strain, as 'tis recited and confuted by *Lactantius* [d] *When we are in Being, Death is not; and when Death is in Being, we are not: Therefore Death ſignifies nothing to us; or, Death and we have nothing to do with each other. What a nice Cheat was this upon our Underſtandings? As if we fear'd Death when 'twas once over, and had taken away our Senſes with it; and not rather fear'd to die, by which Act our Senſes are thus taken from us! For there is a certain Point of time, when* we *ſeem to be gone, and yet* Death *is not quite arrived. And here's the miſerable Moment, when* Death *begins its Being, and* we *conclude ours.*

But farther, ſhould a Man contend with never ſo much Earneſtneſs, that he cannot in democratical Governments, conceive ſuch a Compact in his Mind, or that he judgeth it utterly uſeleſs; yet he cannot fairly take Occaſion thence to exclude it from other Forms, where thoſe who command, and thoſe who obey, are really and naturally different Perſons. For here certainly a mutual Covenant is required, by which the former engage to undertake the Care of the Publick, and to make the Safety and Welfare of the People the chief Law of their Actions; and the latter, again engage to yield Obedience. Hence 'tis evident, what Judgment we ought to make of that other Aſſertion laid down by Mr. *Hobbes* [e] that, *becauſe the particular Members of the Society, not by any Compact with the People, but by private Covenants between themſelves, are bound to acquieſce in every Act of the People; they are, by the ſame Covenants, bound to acquieſce in that Act of the People, which transfers the Sovereign Right of the State upon a Senate, or upon a Monarch.* For 'tis no good Conſequence to ſay; if the general Aſſembly of the People agree to transfer the ſupreme Command on a Senate, or on a King, particular Perſons are bound to ſtand to their Reſolution; therefore there paſſeth no Covenant between the People, who transfer the Right, and the Nobles, or King, on whom it is transferr'd.

He has ſtill an Argument behind, of as much Strength and Weight as the reſt. He tells us, that a King, though elected by the *People*, cannot by the ſame *People* be obliged to any Performance; becauſe immediately upon his Election the *People* are diſſolv'd, and loſe the Exiſtence they had as *one Perſon*; for which Reaſon the Obligation directed towards them as one *Perſon*, doth likewiſe periſh and is diſſolv'd. Now, what he fixeth here for the Baſis of his Opinion, that the Obligation towards any *Perſon* ceaſeth, the Perſon himſelf being taken away; is to be underſtood of thoſe Caſes only, in which, either the Perſon is extinct by a natural Death, or that Quality expires in which alone the Obligation was founded. But when a free People transfer the Government on a King, neither do themſelves die in a natural Senſe, nor is the King's Obligation founded in that *Quality* of the People, which denominated them a free State; but in that by which they reſolve to be, for the future, a Society of Men under a ſingle Governour. As a Suitor who is engaged by Covenant to a young Woman, cannot after the Marriage hath been conſummated, except againſt the Contract, on pretence that his Obligation is expired, becauſe ſhe is not a Virgin now, as ſhe was when the Covenant was made. For the Obligation of a Suitor was not founded in the Quality of Virginity; but he contracted with a Virgin in order to her changing her Condition to that of a Wife. Upon the conſtituting a Monarch, the *People* are *diſſolv'd* in this reſpect only, that the ſupreme Authority doth no longer reſide in a general Aſſembly; but they are by no means diſſolv'd into a looſe Multitude, not united by any mutual Bands: For they ſtill continue one Society, held together by one Government, and by their original Covenant amongſt themſelves. The whole of the Matter therefore is this; Mr. *Hobbes* impoſeth upon leſs intelligent Readers, by the ambiguous Signification of the word *People*. In Democracies, the *People* denotes the whole Body of Men, who, in different reſpects, govern and are govern'd [a]. But who will venture to affirm, that an Obligation towards a People in this latter Senſe, or as they are ſubject to a Monarch, or to a Senate, may not continue and ſubſiſt, tho' contracted whilſt they were yet free, but in order to their future Subjection, and in certain proſpect of it? To conclude, Mr. *Hobbes* himſelf elſewhere [b] expreſly aſſerts, that God was made the King of the *Jewiſh* People by virtue of a Covenant between him and them [1]. And how then can he pretend, that there is no Covenant between a mortal King and his Subjects? A little before he delivers the direct contrary: *When a Man*, ſays he, *ſubmits himſelf to his Conqueror, he is bound by as neceſſary an Obligation as the trueſt Subject; for a Contract, lawfully entred into, can't fairly be broken or tranſgreſs'd* [2].

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[a] *Sect. ult in fin.* [b] Comp. *Luke* XII. 13, 14. [c] C. 7. ſ. 7, *&c.* [d] *Inſtitut. Divin.* l. 3. c. 17. [e] *De Cive*, c. 7. ſ. 9.

XIII. By the means of theſe Covenants then a Multitude of Men are ſo united and incorporated, as to form a civil State; which is conceiv'd to exiſt like *one Perſon* [c], endued with Underſtanding and Will, and performing other particular Acts, diſtinct from thoſe of the private Members. Again, as 'tis diſtinguiſh'd and known from the ſame Members by one general Name [d], ſo it hath peculiar Rights and ſeparate Properties, which neither particular Men, nor many in Conjunction, nor all together, without him in whom the ſupreme Authority reſides, can make any Claim or Pretences to: And laſtly, it hath peculiar Actions proceeding from it, which private Perſons can, on no account, aſſume or challenge to themſelves. So that the moſt proper Definition of a civil State ſeems to be this, [1]'' It is a compound moral Perſon, ' whoſe Will, united and tied together by thoſe ' Covenants which before paſs'd among the ' Multitude, is deem'd the Will of all; to the ' End, that it may uſe and apply the Strength ' and Riches of private Perſons towards main- ' taining the common Peace and Security [e]. Mr. *Hobbes* hath given us a very ingenious Draught of a civil State, conceiv'd as an *artificial Man*: ' In which the Sovereign is the Soul, as ' giving Life and Motion to the whole Body; ' the *Magiſtrates* and the other *Officers*, artificial ' *Joints*; *Rewards* and *Puniſhments*, faſtened to ' the Seat of Sovereignty, and by which every ' Member is moved to the Performance of its ' particular Duty, the *Nerves* which do the ſame ' in the Body natural; the *Wealth* and *Riches* of ' particular Members are the *Strength*; *Salus* ' *Populi* (the *People's Safety*) its *Buſineſs*; *Coun-* ' *ſellors*, by whom all things needful for it to ' know are ſuggeſted to it, are the *Memory*; *Equity* ' and *Laws* an artificial *Reaſon*; *Concord* is *Health*, ' *Sedition Sickneſs*, and *civil War*, *Death*. Laſtly, ' the *Pacts* or *Covenants*, by which the Parts of ' this Body politick are cemented together, re- ' ſemble the divine *Fiat*, or the *Let us make Man*, ' pronounced by GOD in the Creation [f]. Whence we may gather, by the way, that *Iſocrates* [2] was in the wrong, when he affirm'd *the Form of Government* to be *the Soul of the State*, having the ſame *Force* and *Power* as the *Mind* hath in the Body. Whereas the Form of Government is rather the ſame in the State, as in a human Body, the Structure and Diſpoſition of the ſeveral Parts and Members.

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[a] *Vid.* Hobbes *de Cive*, c. 13. ſ. 3.

[b] Leviath. *de Interregnis*, ſ. 7. *Concluſ.*

[c] Statius *Achil.* l. 1. v. 457, 458.

——— — — *Sparſa ac diſſona moles*
In Corpus vultumque coit, & rege ſub uno
Diſpoſita eſt. ———

——— A wild and ſhapeleſs Maſs
Aſſumes a Figure and a comely Grace,
Under a Monarch's Reign. ———

[d] *Vid.* L. 1. t. 8. l. 6. ſ. 1. D. *De Diviſ. Rerum*, & L. 2. t. 4. l. 10. ſ. 4. D. *De in Jus vocando*, & L. 3. t. 4. l. 7. ſ. 1. D. *Quod cujuſcunque Univerſ. Nom.* & L. 48. t. 18. l. 1. ſ. 7. D. *De Quæſtion. Add.* Senec. *de Beneficiis*, l. 6. c. 19, 20.

[e] For that Definition of *Dion. Pruſæus* (in *Boryſthenic.*) *A State is a Multitude of Men living together, in the ſame Place, under the ſame Laws*, we may perhaps hereafter find Occaſion to examine; it being founded on the Maxims of *Grecian* Policy. Nor hath *Apuleius* much better Succeſs when he defines the *Platonic* Commonwealth, as the moſt perfect Model of Government, in the following manner; from the Authority of *Plato* himſelf; *A State is a Union or Conjunction of many Men, amongſt whom ſome govern and ſome are govern'd, but all agree and mutually aſſiſt each other, guide themſelves in their Duty by the ſame Laws (ſuch as are good and juſt) and have accuſtom'd themſelves to live within the ſame Walls, and to have the ſame Inclinations and Averſions in all things.*

[f] Leviath. *Proœm.*

Mr. BARBEYRAC's *NOTES* on § XII, XIII.

[1] *Vid.* Hobbes *de Cive*, c. 35, 40.

[2] *Vid.* Hobbes *Ibid.* c. 20.

[1] This Definition is a little intricate, and as Mr. *Titius* obſerves (*Obſerv.* DLVII.) confounds the *Sovereign* with *the State*. The *State* indeed is a *Body* of which the *Sovereign* is the *Head*, and the *Subjects* the *Members*. Our Author has here too blindly follow'd *Hobbes*'s Definition *de Cive*, Cap. V. §. 9.

[2] Areopagit. *p.* 245, & Panathenaic. *p.* 450. But it ſeems to me, that *Iſocrates* is not ſpeaking there of the form of Government, and that Πολιτεία ſignifies here only Civil Government in general, which as our Author himſelf allows in the following Chapter, Sect. 1. is the Soul of the *State*. Mr. *Hertius* has lately obſerv'd the ſame thing in his Remarks on *Wolfius*'s Tranſlation, which led our Author into this Miſtake.

XIV. The State in exerting and exerciſing its Will, makes uſe either of a ſingle Perſon, or of a Council, according as the ſupreme Command hath been conferr'd, either on the former, or on the latter. Where the Sovereignty is lodg'd in one Man, there the State is ſuppoſed to chooſe and deſire whatever that one Man (who is preſumed to be Maſter of perfect Reaſon) ſhall judge convenient [1]; in every Buſineſs or Affair, which regards the End of civil Government, but not in others. For Inſtance, if a Prince declare War, if he make Peace, or enter into an Alliance, this is interpreted as the Will and Act of the State [a]: But not if he eat, or drink, or ſleep, if he marry a Wife, or if he be guilty of any Vice or Diſorder. So that we may form a Diſtinction between the publick Will of the Monarch, repreſenting the Will of the State, and the private Will of the ſame Monarch, which he uſeth like any other Man, in the Proſecution of his perſonal Affairs. Hence there naturally ariſeth this Queſtion, Whether if he, in whom the publick Will reſides, wills otherwiſe than he ought to do, and conſequently ſins in the Exerciſe of this publick Will, the Action, which proceeds from a Will thus depraved, is to be look'd on as the Action of the State? For every Perſon, who ſubmitted his own private Will to that of the Prince, is ſuppoſed to have done it with this Intention, that the Prince ſhould will nothing, but what ſhould be juſt in it ſelf, and advantageous to the Publick. Here it ſeems reaſonable to pronounce, that an Action, proceeding from the Abuſe and Corruption of the publick Will, is in it ſelf a publick Action, or the Action of the State; becauſe perform'd by the Sovereign, as conſider'd in that Capacity. Thus if a King or a Senate ordain evil Laws, execute wrong Judgment, appoint unfit Magiſtrates, or undertake unjuſt Wars, that Act in all theſe Inſtances is certainly publick. As when a Coachman overturns, the Action is his as a Coachman, tho' as one unskilful or negligent in his Art. But then in the Court of Conſcience no Man is accountable for ſuch an Act, unleſs he contributed poſitively and effectually towards its Production. Therefore Subjects are not charged with the Faults of the Government, nor they in a Senate or ruling Council, who diſſent from any ſuch Propoſal, and are outvoted by the reſt. But the Inconveniences, which innocent Subjects ſuffer on account of theſe publick Crimes, are to be rank'd amongſt thoſe general Evils to which human Nature, in this Condition of Mortality, lies neceſſarily expos'd; and which we muſt therefore endure with the ſame Patience as we do extreme Drought, or immoderate Rain, and thoſe other Misfortunes which we ſtyle *naturally Evil.* Though there are ſeveral things, which Experience ſhews to have a very great Virtue and Efficacy towards the preventing of theſe Inconveniences; as fundamental Laws, good Education and Diſcipline, and above all, the Precepts of Religion.

It follows on the other hand, that whatever any particular Perſon, or many together, or all, without the King, ſhall will or do, beſide or contrary to his Authority or Command, not only in Buſineſs of the latter, but alſo of the former kind, ſhall not in the leaſt be look'd on as the Will or the Action of the State, but as a private Will, or a private Action: Nay, there ſhall be ſo many diſtinct Wills, and ſo many diſtinct Actions, as there are particular Men concern'd in the willing, or the doing thus or thus. And the ſame Judgment is to be paſs'd on that which ſingle Men, or a Number of Men ſhall attempt by their own private Motion, without Authority or Order from that governing Council, in which the ſovereign Power reſides. Therefore amongſt the Opinions which encourage Sedition, and which tend to the diſſolving the inward Frame and Structure of any State, eſpecially of a Monarchy, Mr. *Hobbes* [b] reckons this for one, that the Vulgar are not able rightly to diſtinguiſh between a State, or *People*, and a *Multitude*. A *People* or a State makes but one Perſon, having one Will, and performing only one and the ſame Action. Neither of which can be ſaid of the *Multitude* of Subjects oppoſed to the Prince or ſovereign Council. But what he affirms afterwards, that *The People rule in every State*, comes to nothing through his idle Affectation of overmuch Nicety. For the Word *People* muſt import one of theſe two things; either the whole State, or the Body of the Subjects. In the former Senſe 'tis ridiculous Tautology, *the People, that is the State, rules in every State*: in the latter Senſe 'tis abſolutely falſe, *the People, as diſtinct from the Prince, rules in every State.* As for that which follows, *In Monarchies the People govern; becauſe the People, by the Will of one Man, exert their own*; he ought rather to have ſaid more plainly thus: In a monarchical Government the Will of the Prince is ſuppoſed to be the Will of the State. Nor can that Paradox, *Rex eſt Populus, The King is the People*, be explain'd in any other Senſe than this. His other Remarks are true enough; as, that the Vulgar always ſpeak of a great Number of Men, as of the People, or the State, and are wont upon Occaſion to ſay, the State hath rebell'd againſt the King, which is impoſſible; and that the People or the State, deſire and refuſe what is deſired or refuſed by ſome troubleſome diſcontented Mutineers; under the Name and Colour of *the People*, animating the Members of the State againſt the State, the Subjects againſt the Sovereign.

Mr. Barbeyrac's *Note on* §. xiv.

[1] Provided firſt, that he act with Knowledge, and not thro' Error, nor thro' any raſh Motion, which for a time deprives him of the Uſe of his Reaſon; and, ſecondly, that he don't violate the Fundamental Laws of the State. *Titius* Obſerv. 559.

[a] *Euripid.* Supplic. *v.* 1188, *&c.*

——'Tis fit *Adraſtus* ſwear;
The King and Lord of *Greece* ſhall ſwear for all.

[b] *De Cive*, c: xii. ſ. 8.

XV. But where the ſupreme Authority is conferr'd on a *Council* made up of many Perſons, each of whom retains his own Will; the Queſtion firſt to be determin'd is, What Number of theſe Perſons, agreeing in the ſame Reſolution, ſhall repreſent the Will of the *Council*, and by Conſequence of the State? For otherwiſe, as no Man is bound to follow another's Judgment rather than his own, unleſs he hath ſubjected his Will to the Will of the other Party; ſo tho' a Man enter into Society with others, in order to the directing their Buſineſs by the common Vote, yet if by expreſs Condition he reſerve to himſelf the Privilege, that he will not be oblig'd to any thing to which he doth not give his Conſent, the Decrees of the Majority ſhall not in the leaſt affect him, or force his Compliance. Thus there are *Bodies incorporate*, in which each Member hath a Negative, and by it can render the Conſent of all the reſt void and ineffectual [1]. Yet, if a Perſon abſolutely refuſeth to hearken to Reaſon, and out of mere Stubbornneſs oppoſeth thoſe who are in the right Opinion, he may be expell'd the Society, as a Nuiſance; or, in ſome Caſes, may be brought to farther Puniſhment. For tho' here he is not bound to follow the Act of the greater Part by his own precedent Covenant; yet he is under the Obligation of a general Law, which commands him to ſhew himſelf friendly and eaſy to others, and, as a Part, to conform himſelf to the good of the whole [a]. It muſt be confeſs'd, that in Meetings of this kind, eſpecially when conſiſting of a great Number of Perſons, Buſineſs is never diſpatch'd without much Difficulty, and many times falls and comes to nothing, by reaſon of the Difference of Mens Judgments, and the impregnable Obſtinacy of ſome Tempers. And, according to the ordinary Courſe, if any Perſon hath once abſolutely, and without Terms of Exceptions, united himſelf to any Society or Aſſembly, in as much as he cannot require, that all the reſt ſhould be govern'd by his Vote, or that they ſhall omit what ſeems neceſſary or profitable for them, in Deference to one diſſenting Member; he is, at the ſame time, preſum'd to have oblig'd himſelf to the acknowledging and ratifying all Reſolutions, which the major Part ſhall have ſettled. For if he looks on this as any Hardſhip, he ſhould have put in his Exception to it, when he firſt treated about his Admiſſion into the Society. But it would now betray a Spirit unreaſonably proud and troubleſome, to think himſelf wiſer than all his Fellows. If a Man ſo far perſiſt in his Opinion, as to be uneaſy, becauſe he cannot force it upon the whole Company, he is at his liberty to quit the Union in which he was before engaged. But 'twould be high Injuſtice for a Perſon, when he had been out-voted, to follow the Example of thoſe we find deſcribed in the Hiſtorian [b]. *Every one of them*, ſays he, *taking it heinouſly that his own Opinion was not followed, applied himſelf more negligently and heavily to the common Buſineſs; nay, rejoyced upon any ill Succeſs or Miſcarriage, that he might have Occaſion thence to boaſt amongſt thoſe of his own Party, and demonſtrate that there could be no other Cauſe of the Diſappointment, but the ſlighting his particular Advice.* Hence, according to the regular Courſe, the Votes of the Majority in Aſſemblies have the Force and Virtue of a general Decree; not becauſe there is any Neceſſity of this, by the Appointment of Nature, but becauſe there is hardly any other poſſible means of tranſacting Buſineſs amongſt Numbers [2] [c]: Tho' it ſometimes happens, that a Propoſal more for the Benefit, or the Honour of the State, may be rejected, when the Authors cannot form a Party ſtrong enough to carry it. For in theſe general Eſtabliſhments, for the ordering of human Affairs, which often admit of ſo great Variety, ſince 'twas not poſſible for Men to invent ſuch a Method, as ſhould be free from all manner of

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Mr. BARBEYRAC'S *NOTES on* § XV.

[1] Every one knows, that in *Poland* the Oppoſition of a ſingle Member breaks up the *Diet*. See *Hartknoch de Polon.* Lib. II. Cap. I. Sect. 15. The *States of Holland* likewiſe obſerve this Maxim, when they have any Affair of great Importance to be debated. See Mr. *Hertius*'s Note.

[2] See alſo *Grotius* Lib. ii. Cap. 5. Sect. 17. & *La ccontinuation des penſées diverſes de Mr.* Bayle, Pag. 14. *Gronovius*, in a Note upon the Place I have juſt quoted of *Grotius*, adds the following Reſtrictions to this Maxim of the *Plurality of Voices*. *Firſt*, That the Point in Debate be determin'd by fair Voices, that is, that there be no Combination among the Members, and that the Majority of 'em, before they enter the Aſſembly, have not agreed to carry ſuch a particular Opinion. *Secondly*, That the Majority of the Aſſembly be not ſuſpected Perſons, who, according to the eſtabliſh'd Laws and Cuſtoms, ought not to be in the Buſineſs that is debating, that they may not be Judges in their own Cauſe. *Thirdly*, That the Matter in Debate be not contrary either to Divine Laws, or to Reaſon. *Fourthly*, That it does not deſtroy the Fundamental Laws of the State, and that it does not tend to the changing, without Neceſſity, the Form of the Government. *Fifthly*, and laſtly, That it be not in the leaſt prejudicial to the Rights of particular Perſons, nor to the Privileges and Antient Cuſtoms eſtabliſh'd for the good of the Publick.

[a] On which Subject, we may add the Argument in Father *Paul*'s Hiſtory of the Council of *Trent*, (*l.* 4. *p.* 788.) that the *French* were not bound by the Decrees of the Council, having proteſted againſt it. Where the Judgment of the Parliament of *Paris* is alſo produced, and runs to this effect: 'That the Authority of the 'whole Body is then, indeed, transferr'd on the major Part, when the Cauſe affects all in common, but toucheth 'none in particular: But when the whole Cauſe ſo belongs to all, as that each are to be allow'd their reſpective 'Shares; in this Caſe, the Conſent of every one in particular is neceſſary, and the Negative is the more favourable ſide: Nor are the Abſent in the leaſt obliged: Unleſs they confirm the Reſolutions by their own Vote. 'That, Eccleſiaſtical Aſſemblies are of this kind; in which, how frequently ſoever Councils may be held, the abſent Churches are not at all bound by their Decrees, except they pleaſe to receive them.

[b] Agathias, *l.* iv. *c.* 5.

[c] Vid. L. 50 t. 1. l. 19. *D.* Ad Municipalem. *Plin.* Lib. ii. Epiſt. 13. n. 5. *The Votes paſs by Number, not by Weight; nor is it poſſible, that in a publick Aſſembly it ſhould be otherwiſe, where nothing is ſo unequal as the very Equality it ſelf; whilſt all have not the ſame Wiſdom, and yet all have the ſame Right.* Idem Lib. 6. Epiſt. 13. n. 4. *Whilſt the Point is unreſolv'd, every Man hath the Privilege of diſſenting;* but *when 'tis once determin'd, all are bound to maintain what the Majority have decreed.* And of this regular Courſe of proceeding we are to underſtand that of *Ariſtotle*, Polit. IV. c. 8. *That which moſt agree in, is receiv'd under all manner of Governments. For in Oligarchy, in Ariſtocracy, and in Popular States, the Reſolution of the greater part of thoſe concern'd in the Supreme Management, is confirm'd and ratified as a publick Decree.*

Inconvenience, that muſt be follow'd which holds good for the moſt part [a]. And therefore, 'tis idle to pretend, that ſince it ſeems agreeable to Nature, that what proceeds from more Wiſdom ſhould take place, againſt what proceeds from leſs; it is therefore repugnant to Nature, that the weaker Opinion of many ſhould outweigh the wiſer Opinion of a few, and conſequently that the former ſhould compel the latter to an imprudent Undertaking. Indeed, in determining ſpeculative Truths, Opinions are not paſs'd by *Number*, but by *Weight*: And the Multitude of Patrons is it ſelf look'd on as a Mark of Error [b]. But this Rule can by no means be applied to the Management of Buſineſs in an Aſſembly, the Members of which have all an equal Right to influence the Proceedings. For who ſhall be the Judge here which Opinion is the wiſer? Certainly not the Parties themſelves, which are thus divided. For neither ſide will allow the other thus to over-rule a Point, in which their Credit, as well as their Intereſt, is ſo nearly concern'd. And where's the Man, who doth not think his own Parts and Wiſdom more conſiderable than his Neighbour's? Nay, How many are there who take a Delight in diſparaging an Opinion or a Project, tho' the beſt that could have been advanced, only becauſe they were not themſelves the Authors and Contrivers of it? Nor would it be eaſy, for the two diſſenting Parties to refer ſuch a Controverſy as this, to the Deciſion of a common Arbitrator; for again, the Arbitrator's Wiſdom or Integrity might be call'd into Diſpute, and might require a new Judge to determine the new Queſtion: Not to ſay, that moſt of the Points, debated in theſe Aſſemblies, relate to ſuch Matters as cannot conveniently be committed to the Judgment of thoſe who do not belong to the Society. It hath been therefore thought moſt proper, to enter upon ſuch a Method as ſhould be the leaſt expoſed, either to Difficulty or Uncertainty; and none can be invented which ſhould anſwer this Charracter better, than the counting of Voices [c]. Beſides, whoever is allow'd the Privilege to vote in a Council, is preſumed of ſufficient Ability to penetrate and comprehend all Affairs, that ſhall fall under their Deliberation. Which muſt be allow'd to be true of thoſe Councils at leaſt, into which Perſons are not admitted, without ſome kind of Choice and Approbation of others. Neither would it be always expedient, to give any one Man in the Council, as ſuppoſe the Preſident or chief Director, the Power of controlling the whole Matter by his Vote, and declaring which of the Opinions is the better. For, if the Prerogative ſhould be granted to him, he might prefer the Judgment of the ſmaller Party to that of the greater; nay, he might reject both Propoſals, on Pretence that neither was good; and thus he would, to all Intents and Purpoſes, be the ſole and arbitrary Governour of the State. As abſolute Princes may follow that Advice which is offer'd by the feweſt of their Counſellors; or may take ſuch Meaſures as are contrary to the Opinion of them all.

XVI. But as to this Point of the Plurality of Votes, it is needful to obſerve, that in ſome Councils 'tis not enough for an Opinion propoſed to have the Advantage of one Vote, or of ſome few more than the contrary; but e'er it can be carried, it muſt have a Majority to ſuch a certain Number [d]. Thus the Law about the Election of the Pope [e] requires two Thirds [1] of the Cardinals to agree in their Nomination. And the ſame Rule appears to have been follow'd in [2] the Election, and in the Orders

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[a] Bodin. *De Republ. l.* III. *c.* 4. *p.* 456.

[b] *Senec.* De Beat. Vit. c. 2. *Whilſt I am treating of a Happy Life, You are not to anſwer me, as upon a Diviſion in the Senate-Houſe,* The greater Number is on this ſide; *for the greater part is, for that very reaſon, the worſt; Mankind are not ſo happy, as that the beſt things ſhall have the moſt Patrons and Defenders. And therefore a Multitude is generally an Argument of the Wrong. Phocion,* when a certain Propoſal of his was receiv'd with general Applauſe, turn'd to his Friends, and ask'd them, Whether he had unadviſedly let drop ſomewhat that was amiſs. *Plutarch* in Apophthegm. p. 188. *A.* Idem De Educat. p. 6. *A.* Ed. *Wech. To pleaſe the Vulgar is to diſpleaſe the Wiſe,* Euripides *will bear Teſtimony to this Obſervation, whom we find ſpeaking to the ſame Purpoſe:*

I've not the Art of tickling vulgar Ears,
But yet my Vote weighs ſomewhat with my Peers.
When *Aſſes* judge, 'tis *Muſick* to be loud;
And that which ſhocks the Thinking, charms the Crowd.

Hence, as *Quintilian* obſerves, (Inſtitut. Orat. l. X. c. 7.) *They who are ambitious of appearing Wiſe to the Fools, appear Fools to the Wiſe. Plato* Conviv. p. 1188. *C.* Ed. *Wech. A few Men of Underſtanding are more to be feared, than a whole Multitude compoſed of Ignorance and Weakneſs. Add.* Valer. Max. *l.* 3. *c.* 7. *ſ.* 1. Ext. *Dio. Chryſoſt.* De *Ilio* non capto, p. 190. *D.* Ed. *Pariſ. Morel. For a thing to have been believed along time by Fools, is no Authority or Argument for its Truth.*

[c] *Plin.* Panegyr. c. 62. in fin. *'Tis better to truſt the whole Company, than any private Member: Particular Perſons may deceive, and may be deceived; no Man ever cheated all, no Man was ever cheated by all.*

[d] V. *Grot.* L. 2. c. 5. ſ. 17. ibid. *Bœcler.*

[e] Juſ. Canon. C. 6. De Elect. & Electi Poteſtate.

Mr. Barbeyrac's *Notes* on §. XVI.

[1] V. *Gratian.* Can. 36. Diſtinct 63.

[2] Our Author is very much miſtaken in this Point, in reference to the Election of the *Decuriones* among the Antient *Romans*; and to prove the Truth of this Aſſertion, we need only caſt our Eyes upon the very Laws here cited by him: For they evidently prove, that there muſt be two thirds of the Members of the Council preſent in the Aſſembly; and not that two thirds of the Votes of thoſe that are preſent are required, to determine abſolutely in an Affair. See alſo *Digeſt.* Lib. L. Tit. IX. Leg. II. III. The Paſſage of *Prudentius*, which our Author quotes to prove it, is no better applied; for it ſignifies likewiſe, that to make a Decree of the Senate valid, it was antiently requiſite, that there ſhould be three hundred Senators preſent in the Aſſembly, and not that three hundred Senators ſhould vote for the ſame Thing. For it was ſufficient, that among thoſe three hundred Senators, the Majority of Voices was for one particular Opinion. This appears among others, from this Paſſage of *Livy*, *Plebs ſic juſſit; quod Senatus juratus* Maxima Pars Censeat, Qui Assidetis, *id volumus jubemuſque.* Lib. XXVI. Cap. XXXIII. towards the end. Upon which ſee *Gronovius*'s Note. Our Author himſelf, Sect. 19. cites, in the ſame Senſe I have done, the *very Laws* which he here applies wrong.

of the *Decuriones* under the *Roman* Emperours [a]. In the *Venetian* Hiſtorian [b] we find this Clauſe, added to the Decree of the Senate for Baniſhing the *Jeſuites*, That nothing ſhould be determin'd in Prejudice of the ſaid Decree, unleſs eighteen Senators were preſent, and unleſs five Parts out of ſix conſented to the Reſolution. Yet, where there is no ſuch particular Appointment, that ſide which exceeds the other, tho' by a ſingle Vote, ſhall be accounted a true Majority, and equivalent to the Conſent of the whole Body [c]. 'Tis to no Purpoſe, that ſome urge againſt this Judgment, the Maxim of the Civil Law [d], *Quod omnes tangit, id ab omnibus approbari æquum eſt, Equity requires, that what affects or concerns all, ſhould have the Approbation of all*: For we cannot hence conclude, therefore 'tis Injuſtice, that for the more convenient Diſpatch of Affairs, a few diſſenting Members ſhould yield to the ſtronger ſide. But farther, the Maxim produced doth not relate to thoſe Aſſemblies or Councils, which are conſtituted for the Regulation of publick Affairs; but to private Partnerſhips and Confederacies, form'd by bare Compact, or by the Agreement of ſeveral Men, to be Joint-poſſeſſors of ſome one thing. Now ſuch an Agreement, or Confederacy as this, doth not give the Perſons concern'd, a Right to determine any thing about the common Affair, if ſo much as one of the Partners diſagrees to the Propoſal, thinking it prejudicial to his own Intereſt [e]. As for that Clauſe, which is added by the Law before mention'd, about the Papal Election, that ‘What is there particularly ‘order'd about the two Thirds, ſhall not ‘abridge the Liberty of their Churches, in ‘which the Opinion of the greater and ſounder ‘Part ought always to prevail; the reaſon of it ſeems to be this; becauſe, according to their Hypotheſis, the ſupreme Judge, the Pope, may declare which Opinion is the *ſounder*, in caſe a Diſpute ſhould ariſe on that Point. Wherefore the *ſounder* ſide, unleſs it be the ſtronger likewiſe, ſhall not be conſider'd, except in Caſes where there lies an Appeal to ſome Superior [f].

XVII. If the Parties divided are equal, no Reſolution ſhall paſs; but Matters ſhall continue as they ſtood before: Becauſe there is not ground enough for any Alteration either way; but, the Weight on both ſides being the ſame, the Balance hangs even, and the Buſineſs naturally ſtops. Hence, even in criminal Caſes, upon an Equality of Votes the Party is acquitted: Tho' the Penalties enacted againſt falſe Accuſation, on litigious Suits, ſeem not to take place on theſe Occaſions [g]. Amongſt the *Jews*, the Criminal was not condemn'd [1], tho' there happen'd to be one more Vote againſt him than for him. Which Cuſtom was, no doubt, founded on this Principle, that ſince there is no leſs Religion and Conſcience to be obſerv'd in what is pronounced by a Judge, than in what is depoſed by a Witneſs; as a ſingle Witneſs is not ſufficient to convict [2], ſo a ſingle Judge is not ſufficient to condemn. For the reſt of the Judges, by declaring directly contrary to each other, ſeem'd mutually to evacuate the Force of their own Authority. We ought to add one more Remark on this Subject; and it is, that where Suffrages are given by Companies or Tribes, the particular diſſenting Members in one Tribe, who were outvoted by the Majority of their Fellows, ſhall not be allow'd to increaſe the Number of diſſenting Suffragans in any other Tribe.

XVIII. Laſtly, when more than two Opinions are ſtarted, the Queſtion is, Whether they are all to be reckon'd ſeparately from each other, ſo as to give the Preference to that, which taken apart hath more Favourers than one beſides; or whether two or more Sentences, tho' different between themſelves, may be firſt join'd together to caſt out a third, and then play'd againſt each other, ſo that the Motion, which upon the laſt Reſult hath moſt Voices, ſhall prevail? Here, if we conſider things barely according to their natural Equity, without any ſpecial Compacts or Conſtitutions to the contrary, it ſeems proper to diſtinguiſh between thoſe Opinions which really and totally differ one from the other, and thoſe of which one is included in the other as a Part, or which differ only in Quantity; ſo that the latter may be allow'd to unite in that common Point where they agree, but the former may not be join'd, being abſolutely inconſiſtent. Thus they who adjudge a Delinquent to pay twenty Pounds, and they who adjudge him to pay ten Pounds, may unite in the ten Pounds, againſt thoſe who would entirely acquit him; and he ſhall ſtand guilty to the Value of the ſaid Sum, as that in which the

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[a] *L.* 3. *t.* 4. *l.* 3. 4. *D.* Quod cujuſcunque univerſ. Nom. *&* *C. L.* 10. *t.* 31. *l.* 45. De Decurion. Prudent. *l.* 1. *Contra* Symmach. *v.* 604. *&c.*

Sic conſulta patrum ſubſiſtere conſcriptorum,
Non aliter licitum priſco ſub tempore, quam ſi
Tercentum ſenſiſſe ſenes legerentur in unum.
Servemus leges patrias; infirma minoris
Vox cedat numeri, parvâque in parte ſileſcat.

Whilſt antient Honeſty poſſeſs'd the Throne,
To Acts of Senate juſt Reſpect was ſhown,
Becauſe three hundred Heads had join'd in one.
Still let the Laws prevail; the Weaker *Few*
Yield up their Falſe Belief, a Captive to the True.

[b] Maurocen. *l.* 17.

[c] *Vid. L.* 4. *t.* 8. *l.* 17. *ſ.* 6. *D. De Receptis. Vid.* Grot. *d. l.*

[d] *Cap. Quod omnes* de Reg. Jur. in Decretal. Lib. VI.

[e] By which we are to explain l. 11. of B. 8. t. 3. D. *De Serv. Præd. Ruſt.* & L. 10. t. 3. l. 28. *De Communi dividundo.*

[f] *Add.* Gratian. *c.* 36. *Diſtinct.* 63.

[g] *Quintilian.* Declam. 254. *Equal Votes favour the Perſon in Danger. Antiphon.* Grat. XIV. *When things are equal, they make for the Priſoner, not for the Accuſer; as an Equality of Votes aſſiſts the former, not the latter. Add* Ariſtot. *Probl. ſ.* 29. *c.* 13. *Vid. L.* 42. *t.* 1. *l.* 39. *D.* De Re Judicat. M. Senec. *l.* 1. *Controv.* V. *One Judge condemns, the other acquits; of two different Sentences, the Milder ought to take place.* The *Greeks* called this favourable Caſe, *Minerva*'s *Vote*: On which Subject the Reader may conſult a whole Diſſertation of *Bæcler*'s.

[1] See *Grot.* B. 2. c. 5. ſ. 18. Note the laſt.

[2] See above in B. 5. c. 13. ſ. 19.

Majority of thoſe that are to try him agree: The Fine of ten Pounds being contain'd under that of twenty [a]. Hence aroſe that Cuſtom in the *Roman* Senate, of ordering a Member *Sententiam dividere* [b], *to divide his Opinion*, when he had not deliver'd himſelf diſtinctly, but had advanced two Motions at once, one of which was approved by the Company, the other not. But if ſome vote a Criminal to Death, others to Baniſhment, and a third Part are for clearing him; neither can they who propoſed Baniſhment join with thoſe who declared for his Death, againſt the acquitting Party, nor the Acquitters and the Baniſhers againſt thoſe who condemn'd him to capital Puniſhment. For theſe Sentences are altogether incompatible; Death being neither a Part of Baniſhment, nor Baniſhment of Death. And tho' the acquitting and the baniſhing Parties thus far agree, that both are for ſaving the Man's Life; yet their Opinions do not directly produce this Agreement, but only by way of Conſequence; the Opinions being in themſelves really different. For they who would abſolve the Criminal, do thereby releaſe him from all manner of Suffering; whereas they who ſentence him to Baniſhment inſiſt poſitively upon having him puniſh'd, tho' in ſuch a particular Manner and Degree [c]. *Polybius* [d] reports a remarkable Cauſe of this Nature. Certain *Grecians* were held Captives at *Rome*, and a Motion made in the Senate after what manner they ſhould be diſpoſed of. Upon the Debate three Opinions were propoſed, one that they ſhould be releas'd, another that they ſhould be condemn'd, and a third that they ſhould be detain'd Priſoners ſome time longer; the firſt in the Number of Votes exceeding both the other, if ſeparately taken. Here *Poſthumius* the Pretor, who then preſided in the Senate, having a Grudge againſt the Captives, made uſe of the following Stratagem to the great Prejudice of their Cauſe. When the Members were to divide, he omitted one of the Opinions, and propoſed two only, ordering thoſe who were for releaſing the Men, to go to one part of the Houſe, and thoſe who were for diſpoſing of them any other way, to go to the other part. By which means, they who would have confin'd them for a time, united themſelves with thoſe who whold have condemn'd them; and ſo both together outvoted thoſe who would have granted them their Liberty. In *Gellius* [e] we find the following Controverſy propoſed: *Seven Judges were to ſit upon a Criminal, and that Opinion was to ſtand, in which the greateſt Part of that Number ſhould agree: Upon hearing the Caſe, two of the Judges declared for the Priſoner's Baniſhment, two more would have him fined, and the other three voted him to ſuffer Death; being demanded, in order to his Execution, he demurs to the Sentence.* This Caſe was then offer'd for ſuch an one as they term'd ἄπορος, or *unexplicable. Cnemon* in *Heliodorus*'s Hiſtory [f] is condemn'd by ſeventeen Hundred Voices to Death, and by a Thouſand to Baniſhment: Yet, in as much as the former Party was divided, ſome requiring that he ſhould be ſtoned, others that he ſhould be thrown alive into a vaſt Cavern of the Earth: The Thouſand who decreed to baniſh him, made the greater Number [g].

It is farther obſerv'd by *Grotius* [h], that when ſeveral Perſons join'd together do not form a Society, or general Body, properly ſo call'd, but are only tied to each other with regard to ſome certain thing which they all partake of, yet by unequal Shares; then not only the Order and Precedency ſhall be fix'd according to their different manners of partaking, but the Votes, in ſtead of being numbered, ſhall be meaſured by that Proportion which each Suffragan holds in the common Poſſeſſion [i]. On which Rule we may add this Remark; that ſince a Society or Combination of this Nature is founded only upon ſomewhat, which all have a common Title to enjoy, and not upon ſuch a Covenant as is requiſite to the Eſtabliſhment of a juſt and regular Community, and by which each Member ſubmits his private Will to the Will of the Majority; therefore when 'tis affirm'd, that the Vote of him, who holds a larger Share in the Poſſeſſion, ſhall have the Advantage of another's Vote, who holds a ſmaller Share, we are to underſtand it with this Limitation; that the former ſhall not be allow'd, by Virtue of his ſuperior Vote, to diveſt the latter of his Right, or any way to procure his Prejudice. And thus we may apprehend what is to be look'd on as the *Will of the State*, where the Sovereignty is lodg'd in many Hands.

XIX. As to the Number of Men who may compoſe a Council or Aſſembly, in which publick Affairs are to be debated and determin'd, 'tis manifeſt that *three* at leaſt, are abſolutely required [k]. For ſhould there be but *two*, if they happen to be divided in Judgment, there is none elſe to turn the Scale on either ſide, and ſo no Buſineſs can be concluded [l]. Nor is it any Objection againſt this Rule, that ſometimes two Perſons only are term'd *Colleagues*, as for Inſtance, the *Roman* Conſuls. For that Word often imports no more than the Equality of Office and Dignity [a]. In Latin we meet with *Collegium Tribunorum*, the *College of the Tribunes*; and yet any one of thoſe Magiſtrates, by entring his particular Diſſent, could evacuate any Reſolution agreed on by the reſt. So that they who are united to each other by ſuch a Relation, and bear ſuch a common Title of Honour, do not always form a regular Aſſembly, in which the Wills of all the Members are, by Virtue of ſome Covenant, compacted into one Will. But Men may happen to compoſe a Body or Society, and yet retain each his particular Will, diſtinct from the Will of his Fellows. Therefore to urge, that a *Contract of Fellowſhip* may be made betwen two Perſons only [b], is of no Conſequence in the Point before us. As for what may be alledg'd to the contrary out of the *Digeſts*; the meaning of the Law in that place is, not that a *College* or *Company* may be originally conſtituted by a ſingle Perſon; but that upon Failure of the other Members, by any extraordinary Accident, one Man ſhall be ſufficient to preſerve and repreſent the Body already eſtabliſh'd, till ſuch time as new Members may be ſubſtituted in the room of the former.

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[a] To this Purpoſe ſee *l.* 38. *ſ.* 1. *d. l. D.* de Re Judicat. *& l.* 27. *D.* de Receptis, *d. l. & cap.* 1. Jur. Can. de Arbitris *in* VI. 'Tis but loſt Labour in *Grotius* (*Flor. Sparſ.*) when, as to the Caſe propoſed in one of theſe Laws (*l.* 27.) he oppoſeth the Determination there made, and ſays, the Criminal ought to be condemn'd in *ten*, becauſe the greater Part agreed to this Sum, and that what they diſagreed in, ought to be rejected. For in *five* they all agreed, but the Majority only then prevails, when the whole Body do not unite in any ſingle Reſolution.

[b] *Vid.* Cicer. *Epiſt. Fam. l.* 1. *Ep.* 2. Senec. XXI. *What is cuſtomary in the Senate, ought likewiſe, I think, to be the Practice in Philoſphy: When any Man delivers an Opinion, which I like in part, I bid him* divide, *and I follow accordingly.*

[c] *Vid.* Plin *l.* VIII. *Epiſt.* 14.

[d] *Excerp. Legat.* 129.

[e] *L.* IX. *c.* 15. The ſame Caſe is the Subject of *Quintilian*'s 365th Declamation, where among other things, there is this good Remark: *Non idem ſentientes non potes jungere, idem ſentientes compara. You can't join thoſe that diſagree; therefore compare thoſe that agree.* See likewiſe the Argument of the 30th Declamation in *Liban.*

[f] *L.* 1.

[g] *Add.* Cujac. *Obſerv.* XII. *Cap.* 16. & Ziegler *ad* Grot. *l.* 2. *c.* 5. *ſ.* 17.

[h] *Ibid. ſ.* 22.

[i] On this Subject, *Vid. L.* 2. *t.* 14. *l.* 8. *D.* De Pactis, & *L.* 16. *t.* 3. *l.* 14. *D.* depoſiti, & *L.* 42. *t.* 5. *l.* 16. *D.* De Reb. author. judic. poſſid.

[k] *Vid. L.* 50. *t.* 16. *l.* 85. *D.* De Verb. ſignif.

[l] *Vid. Cap.* 1. Jur. Can. de Arbitris.

According to regular Courſe, the abſent Members are not conſider'd in theſe Aſſemblies, provided they have reciv'd lawful Notice [c], but their Right devolves (as it were) upon thoſe that are preſent. *When two*, ſays [d] *Seneca*, *act by a common Commiſſion, he that is preſent hath the Power of both*. Yet in our Judgment, this Maxim ought to be reſtrain'd to Buſineſs of daily Occurrence, and ſuch as will admit of no Delay. It is likewiſe an Exception to the ſame Rule, if the Laws require ſuch a preciſe Number of the Members to concur in every Buſineſs [e]. In ſome places the abſent Members are allow'd to exerciſe their Power by delegating ſome others, who appear in Perſon, and thus to give their Suffrage amongſt the reſt, either in Writing, or by the Mouth of their Proxy [f].

XX. The Civil State being thus framed and ſettled, the Perſon or Perſons on whom the ſupreme Authority is conferr'd, whether one Man or a Council, either particular or general, obtain the Name of a *Monarch*, or *Senate*, or a *People*; and private Men, as oppos'd to theſe, are ſtyl'd Subjects. Here we muſt obſerve, that a Man may become Member of a State two ways, by *expreſs*, or by *tacit Covenant*. For they who were the original Founders of Commonwealths, are not ſuppoſed to have acted with this Deſign, that the State ſhould fall and be diſſolv'd upon the Deceaſe of all thoſe particular Men, who at firſt compos'd it; but they rather proceeded upon the Hope and Proſpect of laſting and perpetual Advantages, to be derived from the preſent Eſtabliſhment, upon their Children and their whole Poſterity. We muſt therefore preſume them to have had this in their Aim, that their Children and their future Race ſhould, as ſoon as they come into the World, enjoy the Benefits and Bleſſings of the publick Conſtitution. Which ſince it is impoſſible to obtain without Government, the very Life and Soul of a State, therefore all who are born within ſuch Dominions, are hereby ſuppos'd to have ſubmitted themſelves to the ſtanding Government. Hence there is no Neceſſity, that they who have been once inveſted with the ſupreme Command, ſhould require the expreſs Homage and Allegiance of their new Race of Subjects, tho' all the Perſons, who firſt conferr'd their Authority upon them, may poſſibly be extinct. Farther, ſince every civil Community is fix'd in ſuch a particular Scene, where the Members have placed themſelves and their Fortunes in Security, which could not but be endanger'd, were all Men allow'd promiſcuouſly the Privilege of coming thither without acknowledging the Government; therefore 'tis to be look'd on as a general Law in all States, that he who comes within the proper Limits of a State, and much more, if he deſire to reap the Benefit of it, ſhall be preſumed to have abandon'd his natural Liberty, and to have ſubjected himſelf to the Government there eſtabliſh'd; at leaſt for ſo long as he thinks fit to reſide in thoſe parts. If he deny to make this Acknowledgement, he is to be reputed as an Enemy; ſo far however, as that he may lawfully be expell'd the Borders. So it is manifeſt, that they are no leſs ſubjected to the civil Authority, who join themſelves to a State already ſettled, than they, who by aſſembling and uniting themſelves together, form'd it at the Beginning.

It may not be improper to remark on this Occaſion, that there is ſome Diſagreement amongſt learned Men about the true Notion of *Civis*, *a Member of a civil State*. Mr. *Hobbes* [g] ſeems to make *Civis* an equivalent Term with *Subditus*, *a Subject*. According to which way of ſpeaking, Women, Children, and Servants will be made proper Deniſons. Our Judgment on the Point is, that ſince every State is conſtituted by Mens ſubmitting their Wills to a ſingle Perſon, or to an Aſſembly, they principally have a Title to the Name of *Members*, by whoſe Covenants the Society was firſt incorporated, and they who regularly ſucceed into the place of theſe primitive Founders. And ſince theſe Acts belong to the Maſters of Families, they ſhould ſeem to merit this Name by an eſpecial Right; but Women, Children, and Servants, whoſe Wills were before included in the Wills of their domeſtical Governour and Director, can challenge it only by way of Conſequence, and by Virtue of their Dependence upon him; in as much as they likewiſe enjoy the common Protection of the State, and hold ſeveral Rights and Privileges on the Score of that

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[a] *Vid. l.* 173. *D. d. l.* De Verb. ſignif. *&* *L.* 26. *t.* 7. *l.* 14. *D.* De Admin. tut. *&* *L.* 46. t. 3. *l.* 101. *D.* De Solutione, *&c.*

[b] *L.* 3. *t.* 4. *l* 7. *ſ.* 2. *D.* Quod cujuſcunque Univerſit. Nomine, *&c.*

[c] *Vid.* C. 36. Jur. Can. de Electione & Electi Poteſtat.

[d] *Controv.* vii. 4.

[e] *Vid. L.* 3. *D. d. l.* Quod cujuſcunque Univerſit. Nomine, *&c.* & *l.* 45. *D. d. l.* De Decurion.

[f] *Vid. Cap.* 46. De Electione & Electi Poteſtate, in Ultimo.

[g] De Civ. c. v. *ſ.* 11.

Relation. But Inmates, Strangers, and other temporary Inhabitants, are not Members of the Commonwealth, becauſe they propoſe only to tarry for a certain Space, but not to ſettle their Perſons and Fortunes on the publick Bottom. *Ariſtotle's* Definition, fram'd to expreſs a Member of State, and taken from his *holding a Share in the Magiſtracy, and in the judicial Proceedings*, agrees only to a democratical Government, as he himſelf obſerves [a].

XXI. To proceed; in moſt Commonwealths the Members are found eſpecially diſpoſed to two ſubordinate Bonds or Engagements, by one of which they unite in certain Numbers, to form a particular Body, yet ſtill under the Direction of the Publick; and by the other, the ruling Power calls them to ſome inferior Share in the Adminiſtration. Theſe Bodies of Men, form'd in Subordination to the State, or general Body, whether they are term'd Companies, Corporations, Colleges, or paſs under any other Title, may firſt be divided into thoſe which were fram'd before the Settlement of civil States, and thoſe which have been erected ſince. The Bodies or Syſtems, preceding civil States in point of Antiquity, are *Families*; in which the Authority and the Right, held by the Father and the Maſter, have been already explain'd. Of which Right, ſo much remains in their Poſſeſſion, as hath not been cut off, either by the Nature and Frame of the publick Society, or by civil Ordinances, or laſtly, by general Cuſtom. Such *Bodies* as have been form'd ſince the Eſtabliſhment of the civil Society to which they belong, may be diſtinguiſh'd by the Names of *publick* and *private*. The *publick* are thoſe, which have been ſet up by Authority from the Sovereign Power in the Commonwealth. The *private* are, either thoſe which have been compoſed by the ſole Act of the Subjects amongſt themſelves, or ſuch as depend upon ſome foreign Power, which, within the Dominions of another, is to be look'd upon only as a private Right and a private Act. *Private* Bodies may again be divided into *lawful* and *unlawful*; of which the former are, or ought to be, approv'd of and allow'd by the State, the latter not. We ſay, *ought to be allow'd*: For ſuppoſe under a State where the Divine Worſhip is corrupted, ſome endued with Senſe and Knowledge of the true Religion, ſhould hold private Aſſemblies, without either open Tumults, or ſecret Conſpiracies againſt the Government eſtabliſh'd; how much ſoever the Perſons in Authority may diſlike what differs from their own Perſuaſion, yet no one will preſume to term theſe Aſſemblies *unlawful*, ſince the ſupreme Governours themſelves [1] lie under an Obligation to acknowledge, approve, and maintain the ſame Truths that are there profeſs'd. So likewiſe, if in a barbarous State, where all Improvements of Learning are publickly diſcouraged, ſome Perſons ſhould meet together, to join in the Purſuit and Enquiry of Wiſdom; ſuch a Body of Men cannot be pronounced an unlawful Society. Both are again divided into *regular* and *irregular*. The former are thoſe, in which, by Virtue of certain Covenants, there is an Union of Wills amongſt all the Members: The latter thoſe, in which we do not ſo much apprehend any Union of Wills, as a Conſent and Conſpiracy, without any mutual Bond or Engagement, ſuch as may proceed from ſome common Affections, as ſuppoſe, from Hope, from Deſire of Gain, or of Revenge; from Ambition, Anger, and the like.

XXII. With Regard to all *lawful* Bodies, 'tis to be obſerv'd, that whatever Right they poſſeſs, and whatever Power they hold over their Members, is all under the Determination of the ſupreme Authority, which it ought on no account to oppoſe or to overbalance. For otherwiſe, if there could be a Body of Men not ſubject to the Regulations of the civil Government, there would be a State within a State. Therefore, if any Commonwealth was at firſt fram'd by the Union of ſeveral abſolute and independent Bodies, 'twas altogether requiſite, that the reſpective Bodies ſhould give up ſo much of their former Power and Right, as was neceſſary for the forming a civil Community: Becauſe elſe they could not but fall ſhort of the End which they propoſed. But, if we look on theſe Bodies or Syſtems in a State already ſettled, we are then to conſider, what was the Intention of the ſupreme Governour, in founding or in confirming ſuch a Company. For if he hath given, and aſcertain'd to them, in expreſs Words, an abſolute and independent Right, with regard to ſome particular Affairs which concern the publick Adminiſtration; then he hath plainly abdicated part of his Authority, and, by admitting two Heads in the Conſtitution, hath rendred it irregular and monſtrous; which no one in his Wits will do, unleſs upon extreme Neceſſity. But if the Sovereign is deſirous to preſerve the Power whole and unimpair'd, it is neceſſary that the ſubordinate Body ſhould ſo reſtrain and moderate its Rights, as not to prejudice the ſupreme Authority, nor put any ſuch Extent upon their Privileges, or to draw any ſuch Conſequence from them, as ſhall tend to the releaſing the ſaid Body from their inferior and ſubordinate Condition. Now after what manner the Power of theſe Bodies is limited, we are to learn from the particular Charters of their Foundation, or Confirmation; as likewiſe from the common Laws of the State, which are ſuppoſed to bind all and each of the Members,

[a] Polit. *l.* 3. *c.* 1. See the reſt of this Chapter where he thus goes on, *According to different States, the Members are different. Wherefore the Deſcription we have given belongs eſpecially to the Members of a Democracy; to thoſe of other Governments it may accidentally, but doth not neceſſarily agree.* Idem *Polit. l.* 3. *c.* 8. *There being many Forms of Civil Bodies, there muſt, by Conſequence, be many kinds of Members, who compoſe them.*

Mr. Barbeyrac's *NOTE* on § XXI.

[1] 'Tis not for this Reaſon: For the Sovereign doubtleſs believes his own Religion better than that which differs from it; and as long as he is of this Perſuaſion, nothing obliges him to alter it. But 'tis becauſe Sovereigns, of what Religion ſoever, have no Right to hinder any one from peaceably ſerving GOD according to the Light and Dictates of his Conſcience. See hereafter, Chap. iv. Sect. 11. Note 2.

unleſs where they have been expreſly abridg'd or repeal'd. From all which it follows, that, if the Adminiſtration of ſuch a Body be committed to a ſingle Man, whatever he acts according to the Rules of their Foundation, or according to the general Conſtitutions of the State, ſhall be look'd on as the Act of the whole Body. But what he doth contrary to, or beyond either of theſe, ſhall be his own proper perſonal Act, which ſhall not affect the reſt, and for which he alone ſhall be accountable. If the Government of ſuch a Body be lodg'd in a Council of ſeveral Perſons; when any thing is done by them contrary to Law, or to their Foundation, thoſe only ſhall be liable to Puniſhment on this account, who agreed to the Proceeding; but they who either diſſented, or were abſent from the Aſſembly, ſhall be judg'd innocent: Whom therefore it concerns, for the ſake of their own Security, to proteſt againſt the Decree of the reſt, and to regiſter their Proteſtation in the publick Acts and Memorials, leſt they ſhould happen to be involv'd in the Puniſhment of their Fellows Crime. Whereas on the other ſide, in an independent Aſſembly no particular Member hath the Liberty of proteſting againſt a Decree; becauſe this would be to deny the ſupreme Power of the ſaid Aſſembly.

As to the Debts of theſe Bodies or Companies, the firſt thing to be conſider'd is, in whoſe Name they were contracted. For what any Member owes on his own private account, is not a Debt of the Company. Only in this reſpect, that when the Sentence of the Court obligeth him to Payment, Execution may be taken, not only upon the reſt of his Goods, but upon thoſe likewiſe which belong to him as a Partner in that Society. But ſuch Debts as are contracted by the Governors of the Company (whether this Power be lodg'd in the Hands of one, or of more Perſons) according to their Charter of Foundation, and thoſe Rules which are to guide their Proceedings, oblige the whole Body, as ſuch; and unleſs they have a common Stock, each Member is to anſwer for his *Quota.* Yet here again there is this Difference, that ſuch Creditors as do not belong to the ſame Commonwealth, upon Denial of Payment, may treat the Members no otherwiſe than if each had engaged for the whole. As in all other Caſes, any Perſon under a foreign Juriſdiction ſtands liable to ſuffer Repriſals for the Debts of his Countrymen. Debts contracted otherwiſe than the Rules of the Company allow, bind thoſe only who gave their expreſs Conſent to the contracting them; and not thoſe who diſſented, except to the Value of what they have been Gainers by them. And ſuch a Debt, when the common Stock, ſo far as 'tis affected by it, will not hold out, is to be diſcharg'd by Contribution of the diſſenting Members, according to their reſpective Proportion. But if a particular Member lend Money to the Company, as ſuch, he can only charge the Goods of the Company; and if they fall ſhort, he muſt thank himſelf for the Loſs [a]. If a Controverſy ariſe between any Member and the Company, the Company ſhall not be Judge, but the State to which the Company is in Subordination. For 'twould be very inconvenient, that they ſhould be allow'd to give Sentence in their own Cauſe, when the Matter may be referr'd to a common Power.

XXIII. *Unlawful* Bodies are not only thoſe which unite on the account of ſome manifeſt Villany, or ſome Deſign contrary to expreſs Law; as the Companies of Thieves, Beggars, Strowlers, Pirates, Highwaymen, *&c.* but likewiſe any Confederacies between Subjects built on a private Compact, without the Conſent of the Government, and repugnant to the End of civil Communities: Which are uſually term'd *Conſpiracies* or *Factions.* The Deſign of theſe is various. Sometimes the Perſons thus aſſociating aim at the chief Command, and would ſeize the Government into their own Hands: ſometimes they propoſe, by this means, to bring the Management of publick Buſineſs to their own Humour or Advantage. Some are for increaſing their private Fortunes by plundering the Publick: Others bandy into Factions, only to ſecure themſelves from Puniſhment. Nay, thoſe Confederacies which carry a plauſible Pretence, as ſuppoſe Protection from Danger, Redreſs of Grievances, Removal of evil Counſellors, and thoſe likewiſe, the Cauſe of which is kept ſecret, are ſuſpicious and dangerous. For in the firſt place, this is to invade the Office of the Sovereign, by entring upon thoſe Affairs which belong ſolely to his Care and Direction; and then farther, when the Mutineers are grown confident of their own Strength, they may eaſily be encouraged to turn it upon the State [b]. Hence many Actions, not otherwiſe culpable in their own Nature, become unlawful, when perform'd in a tumultuous or factious manner. Thus to petition the Government, or to accuſe any Perſon of a ſuppoſed Crime, are Proceedings which the Law allows; but to do either of theſe, with a numerous Body of Men gather'd for that purpoſe, bears the Appearance of Riot and Sedition. And ſo in martial Laws, it is uſually made a capital Offence, for Soldiers to petition for Pay, in a large Company drawn together on that Deſign [c].

XXIV. Beſides that common Bond, which engageth all Subjects to their reſpective Sovereigns, there lies a particular Obligation on thoſe who are entruſted by the higher Powers with the Exerciſe of ſome part of the Government, in their Name and by their Authority; and who paſs under the general Style of *Magiſtrates* and *publick Miniſters.* Diſtinct from theſe are the private Miniſters or Servants of the

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[a] Comp. *Hobbes*, Leviath. c. 22.

[b] Thus *Otho* ſpeaks in *Tacitus.* (Hiſt. L. 1. c. 84. in the Beginning.) *At preſent indeed, and in the Poſt You now hold, You are for me; but whilſt You run up and down in the dark, and All are in Confuſion round You, Chance or Opportunity may engage You againſt me.*

[c] *Add* Acts xxix. 39, 40. *Vid.* Hobbes, *De Cive, c.* 13, *ſ.* 12, 13. *&* Leviath. *c.* 22. where he compares *lawful* Bodies to the *Muſcles,* and *unlawful* to *Wens, Boils, and Poſthumes, engendred by the unnatural Conflux of Evil Humours.*

Prince, who perform common Offices for him, as they would for any other Maſter. Amongſt the former kind, or thoſe who ſerve the Prince in this politick Capacity, there is this Difference obſervable, that ſome of them exerciſe a part of the Government and princely Office, and do therefore in ſuch a particular Meaſure repreſent the Perſon of the Sovereign; who are properly and ſtrictly term'd *publick Miniſters*: Others barely aſſiſt in the Diſpatch and Execution of publick Buſineſs. To the firſt Claſs belong the Regents, or Protectors of the Kingdom, during either the Minority, or Captivity, or *Delirium* of the Prince; then the Governours of Provinces, Cities, and Diſtricts; the Commanders of the *Militia*, by Land or Sea; the Directors of the Treaſury; the Judges and others concern'd in pronouncing or executing Juſtice; the publick Cenſors of Doctrines, Ambaſſadors to foreign States, and the like. In the other Claſs, we are to reckon the Counſellors, who do not themſelves exerciſe any part of the Sovereignty, but only declare to the Sovereign their Opinion about Affairs: Thoſe likewiſe who are any other way ſerviceable to the publick Management; as the Secretaries, the Gatherers, Keepers or Diſpenſers of the Revenue, the Soldiery; thoſe who lend an inferior Aſſiſtance in the Proceedings of Juſtice, and if there be any others of the like Characters; the Order and Diſtinction of which, in every particular State, may eaſily be underſtood [a].

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[a] Comp. *Hobbes* Leviath. c. 23. & *Bodin*. De Republ. l. 3. c. 7.

CHAP. III.

Of the Generation of Civil Sovereignty or Majeſty.

I. *Sovereignty the Reſult of thoſe Covenants by which the publick Body was firſt united.*
II. *This is done by the Divine Will and Approbation.*
III. *Whether the Majeſty of Princes is immediately derived from GOD.*
IV. *The Arguments which ſome make uſe of to prove the Affirmative.*
V. *Civil Authority not the Effect of War.*
VI. *Whether a Father of a Family may, without any new Act, commence a Prince.*
VII. *How a Vaſſal or Feudatory may become a ſovereign Lord.*
VIII. *Whether a Free State, or a Monarch, reſigning their Power into other Hands, are the efficient Cauſe of the Sovereignty produced.*
IX. *Who has properly the Power of conferring the regal Title.*

LET us proceed to exmine, whence that Sovereignty or ſupreme Command, which appears in every State, and which, as a kind of Soul, informs, enlivens, and wields the publick Body, is immediately produced. In order to which Enquiry, we ſuppoſe, firſt of all, that Civil Authority, for the obtaining of its juſt Effect, requires as well natural *Strength*, by means of which the Subject, if he preſumes to decline Obedience, may be terrified into his Duty, through the Fear of Puniſhment; as alſo a *Title*, by Virtue of which, as by juſt Right, the Performance, or the Omiſſion of any Action, may be impoſed on others: To which *Title* there anſwers in the Subject an Obligation to comply with what is thus enjoin'd. Now both theſe Requiſites do immediately flow from thoſe Pacts by which the State is united and ſubſiſts. For tho' no Perſon can transfer his Strength to another by any real and natural Conveyance, yet he is ſuppoſed to be Maſter of other Mens Strength, according to whoſe Pleaſure they are bound to exert and apply it, not having any Power to reſiſt or to refuſe his Commands. In as much as there can be no other way of transferring Strength amongſt Men. And ſince all the Members of the State, in ſubmitting their Wills to the Will of a ſingle Director, did, at the ſame time, thereby oblige themſelves to Non-reſiſtance, or to obey him in all his Deſires, and Endeavours of applying their Strength and Wealth to the good of the Publick; it appears, that he who holds the ſovereign Rule, is poſſeſs'd of ſufficient Force to compel any Perſons to a Diſcharge of the ſeveral Injunctions, which he lays upon them [a]. So likewiſe, the ſame Covenant affords a full and eaſy *Title*, by which the aforeſaid Sovereignty appears to be eſtabliſh'd, not upon Violence, but in a lawful manner, upon the voluntary Conſent and Subjection of the reſpective Members. This then is the neareſt and immediate Cauſe, from which ſovereign Authority, as a moral Quality, doth reſult. For if we ſuppoſe Submiſſion in one Party, and in another the Acceptance of that Submiſſion, there accrues preſently to the latter a Right of impoſing Commands on the former; which is what we term Sovereignty or Rule. And as by private Contract, the Right of any thing which we poſſeſs, ſo by Submiſſion the Right to diſpoſe of our Strength and our Liberty of acting, may be convey'd to another. Whence, if any Perſon ſhould, for Inſtance, voluntarily and upon Covenant, deliver himſelf to me in Servitude, he thereby really confers on me the Power of a Maſter. Againſt which way of arguing, to object the vulgar Maxim of *Quod quis non habet, non poteſt in alterum transferre, No one can tranſmit to another what he doth not poſſeſs himſelf*; is but a Piece of trifling Ignorance. Yet ſtill to procure to the ſupreme Command an eſpecial Efficacy and a ſacred Reſpect, there is need of another additional Principle, beſides the Submiſſion of the Subjects. And therefore, he who affirms Sovereignty to reſult *immediately* from Compact, doth not in the leaſt detract from the ſacred Character of civil Government, or maintain that Princes bear Rule by human Right only, not by divine.

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[a] Liv. *l.* 2. *c.* 59. *The Force of the ſupreme Command is built on the Conſent of thoſe who obey.*

II. Yet this is beyond Diſpute, that ſound Reaſon ſufficiently intimated to Mankind, how that upon their Multiplication in the World, their Honour, Peace, and Safety could not ſubſiſt, without the Eſtabliſhment of civil States, which cannot be underſtood without a ſupreme Authority. And thus both the States themſelves, and the chief Government erected in them, are ſuppos'd to proceed from God, as the Author of the Law of Nature. For not thoſe things alone are from God, which he inſtitutes and ordains by his own immediate Act, without the Concurrence or Interpoſition of Men; but thoſe likewiſe which Men themſelves, by the Guidance of good Reaſon, according as the different Circumſtances of Times and Places required, have taken up, in order to the fulfilling of ſome Obligation laid upon them by God's Command [a]. And, in as much as the Law of Nature cannot, amongſt a great Multitude, be conveniently exercis'd, without the Aſſiſtance of civil Government; 'tis manifeſt, that God, who impoſed the ſaid Law on human Race, did command likewiſe the eſtabliſhing of civil Societies, ſo far as they ſerve for Inſtruments and Means of improving and enforcing the Law of Nature. And hence likewiſe it is, that God, in the Holy Scriptures, expreſly approves of ſuch Government, acknowledging and confirming it, as his own Appointment, and guarding by the ſevereſt Penalties the ſacred Awe and Veneration of it. But whether or no God expreſly commanded the inſtituting of States, as to particular Times and Places, is a Point in which we have no certain Information. For the Precept of the Sons of *Noah*, concerning *Judicatures* [1], which may perhaps be urged to this Purpoſe, doth not ſpecify the particular Time and Place of erecting them. So that we may underſtand it in this Senſe, that the Methods of judicial Proceſſes, when once ſettled, ought diligenly to be exercis'd and adminiſter'd. *Bœcler* [b] explains the Origin of civil Government with very little difference from what hath been here deliver'd on the ſame Head. *The Supreme Authority*, ſays he, *is not to be derived from the bare Act of Man, but from the Command of God, and from the Law of Nature: Or from ſuch an Act of Men, by which the Law of Nature is follow'd and obey'd. For he that enjoins Society, enjoins likewiſe the Order and Method to be obſerv'd in it: But now the very Soul of Society is Government; and of all the Societies the moſt perfect is a civil State.* Which is right enough; provided we add, that the Divine Command, concerning the Erection of civil States, exerted and diſcover'd it ſelf through the Suggeſtion of Reaſon, by which Men came to underſtand, that the Honour, Gracefulneſs, and Peace, which the Law of Nature propoſeth as its Aim, could not poſſibly ſubſiſt without civil Society; eſpecially after Mankind was conſiderably multiplied. And in this very Point conſiſts the Difference between civil Communities and other human Inſtitutions: The latter alſo being introduced through the Perſuaſion of ſound Reaſon, yet not after ſuch a manner, as if the Honour, Safety, and Welfare of human Race could not be perſerv'd without it. As to the Fifth Commandment in the Decalogue [2], which enjoins Obedience to the civil Magiſtrates (urg'd by *Bœcler*) we are to obſerve, that this doth not exclude the next and immediate Cauſe of Government; as the Commandment againſt Theſt doth not, in the leaſt, exclude or ſuperſede the Origin of Property. And then for the Title of *God's Vicegerents upon Earth*, aſcrib'd to Governours, we think it may very fairly and conveniently be explain'd in this Senſe; that whereas the Peace and good Order of Mankind was not ſufficiently procured by a bare Reverence towards the Law of Nature, and towards the Author of it, that End is now happily produced by the Virtue and Efficacy of civil Dominion. In which Senſe the following Poſitions of the ſame Writer are plain and intelligible: Therefore, *That a State might properly be a State, and might obtain its End, God by the Law of Nature inſtituted a certain Order and Method of commanding and obeying, in which Order, by the Will of God, and by the Dictate of natural Reaſon, there muſt be ſomewhat ſupreme and independent, controulable by no human Pleaſure, which as it is ſubject to God alone, ſo it is the Second or the Deputy of his Power; and this is nothing elſe but the ſupreme civil Authority. But it is purely the Act and Diſpoſal of Men, whether they will intruſt the ſupreme Authority with one, or with many Perſons; and what particular Methods they will follow in eſtabliſhing diſtinct* Forms of Common-

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[a] Comp. 1 *Tim.* ii. 2.

[b] *Ad* Grot. *l.* 1. *c.* 3. *ſ.* 6.

Mr. BARBEYRAC'S *NOTES on* §. II.

[1] *Vid.* Selden. *de Jur. N. & G. ſec.* Hebr. l. 7. c. 4, *&c.* & Le Clerc *in Deut.* i. 17.

[2] 'Tis in the Original the *Fourth Commandment*, inſtead of the *Fifth*, in which our Author follows the *Lutheran* diviſion of the *Decalogue*. Beſides, he too freely grants, that it relates in that place to *Sovereigns*. I know very well, that *Divines* and *Preachers*, by Strength of Conſequences, or rather Artifices, include all *Superiors* under the Names of *Fathers* and *Mothers*. But no good Interpreter will draw any ſuch Concluſions from thence; and without examining the general Foundation of thoſe tedious Expoſitions that are commonly made on the *Decalogue* (on which we may ſee what Mr. *Le Clerc* ſays in his Note on the firſt Verſe of the XX. Chap. of *Exod.* and what our Author ſays, after *Gronovius*, Lib. VIII. Chap. I. Sect 4. towards *the End*) we need only but conſider a little the reaſon that the Legiſlator ſubjoins, to induce the *Iſraelites* to obſerve this Precept, *That thy days may be long upon the Land which the Lord thy God giveth thee*. This is a manifeſt Alluſion to the efficacy that is attributed to the Prayers of Fathers and Mothers for their Children who are obedient. See Mr. *Le Clerc* upon this Commandment, and upon *Gen.* xxvii. 33. This will appear more evident, if the ingenious Expoſition of Mr. *des Maizeaux* (in his *Nouvelles de la Republique des Lettres, November* 1700. p. 500. *&c.*) be well grounded.

wealths. *Grotius*'s Opinion concerning the Original of Government is not ſo profane, but that it may be born with, if aſſiſted by a dexterous Interpretation. He ſays[a] that *Men, not influenced by the expreſs Command of God* (and no ſuch expreſs Command doth indeed appear) *but of their own accord* (yet not without the Dictate of right Reaſon, and the Will and Pleaſure of God) *having experienc'd the weak Defence of ſeparate Families againſt the Aſſaults of Violence* (after Mankind had conſiderably ſpread and increaſed) *united themſelves in civil Society; the Effect of which was civil Power, ſtyled on this Account by St.* Peter [b], *the Ordinance of Man*, as eſtabliſh'd immediately by human Appointment. But as for the other Aſſertion of *Grotius*, That *the civil Authority is therefore term'd Divine, or ſaid to be of God, becauſe God approved of what Men wholſomly inſtituted*; we can on no account admit it in this Senſe, as if God approved of the Eſtabliſhment of civil Government (as 'twere) *ex poſt facto*, or after it had been actually ſettled; as he hath been pleas'd, in many Places of Scripture [c], to confirm and ratify the Condition of Servants, which no doubt is an human Invention. But 'twas abſolutely requiſite to add, that Men were able antecedently to apprehend the Divine Will, by duely weighing the Condition of Mankind upon its Multiplication; which as it could not be preſerv'd without civil Societies, or in a ſolitary Life; ſo Men, whilſt in this Matter they followed the Guidance of Reaſon, agreeably to the Scope and Deſign of the Law of Nature, muſt be ſuppoſed to have fulfill'd the Divine Pleaſure.

III. Tho' we think what hath been here deliver'd, ſufficient as well to ſanctify the Original of civil Government, as to engage the Veneration of Subjects towards their Rulers; yet it may be worth our while to conſider, what Solidity there is in the Arguments of a late Author [1], who maintains that we ought to go much higher in this Point. He ſuppoſeth then, that what is the Cauſe of civil States is not likewiſe the Cauſe of the Publick Government and ſupreme Authority in them. And therefore he allows the States themſelves to be eſtabliſh'd by Covenants; but aſſerts on the other ſide, that the Sovereignty is conferr'd on Princes immediately by GOD himſelf, and that nothing which proceeds from Men, doth at all contribute to its Production. And, conſequently, that a free People, when they voluntarily chooſe to themſelves a King, do not confer Majeſty upon him, but only mark out the particular Perſon on whom that Character is, by the Divine Gift, beſtow'd: As in many Boroughs or Towns Incorporate, the Election of Magiſtrates belongs to ſuch an Order of Men; and yet the Magiſtrates receive their Power of acting, not from that Order of Men, but from the ſupreme Ruler in the State. Which Poſition, tho' it may poſſibly take with ſome Perſons, through a ſpecious Appearance of more than ordinary Piety; yet 'tis manifeſt, that it tends to the breaking in ſunder all thoſe Compacts and fundamental Laws which paſs between Princes and Subjects, with regard to the publick Adminiſtration. And, in the firſt place, we cannot admit, that he ſhould aſcribe Majeſty to Kings alone, and utterly deny it to free States and Democracies. It's true, the Cuſtom of Speech, during theſe laſt Ages, ſeems to have appropriated the Term of Majeſty to Kings, by placing it amongſt their Royal Titles. Yet this doth not hinder but that the ſame Word may be uſed to denote the ſupreme Authority under any Form of Government. And thus too, that Definition of Majeſty, poor and dry as it is, in which he calls it, *The chief Power every where over the State*, agrees as well to a Senate, or to a popular Aſſembly. Tho' in this reſpect Kings have the Pre-eminence, that each particular Member of the Senate, or of the general Aſſembly, is ſubject to the ſupreme Power of the People; whereas the Perſon of a King acknowledgeth no Superior upon Earth. Yet as to the Force and Efficacy of Command over Subjects, 'tis the very ſame under all ſorts of Conſtitutions. To proceed, the ſole Cauſe of this Majeſty he makes God himſelf, *Who, upon the People's Election, immediately transfuſeth it on the Prince.* Here I am miſtaken, if he did not conceive Majeſty under the Notion of a real and phyſical Quality; as they manifeſtly do, who affirm civil Government to be the *Creature*, or the Act and the Work *of God, ſo that no other Creature, either in an equal or in a ſuperior kind of Cauſation, or by any innate Principles, doth at all contribute to its Inſtitution.* By which Diſcourſe their groſs Ignorance of moral Things is ſufficiently betray'd. The Argument which ſets forth, how that Perſons, exalted to the Throne from an inferior Station, have ſuddenly been ſurrounded with an unuſal Glory or Splendor, which could not ſhine from any other place than Heaven; may ſerve for a Declamation before ſuch an Audience, as are unable to diſtinguiſh empty Flouriſhes from ſolid Truth. That Kings are the peculiar Care of GOD Almighty, ſerves not in the leaſt towards the Proof of his Opinion. And beſides, the Divine Providence hath been pleas'd to ſhew no leſs Evidences, as it were, of a particular Favour, to other Perſons preſerv'd to be hereafter in an eminent manner uſeful to the World. At the ſame time, we read of no inconſiderable Number of Kings, who have drunk Poyſon out of their precious Cups, or have fallen by the Treachery of their own People. As to that Temper and Conſtitution of Body in ſome Princes [2], which is obſerv'd to produce Effects not unlike to Miracles, the Phyſicians are to be conſulted on the Point. Nor doth he prove what he aims at, by alledging the Puniſhment, either of tyrannical Kings, or of ſtubborn and rebellious Subjects; or by heaping up Teſtimonies in ſo plentiful a Store (which too acknowledge God no leſs for the Author of ariſtocratical than of monarchical Government) or by reciting thoſe Divine Predictions concerning ſome Kings, the like to which have not been wanting in popular States. And as to what paſs'd in the Nation of the *Jews*, this can carry no Evidence as to the Original of Kingly Government in general [3]; there having been many other Kingdoms eſtabliſh'd long before: But it belongs rather to the manner of conferring the ſupreme Command on a particular Perſon, according to particular People.

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[a] L. 1. c. 4. ſ. 7. n. 3. [b] Epiſt. 1. c. 2. v. 13. [c] *Epheſ.* vi. 5, 6, 7, 8. *Coloſſ.* iii. 22. 1 *Tim.* vi. 1. *Titus* ii. 9.

Mr. BARBEYRAC's *NOTES on* §. III.

[1] Joh. Fred. Hornius *de Civitate*, l. 2. c. 1. Never were more pitiful and weaker Reaſons given than in this Matter. If any one has a mind to ſee a Specimen of 'em, among abundance of Authors whom their Prejudices, Intereſt, or the Situation of Affairs where they liv'd, have moſt groſly perverted; let him only read, for Inſtance, *Bœcler*'s Diſſertation *de Auſpicio Regio*, in the firſt Vol. of the Collection of his *Diſſertations Academiques*; and Mr. *Creech*'s *Engliſh* Notes upon his Tranſlation of *Lucretius* in 1683. in King *James* II's Reign, p. 52, *&c.* The laſt is ſo much the more ridiculous, as he has brought it in by Head and Shoulders, and that of ſixty Pages which he ſpends in giving us ſome few Notes upon his Tranſlation, he waſtes five or ſix in an impertinent Digreſſion. But when he afterwards publiſh'd the *Original* with larger Notes in 1695. upon the Revolution, the Reader will find that he takes care not to mention any thing of this *pretended immediate Emanation* of *Divine Authority*. A *Daniſh* Divine has in our Time, in a more effectual manner, refuted the contrary Opinion, by cauſing to be burnt by the Hangman at *Copenhagen*, a Book of Mr. *Thomaſius*, in which that Civilian maintain'd, that *God is not the immediate Cauſe of Sovereignty*. See what blind Zeal, or rather Flattery of *Churchmen* can do! As for *Hector Godefroy Maſius*, who is the other I am ſpeaking of, which is to be found in the *Bibliotheque Univerſ.* Tom. xi. Pag. 47. *&c.* Mr. *Thomaſius*, from whom I have the Account of the Fact I have juſt now related, obſerves in the ſame place, *Inſt. Juriſpr. Div.* Lib. iii. Cap. vi. Sect. 68. that it was formerly propoſed in *France*, in the general Aſſembly of the States of the Kingdom, to canonize this Propoſition, *that Kings derive their Authority immediately from God*; but it came to nothing, becauſe ſeveral made it appear, that the Welfare of the State did by no means depend on any ſuch Opinion; and if ſo, that the Queſtion muſt be left to the Determination of the Schools. *Gramond. Hiſt. de France*, Liv. I.

IV. Let us conſider the Arguments by which he labours to make out, that all human Cauſes are of a far more inferior Power, than to be capable of producing Majeſty or Sovereignty, the moſt auguſt thing upon Earth. Amongſt which, that which carries the Prize from all the reſt is this; *That neither particular Men, nor a looſe and ungovern'd Multitude, are themſelves endued with Majeſty, therefore neither can they confer it on the Prince.* But now it may and often does happen, that a moral Quality (in which Claſs Government ought to be reckon'd) ſhall be produc'd in another Perſon, by the Concurrence of thoſe who had it not truly and properly in themſelves before; ſo as that they may be rightly deem'd the productive Cauſe of the ſaid Quality [a]. As many Voices joining in Conſort produce a Harmony, which no ſingle Perſon could pretend to by himſelf. And on this account it muſt be cenſured as very falſe reaſoning in *Socrates*, when he encouraged *Alcibiades* not to fear the venturing himſelf in an Aſſembly of the People, by telling him, *If you deſpiſe them Man by Man, you ought likewiſe to deſpiſe them when gather'd into a Multitude* [b]. Farther, ſince Sovereignty reſults from the Non-reſiſtance of the Subjects, and from their Conceſſion that the Sovereign ſhall diſpoſe of their Wealth and Strength; 'tis eaſily ſeen that ſome ſcatter'd Seeds, as it were, of Government lie hid in particular Perſons, which, by Means of concurrent Compacts, being excited into Motion, do grow and ſhoot forth. So that 'tis groſly abſurd to infer, that Sovereignty is not *immediately* of human Original, becauſe it is not diſcoverable in the natural Powers or Faculties of Men: As if we were all this while ſpeaking of a phyſical Quality; or as if there were no moral Qualities, diſtinct from the phyſical. I know not what Reliſh wiſe and Chriſtian Princes can have for ſuch flattering Titles as theſe; that *God tranſcribes in the Perſon of the King that Right of governing Mankind, which he held alone by virtue of Creation*: Yet ſo as that GOD ſtill retains his antient Right, and therefore reacheth out this Power to Kings *by Accumulation, and not by an abſolute Abdication*: Together with the like Inſinuations, by which baſe and wicked Paraſites delight in raiſing the Glory of their Prince to the Diſhonour of their God. You would think 'twas a moot Point with them, whether after the conſtituting of Monarchs, God reſerv'd to himſelf any Power or Command over mortal Race; and whether theſe who govern below, ought to own his ſuperior Authority. Certainly nothing can be more manifeſt, than that civil Government is quite different in kind from that Command of God, which he holds by Right of Creation; and therefore 'tis not only abſurd, but blaſphemous to affirm, that *the Sovereignty which God alone is inveſted with, as the Maker of all Things, be out of his ſingular Benevolence doth communicate to Men.*

Endeavouring to give us another Proof that God is the immediate Cauſe of Sovereignty, he diſtinguiſheth between *the immediate efficient Cauſe*, and *the immediate conſtituting*, or appointing Cauſe. The *Sovereignity* only is, he ſays, immediately produced by God; the *Crown* and *Scepter* being commonly receiv'd from other Hands. Hence he obſerves, " that we ought to ſeparate theſe two ways of ſpeaking, *God is the immediate Cauſe of Sovereignty*; and *God immediately conſtitutes the Prince*, or *God immediately confers the Sovereignity.* It being ſomewhat tolerable to affirm, that God confers the Sovereignty by the Mediation or Interpoſition, either of the popular Vote, or of Succeſſion, or of Occupancy [c]. But that in every Act of producing Sovereignty, God

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Mr. BARBEYRAC'S *NOTES on* §. III.

[2] 'The Souls of Kings and of Coblers are caſt in the ſame Mould. When we conſider the Importance of the Actions of Princes, and their Weight, we imagine that they are produced from ſome Cauſes as important and weighty. We are miſtaken; they are mov'd to and fro in their Inclinations by the ſame Springs as we are in ours. The ſame Reaſon that makes us quarrel with a Neighbour, happening in a Prince, makes him ruin a whole Province. Their Wills are as fickle as ours, but their Power is greater. The ſame Deſires move a *Worm* and an *Elephant*. *Montaign*'s Eſſays, B. 2. c. 12. p. 343. *Edit*. Pariſ. *in fol.*

[3] See *Algernon Sidney*'s Diſcourſe upon Government, C. 2. *ſ.* 9.

[a] *Vid.* L. 41. t. 1. l. 46. D. *de Acquir. Rer. Dom.*

[b] *In* Ælian, *V. H.* l. 2. c. 1.

[c] In this Senſe are we to underſtand that Paſſage of *Themiſtius*, Orat. 6. Ed. *Harduin.* p. 73. C. *Do not imagine the Soldiers to have been the main Cauſes and Authors of this Election. The Concurrence of their Votes was the Act of Heaven: The Vacancy of the Throne was the Appointment of the Gods, and Human Aſſiſtance was only the Inſtrument of compleating and executing the Divine Counſels.*

‘ cannot bear or permit any proximate or ſecondary Cauſe’. Now whoever looks more nicely into things, will perceive that theſe Men apprehend Sovereignty under the Idea of ſome phyſical Being, which, after the Production of it by God, wanders up and down in the World, without any certain Seat or Subject, till the Prince being at length deſign'd by the People, it falls upon him, and cloaths him with auguſt Majeſty and Splendor. Where they muſt certainly be at a Loſs, if a Man ſhould be ſo importunate as to demand, whether this Sovereignty, before it finds a place of Reſt in the Perſon of ſome Prince, be a Subſtance or an Accident; and if the latter, how it can exiſt without a Subject? Farther, at what time it was created? at the Beginning of the World, or afterwards? As likewiſe, whether there be but one Sovereignty only, diffuſed through the whole World; or whether particular Princes have each a peculiar and entire Sovereignty of their own? Whether upon the Death of the Prince the Sovereignty dies with him; or whether it ſurvives, like the Soul in Separation from the Body, or finds Reception, by a kind of *Metempſychoſis*, in the new King [a]? But in Truth, to enquire after the Cauſe of Majeſty or Sovereignty, taken in a ſeparate Senſe, is no better than Impertinence; in as much as it never exiſts, but in the Subject. 'Tis juſt the ſame as if I ſhould make a particular Search into the Cauſe of human Nature, ſeparately conſider'd; when as to the Cauſe of *Men*, as they exiſt, I have ſufficient Information. And ſince this Author, before any hath obtain'd a Right to the Sovereignty, leaves it in the Power of the People, to elect what Perſon, and at what time they pleaſe, or to introduce any Form of Government [b]; I would deſire to know what would become of his Sovereignty, ſhould all the People agree in preferring an ariſtocratical or democratical State to it? We acknowledge indeed, that Election, properly and ſtrictly ſpeaking, is no more than the *Manner* of acquiring Empire. But there ſeems to be no reaſon which ſhould hinder, why by one and the ſame Act the *Perſon* may not be mark'd out, and likewiſe the *Sovereignty* conferr'd, as then firſt commencing its Exiſtence. For 'tis very childiſh to imagine, that in moral Things, when any Right, or any moral Quality is conferr'd on another, it muſt of Neceſſity have ſomewhere exiſted ſeparately before. On the contrary, it is evident, that Rights and all other moral Qualities do rather ariſe from the Concurrence of Mens Minds in mutual Compacts [c]. Nor will there be any Difficulty in removing that other Scruple; *If the People be the ſecondary Cauſe of Sovereginty, then the Power, by which they produce it, muſt have been receiv'd from God; which doth not appear to be true in Fact.* For, ſince God hath implanted in Men a Care of their own Safety, hath commanded them to maintain a peaceable and well order'd Converſation, and hath likewiſe endued them with Reaſon, whence they are enabled to find out Means conducing to this End, amongſt which the Eſtabliſhment of civil Government juſtly challengeth the firſt place; who will make any farther Queſtion, whether or no the Power of ſetting this Conſtitution on Foot was a Privilege vouchſafed to them by God himſelf? Thoſe Maxims of Philoſophy, which our Author ſo frequently lets fly againſt us, are partly but of ſlender Credit, and partly, through Ignorance and Miſtake, are unskifully transferr'd from natural to moral Things; which we are not now at leiſure to diſcuſs in particular. And then, as for the Account which *Ovid* gives of the Origin of Sovereignty, in the Fifth Book of his *Faſti*, 'tis meer poetical Fiction.

V. No leſs Pains hath he taken in confuting the Opinions of thoſe, who derive the ſupreme Authority from any other Head. Upon which Argument, as he hath deliver'd a great deal of Truth, ſo are there ſome things which are juſtly liable to Cenſure. He is ſo far in the right, when he denies that Wars, occaſion'd by the Ambition or the Luſt of Tyrants, could give Riſe to the ſovereign Power. For *Wars occaſion'd by Tyrants* do certainly pre-ſuppoſe civil Communities. Yet ſtill, the notorious Violence of many Perſons, and their Deſire of oppreſſing others, might poſſibly give occaſion to the Fathers of Families, living independent and ſcatter'd up and down, to unite in political Bodies [1]. It is moreover evident, that moſt Empires, which have made a Noiſe and Figure in the World, if not all in general, have owed their Growth and Progreſs to War. And yet this is no reaſon why we ſhould pitch upon War for the Original and Fountain of Government. For at leaſt, that Band of Men, which firſt conſpired to invade their Neighbours, voluntarily engaged in Subjection to a common Leader. And as for thoſe who were invaded, no lawful Sovereignty could be eſtabliſh'd over them, till by giving their Covenant and Faith, they had promis'd Obedience to the Conquerour.

VI. Yet it is not ſo utter an Impoſſibility, that civil Empire might ariſe from paternal Government [2]; ſuch, we mean, as extended it ſelf to ſome Breadth, taking many petty Villages under its Direction. 'Tis true, the Command of Fathers belongs properly to the Care of educating Children, as that of Maſters doth to the Management and Improvement of Eſtates; nor can either be alter'd by the bare *Number* of Children, or of Servants. Yet there is not ſo wide a Diſtance between paternal and civil Government, but that Men might paſs from one to the other, without the Production of any new Sovereignty by the immediate Power of God. For ſuppoſe a Father of a Family, bleſs'd with a plentiful Iſſue and with a numerous ſervile Train, to allow both the Children and the Servants, by Emancipation or Infranchiſement, the Privilege of managing their own Concerns, and of conſtituting particular Families, upon this Condition, that in order to the common Security, they ſhall ſtill be ſubject to his Government; I know not what ſuch a Perſon wants to make him a compleat Prince, provided he be Maſter of ſo much Strength, as is ſufficient to compaſs the End of a civil State. Upon his Deceaſe, if he left any Appointment with regard to a Succeſſor, eſpecially if his Sons conſented to the Diſpoſal, that Settlement ſhall be followed. If he did not, then the People, as if they were to frame the whole Conſtitution anew, ſhall reſolve what Government or what Governour they will hereafter receive. In which Caſe there will be no Breach of the Law of Nature, tho' the younger Son ſhould, by the free Votes of the Aſſembly, be elected in his Father's room [a].

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[a] Add the Diſpute in Father *Paul's* Hiſtory of the Council of *Trent*, l. 2. p. 213. concerning the Nature of the *Sacramental Symbols*, where the Managers are put to great Shifts, by Reaſon of their Unskilfulneſs in *Moral Things*.

[b] See *Deuteron.* xvii. 14.

[c] *Comp.* Hobbes *de Cive*, l. 2. ſ. 4. ſee alſo above in B. 3. c. 5. ſ. 2, 3, 4.

[1] See Mr. *Barbeyrac's* Firſt Note upon the Seventh Section of the Firſt Chapter of this Book.

[2] See Mr. *Barbeyrac's* Second Note upon the Tenth Section of the Second Chapter of the Sixth Book, and Mr. *Lock's* ſecond Treatiſe of Civil Government, C. 8. §. 105, *&c.*

VII. *He* farther endeavours to evince, that neither can ſuch a Perſon be term'd the Cauſe of Sovereignty, who firſt poſſeſſing it himſelf, confers the regal Dignity on ſome one who is at preſent his Subject, releaſing him from all future Dependence: As if a King remits to his Vaſſal his former Engagement, and allows him to hold as a ſovereign Prince, what he before enjoy'd only as a feudatary Tenant; or if he makes a Grant to any of his Subjects of ſome Province in his Dominions, exempting it, for the future, from his own Juriſdiction. for a Ceſſion of this kind is, he ſays, no more than the *Manner* of obtaining Sovereignty, and may be reduced to the Head of Elections. Now whoever throughly conſiders the Matter, will eaſily find out, how the ſupreme Authority is produced in this Caſe. And 'tis plainly thus; the King by quitting his Right, both over the Vaſſal and over the Feud, at the ſame time makes one Perſon capable of ſovereign Power, and others capable of ſubmitting to the Exerciſe of it. For that feudal Territory cannot hereafter belong to the *Vaſſal*, as an abſolute and independent Prince, unleſs it be firſt utterly diſengaged from the Authority of the *Lord*, And by this Means the Government, thus eſtabliſh'd, really and truly proceeds from the Conſent of the People. For if the *Lord* hath Power, by his own ſole Act, to beſtow ſuch a Province on whom he pleaſeth, he certainly, at the Beginning, receiv'd this Power from the Conſent of the People, either voluntarily given, or obtain'd by the Iſſue of a juſt War. But if the *Lord* cannot do this by his own bare Authority, then 'tis evident, that the expreſs Conſent of the People muſt concur in the Diſpoſal.

VIII. To conclude this Diſpute; the ſame Author in the laſt place maintains, that even then the People are not the Cauſe of Sovereignty in the Prince, when having before liv'd under a democratical Form, they chooſe a ſingle Governour. For, ſays he, the Sovereignty cannot here be conferr'd on the Monarch, till ſuch time as the People have firſt renounced their Right; but the People in that very Moment, in which they renounce their Right, have no longer any thing to do with the Sovereignty: therefore all that they do, is to elect a Perſon, who having receiv'd his Power from GOD, ſhall, for the future, rule over them. But now upon the ſame Argument, it may be denied, that Property can paſs from one Man to another. For, juſt in this manner, another cannot become Proprietor of my Poſſeſſion, till I have firſt reſign'd my Property. But after my Reſignation, I have loſt my Property, and conſequently cannot transfer that on another, which I have not my ſelf; and therefore all that I do, is to chooſe a certain Perſon, into whom the Property (ſprouting up anew, I know not where) is afterwards to be infuſed.

As to the voluntary Abdication of Monarchs, his Opinion runs in the following Senſe; *That the Government being firſt abdicated, and the People looſ'd from their Allegiance; the Sovereignty doth afterwards return to its original Author, in order to its being again brought back, and communicated to the appointed Heir.* This is manifeſtly a *Metempſychoſis*, or *Tranſmigration* of the ſovereign Power; which a wiſe Man will not require us to be at the Trouble of confuting. In reality, he who abdicates a Crown, gives his Succeſſor an Occaſion, and a Capacity, of receiving it from the Hands of the People, upon their Submiſſion; or, of actually entring upon the Government, to which the Decree of the People, ſettling the Order of the Succeſſion, had before given him a Right.

IX. It may not be improper, before we leave our preſent Subject, to enquire in ſhort, to whoſe Power it belongs, to confer the regal Titles and the Enſigns of Majeſty, or any Denomination by which the ſupreme and independent Authority in State, inhering in a ſingle Perſon, is wont to be expreſs'd. And here it's manifeſt, that to beſtow the Name and Title, belongs to the ſame Perſons, who have a Right to beſtow the ſame thing it ſelf, that is, the ſupreme Command. And by Conſequence, a People, that either now firſt unite themſelves in a civil Body, or elſe, laying aſide their former Frame of Government, reſolve on a monarchical Conſtitution for the future, whilſt they confer on one Man the Authority over themſelves, they, by this very Act, give him a Right to bear the Title and Style of King, and to ſignify his high Station by decent Badges of Honour. Such a King, as he owes his Dignity and Empire to no foreign Power, ſo he need not wait for the Conſent and Approbation of other Princes or States, in order to the aſſuming the Actions or the Character proper to his Office. But as a Foreigner could not diſpute his Right to the Government, without a manifeſt Injury, ſo would it be [1] injurious likewiſe to deny him the Appellation of King. Nor can any Pretence to the contrary be drawn from the ſmall Extent of his Dominions. For a *Kingdom* doth not denote any certain Meaſure of Territory, or of Power; but a particular Form of civil State, which may happen to be greater or leſs. But to make him a King, who before own'd the Command of ſome Superior, 'tis neceſſary, that he obtain the Conſent of his Superior, to releaſe himſelf and his Dominions from the Bond, by which they ſtood engaged to their former Lord. Thus he who is under a *feudal* Obligation, cannot, without his Lord's Conſent, take up the Character of a ſovereign Prince. And unleſs he be releas'd from this Obligation, tho' his Lord ſhould grant him the *Title*, yet he will hold the *Dignity* itſelf after an imperfect and ſubordinate manner. So we find that the Succeſſors of *Alexander* the Great durſt not aſſume the regal Style, till *Alexander*'s own Family was extinct, to which the Sovereignty did of Right belong. And even after this, 'twas neceſſary for them to have the Conſent of the People under their Command, which the numerous Forces kept in Pay about them, ſecured beyond the Poſſibility of a Denial [a]. In the ſame manner, he who ſubdues a Territory by Arms, as he may, by the Right of War, acquire the Power and Authority, ſo may he likewiſe obtain the Title and Character of a King [b]. If a Prince would erect any particular Province of his Empire into a diſtinct Kingdom, the way of compaſſing this Deſign is to ſeparate it from the reſt of the Body, and to govern it by a peculiar Juriſdiction, independent of his other Dominions. That the *Roman* Senate frequently beſtow'd the Title of *Friend* and *King*, as Marks of Eſteem and Honour, is a piece of Hiſtory vulgarly known. And this they might juſtly do with regard either to thoſe Princes, on whom they themſelves had conferr'd the reſpective Dominions, or to thoſe, over whoſe Kingdoms they ſtill held ſome ſuperior and tranſcendent Right. But to have offer'd the ſame Title, as purely a Matter of Favour, to other Monarchs, over whom they could not pretend to the leaſt Authority, had been a moſt inſolent piece of Uſurpation. And yet ſuch a preſuming Prerogative the Popes have not been aſhamed to challenge over the moſt free and independent States of *Europe* [c].

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[a] See *Geneſ.* XXVII. 29, 37.

Mr. BARBEYRAC'S *NOTE on* §. IX.

[1] Mr. *Titius* (Obſerv. DLXI.) aſſerts *not*: And that Foreigners are at their Liberty whether they will acknowledge or not acknowledge ſuch a Sovereign for *King*; becauſe, *ſays he*, this Title generally gives a Rank and Prerogatives that may occaſion ſome Prejudice to other States.

[a] *Vid.* Cornel. Nep. *Eumen.* Plutarch Demet. Juſtin. *l.* 15. *c.* 2. Appian. Alexand. *in Syriac.* Diodor. Sic. *l.* 20. *c.* 54, 55.

[b] *Vid.* Juſtin. *l.* 41. *c.* 4, 5.

[c] See Father *Paul*'s Hiſtory of the Council of *Trent*, l. 5. p. 354. where he reports, how *Paul* IV. advanced *Ireland* to the Honour of a Kingdom; and *Thuanus*'s Hiſt. *l.* 46. about the Title of *Great Duke* conferr'd on *Coſmo* of *Florence*.

CHAP. IV.

Of the Parts of Sovereignty, and their natural Connexion.

I. *In what Senſe the ſupreme Power may be ſaid to conſiſt of Parts.*
II. *The legiſlative Power.*
III. *The vindicative Power.*
IV. *The Judiciary Power.*
V. *The Power of War and Peace, and of making Leagues.*
VI. *The Right of appointing Magiſtrates.*
VII. *The Right of levying Taxes.*
VIII. *The Right of examining Doctrines.*
IX. *Government a more ſtrict Obligation than bare Compact.*
X. *Who may properly be ſaid to hold a part in the Government.*
XI. *The Connexion of Parts in the ſupreme Authority demonſtrated;*
XII. *And illuſtrated,*
XIII. *Many are for dividing thoſe Parts:*
XIV. Grotius *amongſt the reſt; whoſe Opinion is particularly diſcuſs'd.*

THE ſupreme civil Authority, tho' in its own Nature it be one indiviſible thing [1], yet becauſe it exerts its ſelf in different Acts, according as it is imploy'd about different Means, neceſſary to the Preſervation of the State, is generally conceiv'd as conſiſting of many Parts; with Reſemblance to thoſe Parts which are term'd *Potential* [2], in natural Philoſophy. For the ſovereign Command is by no means ſuch an entire compound Being, as is made up of heterogeneous Parts, which as they are join'd and knit together by ſome common Band, compoſe one Body, yet ſo as that each Part is capable of ſubſiſting ſeparately by its ſelf. But as the

Mr. BARBEYRAC'S *NOTES.*

[1] Theſe are *Grotius*'s Terms, in B. 1. c. 3. ſ. 17. n. 1. 'Tis founded upon a falſe Hypotheſis, which our Author has confuted in the preceding Chapter; by which the *Supreme Civil Authority* is conceiv'd to be as a *phyſical* Being, that has no Parts, and that only receives different Names according to the Diverſity of Objects, with regard to which it acts. Indeed, the *Supreme Civil Authority* contains an *Union* of *different Rights*, or *different diſtinct Powers*, but conferred for the ſame End, that is, for the good of the Publick, ſo that to conſider them in themſelves, nothing hinders but that they may be either entirely ſeparate one from another, or in the Hands of different Perſons. See Mr. *Titius*'s Obſerv. DLXIX. Numb. 2. and his Specimen *Juris Publici*, &c. Lib. VI. Cap. VIII. §. 26. &c, as alſo what the learn'd *Obrecht* ſays againſt our Author, in his Diſſertation *de Unitate Reipublicæ in S. Imperio Romano*, §. 5. 'Tis the XIV of the Collection publiſh'd in 1704.

[2] By that is underſtood the *Species* of the ſame *Genus*: For *the potential whole* is what the *Schoolmen* call in other Terms, the *Logical* or *univerſal whole*; upon which we may conſult the Metaphyſicians. Thus *Sovereignty* is conceiv'd as a *Genus*, whoſe *Species* are the *Sovereign* Power of making War or Peace; the Sovereign Power of puniſhing, the Sovereign Power of raiſing Taxes, *&c.* To that is oppoſed the *ſubordinate Parts of Sovereignty*, that is, the different Subjects,

Soul is one ſingle Subſtance, diſpenſing Life and Vigour through the whole Body, and yet as it exerciſeth different Operations, in Proportion to the Difference of the Objects preſented to it, or of the Organs through which it works, is conceiv'd as having *Potential* Parts; ſo, in like manner, the Supreme Authority, as it is buſied in preſcribing general Rules of Action, is term'd the *Legiſlative Power*; as it determines the Controverſies of the Subjects by the Standard of theſe Rules, 'tis the *Judiciary Power*; as it either arms the Subjects againſt Foreigners, or commands them to lay down their Hoſtility, 'tis *the Power of War and Peace*; at it takes in the Aſſiſtance of Miniſters in the Diſcharge of publick Buſineſs, it is called the *Right or Power of appointing Magiſtrates*; and ſo with regard to its other Offices and Functions.

II. What therefore theſe Parts of Sovereignty are, may plainly be diſcover'd from the Nature and End of Civil States. A State then is a Moral Body conceiv'd to act by one Will. But in as much as it is made up of many Natural Perſons, each of whom hath his particular Will and Inclination; and ſince theſe ſeveral Wills cannot, by any Natural Union, be join'd together, or temper'd and diſpos'd into a laſting Harmony, therefore that one Will, which we attribute to the State, muſt be produced by the Agreement of all Perſons, to ſubmit their own private Wills to the Will of one Man, or one Aſſembly of Men, on whom the Government hath been conferr'd. Farther, ſince the reſpective Members ought in Duty to conform themſelves to the Will of the State, 'tis neceſſary, that this Will be made known to them by clear and evident Signs. Hence we apprehend it to be one of the chief Offices of Sovereignty, to preſcribe and declare to others what they ought to perform, or to omit. And becauſe 'twould be impoſſible, in ſo great a Multitude, to give Injunctions to every particular Man, on occaſion of every particular Action; therefore general Rules are eſtabliſh'd, for the perpetual Information and Direction of all Perſons in all Points, either of poſitive, or of negative Duty. Beſides, ſince we eaſily diſcover amongſt Men an immenſe Variety of Judgments and of Appetites, whence an infinite Field of Controverſy might ariſe; it is on this Score highly conducive to the common Peace, that publick Determinations ſhould ſettle what each Man ought to look on as his own, what as another's; what is to be eſteem'd lawful, or unlawful [1] in the State, what honeſt, or diſhoneſt; as likewiſe, what Degree every Man retains of his natural Liberty, or after what Manner each Perſon is to moderate the Uſe and Exerciſe of his own private Rights, in order to the publick Tranquillity [2].

III. To proceed; the chief End of Civil Communities is, that Men, by conſpiring mutually to aid and aſſiſt each other, may be ſecured againſt thoſe Damages and Injuries, which they might otherwiſe ſuffer from their own Kind; and by this means may either enjoy Peace, or have ſufficient Defence againſt any Aſſaults or Moleſtations. Now in order to the procuring of Peace, 'tis in an eſpecial manner neceſſary, that each Perſon be ſo far guarded againſt the Violence of his Fellows, as that he may be able to live ſecurely; that is, without having juſt Cauſe to fear Injury from others, whilſt he himſelf is not injurious to others. Indeed, that Men ſhould be abſolutely protected from mutual Hurt, or that all Injuries ſhould be impoſſible, the Condition of human Things will not allow. Yet ſuch Care may be taken, ſuch Proviſion made, as that there ſhall be no probable Grounds for the Apprehenſion of Danger. And this Security is the Aim which Men propoſe, when they ſubmit themſelves to the Direction of others. Of which, if no greater Degree could be obtain'd by joining Strength, than each private Man could give himſelf by ſtanding ſingly upon his own Guard, 'twould be Folly to renounce our natural Liberty, in which every Perſon is his own Protector. But to compaſs this Security, 'tis not enough that each of thoſe who are about to form a Civil Body, do covenant with the reſt, by Word, or Writing, that he will not kill, ſteal, or offer any other Harm or Prejudice: For 'tis manifeſt how far Human Nature is in moſt Perſons corrupted; and experience ſadly informs us, how little Force the Reverence of verbal Engagements, or the Authority of Oaths, hath with the generality of Mankind, towards the keeping them in their Duty, ſhould the Fear of Puniſhment be once remov'd. For which reaſon likewiſe 'tis not enough to have one who ſhall preſcribe Rules of Acting, if he be inveſted with no farther Power. Therefore, to engage Men to an Obſervance, both of the common Precepts of Nature, and thoſe particular Laws, which are enacted for the good of the State, there muſt be added the Fear of Puniſhment,

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or the different Perſons among whom the *Sovereignty* is divided, as when the *Roman* Empire was in the Hands of the TRIUMVIRI, *Auguſtus*, *Mark Anthony*, and *Lepidus*, &c. But I muſt obſerve by the bye, that Mr. *Courtin*, according to his uſual Exactneſs, ſays in his Index, that by *potential parts* of a State, *Grotius* means *the parts that have the Sovereign Power*; ſo that, adds he, *it happen'd that the ſame* Roman *Empire has had two* Sovereigns *or* two potential Parts, *who reign'd at once, one in the* Eaſt, *and the other in the* Weſt, *the* Imperial *Authority however remaining ſtill one and indiviſible.* On the contrary, the *Subordinate Parts* are, according to him, *thoſe that are ſubject to the Sovereign Power*, that is, *the Subjects of the Provinces that compoſe* the State, *which are with reſpect to the* State *or* Sovereign Power, *what in the Schools ſeveral* Species *are with reſpect to the* Genus. By this ſmall Specimen one may eaſily ſee what Dependence there is upon this Tranſlator's Explanation both of the Terms and of ſome Thoughts of *Grotius*; without ſaying any thing of the Tranſlation it ſelf. This heap of Nonſenſe is ſo much the more inexcuſable in him, becauſe he might eaſily have avoided it by following *Gronovius*, whoſe Notes 'tis plain he had read.

Mr. BARBEYRAC's *NOTES* on §. II.

[1] Tho' here our Author uſes the Terms of *Hobbes* (*De Cive*, c. 6. ſ. 9.) yet he means always, that the Laws of a Sovereign include nothing contrary to the Divine Laws, whether Natural or Reveal'd, as he will prove in the firſt Chapter of the next Book.

[2] The latter Part of this Section is taken from our Author's Abridgment, *De Offic. Hom. & Civ.* B. 2. c. 7. ſ. 2.

and the Power of inflicting what is fear'd. And, that Puniſhment may produce the proper End of its Inſtitution, it ought to riſe to ſuch a Meaſure and Proportion, as that there ſhall be manifeſtly a greater Evil in tranſgreſſing the Laws, than in obeying them; ſo that the Severity of what is to be ſuffer'd may over-balance any Pleaſure, or Profit, which may now, or hereafter be obtain'd by the Offence: It being impoſſible for Men out of two Evils, not to chooſe that which to their Judgment appears the leaſt. And thus the regard which Men have to their own Lives and Safeties ſecures mine. And altho' it may ſometimes happen, that Perſons ſhall be ſo tranſported, either through Raſhneſs and Precipitancy, or ſome other extravagant Commotion of Mind, as to prefer the Satisfaction of the Crime to the Bitterneſs of the Penalty; yet this is to be reckon'd amongſt thoſe uncommon and extraordinary Accidents, which the Condition of our Nature, and the Circumſtances of our Affairs will not ſuffer us to prevent. This Power of inflicting Puniſhment, on thoſe who tranſgreſs the Commands of the Sovereign, is preſumed to be then conferr'd, when particular Men yield up the Uſe of their own Strength to the Service of the Community. By which Act they oblige themſelves to execute Juſtice on Delinquents, when the Sovereign demands their Aſſiſtance in this particular; or at leaſt, not to aid and defend thoſe who are to ſuffer. But for a Man to oblige himſelf to undergo Puniſhment, without Reluctancy, or Reſiſtance, is a void Engagement, and ſuch as cannot hold good, on account of that natural Averſion, which we bear to all things deſtructive of our Safety and our Life. It is truly enough affirm'd by Mr. *Hobbes* [a], that this is the higheſt Degree of Power, which Man can hold over Man, to be able to preſcribe to others, in whatever he thinks beneficial to the State; and by denouncing juſt Penalties, to terrify the Stubborn and Diſobedient into a Compliance with what he thus enjoins. But then, as for what the ſame Author farther aſſerts, *That he who hath a Right of inflicting Puniſhment as he ſhall ſee fit, hath a Right of compelling all Perſons to all things at his Pleaſure*; it ought to have a Limitation affix'd to it, taken from the End of Civil Government: In as much as we are to preſume, that he in whom the Supreme Authority reſides, hath no other Will or Pleaſure, but ſuch as upon good Principles of Reaſon appears to have ſome Tendency towards the ſaid End.

IV. Moreover, ſince under the exacteſt Syſtems of Laws there ariſe frequent Diſputes, about the right Application of them to particular Caſes, and many Circumſtances are to be conſider'd, before a Fact can be pronounced illegal, or the Author of it convicted: On this account the *Judiciary* Power is ſuppoſed to come in to the Aſſiſtance and Support of the two Powers already mention'd. The Office of the *Judiciary* Power is to hear and decide the Cauſes of the Subjects, to examine the Actions of particular Men, which are repreſented as Breaches of the Law; and to pronounce Sentence according to the Legal Penalties. Mr. *Hobbes* [b] ſeems to have had an improper Notion of this Power: Since the Right of Judging, as to the Uſe and Exerciſe of any Part of the Sovereignty, is underſtood to be implied or included in the reſpective Part.

V. But tho' the Means hitherto preſcribed may afford the Subjects full Security againſt thoſe of their own Body; yet this is not enough to anſwer the End of civil Eſtabliſhments. For 'tis to little Purpoſe for Men to be at Peace amongſt themſelves, if they are not able to defend themſelves againſt Strangers; and this they cannot effect, unleſs they are united in their Strength. Becauſe it's purely owing to Conjunction, that many are ſtronger than one; in as much as otherwiſe a thouſand ſeparate Men are not ſuperior in Force to a ſingle Perſon. In order therefore to the general Safety and Welfare, 'tis neceſſary, that there be ſuch a Power in the State as may aſſemble, unite, and arm ſo many Subjects (or hire Mercenaries in their room) as ſhall be thought ſufficient for the common Defence, with Proportion to the uncertain Number and Strength of the Enemy; and may likewiſe, when it ſhall be afterwards expedient, embrace Conditions of Peace. And ſince both the Seaſons of Peace and of War receive a conſiderable Advantage from Leagues, for the better communicating the Benefits of different States, and for repelling and reducing to Reaſon ſome ſtronger Enemy, by a confederate Force; there muſt be inherent in the Sovereignty, a Power to enter into ſuch Alliances as ſhall be ſerviceable in either Condition, and to engage all the Subjects to a juſt Obſervance of them; and at the ſame time, to derive upon the Publick ſuch Fruits and Advantages, as ſhall accrue by their Means.

VI. Again, ſince the Affairs of the Community, occurring as well in Peace as in War, cannot be adminiſtred and executed without Officers and ſubordinate Magiſtrates, there is need of ſuch a Power as may appoint Men to enquire into the Controverſies ariſing between Subjects [c], to dive into the Policies of neighbouring States, to gather in and give out the publick Revenues, and laſtly, in every reſpect to conſult and promote the common Benefit. And then it muſt be another part of the ſame Power, to compel theſe Officers, when once conſtituted, to the Performance of their Duty, and to call them to account upon proper Occaſions [d].

VII. Farther, in as much as publick Buſineſs in the time of War, or of Peace [1], cannot proceed without Expence, ſuch a Power is likewiſe requiſite, as may ſet aſide for theſe Uſes ſome part of Goods or Products of the Country; or may compel private Men to contribute ſo much out of what they ſeparately poſſeſs, as is judg'd neceſſary to ſupport the common Charges; as likewiſe to command and require the Hands of the Subjects, upon occaſion of any needful Work. To the ſame Power belongs the Invention of other lawful Ways and Means of increaſing the Riches of the State. The Principal of which is the Right of impoſing Duties on Goods imported, or exported; and alſo of paring off ſome moderate Proportion from the Price of Commodities conſumed by the Subject.

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[a] *De Cive*, c. 6. ſ. 6. [b] *Ibid.* ſ. 8. [c] See *Exod.* xviii. 15. Philo. Jud. *de Creatione, init.* Joſep. *Archæolog.* III. 3.
[d] *Add.* Bœcler *ad* Grot. *l.* 1. *c.* 3. *ſ.* 6, *p.* 218.

Mr. BARBEYRAC's *NOTE* on §. VII.

[1] This is what St. *Paul* intimates to us, when he ſays: *For this Cauſe pay you* Tribute alſo (to the Magiſtrates) *for they are God's Miniſters, attending continually upon this very Thing.* Rom. xiii. 6. They can't (*ſays* Mr. *Le Clerc upon this place*) leave the care of their own Affairs to apply themſelves to thoſe of the State, without having ſome Recompence for it; nor maintain the Dignity of Miniſters of

VIII. Laſtly, Tho' to make away the intrinſick Liberty of the Will, and at the ſame time, to unite and compoſe Mens Judgments of things in a perpetual Harmony, by an inward Principle, be above human Ability to effect; yet to provide that theſe Sentiments and Perſuaſions, however different, may not diſturb the publick Peace, is a Buſineſs abſolutely neceſſary. For ſince all voluntary Actions take their Riſe from the Will, and have a natural Dependence upon it; and ſince the Inclination of the Will, to the doing, or the not doing of any thing, is built on the Opinion of that Good, or Evil, of that Reward, or Puniſhment, which the Party conceives will follow from the Performance, or the Omiſſion; and conſequently, ſince Mens Actions are ever guided by their Opinions; ſome outward Means muſt needs be found out, by which theſe Opinions and Judgments ſhall be brought, as near as poſſible, to conſpire and agree; at leaſt ſhall be hindred from giving the State any Diſturbance by their Oppoſition. To this End it is expedient, that the State do publickly own and profeſs ſuch Doctrines, as are agreeable to the End and Deſign of Civil Government, and the Minds of the Subjects be from their Childhood grounded in them. In as much as the Generality of Mankind judge of things according as they have been accuſtom'd, and according to the common Notions, which they ſee obtain in the World; very few being able, by the Strength of their own Parts, to diſcern what is good and ſolid in the Conduct of human Life. There is indeed ſcarce any one Opinion, either relating to the Worſhip of God, or concerning thoſe things, the Knowledge of which is ſtrictly term'd *human*, but may be made the occaſion of Diſſention, Diſcord, Reviling; and in the final Iſſue, of Blood and War. And this doth not happen on account of the Falſity of the Opinion, or becauſe to admit the contrary, would bring heavy Inconveniences on Mankind, or on Civil Communities; but by reaſon of Mens unhappy Diſpoſitions, who always imagining themſelves to be wiſe, would gladly appear ſo to all others, and are violently enraged againſt thoſe who preſume to be of the contrary Perſuaſion. This any one will readily confeſs, who hath but chanced to caſt his Eye on thoſe Quarrels of the learned about meer Trifles, carried on with no leſs Heat and Fury, than if their Lives and Religions lay at Stake. Now ſuch Differences and Diſputes, tho' they cannot be abſolutely prevented, yet they may be hindred from interrupting the publick Peace and Tranquillity, by due Penalties enacted againſt thoſe who ſhall maintain and foment them [a]. Yet, what we would obſerve on this Subject, is not properly level'd againſt thoſe Opinions concerning indifferent Points, but againſt ſuch as being obtruded upon Mankind, either under the Colour of Religion, or with ſome other fair Pretence, ſhock and confound the Laws of Nature, and the Principles of ſound Policy, and tend to the breeding of Moral Diſeaſes in a State. Nor will any true and juſt Opinions be in Danger of ſuffering by this Cenſure. For no true Doctrine is oppoſite to the common Peace; and that which doth contradict Peace cannot be true; unleſs we may at the ſame time affirm, that Peace and Concord are repugnant to the Laws of Nature. Wherefore the Power of examining the aforeſaid pernicious Doctrines, and of baniſhing them from civil Societies, is juſtly attributed to the ſupreme ruling Authority [b].

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a Society, and defend it againſt thoſe that diſturb and invade it without an Expence. So that this is the Foundation of all the Taxes of lawful Powers, and which conſequently a Subject ought to pay; becauſe every one is oblig'd to contribute to the ſupport of the Society, in which he lives quietly, and enjoys the Protection of the Laws. And to this part of Sovereignty we may alſo refer the Right of *coining Money*, the Right of *Hunting* or *Fiſhing*; and in general the Power of appropriating the uſe of things that have been left in common, and that cannot conveniently be divided among private Perſons.

[a] Plato *de LL.* l. 11. p. 977. *D. Ed.* Wech. *Let no Man revile another; but in Caſes of Doubt and Controverſy, let the Parties behave themſelves towards each other, and towards the Company, after the manner of Learners, as well as of Teachers; ſo as utterly to refrain from Reproach. For, to abuſe each other in a Diſpute with foul and ſcandalous Language, is to ſcold like Women: And very frequently Words, which in themſelves are trifling Matters, give Occaſion to the deepeſt Hatred and Enmity amongſt Men.*

[b] *Diogenes Laert.* (in *Theophraſt.* §. 38.) reports a Law of *Sophocles* Son of *Amphiclidas*, to this Purpoſe, *That no Philoſopher ſhould keep a School, unleſs by the Decree of the Senate and Commons; and that to do the contrary ſhould be a Capital Crime.*

Plato *de LL.* l. 7. p. 888. C. *Ed.* Wech. *Let no Poet preſume to feign any thing, but what is conſiſtent with the Laws of the State, and is juſt, honeſt and good. Nor ſhall he be allow'd to ſhew his Compoſitions to any private Perſons, before the Guardians of the Laws, and the Judges appointed for this Service, have reviſed and approved of the Performance.* To this Purpoſe ſee *Caſaubon* Exercitat. in *Baron.* and his Epiſtle to *Fronto Ducæus*, n. 624. Ed. *Græv.* Nor is it a deſpicable Remark of Mr. *Hobbes*, which he gives us in his Book *de Homine*, c. 13. §. 8. *Many Books*, ſays he, *we have, compil'd by* Romans, *either under the Commonwealth, or ſoon after its Extinction, and by* Grecians, *during the flouriſhing Condition of the* Athenian *State, repleniſh'd as well with Precepts as Examples, by which the Minds of the Vulgar are render'd averſe to Regal Power; and this for no other reaſon, but becauſe they find theſe Authors making Panegyricks on the Villanies of baſe and perfidious Men, that is, on the Murthers of Kings, when they have before branded them with the Name of Tyrants. But ſtill the Genius and Diſpoſition of the Multitude is much more corrupted by the reading of thoſe Books, and the hearing of thoſe Preachers, who would have a Kingdom within a Kingdom, and Eccleſiaſtical within a* Civil Supremacy. *Hence inſtead of the* Old Bruti *and* Caſſii, *we have our Modren* Clements *and* Ravalliacs, *who whilſt in aſſaſſinating their Princes, they were only the wicked Inſtruments of other Mens Ambition, thought they did God Service.*

IX. Our next Buſineſs is to ſhew, that theſe Parts of the Sovereign Power are naturally ſo united, and, as it were, interwoven with one another, that ſhould we ſuppoſe ſome of them to inhere in one Perſon, ſome in others, the regular Frame of the State muſt abſolutely be deſtroy'd [a]. Which Truth that we may throughly apprehend, it ought to be obſerv'd, that there are, above all others, two Bands eſpecially, by which the Wills of many Men, or of whole Aſſemblies, are cloſed and made to conſpire into one; *Covenant* and *Command*: Of which, nevertheleſs, the latter adds a much ſtronger Tie than the former. They who are held together by bare Covenant, ſtand obliged by the Law of Nature voluntarily to perform the Terms of Agreement; their natural Equality, in other reſpects, remaining as before. Now ſo long as the Articles are on both ſides obſerv'd, a fair Union and Concord may continue amongſt them. And when any one Party, with a wicked Deſign, flies from the Engagement, he is guilty of a Breach of the Law of Nature: But then the reſt, whoſe Intereſt it was that the Covenant ſhould remain inviolable, have no means left of reducing the falſe Brother to Reaſon, but meer Force of Arms, in which he who offer'd the Injury, is frequently not inferior to him that receiv'd it. After the ſame manner, they, who upon equal Terms ſtand bound to each other by virtue of ſome League or Confederacy, are at Peace and Agreement, ſo long as each Party makes good what he promiſ'd; but when either proves perfidious, the Band of Union is diſſolv'd, and an Occaſion of Hoſtility enſues. Whenec it appears, that bare Covenants are not Bands ſufficient, at leaſt, for the long holding together many Perſons in a moral Body; eſpecially ſince it doth not always ſo happen, that the ſmaller and weaker Party recede from their Obligation, to the Prejudice of the more numerous and the more powerful, but very often the direct contrary. And tho' we ſhould ſuppoſe, in the principal Compact, a Clauſe to this Purpoſe, that whoever preſumed to break this Article, ſhould be proſecuted with the united Strength of all the reſt, yet (not to ſay, that this Clauſe would be of no effect, in caſe many Perſons ſhould join in ſuch a Breach, unleſs a Democratical Government were eſtabliſh'd amongſt the Members, or unleſs they who before compoſed a *Society*, do unite more cloſely in a formal *State*) there will be need of another Covenant, to determine what Method ſhall be obſerv'd in proceeding againſt him who ſhall refuſe to ſtand to this additional Engagement; and ſo on, *in infinitum*. But now Sovereignty or Command is a much ſtronger Tie, for the keeping an united Body of Men in firm Agreement. For they who are bound to each other under the ſame Government, do not continue equal to the Government itſelf; but whilſt the Power of preſcribing Rules to, and of inflicting certain Evils, by way of Puniſhment, upon ſuch as tranſgreſs the Rules preſcrib'd, is conferr'd either on a ſingle Perſon, or upon an Aſſembly; all Perſons lie under a far greater Neceſſity to remain obedient, than if they were united by Compact only; which could not take away the Equality of the Members, or their Right of adminiſtring their private Affairs according to their own Judgment.

X. It ought farther to be conſider'd, that if any will maintain the *Potential* Parts of the Sovereignty (as they are term'd) to be within the ſame State, ſeated in diſtinct Perſons or Councils, they muſt at the ſame time neceſſarily allow, that he to whom any Part belongs, muſt be furniſh'd with ſufficient Power, as well to compel the Subjects to the Obſervance of what he ordains, by virtue of that Part, as to defend this his Right, when attack'd, or diſturb'd; tho' that particular Limb of the Prerogative, which contains the Power of War and Peace, may poſſibly reſide in another Perſon: And laſtly, that he have a right of determining, by his own Judgment, at what time and in what manner, the Part of the Government which he holds ſhall be exercis'd and imploy'd. For to poſſeſs a Right of declaring to others what you would have them do, and yet to be deſtitute of Power, for the obliging thoſe to a juſt Compliance who refuſe your Injunctions, deſerves any other Name rather than that of Authority, or Command. And we hold *that* by a very precarious Title, which we cannot defend againſt others. Nor is he any better than another's Officer, or Miniſter, who exerciſeth any kind of Right at the Pleaſure and Diſpoſal of that other Party.

XI. From what we have laid down, it will be evident, that there is ſo near and ſo neceſſary a Connexion between all the parts of the Sovereignty, as that not one of them can be ſeparated from any other, but the regular Frame of the Commonwealth muſt be deſtroy'd; and inſtead of it an irregular Body muſt ſtart up, held together only by an infirm and ineffectual Covenant. For if we appropriate the legiſlative Power to one, and to another the judiciary, each primarily and independently, it will of Neceſſity follow, that either the former is null and void, or that the latter miniſters only to the former. Becauſe, to make Laws which you can't put in Execution is vain and inſignificant; and on the other ſide, to have Strength whereby you may compel and controul, and yet ſuch as you muſt not uſe or apply, but at the Pleaſure of another, is to be an Officer barely executive. Again, ſhould we grant the latter the Privilege of applying his Strength according to his own Diſcretion, without being accountable to others, then we utterly overthrow the legiſlative Power, as before. It is neceſſary therefore, that both theſe Powers ſhould depend upon one and the ſame Will. Nor can the Power of Peace and War, or that of exacting Tribute, be ſeparated from this vindicative, or judiciary Right. In as much as no one can fairly compel the Subjects to bring in Contributions towards the Expences of the State, on either account, but he who hath alſo the Right to puniſh the diſobedient. Farther, it would be abſurd to give the Right of making Leagues for the Service either of Peace, or War, to any other Perſon, beſides him who hath alſo the Right of decreeing Peace, or War, as he judgeth convenient. For otherwiſe, either the former will be only a bare Miniſter, or the latter will depend upon another's Pleaſure, in acquiring Means for the Exerciſe of his own Right. So likewiſe, if you conſtitute any Perſon for the chief Management of Buſineſs, and do not, at the ſame time, impower him to appoint inferior Aſſiſtants, and to require their Service in their reſpective Poſts (without which Aſſiſtants the Buſineſs cannot be perform'd) you really make him as meer a Servant as the reſt. For which reaſon, neither can the Power of appointing Magiſtrates be divided from the other parts of the ſupreme Authority. Laſtly, to the ſame Authority it muſt belong, to take Cogniſance of Doctrines and Opinions, of ſuch eſpecially, as bear any Relation to the End of civil Government, and which are of Force and Efficacy either in promoting, or in hindring Obedience to the ſovereign Ruler. For if one ſhould command the Subjects to do a thing under Pain of temporal Death, and another perſuade them that to do it would be to incur eternal Death; and each by his own Right, ſeparately and independently enjoy'd [1]; the Conſequence muſt be not only that the Subjects tho' innocent, may be juſtly puniſh'd, but alſo that the State muſt ſink into an irregular Syſtem, a Monſter with two Heads. For neither can any Man *ſerve two Maſters*, nor, in the Caſe before us, is he whom we think we ought to follow, upon Pain of eternal Damnation, leſs our Maſter, than he whom we obey upon the Fear of temporal Deſtruction. And were the Right of controlling and regulating Doctrines once taken away, the more ſuperſtitious Subjects would be drawn into Rebellion by their own Fanſies [a]. What farther Power the Sovereign hath, as to ſacred Matters under Chriſtian Government, is a Point which we leave to be more diſtinctly ſtated by others [b] [2]. Nor are we here at leiſure, to diſcuſs the Opinion of *Philo* the *Jew* [a], who having ſhewn that *Moſes* was a King, a Lawgiver, a Prieſt, and a Prophet, adds, *Since all theſe Offices are reducible to one and the ſame Head, they ought by mutual Ties to be united and incloſed one with the other; and they are all requiſite in the ſame Perſon, ſo that he who wants any one of the four, is to be look'd on as a lame Ruler of an imperfect Commonwealth.*

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[a] Add the Preface of Mr. *Hobbes* to his Book *de Cive*; as alſo *Leviath.* cap. 21. where he reckons up the Miſchiefs, that have ariſen from the *Ariſtotelian* Doctrine of Liberty. *Comp. de Cive*, c. 6. *Leviath.* c. 29, 46, 47.

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[a] *Comp.* Hobbes *ibid. &* Horn. *l.* 3. *c.* 11. *ſ.* 3.

[b] See eſpecially *Grotius De Imperio ſummarum Poteſtatum circa, ſacra*, c. 1.

Mr. BARBEYRAC's *NOTES* on §. XI.

[1] See a Diſcourſe of our Author's, intituled, *De Concordia veræ Politicæ, cum Religione Chriſtiana*, ſ. 11. *and the Rights of the Chriſtian Church*, &c.

[2] It is, however, worth our while to ſay ſomething upon this important Matter. If we here make uſe of an unprejudiced Mind, it may be decided in few Words, at leaſt as far as is neceſſary to eſtabliſh general Principles, from whence we may eaſily draw Conſequences in particular Caſes; and in other Points depending upon that. The following *Letter concerning Toleration* contains what is ſufficient to ſatisfy us. 'The Toleration of thoſe that differ from others in Matters of Religion is ſo agreeable to the Goſpel of Jeſus Chriſt, and to the genuine Reaſon of Mankind, that it ſeems monſtrous for Men to be ſo blind as not to perceive the Neceſſity and Advantage of it in ſo clear a Light. I will not here tax the Pride and Ambition of ſome, the Paſſion and uncharitable Zeal of others. Theſe are Faults from which human Affairs can perhaps ſcarce ever be perfectly freed; but yet ſuch as no body will bear the plain Imputation of, without covering them with ſome ſpecious Colour; and ſo pretend to Commendation, whilſt they are carried away by their own irregular Paſſions. But however, that ſome may not colour their Spirit of Perſecution and Unchriſtian Cruelty with a pretence of Care of the Publick Weal, and Obſervation of the Laws; and that others, under pretence of Religion, may not ſeek Impunity for their Libertiniſm and Licentiouſneſs: In a word, that none may impoſe either upon himſelf or others, by Pretences of Loyalty and Obedience to the Prince, or of Tenderneſs and Sincerity in the Worſhip of God; I eſteem it above all things neceſſary to diſtinguiſh exactly the Buſineſs of Civil Government from that of Religion, and to ſettle the juſt Bounds that lie between the one and the other. If this be not done, there can be no end put to the Controverſies that will be always ariſing between thoſe that have, or at leaſt pretend to have, on the one ſide, a care of the Commonwealth. The Commonwealth ſeems to be a *Society of Men conſtituted only for the procuring, preſerving and advancing their own Civil Intereſt*. Civil Intereſts I call Life, Liberty, Health and Indolency of Body; and the Poſſeſſion of outward Things, ſuch as Mony, Lands, Houſes, Furniture, and the like. It is the Duty of the Civil Magiſtrate, by the impartial Execution of equal Laws, to ſecure unto all the People in general, and to every one of his Subjects in particular, the juſt Poſſeſſion of the Things belonging to this Life. If any one preſume to violate the Laws of Publick Juſtice and Equity, eſtabliſh'd for the Preſervation of thoſe Things, his Preſumption is to be check'd by the Fear of Puniſhment, conſiſting of the Deprivation or Diminution of thoſe Civil Intereſts or Goods, which otherwiſe he might and ought to enjoy. But ſeeing no Man does willingly ſuffer himſelf to be puniſh'd by the Deprivation of any part of his Goods, and much leſs of his Liberty or Life, therefore is the Magiſtrate arm'd with the Force and Strength of all his Subjects, in order to the Puniſhment of thoſe that violate any other Man's Right. Now that the whole Juriſdiction of the Magiſtrate reaches only to theſe Civil Concernments; and that all Civil Power, Right, and Dominion, is founded and confined to the only care of promoting theſe Things; and that it neither can, nor ought in any manner to be extended to the Salvation of Souls, theſe following Conſiderations ſeem unto me abundantly to demonſtrate. *Firſt*, Becauſe the Care of Souls is not committed to the Civil Magiſtrate any more than other Men. It is not committed unto him, I ſay, by God, becauſe it appears not that God has ever given any ſuch Authority to one Man over another, as to to compel any one to his Religion. Nor can any ſuch Power be veſted in the Magiſtrate by the *Conſent of the People*; becauſe no Man can ſo far abandon the Care of his own Salvation, as blindly to leave it to the choice of any other, whether Prince or Subject, to preſcribe to him what Faith or Worſhip he ſhall embrace. For no Man can, if he would, conform his Faith to the Dictates of another. All the Life and Power of true Religion conſiſt in the outward and full Perſuaſion of the Mind; and Faith is not Faith without Believing. What Profeſſion ſoever we make, to whatever outward Worſhip we conform, if we are not fully ſatisfied in our own Mind that the one is true, and the other well pleaſing unto GOD, ſuch Profeſſion, and ſuch Practice, far from being any Furtherance, are great Obſtacles to our Salvation. For in this manner, inſtead of expiating other Sins by the Exerciſe of Religion, I ſay, in offering thus unto God Almighty ſuch a Worſhip as we eſteem diſpleaſing to him; we add unto the Number of our other Sins, thoſe alſo of Hypocriſy and Contempt of his Divine Majeſty. *Secondly*, The Care of Souls cannot belong to the Civil Magiſtrate, becauſe his Power conſiſts only in outward Force; but true and ſaving Religion conſiſts in the inward Perſuaſion of the Mind, without which nothing can be acceptable to GOD. And ſuch is the Nature of the Underſtanding, that it cannot be compell'd to the Belief of any thing by outward Force. Confiſcation of Eſtate, Impriſonment, Torments, nothing of that Nature can have any ſuch efficacy as to make Men change the inward Judgment that they have fram'd of things. It may indeed be alledg'd, that the Magiſtrate may make uſe of Arguments, and thereby draw the Heterodox into the way of Truth, and procure their Salvation. I grant it; but this is common to him with other Men. In teaching, inſtructing and redreſſing the Erroneous by Reaſon, he may certainly do what becomes any good Man to do. Magiſtracy does not oblige him to put off either Humanity or Chriſtianity; but it

XII. This will be more clearly diſcern'd, if we examine thoſe ſeveral Diviſions of the Sovereignty, which might be propoſed. Let therefore the Power of Peace and War be in the Prince; the Power of making Laws and executing Juſtice, in the Senate; the Right of levying Tribute, in an Aſſembly of the People. Here, if the King commands the Subjects to Arms, and they refuſe to obey his Orders, either the King may compel them by Puniſhments, which he himſelf has a Right of inflicting, or he ought to deliver them up to take their Tryal before the Senate. Now ſhould we admit the former of theſe, it doth not appear, how he, whom we ſuppoſe not to have the Power of putting the Laws in Execution, can puniſh the Subjects before they are actually liſted, and brought under martial Diſcipline. If you ſay, that, in this particular Caſe, the King hath a Right to puniſh the Diſobedient, tho' not in other Caſes; you, at the ſame time give him the Privilege of oppreſſing and grieving his People, as he thinks fit, and ſo you cancel the Rights of all beſide. For when he orders them to take up Arms, he'll puniſh them, if they dare to refuſe; and when he hath once led them out on an Expedition, then the Nature of military Diſcipline gives him the Power of Life and Death over them: And nothing is eaſier than for a General to cut off any Soldier, who hath the Misfortune to fall under his Hatred, or Diſpleaſure [b]. On the other

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is one thing to perſuade, another to command; one thing to preſs with Arguments, another with Penalties. This Civil Power alone has a right to do; to the other, Good Will is Authority enough. Every Man has Commiſſion to admoniſh, exhort, convince another of Error, and by Reaſoning to draw him into Truth: But to give Laws, receive Obedience, and compel with the Sword, belongs to none but the Magiſtrate. And upon this ground I affirm, that the Magiſtrate's Power extends not to the eſtabliſhing of Articles of Faith, or Forms of Worſhip, by the force of his Laws. For Laws are of no Force at all without Penalties; and Penalties in this caſe are abſolutely impertinent, becauſe they are not proper to convince the Mind. Neither the Profeſſion of any Articles of Faith, nor the Conformity to any outward Form of Worſhip (as has been already ſaid) can be available to the Salvation of Souls, unleſs the Truth of the one, and the Acceptableneſs of the other unto God be thoroughly believ'd by thoſe that ſo profeſs and practiſe. But Penalties are no ways capable to produce ſuch Belief. It is only Light and Evidence that can work a Change in Mens Opinions; which Light can in no manner proceed from Corporal Sufferings, or any other outward Penalties. *Thirdly*, The care of the Salvation of Mens Souls cannot belong to the Magiſtrate; becauſe tho' the Rigour of Laws and the Force of Penalties, were capable to convince and change Mens Minds, yet would not that help at all to the Salvation of their Souls. For there being but one Truth, one way to Heaven; what hope is there that more Men would be led into it, if they had no Rule but the Religion of the Court, and were put under a Neceſſity to quit the Light of their own Reaſon, and oppoſe the Dictates of their own Conſcience, and blindly to reſign up themſelves to the Will of their Governours, and to the Religion which either Ignorance, Ambition, or Superſtition had chanced to eſtabliſh in the Countries where they were born? In the variety and contradiction of Opinion in Religion wherein the Princes of the World are as much divided as in their Secular Intereſts, the narrow way would be much ſtraiten'd; one Country alone would be in the right, and all the reſt of the World put under an Obligation of following their Princes in the ways that lead to Deſtruction; and that which heightens the Abſurdity, and very ill ſuits the Notion of a Deity, Men would owe their Eternal Happineſs or Miſery to the Place of their Nativity'. Theſe are the Author's own Words: From whence he aſſerts, that the Magiſtrate ought to leave every one the Liberty of profeſſing ſuch Opinions as he believes the moſt reaſonable, and to take care that no Violence be offer'd to any Perſon upon that Account. He ſhews at large the Inconveniences that there would be in ſubmitting ones ſelf to the Humours of Princes; who act nothing but by the Suggeſtion of the *Churchmen* that are about them. If a Man were obliged to follow the Religion of the Prince, he muſt change his Religion as often as his Prince; ſo that if Princes of different Opinions ſhould ſucceed one another, as it has happen'd in *England*, the Inhabitants of a Country muſt in a few Years be of different Religions to be ſav'd. 'But as in every Church there are two Things eſpecially to be conſider'd, the outward Form and Rites of Worſhip, and the Doctrines and Articles of Faith; the Author takes notice there of the Duties of a Magiſtrate with reſpect both to the one and the other. As for Ceremonies, or the outward Form and Rites of Worſhip, it appears by the Definition of a Church, which is, according to him, *a voluntary Society of Men joining themſelves together of their own accord, in order to the publick worſhipping of God in ſuch manner as they judge acceptable to him, and effectual to the Salvation of their Souls.* It appears, I ſay, by this Definition, that the Prince has no Power to enforce by Law, either in his own Church, or much leſs in another, the Uſe of any Rites or Ceremonies whatſoever, in the Worſhip of God. We cannot ſay, that being things indifferent, the Prince has a Right to regulate them as he finds convenient, becauſe when ſuch things are brought into the Church and Worſhip of God, they are remov'd out of the reach of the Magiſtrate's Juriſdiction, and in that uſe they have no Connexion at all with Civil Affairs. Beſides, if they are indifferent, in themſelves, they do not by the Prince's Approbation become acceptable to God, who has not promis'd to be pleas'd with the Worſhip that the Magiſtrates ſhould eſtabliſh. As to the Doctrines and Articles of Faith: *Firſt*, Princes ought not to tolerate any Opinions contrary to Civil Society. *Secondly*, They ought not in particular to tolerate thoſe who under the pretence of Religion would diveſt private Perſons, or even Magiſtrates of their Civil Rights and Poſſeſſions. *Thirdly*, They ought not to ſuffer Churches which are conſtituted upon ſuch a Bottom, as that all thoſe who enter into them, *ipſo facto*, deliver themſelves up to ſome Foreign Authority which they are ready to pay a blind Obedience to, notwithſtanding they have Princes of their own. *Fourthly*, and laſtly, Atheiſts who deny the Being of a God are not to be tolerated, becauſe having no Religion, they make a Conſcience of nothing but what is puniſhable by the Civil Laws'. Two Reaſons induced me to ſet down here the Principles of this little Treatiſe. One is, Their being a neceſſary Conſequence of a Truth which our Author himſelf has ſolidly proved in his Diſcourſe *de habitu Religionis Chriſtianæ ad Vitam Civilem*, I mean, that Religion is antecedent to Civil Societies, and that it has nothing at all to do with their Eſtabliſhments. See Sect. 1, 2, 3, 4, 5, 6. The other Reaſon is the Authority of the Perſon who wrote the *Letter concerning Toleration*, which is of very great weight: Since the Learned Mr. *Locke* has, in his laſt Will and Teſtament own'd it for his. See alſo Mr. *Nootd*'s excellent Diſſertation *de Religione ab Imperio jure Gentium libera*; publiſh'd by me in *French* in the beginning of the Year 1707. and ſince tranſlated into *Engliſh* The Reader will find, in my Notes, the principal Treatiſes that have been written upon this Subject, ſpecified and referred to.

[a] *De Præm. & Pæn.* p. 919. *A.* Edit. *Pariſ.* Our Author might plainly have ſaid, that this Opinion, having no other Foundation than *Philo*'s Authority, was not worth refuting.

[b] *Vid.* Liv. *l.* II. *c.* 23, 32, 58. *l.* III. *c.* 10, 20, 24. *l.* IV. *c*, 1, 5. 58. *l.* V. *c.* 2. 10. and in many other places. *Diodor. Sic.* l. XIV. c. 73. *Quintus Curtius*, l. VII. c. 2. *Polyb.* l. 1. c. 9.

hand, if the King muſt be obliged to have recourſe to the Senate for Juſtice, when any Perſons refuſe to liſt themſelves under his Command; in this Caſe, either the Senators muſt pronounce the Sentence of their Condemnation, and give Orders for the Execution of it, barely by the King's Commiſſion and Authority; which is contrary to the Suppoſition: Or they muſt judge whether the Act alledg'd be criminal, or not; and this Proceeding will certainly be vain and fruitleſs, unleſs the ſame Judges may likewiſe take upon them to examine, whether or no the War now engaged in by the Prince, be for the Advantage of the Commonwealth; and thus the King's Right will again be deſtroyed. We ſhall diſcover the ſame Inconveniences, if we compare the Right of the *Prince* with that of the *People*, under ſuch a Conſtitution, as we did before with that of the *Senate*. For as the Meaſures of War are now ſettled in moſt Countries, *Tacitus*'s Obſervation [a] holds true; that *Armies cannot be without Pay, and Pay cannot be had without Taxes.* If therefore the Prince have not a Power of compelling the Subjects, by virtue of his ſovereign Command, to bring in their Shares of the publick Contributions, his Right over the Affair of War will be no more than a bare Power of perſuading and adviſing the People, that, in ſuch or ſuch a particular Juncture, to engage in a War would be for the Advantage of the Commonwealth. On the other hand, if the People are not impower'd to judge whether the War, towards which theſe Subſidies are levied, be for their Intereſt, or not; then what have they to boaſt of, but the laborious, and ſervile Office of Aſſeſſors and Collectors? Nor will things be in a better Poſture, ſhould we ſeparate the Branches of Sovereignty, according to any other Diviſion that could be invented [b]. So juſt was that Remark of *Aſinius Gallus*, in *Tacitus* [c], that *As a Government hath but one Body, ſo it muſt be directed but by one Mind* (whether of a ſingle Perſon, or of a Council, or Aſſembly.) This may be well illuſtrated by the Example of the human Soul, to which the ſovereign Authority in a State ſeems to bear ſome Reſemblance. Now ſhould we ſuppoſe the potential Parts of the rational Soul, the Underſtanding and the Will, to exiſt ſeparately, in two different Subjects or *Suppoſitums*, one of which ſhould have only the Faculty of the Underſtanding, the other only the Faculty of the Will; neither of theſe *Suppoſitums* could be call'd a Man, nor could human Actions be expected from either; whilſt one lay unactive and immoveable, the other blind and inſenſible. To which purpoſe the Epigram in the *Anthologia* [d] ſeems proper to be applied:

Πηρὸς ὁ μὲν γυιοῖς, &c.

The blind Man bears the lame: What Fate denies
The wretched Pair, their mutual Help ſupplies;
One lends his Feet, the other lends his Eyes.

Here the two unfortunate Perſons were able in ſome ſort to make up the Defects of Nature, ſo long as they agreed to afford their mutual Aſſiſtance. But ſhould this Agreement have been once broken, and a Quarrel have happen'd between them, each Party would have been alike at a loſs about their Way. In the ſame manner ſhould any perſiſt in dividing the Parts of the Sovereignty, he will by no means compoſe a regular State, but a diſorderly Body, the Members of which holding theſe ſeparate Limbs of the Government, ſhall be kept together, not by any common Authority, but bare Compact or Agreement. Now in ſuch a Society ſome kind of Peace and Concord might be maintain'd, ſo long as particular Perſons kindly conſpir'd in their Opinions with regard to the publick Good, and were each of them ready voluntarily to perform what was requiſite towards this End. But ſhould any Diſſention ariſe, no means of Redreſs would be left, but either to ſeek abroad for an Arbitrator, or to decide the Controverſy by the Sword.

XIII. Tho' the Caſe be manifeſtly thus, as we have repreſented it, yet there is no inconſiderable Number of Men, who ſtand up reſolutely for the Diviſion of the ſovereign Power, that hereby they may frame I know not what Mixture of Commonwealths, which being rightly temper'd and qualified muſt needs, forſooth, produce the moſt happy Syſtem of Government. They would gladly engage *Ariſtotle* to be of their Party, but without Effect; he in the place of his Works, which they alledge [e], ſpeaking of a Mixture far different from any that can be applied to the parts of the Sovereignty. Which makes it ſeem the more ſtrange, that ſome Interpreters (and *Mich. Piccart* amongſt the reſt) when they come to treat of this Mixture, put ſuch things together, as probably never entred into the Philoſopher's Head. The Temperature which *he* ſo much adviſeth and recommends, runs in the following manner: *That the King ſhall have the Power of making War, of coining Money, of engaging in Leagues, of conferring publick Rewards: that the Senate ſhall poſſeſs ſuch Rights as demand Experience and Deliberation; the framing and the executing of Laws, and the adminiſtring of publick Juſtice: Laſtly, that the Populacy ſhall manage ſuch Affairs, as their Knowledge chiefly directs them to; the Examination of the Revenue, the Diviſion of Lands, the Creation of Magiſtrates, the Inſpection of Buildings, Highways, Aqueducts, Corn, and other Helps and Aſſiſtances of the State.* In like manner, it would not argue any Diviſion in the Sovereignty, ſhould we, for Inſtance, ſuppoſe that the Senate had the Power of condemning, but the Prince or the People of pardoning and acquitting. For here the Prince might by his Prerogative abſolve any Perſon, againſt whom the Judges had pronounced Sentence; and conſequently the latter would be only an inferior Court, whoſe Deciſions muſt borrow their Force and Ratification from the Authority of the former. Whence it ſufficiently appears, that if in any State, the Judgment of capital Cauſes belongs to the Senate, the King ſtill retaining the Right of *Grace*, or Pardon; the Senate doth really hold, by Deputation from the King, this Power of preſiding in criminal Proceſſes, and of pronouncing Sentence as the Law directs; and this as well for the Baniſhing all Partiality from the Methods of Juſtice, as to divert the *Odium* from the King: Yet ſo as that the Power of Life and Death are radically, or originally, inherent in the King's Perſon. Some would frame a Diviſion in the judiciary Power it ſelf; ſo that the Prince ſhould have the Power of Life and Death over Strangers only, but the People over the Natives. But now, if the People exerciſe this Power over the Natives, only as an inferior Court, then they do not in the leaſt intrench upon the Prerogative of the Prince. On the contrary, if they hold it originally and independently, then the King will have nothing left him but an empty Title, and will only perform the Office of *Prætor peregrinus*, a Judge of foreign Cauſes. As for what they add, about dividing the Right of Coinage, it is too impertinent to deſerve a Repetition.

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[a] Hiſt l. IV. c. 74.

[b] *Add.* Bodin. *De Republ. l.* 2. *c.* 1. *p.* 287. with the Obſervation made on that Author, by *Arniſæus, De Republ. l.* 2. *c.* 6. Sect. 1. §. 56.

[c] Annal. l. 1. c. 12.

[d] L. 1.

[e] Polit. *l.* IV. *c.* 8, 9.

Arniſæus [a] is very large on this Point, and amongſt many accurate Remarks, juſtly rejects ſome ſpurious kind of Mixtures in Government. And at laſt, the faireſt Model he could invent, was, that the King ſhould have the Power of War and Peace, of levying Tribute, of Coining Money, of diſtributing publick Rewards; that the Senate ſhould be employ'd in judging Cauſes, and in receiving Appeals, as likewiſe in the Reformation of Manners by good Laws, and in exerciſing the Power of Life and Death; and laſtly, that the People ſhould be allow'd the Care of the Revenue, and the Creation of Magiſtrates. Of which Model a Judgment may be formed, by what we have before obſerv'd.

XIV. *Grotius* himſelf [b] hath attempted ſomewhat towards dividing the Parts of the Sovereignty. Where he is ſo far in the right, when he denies that any ſuch Partition of Power, between the Prince and the People, can be made, as that the prime Compact ſhall be thus looſely expreſs'd, *If the King govern well, then the People ſhall obey him; if he govern ill, then the People ſhall compel him to his Duty*: Obſerving, that certain Bounds and Limits ought rather to be aſſign'd to the Power of either Party; ſuch as may eaſily be apprehended from the Difference of Places, Perſons, and Affairs; but that the bare Good or Evil of an Action, conſiſting in the Application of fit Means to the publick Safety, which often admits of very great and obſcure Debates, cannot be a proper Bottom to ground a Partition upon; in regard to that extreme Confuſion which muſt follow, whilſt the King, on the one hand, would inſiſt upon the Management of an Affair, alledging that he order'd it well; and the People, on the other hand, would challenge the Direction of it, pretending that it had been ill managed before. His other Remark is no leſs true, that for a Prince to promiſe the People by an Oath, that he will perform, in ſuch a peculiar manner, things which belong to the Adminiſtration of the Government, doth not argue a Partition of Power. But through all the reſt of his Diſcourſe he falls into the common Error. One way then, by which he thinks the Sovereignty may be divided, is, when a Partition ſhall be made by expreſs Agreement. A Precedent of this kind he alledgeth from the *Roman* State in the time of *Probus*, when the Senate confirm'd the Prince's Laws, heard Appeals, created Pro-conſuls, and ſupplied the Conſuls with Lieutenants. As if any Perſon could be ignorant, how that, amongſt the Emperors, thoſe who affected to ſeem more modeſt than others, exerciſed the Sovereignty under the Mask and Diſguiſe of the antient Commonwealth; leaving to the Senate ſome inferior and petit Affairs, ſuch as had little Influence on the main Government; but reſerving ſtrictly to themſelves the chief Force and Command, which conſiſted for the moſt part in the Soldiery. Another Project of dividing the Sovereignty he expreſſeth in this manner: *If the People, being as yet free, ſhall require thus much of him whom they chooſe to be their King, and ſhall lay it upon him after the manner of a ſtanding Rule or Command.* Now here 'tis not eaſy to apprehend what kind of thing a *ſtanding Command* is, when ſuppoſed to continue after that the Party hath loſt the Power of Commanding. For every Command preſuppoſeth a compulſive Force, to be exerted ſo often as the Command ſhall be tranſgreſs'd. Wherefore the People, who appoint themſelves a King on ſuch Terms, ſhall either keep this compulſive Power over him, or they ſhall not keep it. If the former, the King is only ſo in Name; the Force and Efficacy of the Government reſiding in the People: If the latter, the Command will be inſignificant. He ought therefore to have ſaid, that a People, as yet continuing in a State of Liberty, may oblige the future King to follow certain Rules in the Diſcharge of the Government. But that ſuch a Compact doth not imply or infer a Diviſion of the ſovereign Power, we ſhall hereafter make appear. His laſt Inſtance of dividing Sovereignty is, *When in conferring the Government, ſome Clauſe was added, importing that the King might be compell'd or puniſh'd* upon Default. But indeed the Sovereignty can by no means be ſaid here to be divided, but the People really poſſeſs it entire, only allowing the King, under a great and ſpecious Title, the Office of an extraordinary Magiſtrate; in caſe the People have a Right, on any account, to compel or to puniſh their Prince. For Puniſhment ever proceeds from a Superior, conſider'd in that Capacity. And as for Compulſion, this may be uſed two ways, either morally, or phyſically; that is, either by way of Authority and Command; or by way of Force and Violence. Authority over an *Equal*, as ſuch, is impoſſible. Therefore when *Grotius* argues that the People at leaſt are equal to the Prince, becauſe in ſome particular Caſes they may compel him; he muſt at the ſame time allow, that neither Prince nor People have Authority or Sovereignty over the other; which is repugnant to the Nature of a civil State. The other kind of Compulſion, by Arms and hoſtile Violence, takes place only between Equals, or ſuch as are not properly ſubject one to the other. And of this Compulſion muſt we underſtand the Caſe urged by *Grotius*; *That a Creditor hath naturally a Right of compelling his Debtor.* For certainly he hath no ſuch natural Right, by way of Command or Sovereignty, inherent in his Perſon; for then it muſt neceſſarily follow, that every one who commenceth a Debtor, muſt fall under *Subjection* to his Creditor. But ſtill the Creditor hath the full Privilege of compelling his Debtor to Payment, either by the Aſſiſtance of the Judge (ſuch as cannot be had between Prince and People) or elſe, if he live in a Condition of natural Liberty, by hoſtile Force. If then we would aſſign this way of compelling to the People, we muſt withal allow, that both Prince and People live in a State of natural Freedom; that is, that the civil Government is utterly diſſolv'd. To conclude, we readily acknowledge the Truth of *Grotius*'s Obſervations, That *in civil Inſtitutions there is nothing abſolutely free from all Inconvenience; and that therefore we ought not, on account of the Inconveniences attending a divided Power, to conclude it impoſſible: In as much as every Right is to be meaſur'd, not by the Opinion of one or two particular Perſons, but by the Will of him from whom the Right proceeds.* But then it muſt be granted us in requital, that if any pleaſe themſelves with framing ſuch a Partition, they will hereby conſtitute, not a regular State, but an ill-jointed and diſtemper'd Body.

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[a] Rel. Polit. *l.* 1. *c.* 6. *ſ.* 1.

[b] L. 1. c. 3. ſ. 9, 17.

CHAP. V.

Of the different Forms of Government.

I. *The Accidents of civil States cannot conſtitute a new Species.*
II. *Irregular Forms and Syſtems of Government.*
III. *The three Forms of regular Government.*
IV. *Democracy ſeems to be the moſt antient Form.*
V. *Democracy no leſs inveſted with ſupreme Power, than Monarchy.*
VI. *Democracy, how conſtituted.*
VII. *The ordinary Requiſites of Democracy.*
VIII. *How Ariſtocracy is eſtabliſh'd:*
IX. *And how Monarchy.*
X. *In Bodies politick there may be Vices of Men, and Vices of State.*
XI. *Yet theſe compoſe not a peculiar Species of Government.*
XII. *As neither do the various Accidents of Democracies and Ariſtocracies.*
XIII. *Of the mixt Government propoſed by modern Authors.*
XIV. *The Nature of irregular States.*
XV. *This Irregularity beſt illuſtrated by Examples.*
XVI. *States which admit of Provinces do not hence become neceſſarily ſyſtematical.*
XVII. *Of Syſtems occaſion'd by a Common Prince.*
XVIII. *Of Syſtems compoſed by League and Confederacy.*
XIX. *Of the Communication of Councils and Buſineſs in theſe united Bodies.*
XX. *Whether the greater part ought here to conclude the leſs.*
XXI. *How theſe Syſtems are diſſolv'd.*
XXII. *The ſeveral Forms of Government compared.*

I. THE Sovereign Authority, beſides that it inheres in each State, as in a common or general *Subject*; ſo, farther, according as it reſides either in one Perſon, or in a Council (conſiſting of ſome, or of all the Members) as in a proper or particular *Subject*, it produceth different Forms of Commonwealths. And here, e're we proceed to enquire into this Variety, we take it for granted, that we may have free leave to retain the Word *Form*, when we would expreſs that Conſtitution or Model of State, which ariſeth from the Difference of the *Subject*, in which the ſupreme Power is primarily and originally ſeated. That the actual Adminiſtration of the Government recedes, in many Caſes, from the particular Form, is a thing vulgarly known: As in *Democracy*, for inſtance, ſome Affairs are managed in the way of *Monarchy*, others in the way of *Polyarchy*; according as Buſineſs is committed to the Care of one Perſon, or to ſuch a Number of Commiſſioners. And becauſe it is a Matter of great Conſequence, whether the Power any Perſon exerciſeth be his own, or whether it be another's, of which he may at any time be deprived, holding it only by a precarious Title; therefore 'tis great want of Accuracy in a certain Author to affirm, that 'When a King ſuffers himſelf to be led by the Noſe by ſome few Counſellors, who abuſe the Eaſineſs of his Temper, or a People by ſome powerful Demagogue, or when in a ruling Senate one Member leads the reſt, by his Wiſdom or Eloquence, or overawes them by his Intereſt and Strength; a *Polyarchy* is really introduced in the firſt of theſe Caſes, and a *Monarchy* in the two latter; and that in the firſt Caſe there is nothing but an empty Name, and outward Semblance of Monarchy, in the ſecond of Democracy, in the third of Polyarchy or Ariſtocracy. Thus alſo, no intelligent Perſon will imagine the *Form* of a Commonwealth to be alter'd, upon a Change either in the Perſons, or in the Number of Miniſters; no more than he will think, that when a new Succeſſor baniſheth from his Councils and Preſence, one who was chief Miniſter under the former Prince, and had the Management of all Affairs, an *Interregnum* muſt hereupon enſue. The Capacity

city and Inclinations of him or them, who either by their own Right, or by Delegacy from others, exerciſe the ſovereign Power, do indeed affect and vary their Adminiſtration, but do by no means touch the *Form* of Government. In the ſame manner, ſuppoſing the chief Authority to be exercis'd well in one Place, and ill in another; yet a new Model of State doth by no means reſult from the different Exerciſe of the ſame Power. Wherefore as a Perſon in ſound Health doth not differ *in Specie* from one that is ſick, and as the unnatural Diſtortion of the Body doth not produce Men of a new kind; ſo neither do the Vices of thoſe who command, or of thoſe who obey, nor the Corruption of Laws, make the leaſt Step towards conſtituting another Species of a Commonwealth.

II. It may be uſeful farther to obſerve, that moſt Authors who have treated of civil Knowledge, have imploy'd themſelves in explaining the regular Forms of Government; as for the irregular Forms, many have not ſo much as thought of them, ſome few have very ſlightly touch'd upon them. Hence it came to paſs, that if they happen'd to meet with a *civil Body*, which did not exactly come up to one of thoſe uſually term'd *ſimple* Forms, they had ſcarce any Word left to expreſs it by, beſides the Name of a *mixt* Government. But now, not to urge how very ill this *Mixture* is applied to ſome Commonwealths; it is weak to imagine, that beſides theſe three *regular* Forms, there are none other, which may be term'd *irregular*. For all Men don't build their Houſe juſt according to that Model which the Rules of Architecture preſcribe. The *Regularity* of a State we conceive to conſiſt in this, that all, and each of the Members ſeem to be govern'd as it were by one Soul; or, that the ſupreme Authority is exercis'd through all the parts of the State by one Will, without Diviſion or Convulſion. And hence the Nature of an *irregular* State may without much Difficulty be collected. Farther, there are ſome political Syſtems compoſed of ſeveral perfect States in Conjunction, which with unſkilful Judges paſs for ſingle States, and theſe too may have their uſe in our Enquiries, concerning the ſeveral Forms of Commonwealths.

III. The Forms of a regular State are three, only ariſing from the *proper* or particular *Subject*, in which the ſupreme Power reſides; which is either a ſingle Perſon, or a Council ſelect or general. For the Sovereignty is committed either to one Man, or to a Council of ſeveral Men. And this Council is made up, either of all the Members, or of the ſmaller indeed, but the better and more ſelect Part. One Species or Form therefore is, when the Sovereignty is lodg'd in a Council conſiſting of all the Members, and where every Member hath the Privilege of a Vote; and this is call'd a *Democracy.* Another is, when the Sovereignty reſides in a Council compoſed of ſelect Members, term'd an *Ariſtocracy.* A third when the Sovereignty is in the Hands of one Man; call'd a *Monarchy* or a Kingdom. In the firſt, the Sovereign is ſtyl'd a *People*; in the ſecond *Optimates* or Senators; and a *Monarchy* in the third. *Pindar* [a] hath expreſs'd all the three together:

—— When Choice of Fate
Puts to the Reins a ſingle Maſter's Hand;
Or when th' impetuous Multitude command,
Or when wiſe Patriots guard the thriving State.

IV. In the firſt place, we will examine the Nature of a *democratical* Government; not that we think it to excel the other Forms, either in Dignity or Splendor, or in real Uſefulneſs and Advantage [1]; but becauſe in the greateſt part of the World it appears to have been the moſt antient; and becauſe Reaſon ſhews it to be more probable, that many Men, being in a Condition of natural Freedom and Equality, when they reſolv'd to join in one Body, ſhould at firſt be inclined to adminiſter their common Affairs by their common Judgment, and ſo to conſtitute a Democracy. Nor is it to be ſuppoſed that a Father of a Family, as yet free and independent, who upon weighing the Inconveniences of a ſeparate Life, voluntarily join'd himſelf to thoſe of his own Condition, in order to the forming a civil Community, ſhould in a Moment have ſo far forgot his former State, under which he diſpos'd of all things relating to his own Safety meerly as he pleas'd, as to be willing to ſubmit himſelf immediately to a ſingle Director, with regard to the common Intereſt, with which his own private Security had a neceſſary Connexion. But at the Beginning it ſeems rather to have been thought more equitable, that what belong'd to all, ought to be managed by all; 'till in Progreſs of Time, moſt receded from this Model, either voluntarily or by Neceſſity; whether this Neceſſity was brought upon them by ſome of their own Members, or by Strangers. What *Plato* [b] diſcourſeth concerning the *Athenian* Commonwealth, ſeems to be of weight on this Subject: *The Original* (ſays he) *of our Government* (under which the chief Authority was in the People, and the Magiſtracies were conferr'd on Perſons of the greateſt Ability and Merit) *was taken from the Equality of our Race. Other States there are, compoſed of different Blood, and of unequal Lines; the Conſequences of which are diſproportionable Sovereignty, tyrannical or oligarchical Sway. Under which Men live in ſuch a manner, as to eſteem themſelves partly Lords, and partly Slaves to each other. But we and our Countrymen, being all born Brethren of the ſame Mother,* do

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[a] Pyth. *Od.* 2. *v.* 157, *&c.* Ed. *Oxon.*

[b] *In* Menexeno, *p.* 519. B.

Mr. BARBEYRAC'S *NOTE on* §. IV.

[1] Philo. Jud. *De Mundi Opificio*, gives this Cenſure of the Favourers of Polytheiſm; *They who are not aſhamed to transfer, from Earth to Heaven, the worſt Frame of Government, the Dominion of the Multitude.* Our Author cites this Paſſage, as if *Democracy* were there acknowledg'd to be the worſt Form of Government in the World. But what is ſaid in that place is only meant of the Abuſe that crept into it whenever the vile Populace is at the Head of Affairs (ὀχλοκρατία) and beſides the ſame Author in another Treatiſe (*de creatone principis* towards the End) ſays in expreſs Words that *Democracy* is the beſt and moſt lawful Form of Government. Ἐν δὲ ἀστεῖσιν ἡ εὐνομωτάτη καὶ πολιτειῶν ἀρίστη δημοκρατία.

not look upon our ſelves to ſtand under ſo hard a Relation, as that of Lords and Slaves. But the Parity of our Deſcent inclines us to keep up the like Parity by our Laws; and to yield the Precedency to nothing, but to ſuperior Virtue and Wiſdom. Now it is manifeſt, that moſt civil Communities aroſe, at firſt, from the Union of ſuch Families as were allied in Race and Blood [a]. Nor is this Judgment oppoſed by the Authority of antient Story, which, tho' it makes frequently mention of Kings, yet at the ſame time informs us, that moſt of them were ſuch, as had rather an Influence in perſuading, than any Power of commanding. So *Juſtin* [1], in the entrance of his Work, deſcribes that kind of Government as the moſt primitive, which *Ariſtotle* [2] ſtyles an *Heroical Kingdom*; ſuch, as is by no means inconſiſtent with a democratical State. To the ſame purpoſe *Thucydides* [b] obſerves, that *the moſt antient Kingdoms paſs'd by Inheritance, and were confined within ſettled Honours, and tied to certain Terms and Conditions.* Thus in moſt Nations, Liberty and popular Sway were at firſt eſtabliſh'd; till, by Degrees, that vaſt Multitude of petit Commonwealths was reduced, chiefly by War and Violence, into ſome few great Empires. What *Ariſtotle* [c] urgeth for the Antiquity of regal Government is as follows: *Wherefore Cities were at firſt under Kings, as the barbarous Nations are at this day; for the Perſons who join'd in forming thoſe States, were themſelves before under the ſame Government, the Sovereign Rule in Families being that which is kept up in Kingdoms.* Which laſt Words receive a fair Illuſtration from the ſmart Saying of *Lycurgus*, who, when a Perſon adviſed him to introduce a Democracy in the State, anſwered, *Do you firſt eſtabliſh a Democracy in your own Houſe* [d]. But really, *Ariſtotle*'s Argument doth not conclude. The contrary might rather be inferr'd; that theſe antient Fathers of Families, having been accuſtom'd before to bear Rule, ſhould be more inclined to a democratical Form, under which they might ſtill enjoy the Privilege of giving their own Judgment upon Affairs, and might bear a part in the publick Adminiſtration. Nor do they ſettle the Point, who tell us, that ‘paternal Government was the moſt antient amongſt Men; being at firſt mild and gentle, till, upon the Increaſe of Families and of Vices together, it was ſtrengthen'd with the Power of Life and Death. That this Government was continued down through ſucceeding Families, in the Perſons of the Firſt-born, who, by a kind of natural Right, held both the ſacred Office, and the civil Authority; that, by this means, the Heads of Families grew into ſo many petit Kings; the great Multitude of whom, diſcover'd in the Land of *Canaan* [e], ſeems a plain Argument in the preſent Caſe. But indeed, as the Right of Primogeniture was not of ſo great Force and Efficacy, as to eſtabliſh regal Dominion amongſt Brethren without their Conſent, and to oblige them to unite their Families to that of their Elder Brothers; ſo beſides, theſe primitive Governours, whom we find dignified with the Title of Kings, were commonly no more than ſuperior Magiſtrates in popular Societies; tho' this Honour was moſt frequently beſtow'd on the chief of the Race, when the reſpective Society was compoſed of Families, which had the ſame Original; yet ſo as that this Right of Birth and Seniority was not always obſerv'd.

V. It ſeems needful, on the preſent Argument, to bring the Opinions advanced by *Hornius* [f] under a particular Examination. He then, in relation to Ariſtocracies and Democracies, which he comprizeth under the General Name of *Free States*, paſſeth his Judgment to this purpoſe: *There may be ſuch an Eſtabliſhment found out, as ſhall avoid the Confuſion of the promiſcuous Multitude, and ſhall attain to a decent and agreeable Order, making Proviſion for the common Safety by Pacts and Covenants, without Subjection, and without the Loſs of that Liberty which is extinguiſh'd under a Monarch's Reign.* Here we have almoſt as many Miſtakes as Words. That the Order, which may be obſerv'd in free States, is the only thing which ſhields off the Confuſion of the promiſcuous Multitude; that free States are held together barely by Compact and Covenant, without any Sovereign Command; that particular Perſons are not ſo ſtrictly ſubject to a popular Aſſembly, or to a Council of Senators, as to a Prince under a Monarchy; that all the parts of Sovereignty are not ſo fully exercis'd under the former Governments, as under the latter; that the Power of Life and Death is leſs imploy'd, with regard to private Men, by a People, than by a Prince. What he aſſerts farther, that *certain Fathers of Families, living at yet in a ſeparate Condition, learnt from the neighbouring Kingdoms, what form of Government to introduce*; is ſo far from appearing true, that in the firſt Union of Families and Nations, moſt Communities ſeem rather to have been of the popular Form; till upon Diſcovery of the Inconveniences attending ſuch a Government, they fell, ſooner or latter, under the Command of a ſingle Sovereign; ſome, by their own voluntary Act, ſome, by Force and Compulſion. No leſs vain is that Remark; *As Art endeavours to imitate Nature, but can never reach to equal or to excel her; ſo in theſe artificial Forms of Government, the Nature of Kingdoms is, in ſome ſort, repreſented, as to the Influence which they have on the common Uſe and Benefit; but the inward Force, and Virtue, and Dominion, with which Monarchies are endued, being the Work of Almighty GOD, was beyond the Power of Men to produce.* Of the Origin of Majeſty or Sovereignty we have already treated; and why may not this as well agree to a moral compound Perſon, as to a ſingle Man? For ſurely 'tis no Contradiction to affirm, that the Senators, under an Ariſtocracy, are all equal, as to their private and ſeparate Capacities, and yet are each of them ſubject to the Authority of the whole Council. And it requires no Depths of Parts to apprehend the Difference between all in general, and each in particular; between the Aſſembly of the People in Democracies, and private Men diſpers'd according to their reſpective Habitations. Therefore 'tis but a trifling Argument which we find urged by this Author; *Where the Sovereignty is aſcribed to all, there either all do really poſſeſs it, or ſome few only. If all, then they will have none to be their Subjects; becauſe to command and to obey cannot belong to the ſame Perſon: If it be ſaid that the particular Men are Subjects, then all cannot be Governours; becauſe when each ſeparate Perſon is in a Condition of obeying, the Multitude, which they compoſe, muſt likewiſe ſtand under the ſame Engagement; for Obedience is the only thing, which in this Caſe the private Members confer on the common Body.* Certainly in moral compound Bodies ſomewhat may be attributed to all in Conjunction, which we cannot aſſign either to each Member taken apart from the reſt, or to any one of thoſe particulars; and conſequently the whole Society is in reality a moral Perſon diſtinct from the ſeparate Members, to which ſuch a peculiar Will, ſuch Actions, and ſuch Rights, may be appropriated, as private Men are not capable of poſſeſſing. Thoſe Scruples likewiſe muſt ſoon vaniſh, which are rais'd from this Conſideration, that in popular Aſſemblies the Majority always prevails. For this is one of the moral Affections which attends the very Eſſence of a compound Body, that the Conſent of the greater part of thoſe, who make up the Council, ſhall be deem'd the Conſent of all; in as much as no other means can be aſſign'd, by which the Wills of many natural Perſons, when they happen not exactly to conſpire, ſhould be brought to a moral Union. Wherefore it cannot be pretended, that in ariſtocratical or democratical States, the *Subject*, in which the chief Authority reſides, is obſcure and uncertain, tho' it ſhould happen that thoſe individual Perſons, whoſe Voices upon one Occaſion compoſed a Majority, upon another ſhould prove to be of the weaker ſide. For none of theſe Circumſtances take away that Unity of Will, which is to be attributed to the whole Body. In a Senate, if ſo many Members happen not to agree, as are required towards making a Majority, the Senate is preſumed to deſign or to declare nothing, and therefore no Step is to be made in the new Affair. Which tho' it often turn to the Diſadvantage of the State, yet doth not prove that the Senate is not inveſted with ſovereign Command. Beſides, that other Allegation is falſe: *True and proper Sovereignty cannot be aſcribed to a Multitude, by reaſon that the Obedience, which is neceſſary upon ſuch a Suppoſition, muſt be here wanting; ſince the Multitude cannot be bound always to keep the Reſolution which they once embrac'd; and ſince the Obligation, riſing from their Authority, doth not affect them as taken all together in a general Body.* For as it doth not deſtroy the Sovereignty of a King, that he may, when his Pleaſure alters, revoke a former Decree, upon which Act the Obligation of the Subject to the ſaid Decree expires; ſo whatever Power the common Aſſembly may have, as to the altering of their own Decrees, yet in the mean time, particular Perſons are no leſs engaged by them, than they would by regal Injunctions. If not, let thoſe who maintain the contrary Opinion ſhew us, that Offenders againſt the Laws are not ſo liable to Puniſhment under free States, as they are under Monarchies [a]. 'Tis no better than trifling to argue; that *if the Sovereignty be lodg'd indiviſibly in the Hands of many together, then each of theſe many muſt neceſſarily hold ſome part of it, out of the Collection of which Parts the whole Sovereignty muſt at length be conſtituted. But at the ſame time 'twill be likewiſe neceſſary, that each of theſe parts be ſupreme; and thus in one State, there will be more than one ſupreme, which is abſurd.* For in moral Conſideration there is no manner of Abſurdity in ſuppoſing, that thoſe particular Wills, which unite and conſpire to make up the Will of the Community, ſhould want ſome Power or Quality which the general Will is poſſeſs'd of. So that 'tis no good Conſequence to ſay, the Sovereignty is the ſupreme Right; therefore each Man holds a part of it, which part is likewiſe ſupreme. We might with as much reaſon infer, that becauſe the Votes of particular Perſons, ſeparately and ſolitarily conſider'd, are ineffectual towards the enacting of a Law, therefore many of them in Conjunction are ſtill unable to perform this Work. Laſtly, he adds, that *ſince in a governing Senate, there is no one Member, who may not, if he offend againſt the State, be brought to due Puniſhment by his Brethren; it follows, that in caſe all the Senators ſhould prove guilty, the puniſhing of them would belong to the People. But each Member being thus puniſh'd and remov'd, the Sovereignty of the whole Council could no where ſubſiſt.* This Difficulty will admit of an eaſy Solution, if we firſt rightly explain what it is to offend againſt the State. He then is properly ſaid to be thus guilty, who commits any thing tending to the Prejudice of the Publick, contrary to the Laws and Injunctions of the Sovereign. Wherefore the whole Body of Senators cannot offend againſt the State, unleſs they either violate thoſe Laws, the Obſervation of which was made the Condition of their holding the Sovereignty; or turn profeſs'd Enemies to the People under their Charge: Upon which Suppoſitions their Fate will be the ſame, as that of Kings in the like Caſes. What he farther vents in prejudice of free States is notoriouſly falſe. As that, *The Sovereignty exercis'd by a Monarch is quite a different thing from that which appears in free Governments, tho' their Effects may be alike. Becauſe a Monarch,* beſides that perſonal Dignity and Splendor, of which no Man is capable in a Commonwealth, *is endued with Majeſty, which free States may not aſſume.* But now we look on it as a certain Truth, that GOD may with equal Juſtice, be ſtyl'd the Author of Monarchies and of free Commonwealths; and the former are no leſs produced by Covenants, than the latter; from which Covenants the Sovereignty reſults in both Caſes; the immediate Cauſe of Obedience being in the People: That a Subject conſider'd under that Capacity is obliged to the ſame Duties in a Commonwealth, and in a Kingdom; that his Obedience is no leſs ſtrictly required, and his Subjection is in no leſs Degree, under the one Form, than under the other; and that both Governments have the ſame Right of puniſhing Criminals. For who will believe, upon the bare Word of this Author, *that in a Kingdom the Puniſhment of Offenders is grounded on a Right over the Lives of the Subjects, which is wanting in free States*; and that therefore *under the latter, the Tranſgreſſors of the Laws are puniſh'd as Enemies*; or only by the Right of War?

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[a] *Iſocrates* is of the ſame Judgment, *It ſeem'd unjuſt to us* (Athenians) ſays he, *that many ſhould be ruled by the Authority of a few; that thoſe who were inferior in their Fortune alone, and in no other Reſpect, ſhould be debar'd from a Share in the Magiſtracies and Honours: And that, whilſt we have All the ſame Common Country, the ſame Privileges of Birth, ſome ſhould be Maſters and Proprietors of the State, others no better than Strangers and Dependents; and that, under the Pretence of Law, Perſons by nature Members of the Commonwealth, ſhould be denied the Offices and Employments in it. Add* Liban. *Progym. loc. comm. contra* Tyrannum.

[b] L. 1. c. 13. p. 8. Ed. Oxon.

[c] *Polit. l.* 1. *c.* 2.

[d] Plutarch *in* Lycurg. *p.* 52. A.

[e] *Vid.* Joſh. xii. & Judg. i. 7.

[f] *De Civitate, l.* 3. *c.* 11.

Mr. BARBEYRAC'S *NOTES on* §. IV.

[1] Principio rerum, Gentium Nationumque Imperium penes erat Reges, L. 1. c. 1.

[2] In his Politicks, B. I. c. 14.

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[a] *Add.* Liv. *l.* 2. *c.* 3.

VI. We may now enquire how a Democracy is erected, and what this Form of Government hath in it peculiar from others. When therefore a Number of free Perſons aſſemble together, in order to enter upon a Covenant about uniting themſelves in a civil Body, this preparative Aſſembly hath already ſome Appearance of a Democracy; properly in this reſpect, that every Man hath the Privilege freely to deliver his Opinion concerning the common Affairs. Yet he who diſſents from the Vote of the Majority, ſhall not in the leaſt be obliged by what they determine, till ſuch time as, by means of a ſecond Covenant, a popular Form ſhall be actually confirm'd and eſtabliſh'd. Mr. *Hobbes* [a], for want of diſtinguiſhing theſe two Covenants, hath handled this Subject with great Confuſion. For we have formerly proved [b], that no Man can be obliged by the plurality of Votes, before he hath given his Conſent to ſuch a Form of publick Adminiſtration. Therefore what he aſſerts is falſe, that *by their voluntary aſſembling of themſelves together, we are to ſuppoſe that they ſtand obliged to whatever the major part ſhall reſolve.* What he farther delivers, may in the following manner be more clearly explain'd. When many Men upon a general Meeting, oblige themſelves by Compact to unite their Strength and Wealth; either in this very Meeting a Decree is paſs'd, for the introducing ſome particular Form of Government, or not. In Caſe no ſuch Decree about the Government be made, nor the Time and Place aſſign'd for the holding another Aſſembly, then the preſent Meeting is preſum'd to be void, and each Perſon continues in his natural Condition of Liberty as before. For a Number of Men cannot become one Body, unleſs they have agreed upon a conſtant Method of tranſacting publick Buſineſs. If they break up without ſettling this Point, yet prefix a Time and Place for conſidering and debating the Matter farther, in order to a final Reſolution; we have then no more than the Rudiments and firſt Principles of a State, which cannot be properly ſtyl'd a Democracy. For we muſt not preſently make uſe of this Name, when every Man hath a Right to give his Opinion, or when the Time and Place are pitch'd upon for another Congreſs; in as much as this way of proceeding is common to all kinds of Societies and Conventions at their firſt Riſe, and before they are fully eſtabliſh'd: But we are then to call it a democratical Government, when the Right of ſettling Matters, relating to the publick Safety, is conferr'd for ever on a general Aſſembly.

VII. Towards compleating the Nature of a democratical State, theſe Conditions ſeem eſpecially neceſſary. Firſt, that a certain Time and Place be aſſign'd for holding thoſe Aſſemblies, in which the common Affairs are to be debated and determin'd. For as on the one ſide, the private Buſineſs of particular Men will not ſuffer them always to attend the Publick, ſo on the other ſide, if nothing be agreed upon as to the Time and Place; thoſe who belong to the Society may either meet at different Times and Places, by which means Factions are neceſſarily introduced; or elſe not aſſemble at all, in which Caſe they will not be a *People*, but a ſcatter'd Multitude, to whom no Action, and no Right can be attributed as to one compound Perſon [c]. Secondly, that the Vote of the Majority ſhall paſs for the Vote of the whole Body: Since, as the World goes, it ſo very rarely happens, that a great Multitude of Men agree in their Judgments as to the ſame Matter. In the laſt place; ſince ſome Affairs of the Commonwealth occur every Day, and are of inferior Moment; others are leſs frequent, and affect the main Intereſt; and ſince it cannot be convenient, for the whole People to meet about ſettling the former Concerns, either in daily Councils, or at Intervals of ſo little Diſtance, as to let nothing of this Nature eſcape their Examination; it is therefore neceſſary to appoint certain Magiſtrates, as Subſtitutes or Delegates, who, by the Authority of the whole People, may diſpatch Buſineſs of every Day's Occurrence; may with mature Diligence ſearch into more important Affairs, and in caſe any thing happens of greater Conſequence, may report it to the popular Aſſembly; and may likewiſe ſee the Decrees of the People put in Execution: For a large Body of Men is almoſt utterly uſeleſs in reſpect of this laſt Service, as of many others.

VIII. An *Ariſtocracy* is then conſtituted, when the Aſſembly, who by means of their firſt Covenant united themſelves, as it were, into the Rudiments of a State, do by common Decree entruſt the ſupreme Adminiſtration in the Hands of a Council, conſiſting of ſome ſelect Members. Theſe Members, when they have been declared and deſign'd by the ſaid Aſſembly, either by their Names, or by ſome other Mark of Diſtinction, and have alſo accepted of their Deſignation, are then ſuppoſed to enter upon the ſovereign Command. And here we may obſerve, that Mr. *Hobbes* [a] is miſtaken, when he draws the Origin of Ariſtocracy from Democracy, if his meaning be, that all Governments of the former kind were Changes from the latter, which are ſuppoſed to have been before compleatly eſtabliſh'd. For Experience proves, and Reaſon does not deny, that Men might paſs on from the firſt preparatory Covenant, either to Ariſtocracy or to Monarchy, without taking Democracy in their way. Beſides, we have before made it appear [b], that Mr. *Hobbes* doth but play with an Argument, when he tells us, ‘That no Covenant can be tranſacted between the Senators and People, becauſe the Government, being once conferr'd on the former, the latter do no longer exiſt after the manner of one Perſon’. For to make Men capable of ſuſtaining Obligations towards others, 'tis ſufficient that they ſtill continue natural Perſons, tho' the moral Perſonality, which they once bore, may be expired. We may add, tho' the People, upon transferring the Sovereignty from themſelves, do not henceforth exiſt as one compleat Perſon, oppoſed to their newly received Head; yet this doth not diſſolve them into a looſe Multitude; in as much as being join'd to their Head, the Senate, they ſtill conſtitute one Perſon. Farther, what he infers in another place [c] is falſe; that *As the People under a Democracy, ſo the Court of Senators under an Ariſtocracy, are free from all manner of Obligation.* For ſhould we be never ſo willing to grant the Antecedent [d], upon Suppoſition that the reſpect, which all in general bear to each in particular, may perhaps ſeem inſufficient to found a mutual Obligation between them; yet it cannot hence be concluded, that neither is there any mutual Obligation betwixt Senators and People, as 'twould be no Conſequence to ſay, I do not any way ſtand oblig'd to my ſelf, whilſt I manage my own Affairs in Perſon; therefore if I transfer the Care of them on another, he likewiſe ſhall be exempt from all Obligation. One thing this Author rightly obſerves [e], that under an ariſtocratical, as well as under a democratical Form, unleſs certain Times and Places are appointed for the Senators to meet, there will be no longer any ſuch thing as a *Court* or a compound Perſon, but a diſorderly independent Multitude, without Authority or Rule. In as much as the Wills of the particular Members, from the Combination of which we apprehend the Will of the Court to ſpring, cannot be known otherwiſe than by their aſſembling together for this Purpoſe. For to take the Senators Votes, by a diſtant Scrutiny ſent about in Writing, is a Method full of Inconvenience. Farther, it is no leſs neceſſary in an Ariſtocracy than in a Democracy, that the Times of meeting in a Council be not fixt too far aſunder, unleſs the Exerciſe of the ſovereign Power, at leaſt with regard to Buſineſs of daily Occurrence, be in the mean Time entruſted with ſome one Magiſtrate, or with Commiſſioners not many in Number.

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[a] De Cive, c. 7. ſ. 5. [b] C. 2. ſ. 7.

[c] *Thucydides* (l. 2. c. 22. Ed. *Oxon.* in the beginning) reports, 'That *Pericles*, once finding the *Athenians* to be of 'a wrong Opinion about the Method to be uſed in a War, would neither call an Aſſembly of the People, nor hold 'a ſelect Council; leſt ſome very falſe Step ſhould be taken, whilſt their Debates would be guided rather by 'Paſſion than by Reaſon.

IX. Laſtly, A *Monarchy* is ſettled, when the ſovereign Authority is conferr'd upon one Man. And that this is done by means of a Covenant intervening, we have already ſufficiently demonſtrated againſt the Opinion of Mr. *Hobbs* [f]. Before we proceed farther, we cannot but take under Examination the peſtilent Notion of a certain Anonymous *Dutch* Author, in his *Political Balance*, which runs in the following manner: ‘Since the Act of conferring the ſovereign Power is always deſign'd for the more convenient Prevention and Removal of Evils, whether proceeding from inward or from outward Cauſes; it cannot be preſumed that a democratical Society ſhould ever have devolv'd this Authority on one Man and his Heirs, by a perpetual Succeſſion. For, in as much as their Hopes of a more commodious Protection under a ſingle Government, were grounded purely on the Virtues which appear'd at firſt in the Perſon elected; and ſince no one can be ignorant, that all Men are changeable and mortal, and that, in a ſhort time, either Age will render them unfit for Government, or, if they die ſooner, they will leave either no Iſſue, or ſuch as muſt be young and unxperienced; or that, ſhould they happen to leave Children grown to mature Years, yet theſe may either not be more able to rule than others, by any natural Capacity; or may want Will and Inclination to defend their Charge; we muſt therefore by no means ſuppoſe that a popular Society ever intended to debar themſelves of the Privilege of chooſing a better Governour, in the room of one, who is either weak, or wicked. But that when Perſons had thus got the Sovereignty into their Hands, it was eaſy for them, by drawing to their Aſſiſtance the greateſt part of the People, eſpecially the Soldiery, ſo to confirm their Power to themſelves and their Poſterity, as to be able ever to hold the Command even againſt the Will of the Subject. To which we reply, if it ever entred into the Thoughts of a Society, to confer the chief Rule on a Perſon under this Condition, that whenſoever the People ſhould vote his Government not ſo effectual towards procuring the common Safety, as their democratical State was before, he ſhould be depriv'd of his Office, they did not, by ſuch an Act as this, conſtitute a Monarch, but only an extraordinary Magiſtrate, who was to depend upon the Breath of the Multitude, and therefore was not inveſted with the ſupreme Authority. Beſides, ſince 'tis evident, how little a State is a Gainer by frequent Changes in the Throne, other *Men* rather than other *Manners* ſtill ſucceeding; and how great a Blow it muſt be to the Publick to force a Prince from his Command, who hath had Opportunity, in his publick Adminiſtration, to ſtrengthen his private Intereſt; it is but a fair and eaſy Preſumption, that a People ſhould be willing to truſt their Fortune once for all, by fixing the Government irrevocably in a King: the Evils which naturally flow'd from their former uncertain, unſettled Condition, being much more to be dreaded, than any which a degenerate Monarch might create. Eſpecially, if we conſider how far the exorbitant Inclinations of ſuch a Prince may be limited and retrench'd by fundamental Laws. And laſtly, 'tis by no means allowable to revoke all ſuch Acts, the Iſſue of which doth not exactly anſwer our Expectation: Since human Affairs muſt be always liable to Accidents, and ſince we can eſtabliſh nothing, but what will be attended at leaſt with ſome Inconveniences [a].

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[a] *Ubi Supra*, ſ. 8.
[b] C. 2. ſ. 12.
[c] The Fifth Section of this Chapter.
[d] C. 2. ſ. 9. &c.
[e] S. 9.
[f] S. 10.

A *Monarchy* differs from the Two former Species of Government in this reſpect [b], that under them, before any Matter can be debated or determin'd, that is, before Authority can be actually exerciſ'd, 'tis neceſſary that certain Times and Places be aſſign'd for this purpoſe: Whereas in a *Monarchy* (at leaſt if it be ſuch as we term *abſolute*) Deliberations may be held, and Reſolutions taken, at all Places and Times [c]. For a People, or a Senate, in as much as they do not compoſe one natural Body, muſt wait an Opportunity of meeting together. But a *Monarch*, who is but one Perſon in natural, as well as in moral Account, is always furniſh'd with an immediate Power of exerciſing his ſovereign Command, thro' all Inſtances of Government. It is likewiſe true what Mr. *Hobbes* [d] obſerves on this Head, that in a People, or in a Court of Senators, in caſe any Decree paſs which is contrary to the Law of Nature, the State it ſelf, or the *moral* Perſon, is not affected with the Guilt, but thoſe Members only whoſe Votes concurr'd in the Reſolution. For *Sin* regards only the natural or expreſs Will, not the moral or political Will, which is purely artificial. Otherwiſe they alſo, who diſliked the Proceeding, would be included in the Crime [e]. But in a Monarchy, if the Prince decree any thing which the Law of Nature forbids, the Prince himſelf is the Sinner; becauſe, in his Perſon the civil or political Will is the very ſame with the natural.

X. To theſe regular Forms of Government, it hath been the Cuſtom, with moſt Authors, to add certain others, which they term *vicious*, *diſtemper'd*, or *corrupt*. Now here it is certain, that in many Commonwealths, no leſs than in particular Men, we may obſerve a very plentiful Field of Corruption and Diſeaſes; ſo that it may be look'd on as ſome kind of Perfection to have the feweſt Failings. Of thoſe Diſeaſes, which infect civil Societies, ſome we ſee, take their Riſe from the Wickedneſs of particular Perſons, others from ſome Defect in the publick Conſtitution. The former we may ſtyle the *Vices of Men*, the latter *the Vices of the State*. It may be proper to touch on ſome Inſtances of each Kind, for Illuſtration and Diſtinction. In a Monarchy then, *the Vices of Men*, or perſonal Faults, are as follow; if he, whom either the Chance of Blood, or the unhappy Suffrage of the People, hath advanced to the Throne, be deſtitute of the Arts of Government, and very little or not at all affected with any Care or Concern for the common Intereſt, which he proſtitutes to the Ambition, or to the Avarice, of bad Miniſters; if he render himſelf terrible by Paſſion or Cruelty, forgetting that he is a *Man* himſelf, or that he governs *Men*; if he take a delight in expoſing the Commonwealth to unneceſſary Hazard or Danger; if he ſquander away what hath been gather'd to defray the Expence of the Publick, either in Luxury, or in unadviſed Grants and Bounties [f]; if he heap up Money beyond the Bounds of Reaſon, firſt ſqueez'd out of the Subject; if he be notoriouſly abuſive or unjuſt [g]; or guilty of any other Practice, which enters into the Character of a bad Prince [h]. The *Vices of Men* in an Ariſtocracy are: if, by Corruption and baſe Acts, Perſons of no Honeſty or of no Ability, find an eaſy Admiſſion into the Senate, whilſt true Merit is excluded; if the Senators break into Parties and Factions amongſt themſelves; if they make it their Endeavour to enſlave the Commonalty to the Service of their private Intereſt, and to increaſe their own Eſtates at the Expence of the Publick. In a Democracy, perſonal Faults are ſuch as theſe; if Men, who really want Judgment, turbulently and importunately maintain their own Opinions; if extraordinary Virtue, yet ſuch as is not likely to prove too hard a Match for the Commonwealth, be oppreſs'd and born down by Envy; if through a Lightneſs and Inconſtancy of Humour, Laws, are raſhly made, and as raſhly repeal'd; and what was embraced but now with Applauſe, is ſoon after diſliked and rejected without Reaſon; and if ſordid and worthleſs Perſons are entruſted with the Management of Affairs [i]. Laſtly, ſuch *Vices of Men* as may affect any Species of Government, are: If the Perſons on whom the chief Adminiſtration lies, perform their Office negligently or diſhoneſtly; and on the other hand, if the Subjects, who ought to reſt contented with the Glory of obeying, grow refractory and aſpire to Command [a].

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[a] *Add.* Grot. *L.* 1. *c.* 3. *ſ.* 8. *n.* 1.

[b] *Vid.* Hobbes, *De Cive*, C. 7. ſ. 13.

[c] *Ibid.* ſ. 14.

[d] *Herodian.* l. 1. c. 14. p. 13. Ed. *Oxon.* Ἐκεῖ τε ἡ Ῥώμη, ὅπου ποτ' ἂν ὁ βασιλεὺς ᾖ. *Where the* Emperour *is, there* Rome *is.*

[e] See *Luke* xxiii. 51.

[f] *Drepan.* Paneg. upon *Theodoſius*, c. 27 n. 1. *Ed.* Cellar. *'Tis the laſt Defence of wicked Princes, to plunder ſome, that they may be bountiful to others.*

[g] 'Tis remarkable what *Philoſtratus* reports (*De Vit. Apollon.* l. 3. c. 30. in the Beginning.) of the old *Indians*, that they allow no manner of Honour or Privilege to the Heirs of the Crown; *That neglectful Treatment may be a Leſſon to them againſt unreaſonable Pride.*

[h] Such as *Claudian* ſets down, *De Bello* Gildon. *v.* 157, *&c.*

——Quodcunque profunda
Traxit avaritia, luxu pejore refundit:
Inſtat terribilis vivis, morientibus hæres,
Virginibus raptor, thalamis obſcœnus adulter.
Nulla quies: oritur præda ceſſante libido;
Divitibuſque dies, & nox metuenda maritis.

Thoſe Heaps which boundleſs Avarice ſupply,
Vainly he ſpends in viler Luxury;
Tyrant to all that live, and Heir to all that dye.
Alike the Nymphs and injur'd Matrons move,
Or Brutal Rape, or foul adult'rous Love.
Sin never ſleeps; new Spoils, new Luſts invite:
The Wealthy fear the Day, the Married dread the Night.

Themiſt. Orat. 10. *De Pace ad* Valent. Imper. *He is but a lame Prince or Legiſlator, who is fit for the Service of War, but unskilful in preſerving Peace.*

[i] In *Plutarch*, Dion. *p.* 978. E. *Popular Ambition* is term'd *a wild Diſtemper, not inferior to Tyranny it ſelf.*

The *Vices* or Faults *of a State*, in general, are; when the Laws and Inſtitutions are not accommodated to the Nature of the People, or of the Place; or when they are ſo framed, as to breed inward Diſtractions, or to provoke the juſt Hatred of Foreigners; or when they render the Subjects incapable of performing ſuch Service as is neceſſary for the Preſervation of the Commonwealth: As ſuppoſe the Conſtitution be ſuch, that Men, whilſt they comply with it, cannot avoid ſinking into effeminate Weakneſs, or, on the other hand, cannot bear the eaſy unactive Condition of Peace [1]; or laſtly, when they contradict ſome of the principal Maxims of civil Doctrine; and the Miſchief will ſtill be the greater, if theſe Irregularities happen to wear the Diſguiſe of Religion [b].

XI. Though a ſound and a diſtemper'd Commonwealth are vaſtly different from each other, yet we are not, on this account, to multiply the *Forms* of Government, and to oppoſe one or two *vicious* Forms to each of thoſe which we term good and regular. For theſe *Vices* or Defects do neither change the Nature of the Authority it ſelf, nor the proper Subject in which it reſides. And thus far Mr. *Hobbes* [c] is in the right, when he denies, that *Anarchy* oppoſed to *Democracy*, *Oligarchy* to *Ariſtocracy*, *Tyranny* to *Monarchy*, are three other kinds of Commonwealths [2]. *I think* (ſays he) *no Man believes that Want of Government is any new kind of Government.* But what he farther obſerves [3], is not univerſally true; 'That Anarchy, Oligarchy, and Tyranny 'are three Names impos'd by thoſe who either 'miſliked the Government, or the Governours. 'It being uſual with Men to ſignify by Names, 'not the things only, but at the ſame time their 'own Affections, as their Love, Hatred, or 'Anger, their Contempt, or Eſteem. For, as it happens in other Matters, that one Man loves what another violently abhors, ſo the ſame Form of Government meets with the Approbation of ſome, and with the Averſion of others. And this not only becauſe ſome perhaps reap a particular Advantage from ſuch, or ſuch a Species of Commonwealth; but likewiſe on account of peculiar Tempers and Inclinations [d]. Men of haughty Spirits, and who diſlike the Equality of a popular State, when they ſee all Men without Diſtinction, giving their Votes in publick Buſineſs, of whom the inferior Commonalty always make up the greater Number, call this an *Ochlocracy*, or a State where the baſe Rabble ſit at the Helm, and where no Prerogative is allow'd to ſuch extraordinary Merits, as they look on themſelves to be poſſeſs'd of. And yet this Name, as full of Contempt as it is, might with Juſtice be applied to ſuch a Government as we read of amongſt the *Epheſians* of old: Who when they expell'd *Hemodorus* out of the City, gave this reaſon for their Proceeding; *Let no Man amongſt us excel his Neighbour; if he doth, let him find out another Seat, amongſt another People:* And whom *Heraclitus* for this Judgment, declared to be all worthy of Death [e]. Again, if any Perſon is diſcontented that he hath not a place in the Senate, and at the ſame time thinks himſelf not in the leaſt inferior to many of that Order; Envy and Contempt together prompt him to give them the Name of *οἱ ὀλίγοι*, *the Few*; that is ſome inconſiderable Mortals, who having in no reſpect the Advantage of thoſe about them, do yet exerciſe Authority over their equals or their betters. And a Man under this Chagrine hath commonly in his Mouth the Complaint which *Ajax* makes in the Poet [f].

——— οὐ γὰρ ἔτ' ἐσθλὸς ἔχει γέρας, &c.

Merit no longer finds a juſt Reward:
Folly's a Favourite, and Vice perfer'd.

People of a more lofty Genius, and thoſe on the contrary who are more mild and tractable, both join in giving the Title of *Lords* and *Maſters* to foreign Princes, who govern with a ſtricter Hand: Whereas 'tis well known, that when a Father treats a ſtubborn Child with Severity, and one that is more ſubmiſſive with Gentleneſs and Kindneſs, in both Inſtances he exerciſeth the very ſame paternal Power. The like may be affirm'd of the Name of *Tyrant*, which is now attended with an indelible Mark of Hatred and Deteſtation, from the Cuſtom of the *Grecians*, who thought the chief Happineſs of the States to conſiſt in a popular Liberty. *Lucian* [g] himſelf paſſeth this Cenſure upon them: *In general*, ſays he, *People, not conſidering whether the Perſon who bears Rule be juſt or unjuſt, have an Abhorrence to the bare Name of Tyranny.* Many of their Authors apply the ſame Word to any kind of Government in the Hands of a ſingle Perſon. Thus *Æſchines* [h] particularly ſays, *There are three political Forms in uſe in the World, Tyranny, Oligarchy, and Democracy* [i]. Hence 'tis worthy our Remark what *Mnemon* [k], in *Photius*, reports of *Dionyſius*, the Fourth *Tyrant of Heraclea*; *Having,* ſays he, *arrived to a high pitch of Glory, he diſdain'd the Name of* Tyrant, *and aſſumed that of* King; the latter being leſs odious and more honourable. Yet there is no one who doth not apprehend, that theſe invidious Titles are ſometimes affix'd with ſufficient Juſtice, to diſtinguiſh the Government of bad Princes or Senators from that of good, the Fury of a turbulent and inconſtant Multitude, from the wiſe Adminiſtration of a modeſt People. *Ariſtotle*'s Deciſion of this Point differs little from what hath been here eſtabliſh'd; who terms *Tyranny*, *Oligarchy*, and *Anarchy* (for as to this latter word, he uſeth the general Name of *Polity* for a ſound popular Government) παρεκβάσεις *Deviations* or Degeneracies from a Kingdom, an Ariſtocracy and a Democracy [a]. And who will pretend that a bare *Deviation* is ſufficient to conſtitute a new *Species*? As for that Latitude of which the Word Εἶδος or *Species* is capable, we think it not conſiderable enough to afford any juſt Matter of Diſpute [2].

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[a] *Add.* Hobbes *Leviath.* c. 29. about the End, where he diſcourſeth ingeniouſly on ſome Diſeaſes of the State.

[b] Such was the Authority of the Prieſts amongſt the People of *Meroe*, mention'd by *Diod. Sic.* l. 3. c. 6. and *Strabo* l. 17. p. 566. Ed. *Genev. Caſaub.* to whom the Kings themſelves were accountable.

[c] *De cive*, c. 7. ſ. 2.

[d] So that we cannot univerſally allow that of *Lyſias*, *De Populari Statu*, Orat 24. *No Man is more inclined by Nature either to a Popular, or to an Ariſtocratical State; but every one endeavours to eſtabliſh that Form of Government, which tends moſt to his particular Advantage.* With whom *Iſocrates*, *De Pace*, p. 320. joins his Opinion: *No Man hath a Natural Affection for any of theſe States; but all love that beſt, in which they themſelves meet with the greateſt Honour and Eſteem.*

[e] In *Cicero*, Tuſc. Quæſt. *l.* 5. *c.* 36. *Diog. Laert.* l. 9. in *Heraclit.* ſ. 2. *Strabo*, l. 14, p. 441.

[f] *Quint.* Calaber. *l.* 5.

[g] In *Phalarid* I. *pag.* 735. *tom.* 1. Ed. *Amſt.*

[h] *Contra* Cteſiphont.

[i] *Add.* Cornel. Nep. *Miltiad.* c. 8. n. 3.

[k] Of the Tyrants of *Heraclea*, c. 5.

Mr. BARBEYRAC's *NOTES* on §. X, XI.

[1] Theſe Inſtances are taken out of our Author's Abridgment, *De Offic. Hom. & Civ.* L. 2. c. 8. ſ. 10.

[2] See *Hobbes*'s *Leviath.* B. 2. c. 19.

[3] De Cive, *ubi ſupra.*

XII. But when we meet with ſuch a Government, as we can neither bring under any of thoſe Forms which are ſound and regular, nor yet explain how it differs from them, by the bare Notion of a Diſeaſe or Deviation, then the learned are put upon a more laborious Enquiry. Moſt Authors judge it the ſhorteſt way of getting over this Difficulty, to call ſuch Governments *mixt* States; as if they were the Reſult of the more regular Forms, allay'd and blended together. *Ariſtotle* is called in by many to countenance this Project; and therefore it may be worth our while to examine his Opinion in the Caſe. Firſt then, as for what he delivers, in the Fourth Book of his *Politicks* [b], concerning the ſeveral Kinds of Democracy and Ariſtocracy, it bears no Reſemblance to the Mixture propoſed by our modern Deſigners. The chief thing he there inſiſts on, is the reckoning up of certain Conditions and Qualities, to be found in thoſe who are to be admitted into the popular Aſſembly, or into the ruling Senate. By which means, neither is the Sovereignty it ſelf any way varied, nor are the Parts of it torn and wreſted from each other, nor the State rent into two or more diſtinct Bodies; but the Forms of Government which he there mentions, are only hereby ſlightly diverſified, according to their ſeveral *Accidents*, or circumſtantial Differences. Thus, although in the Definition of a Democracy, the chief Authority ſhould be laid to reſide in a *general* Council, or a Council made up of *all* the Members, and at the ſame time tho' it be true, that Women and Children have as much Intereſt as others in the common Welfare; yet who will maintain that a new Form of Government is eſtabliſh'd, when the Women, the Children, and Servants, are excluded from the publick Debates? Tho', in our Judgment, 'tis ſufficient for the conſtituting a Democracy, if thoſe Perſons are allow'd the Privilege of Votes, who by uniting together, firſt compoſed the State, and after them their Succeſſors, to whom their Places and Rights properly deſcended. But now it's manifeſt, that civil States were originally compos'd by Fathers of Families, who held the inferior Train beforemention'd, under their domeſtical Sway, and certainly did not intend to relinquiſh all Authority over them, or to ſet them on the level with themſelves. It was neceſſary therefore, that Perſons who were thus in Subjection, ſhould be debarr'd from giving their Suffrage with their Lords. After the Democracy was once ſettled, 'twas in the Power of the Members to receive others into the State, or not; to give them a full, or imperfect Right; to let them have the ſame Share with themſelves in the Adminiſtration, or utterly to exclude them from it. Whence it may happen, that in free Governments many ſhall want the Privilege of a Voice, whilſt yet the popular Eſtabliſhment continues as perfect as ever. On the other hand, 'tis poſſible indeed, that a State, at firſt democratical, may, by receiving large Additions, and by ſhutting out all theſe new Comers from their Honours and their Councils, at length commence an Ariſtocracy. In the ſame manner, the Species of ariſtocratical Government will not be multiplied, though, in one place, Virtue and Merit ſhould be a ſufficient Qualification for a Senator, in another, the Eſtate and Family ſhould be likewiſe conſider'd. No more could it be ſaid, that there were ſo many ſeveral diſtinct Forms of Democracy; if, under one State, every free Deniſon had a Vote in the Aſſembly; under another, none but Men of ſuch and ſuch Fortunes were admitted; under a third ſome particular Profeſſion rendred Perſons incapable of this Honour. Much leſs do any new Forms or Species (properly ſo call'd) ariſe from the different Laws of Democracies, relating to the Election of Magiſtrates; whilſt in ſome places, for Inſtance, all Perſons promiſcuouſly have a Right to bear theſe Employments; in others, again an Eſtate, to ſuch a Value, is made a neceſſary Condition: As ſuppoſe, under one Government, the rich were allow'd to abſent themſelves from the publick Councils without Cenſure, the Poor not; or *vice versâ*. And indeed, this whole Matter is plain beyond Diſpute. What Judgment we ought to paſs on the Mixtures, ſuppoſed to be in the Commonwealths of *Sparta* and *Crete*, as deſcribed by *Ariſtotle*, we ſhall elſewhere diſcuſs. The *Athenian* State, which *Ariſtotle* [c] and *Iſocrates* [d] deſcribe and commend, was in all reſpects truly *popular*. *Polybius*'s Opinion [e], concerning the mixt Government in the *Roman* Commonwealth, comes under our Examination in another place.

XIII. As for the Moderns, ſome of them have invented many kinds of mixt States;

Mr. BARBEYRAC'S *NOTE on* §. XI.

[2] *Add.* Salluſt. *Philoſoph. de Diis & Mundo*, c. 11. and to the ſame purpoſe, *Themiſtius*, Orat. 16. p. 336. *Edit.* Petav. Who then will be ſo bold as to maintain, that the Corruption of a *State* is ſufficient to conſtitute a new Form of *Government*? See likewiſe what Mr. *Perizonius* ſays concerning ſome of *Ariſtotle*'s Terms, in his fourth Note on *Ælian. Var. Hiſt.* Lib. II. Cap. XX.

[a] *Vid.* Polit. *l.* 3. *c.* 7, 8.

[b] C. 3. *&c.*

[c] *Polit.* l. 2. c. 9, 10.

[d] *In* Areopagit.

[e] L. 6. §. 20.

yet ſo as that, upon the whole, rejecting the greateſt part of them as inconvenient, they applaud two ways, as eſpecially proper and uſeful. The firſt is, when the parts of the Sovereignty reſide ſeparately and independently in different Perſons, or Bodies of the ſame Commonwealth, ſo that each Perſon or Body hold their reſpective Parts by their own proper Right, and adminiſter it according to their own Judgment, whilſt in reſpect of the other parts they are altogether in the Nature of Subjects. Much after this manner was the Diſpoſal of the Kingdom of *Numidia* by *Scipio*, after *Maſiniſſa*'s Death; his three legitimate Sons being all allow'd to bear the regal Title and Dignity; but with this Difference, that the Elder Brother *Micipſa* ſhould keep his Court at *Cirtha*, the ordinary Seat of the Kings; that *Guluſſa*, the next to him, ſhould have the chief Command of War and Peace; and that the youngeſt, *Manaſtabales*, ſhould preſide in judicial Affairs [a]. The other way which they propoſe is, when the ſovereign Authority inheres indiviſibly in many together, yet ſo as that neither the moſt conſiderable Majority, without ſome few diſſenting Members, nor indeed all the reſt, when any one of the Number ſtands out, can act to any purpoſe, or exerciſe any part of the ſupreme Power. And this again is ſubdivided into two Models, either that all the Members ſhall have equal Power; or that ſome one or two of the Number ſhall be inveſted with certain extraordinary Rights and Prerogatives, which they may uſe without the Aſſiſtance of their Brethren. They proceed to alledge many Authorities from the Antients, where Mention is made of *mixt* Commonwealths; with regard to which Authorities we have already obſerv'd, that what is deliver'd in them concerning the *mixture* of Governments, doth not in the leaſt belong to the Diviſion of the ſovereign Power amongſt ſeveral Perſons or Councils; but either to the ſettling the due Qualifications of thoſe Perſons, of whom the governing Council is to be compoſed, or to the joining together of ſeveral good Inſtitutions drawn from different States. Beſides, we are of Opinion, that ſome Examples of theſe Mixtures might receive a convenient Explication, by diſtinguiſhing between the Sovereignty it ſelf, and the manner of adminiſtring it. So that we may affirm thoſe States to have mingled as it were ſomewhat of others in their Compoſition, in which the Method of Adminiſtration ſeems to have been borrow'd from another Form: As ſuppoſe for Inſtance, in a popular State, the main Buſineſs ſhould be diſpatch'd by ſome one principal Officer, or by a Senate; or if under an Ariſtocracy, one Magiſtrate ſhould be inveſted with extraordinary Authority, or the People conſulted in many important Affairs; or if in a Kingdom, the Difficulties of publick Buſineſs ſhould be referr'd to the Debates of a Senate, or of a popular Aſſembly. And if this come not up to a full Solution of the Paſſages cited from Antiquity, the Point will be throughly clear'd from what follows. We have above demonſtrated, that in order to compleating the Eſſence of a juſt and regular State, ſuch an Union is requir'd, as ſhall make all things, which belong to the Government of it, ſeem to proceed from one Soul. Now hence it is manifeſt, that the former way of Mixture conſtitutes ſuch a Body as is held together, not by the Bond of one ſupreme Authority, but barely by Compact; and which therefore is to be rank'd, not amongſt the regular, but amongſt the irregular States; being but weakly guarded againſt foreign Aſſaults, and very obnoxious to inward Diſorders and Convulſions. As to the other kind of Mixture propos'd, we think it ought to be conſider'd, whether thoſe Perſons, in whom the ſovereign Power is ſaid thus indiviſibly to reſide, do make up a ſtanding Senate, which is to guide and direct the whole State as one laſting Body. If ſo, the Form will be ariſtocratical; yet ſuch as muſt be very unfit for the Diſpatch of Buſineſs, whilſt ſome few, or but one of a contrary Judgment, may vacate the Reſolutions of all the reſt. Again, if thoſe particular Members, in other reſpects equal, do each of them hold ſome part of the Government, yet ſo as that the ſovereign Acts cannot be exercis'd without the unanimous Conſent of the whole Number, then the State is *ſyſtematical*, according to the proper Notion of that Word; yet ſuch as will likewiſe have great Diſadvantages, as to the Management of Affairs, by reaſon of this very great and unneceſſary Streightneſs. If ſome one Perſon be endued with high Degrees of Authority, and ſeveral parts of the ſupreme Power above others in the Council, then the State will be plainly irregular, lying between ſuch a Monarchy as is overawed by an aſſuming Senate, and a *ſyſtematical* Form. And this [1] Irregularity will in Proportion be the greater, in Caſe more than one are inveſted with theſe ſignal Prerogatives above the reſt.

XIV. For our part, as we envy no Man the Praiſe of his Conſtancy and Reſolution, who will on no account lay aſide the Term of a *mixt* State; ſo we think it the more commodious and eaſy Method, and the more expeditious for the Explication of certain *Phænomena* in particular Commonwealths, to call thoſe Governments *irregular*, in which we can neither diſcover any one of the three regular Forms, nor yet any proper Diſeaſe or Deviation; and which at the ſame time cannot, with due Exactneſs, be rank'd amongſt the *ſyſtematical* Models. Concerning which we may in general obſerve, that they differ from regular States in this reſpect, that all things do not ſeem to proceed in them from one Soul and one Will, nor all and each of the Members to be ruled by one common Power. Again, they vary from *ſyſtematical* Forms, becauſe they are not compos'd of ſeveral compleat and diſtinct States. Laſtly, they do not fall in with *Diſeaſes* or *Deviations*, becauſe a diſtemper'd State always appears under Circumſtances of Ignominy, and hath as it were ſomewhat of the

[a] Appian. in Libye. *Bell.* p. 64. Ed. *H. Steph.*

Mr. Barbeyrac's *Note on* §. XIII.

[1] See Mr. *Bayle*'s Reflections on *La difficulté de trouver un juſte Milieu dans un Gouvernment mixte*, Tom. I. of the *Reponſe aux Queſtions d une Provincial*, pag. 611. *&c.*

Baſtard in its Countenance; in as much as it proceeds either from the ill Management of a good and regular Frame, or from incoherent Laws and improper Inſtitutions. Whereas the Irregularity of a Government doth not only affect its Frame after an intrinſick and ſecret manner, but being openly confirm'd, and as it were declar'd legitimate, ſhews it ſelf in publick without Shame or Guilt. Therefore the former, or the *Diſeaſe*, cannot be ſuppos'd to have entered into the Intention of thoſe who firſt founded the Commonwealth, ever appearing as a ſubſequent Vice or Defect: But the latter, the *Irregularity* owes, if not its Original, yet at leaſt its Confirmation to the Will and Approbation of the firſt Authors. It is juſt the ſame Difference as may be obſerv'd between two Buildings, one of which is deſign'd according to the Rules of Architecture, but either the Materials are naught, or through the Negligence of the Inhabitant, the Roof gapes, the Walls ſhake, the Beams crack, the Foundation ſinks and gives way: In the other, either the Builder at firſt propos'd a Model not agreeable to the common Rules; or ſome great Fault, which afterwards happen'd, hath been cur'd and made up after a ſtrange and unſeemly manner. Farther, ſome Irregularities appear'd upon the firſt Settlement of a State, others crept in by ſilent Steps, and in long Progreſs of Time. For it might ſo happen, that the Authors or the Reformers and new Modellers of a Commonwealth might not be able to introduce a regular Frame, either on account of Ignorance, or becauſe the preſent Poſture and Exigence of Affairs would not ſuffer them to conſider of a more accurate Conſtitution [a]. Sometimes too, Perſons, who have been the chief Leaders and Aſſiſtants in winning a Kingdom, have beforehand contracted for ſuch Lordſhips, or ſuch Privileges in it, as that they cannot be rank'd in the Number of true and proper Subjects. Again, many times, either through Neglect of the Governours, or upon ſome other Occaſion, a Diſtemper ſeizeth a State, and having taken ſo deep root, that it cannot be removed without the Deſtruction of the publick Frame, there remains no Cure for it, but this; to diveſt it, as it were, of its Faultineſs, and to vindicate it from Cenſure, by turning it into a ſolemn and legal Appointment; by which means what was before term'd Uſurpation, Faction, or Contumacy, ſhall, for the future, bear the Style of a juſt Right and Privilege.

XV. Theſe irregular Forms [1] of Government can neither be brought within any certain Number, nor divided into proper Kinds, by reaſon of that great Variety, which either really occurs in Fact, or at leaſt may be framed in our Imagination. So that we have ſcarce any other means of diſcovering their Nature, but by gathering it from particular Inſtances, and the illuſtrious Examples in Story. Such an Example we endeavour'd to exhibit in the [b] *Roman* Commonwealth: As the like hath been attempted in the *German* Empire by *Severinus de Monzambano* [2]. At preſent, 'twill be ſufficient to offer a Remark or two concerning the Irregularity, which ſome obſerve, in the Government of *Rome*, under the antient Emperours: Whilſt ſometimes the State appear'd a Monſter with a double or triple *Body*, one Prince ruling the Eaſt, another the Weſt, or three dividing the World amongſt them; ſometimes again, with a double or triple *Head*, whilſt two or three of the royal Family held the ſovereign Power, as Copartners, and govern'd in common. Now as to the former of theſe Caſes, we may note, that whilſt two Emperours preſided, one over the Eaſtern, the other over the Weſtern World, ſeparately and independently from each other, then there were really Two diſtinct Kingdoms, which, taken both together, ſtill retain'd the Name of the *Roman* Empire, out of which they had been compoſed. Beſides which Agreement as to their Original, the Reſemblance of Laws and Manners, the natural Relation between the reſpective Sovereigns and between their Subjects, their ſtrict League and Alliance, which inſured their mutual Help and Support, all concurr'd to make up ſome Appearance of Unity. But what Name we are to impoſe on that Form of Government, when two or three royal Partners adminiſtred Affairs in Conjunction, it is not eaſy to determine. Certainly *two* Perſons cannot make an Ariſtocracy. For ſince each is inveſted with equal Power (upon which Suppoſition the Caſe before us proceeds) they cannot be united, otherwiſe than by Covenant; and there could be no Expedient found out for the Diſpatch of Buſineſs, ſhould they happen to diſagree about any Propoſal, there being no third Perſon to turn the Scales. And tho' the ſame Inconvenience may ſeem to attend any ruling Council or *College*, where the Members are of an even Number; yet it cannot ſo frequently happen, that upon a Diviſion in Judgment the Votes ſhall be equal. Beſides, in this Caſe it is not difficult to bring over ſome one out of ſuch a Number to the oppoſite Sentence: Or, if this can't be done, the next Expedient is to let that Opinion prevail, which declares againſt Innovation, and would have things continue in their preſent State. Farther, neither can we, properly ſpeaking, affirm the united Government of three *Cæſars*, reigning together, to have been *ariſtocratical*. For this royal Triumvirate did not compoſe ſuch a *collegiate* Body, as was to determine State-Affairs by the Plurality of Voices, or where two Members, agreeing in Opinion, might by their proper Right and Authority compel the third, who diſſented, to follow their Reſolution. And in all Caſes, a Council or Body of Men, in which the Major part cannot influence and draw over the reſt, ſeems to be held together, rather by bare Compact, than by any Government or Command. We may therefore ſay, as to the Queſtion before us, that the ſovereign Authority did truly and radically inhere in that Perſon alone, who aſſumed the other into a Partnerſhip with him; tho' both might ſeem equal as to the exterior Enſigns of Majeſty. Thus the Hiſtorian[a] tells us of *Lucius Verus*, *That he lived not as a free and ſovereign Prince, but, under* Marcus, *inveſted with the imperial Authority.* Nor was it eaſy to ſuſpect, that any Man would be guilty of ſo notorious Ingratitude, as to oppoſe the Will of his Patron, to whom he owed his Promotion and Honour. To which we may add this Conſideration, that for the moſt part the Perſons thus ſharing the Government, were either Father and Son, Father-in-Law and Son-in-Law, or two Brothers; ſo that the Party admitted as a ſecond in the Dignity, might be farther reſtrain'd by the Ties of Blood or the Alliance of Marriage, from abuſing the Power which had been given him, to the Prejudice of the Donor. Whence it appears, that this Practice of aſſuming a Colleague was not any Portion of the Sovereignty, but as it were the Deſignation of a Vicar-general and Heir apparent who was immediately receiv'd into the Buſineſs of State, and join'd with the other in the Adminiſtration; being likewiſe inveſted with the moſt ſhining Ornaments and the richeſt Trappings of Greatneſs. Now that which put the Emperours upon this Method, was the inconſtant Humour of the Soldiery; who, on frequent Occaſions, took a Pride in complementing their Leaders with the imperial Title[b]. If this Explication will not ſatisfy ſome Men, or if it ſeems not applicable to every particular Inſtance which we find upon Record; we have no way left but to affirm, that the *Government* then commenced *irregular*, when more Perſons than *one* held the *Monarchy* (if it might ſtill deſerve that Name) in Conjunction; and yet were engaged to each other only by Compact or Faction. Amongſt whom if any Diſſenſion or Hatred ſhould chance to ariſe, the Conſequence could be nothing leſs than mutual Suſpicions, Plots, and Deſigns, and in the final Iſſue, a civil War[c]. Such an Irregularity the *Roman* State was evidently ſenſible of, whilſt *Romulus* and *Tatius* ſat as Partners in the Throne[d]. In general, we may apply to all theſe *polyarchical* Governments, what *Solyman* the *Turk* obſerved in the *German* Empire; that it might be well compar'd to a Lute, which coſts a great deal of Labour and Skill to put it in Tune, and is very eaſily put as far out of Tune as ever[e].

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[a] *Add.* Hobbes *Leviath.* c. 29. *poſt. princip.*

[b] In a Diſſertation entituled, *De forma Reipublicæ Romanæ*, among thoſe juſt now cited.

Mr. BARBEYRAC'S *NOTES on* §. XV.

[1] See our Author's Diſſertation *De Republica Irregulari* among his *Diſſertationes Academicæ ſelectiores*, where he treats more fully of this matter.

[2] This Work is generally attributed to our Author: However, he has never, as I know of, publickly own'd it; he has indeed ſtrenuouſly defended it againſt ſeveral Authors who attack'd it, in his Diſſertation *De Republica Irregulari*; and thoſe who are acquainted with his Style and Character, do not much doubt of its being written by him; neither after all, is it a Work that does him any manner of Diſcredit, but rather the contrary, for not to mention the principal Deſign of the Work which the World has highly approv'd of, the Preface has abundance of Wit and Life in it. Since the firſt Edition of this Tranſlation, the *Monzambano* has been printed in 1706, at *Berlin*, with the Author's Name to it; who at his Death order'd his Heir to publiſh it from a Copy full of ſeveral Alterations, Corrections and Additions. There are likewiſe ſome things left out, which together with the Suppreſſion of the Preface, will doubtleſs make the learned very well pleas'd to have the Edition, which was ſurreptitiouſly publiſh'd, as well as that which is now extant with the Author's Name and Approbation. Mr. *Titius* has taken care to ſatisfy their Curioſity in that point at an eaſy rate, in bethinking himſelf of a thing odd and ſingular enough; which was his printing in 1708. at *Leipſick* the Book we are here ſpeaking of, in ſuch a manner as to give 'em the two Editions all together; for the Paſſages which Mr. *Puſendorf* had either retrench'd or alter'd are here inſerted again, in their proper Places between two Crotchets, and diſtinguiſh'd by a different Character. Beſides, the Editor has made a ſort of *variorum* of it, by putting at the bottom of every Page the Notes of ſeveral Commentators upon the old *Monzambano*.

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[a] *Julius Capitolinus*, c. 1.

[b] *Themiſt.* Orat. 16. *Fratres Amantes*, p. 76. B. Ed. *Pariſ.* ſpeaking of *Valentinian* who had admitted his Brother *Valens* into a Partnerſhip with him in the Empire, uſeth the following Expreſſion: *He receiving the Whole and giving the Whole, at the ſame time a Brother and a Father, the one by Nature, the other by his own Act and Choice, tho' he hath conferr'd an equal Share of his Power, yet, in effect, he ſtill keeps it entire; by reaſon of the Obedience and Compliance of him on whom it was conferr'd.*

Thus *Solinus*, c. 8. reports of *Æneas*, that he reign'd with *Latinus* three Years, *ſocia poteſtate*, as his *Fellow* or Equal in the Supreme Authority.

[c] *Lucan*, l. 1. v. 92, *&c.*

Nulla fides regni ſociis; omniſque poteſtas
Impatiens conſortis erit.

To truſt a Partner's Rule impairs our own,
And Empire hates a Conſort in the Throne.

Statius, Theb. 1. ver. 130. ——*Sociiſque comes diſcordia regnis.*

——Howe'er the Crown is *ſhar'd*,
Diſcord's a *Partner*.

[d] *Vid.* Plutarch. Romul. *Add.* Eryc. Putean. *Hiſt.* Inſubric. *l.* 2. the Story of *Pertharite* and *Gundebert*, joint Kings of *Lombardy*. *Procopius* relates a like Caſe; *Hiſt. Goth.* l. 1. *The* Goths, *ſays he, and* Odoacer*'s Army came to this Agreement; That* Theuderick *and* Odoacer *ſhould reign in the City* Ravenna *with equal Power. And for ſome time the Compact was faithfully obſerv'd; but the Iſſue was, That* Theuderick, *according to the vulgar Report, inviting* Odoacer *to a Banquet treacherouſly ſlew him.* 'Tis a true Remark of *Euripides*, Andromach. *v.* 471, *&c.*

Two Tyrants can no more be born than one,
But preſs the Subjects with a double Load;
Till Diſcord and Sedition work their Fate.

Plin. Paneg. *c.* 8. *n.* 4. *What a ſmall Difference is there between laying down the Imperial Honour, and ſharing it with another; unleſs the latter be difficult and dangerous?* *Add.* Herodian. *l.* 4. *c.* 1, *&c.* See likewiſe *Racine*'s *Fréres Ennemis*, Act. I. Scen. V. and the *Fables de la Fontaine*, Lib. I. Fab. XII. intituled *le Dragon a pluſieurs Tétes, & le Dragon à pluſieurs queues.*

[e] We do not think that we ought to admit, under the Head of Irregular Forms, what *Francis Carron* reports of *Dayre* in *Japan*; who he ſays was the true Heir of the Crown, yet was put off by the Prince in poſſeſſion, with the outward Majeſty, and empty Badges of Honour. Much to the ſame purpoſe, *Alexander de Rhodes* relates, That in the Kingdom of *Tonquin* there are two Kings, one called *Bua*, the other *Choua*; yet ſo as that the former barely enjoys the Title, the latter really holding the Command; only *Bua* hath the Power of conferring the Degree of Doctor, and receives the Oaths of the Subjects when they renew their yearly Allegiance; as to other matters, he paſſeth his time ſhut up in an old Palace without Action or Buſineſs, *Itin.* par. 2. c. 6.

XVI. When ſeveral States are, by ſome ſpecial Band, ſo cloſely united, as that they ſeem to compoſe one Body, and yet retain each of them the ſovereign Command in their reſpective Dominions; theſe we term *Syſtems* of *States*. Whence it is in the firſt place evident, that when a State is compoſed of ſeveral ſubordinate Bodies, we muſt not on this account preſently give it the Name of *Syſtem*: Tho' Mr. *Hobbes* [a] is pleas'd thus to ſtyle it, and to compare the ſaid Parts with the Muſcles in the Body natural. No more are we to apply this Term, in general, to all thoſe larger States which have vaſtly increaſed their Dominions by ſwallowing up their little Neighbours, and by reducing them into the ſame Body with themſelves. Which we may obſerve to be done chiefly in the following Methods. Firſt, when the Victor either removes the vanquiſh'd into his own Territories, or however gives them the ſame Privileges with his former Subjects. Secondly, when the conquer'd Nation is left to poſſeſs its antient Seat, but utterly loſing the Sovereignty which it held before, is rendred purely the Subject of the conquering People. In both Caſes the State thus ſubdued loſeth its Name; but in the former the conquer'd are made equal to the Conqueror; in the latter they are put under an inferior Condition, being reduced into the Form of a *Province*. Tho' it often happens, that the vanquiſh'd are partly left in Poſſeſſion of their antient Laws or Privileges, how different ſoever from the Manners and Inſtitutions of the conquering State [b]. For in order to preſerve the Unity of a Commonwealth, 'tis not required, that all its particular Parts ſhall uſe the ſame poſitive Ordinances, or ſhall ſtand exactly upon the ſame Bottom; but 'tis enough, if they depend upon one Government. And it is frequently the Art and Policy of a Conqueror, to make no Alterations in the Cuſtoms of thoſe who are fallen under his Dominion: Or, at leaſt to accommodate himſelf to them for ſuch a time as he thinks convenient.

In relation to the Government of Provinces, we are to examine what Mr. *Hobbes* delivers on that Subject [c]. *Whereas, ſays he, heretofore the* Roman *People govern'd the Land of* Judea, *for Example, by a Preſident; yet was not* Judea *therefore a Democracy, becauſe they were not govern'd by an Aſſembly into which any of them had Right to enter; nor by an Ariſtocracy, becauſe they were not govern'd by an Aſſembly, into which any Man could enter by their Election; but they were govern'd by one Perſon: Which, tho' as to the People of* Rome *it was an Aſſembly of the People, or a Democracy; yet as to the People of* Judea, *which had no Right at all of participating in the Government, was a Monarch. For tho', where the People, are govern'd by an Aſſembly, choſen by by themſelves out of their own Number, the Government is call'd a Democracy or Ariſtocracy; yet when they are govern'd by an Aſſembly, not of their own chooſing, 'tis a Monarchy; not of one Man over another Man, but of one People over another People.* So that Mr. *Hobbes* ſeems to look on theſe Provinces which are dependent on ſome ariſtocratical or democratical State, as ſo many diſtinct Monarchies. Now tho' we eaſily allow, that 'tis the more uſual Practice to govern *Provinces* by one Man, than by an Aſſembly conſiſting of many, as the ſame Author ſhews at large [d]; yet we think it needleſs to enquire what Form of Government it eſtabliſh'd over a dependent People. For *Provinces* have loſt the Nature of *States*, and are made the Appendages of other *States*, having no kind of ſovereign Authority in themſelves. Whether therefore ſuch a Province is govern'd by a Preſident, or by an Aſſembly, is an indifferent Point, which doth not in the leaſt affect the proper Sovereignty, in as much as both *he* and *they* bear only a ſubordinate or delegated Power. So that the Sovereignty, exercis'd over theſe additional Dominions, is exactly of a piece with that of the main State, and cannot, without Impropriety, obtain the diſtinct Name of a Monarchy or an Ariſtocracy; which are Terms belonging to true and independent States, ſuch as really poſſeſs a ſupreme Government of their own.

XVII. Of *Syſtems* properly ſo call'd, theſe two kinds do eſpecially fall under Notice: One, when two or more States are ſubject to one and the ſame King [1]; the other, when two or more States are link'd together in one Body by virtue of ſome League or Alliance. In regard to *Syſtems* of the former kind, 'tis obſervable, that it implies no Contradiction in *Moral* Bodies, to have but one Head over ſeveral of them together, and conſequently to have one Perſon the Head of many diſtinct Bodies; which in *Nature* would bear ſo monſtrous an Appearance. But becauſe the Union of theſe *Syſtems* is founded either in the ſole Perſon of the Prince, or in his Family, hence it comes to paſs, that when the Perſon is deceas'd, or the Family extinct, the reſpective People recover their particular Right of ſettling their own Government, and are no longer obliged to make Uſe of a common Head. Nay, during the Continuance of the ſaid Head, the States are really diſtinct from each other. The Cauſes whence ſuch Combinations ariſe are various; but the moſt frequent ſeem to be the Marriages of Princes, and the Right of Inheritance. For there are many States, in which the Crown deſcends to the female Iſſue of the royal Houſe, not only when the male Line is utterly extinct, but when there is no male Heir in a nearer, or in an equal Degree. Now here if the Lady Sovereign happen to take another Sovereign for her Husband, the two Kingdoms will come to a Conjunction, if not in their Perſons, at leaſt in their common Iſſue. For it is not neceſſary, that, in a Match of this Nature, the Princeſs ſhould put her ſelf and her Dominions in Subjection to the Prince. So likewiſe in one undivided Kingdom, where the Hereditary Succeſſion is eſtabliſh'd, [e] either according to the plain and direct, or the lineal Courſe, if one of the remote Heirs any way become Maſter of another Crown, and the Rule of Succeſſion (all the reſt failing who ſtood nearer) call him to receive that of his own Country, the two Kingdoms will by this means be united under his Reign. The Conſequence is the ſame, if a People chooſe for their King one who bears the ſame Character elſewhere, in Poſſeſſion, or in Reverſion. Again, two or more Nations may engage by League to elect one Prince over both by joint Suffrages, and yet as to other Matters, continue ſeparate Kingdoms, without tranſacting their Affairs in a common Aſſembly. Laſtly, ſuch a *Syſtem* doth then ariſe, when a Prince, conſtituted by the free Conſent of the People, ſubdues by Arms another People, in his own Name, and at his own Hazard and Expence; not in the Name or at the Charges of the State over which he preſides. For that this is no impoſſible Caſe, *Grotius* [a] hath ſufficiently made out, againſt the Opinion of *Hottoman* the Civilian [b].

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[a] *Leviath.* c. 22. [b] Hobbes *Leviath.* c. 26. [c] *Leviath.* c. 19. [d] *Ibid.* c. 22. [e] For Example, *Great-Britain* and *Ireland*, See our Author's Diſſertation, *De Syſtematib. Civit.* S. 9, 10.

Mr. BARBEYRAC's *NOTE* on §. XVII.

[1] See the Seventh Chapter of this Book, §. 12, 13.

As for the Diſſolution of theſe *Syſtems*, 'tis manifeſt it muſt happen, either upon the Death of the Prince, if the Union was founded in his Perſon only; or upon the Extinction of the royal Family, in caſe the reſpective Kingdoms were all entail'd in the way of Inheritance. For then each ſeparate People recover their Right of conſtituting a new King, or of introducing what Form of Government they think fit, without conſulting the reſt; they being ſuppoſed to have no other Bond of Union. If a Prince holds one Kingdom by Right of Inheritance, and another by free Election; upon his Deceaſe the Union between them will be broken, and the latter Kingdom ſhall have no Obligation to advance his Son to the Crown.

But if this Union depend upon a League between the Kingdoms, 'tis no leſs manifeſt, that if the Agreement happen to be violated, eſpecially in the principal Articles, then the injured State may diſengage it ſelf from the other. Yet here we ought carefully to diſtinguiſh between the Obligation by which particular Kingdoms are tied to their reſpective Kings, and the Obligation by which the ſame Kingdoms are united amongſt themſelves. A King once elected, and who hath receiv'd the Fealty and Allegiance of his People, may not afterwards be deſerted on account of any Miſbehaviour, or any Action contrary to his Engagement, ſo long as he doth not profeſs open Hoſtility towards the State. Unleſs perchance the Compact, between the Elected King and the People, had this conditional Clauſe expreſly annex'd to it [1], that the Obedience of the latter ſhould be due on no other account, but upon the former's performing all and each of the Articles ſettled betwixt them. On the contrary, the Engagements by which united Kingdoms are held together, may be renounced on that ſide, to the Prejudice of which the Laws of the Union have been violated, tho' the Injury be not very conſiderable; in caſe the other Kingdoms concurr'd in the Action, or if it was undertaken for their Sake, or converted to their Uſe and Service. Wherefore upon the Deceaſe of the common Prince, the Injured State may diſclaim the Union, reſerving a Right to proſecute the Authors or Abettors of the Fact, and to recover what is loſt by their means. If, by the Marriage of hereditary Princes ſeveral States are conjoin'd, which obſerve a different Courſe and Order of Succeſſion, the Union will be diſſolv'd, if ſuch a Caſe happen, as that the ſame Perſon proves incapable of ſucceeding to both Crowns according to the publick Laws. Let us ſuppoſe two Kingdoms in Conjunction, one of which receives the Method of lineal Deſcent by *Agnation*, the other by *Cognation*. Here, if it ſo fall out, that the common Prince deceaſe without male Iſſue, the latter of the two Kingdoms ſhall paſs to his Daughter, the former to the Heir male in the next Degree. But if an Union, at firſt contracted on the Occaſion of Marriage, ſhall be afterwards confirm'd, and turn'd into a perpetual Eſtabliſhment, by means, either of a ſolemn League paſſing between all and each of the Kingdoms to this purpoſe, or a Decree made by the common Sovereign, with the Approbation of the reſpective States; then any difference, which was before obſerv'd in their way of Succeſſion, ſhall be underſtood to be actually taken off. And, for the future, ſuch a Method ſhall be followed, as is expreſly ſpecified in the League, or in the Decree; or ſuch as the Authors of the Union appear to have been moſt inclined to; or ſuch as is moſt agreeable to Reaſon, and moſt conducive to the Safety of the united States. But when one Kingdom happens to be join'd to another, in the manner of a *Province*, the Union founded on a precedent League expires, and a much cloſer Bond ſucceeds in its room, by means of which they unite into the ſame civil Body.

XVIII. The other kind of *Syſtem* is, when ſeveral States are join'd to each other by a perpetual League or Alliance [2]; the chief Occaſion of which ſeems to have been, that each particular People loved to be their own Maſters, and yet each was not ſtrong enough to make Head againſt a common Enemy. The Purport of ſuch an Agreement uſually is, that they ſhall not exerciſe ſome part of the Sovereignty there ſpecified, without the general Conſent of each other. For the Leagues to which theſe *Syſtems* owe their riſe, ſeem diſtinguiſh'd from others (ſo frequent amongſt different States) chiefly by this Conſideration; that in the latter each confederate People determine themſelves by their own Judgment to certain mutual Performances, yet ſo as that, in all other reſpects, they deſign not in the leaſt to make the exerciſe of that part of the Sovereignty, whence thoſe Performances proceed, dependent on the Conſent of their Allies, or to retrench any thing from their full and unlimited Power of governing their own States. Thus we ſee that ordinary Treaties propoſe, for the moſt part, as their Aim, only ſome particular Advantage of the States thus tranſacting; their Intereſts happening at preſent to fall in with each other: But do not produce any laſting Union, as to the chief Management of Affairs. Whereas in thoſe Leagues we are now ſpeaking of, the contrary is obſervable; they being carried on with this Deſign, that the ſeveral States ſhall for ever link their Safety one within the other, and in order to this mutual Defence, ſhall engage themſelves not to exerciſe certain parts of their ſovereign Power, otherwiſe than by a common Agreement and Approbation. For the Promiſes made in the two Caſes here compared, run in very different Terms; in the former thus: ‘I will join you as a Confederate in this particular War, and the manner of our attacking the Enemy ſhall be concerted by our common Advice: In the latter thus; None of us, who have entred into this Alliance, will make uſe of our Right, as to the Affair of Peace and War, except by the general Conſent of the whole Confederacy. We obſerv'd before, that theſe Unions ſubmit only ſome certain parts of the Sovereignty to mutual Direction. For it ſeems hardly poſſible, that the Affairs of different States ſhall have ſo cloſe a Connection, as that all and each of them muſt look on it as their Intereſt, to have no part of the chief Government exercis'd without the general Concurrence. Or, if there be any Communities thus mutually depending, it had been the wiſer Courſe for them, rather to have incorporated themſelves under the ſame Government, than to rely on the bare Engagement of a League. The moſt convenient Method therefore ſeems to be, that the particular States reſerve to themſelves all thoſe Branches of the ſupreme Authority, the Management of which can have little or no Influence (at leaſt directly) on the Affairs of the reſt. The ſame muſt be ſaid of ſuch publick Buſineſs, as either occurs every Day, or elſe requires ſo ſpeedy Meaſures as to prevent a general Debate. But then as to all Affairs, on which the Safety of the Allies hath a joint Dependence, theſe ought in reaſon to be adjuſted by common Conſtitution. And in this Number War, whether offenſive or defenſive, ſeems to claim the firſt Place; after that, Peace as the Reſult and Iſſue of War. To which we may add Taxes and Subſidies, as they contribute to the mutual Support; and Alliances with foreign States, as they promote the common Safety. It falls under the ſame Head of Duties, that in Caſe any Diſpute ariſe amongſt the Confederates themſelves, the other Members who are unconcern'd, ſhall immediately interpoſe their Mediation, and not ſuffer the Controverſy to come to Blows. Thus the wiſe Prince *Philip* of *Macedon*, declares in the Hiſtorian [a], that *The mutual Wrongs of his Allies ſo particularly concern'd himſelf, as that he could not but uſe his beſt Endeavours for a Compoſition, by Words to the preſent, and by Letters to the abſent Parties: Whereas thoſe other Dangers or Injuries, which affected the whole Confederacy, belonged to the Care of the common Aſſembly, and were thence only to receive their proper Redreſs.* As for other Matters, which ſeem not ſo neceſſary to be tranſacted in common, as Negotiations of Traffick, Subſidies for the particular Occaſions of any ſingle State, the conſtituting of Magiſtrates, the enacting of Laws, the Power of Life and Death over the reſpective Subjects, the eccleſiaſtical Authority, and the like; there is no reaſon but that they may be left to the Pleaſure of each diſtinct Government: Tho' at the ſame time, particular States ought ſo to manage theſe Privileges, as that they ſhall cauſe no Diſturbance in the general Union. Whence 'tis evident, that one or more of the Allies cannot be hindred by the reſt from exerciſing, according to their own Judgment, ſuch parts of the civil Adminiſtration, as were not, in the Treaty of Alliance, referr'd to the common Direction. Yet as to the Power of Life and Death, ſome Scruple may be made on account of that Paſſage in the Civil Law [b] [1]: *At fiunt apud nos rei ex Civitatibus fœderatis, & in eos damnatos animadvertimus. But ſome Perſons, Members of our Confederate States, are here arraign'd in Judgment, and receive from us both their Condemnation and Puniſhment. Grotius* [c] hath taken a great deal of Pains to ſolve this difficulty; but whoever throughly conſiders his Diſcourſe, will find that he hath labour'd to little purpoſe. For he certainly leaves the following Queſtion unanſwered; How that State can entirely preſerve its Liberty, the Subjects of which are are liable to be arraign'd under another Government, and to be puniſh'd upon Conviction? We find that the Freedom of the *Achaians* was look'd on as conſiderably impair'd, when, by the Treachery of *Callicrates*, the moſt worthy Perſons in that Commonwealth were accuſed of favouring *Perſeus*'s ſide, againſt the *Romans*, and were cited to *Rome*, thereto anſwer the Charge, upon Occaſion of *Xenon*'s Proteſtation, who under a juſt Aſſurance of his own Innocency, happen'd to declare, that if any Man had Thoughts of impeaching him amongſt the reſt, he was ready to take his Tryal, not only in the Common Aſſembly of his Countrymen, but amongſt the *Romans* themſelves [d]. On another Occaſion, the *Achaians* ſeem to have made a Breach on the Laws of regular Government, when they demanded thoſe *Spartans* to be deliver'd up into their Hands, who had been the chief Inſtruments in promoting the Siege of *Las*, a *Laconian* Town [e].

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[a] L. 1. c. 3. ſ. 12.

[b] Quæſt. Illuſtr. 1.

Mr. BARBEYRAC's *NOTES* on §. XVII, XVIII.

[1] *Lex Commiſſoria*: See *Grotius* Lib. I. Cap. III. Sect. 16. Numb. V. by that is generally underſtood a conditional Clauſe added to a Contract, the not performing of which renders void or makes the thing in diſpute to be forfeited. We have ſeen ſome Inſtances of it relating to the *Contract of Sale*, Book V. Chap. V. Sect. IV. and of *Pawns* and *Mortgages*, Chap. X. Sect. XIV. ſo in that Place the *lex Commiſſoria* or *conditional Clauſe* is an Article impoſed upon the King; by virtue of which, if he breaks the Engagement which that obliges him to perform, he forfeits *ipſo facto* the Crown: Juſt ſo in *Manors*, when the *Vaſſal* does not do Homage, or does not pay the Rent due to his *Lord*, or becomes guilty of *Felony*, the *Fee* falls into *Lapſe*, as the Law terms it; that is, is forfeited to the uſe of the *Lord*, and is re-united to the *Manor*.

[2] As for Example, the United Provinces of the *Netherlands*, the *Swiſs* Cantons, &c.

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[a] Polyb. *l.* 4. *c.* 24.

[b] *L.* 49. *t.* 15. *l.* 7. *ſ.* 1. *D. De Captiv. & Poſtlim.*

[c] *L.* 1. *c.* 3. *ſ.* 21.

[d] See the Caſe at large in *Pauſanias*, *Achaiac.* It is likewiſe touch'd upon by *Polybius*; *Excerp. Legat.* 105.

[e] *Liv.* l. 38. *c.* 31.

Mr. BARBEYRAC'S *NOTE on* §. XVIII.

[1] This Law is more naturally brought in hereafter, in the Eighth Book, c. 9. ſ. 4.

Whereas the Cauſe ought firſt to have been heard in a common Council of both States, and upon Conviction, the *Spartan* Government ſhould have been moved either to puniſh the Criminals, or to ſurrender them to their Accuſers. As for the Place alledg'd from the *Civil Law*, we think this the cleareſt way of replying to it; that whereas the precedent Diſcourſe had explain'd what the Nature of Leagues would bear, and what *ought* to be done, the Words here cited declare what *was* actually done in later Times; when the *Romans*, growing inſolent on Succeſs, uſed their Allies, who by free and voluntary Leagues had engaged their Friendſhip, with the ſame Treatment as thoſe whom they had conquer'd by their Sword. Of which Injuſtice *Cicero* himſelf complains [a].

XIX. Since in theſe *Syſtems*, 'tis neceſſary there ſhould be a Communication of certain Affairs expreſs'd in the League, and ſince this cannot be done ſo conveniently by Letters, a determinate Time and Place ought to be ſettled for the holding Aſſemblies, and one or more Perſons appointed, who ſhall have Power to call the States together, in Caſe of any extraordinary Buſineſs, which will not admit of Delay. Tho' it ſeems a much more compendious Method, to fix a ſtanding Council, made up of Perſons deputed by the ſeveral Confederates, who ſhall diſpatch Buſineſs of daily Occurrence, or of leſs Importance, according to the Tenor of their Commiſſion; who in Matters of greater Conſequence ſhall make report to the States, and ſhall publiſh and execute ſuch Decrees as are return'd to them on theſe Occaſions; to whom the Miniſters of the Confederacy in foreign Parts ſhall give an immediate account of their Proceedings, and who ſhall treat with the Ambaſſadors of other Nations, and conclude Buſineſs in the general Name of the Confederates: But who ſhall determine nothing that exceeds the Bounds of their Commiſſion, unleſs all the Subjects have been firſt conſulted on the Point. How far the Power of this Council of Delegates extends, is to be gather'd either from the Words of the League it ſelf, or from the Warrant by which they act. This is certain, that the Power, whatever it be, is not their own, but deriv'd to them from thoſe whom they repreſent; and altho' the Decrees which they publiſh paſs ſolely under their own Name, yet the whole Force and Authority of them flows from the States themſelves, by whoſe Conſent ſuch a Council hath been erected. So that the Deputies are no more than *Miniſters* of the confederate States, and are altogether as unable to enjoin any thing by their own proper Authority, as an Ambaſſador is to command and govern his Maſter.

XX. Yet it may ſtill appear doubtful, whether or no the whole Body of the Aſſociates, or the Majority of them, have not a Power over particular States, or over thoſe whom they exceed in Number, with regard to ſuch Matters as were the firſt occaſion of the Alliance, and which by the expreſs Terms of the League were appointed to be managed in a common Aſſembly; ſo far as that the few diſſenting States ſhall be bound, tho' againſt their Will, to do as the major part have determin'd. Here in our Opinion, the negative ſide of the Queſtion ought to be preferr'd; if we ſpeak of regular Syſtems, and where the particular States reſerve to themſelves the entire Poſſeſſion of their former Liberty. In as much as the Liberty of a State, which is nothing elſe but the Power of finally reſolving and determining, according to its own Judgment, all Matters in which its Safety is concern'd, cannot be underſtood, in caſe the State may, by virtue of the Authority held over it by ſome other, be compell'd to certain Performances againſt its Will. Nor can any reaſon to the contrary be drawn from hence, that in the League 'twas agreed not to exerciſe ſome particular parts of the Sovereignty there expreſs'd, unleſs by common Conſent. For 'tis one thing to ſay, *I engage not to uſe my Right unleſs you are willing*; and another to ſay, *I gave you a Power of compelling me to uſe my Right, tho' againſt my Inclination.* Now the firſt of theſe Forms is only implied in the League, not the latter. For the clearer Apprehenſion of which Point, it ought well to be obſerv'd, that when the Wills of many Perſons are bound to conſpire in one, this muſt ariſe either from a Compact between them to this Effect, or becauſe one of them hath ſubmitted his Will to the Will of the other. An Union or Concurrence of Wills, grounded on bare Compact, doth not in the leaſt deſtroy the Liberty of which we have been now ſpeaking. For they agree beforehand in ſettling thoſe Affairs, which are referr'd to their joint Management; or if any new Buſineſs offers it ſelf to their Debates, they deſire to be influenced not by Authority, but Argument and Reaſon. But when I have ſubmitted my Will to the Will of another, and by this means have given him a full Authority over me, I may then be obliged to things which are very inconſiſtent with my good liking. Nor doth *The Right of the Majority* [b] (which ſome may urge) oppoſe our Judgment in this Caſe. For firſt, *The greater part draws the leſs* only in Bodies already conſtituted, not in thoſe which are ſtill to be eſtabliſhed. And then farther, the Prerogative of the Majority in a ſettled Council to oblige the reſt is owing to human Compact and Inſtitution, not to Nature; tho' natural Reaſon adviſeth the Reception of this Method (as the moſt convenient) in numerous Aſſemblies, and where Buſineſs of various kinds, and of every Day's Occurrence, is to be diſpatch'd. Now in order to this, 'tis neceſſary that each Member do in ſuch manner ſubmit his Will to the Will of the whole, or of the major Part, as that he, tho' himſelf of a contrary Opinion, ſhall be bound abſolutely to follow what they determine; which we cannot conceive, unleſs at the ſame time we ſuppoſe the latter to hold a Command or Authority over the former. Beſides, in an Aſſembly of Confederates, there ſeems to be no Occaſion for this Right of the Majority; inaſmuch as they are ſeldom compoſed of any conſiderable Number of States, and are chiefly united by the Proſpect of general Advantage, which 'tis preſumed none in their Wits will obſtinately oppoſe. Yet if any, through a malicious and unreaſonable Perverſeneſs, ſhall refuſe to join in the wholſome Counſels of the reſt, and by this means ſhall endeavour to betray the common Safety, or Intereſt; it will be then lawful to apply the ſame Methods of Redreſs, as they who live in a Condition of natural Liberty are allow'd to uſe againſt the Violaters of Faith and Contract. Unleſs it be judg'd the more eligible Courſe, utterly to purge the Society of ſo intractable a Partner. To all which we may add, that it muſt frequently occaſion great Injuſtice, if in a confederate Syſtem the Plurality of Votes were to bind the whole Body: As when the Allies are diſproportion'd in their Wealth and Strength, and conſequently ſome contribute more than others to the common Defence. For tho' we may be apt to imagine, that they who contribute according to the Proportion of their Ability, do really bring equal Shares; yet it may happen very frequently, that one who hath but ſlender Fortunes may be more willing to expoſe them to Danger, than another who hath larger Poſſeſſions. Thus let us ſuppoſe, that in a Confederacy, ſome one State contibutes more to the common Security, than all taken together; here it would be a manifeſt [a] Breach of Equity, if this State ſhould, by the Agreement of the reſt, be compell'd to engage in any Action, the chief Burthen of which muſt lie upon its own Shoulders. On the other hand, if the Votes were to take place according to the Proportion of Force, or Treaſure ſupplied to the common Cauſe; then the more powerful State would actually obtain a Sovereignty over all beſides [b]. So that we may conclude from the whole, that where-ever Buſineſs is decided by Plurality of Voices, in ſuch a manner as that the diſſenting Parties are likewiſe bound to ſtand to the Reſolution; there the regular Form of *Syſtems* or Confederacies is deſerted, and the Members either break into an irregular Body, or cloſe together in one undivided State.

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[a] *Offic.* Add the Story of *Decius Magius*, who was laid in Irons by *Hannibal*, *Livy*, l. 23. c. 7, 10. and *Scipio*'s Advice to the *Romans*, that they ſhould not hear the Informers againſt the ſame great Enemy; *Livy*, l. 33. c. 47.

[b] See B. 7. c. 2. ſ. 15.

XXI. The Diſſolution of theſe Syſtems happens, when ſome of the Confederates voluntarily quit the League, and govern their own States apart; which they are induced to chiefly by this Motive, that they hope to receive more Advantage by a Separation, than they could expect under a Conjunction, and apprehend their Allies to be rather a Burthen to them, than an Aſſiſtance [c]. Inteſtine Wars are another Cauſe which muſt neceſſarily break theſe Unions, unleſs, upon the Eſtabliſhment of the Peace, the League be alſo revived. If a confederate Power happen to be overcome in a foreign War, it is ſometimes a Policy of the Conquerour to cut the Knot, and to make each Government independent of the reſt: As the *Romans* did in the Caſe of the vanquiſh'd *Achaians* [d]. We are farther to obſerve concerning thoſe Diſſolutions, which ariſe from external Force, that the Enemy, by poſſeſſing himſelf of one or two more of the united States, acquires no manner of Right over thoſe that remain, nor can demand to be admitted into the Confederacy, by virtue of that League which engaged the conquer'd States to the others. But a new Agreement muſt neceſſarily paſs, before any ſuch new Member can be receiv'd into the Alliance, in the room of thoſe whom he hath ſubdued. Thus we find King *Philip*, by a Decree of the *Amphyctionians* obtaining a Seat in their common Aſſembly, in the room of the *Phocæans* [e]. For altho' the League, by which the ſeveral States are thus combin'd, may ſeem to be a real laſting Engagement [f], and tho' a State doth not ceaſe to be the ſame, upon the Alteration of its Government; yet the Alliance muſt always be preſumed to expire, when any one People are brought under a foreign Yoak, or made the *Acceſſion* of another Kingdom. Becauſe, the League being made between *free* States, conſider'd in that Capacity, whenever this Condition fails, the League muſt fail with it. Nay, tho' we ſhould go ſo far, as to ſuppoſe, that in the Terms of the League there was an expreſs Clauſe, that the Change of Government in any State ſhould not exempt it from the Engagement, yet the Change here ſpoken of muſt be preſumed to be made in a lawful manner, and with the Conſent of the People. And conſequently neither an unlawful Uſurper, nor any foreign Enemy, ſhall have a place in the Congreſs of Allies.

On the other hand, theſe *Syſtems* do more cloſely unite, and are incorporated into the ſame civil State, by the following means: Either if all the Confederates, by a voluntary Submiſſion, put themſelves under the Government of ſome one Perſon or Council; or if ſome one People, which hath the Advantage in Strength and Power, ſhall reduce the reſt to the Condition of dependent Provinces: Which uſually happens, when weaker States allow any laſting Preference of Prerogative to thoſe that are ſtronger, and engage themſelves in unequal Alliances [g]. Laſtly, if ſome particular Man invade the ſovereign Command, through the Favour of the Soldiers, the Eſteem of the Commonalty, or the Strength of a prevailing Faction.

XXII. To conclude; the laſt Diſpute upon this Head commonly is, concerning the Excellency of particular Forms of Government, and which ought to be perferr'd to another: whether that under which the publick Welfare may with more Expedition, and more Certainty, be procured, or that where the Sovereign Authority is leſs expoſed to Corruption and Abuſe. Now as to the Point of Compariſon, thus much in the firſt place is evident, that no Frame of civil Conſtitution can be ſo exactly model'd, and ſo well guarded by Laws, but that either through the Negligence or the Wickedneſs of thoſe who bear Rule, the ſame Government which was inſtituted for the Security of the Subjects, may turn to their Prejudice and Miſchief. The Reaſon of which is, becauſe Government was firſt eſtabliſh'd as a Defence againſt thoſe Evils, which Men were capable of bringing on each other. But at the ſame time, they who were to be inveſted with this Government were likewiſe *Men*, and conſequently not free from thoſe Vices which are the Spurs to mutual Injury. *Vitia erunt, donec homines* [a], *Whilſt there are Men in the World, there muſt be Faults:* And therefore we cannot but ſometimes ſuffer from their Hands the very Evils from which they ought to protect us. Hence the old Remark is ſo often true,

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[a] *Vid.* Grot. *Apologet.* Cap. 1. *ſub fin.*

[b] Add. *Diodor. Sic.* l. 15. c. 28.

[c] Add. *Liv.* l. 38. c. 31, 32.

[d] Comp. *Xenoph.* l. 4, 5. Rer. *Græc.* where he ſpeaks of the Peace with *Antalcidas.*

[e] *Diod. Sic.* l. 16. c. 61.

[f] See hereafter in B. 8. c. 9. ſ. 6.

[g] Vid. *Grot.* l. 1. c. 3. ſ. 21. n. 10. *circa fin.*

Quicquid delirant reges, plectuntur Achivi [b].

The Kings grow frantick, and the People ſmart.

As therefore the Condition of human Affairs will bear an abſolute Perfection; ſo 'tis controverted between many Perſons, what Form of Government ſeems to have the feweſt Imperfections: And the Generality of Judges pronounce in Favour of Monarchy [c]. It is not our Deſign to examine the particular Allegations of each Party. Only thus much we would obſerve, that Arguments of this kind are by no means ſo very ſtrong and concluſive, as that the Inferences, drawn from them, muſt neceſſarily fall out in all places and at all times: And that the Actions of one or two Governours are no manner of Proof, that all others of the ſame Order or Title muſt needs follow their Example. And in our Judgment, the wiſe Speech of *Marcellus* in *Tacitus* [d] is what every good and uſeful Subject ought to meditate upon: He ' ſaid, He could not but remember that happy ' Age, under which he himſelf came into the ' World, and that Form of Government which ' had been inſtituted by their Foreſathers; yet ' 'twas his Principle, *Ulteriora mirari, præſentia ſequi; bonos Imperatores voto expetere, qualeſcunque tolerare: To admire what was paſt, but to follow what was preſent; to wiſh for good Emperours, but to bear with any* [1].

It may not ſeem improper on this Occaſion, to ſhew briefly the Reaſon why, amongſt the antient *Grecians*, ſuch Perſons as under a *democrtical* or *ariſtocratical State*, aſſumed a *monarchical* Power, met with ſo univerſal Hatred and Cenſure: And what Motives induc'd them to maintain their Authority by ſuch evil Arts, as we find deſcribed in *Ariſtotle* and other Authors; on account of which the Name of *Tyrant* hath been branded with an indelible Mark of Deteſtation. Now the *Grecian* States ſeldom ſtretched their Dominion beyond the Compaſs of a ſingle Town. And to ſuch the moſt agreeable Government was, either a Democracy, or an Ariſtocracy moderately exercis'd; or laſtly, what *Ariſtotle* terms an *heroical Kingdom*, a princely Sway, founded rather upon the Authority of Perſuaſion, and upon the general Character of extraordinary Virtue, than upon any proper Sovereignty, or Force of Command. Beſides, the *Grecian* Nation, being of a haughty Spirit, and of a ſtirring and reſtleſs Temper, was moſt in love with ſuch a Conſtitution, under which every Man might bear a part in the Government. Wherefore in a State of this kind, he who had taken on himſelf a regal Authority, a thing ſo odious to the People, againſt their Conſent, was obliged, for his own Security, to awe the Town with a Caſtle or Cittadel, and to place a ſtrong Guard round his Perſon; and then this Guard was to conſiſt of Foreigners, becauſe it had not been ſafe to truſt his own Subjects, and becauſe he had not the means of bridling one Province by another, by interchanging the Native Forces. Farther, the Truth and Loyalty of the Guard was not otherwiſe to be purchaſed than by the largeneſs of their Pay; and hence for the raiſing of ſufficient Funds, the Subjects were to be drain'd by conſtant Impoſitions. Again, it was no leſs neceſſary that the Natives ſhould be diſarm'd, and render'd as weak and *little* as poſſible; that *the Heads of the Poppies* ſhould be *cut off*; that all Meetings of the wealthier Subjects ſhould be ſuppreſs'd; and that Informers and Court Spies ſhould be maintain'd and encouraged. So that 'twas not Injuſtice only, but downright Madneſs, in theſe *Tyrants*, to affect ſuch a Government as was to be preſerv'd by evil Arts, which could not be laſting, and under which 'twas impoſſible for them to gain the Love of their Subjects. And it is equally abſurd to inſtitute a Monarchy in a State, confin'd to a ſingle Town; and a Democracy in larger Territories, and vaſtly extended Dominions. But ſince Princes who ſtand poſſeſs'd of wide and ſpatious Realms, have no need to make uſe of theſe Arts for their

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[a] Tacit. *Hiſt.* l. 2. c. 74.

[b] *Horat.* L. 1. Ep. 2. v. 14.

[c] Vide *Iſocrat.* in *Nicocl.* *Herodot.* (*Thalia*) where the *Perſian* Nobles debate about eſtabliſhing a Form of Government, after the *Magi* had been kill'd. *Euripid. Supplicibus*, verſ. 405, *&c.* Bodin. *de Rep.* l. 6. c. 4. Arniſæus, *Relect. Polit.* l. 2. c. 7. ſ. 2. and many others. On the other hand, the *Dutch* Writer of the *Political Balance* ſeems to have omitted nothing that Malice or Envy could ſuggeſt againſt Monarchy. A great part of whoſe Arguments may be turn'd upon him by what Mr. *Hobbes* obſerves, *De cive*, c. 10. *&* *Leviath.* c. 19.

[d] *Hiſt.* l. 4. c. 8.

Mr. Barbeyrac's NOTE *on* §. XXII.

[1] See *Maximus* of *Tyre*, Diſſert. VI. p. 66. *Edit. Davis*, where he maintains, that as *Ariſtocracy* is better than *Democracy*, ſo *Monarchy* is preferable to both. See likewiſe *Montagne*, Liv. III. Chap. IX. p. 711. Ed. Par. *in Folio*, where there is in the Margin, *Police, la meilleure à chaque Nation?* And *les Caractères* of Mr. *la Bruyere*, Chap. *du Souverain, ou de la Republique* at the Beginning. *Montagne* however, ſays in another place, that *Democracy* is moſt natural and moſt equitable. Liv. I. Chap. III. p. 11. But after, all no body has better handled this Queſtion relating to the Excellency of particular Forms of Government than Mr. *Sidney* in his *Diſcourſe on Government.* 'Tis worth while to ſee what he ſays from the ſixteenth Section of the ſecond Chapter, quite to the End of it; or, if any one has a mind to have a general Idea of it at one view, he need only read the *Nouvelles de la Republique des Lettres*, *Avril* 1700. p. 444. &c. See alſo the *Parrhaſiana*, Tom. II. p. 161. *&c.* and the *Eſſay upon Popular Diſcontents*, which is the firſt Piece of Sir William Temple's *Poſthumous Works*, *Publiſh'd in* 1704.

Support, inaſmuch as they may be able to poize and balance one Province with another; thoſe Perſons are guilty of no leſs Baſeneſs and Wickedneſs, who ſuggeſt any ſuch Practices of Tyranny to the Imitation of great and potent Monarchs, than thoſe who make it their Endeavour to turn the *Odium* of the old *Grecian* Tyrants upon Monarchy in general. And hence likewiſe it is evident, that Princes live much more ſecurely in ample Dominions; becauſe there the diobedient and rebellious cannot ſo eaſily communicate their Deſigns, unite their Strength, or touch and taint the Loyalty of others. Whereas when a whole State is confin'd within the ſame Walls; the way lies ready for a handful of Mutineers to ſpread the infectious Madneſs, and to corrupt the whole Body of the Subjects, before the Government can either prevent, or apprehend the ſurprizing Danger [a].

[a] Compare the Reflections which Mr. *Gravina* makes in his *Origines Juris Civilis, &c.* Publiſh'd at *Leipſick* in 1708. with theſe of our Author in this Section.

CHAP. VI.

Of the Affections, or Properties belonging to Sovereignty.

I. *How the ruling Power in a State comes to be ſtyl'd Supreme.*
II. *He that is inveſted with this Power is unaccountable.*
III. *And above human Laws.*
IV. *Of the Diſtinction between real and perſonal Majeſty.*
V. *That a King may be ſuperior to a whole People, demonſtrated.*
VI. *The Arguments to the contrary refuted.*
VII. *Abſolute Government, what.*
VIII. *Not occurring alike in all Forms of civil Eſtabliſhments.*
IX. *Limited Governments, how occaſion'd:*
X. *Founded on what Covenants.*
XI. *In what reſpect the different parts of the Government may be limited.*
XII. *Of the Power of Eſtates, and Councils.*
XIII. Hobbes *anſwer'd.*
XIV. *The various ways of holding the ſovereign Power.*
XV. *A temporary Sovereignty, whether poſſible.*
XVI. *Of patrimonial Kingdoms.*
XVII. *Of Kings, aſſumed by the free Act and Grant of the People.*

WHen we would enquire into the *Affections* and *Properties* of the *ſupreme* Power, the firſt Point, which falls under Examination, is how it comes to obtain that Name and Title. And the chief reaſon ſeems to be this; becauſe 'tis impoſſible, that one Man ſhould bear a greater Sway over another, than that the latter ſhall be oblig'd to imploy his Strength and his Fortunes for the Advancement of the publick Good, as the ruling Party directs, and ſhall farther be obnoxious to capital Puniſhment upon Default. To which may be added this Conſideration, that as, ſetting aſide the Divine Sovereignty, particular Men cannot enjoy a higher Degree of Liberty, than the Power of guiding and applying by their own Judgment their Actions, Perſons, and Goods; ſo the Freedom of a Community or Body of Men conſiſts in their being able, by their own joint Diſcretion, independent of the Will of any Superior [1], to reſolve and decree ſuch Matters, as appear conducive to the general Benefit and Safety. And hence likewiſe it follows, by neceſſary Conſequence, that ſuch a Power being *ſupreme*, or not acknowledging any Superior upon Earth, the Acts, which proceed from it, cannot be diſannull'd at the Pleaſure of any other Mortal [a]. But that a Perſon or a State ſhould be able to alter the Decrees and Reſolutions of their own Will, is ſo far from abridging, that it really inhanceth their Liberty.

II. For the ſame Reaſon muſt the *Sovereign* be acknowledg'd *unaccountable*: That is, not obnoxious to human Judgment, or human Puniſhment [1]. For both theſe ſupppoſe a Superior; but a Superior to the Supreme, in the ſame Order of Men, and the ſame Notion of Govern-

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Mr. BARBEYRAC's *NOTES* on §. I. and II.

[1] *Proprio, & aliunde non dependente judicio*; theſe are the Author's own Words; but if this be true, then Princes whoſe Power is limited, are not *Sovereigns*: Since they cannot do any thing good in Law, in ſome certain Caſes without conſulting an Aſſembly of the People, or of thoſe who repreſent them: But our Author in the tenth Section of this Chapter plainly aſſerts the contrary. He ought therefore to have expreſſed himſelf here in ſuch a manner as to have compriz'd more clearly what is agreeable both to an abſolute *Sovereignty*, and to a *limited one.*

See Sir *George Mackenzie*'s *Jus Regium*, Archbp. *Uſher* of the Obedience of Subjects to their Princes, and the Homily of the Church of *England* againſt Rebellion.

[a] Vid. *Grot.* l. 1. c. 3. ſ. 7. n. 1.

[1] *Nam impuné quælibet facere id eſt Regem eſſe. C. Memmius apud Saluſt. Bell. Jugurth.* Cap. 36. 'To do with Impunity whatever one will, is to be a King. *Pliny the Younger* ſays, that what is moſt agreeable in Sovereignty, is the not being accountable for any Thing whatſoever: *Ereptumque principi [Nervæ] illud in principatu beatiſſimum, quod nihil cogitur.* Panegyr. Cap. 6. Num. 1. Our Author cites theſe Paſſages. See *Grotius* Lib. I. Cap. VI. *Num.* 6. Sect. 6. However all that our Author here ſays, is to be underſtood with this Reſtriction, *as long as he does not forfeit his Right.* See hereafter, Chap. VIII.

ment is a Contradiction. But it will be proper here to obſerve, that I may give an Account two ways, either to a *Superior*, who upon his Diſlike may reverſe all my Acts, and farther inflict a Puniſhment upon me: Or elſe to an *Equal*, whoſe bare Approbation of my Proceedings I am willing to obtain; only to keep up my fair Character with him, and to juſtify my Integrity and Honour. In the former manner, ſupreme Rulers are not accountable to any earthly Power. But in the latter way, Princes who are tender of their Reputation, commonly endeavour to lay open their Actions and Counſels to the View of the whole World: Which being done only to ſecure the Credit of their Reign, cannot imply the leaſt ſhadow of Subjection. In the ſame manner, I may expend my Money and Fortunes at my own Pleaſure, and as I ſee Occaſion; and yet I am willing to keep Books of my Accounts, to ſatisfy my Friends, that I am no ill Huſband.

And then as for the other Point, the being obnoxious to Puniſhment, this cannot affect him, who owns no Court that can give him his Tryal, no Judge that can pronounce or execute Sentence upon him. For the Courts of Juſtice in a Commonwealth reach no farther than the Subjects, and are beholden to the Sovereign for all their Authority and Power. But if, as it frequently happens, Princes condeſcend to anſwer an *Action* in their own Courts in Matters of Debt and the like Caſes; this is not done, as if they acknowledged any ſuperior Force, that could oblige and compel them, but only expreſſeth their Deſire of ſeeing the Plaintiff's Pretenſions clearly made out; which, if they once appear juſt, they are ready to ſatisfy and diſcharge in a voluntary manner. Yet we ſpeak here of human Puniſhment only, inflicted by a ſuperior earthly Judge. For the Divine Juſtice finds many ways of ſhewing it ſelf on thoſe high and potent Sinners, who violate the Laws of Nature, in Contempt of all earthly Tribunals. *Reges in ipſos imperium eſt* Jovis [a]. *Princes are but the Subjects of Heaven.* As to what Hiſtory [b] tells us of the *Egyptians*, that when their Kings had been ill Governours, they denied them the uſual Honours of Burial; this piece of Diſreſpect can ſcarce fall under the proper Notion of Puniſhment.

III. Farther, when a civil Power is conſtituted *Supreme*, it muſt, on this very Score, be ſuppoſed exempt from human Laws, or, to ſpeak more properly, *above* them. As for the Laws of GOD and Nature, to bring them into the Queſtion, would be no leſs abſurd than impious [c]. Now human Laws are nothing elſe, but the Decrees of the ſupreme Power, concerning Matters to be obſerved by the Subjects, for the publick Good of the State [1]. That no ſuch Edicts can directly oblige the Sovereign is manifeſt; becauſe his very Name and Title ſuppoſeth that no Bond or Engagement can be laid on him by any *other* mortal Hand: And for a Perſon to *oblige himſelf* under the Notion of a Lawgiver, or of a Superior, is an impoſſibility [d] [2]. Yet in an indirect manner and by way of Reflection, the Force of his own Ordinance frequently reacheth the Legiſlator, on account of natural Equity, and publick Decorum; to excite and encourage Obedience in the Subject, by acting that himſelf which he preſcribes to others, as expedient for the common Intereſt; and leſt by forbidding ſuch Practices, as he is himſelf obſerv'd paſſionately to purſue, he ſhould ſeem to envy others the Sweetneſs of Vice, and

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[a] Hor. *Ode* 1. *v.* 5, 6. *L.* 3.

[b] *Vide* Diodor. Sic. *l.* 1. *c.* 72.

[c] ‘ The Generality of Mankind imagine, that the principal Advantage of Sovereignty conſiſts in not acknowledging any ſuperior Power--- ‘ who then ſhall govern the Prince? That Law which *Pindar* calls the living and ſupreme Directreſs of Men ‘ and Gods: not written in Books, or engraven in Tables; but imprinted in a lively ſenſe upon the Reaſon, ever ‘ reſiding and keeping a conſtant watch, nor ſuffering the Mind to be one moment without a Guide and Ruler. *Plutarch ad principem indoctum*, p. 780. c. See alſo upon the ſame Subject Mr. *Buddeus*'s Diſſertation, intituled, *Principem Legibus Humanis, ſed non Divinis ſolutum.* Printed at *Hall* in 1695.

Omne ſub regno graviore regnum.
Monarchs muſt anſwer to a higher Throne.

[d] *Vide* Hobbes *de Cive*, *c.* 6. *ſ.* 14.

Mr. Barbeyrac's *Notes* on §. III.

[1] Our Author is here guilty of the very ſame Error which I have taken notice of in the firſt Note upon this Section. For neither does this agree with Sovereigns whoſe Power is limited; becauſe, tho' they ratify and confirm the Acts which the Aſſembly of the People, or their Repreſentatives, have paſs'd relating to publick Affairs, the whole Management of which they are not willing to leave entirely to them; and tho' theſe Acts derive their Power and their Authority immediately from them, yet however they cannot revoke 'em, or make any Alterations in them without the Conſent of the People. It muſt ſtill be obſerv'd, that what our Author here ſays, only regards the Actions of the Sovereign, and not the Effects which the Laws that he has abrogated may have already produced with reſpect to the Subjects. See Book I. Chap. VI. Sect. 6.

[2] V. *Grot.* L. 2. c. 4. ſ. 12. n. 1. *Gronovius* in his Notes on this place of *Grotius* cavils like a true *Grammarian* at the ſame time that he reproaches that great Man with a wretched piece of Sophiſtry (*Sophiſtica cavillatio.*) *When the People*, ſays he, *make a Law, does not the Law it ſelf oblige them to obſerve it? Do they not make the Law above themſelves? Whence then proceeds that Remark of* Titus Livy (Lib. II. Cap. 1.) that from the Time of the *Expulſion of the Kings out of* Rome, the Empire of Laws, more powerful than that of Men, immediately began? *If each particular Man can bind himſelf by a Promiſe, or by an Oath, why ſhould not a whole People be bound by the Laws* of their own making? The Law is, *according to the Civilians*, a general Convention of the Citizens (*Communis Reipublicæ Sponſio*, Digeſt. Lib. I. Tit. III. Leg. 1, 2.) *and a ſort of Oath, by which they engage themſelves to certain Things: And this is the Reaſon why* Juſtin *calls the Laws of an antient Society of Pythagoreans*, *Sodalitii Sacramenta* (Lib. XX. Cap. IV. Num. 14.) But I. *Grotius* had a mind, and certainly he ought to ſpeak with a Philoſophical Exactneſs, and not as *Gronovius* does, to diſpute about a figurative Expreſſion very common both in Antient and Modern Authors, as well as in common Diſcourſe. Properly ſpeaking, one cannot ſay that the Law is either above the Legiſlator who made it, or even thoſe to whom it is preſcrib'd; with leſs reaſon than that the Law it ſelf impoſes on them any Obligation. The Obligation proceeds from the Authority of a Superior; and every Superior is a Perſon, and not a Thing. If we are bound to obey the Laws as Law, it is not directly becauſe it ſeems to be or is even really juſt, or advantageous to the Publick (otherwiſe we might diſpenſe with obſerving thoſe which only related to indifferent Things) but becauſe it is preſcribed by a Superior, who has a Right to demand our Obedience in every thing that is not contrary to the Laws of God or of Nature. Therefore when a free People eſtabliſh Laws of their own accord to govern themſelves by, every

engroſs it all for his own Poſſeſſion and Prerogative. *The Life of a Prince*, ſays *Pliny* [a], *is a perpetual Cenſorſhip; by this we are turn'd and directed in all our Proceedings; and to ſecure our Obedience, we have ever more need of his Pattern, than of his Preſcriptions. For Fear is a moſt unfaithful Guide to Virtue. Men are much better influenced into Goodneſs by the Power of Examples which at firſt ſight, diſcover this Advantage in themſelves, above all other Methods of Inſtruction, that they ſhew the Poſſibility of obtaining what they adviſe us to purſue.* There is a Remark, not unworthy the Majeſty of Kings, which *Athenæus* [b] hath made from the Reports of more antient Hiſtories, that of the two great Monarchs in *India* and in *Perſia*; the former was abſolutely forbid to exceed the moderate Bounds of Drinking; and the latter allow'd his Liberty in this Reſpect, but one Day in a Year, at a ſolemn Sacrifice and Feſtival. *Claudian's* Admonition to the young Emperor was wiſe and proper;

In commune jubes ſi quid, cenſeſque tenendum,
Primus juſſa ſubi: tunc obſervantior æqui
Fit Populus, nec ferre negat, cùm viderit ipſum
Authorem parere ſibi: componitur orbis
Regis ad exemplum; nec ſic inflectere ſenſus
Humanos edicta valent, ut vita regentis [c].

Would you your publick Laws ſhould ſacred ſtand?
Lead firſt the way, and act what you command.
The Crowd grow mild and tractable to ſee
The Author govern'd by his own Decree.
The World turns round, as its great Maſter draws;
And Princes Lives bind ſtronger than their Laws [d]:

IV. For the better aſſerting and vindicating the juſt Pre-eminence of the ſupreme Power, eſpecially in monarchical Governments, it will be proper to take under our Cenſure that vulgar Diſtinction of Sovereignty into *real* and *perſonal*; which ſeems, in our Judgment, to be not only very abſurd, but of very pernicious Conſequence, if applied to this Senſe, that there ſhall be ſuppoſed at the ſame time, in the ſame Monarchy, a *real* and *perſonal Sovereignty*; the latter to be lodg'd in the King, the former in the People, as oppoſed to the King; and that in this, as in moſt other Caſes, the [e] *real* Authority and Right ſhall have the Aſcendant of the *perſonal*. Nothing can be more evident, than that ſuch a Notion contradicts it ſelf, turning every Kingdom into a Monſter with two Heads, and expoſing it to utter Convulſion and Ruine. The Neceſſity of this Diſtinction doth by no means appear from the Reaſon commonly alledg'd, that the King or the royal Family being extinct, the People ſo far return to their firſt Right and Freedom, as that they may at their Pleaſure either chooſe a new King, or ſet up another Form of Government. It may as well be affirm'd, that we ought to ſuppoſe a *real* Power in a Servant, contradiſtinct to the *perſonal* Power of his Maſter, meerly becauſe if the Maſter dies without Heirs, the Servant is at his own Diſpoſal. Nor can any better Argument be drawn from the Poſition of *Grotius* [f] and others, that there is a twofold Subject in which the ſupreme Power reſides, one *common*, the other *proper*; the former the whole State or Kingdom, the latter a ſingle Perſon, or a Council, whether conſiſting of many, or of few. For the Senſe of that Obſervation can be only this, if we ask in a general and confuſed manner, Where the ſupreme Power is lodged? The Anſwer will be, In the whole Commonwealth: But if we propoſe the ſame Queſtion diſtinctly, and enquire what *Perſon* bears the Sovereignty in the State? It will be anſwer'd, The King, or the Senate, or the People. But who will hence infer, two diſtinct ſovereign Powers, one *real* in the People, another *perſonal* in the Prince? This would be no leſs ridiculous, than to conceive two diſtinct *Sights* in a Man; one reſiding a *common Subject*, the Perſon; the other in a *proper Subject*, the Eye.

Member indeed promiſes to obſerve 'em as long as they are in being, becauſe with reſpect to him they are ſo many *Ordinances* of a Superior, or of the whole Body of the Community, to whoſe Will he has ſubmitted himſelf. But the whole People are not bound by any Compact, becauſe they cannot be ſuperior to themſelves. I own that if theſe Laws are conſiſtent with the Good of the Society, they ought not lightly to be aboliſh'd, as long as things remain in the ſame ſituation. But it is not becauſe they are Laws that have been impoſed and eſtabliſh'd as ſuperior to themſelves; 'tis only by virtue of the Law of Nature which the Creator and ſovereign Legiſlator impoſes one very particular Society, as well as on every individual Perſon, to take care of their own Preſervation. II. The Conſequence that *Gronovius* draws from the Obligations, into which we enter by Promiſes or Compacts, and by an Oath, is evidently falſe. When I make a Promiſe to any one, he whom I promiſe acquires from that Moment a Right with reſpect to me; and I am actually bound by my Word till I have accompliſh'd it, or he acquits me of it. But who does acquire, by the Laws that a People eſtabliſh to govern themſelves, a Right by virtue of which he can demand of them not to aboliſh 'em? The ſame is to be ſaid of an Oath: For, in every valid Oath the Divinity which we call to witneſs, acquires, if I may ſay ſo, a Right to demand the Performance of what we have ſworn; whether the Oath be reduced to a ſort of Vow, or whether 'tis only inſtead of an Acceſſory, as in the Engagements which we enter into with other People. See what I have ſaid in one of my new Notes, Book IV. Chap. II. Sect. 17. *Note* 2. III. The Laws properly ſpeaking can never be look'd upon as Conventions. See what our Author has ſaid Book I. Chap. VI. Sect. 2. IV. In ſhort, *Grotius*, as well as our Author, is here only ſpeaking of the Civil Laws *purely poſitive*, and not of the *Laws of Nature*: For with reſpect to the laſt, nothing is more true than what *Pliny* the Younger ſays, *Non eſt princeps ſuper Leges, ſed Leges ſuper Principem*, Panegyr. *Trajan* Cap. LXV. Num. 1.

[a] *In Panegyr. c.* 45. *n.* 6.

[b] *L.* 10, *ex Oteſ.*

[c] *De* IV. *Conſul.* Honorii, v. 296, *&c.*

[d] Liv. *l.* 26. *c.* 36. *Would You lay an Injunction on an Inferior? The moſt likely means to engage his Obedience, will be to apply Your ſelf, and thoſe about You, to the ſame Practice.* Plin. *l.* IV. *Epiſt.* 22. towards the End. *As in a Body, ſo in a Government, the moſt dangerous Diſeaſe is that which flows from the Head. Vide* Juſtin. *l.* III. *c.* 2. *n.* 8. The Old *Perſian* Proverbs to this purpoſe carry much good Senſe in a very odd Dreſs: *If a King pluck but an Apple in a Subject's Garden, his Servants will root up the Tree. If a King allows his Soldiers the ſtealing of half a Dozen Eggs; their next Exploit will be to victual the Camp with Hens.* Roſar. Perſic. *c.* 1.

[e] Thoſe are call'd Rights *purely Perſonal*, which are only lodg'd in the Perſon who is inveſted with 'em; and thoſe *Real Rights*, which indeed ſuit with a certain Perſon (for that is common to all ſort of Rights) but which are alſo in ſome manner fix'd to a certain Thing, which they always follow, ſo that whoſoever acquires the Thing, has from that moment the Right, by that very Circumſtance, that he lawfully poſſeſſes it. See *Grotius*, Lib. I. Cap. I. Sect. 4.

[f] *L.* 1. c. 3. ſ. 7.

V. Many have taken the Liberty to aſſert, that the Power of the Prince neither can, nor ought to be ſuperior to that of all the People. *Ariſtotle* ſeems very much to countenance this Opinion, in the ſixteenth Chapter of his third Book of Politicks [1]. And in the fifteenth Chapter of the ſame Book, he diſcourſeth to this purpoſe [a], *A King ought indeed to be inveſted with Strength and Power; but in ſuch a Degree, as that he ſhall be greater indeed than ſingle Perſons: And than many in Conjunction; yet ſtill inferior to the whole Body of the People.* *Grotius* [a] hath undertaken the Controverſy with theſe Men; and the firſt Argument he urgeth againſt them is, that as each particular Man may give up himſelf in perſonal Servitude to another; ſo a whole People or Nation may transfer on a ſingle Governour all their Right and Power over themſelves, without Limitation or Reſtriction [2]. Tho' indeed, in other reſpects, it ſeems by no means fair to compare the Condition of Subjects, under an *abſolute* Monarch, with that of Slaves. For as *Claudian* [c] well obſerves.

Fallitur egregio quiſquis ſub Principe credit
Servitium: Nunquam libertas gratior extat,
Quam ſub Rege pio.——————

They groſly err, that think a ſlaviſh Chain
Binds 'em beneath a virtuous Monarch's Reign.
When Juſtice, Piety, and Goodneſs ſway
The regal Power, 'tis *Freedom* to *obey* [d].

Grotius proceeds to reckon up ſeveral Cauſes and Occaſions which may induce a People to renounce all their Right in this manner, and yield it up into the Hands of an abſolute Lord. Many of theſe we find put together by *Tully* [e]: *Men*, ſays he, *ſubject themſelves to the Power and Command of another, for ſeveral Reaſons. They are led by Kindneſs and good Will, by extraordinary Benefits, by ſuperior Worth and Excellency, by the Hopes of Advantage, and by the Fears of Compulſion; large Promiſes of Bounty and Favour; and laſtly, as we have ſeen it often happen in our Commonwealth, by downright Wages and Hire.* But thoſe Caſes which *Grotius* chooſeth to inſiſt upon are, if a People ſhould chance to lie under manifeſt Danger of Ruine from an Enemy, and have no other means of being deliver'd, than to put themſelves, without any reſerve, under the Command of their Protector [f]: Or, if being in Diſtreſs with violent Want, they cannot otherwiſe procure Suſtenance and Support [g]: If a Father of a Family, having large Territories, ſhould refuſe to admit any Perſon into his Lands, but upon Covenants of abſolute Subjection: Or if a Maſter, who poſſeſſeth a vaſt Number of Slaves, ſhould give them their Freedom on the ſame Condition. Beſides, it's poſſible, that ſuch a Form of Government may ſuit with the Genius of ſome particular People. Nor ought the Deſire of living under an abſolute Monarchy to be always judg'd a Token of a low and abject Spirit, tho' it hath uſually lain under this Cenſure in the Opinions of Perſons born in Democracies; who, on that Score, will never pardon the *Cappadocians* for refuſing Liberty, when offer'd them by their *Roman* Conquerours [h]. But on the contrary, to any People, amongſt whom there are a Number

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Mr. BARBEYRAC's *NOTES on* §. V.

[1] In the Beginning: Where he cites the Reaſons of thoſe who are of Opinion, that *Abſolute Monarchy* is contrary to Reaſon. For that Philoſopher calls *an Unlimited and Abſolute Monarchy*, a Government where the King manages as he thinks proper all the publick Affairs with the ſame Authority, as a Father commands in his Family, and a Commonwealth governs it ſelf. In the ſeventeenth Chapter *Ariſtotle* decides this Queſtion according to his Ideas; and ſays, that as the Temper and Genius of every People require one certain Form of Government more than another, if in a Nation proper for Monarchy, there be any Perſon or Family that ſurpaſſes all the reſt of the Subjects in Virtue, that then it is equally juſt and advantageous to the State, that that Perſon, or that Family, ſhould reign with an abſolute Power. Therefore that Philoſopher does not aſſert that no King can ever be above the People, tho' our Author ſeems here to charge him with it. The Qualifications that *Ariſtotle* requires in an *Abſolute Monarch* are very rare; and that gives room to Mr. *Sidney* in his Diſcourſe upon Government (Chap. III. Sect. XXIII.) to maintain, that that Philoſopher ſuppoſes a Man that is not to be found in the World, to inſinuate by that, that we ought not to truſt any one whatſoever with abſolute Power. But perhaps *Ariſtotle*, never conceiv'd any Idea of a perfect Virtue, and that only ſuppoſing Men to be as they generally are, he deſign'd only to exclude thoſe enormous Vices which denominate a Tyrant. Beſides, our Author here cites another Paſſage out of *Ariſtotle*, which does not at all relate to the Superiority of the People above the King, but only to the Strength and Power with which the King is inveſted to put his Laws in Execution, and to reſtrain his rebellious Subjects. *He ought, indeed to be greater than every Subject in particular, or than many in Conjunction, but ſtill inferior to the whole Body of the People*

[2] Ibid. ſ. 1. *Gronovius* here alſo finds fault with that great Man; but his Cenſure is no better grounded than that mention'd in our fourth Note, Sect. 3. He takes abundance of pains to prove that when a King degenerates into a Tyrant, and governs in a manner manifeſtly tending to the ruin of the State; or if he violates the fundamental Laws, to which he has ſworn to conform himſelf, the People may reſiſt him, and free themſelves from that unjuſt Subjection. But this is what *Grotius* himſelf owns in expreſs Terms, Cap. IV. Sect. 7. Num. 1, 2, 3. 4, 5. And Sect. 11, 13, 14. All that he pretends to eſtabliſh in the place here mention'd is, that the *Sovereignty does not belong to the People always, and without Exception, ſo that they may reſiſt and puniſh their Kings as often as they abuſe their Power.* So that *Gronovius* might have ſav'd himſelf the Trouble of refuting what his Author does not maintain.

[a] Towards the End.

[b] *Vid.* Exod. xxi. 6. Levitic. xxv. 39. *Add.* Selden. *De J. N. & G. ſec. Heb. l. 6. c. 7. V. L.* 40. *t.* 12. *l.* 37. *D.* De liberali cauſa, *& C. L.* 7. *t.* 16. *l.* 10. *D. d. t. l.* 7. *& l.* 33. *& D.* Quib. ad Libert. proclam. non licet. *L.* 40. *t.* 13. *l.* 4. *& L.* 28. *t.* 3. l. 6. *ſ.* 5. *D.* De injuſt. Teſtam. *&c. Novell. Leonis.* LIX. *Cæſar* reports of the antient *Gauls*, that amongſt them, moſt of the inferior Populacy, when oppreſs'd, either by Debts or Taxes, or the Injuries of too powerful Neighbours, fix'd themſelves as Vaſſals, on ſome of the Nobility, who enjoy'd all thoſe Rights over them, which Maſters ordinarily bear over their Slaves. *De B. G* l. VI. c. 13. n. 2.

[c] *De laudibus Stilicon. L.* 3. *v.* 113, *&c.*

[d] There is an excellent Saying to the ſame purpoſe in *Philoſtrat.* De Vit. *Apollon.* l. 5. c. 12. p. 245. *B.* Ed. *Morel.* *As ſome one Man in a Commonwealth, highly ſurpaſſing others in Wiſdom and Virtue, ſeems by his good Management to turn the Popular Government into the Command of a ſingle Perſon; ſo a ſingle Perſon reigning Sovereign in a State, if he direct all his Counſels to the Publick Good, ſeems to expreſs, in his Authority, the Freedom of a Popular Government.* *Add.* Hobbes *De Cive, c.* 10. *ſ.* 8.

[e] Offic. II. c. 6.

[f] *Vide* Liv. *l.* 7. *c.* 31.

[g] *Vide* Geneſ. xlvii. 19.

[h] *Vide* Strabo, *l.* 12. *p.* 273. *&.* Juſtin. *l.* 38. *c.* 2. 'Tis a Saying of *Euripides*, in (*Helen.* v. 283) and 'tis no more than what was the current Notion of the *Grecians*;

Τὰ Βαρβάρων δοῦλα πάντα πλὴν ἑνός.

In Barbarous Kingdoms all are Slaves but One.

of proud, inſolent, aſpiring Men, impatient of Equality, a popular Liberty muſt be the moſt pernicious thing in the World; and yet the ſame Men very contentedly ſubmit to a monarchical Government. For they had rather ſerve One, and lord it over all others in the State, than live on the common Level; and, as *Auſonius* ſays [a], *For the Sake of commanding, they are willing to obey.* The Eaſtern Nations have been of old, and are ſtill ſo accuſtom'd to Monarchy, that we are told the *Chineſe* could not form any Notion of the *States* of *Holland*, having heard of no Government, but that by Kings [b]. And a *Venetian* Traveller [c] reports, that the King of *Pegu*, when he was inform'd, that the ſovereign Power at *Venice* was lodg'd in the *Senate*, burſt out into a Fit of Laughter, taking it for a meer Jeſt in Politicks. On the other ſide ſuch Men are fit only to live in a popular State, as have moderate Spirits and eaſy Paſſions, and know how to reſt ſatisfied with the ſame humble Condition as their Neighbours. Laſtly, it often falls out, that free States are by inteſtine Diviſions brought into ſuch Circumſtances, as that they cannot be ſafe otherwiſe than under the abſolute Command of a ſingle Perſon; and, as *Lucan* obſerves,

Cum Domino Pax iſta venit [d].———

They gain a *Maſter* when they gain a *Peace*.

VI. It may, perhaps, ſeem more to the purpoſe, to examine the Reaſons of thoſe Men, who are ſo fond of exalting, above Kings, that *real Sovereignty* of the People, [e] which they have fram'd in their own Fancy. They tell us, then, that all Kings are conſtituted by the People, and that 'tis natural the Parties, who confer the Dignity, ſhould be ſuperior to the Parties who receive it. Now, as to this Point it muſt be obſerv'd, that altho', in the conſtituting of all Kings, the People interpoſe their Conſent, yet there is a great Difference in the manner how ſuch Conſent is obtain'd and applied. Some Nations take a King upon their own free and voluntary Motion: Others under the Diſtreſs of War, or ſome other great Neceſſity, receive the ſame kind of Government; which they would have been very far from deſiring, had they not been driven to it by theſe Misfortunes. It is agreeable to the common Uſage of Speech, to ſay, that thoſe Princes only are conſtituted by the People, whom the People appoint by their own free Act. On the other hand, thoſe who extort the Peoples Conſent by Arms, or the like means, are not ſaid to have been made by the People's Appointment, but to have ſubjected the People to their Command. But farther, then only the Parties who conſtitute another are properly ſuperior to him, when it is always in their Power to determine how long he ſhall poſſeſs the Dignity with which they have once inveſted him. Whereas, in many Caſes, it is at firſt a Matter of free Pleaſure and Choice to appoint the Perſon, and yet the Appointment, being once made, becomes neceſſary and irreverſible. Others anſwer the ſame Argument with this Diſtinction; a Man may conſtitute another, either over a third Perſon, or over himſelf. In the former Caſe, the conſtituting Party is ſuperior to him whom he thus conſtitutes. For 'tis ſuppoſed before-hand, that the third Man, both was, and ſtill is, under the Power of him, who thus ſets a new Ruler over him. Whence it follows, that this new Ruler muſt depend on the Will and Pleaſure of the old. For ſince *no one can ſerve two Maſters*, unleſs in Subordination; I cannot appoint another Lord over my proper Subject, without making him accountable to my ſelf: And conſequently, he is no more than a ſubordinate Governour. Thus a free State, when it gives a General the full Command of its Soldiers, was and ſtill is ſuperior to him and them. But he, who conſtitutes another with Authority over himſelf, can no more be ſuppoſed to continue ſuperior to him, than he can, at the ſame time, and in reſpect of the ſame Perſon, command and obey.

But 'tis farther urged on the other ſide [f], that ſince all Government is inſtituted for the ſake of thoſe who obey, not of thoſe who rule; or, ſince the King is made for the People, not the People for the King; on that ſcore, the People muſt be ſuperior to the Prince: In as much as that, for which another thing is ordain'd, ſeems more noble and excellent, than what is thus framed on its account. Here the Aſſertion, if held in general, is falſe; for all Government or Command is not inſtituted for the ſake of thoſe who obey; as is clear in the Authority of Maſters over their Servants: Altho' the Maſter cannot indeed well enjoy the Fruits of his Sovereignty, unleſs he take ſome Care of thoſe, who are thus placed in Subjection under him. Beſides, the Queſtion is not, whether the Perſon of the Prince be of more value than the whole People; as it is in caſe either he or they were neceſſarily to periſh: But, whether, ſince civil Government is ſet up for the Benefit of the Community, the means of procuring this End ſhould be determin'd by the Judgment of thoſe, who have ſubmitted their Wills to the Will of the Prince, or by him, to whoſe Prudence and Conſcience the Adminiſtration of Affairs hath been given in Charge.

Some, becauſe we read of the Peoples being puniſh'd for their Princes Sins, thence infer, [g] that the People had a Power to reſtrain them from ſinning, which cannot be ſuppoſed, without a right ſuperior to the regal Authority [h]. For I am not chargeable with the Guilt of another Man's Action [i], when I contributed nothing to it. But 'tis impoſſible to conceive how the People can partake in the Sin of their Prince, at which they are heartily diſpleas'd, unleſs by neglecting to uſe ſome proper Method of Correction. In anſwer to what is thus urged, we take it for a certain Truth, that the Sins of the Princes do not directly, and on their own account, derive any Guilt on the Subject, unleſs the Subjects themſelves have contributed ſome poſitive Aſſiſtance to them [a]. But they cannot contract a Guilt from the Omiſſion of any Reſtraint or Puniſhment [b]; becauſe being inferior to the Prince, they had neither Power nor Obligation to apply ſuch means of reclaiming him. For as our Ability, ſo our Duty of hindring another Man's Sins, ariſeth from our Power over him, or from ſuch an Authority, as implies our Right of directing and controlling his Proceedings. Therefore, what the Prince acts, before he receives that Dignity, certainly cannot affect the reſt of the People; ſince *Equals* have no Command one over the other. No more can the Subjects be charged with what he commits after his acceſſion to the Crown: Since 'tis ridiculous to ſay, that thoſe who, during his private Station, had no Command over him to reſtrain him from offending, whilſt he was in all Points their Equal, ſhould then at laſt obtain ſuch a Command, when they gave up themſelves to his Direction and Sway. Nor doth that Act or Covenant, by which Subjects inveſt a Prince with *abſolute* Power, by any means make them partakers of his Sins. For by ſuch a Covenant the People do not indulge an Impunity to the King, but only leave him in Poſſeſſion of that which he before enjoy'd by virtue of his natural Liberty: Since he could not exerciſe the ſupreme Authority, were he not exempt from human Puniſhment [b].

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[a] ——— *Et dominari Ut poſſint, ſervire volunt*,——Idyll. 15. v, 37, 38.

[b] Neuhof. *in Legat.*

[c] Caſpar Balbi, *in Itinerar.*

[d] *Lib.* 1. Pharſal. *v.* 670.

[e] Our Author hints at, eſpecially, the famous Book, intitul'd, *Vindiciæ contra Tyrannos.* See Queſtion III. of that Book, p. 67, *&c.* Ed. *Francof.*

[f] V. *Grot.* L. 1. c. 3. ſ. 8 n. 13.

[g] *V.* Grot. *ubi ſupra*, ſ. 14.

[h] See the *Vindiciæ contra Tyrannos Junii Bruti*, p. 29, *&c.*

[i] *V.* Grot. *ubi ſupra*, ſ. 16.

What ſome urge, that, as he who hath given himſelf up for a Slave, ſtill keeps a Right of recovering himſelf from that State; ſo a People, who have ſubmitted to the Yoak of Monarchy, retain an equal Right of reaſſuming their Freedom: This no Man in his Wits will allow for Truth, unleſs it be added, as a neceſſary Condition, that ſuch a return to Liberty be made with the Conſent of the Maſter, or the Prince, by their voluntary receding from that juſt Right and Authority, which they had before obtain'd over the Servant, or over the Subject [c]. Beſides, 'tis a groundleſs Aſſertion, to ſay, that a People, to whoſe Temper and Diſpoſition an abſolute Monarchy was once agreeable, when they have, in Courſe of Time, worn off their ſervile Genius, may re-eſtabliſh themſelves in a free Commonwealth. For if ſuch a Caſe ſhould happen, it will be incumbent on the Prince, ſo far as Prudence permits, to humour this Change of Inclination in the Subject, by ſoftening the Rigour, and varying the Meaſures of his Reign. No leſs ridiculous is it to infer, that becauſe a Maſter or Proprietor, who abuſeth his own Poſſeſſions, may be puniſh'd, or deprived of his Goods, therefore a Prince too, who makes ill uſe of his Power, may be corrected and reduced to Reaſon. For that which makes ſuch a Proceeding lawful in the former Caſe, is the Prince's ſuperior Right over the Goods of the Subjects, which 'tis the Intereſt of the whole Community to preſerve from being thrown away to no purpoſe. But who will pretend, that the People have a kind of Prerogative, or a more eminent Right over the Rights of their King; or, that they are Maſters to their own Maſter?

As for the Sayings of ſome Princes, produced in favour of the oppoſite Opinion, it cannot be denied, but that many ſuch fine Speeches have been uſed out of a principle of Oſtentation. But they will all fall under this general Anſwer, that a Prince ought indeed to direct every thing to the Good and Safety of his People: But the People are not thereupon inveſted with a Power of puniſhing him, as often as they ſhall judge that he applies wrong Means towards the obtaining of that End. Alike ſenſleſs and trifling it is to argue, that, in as much as the People have not a Right of deſtroying themſelves, or of practiſing any grievous Cruelty on their own Body, therefore they can transfer no ſuch Right on the King. For who ever maintain'd, that Princes had a Right of deſtroying their People? We ſhall hereafter make it appear, that abſolute Government is by no means ſo formidable a thing, as theſe Men are willing to fanſy: And how far a People may proceed, in caſe the Prince manifeſtly ſeeks their Ruin, will be likewiſe conſider'd in its proper place [d]. When we are told of the antient *Conſuls*, and other Magiſtrates, ſaid to be placed over the People, and yet frequently reform'd by the Peoples Cenſure and Puniſhment; theſe Allegations are vain and idle, the Inſtances not coming up to the Queſtion [1].

Laſtly, as to what is objected from Scripture Hiſtory, that the *Jews* threw off the Yoak of the *ſtrange Nations*, when they ſeem'd to have been ſufficiently chaſtiſed for their Rebellion againſt GOD; we thus reply, that either they ſtill continued in a ſtate of War with thoſe Nations, never engaging their Faith, or ſubmitting as true Subjects; and ſo they had a Right of treating their Oppreſſors as Enemies: Or elſe, they acted in theſe extraordinary proceedings by expreſs Command from Heaven; which if it ſeem to intrench on the common Meaſures of *Right*, is no Precedent for the Imitation of others [e].

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[a] Euripid. *Suppl. v.* 879, 880.

——— The State which ſuffers in its Fame
For a bad Prince, it ſelf is innocent.

[b] The Argument urged from 2 *Sam.* xxiv. is ſufficiently anſwer'd by *Grotius*, in the place above quoted. See a remarkable Paſſage in *Martinius*'s Hiſtory of *China* (*l.* 3. *c.* 1.) applicable to the ſame Chapter, v. 17.

[c] *Vid.* Xenophon Cyrop. *l.* 3. *princip.* [d] Chap. 8. [e] *Add.* Sanderſon *De Obligat. Conſcient. Prælect.* IX. §. 16, &c. & *Prælect.* X. §. 13, 16, 22, 23.

Mr. BARBEYRAC's *NOTE* on §. VI.

[1] For thoſe Conſuls and Magiſtrates were not Sovereigns, but the meer Miniſters of the People.

VII. To proceed, nothing is more apparent, than that in ſome States the ruling Power (eſpecially, if monarchical) is free in its Proceedings; in others, it is reſtrain'd to a particular manner of acting: Which Difference gave Occaſion to the Diſtinction of Sovereignty into *abſolute* and *limited.* And here we think our ſelves obliged, in the firſt place, to explain, with what Accuracy we can, the proper Signification of this Term *abſolute*; which bears a hateful Sound in the Ears of Perſons born under free Governments. Indeed the Word, if falſly applied and underſtood, may encourage ill Princes to grieve and oppreſs the State, and to commit the worſt of Diſorders. Eſpecially, ſince there will be ſeldom wanting a Tribe of Flatterers to ſecond the Motion, and under this fair Pretence to feed and inflame the Ambition, and other Vices of their Maſter. '*You are abſolute*, will they ſay, 'therefore your Pleaſure is your Law: Therefore waſte your Subjects and your Neighbours 'with unneceſſary Wars, to procure your ſelf 'the Name of a great Commander: Therefore, 'take the Liberty of treating with Inſolence and 'Abuſe, whomſoever you think fit: Therefore, 'drain your People with Rapines and Exactions, 'to ſupply your Luxury, or your Pride. A high Strain of this paraſitical Rhetorick was that which *Anaxarchus* uſed to *Alexander*, when under Diſcontent for his Murther of *Clytus*; he told him, 'That Juſtice was therefore feign'd by the 'Poets to ſit on the ſame Throne as the Gods, 'or to ſtand behind *Jupiter*'s Chair, that Men 'might apprehend and acknowledge whatever a 'King acts to be good and right [a].

Nay, there are Authors, who upon profeſs'd Principles maintain the abſolute Right of Kings, by ſuch Arguments and Reaſons, as if they meaſured it only by a general Impunity, and a Licence to oppreſs and ſpoil the People. The true State of the Point then is this: As we cannot conceive, in ſingle Perſons, a higher and more abſolute Liberty, than that they ſhall determine and diſpoſe of their Goods and Actions, not by the Will of another, but by their own Judgment and Pleaſure, yet ſtill with a full Obedience to the Law of Nature; and as this Liberty naturally belongs to all Perſons, who are not ſubject to the Command of others: So, where many Men cleave together in an eſtabliſh'd *State*, there too, as in a *common ſubject*, muſt neceſſarily reſide the ſame Liberty, or the Power of chooſing, by their own Judgment, all Means and Methods tending to the Preſervation of the whole Society. And this Liberty is attended with an *abſolute Command*, or a Right of preſcribing thoſe Means to the particular Members, and of compelling them to a due Obedience and Conformity. Therefore in every *State*, properly ſo call'd, there muſt always be ſuch an *abſolute Authority*, at leaſt in *Habit* and *Power*, if not always in *Exerciſe* and *Act*. For 'tis a Contradiction to ſay, that ſuch a Community is obnoxious or ſubject to none, but purely free and independent, and yet that it hath not a Right of adminiſtring its proper Affairs by its own Inclination and Judgment. And that this *abſolute* Sovereignty implies nothing that can be term'd unjuſt or intolerable, we may eaſily apprehend from the End of civil Eſtabliſhments and Communities. For theſe publick Bodies were never inſtituted with a Deſign, that Men ſhould throw off the Reſtraints and Commands of Nature, and run into all the Extravagancies of evil Luſts; but that, by the united Strength of a Multitude, a better Proviſion might be made for the Intereſt and Security of each Member; and conſequently, that we might be put into an eaſier and ſafer Courſe of obſerving the Edicts of natural Law.

VIII. But when we conſider the ſupreme Power, as it inheres in one Man, or in a Council, whether of all, or of a few, as in its proper and peculiar *Subject*; it is not every where thus free and abſolute, but in ſome places we find it under the Reſtraint of certain Rules and Laws. Indeed, as for Democracies, the Diſtinction between *abſolute* and *limited* Sovereignty is not in them ſo eaſily diſcoverable. For although, in every ſuch free State, there muſt be ſome ſettled Rules, founded either upon Cuſtom, or upon written Law, determining at what Time, and by what Perſons, the People ſhall be call'd together, publick Affairs propoſed, and the Reſolutions executed (for we can form no Notion of a civil Community without theſe conſtant Methods of proceeding) yet ſince the Council, in which the Sovereignty reſides, conſiſts of all the People, and conſequently every Man is there who *obtains any Right* by ſuch Rules or Orders; therefore nothing hinders, but that the People thus aſſembled may, at any time, alter or repeal them [b]. *Anacharſis* in *Plutarch* [c] laugh'd at *Solon* for hoping that he ſhould be able to curb the Injuſtice, and the other Vices of his Countrymen, *by written Ordinances, things of no more Strength than Cobwebs*: *Solon* wiſely anſwered, that Men commonly ſtand to Bargains and Agreements, when it is the Intereſt of neither Party to break them: And that he would ſo frame and temper his Preſcriptions, as to make it evident to all Perſons in the State, that it would be much more for their Benefit and Advantage to obey the Laws, than to tranſgreſs them. But the Event of Things confirm'd the Judgment of *Anacharſis* rather than the Hopes of *Solon.* The moſt likely Means that can be thought of, for the enſuring and perpetuating theſe Decrees, is for the People to bind themſelves by a ſolemn Act of Religion, that they will ever obſerve them: As was practiſed in *Rome*, with regard to the Law prohibiting regal Government. Yet whether ſuch an Oath is any longer obligatory, when none of the Perſons ſurvive who firſt engaged in it, hath been the Subject of a former Enquiry [a]. *Cæſar* found an eaſy piece of Sophiſtry to elude ſuch a publick Conſtitution. The *Roman* People had laid-up a certain Sum in the Treaſury, with a ſolemn Execration of any one that ſhould dare to touch it, unleſs in caſe of an Invaſion from the *Gauls*: *Cæſar* laid Hands on the Money, and ſolv'd all Scruples with this *Bravado*, that by ſubduing the *Gallick* Nation, he had at once freed the Commonwealth from their Oath, and from their Enemy [b]. *Herodotus* [c] informs us, that the *Athenian* Lawgiver but now mention'd made his People ſwear, that they would not reverſe one of his Ordinances within the Space of Ten Years. Others have endeavoured to preſerve ſuch publick Rules, by decreeing a Penalty againſt any Perſon, who ſhould *move* to have them repeal'd; tho' the Penalty, in this Caſe, may as well be abrogated as the Law. Thus the *Thaſians* made it Death for any Man to propoſe a League with the *Athenians* [d]. And the *Athenians* themſelves denounced a Fine againſt him who ſhould prefer a Bill for the Recovery of the Iſland *Salamis* [e]. *Charondas* decreed amongſt the *Thurians*, that whoever attempted to correct or alter the ſettled Laws, ſhould come into the publick Aſſembly with a Halter about his Neck [f]. In the ſame manner *Xenophon* [g] reports, that by an Order of War in *Cyrus's* Expedition, it was declared capital for any Perſon to ſpeak of dividing the Army.

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[a] Plutarch. *ad Princip. Indoct.* p. 780. And ſo in *Sophocles*, *Antigon.* p. 234. Ed. *H. Steph.*

Kings have large Privileges; and, in chief,
The Power to act or ſpeak whate'er they pleaſe.

[b] Add *Mauroceni* Hiſt. *Venet.* l. 13. p. 517, *&c.*

[c] In *Solon*, p. 81. A. B.

But in Ariſtocracies and Monarchies, where the Perſons governing are different from thoſe who are governed, and conſequently where the latter may obtain a Right by the Pacts and Promiſes of the former, the Diſtinction between abſolute and limited Sovereignty is clearly diſcernible. He then, under ſuch States or Kingdoms, is properly *abſolute*, who exerciſeth the publick Adminiſtration by his Judgment, not according to any ſettled Rules or perpetual Decrees, but as the various Conditions of Affairs ſeem to require: Or, in ſhort, who procures the Safety of the Commonwealth by ſuch means as his own Prudence ſuggeſts, in every Exigency of Things and Times. And in this Senſe the Term *abſolute* is ſo far from implying any thing that looks odious and tyrannical, that it lays on Princes a Neceſſity of applying a ſtricter Care and Caution, than thoſe who proceed in all Buſineſs by conſtant Forms; if they would fully ſatisfy their Conſcience and their Duty. *Dio* the Orator [h] ſpeaks admirably to this purpoſe: *A good Prince*, ſays he, *covets nothing, becauſe he thinks himſelf to poſſeſs all things: He abſtains from Pleaſures, becauſe he knows they are all within his reach, if he ſhould be inclined to make uſe of 'em: He is juſter than all others, becauſe he knows himſelf to be the Fountain of Juſtice to the whole State: he takes a Delight in Buſineſs and Labour, becauſe he engageth in it by his own free Motion: and he loves the Laws, becauſe he doth not fear them. And in this way of arguing he proceeds truly and rationally. For who hath need of greater Prudence, than one who is to ſteer and direct ſuch important Affairs? Who of a ſtricter and more accurate Juſtice, than one who is above the Laws? Who of a more tender Modeſty, than one who hath a Licence to do all things? And who of a more reſolute Courage, than one, who is by his Office the common Guardian and Protector?*

IX. But ſince, in conſulting the publick Safety, the Judgment of a ſingle Perſon may eaſily be deceiv'd; and ſince all Men are not arrived at ſuch a Strength of Soul, as to be able to rule their Paſſions under ſo vaſt and ſo tempting a Liberty [1]; many Nations have thought it the more ſecure and prudent Courſe, not to put ſo unbounded a Power entirely into the Hands of one Man, who can neither be infallible in his Underſtanding, nor inflexible in his Will; but rather to preſcribe to him a certain Method of governing: It having been firſt diſcover'd, that theſe fixt Rules and Forms of publick Buſineſs, are agreeable to the Genius of the People, and the Conſtitution of the State. Nor is this Limitation of Power an Injury to thoſe Princes, who owe their Crown to the free Gift of the People. For if they thought it hard to receive an Authority, which they could not exerciſe at their own Pleaſure, they were at Liberty to have refuſed it. But when they have once accepted of the Sovereignty under theſe Conditions, the ſolemn Oath by which they engage to obſerve the Conditions, utterly forbids them to uſe any Means, whether of ſecret Contrivance, or of open Violence, in order to ſubvert the Laws of the Kingdom, and render themſelves abſolute. Becauſe, as *Pliny* [a] obſerves, *No one ought more religiouſly to obſerve his Oath, than he who hath the greateſt Intereſt in not being forſworn* [1].

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[a] B. 4. c. 2. ſ. 17.
[b] Appian. Alexand. *de Bell. Civ.* l. 2.
[c] *Clio.*
[d] Polyæn. *Strateg.* l. 2. c. 33.
[e] *Plutarch. Solon.* p. 82. B.
[f] *Diodor. Sic.* l. 12. c. 17.
[g] Περὶ ἀναβάσ. l. 6.
[h] *Orat.* 63. *de Regno. & Tyranno*, p. 588. *A. B.* Ed. *Morell.*

Mr. BARBEYRAC'S *NOTE on* §. IX.

[1] This is what *M. Antoninus* acknowledges in *Herodian*, B. 1. c. 8. *Ed.* Oxon. Χαλεπὸν δὲ μετρῆσαί τι, ϗ ὅρον ἐπιθεῖναι ἐπιθυμίαις, ὑπηρετούσης ἐξουσίας. This is a Quotation of the Author's. *Plato* ſaid long before that time, that tho' a Prince ſhould be perfectly inſtructed in the Maxims of true Politicks, yet if he were to be accountable to none, he will not be able during the whole Courſe of his Life, to have only in view the publick Good and to prefer it always to his own private Advantage: The Propenſity of human Nature, which inclines to ſeek Pleaſure, and raſhly to avoid Pain, will conſtantly put him upon trampling under foot the Laws and Intereſt of the State, to ſatisfy his immoderate Deſires, and to bring at laſt, by that means, both upon himſelf and the Publick an infinite number of Evils. Ἐὰν ἄρα ϗ τὸ γνῶναι τὶς ὅτι ταῦτα οὕτω πέφυκε, &c. *de Legibus*, Lib. IX. p. 875. *B. C. Edit. Serran.* As for the reſt, I refer the Reader to Mr. *Sidney's* Diſcourſe *upon Government*, Chap. II. Sect. XXX. where that ſkilful Politician ſhews for ſeveral Reaſons, and by a great number of Inſtances, how very difficult it is for a Monarchical Government to be regulated as it ought to be, when it is not limited by ſome Laws; and I ſhall content my ſelf with only relating the following Words taken from another place of the ſame Author. ‘If the *Rulers* of Nations be *reſtrain'd*, not only the People are by that means ſecur'd from the Miſchiefs of their Vices and Follies, but they themſelves are preſerv'd from the greateſt Temptations to Ill, and the terrible Effects of the Vengeance that frequently enſues upon it. *An unlimited* Prince might juſtly be compar'd to a weak Ship, expos'd to a violent Storm, with a vaſt Sail, and no Rudder. We have an eminent Example of this in the Book of *Eſther*. A wicked Villain having fill'd the Ears of a fooliſh King, with falſe Stories of the *Jews*, he iſſues out a Proclamation for their utter Extirpation; and not long after being inform'd of the Truth, he gave them leave by another Proclamation to kill whom they pleas'd, which they executed upon ſeventy thouſand Men. The Books of *Ezra*, *Nehemiah*, and *Daniel*, manifeſtly diſcover the like Fluctuation in all the Counſels of *Nabuchodonozor*, *Cyrus*, *Darius*, and *Artaxerxes*.—If a frantick Fit come into the Head of a drunken Whore, *Perſepolis* muſt be burnt, and the Hand of *Alexander* is ready to execute her Will. If a dancing Wench pleaſe *Herod*, the moſt venerable of all human Heads muſt be offer'd in a Diſh for a Sacrifice to the Rage of her impure Mother. The nature of Men is ſo frail, that whereſoever the *Word* of a ſingle Perſon has had the force of *a Law*, the innumerable Extravagancies and Miſchiefs it has produc'd have been ſo notorious, that all Nations, who are not ſtupid, ſlaviſh, and brutiſh, have always abominated it, and made it their principal Care to find out Remedies againſt it, by ſo deciding and balancing the Powers of their Government, that *one* or a *few* might not be able to oppreſs and deſtroy thoſe they ought to preſerve and protect. This has always been as grateful to the beſt and wiſeſt of Princes, as neceſſary to the weakeſt and worſt. (Chap. III. Sect. XLIII.)——*Moſes* was a Man of as great Parts as any in the World, and yet could not bear the weight of Government *alone*, and therefore GOD choſe out ſeveral Perſons to eaſe him of it.——Power, as *Theopompus* King of the *Lacedemonians* ſays very well, was ſecureſt when 'twas leſs courted and leſs hated. Book II. likewiſe Mr. *Titius* Obſ. in *Pufen.* DCI.

'Tis a very poor Argument which ſome make uſe of, when they tell us, that ſince Princes are ordain'd by God, and ſince he hath commanded them fully to diſcharge their Duty, which cannot be done without the Exerciſe of the ſovereign Power; therefore we ought to ſuppoſe, that God, by the ſame Act, gives them ſuch a certain Meaſure of Authority; of which as they ought not to ſuffer themſelves to be in the leaſt abridg'd; ſo the People cannot, with any Juſtice, deſire to make an Encroachment upon it; nor, if they did, could they be able to blind the Prince, by a Contract ſo prejudicial to his Right, and to the Truſt which he receiv'd from God. At the ſame rate, they ſay, a Wiſe might engage her Husband, by Covenant, to wink at her ſtolen Amours: So as to anſwer the Poet's Character [2].

—— ——Doctus ſpectare lacunar,
Doctus & ad calicem vigilanti ſtertere naſo.

Who his taught Eyes up to the Ceiling throws,
And ſleeps all over but his wakeful Noſe.
Mr. *Dryden.*

Or the Bargain might be mutual;

Ut faceres tu quod velles; necnon ego poſſem
Indulgere mihi [3]:

The Parties ſhould be pleas'd on either ſide;
And both may for their private Needs provide.
Mr. *Dryden.*

But, as we have already evidenced [4] the Origin of Sovereignty to be from God, ſo we take it for a certain Truth, that it was left to the Pleaſure and Judgment of Men to chooſe what particular Form of Government they thought moſt convenient; except where civil Laws have been divinely inſtituted, by the extraordinary Interpoſition and Appointment of Heaven. 'Twas a wiſe Saying of *Melancthon* [b], *States and Kingdoms differ in their Frame, ſome admitting Liberty in one Degree, ſome in another. But God approves of all Forms of Government, which are agreeable to Nature, and to Reaſon.* None will pretend that when a free People are about to elect a King, one Candidate can plead the divine Deſignation more than another: Or that there is any peculiar Form of Words eſtabliſh'd by GOD himſelf, under which the Inveſtiture of Sovereignty muſt neceſſarily be made.

Nor will the famous Deſcription of a King by *Samuel* [c], do theſe Authors any Service, which they expound as a general Right belonging to every Monarch; whilſt others will have it to be a bare account of Matter of Fact, what ſome Kings *will* do, tho' none may juſtly do it. *Grotius* [d] takes the middle way between theſe contrary Interpretations, and tells us, that the Prophet's Words do neither expreſs a Matter of *Right*, nor yet a bare *Fact*, ſuppoſed to be wrong and injurious; but ſuch a Fact as carries in it the *Force* or *Conſequence* of a *Right*, tho' it hath not the *Foundation*; and this *Force* or *Conſequence* is, that it obligeth the Subject to Non-reſiſtance: In other words, that however the Prince may in Actions violate his Duty, yet the People have no more Licence to oppoſe his Proceedings, than if he did nothing but what was highly juſt and equal. And on this Account he obſerves it to be, that *Samuel* foretels the People, they ſhould *cry to GOD* under theſe Oppreſſions; intimating, that the Things were above human Relief or Remedy. In fine, he ſays, ſuch Acts as theſe in Kings may be term'd *right*, by the ſame way of Speech, as when the Civil Law [e] affirms the Prætor *jus reddere*, *to do Right*, even when his Sentence is unjuſt. But the true Import of that place of Scripture may perhaps better appear, if we take this plain and eaſy Method of explaining it. The *Jewiſh* Nation had hitherto liv'd under a Democracy, but ſuch a one as often bore the Semblance of that kind of Government on which *Ariſtotle* beſtows the Title of *Heroical*. Their *Judges*, rais'd up for the moſt part by divine Impulſe, either deliver'd them from their Oppreſſors by War, or adminiſter'd Juſtice in Peace: Yet, in ordinary Caſes, they had more *Authority* to *perſuade*, than *Power* to *command*: And no Taxes were allow'd them beyond the ſtanding Revenues to increaſe their Strength, or to adorn their Dignity [f]. At length the People, grown weary of this Conſtitution, deſir'd a King, after the manner of other Nations; that is, one who ſhould ſhine with external Pomp and Grandeur, and ſhould either keep a conſtant Body of regular Forces, or at leaſt ſhould train up the Subjects to Arms, that they might be ready to make Head againſt any ſudden Invaſion [g]. When Matters ſtood thus in the Peoples Opinion, *Samuel*, to put them upon a ſerious Deliberation, before the thing was paſt recovery, ſets out to them, in lively Colours, the Rights of ſuch a Sovereign, and the Inconveniences which would attend the Government. You would have a King, ſays he, who ſhould appear with State and Magnificence: why, to compaſs this End, he muſt be attended with a numerous Train of Guards [1]; therefore, *He will take your ſons and appoint them for himſelf, for his chariots, and to be his horſemen, and ſome ſhall run before his chariots.* You would have a King, who ſhould be furniſh'd with a ſtanding military Force: It will be neceſſary therefore for him, to *appoint captains over thouſands, and captains over fifties*, out of your Sons, who might otherwiſe have been imploy'd in the Improvement of your private Eſtates. Again, the Care of publick Affairs will not allow ſuch a King to undertake the Culture of his own Lands; therefore he will take your Sons *to ear his Ground, and to reap his Harveſts*; as likewiſe, *to make his inſtruments of war, and inſtruments of his chariots.* Beſides, ſince his Court will be large and full, and ſince it will be beneath the Dignity of his Wives, or Daughters to govern the Kitchen, and to provide Suſtenance for ſo vaſt a Houſhold; *he will take your daughters to be confectionaries, and to be cooks, and to be bakers.* He will have Occaſion for a Multitude of Officers, to inſpect and regulate the Affairs of War and Peace; and all theſe muſt have their fix'd Salaries to reward their Service; for which purpoſe, *he will take your fields and your vineyards, even the beſt of them, and give them to his Servants*: And for the ſame uſe he will require the *tenth* of your Cattle. And, after all, if need be, he will not ſtick *to take your ſervants, and your beaſts, and put them to his work.* In a word, if you reſolve to have a King, you muſt maintain him like a King, and ſettle a large Revenue for his ſupport; and ſhould you afterwards grow weary of the Burthen, you cannot lay him aſide at your pleaſure; your Election having given him ſuch a Right to the Crown, as may not be taken from him without his Conſent. It is plain then, on the whole, that this Paſſage in the Scripture-Hiſtory doth by no means patronize ill Princes, nor doth contain any certain Meaſure and Standard of regal Power, there preſcribed by God in the manner of a Law, ſo as to be incapable of receiving Addition or Diminution from any human Agreement; but that the Prophet barely enumerates the Burthen and Charges of a monarchical State, whether abſolute or limited. 'Tis certainly therefore left to the Judgment of a free People to determine, whether they ſhall confer the Sovereignty on a Prince in an abſolute manner, or whether they ſhall bind him to certain Conditions; provided theſe Conditions imply nothing, which is either impious towards GOD, or deſtructive of the proper End of Government. For although it be true, that Men firſt entred into regular Bodies and States, upon their own free Choice, yet in as much as they were always under the Command of the Law of Nature, they ought, on all accounts, to inſtitute ſuch Rules of Sovereignty and of civil Obedience, as ſhould be conformable to that Law, and to the juſt Deſign of political Societies.

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[a] *Paneg.* c. 65.

[b] *In Epitom. Moral. Philoſ.*

[c] 1 *Sam.* viii. 11, *&c.*

[d] L. 1. c. 4. ſ. 3.

[e] L. 1. t. 1. l. 11. D. *De Juſt. & Jure.* This is what *Pedo Albinovanus* calls, *Jus injuſtum*, Eleg. I. Verſ. 54. *Edit. Gorall.*

[f] Add. *Grot.* ad *Judic.*

[g] See 1 *Sam.* xiii. 2. xix. 48. 52.

Mr. BARBEYRAC'S *NOTES on* §. IX.

[1] See *Sidney* upon Government, C 3. S. 14.

[2] Juvenal. *Satyr.* 1. *v.* 56, 57.

[3] Juvenal. *Satyr.* 6. *v.* 281, 182.

[4] In the Third Chapter of this Book.

X. But that we may rightly apprehend what Promiſe or Engagement (for all have not the ſame Force) is required to the rendring a Monarchy *not abſolute* (and the ſame will hold of an Ariſtocracy) we muſt obſerve that a King, at his undertaking the chief Government, binds himſelf to the due Diſcharge of it, either by a general, or by a particular Promiſe, to which is uſually added the Confirmation of an Oath. A *general* Promiſe may be made either *tacitly*, or *expreſly*. A King, by the Act of accepting the Adminiſtration, is ſuppoſed *tacitly* to engage, that he will conſcientiouſly perform his Truſt; altho' no *expreſs* Promiſe be given [a]. But the moſt common way is to make this Promiſe in *expreſs* Words, with the addition of an Oath, and the Solemnity of certain Rights and Forms. And nothing is more frequent, than to have the Prince's Duty deſcribed in theſe ſet Speeches, by way of *Periphraſis*, or an Enumeration of its principal Parts: As ſuppoſe, that he will be diligent and watchful in promoting the publick Security, that he will potect the good, and puniſh the bad, that he will faithfully adminiſter Juſtice, will not oppreſs the Subject, and the like. Now Promiſes of this kind do not in the leaſt prejudice the [1] *Abſoluteneſs* of a Sovereignty. The King is indeed obliged by them to govern well; but they leave it to his Judgment and Pleaſure,

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Mr. BARBEYRAC's *NOTES* on §. IX, X.

[1] How ingenious ſoever our Author's Paraphraſe on this Place may be, it is highly probable that *Samuel* does not repreſent what Kings have a Right to do, but only to ſet before the *Jews* the Misfortunes that they would be expoſed to under a Royal State, to endeavour to put them out of Conceit with it. See Mr. *Sidney*'s *Diſcourſe upon Government*, Chap. 3. Sect. 3, 4, 5, 7. The Aſſertors of abſolute Power depend chiefly upon the firſt Words of *Samuel*'s Diſcourſe, which they thus tranſlate: *This will be the Right of the King*, &c. but the Word משפט in the original, *Miſchpath*, often ſignifies, as Mr. *Le Clerc* obſerves, the manner of acting, the common Method whether good or bad, juſt or unjuſt. 'Twill be ſufficient to give one ſingle Inſtance of it, taken from the ſame Book of *Samuel*: Now the Sons of *Eli* were Sons of *Belial, they knew not the Lord. And the Prieſts* (Miſchpath) *Cuſtom with the People was, that when any Man offered Sacrifice, the Prieſts Servant came while the Fleſh was in ſeething, with a Fleſh-Hook of three Teeth in his Hand: And he ſtruck it into the Pan, or Kettle, or Cauldron, or Pot; all that the Fleſh-hook brought up, the Prieſt took for himſelf*, 1 *Sam*. Chap. ii. 12, 13, 14. Now the Prieſts had no right to do that; for only the Breaſt and the right Shoulder of the Sacrifices here mention'd belong'd to them, *Lev*. vii. 30, &c. Mr. *Le Clerc* has likewiſe ſhewn by the Sequel of *Samuel*'s Diſcourſe, that the Interpretation which they put upon it, is entirely contrary to the Rules of Criticiſm, as well as to the Maxims of Reaſon.

[1] Thoſe Princes who have been the moſt jealous of their abſolute Authority, have ſometimes acknowledged that they could do nothing contrary to the Laws. There is a remarkable Inſtance of it, which Mr. *Sidney* has taken Care to relate; it is, that in the *Treatiſe of the Rights of the Queen of* France, printed in 1667. by the Command of *Lewis* xiv. to juſtify that Monarch's Pretenſions to part of the *Spaniſh Netherlands*; there are theſe very Words, *That Kings have that happy want of Power, that they can do nothing contrary to the Laws of their Country.*

[a] *Grotius* on 2 *Kings* xi. 17. *The People promis'd to take the King's Safety under their Care.* So ſays *Joſephus*; *For, that the King ſhould promiſe any thing to the People, was not the Cuſtom amongſt the* Jews: That is, by an expreſs Promiſe and ſuch as ſhould be made at the Coronation.

to chooſe and apply the Means in order to the obtaining this End. A *particular* Promiſe, which ſpecifies the manner and means of governing, may be divided according to its different Force and Effect. For ſometimes it only binds the Conſcience of the Prince; ſometimes it makes his due Performance the Condition of his Subjects Obedience. The former is done, when the Prince engageth, for Inſtance, that he will confine the Offices and Places of Truſt to Men of ſuch Rank, or of ſuch Qualifications; that he will inveſt no Perſon with Privileges and Immunities, burthenſome or prejudicial to others; that he will enact no new Laws, impoſe no new Taxes or Tributes, imploy no foreign Soldiers, and the like. But then we ſuppoſe the People to demand all this of the Prince, without conſtituting any certain *Council*, to which he ſhall be bound to apply himſelf, in caſe the Neceſſities of the Commonwealth require a Digreſſion from ſuch Promiſes and Engagements; which are always to be underſtood with this tacit Expreſſion, *unleſs the publick Safety* (the ſupreme Law) *command the contrary*. Such a *Council*, we mean, as might proceed, not precariouſly, but by its own proper Right, in determining theſe Affairs, and without the Conſent of which the Subjects ſhould not be obliged to obey the Prince's Orders, in Points of this nature. Now in ſuch a State as we have been here deſcribing, the Adminiſtration of the Government is bounded and confin'd by certain Laws; and the Prince, who ſhall act otherwiſe, except in Caſes of Neceſſity, hath no doubt violated his Word and Faith. And yet the Subjects are not impower'd to reject his Commands, or to reverſe his Proceeding upon this Pretence. For whilſt he declares, that the Safety of the People, or ſome extraordinary Benefit to the Publick, is the Cauſe and Motive of what he does, as indeed this Preſumption always attends the Acts of ſovereign Princes, the Subjects are cut off from all farther Anſwer or Plea: Inaſmuch as they have no Authority to take Cognizance of thoſe Matters, and to judge whether the Neceſſities of the Commonwealth require them, or not. Whence 'tis eaſy to draw this Obſervation, That a People do not ſufficiently guard and ſecure their Liberties, when they create a King only with a *limited* Sovereignty, and yet do not appoint a *Council*, without the Approbation of which thoſe Acts, excepted in the limited Grant, ſhall not be perform'd: Or unleſs they oblige the King to hold an Aſſembly, in which thoſe extraordinary Affairs may be debated. For this is a much better Expedient, than if the King ſhould be only bound in theſe Caſes, to follow the Opinion of a ſmaller Council: Since it might ſo happen, that the private Intereſt of thoſe few Members, who compoſed ſuch a Meeting, ſhould interfere with the publick Good; whence they might be prevail'd on by the Motive of particular Advantage, to with-hold their Conſent from the ſalutary Propoſals and Intentions of the Prince.

But Monarchy is brought into much narrower Bounds, and under much ſtricter Ties if at the firſt conferring of Sovereignty, it be expreſly covenanted between the People and the Prince, that the latter ſhall govern according to certain fundamental Laws, and in all ſuch Affairs, as are not left to his abſolute Diſpoſal, ſhall have recourſe to a Council of the Commons, or of the Nobles, and determine nothing without their Conſent: That in caſe he do otherwiſe, the Subjects ſhall not be obliged by any of thoſe illegal Commands. A People, who conſtitute a King over them in this manner, are ſuppoſed to have promiſed him Obedience, not abſolutely and in all Points, but ſo far as his Government is agreeable to the original Contract and the fundamental Laws: From which whatever Acts of his recede are thereby void, and loſe all Force of engaging the Subjects to a Compliance. Nor yet can it be truly ſaid, that theſe fundamental Laws render the ſupreme Power lame and imperfect. For all the Acts of Government may be exercis'd here, as well as in an abſolute Kingdom: Only, that whereas in the latter, the Prince proceeds by his own ſole Judgment, at leaſt as to the final Determination of things; in the former there is a Council eſtabliſh'd, which doth, as it were, bear him Company in the adjuſting of Affairs; and on the Authority of its Deciſions the Sovereignty depends; not as on the proper Source of Power, but as on a neceſſary Condition. Neither are there in ſuch a State two Governing *Wills*; ſince whatever the common Body acts by the *Will* of the Prince: The Limitation of the original Grant only producing this Effect, That, unleſs under ſuch a Condition, the Prince ſhall not incline his Will to ſome particular Deſigns, or that ſuch Acts of his Will ſhall have no Force or Virtue. No more can it be pretended, that the King in a Realm thus conſtituted, loſeth his ſovereign Power, or that the Council is ſuperior to him. For theſe are very faulty Conſequences, ‘The Prince cannot act in every thing according to his own Pleaſure; therefore he hath not the ſupreme Authority: I am not obliged to obey him in all things; therefore I am his ſuperior, or at leaſt his equal: I can't command a Subject in an arbitrary manner; and therefore he muſt have his Turn of peremptorily commanding me who am his Prince. There is a great deal of Difference [1] between theſe two Propoſitions, ‘I am bound to act with this Perſon's Approbation, becauſe I have engaged my ſelf to it by Covenant: And I am bound to follow this Perſon's Will and Pleaſure, becauſe, by virtue of his Sovereignty, he hath a Right of laying theſe Injunctions on me’. *Supreme* and *abſolute* are by no means one and the ſame Term. For the former only denies a ſuperior or

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Mr. BARBEYRAC'S *NOTES on* §. x.

[1] *Vide* Grot. *L.* 1. *c.* 3. *ſ.* 16. Numb. 1. where he explains this matter by the Example of a Father of a Family, who if he has promis'd his Family any thing even relating to its Management, he is indiſpenſibly obliged to keep his Word, without ceaſing, upon that account, to be leſs the *Head*, or *Sovereign* if I may ſay ſo, of that little Society. A Husband likewiſe does not loſe any thing of his Authority over his Wife, for having promis'd her ſomething, which he cannot lawfully diſpenſe with the performing of.

an equal in the ſame Order: The latter farther imports a Power of exerciſing any kind of Right, according to one's own Judgment and Inclination.

But what ſhall we ſay, if in the original Agreement it was expreſly [a] [1] made a Condition, that if the Prince acted otherwiſe, he ſhould forfeit his Sovereignty? We have many Inſtances of this Practice in Hiſtory. *Diodorus Siculus* [b] reports, that amongſt the *Sabæans*, the King, though in all other reſpects unaccountable, yet if he ſet a Foot beyond his own Palace, was to be ſtoned by the People. And this, he ſays, was ordain'd by the Advice of an antient Oracle. The People of *Arragon* heretofore, when the King had taken an Oath to preſerve their Privileges, engaged their Allegiance to him in this Form, *We who have as much Power as you, make you our ſovereign Lord, upon Condition you keep inviolably our Laws and Rights, and not otherwiſe* [c]. *Severus*, when he entred upon his Reign, not only ſwore that no Senator ſhould be ever put to Death by his Order; but likewiſe publiſh'd a Decree to this Effect, *That whatever Emperor ſhould take off one of the Senatorian Rank, he himſelf, his Children, and the Agents he made uſe of, with their Children, ſhould be declared Enemies of the Commonwealth* [d]. Though *Julius Solon*, who by the Emperor's Command wrote this Decree, in a little time after loſt his Life. To come then to a Reſolution of the Queſtion before us, 'tis plain that no *abſolute* Prince can receive his Authority under ſuch a Clauſe or Condition as we have now deſcrib'd. Yet nothing ſeems to hinder why a limited Government, and yet a true and proper Monarchy, may not be conferr'd on a Perſon under the Terms of Reſtraint. For though we ſhould allow, That a *temporary* Authority cannot rightly be term'd *ſupreme*, yet we muſt not call that Authority *temporary*, which depends on a Condition in the Power of the Prince to perform. Nor do we by this means ſubject the Prince to the Judgment of the People, as if they were in a ſolemn manner to determine whether he hath broken his Engagement, or not. For, beſides that the *Condition* we ſpeak of uſually conſiſts of ſuch Matters as are clear and obvious to Senſe, and therefore not eaſily liable to Doubt or Diſpute; ſuch an Act of the People, whereby they take Notice of the Prince's Miſcarriage and Forfeiture, doth not carry in it the Semblance of a judicial Proceeding, for the taking Cognizance of a Subject's Offence: But is no more than a bare Declaration, by which the one Party obſerves and proteſts, that its manifeſt Rights have been violated by the other Party; and ſuch a Declaration may be made by an Inferior [e].

Grotius [2] ſpeaks ſomewhat obſcurely when he obſerves that the Obligation, ariſing from the Promiſes of Kings, may reſtrain either the *Exerciſe of the Act*, or *directly the very Power*. That an Act contrary to Promiſes of the former kind is *Unjuſt* and yet *Valid*; but an Act repugnant to Engagements of the latter ſort, is not only *unjuſt*, but void and ineffectual. As if he had ſaid, ſometimes a King promiſeth that he will uſe ſuch a part of his Sovereignty only in a certain manner; ſometimes he plainly abridgeth himſelf of ſuch a part of his Power. Concerning which Diſtinction we may offer theſe two Remarks: Firſt, that an Act committed againſt Promiſes of the former kind, may likewiſe be *void*: For Inſtance, ſuppoſe a Prince hath engaged, that he will not levy new Taxes without conſulting the *States* of the Realm, we conceive that the Levies which he ſhall make in this arbitrary manner are null and unbinding. And, Secondly, that as to the latter part of the Diſtinction, what *Grotius* there ſuppoſeth, cannot but maim and diſmember the ſovereign Power.

XI. But to give us a deeper Inſight into the Nature of limited Monarchies, it will be uſeful to remark, that the Affairs which offer themſelves in the publick Adminiſtration, are chiefly of two kinds. Some may be ſettled and regulated before-hand; becauſe, whenever they happen, they have the ſame conſtant Nature. Others there are on which Judgment cannot be given, whether or no they are expedient to the publick Welfare, but at the very time when they appear: Becauſe the Circumſtances which attend them are not to be foreſeen. Now a People, who have ſettled themſelves in a limited Monarchy, may provide that, in neither of theſe kinds of Affairs, any Prejudice ſhall ariſe to the Good and Safety of the Commonwealth. As to the former, by ordaining perpetual Laws, which the King ſhall be bound to obſerve: And as to the latter, by appointing a Council of *Peers*, or of *Commoners*, who ſhall always be conſulted on ſuch Emergencies. Thus a People who are fully ſatisfied of the Truth of the Religion they profeſs, and likewiſe of the Decency of their external Rites, and their eccleſiaſtical Polity, may oblige a Prince, when they inveſt him with the Government, to make no Alteration in the Eſtabliſh'd Worſhip, by his own ſole Judgment and Authority. Again, no Man is ignorant how much the Juſtice of a Nation ſuffers, when Cauſes are determin'd, not according to written Laws, but by the bare Sentence of the Prince, and by what they term *Equity*: Since in this way of proceeding, Paſſion, or Ignorance, muſt frequently get the Advantage over Reaſon [f]. To avoid which Inconvenience, a People may engage the Prince whom they create, that he ſhall either obſerve the Laws already extant, or enact new and reaſonable Statutes; and that according to theſe Conſtitutions, Juſtice ſhall be given by certain *Colleges*, or ſtanding Courts; no Cauſes, except of very weighty Concern, or by way of Appeal, being allow'd to come before the King. Yet, as to this Point, Kings themſelves are often fond of referring invidious Cauſes to the Deciſion of others [a]. And this Excuſe is often ſerviceable, in putting off the importunate Interceſſions of great Perſons on the Behalf of Criminals. 'Twas a brave Saying of the Emperor *Andronicus Comnenus* [b], *That the Severity and Authority of the Laws ought to be of more Force than his private Will and Inclination*; *and, that 'twas fit the Sentence of the Judges ſhould over-rule the Opinion of the Prince.* No leſs obvious is it to remark, how eaſily Luxury or Ambition may ſquander away what hath been got by the Induſtry and Sweat of other Men. On this Score therefore, leſt the Riches of the Subject ſhould ſerve only for Fuel to the Vices of the Sovereign, many Nations have wiſely aſſign'd their Kings ſuch fixt Revenues, as they thought ſufficient for his ordinary Expences on the Commonwealth; and leſt the raiſing of larger Sums, when there ſhould be Occaſion for them, to the Conſideration of a Council or Aſſembly. In like manner, ſince ſome Princes, out of too great a Fondneſs for martial Glory, hazard themſelves and their Realms by engaging in unneceſſary Wars; it was a prudent Caution in thoſe People, who, when they conferr'd the Sovereignty on their Kings, obliged them not to enter upon a War, at leaſt not on the offenſive ſide, without the Advice and Concurrence of a proper Council. We are told of the Inhabitants of the Iſland *Borneo* [c], that they have ſuch a Natural Averſion to War, and to martial Princes, that when they find their Monarch to be of a fiercer Diſpoſition, they oblige him to fight at the Head of his Army, where he may meet with the greateſt Danger. In theſe therefore, and in all Inſtances of Buſineſs, which a People find to be of publick Uſe and Benefit, they may provide for their own Security, by ſettled Conſtitutions and Decrees: Leſt if they ſhould leave the abſolute Diſpoſal of ſuch Affairs in the Hands of the Prince, the common Intereſt might poſſibly ſometimes ſuffer.

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[a] We ſay *expreſly*, for if the Clauſe run only thus, *In caſe the King act otherwiſe, the Subject ſhall not be obliged*; it will not amount to ſuch a peremptory Condition, as the *Civilians* call *Lex Commiſſoria*.

[b] L. 3. c. 47. *Add.* Agatharcid. *de Mari Rubro.* c. 50. *Strabo*, l. 15. pag. 488. Edit. *Genev. Caſaub.* tells us of a Cuſtom much like this; that in *India*, if the Prince happens to drink to exceſs, the very Women have Liberty to kill him; and ſhe that doth the Feat, for her Reward, may claim his Succeſſor in Marriage.

[c] See *Hottomann. Franco Gall.* c. 12.

[d] Xiphilin. *Epit.* Dion. *in* Sever.

[e] *Comp.* Bœcler. *ad* Grot. *l.* 1. *c.* 3 *ſ.* 16.

[f] *Vide* Tacit. *Annal.* 13. C. 4. & 42.

Mr. BARBEYRAC'S *NOTES on* §. X.

[1] *Vide* Grot. *d. l.*

[2] *Ubi ſupra.*.

From what hath been obſerv'd on this Head, it appears in what Senſe we ought to explain that common Aſſertion of the *Grecian* Politicians, and others who follow them, when they tell us, *That the Government of a State ought rather to be committed to Laws, than to Men.* For the only rational Interpretation of ſuch a Maxim muſt be this, that it is more expedient the Rulers of Commonwealths ſhould govern according to the ſtanding Preſcriptions of the Law, than according to their own private and unconfined Pleaſure. For otherwiſe bare Laws are no fitter to govern a State, than the bare Needle to govern a Ship, without the Aſſiſtance and Direction of a Pilot.

Many Examples and many Methods we find in Hiſtory, how the regal Power hath been limited and reſtrain'd [d] [1]. But perhaps no Relation is ſo extraordinary as that which *Solinus* [e] gives us of the People of the Iſlands *Hebrides* in *Scotland*: *Their King*, ſays he, *hath nothing of his own*; *all Poſſeſſions lie in common: He is tied to Equity by eſtabliſh'd Laws. And leſt Covetouſneſs ſhould tempt him from Truth and Right, he is taught Juſtice by the Diſcipline of Poverty*; *having no fixt Revenue, nor private Eſtate, but owing his Maintenance to the publick Stock. He is allowed no Wife, but makes free with any of his Subjects Beds, as he thinks convenient. And thus he hath no Hopes of a Family and Children, to engage and to enſnare him. Apollonius Rhodius* [f] tells us a lamentable Story of the Kings of the *Moſtynæci*, that if at any time they pronounced an unjuſt Sentence, they were immediately ſhut up in a Tower, and there ſtarv'd to Death.

XII. But whereas, as hath been already ſhewn, Princes in a limited Monarchy are for the moſt part obliged, in ſuch Affairs as the People thought fit not to leave to their abſolute Diſpoſal, to apply themſelves to a Council, either of all the Subjects in general, or of Deputies, repreſenting the particular Claſſes and Orders; it is farther to be obſerved, that the Power of ſuch Councils is not in all places alike. For there are Realms, where the King, being in other reſpects abſolute, appoints a Council or Senate, the Approbation of which he makes eſſential to the Validity of his Decrees [g] [2]. Now a Senate of this kind is, as to its Authority, no more than a Board of Counſellers; and when it proceeds to take the royal Edicts under Examination and Cenſure, and to reject ſuch as ſeem leſs expedient to the Commonwealth, it does this, not by its own proper Right, but by a power delegated from the Prince; who makes this prudent Proviſion, that nothing may be enacted prejudicial to the Publick, either through his own Inadvertency, or through the Inſtigation of Flatterers. *Plutarch* [h] reports it as 'A Law of the *Egyptian* 'Kings, which they conſtantly obſerved, to 'bind the Judges by Oath, that they ſhould not 'obey the Prince himſelf, if he deſired them 'to paſs an unjuſt Sentence. And on the ſame Occaſion he tells us, that *Antigonus* the Third gave Notice to the States, 'That in caſe he

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[a] Ovid. *Metam.* (l. 12. v. 626, *&c.*) makes *Agamemnon* uſe this wiſe Conduct in diſpoſing of *Achilles*'s Arms:

A ſe Tantalides odium invidiamque removit;
Argolicoſque duces mediis conſidere caſtris
Juſſit, & arbitrium litis trajecit in omnes.

The King throws off the *Odium*, and denies
To ſit ſole Judge upon ſo vaſt a Prize:
But cites a Council of the Martial Peers,
And to the general Vote the mighty Cauſe refers.

[b] Nicetas Acominat. *l.* 1. *De Imper.* Andronic.

[c] Franc. Lopez *de* Gomara *Hiſt.* Ind. *Occidental.* c. 95.

[d] How the Power of the *Egyptian* Kings was confined, ſee *Diodor. Sic.* l. 1. c. 71. *Add.* Plin. *Nat. Hiſt.* l. 7. c. 22. *in fin.* & Solin. C. 66. *Philoſtratus* (Vit. *Apollon. Thyran.* l. 3. c. 33.) reports, that the antient Conſtitutions of the wiſe *Indians* permitted the King to ſtay amongſt them but a ſingle Day at once.

[e] *Cap.* 35.

[f] *Argonaut.* l. 3.

[g] See what *Neuhof* relates of the Empire of *China*, *Deſcrip.* Sin. C. 1.

[h] *Apophtheg.* p. 174 *B.* 183. *F.*

Mr. BARBEYRAC's *NOTES on* §. XI, XII.

[1] *Grotius*, B. 1. c. 3. ſ. 16. Numb. 3. is more worthy to be conſulted upon this, than the Places juſt mention'd.

[2] See *Grot.* B. 1. c. 3. ſ. 18.

‘ſhould, by any Letter to them, command any thing contrary to the Laws, they ſhould not perform ſuch an Injunction, but ſhould take it for granted that he had forgot himſelf [a]. By this means too Princes often get rid of bold Petitioners, whilſt in appearance they grant the Requeſt, but at the ſame time know, that the Senate will cancel and reverſe it [b].

Yet, under this Conſtitution, if at any time the Prince poſitively inſiſts in having his Will take place, and doth not own the Reaſons, urged by the Senate, to be of ſtrength enough to perſuade the contrary; the Senate cannot proceed farther in oppoſing the Prince's Power. For it is not ſuppoſed, that he, in appointing ſuch a Council, intended to give up irrevocably his abſolute Right of governing, and of his own accord to make his Subjects Obedience only conditional, when he might have claim'd it without any ſuch Terms of Reſtraint. The Senate therefore, in this Caſe, hath its Authority only by Commiſſion from the Prince, who may conſequently put a Stop to it, when he thinks fit: Tho' indeed he ought not to think fit, unleſs on very extraordinary Occaſions. But thus much may be done on the Peoples ſide; when one King hath, by his own free Act, conſtituted ſuch a Senate, they may oblige his Succeſſors (by an Oath, at their Admiſſion to the Government) not to diſſolve it.

A Senate thus form'd, and eſpecially if it be left in the King's Power to ſuppreſs it, doth not hinder the King from being abſolute. For when we apply this Denomination to a Prince, we do not preſume that he acts whatever he pleaſeth, according as he is led by the Blindneſs of Luſt, or the Raſhneſs and Inadvertency of Paſſion; but only that he determines, by his own final Judgment, all Matters belonging to the Commonwealth: Which is very far from being inconſiſtent with a Neceſſity of hearing good Reaſon and ſound Advice. Hence, altho' the Counſel, which ſuch a Senate offers the Prince, doth not oblige him by its own Force, or by any Authority inherent in it ſelf, yet, it affords the Ground and Occaſion of an *Obligation*, by repreſenting to the Prince after what manner he may truly diſcharge his Duty, in the Buſineſs at preſent under Debate [c]. For ſo a Phyſician cannot be ſaid to *oblige* a Patient by his own Power and Authority; yet when he ſhews him what will conduce to his Health, the Patient is bound to follow his Preſcriptions by the Law of Nature, which enjoins every one to take care of his own Health and Safety. The ſame muſt be ſaid of the Aſſemblies of the Eſtates in a Realm; which ſerve only for a larger Council of the Prince, by means of which the Complaints of the People, which are often neglected or ſuppreſs'd in private Councils, may be brought to the Prince's Ear; who hath the Liberty of taking what Method he pleaſeth for their Redreſs [d]. It is well obſerv'd by Mr. *Hobbes* [e], that unleſs we would rob the King of his Sovereignty, and make a State with two Heads, ſuch an Aſſembly cannot undertake more Buſineſs than the King hath propounded to them: *Since the People cannot chooſe their Deputies to other Intent, than is, in the Writing directed to them from the Sovereign, expreſs'd.* For the ſame Reaſon, when the Sovereign ſhall declare, that nothing more at preſent remains to be propounded to their Debate, the Body is diſſolv'd. Yet they are allow'd, of their own accord, to inform the King of ſome Matters in the way of Addreſs and Petition.

But the Sovereignty may then properly be term'd *limited*, when the People at firſt conferr'd it on the Prince, under this Condition, that before he proceeded to the Exerciſe of certain Acts, he ſhould conſult the Aſſembly of the Eſtates, and that without their Conſent his Decrees ſhould be of no Force. Yet ſtill we ought to leave it in the King's Power, to call this Aſſembly, and to diſſolve it [1]: As likewiſe to

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[a] *Vide C. L.* 1. *t.* 19. *l.* 1. *De Precib. Imperat. offerend.*

[b] *Vide* L. 10. t. 12. l. 1. C. *De Petit.* Bonor. *ſublat.* Bodin. *de Republ.* l. 3. c. 4. p. 455. Gramond. *Hiſt.* Gall. *l.* 5. *p.* 277. *&c.* Joh. Labardæ, *Hiſt.* Gall. *l.* 3. *p.* 132, 133. Ed. *Pariſ.* 1671.

[c] Add 1 *Kings* xii. 7, 8. *Martinius* in his Hiſtory of *China* (l. 5. c. 37. p. 122) relates, that the better ſort of Princes amongſt that People, made it a Cuſtom, when they were admoniſh'd by Perſons celebrated for Wiſdom and Goodneſs, of ſhunning Vice, or of purſuing Virtue, or of any Affair relating to the Publick Welfare, to receive the Advice with bended Knee. *Add.* l. 6. c. 1. p. 204.

[d] See *Grot.* l. 1. c. 3. ſ. 10.

[e] *Leviathan*, c. 22.

Mr. Barbeyrac's NOTE *on* §. xii.

[1] 'Tis worth the while to explain that Point a little. Let us hear Mr. *Sidney* upon it: ' The Power of calling and diſſolving Parliaments, is not ſimply in Kings. They may call Parliaments, if there be occaſion, at times when the Law does not exact it. They are placed as Sentinels, and ought diligently to obſerve the Motions of the Enemy; and give notice of his Approach: But if the Sentinel falls aſleep, neglects his Duty, or maliciouſly endeavours to betray the City; thoſe who are concern'd may make uſe of all other means to know their Danger, and to preſerve themſelves.—The Conſuls, or other chief Magiſtrates in *Rome* had certainly a right of aſſembling and diſmiſſing the Senate: But when *Hannibal* was at the Gates, or any other eminent danger threatned them with Deſtruction; if that Magiſtrate had been drunk, mad, or gain'd by the Enemy, no wiſe Man can think that Formalities were to have been obſerv'd. In ſuch Caſes every Man is a Magiſtrate; and he who beſt knows the danger, and the means of preventing it, has a right of calling the Senate or People to an Aſſembly. The People would, and certainly ought to follow him, as they did *Brutus* and *Valerius* againſt *Tarquin*, or *Horatius* and *Valerius* againſt the *Decemviri*; and whoever ſhould do otherwiſe, might for Sottiſhneſs be compar'd to the Courtiers of the two laſt Kings of *Spain*. The firſt of theſe, by name *Philip* the *Third*, being indiſpos'd in cold Weather, a *Braziero* of Coals was brought into his Chamber, and plac'd ſo near to him, that he was cruelly ſcorch'd. A Nobleman then preſent ſaid to one who ſtood by him, *The King burns*; the other anſwer'd it was true, but the Page whoſe Office it was to bring and remove the *Braziero* was not there; and before he could be found, His Majeſty's Legs and Face were ſo burnt, that it caus'd an *Eryſipilas* of which he died. *Philip* the *Fourth* eſcap'd no better, who being ſurpriz'd as he was a Hunting by a violent Storm of Hail and Rain, and no Man preſuming to lend the King a Cloak, he was ſo wet before the Officer could be found who carried his own, that he took a Cold, which caſt him into a dangerous Fever. If Kings like the Conſequences of ſuch a Regularity, they may cauſe it to be obſerv'd in their own Families; but Nations looking in the firſt place to their own Safety, would be guilty of the moſt extreme Stupidity, if they ſhould ſuffer themſelves to be ruin'd for adhering to ſuch Ceremonies—The Law for annual Parliaments expreſly declares it not to be in the King's Power as to the point of their meeting, nor conſequently their continuance: For they meet to no purpoſe, if

propoſe the Matters which are to be debated in it; unleſs we would give him the Name only and Shadow of a King, or would throw the Commonwealth into an irregular Shape. And altho' it be granted, that the Eſtates aſſembled may, of their own accord, lay before the King Conſiderations relating to the publick Safety, yet the Decrees which they form on ſuch heads, ſhall derive their Force from the royal Aſſent and Ratification. The Difference between ſuch a Body of Repreſentatives, and *Counſellors* properly ſo call'd, is this, that although, in their Applications to the Sovereign, they both act in the ſame manner by Reaſons and Advice; yet the Sovereign may reject the Reaſons of the latter, but not of the former. Nor ought the Prince to think it hard, if the Eſtates do ſometimes deny their Concurrence to what he offers. For he hath engaged himſelf by his Promiſe, to have always an Eye and Regard to the common Welfare, which in all Probability muſt be better underſtood, and more ſurely conſulted by a Number of ſelect Judges, than by a ſingle Man. The Prince therefore, in caſe his Eſtates ſhould thus happen to diſſent from his Opinion, muſt attribute the Misfortune to his own Inadvertency or Paſſions, or to the ill Fate of the Kingdom. 'Tis an idle Fear which poſſeſſeth ſome Men, that by this means we ſhall put it in the Power of the Eſtates to preſerve, or to deſtroy the Commonwealth, as they think fit. For 'tis ridiculous to ſuppoſe ſo much Imprudence, either in the King, as that he ſhall be unable to repreſent to the Aſſembly the real Neceſſities of the Kingdom; or in the Aſſembly, as that, when they ſee the Buſineſs thus clearly laid before them, they ſhall obſtinately betray their own Security. But this is certain, ſince the Perſons who firſt inveſted the Prince with a limited Sovereignty, cannot be preſumed to have been deſirous, either of overturning and deſtroying the Government, or of hindring, by their Acts and Covenants, the true End of civil Communities from being obtain'd; it may hence be gather'd, that theſe original Covenants and Agreements are always ſo to be interpreted, as that they may conſiſt with the publick Safety, and on no account contradict and oppoſe it: And conſequently, that the Perſons thus covenanting muſt be ſuppoſed to have done all with this Reſerve in their Mind, that the Terms and Conditions, which they now ſettled, ſhould not in the leaſt prejudice the general Intereſt or Security, or cauſe a Convulſion or a Diſſolution in the Commonwealth. If then ſuch a Caſe ſhould happen, that the Covenants firſt entred upon by the People ſhould afterwards, in any Inſtance, appear prejudicial or deſtructive to the publick Welfare, it will be convenient, if the Matters ſhall admit of Delay, to propoſe them in an Aſſembly of Eſtates. When this cannot well be done, the King hath it in his own Power to correct, by Wiſdom and Art, thoſe dangerous Eſtabliſhments. And the ſame Rule will hold, with regard to the ſtanding Laws; which are now and then enjoin'd Silence by the ſupreme Law, the Safety of the People. Thus *Ageſilaus* commanded the Laws to *ſleep one Day*; that thoſe who had fled in the Battle of *Leuctra*, might have Leave to return, without the uſual Penalty and Diſgrace. In the ſame manner, the ordinary Courſe of judicial Proceedings is often hindred either by the Neceſſity of the Times, or by the Condition of the Parties offending; who perhaps, were they to be formally arraign'd, muſt firſt be vanquiſh'd as Enemies, before they can be try'd as Criminals. Therefore Mr. *Hobbes's* Poſition will not ſtand, without ſome Grains of Allowance, when he aſſerts [a], *That the Evil inflicted by publick Condemnation is not to be ſtyl'd by the Name of Puniſhment, but of an hoſtile Act.* He ſpeaks Truth, in caſe there was no precedent Crime: But when the Offence is evidently proved, the Evil inflicted will be truly and properly a Puniſhment, tho' the preſent poſture of Affairs hinder the Offender from being condemn'd in the common Method of Juſtice.

XIII. But Mr. *Hobbes* ſeems inclin'd to allow no Diſtinction between ſupreme and abſolute Power; or rather to make all Power abſolute, that is, ſupreme. To whoſe Notions this general Remark may be applied, that what he ſo crudely delivers, ſhould be limited with this Condition, *So far as the End of civil Government will admit*: As, for Inſtance when he ſays, that *he, to whom the Right of Puniſhing belongs in a Commonwealth, may juſtly compel all Men to all things that he pleaſeth* [b]. And indeed he himſelf inſerts this Reſtriction; for he tell us, that by *all things*, he means, *all things that are neceſſary to the common Peace and Security* [c]. And ſo again, he obſerves, that *there is connected with the Right of the Sovereign, ſo much Obedience in the Subject, as the Government of a State neceſſarily requires.* By the ſame Rule therefore, when he affirms [d], that *he, who hath in ſuch a manner ſubjected his Will to the Will of a Prince, as that the Prince may, without Reſtraint, do what he liſts; make Laws, judge Cauſes, inflict Puniſhment, uſe the Strength and Riches of the People at his Pleaſure, and all this by Right; hath certainly granted the higheſt Power of Sovereignty that can be given*: We are to conſider, with what Purpoſe and Intention Men firſt applied their Minds to the conſtituting of civil States: And then we ſhall ſuppoſe no Perſon to have voluntarily transferr'd on the Prince any farther Degree of Power, than appears conducive to that End, in the Judgment of any wiſe Man: Tho' to determine what is thus conducive according to particular Circumſtances and Occaſions, doth not belong to thoſe who transfer their Right, but to him, on whom it is transferr'd. The Sovereign

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' they may not continue to do the Work for which they meet; and abſurd to give them a Power of meeting. if
' they muſt not continue till it be done: For as *Grotius* ſays, *Qui dat finem, dat media ad finem neceſſaria*, the only
' reaſon why Parliaments do meet, is to promote the publick Good; and they by Law ought to meet for that end.
' They ought not therefore to be diſmiſs'd, till it be accompilſh'd. Mr. *Sidney*'s Diſcourſe upon Government,
' Chap. 3. Sect. 38. See the reſt of the Chapter.

[a] Leviath. *c.* 28.

[b] De Cive, *c.* 6. *ſ.* 6.

[c] C. 5. *ſ.* 6. *& ſ.* 9. *in fin.*

[d] *Ibid. c.* 6. *ſ.* 13.

therefore hath a Right of compelling the Subjects to all ſuch things as he judgeth to be of any Conſequence to the publick Good. But to conſtrain them to that which is inconſiſtent with the Safety of the Commonwealth, or with the Laws of Nature, is what he ought not to entertain, even in Thought and Inclination. And if he ſhould engage in any ſuch Attempt, no doubt he tranſgreſſeth the proper Bounds of his Authority.

It may not be amiſs, if we here examine the Arguments alledg'd by the ſame Author [a], by which he endeavours to make out, that it would be a vain Deſign to introduce a limited Sovereignty. For, in this Caſe, ſays he, 'The Aſſembly, which preſcribed Laws to the future Prince, had certainly an abſolute Power, at leaſt actually, or virtually. If then, the Aſſembly continues; or, proroguing it ſelf from time to time, meets again at a fixt Day, and at a certain Place; this abſolute Power remains ever as it was firſt ſeated; and ſo the Prince will not have the ſupreme Authority, but will be a bare Magiſtrate. (And thus much we grant, if the Aſſembly thus meets by its own Right, and hath the Power of determining all kinds of publick Buſineſs, and of calling the King himſelf to an account.) 'But if the Aſſembly diſſolves it ſelf, unleſs the State be diſſolv'd with it, there muſt be left ſomewhere a Power of puniſhing thoſe who tranſgreſs the Law; *which cannot be done without abſolute Authority*: This Clauſe we deny, as utterly falſe; and we have no better Opinion of the Reaſon, on which he builds it:' A Prince '(ſays he) who hath ſo much Strength granted him in rightful manner, as to enable him to puniſh any Subject whatſoever; enjoys the greateſt Power that a People can give. For the Weakneſs of this Argument will eaſily be diſcover'd by any one, who reflects on the Deſign of civil Eſtabliſhments, and conſiders, that by ſubmitting their Will, and their Strength, Men do not turn themſelves into meer Engines, to move no otherwiſe than as they are drawn; but that they only grant to another the Uſe of their Powers under a Condition; ſo as that they themſelves are to judge whether this Condition be made good, and if it be not, are at Liberty to retract what they gave. Alike abſurd is it to pretend, that there is not more Security againſt the Abuſe of Power in a limited, than in an abſolute, Government [1]. He who hath Strength enough to defend his People (as all wiſe Subjects muſt allow their Prince) hath not always Strength enough to oppreſs or to deſtroy them. The Commands of a General may work with good Force upon his Soldiers, when he orders them vigorouſly to attack the Enemy: And yet they would be found very inſignificant, ſhould he bid them turn their Swords againſt each other. On the whole he is a prudent Prince, who tho' intruſted with an abſolute Sovereignty, yet in ſome Inſtances waves his own particular Advantage, when he finds the Subjects are not to be brought to a Compliance, without endangering the publick Welfare. But they are no leſs a prudent People, who well knowing what things would be inexpedient to their Conſtitution, have, by means of fundamental Laws, put it out of the Power of Princes to conſtrain them in thoſe Inſtances.

XIV. Laſtly, it is incident to the ſupreme Power, that it may be enjoy'd, either fully, or under more or leſs Degrees of Diminution: And this chiefly belongs to monarchical Government. For ſome Kings poſſeſs their Realm in the way of Patrimony, others in the way of *Uſe* only, not of *Property*; and this either for the Term of their own Life, or with the Power of tranſmitting it to their Poſterity under certain [b] Conditions: And others are commiſſion'd to hold their Sovereignty only for ſuch a fix'd period of Time, which being once elapſed, their Power paſſeth away with it, and they return to the Condition of private Men. Indeed Mr. Hobbes [c] will have thoſe Monarchs likewiſe to be call'd temporary, who receive their Power for life, and affirms them to be properly no Monarchs, but only the Miniſters [d] of the People. But it is contrary to the common Cuſtom of Speech, to call him a temporury Prince, who doth not lay down his Dignity, but with his Life: This Term being properly applied to thoſe, whoſe Authority expires at ſuch a certain and definite point of Time, not by Chance, but by Right.

XV. But learned Men are not agreed to acknowledge any ſuch Thing, as a temporary Monarch. *Grotius* will have the Dictator, amongſt the *Romans*, whoſe Power laſted but ſix Months, to have been truly a Monarch: *Becauſe*, ſays he, *whilſt this Period laſted, he exercis'd all the Acts of ſupreme Authority, with the ſame Right, as thoſe who are moſt juſtly and properly ſovereign Princes; neither could his Acts be revers'd by any other Power. But we underſtand the Nature of moral Things by their Operations, and conſequently thoſe Powers, which produce the ſame Effects, ought to go under the ſame Name.* Tho' the continuance of a Thing doth not change the nature of it [2], yet there is no doubt to be made, but that a temporary Command is in Dignity much inferior to one perpetual; ſince Men are wont to reſpect thoſe with a much more ſolid Veneration, whom they apprehend to be incapable of returning to a private Condition, than thoſe whom in a little time they are again like to ſee on the ſame Level with themſelves. But indeed, *Bodinus* [a] before *Grotius*, and many good Authors ſince him, have ſhewn, that the Dictator was by no means a Monarch, but only an extraordinary Magiſtrate. Nor doth that Axiom ſtand on very ſure Ground, *Thoſe are the ſame Powers, which produce the ſame Effects*: For it muſt be farther conſider'd, whether the Perſon exerciſeth this Power as properly *his own*, or as *delegated* to him by *others*, to uſe in their ſtead. On which account, it is a Miſtake likewiſe in *Grotius* [b], to rank thoſe Perſons in the Claſs of temporary Monarchs, *Who during the Minority of Kings, or in the time of their Captivity, or Lunacy, are appointed Protectors: In as much as they are neither ſubject to the People, nor is their Power revocable, before the time fix'd by Law*: For theſe Governors exerciſe the ſupreme Authority, not in their own Name, but in another's; and therefore can no more be term'd Monarchs, than we call a *Guardian* the Proprietor of the Goods of his *Ward*. And then no Man, who is vers'd in the *Roman* Hiſtory, will allow that the Dictator had all, and each preciſe part [1] of the Sovereignty ſo committed to him together, as that during the ſix Months Space he might exerciſe it as he pleas'd. And as for what is urged, that *his Acts could not be revers'd by any other Power*; it is not abſurd to ſuppoſe a Magiſtrate ſo commiſſion'd and impower'd, that, at leaſt in ſome certain Affairs, there ſhall lie no Appeal from his Sentence; and yet he ſhall be no more than a Magiſtrate [c].

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[a] De Cive, *c.* 6. *ſ.* 17. [b] *De Cive, ubi ſupra*, c. 7. ſ. 16. [c] C. 9. ſ. 11. [d] *L.* 1, *c.* 3. *ſ.* 11.

Mr. BARBEYRAC's *NOTES* on §. XIV, XV.

[1] *V.* Hobbes, *c.* 6. *ſ.* 13. *ibid. Annotat.* not excepting the Clauſe by which it is ſtipulated, that the Prince ſhall be of ſuch a Religion. See Mr. *Hertius*'s Diſſertation *de Superioritate Territoriali*; which makes part of the ſecond Tome of his *Commentationes* & *Opuſcula*, &c. Sect. 13. p. 217, &c. as alſo *La Reponſe aux Queſtions d'un provincial*, by Mr. *Bayle*, Tom. 1. p. 535, &c.

[2] *That is true* (ſays Mr. *Buddeus*, in his excellent Diſſertation, entituled *Juriſprudentiæ Hiſtoricæ Specimen*, among his *Selecta J. Natur.*) *provided that the Nature of a thing has ſo cloſe a Connexion with the Continuance, that the change of the one neceſſarily takes away the other.* Sect. 47. See his 43d Section to the 48th.

It is worth obſerving on this Head, that the Power of the Dictators, and of all other Magiſtrates appointed for a certain time, doth at that very Inſtant expire, and the Perſons do by Right return to a private Station; and that therefore, whatever they do, after this preciſe point of Time, is look'd on as a private Act, to which any Man may refuſe Obedience [2]; tho', perhaps they ſtill bear the external Enſigns of Power. Hence to abrogate the Command of ſuch Repreſentatives, there is no need of a new Decree of the People; but, if they refuſe to reſign, the old Decree is ſufficient to be immediately put in Execution againſt them. For thoſe Rights, the Validity of which depends on a certain ſpace of time as on a neceſſary Condition, do ceaſe with the elapſed Time, without farther Proceſs: But in Controverſies about Rights, when the Quality of certain Actions is to be proved, there is need of long Debate, and of a formal Sentence. The reaſon of which Difference is this; there can be no Diſpute whether ſuch a point of Time is paſs'd, but whether an Action was good or bad, may be argued with Probability on both ſides [d].

But it is by many thought impoſſible to give an Inſtance of temporary Sovereignty, if we ſpeak of ſuch Power as is properly ſupreme; and not conferr'd by Deputation. For what we read of *Auguſtus* [e], that he would ſuffer his Empire to be granted him only for ten Years; and upon the expiring of that Term, renewed it again for ten Years more; was a meer Jeſt and a popular Cheat. *Narbarzanes*, in *Q. Curtius* [f], hid the vileſt Treachery under the ſame ſpecious Propoſal: *Put your Government*, ſays he to *Darius*, *into the Hands of another, who ſhall bear the Name of a King, 'till ſuch a time as he ſhall have driven the Enemy out of* Aſia; *and when his Victory hath ſecured the Kingdom, let him reſtore it to its proper Maſter. Let* Beſſus *enjoy the ſovereign Command, during this Juncture; and when things are ſettled, let him deliver to you, the lawful Prince, that Power which he receiv'd only in Truſt* [g]. In *Nicephorus* [h] we find *Michael Palæologus* obliged by Oath to adminiſter the Government, 'till the lawful Heir and Succeſſor ſhould be grown up, and then to reſign freely to him the Throne and all the Enſigns of Majeſty. Tho' indeed his Oath was never kept. And for the Compact between *Eteocles* and *Polynices*, that they ſhould reign each a Year by Turns, this Inſtance may eaſily be anſwered, by ſaying, that it was contrived only as an Expedient to keep the Kingdom undivided; each Brother thus poſſeſſing the entire Command, tho' in an alternate Courſe [i].

XVI. As for that way of poſſeſſing Kingdoms, by which they are ſaid to be *in the Patrimony of the Prince*, we are firſt of all to obſerve, that a Man's Patrimony is not, ſtrictly ſpeaking, ſo much what he derives by Inheritance from his Parents, as what he enjoys with full Property or Dominion, by whatever Means it came into his Hands. Hence, as *Property* is chiefly applied to *Things*; ſo they too are eſpecially term'd *patrimonial*, in as much as they have no inherent Right, which might hinder the Poſſeſſor, either from imploying, or from abuſing them at his Pleaſure. Afterwards Slaves came to be added to the Things or Goods, which compoſed the Patrimony of their Lords; who challeng'd ſo abſolute a Right and Title over them, as to make the Servant not at all concern'd in his own Safety or Deſtruction, affirming the one and the other to be entirely the Maſter's Advantage and the Maſter's Loſs. And within theſe Bounds did the Fathers of Families confine Pratrimonies in the early Times. For as to the Right of governing their Wives and Children, tho' this indeed belong'd to them, and to them alone; yet in as much as theſe near Relations were Perſons conſiderable on their own account, they did not pretend to put them amongſt their Poſſeſſions, or to reckon them part of their Wealth and Eſtate [a]. Nor are Men wont to ſet down their Learning and their Skill in the Liſt of their Fortunes, however advantageous to them [b]: tho' many a Perſon by theſe Accompliſhments ſupplies, the want of real Poſſeſſions, and comes under that Character in *Ovid* [c];

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[a] *De Republ. l.* 1. *c.* 8.

[b] Chap 3. §. 11.

[c] Such were heretofore among the *Romans*, the *Præfecti prætorio*; upon which ſee a Reſcript of *Conſtantine*: *A præfectis autem prætorio provocare non ſinimus.* Cod. Lib. vii. *Tit.* xlii. *de Appellat.* & *Conſult.* Leg xix. ſee alſo *Tit.* xlii. *de Sententiis præfect. prætor.* & *Digeſt.* Lib. iv, *Tit.* iv. *de Minoribus*, Leg. xvii, xviii. The Biſhops, who never fail'd to take the Advantage of the Indulgence of Princes to ſatisfy their own Ambition, obtain'd that Privilege of the Emperors *Arcadius*, *Honorius*, and *Theodoſius*, with reſpect to the Cauſes that were determin'd by them. *Epiſcopale judicium ratum ſit in omnibus, qui ſe audiri à ſacerdotibus elegerint; eamque illorum judicationi adhibendam eſſe reverentiam jubemus, quam veſtris deferre neceſſe eſt poteſtatibus, à quibus non licet provocare.* Cod. Lib. I. *Tit.* iv. *de Epiſcopali Audientia*, &c. Leg. viii. ſee *Geneſ.* xli. 40, 44.

[d] *Vide* Livy, *l.* III. *c.* 38, &c.

[e] Dio. *l.* 53.

[f] *L.* V. *c.* 9.

[g] What we meet with in *Diod. Sic.* (*l.* IV. *c.* 23, & 33.) may be produced with a better Colour, for an Inſtance of a Kingdom *in Truſt*.

[h] L. VI.

[i] *Vide* Euripid. *in* Phœniſs. Statius *Theb. l.* 1.

Mr. BARBEYRAC'S *NOTES on* §. XIII.

[1] See *Roſin Antiq. Rom.* L. 7. c. 17.

[2] See *Sidney* upon Government, c. 2. ſ. 24.

Ars illi ſua cenſus erat.——

——His Art was his Eſtate.

But when the Ambition of Princes began to rank, amongſt the chief Goods, a Power and Command over Men; and many of them brought it into a Cuſtom to maintain their own Pleaſures and Vices at the Subjects Coſt; thoſe Kingdoms came to be look'd on as Patrimonies, which the Sovereign had receiv'd a Power of alienating, as he ſhould think fit: This being eſteem'd the utmoſt Force of *Property*, and the very Eſſence, in which a real Poſſeſſion did conſiſt [1]. Whereas other Monarchs, who had not obtain'd ſo vaſt a Privilege, and ſo unbounded a Power over their Realms, were ſaid to hold them in the manner of *Perſonal* Poſſeſſions, and rather to have the *Uſe* of them, than the *Property*. Which Diſtinction ſeems to have taken its Riſe from the different ways of acquiring Government, eſpecially monarchical. For altho' no Prince can be lawfully conſtituted, without the Conſent of the Subjects, yet there are different manners of exerting and applying this Conſent. So that, in ſome Caſes, the King confers a Benefit on the People, in taking them under his Sovereignty; in others, the King is highly obliged and indebted to the People, for advancing him to the Throne. Thoſe, who have given a Prince juſt Cauſe of proceeding to Hoſtility againſt them, in caſe they loſe the Day, may, by the Right of War, be deprived of all their Poſſeſſions, and of their perſonal Liberty itſelf. Therefore, if Men under theſe Circumſtances are admitted to any Terms or Conditions, they are to acknowledge it as the pure Favour and Mercy of the Conquerour: Who, tho' he leaves them to enjoy their Life and perſonal Liberty, and their private Eſtates; yet is ſuppoſed to challenge the Sovereignty over them in the fulleſt and moſt irrevocable manner, for himſelf and his Poſterity [2]. The ſame Claim is preſumed to be made by a Prince, who receives a People into his Protection, when they had otherwiſe been inevitably ruin'd [d]. Now the Effect reſulting from a Sovereignty thus obtain'd, is chiefly ſeen in this, that not only the Condition of the Subjects depends entirely on the Pleaſure of the Prince; but that Prince may transfer his g Right of governing ſuch a Realm on any Perſon, whom he ſhall chooſe; and conſequently may appoint any Method of Succeſſion that ſhall be agreeable to his Judgment or Inclination.

XVII. But where the King receives his Crown from the Grant of the People, there each Perſon thus concurring is ſuppoſed to have reſerv'd and ſecured to himſelf ſo much of his former Rights and Privileges, as is conſiſtent with the Nature of a civil State. And therefore, the Condition of the Subjects, under ſuch a Conſtitution, rather depends on their own Choice, than on the Prince's Pleaſure. Yet they could not but find it neceſſary, to abridge themſelves of their natural Liberty in ſuch a Degree, as the Form of Government required, which they are now about to introduce. Farther, ſince in conferring Sovereignty by a voluntary Act, Men are uſually prevail'd upon by the Conſideration of ſome peculiar Merit or Advantage in the Perſon, and therefore would not perhaps ſubmit to the Authority of *another*, as they are willing to yield to *his*; it follows, that according to the regular Courſe, the People are to determine on whom the Crown ſhall devolve, after the Deceaſe of the King now elected. And here, if the People ſhould not think it proper to conſtitute every new King by a particular Election, it ſhall be in their Power to ſettle the Method of Succeſſion; and the Prince's Nomination ſhall, in this point, by no means hold good againſt their Act. Upon this account chiefly it is, that many Authors have affirm'd theſe Monarchs to hold their Realms *jure uſufructuario*, by the Right of *Uſe* and *Profit*; as we have already hinted: In as much as by their own Pleaſure, and without the Conſent of the People, they can ſettle nothing, either in regard to the inward Frame and Conſtitution of the State, or to the alienating and transferring it on any Perſon [e]. We are by no means for extending the Compariſon farther between Princes, conſtituted by the free Grant of the People, and thoſe Perſons whom the civil Law terms *Uſufructuarii*, Poſſeſſors of things with a Title only to the *Uſe*. And therefore we utterly diſlike the Aſſertion of Mr. *Hobbes*, which we meet with in his Book *De Cive* [f]; *If*, ſays he, *the People, e'er they departed from the Election of a temporary Monarch* (that is, in his Notion, a Prince who receives the Government for Life) *made a Decree to meet again at a certain Time and Place after his Death; then, ſo ſoon as he ſhall happen to deceaſe, the Sovereignty returns in full to the People; not by any new Act of theirs, but by the Right which they before enjoy'd. For during that whole Interval, the ſupreme Dominion was in the People, as to the Property, and only as to the Uſe and Exerciſe in that temporary Monarch.* This Notion, if taken in the groſs Senſe in which it is deliver'd, we cannot but look upon

[a] *Vide L.* 5c, *t.* 17. *l.* 126. *ſ.* 1. *D.* De diverſ. Reg Jur. *& ibi* Jac. Godofred. *& L.* 9. *t.* 2. *l.* 33. *D. ad.* L. Aquil.

[b] Philo Jud. *De Plantatione* Noe, *p.* 224. C. *Ed.* Pariſ. *The Painter reckons his Art, and every Mechanick the Myſtery of his Calling a kind of Inheritance or Fortune to him; not as an Earthly Poſſeſſion, but has a free Reward. For theſe Advantages, tho' they do not fall under Property, yet are highly beneficial to the Perſons who enjoy them.*

[c] Metam. l. 3. v. 588.

Mr. BARBEYRAC's NOTES *on* §. XVI.

[1] See the next Chapter, ſ. 11. and B. 8. c. 5. ſ. 9, *&c.*

[2] 'Twas thus among the *Jews*, that the King choſe which of his Sons he pleas'd, to be his Succeſſor. See 1 *Kin.* i. 35. 2 *Chron.* xi. 20, 22. with Mr. *Le Clerc's* Notes thereupon. The reaſons urged againſt Patrimonial Kingdoms by *Franc. Hottomann. Quæſt. Illuſtr.* 1. are anſwered by *Grotius*, l. 1. c. 3. ſ. 12.

[d] *Comp. L.* 7, *t.* 1. *l.* 13. *ſ. ult*, *ſ.* 15. *ſ.* 1. *D.* De Uſufruct. *& L.* 3. *t.* 33. *l.* 9. *C.*

[e] *V.* Grot. *ubi ſupra*, ſ. 13.

[f] C. VII. ſ. 16.

as highly dangerous and prejudicial to all thoſe limited Princes, who are ordain'd by the voluntary Donation of the People, and bound up to certain fundamental Laws. And the rather, becauſe, ſince he hath taken the Liberty to call a King for Life a *temporary Monarch*, others may with as much reaſon extend the Name to thoſe who receive the Sovereignty, with the Privilege of tranſmitting it by Inheritance, yet ſo as to keep it within their own Line and Family. Beſides, ſince Mr. *Hobbes* hath not determin'd how far he would ſtretch the Parallel which he uſeth, he may eaſily be intangled in a Train of very pernicious Conſequences. For ſince Property, conſider'd in it ſelf, is a much more noble Right, than that of temporary Uſe; ſome Men may, on theſe Principles, conclude that the People are ſuperior to the Prince, and have a Power of bringing him to Correction, in caſe he doth not govern according to their Pleaſure and Humour. On the like Score we ought to reject what the ſame Author lays down in his *Leviathan* [a], that *Elective Kings have not the ſupreme Power*; that *They, who have the Privilege of appointing a Succeſſor after the Death of the preſent King, do really hold the Sovereignty even in his Life time: ſince none have Right to give that which they have no Right to poſſeſs.* For as to the Power of a Sovereign over his Subjects, it matters little what Proviſion is ſettled, or what Method agreed on, in Caſe of an *Inter-regnum.* And even when this Point is ſtated and determin'd by Law, the Subjects may nevertheleſs yield a moſt ſtrict Obedience to the Prince, and be far from invading any part of the Sovereignty, or from thinking of a Succeſſor, or of a new Form of Government, during the Life of their preſent Maſter. And then, beſides, 'tis a very weak Conſequence to ſay, that becauſe an elective Prince cannot appoint a Succeſſor at his pleaſure, therefore he hath the *Uſe* only, and not the *Property* of the ſupreme Command, and is no more than the Miniſter of a Power which reſides in others. For all the Power which, in this Caſe, continues in others, is, that upon the Deceaſe of the Prince, the Liberty of conſulting their own Security, and of governing their Actions by their own Judgment, ſhall return to them. But for the maintaining of this Power, 'tis by no means neceſſary ſo to break and divide the Sovereignty, as to ſay that the χτῆσις, the *Property* or real Poſſeſſion reſides in the People, and the χρῆσις only, or the *Uſe*, in the Prince. Since even in Caſe of an *abſolute* Lord or Governor, when he is extinct, the Perſon who was under his Dominion falls again into the Liberty which Nature gave him, and the Force of which ſeems now to revive in him. Thus who for inſtance will pretend, that a Father hath only the χρῆσις of paternal Authority, becauſe upon his Death the Children are at their own Diſpoſal? Or that a Maſter hath only the χρῆσις of the deſpotical Power, becauſe in caſe he die without Heirs, the Slave recovers his Liberty?

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[a] C. 19.

CHAP. VII.

Of the Ways of acquiring Sovereignty, eſpecially monarchical.

I. *The way of acquiring Sovereignty in democratical States is uniform.*
II. *In Ariſtocracies and Monarchies various.*
III. *How far Government may be ſeiz'd on by juſt Force.*
IV. *How far by unjuſt Force.*
V. *How a Perſon may be releas'd from the Government of another.*
VI. *Election, of how many kinds.*
VII. *Inter-regnum, what.*
VIII. *And Inter-reges.*
IX. Hobbes *examin'd.*
X. *The Caſe of poſthumous Iſſue in the hereditary Line.*
XI. *Of Succeſſion in a patrimonial Kingdom.*
XII. *Of the ſame in the Kingdoms eſtabliſh'd by the free Act of the People: And this either ſimply hereditary,*
XIII. *Or lineal,*
XIV. *Or tranſverſe.*
XV. *Of the Judge of Controverſies ariſing in the Caſe of Succeſſion.*

SINCE in examining how Sovereignty is acquired, it muſt regularly be ſuppoſed before hand, that the Perſon who acquires it, is different from thoſe over whom he acquires it; 'tis manifeſt that the Queſtion before us is but little concern'd with Democracies; under which thoſe who command, and thoſe who obey, are diſtinguiſh'd by a moral reſpect only, and not a phyſical. And though this Form of popular Government is ſometimes ſet up, upon the Expulſion of a King, or of the ruling Members in an Ariſtocracy; yet ſince ſtill the governing and the governed Parties are the ſame, 'tis abſurd to ſay, that the People have obtain'd the chief Command by a violent Courſe; or that the People have, by ſuch Force as properly belongs to Subjects, erected a Sovereignty over themſelves. In Democracies therefore (contrary to what we ſee in Monarchies) the way of holding Sovereignty is ever one and the ſame. Yet theſe, as well as other States, ſometimes owe their *Increaſe* and *Improvement* to the Force of Arms, tho' never properly their *Original.*

II. In *Ariſtocracies* there appears ſome Difference, with regard to the manner of obtaining the ſovereign Power. Not only becauſe, in ſome places, this Form of Government was introduced by the voluntary Act of the People, and in others by Violence; but likewiſe becauſe, upon the Deceaſe of any Member in theſe ruling Councils, the vacant Seat is fill'd up in ſome Places by Election; and in ſome again, Birth and Inheritance give a Title to the Honour. But in Monarchies, this Difference of Acquiſition moſt viſibly diſcloſeth it ſelf. For tho' all Princes in order to legal Eſtabliſhment of their Authority have need of the People's Conſent, yet this Conſent is obtain'd ſeveral ways; and even when the Sovereignty is conferr'd by the free Motion and Grant of the People, there is ſtill this Diſtinction, that ſome Princes are advanced to the Crown by Election, others by Succeſſion [1].

III. The way of acquiring Sovereignty by Violence is uſually term'd *Occupatio*, or *Seiſure* [1]: Which yet we muſt obſerve to be different from that by which we lay hold on things that want a Proprietor, and thus make them our own. For ſince, in things of this kind, there is no inherent Right, which might cauſe them to belong rather to one Man than to another (excepting the Determination of civil Laws) hence to obtain the Property of them, there is no need of a particular Title, but it is ſufficient barely to lay our Hands upon them, with a Deſire of poſſeſſing them [2]. But ſince every Man is by Nature equal to every Man, and conſequently not ſubject to the Dominion of others, therefore this bare ſeiſing by Force is not enough to found a lawful Sovereignty over Men, but muſt be attended with ſome other Title. When *Grotius* [a] therefore tells us, *That of Things which properly belong to no Body, two are capable of Seiſure, Sovereignty and Property*; we muſt not underſtand the word *Sovereignty* in the ſtrict Senſe, for ſuch as is exercis'd over Men; but for a Sovereignty over Lands, the Effects and Virtue of which amounts to this, That no Perſon ought to fix in ſuch a Lordſhip, or Diſtrict of ours, againſt our Conſent, or unleſs he will yield himſelf a Subject to us. For Men cannot be ſaid to *belong to no Body*; *he is his own Man*, who is not *another's* [b]. And on this account the ſame Author [c] truly remarks, *That in caſe a Perſon dies without Heirs, his Servants regain their Freedom, and his Subjects are left to their own Judgment and Diſpoſal*; inaſmuch as neither of theſe fall under the Right of Seiſure. But as for the Limitation which he adds, *unleſs they voluntarily relinquiſh their Liberty*; it might perhaps have been better omitted. For where can we find a Man, who will thus utterly wave and abdicate his Freedom? He may perhaps think it convenient always to be under ſome Maſter; but he will likewiſe claim it as his Privilege to chooſe one Service rather than another. Such *Occupancy* then is a proper Means for the obtaining of Sovereignty, as preſuppoſeth a juſt Cauſe of the Invaſion, and is confirm'd by the Conſent of the Subject, and by ſubſequent Articles and Covenants [d]. For without theſe mutual Ties the *State of War* continues; and there can be no Fidelity or Obligation, and therefore no true Authority or Command. On which Score *Hornius* [e] ought to fall under Cenſure, when he aſſerts, *That he who ſubdues another upon precedent Injuries and juſt Provocation, immediately obtains a lawful Dominion over the conquer'd Party, and needs not to wait for his Conſent.* For how is it poſſible to deſcend from the Condition of War to that of Peace, without ſome intervening Compact? Or how can Allegiance be due to him, who hath not purchas'd and receiv'd it by ſome certain Terms of Agreement? All the Advantage which the Conqueror in a juſt War gains in this reſpect is, that he lies under no Neceſſity of careſſing thoſe whom he hath ſubdued, and of winning their Conſent by Flatteries or Intreaties, but may extort it by denouncing the ſevereſt Evils. And therefore *Hornius's* Argument comes to nothing, when he ſays [f], *That if the Conſent of the conquer'd were*, in this Caſe, *neceſſary, a lawful Conqueror could never gain Dominion by Occupancy: In as much as the Occupancy would be of no force, ſhould this Conſent of the conquer'd be withheld.* For ſince ſuch Occupancy ſuppoſeth the Victor to be ſuprerior in Strength to the vanquiſh'd, and therefore able to ſet before them any Pains or Puniſhments; it can't but have ſo much Effect, as to hinder them from withholding their Compliance. Becauſe, as there is no Man who would not rather conquer than be conquer'd, ſo every wiſe Man, when he finds himſelf worſted, will be glad to come off as cheap as he can, and will by no means think himſelf prejudiced, in yielding a Conſent to the Victor's Sway [3], when without this he muſt have inevitably periſh'd.

IV. But what ſhall we ſay in caſe the Dominion be *ſeiſed by unjuſt Force*? As to this Queſtion, it is firſt acknowledg'd, on all Hands, that a popular State, or the Majority in ſuch a State, may, for the avoiding any grievous Evil (whatever be the occaſion which threatneth it) relinquiſh their preſent Liberty, and put themſelves under the Command of a ſingle Perſon, or of a ſelect Coun-

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Mr. BARBEYRAC's NOTES on §. II. and III.

[1] This manner of acquiring Sovereignty by the *Right of Succeſſion*, takes place in Kingdoms originally eſtabliſh'd by a forc'd Conſent of the People, as will be ſhewn hereafter in the 11th Section.

[1] See above in B. 4. c. 6. the laſt Section.

[2] Of this we ſhall treat in the Sixth Chapter of the Eighth Book, §. 21.

[3] 'Tis not only by this Act of Clemency which the Victor ſhews to the vanquiſh'd, that he obtains a lawful Dominion over them. The Title of his Sovereignty is farther grounded upon the Reaſon, that the vanquiſh'd (having undertaken a War againſt him) upon precedent Injuries, and a refuſal to give him that juſt Satisfaction which was due to him, have expos'd themſelves by ſo doing to the Fortune of Arms, and have tacitly conſented beforehand to whatever Conditions the Victor ſhould think fit to impoſe upon them. Our Author's Abrigment, *De Offic. Hom. & Civis*, l. 2. c. 10. ſ. 2.

[a] L. 2. c. 3. ſ. 4.

[b] Xenophon. *Cyrop.* l. 4. l. 59. Ed. *H. Steph. Nothing is ſo much as our ſelves.*

[c] L. 2. c. 9. ſ. 1.

[d] It was a wiſe Rule with the *Yncas* of *Peru*, to advance the Empire by the floweſt and moſt inſenſible Degrees, and rather to invite new Subjects by Clemency and Kindneſs, than to compel them by Arms and Violence. *Vid.* Garcil. de la Vega, *Com. Reg.* l. 2. c. 19.

[e] *De Civitate*, l. 2. c. 9. ſ. 2.

[f] *Ibid.*

cil. And for the ſame reaſon, that a People ſubject to Kingly Government, may, to eſcape Deſtruction, and when their Prince can no longer aſſiſt or protect them, ſubmit themſelves to another. But all the ſtreſs of the Difficulty lies in this, that ſince Fear unjuſtly caus'd invalidates a Covenant, and ſince he, who by his injurious Proceedings hath endamaged another, is obliged to make Reſtitution, how ſuch a Conſent of the Subject, as is extorted by unjuſt Force, can confer the Sovereignty in ſo lawful a manner upon the Invader, as to give him Quiet of Conſcience in the Poſſeſſion. For what *Hornius* ſays[1] is meer trifling, *That ſince the Sovereignty, which the Invader receiv'd by the Conſent of the People, he did not take from the People, but was inveſted with it by GOD, therefore were it to be reſtor'd, it muſt be reſtor'd to GOD, not to the People.* But we ſhould rather conclude, that ſince the People, as *Hornius* himſelf allows, have the Power of appointing the Perſon in whom the Majeſty ſhould be infuſed by God; therefore it is ſufficient, if the Oppreſſor reſtores this Power only to the People. For if the People do but recover the Privilege of marking out the Perſon who is to govern them by their own free Choice, they will not think themſelves much concern'd, whether the Invader retains the pretended Majeſty he hath ſeiſed, or reſtores it to Heaven. Our Judgment on this Point is, that we ought firſt to conſider, whether the forcible Invader hath turn'd a Democracy into a Monarchy, or whether he hath driven out a Monarch, and ſettled himſelf in his room. In the latter Caſe, the Obligation to Reſtitution doth not expire, till the expell'd Prince and his Heirs, who had a Right of ſucceeding, are all deceas'd; or till ſuch an unfortunate Prince hath quite abdicated, or relinquiſh'd his Claim to the Kingdom: And this he is preſumed to have done, as by other Inclinations, ſo if in a long courſe of time he hath made no Effort towards the recovering of his Crown [a]. And in the mean time, even whilſt the Invader's Title and Conſcience are both unſettled, the Allegiance, promis'd by the Subjects to him, holds ſtrong and binding; provided they did not give it, till they had done all that could be requir'd of them towards ſerving their old Maſter[2]. As for the former Caſe, this ſeems the moſt probable way of determining it, to ſay, that ſince a Nation may live in all reſpects as happy under a Monarchy, as under a Democracy, 'twill be eaſy for them to digeſt the Loſs of their popular Liberty, if their new Sovereign proves a good Governor. And we may preſume, they are thus ſatisfied, when their quiet Deportment and long Uſe ſeems to have reconciled them to the Alteration. As for the few Murmurers and Malecontents which remain, they are not worthy to fall under regard: Since there will not want ſome of this uneaſy Temper in every Form of Government, however freely and fairly conſtituted by the Community. But in caſe the Invader, after having made this Charge and Revolution in the State, ſhould treat his Subjects in a wicked and injurious manner, we can ſcarce conceive, that they are by any intrinſical Obligation engaged to obey him. We muſt therefore grant *Hornius* [b] what he aſſerts without Proof, *That it doth not belong to the Nature of Sovereignty, to conſider what way it was obtain'd; inaſmuch as at all times, and in all places it demands the ſame correſpondent Obedience.* For indeed, when a Perſon hath not only intruded into the Throne, by Force or Fraud, but likewiſe ſtill grievouſly oppreſſeth the People, and ſeems to make open and arbitrary Violence the Standard of his Reign; this is a Guilt which ſeems incapable of being purg'd by any Courſe of years, tho' Time in other Caſes be thought ſufficient to found a Right of Preſcription. For long Poſſeſſion is here nothing elſe but a long continued Injury [c] [2].

V. To theſe Enquiries another may be added, by what means and at what times a Community which hath thrown off monarchical Government, is confirm'd in its new Democratical Frame? In reſolving which Doubt different Judgments muſt be given, according to the difference of the Caſes that may ariſe. *Firſt*, then, if a City or Country hath on any occaſion whatſoever diſcarded the Sovereignty it once ſtood under, and ſet it ſelf up for a free independent State, upon Suppoſition that it hath tranſacted the Affair in a friendly manner with its former Lord, and hath by him been acknowledg'd for a free Commonwealth, it immediately commenceth ſuch, with the fulleſt Right of Liberty, and need not wait for the tedious Confirmation of Preſcription and Uſe. *Secondly*, if a Sovereign hath upon juſt Reaſons been diveſted of his Power, the Liberty is preſently valid ſo ſoon as it is actually aſſerted; nor is there any Neceſſity of its being either confirm'd by long Poſſeſſion, or acknowledg'd for lawful by the former Lord; except ſo far as this laſt Circumſtance may be a means of preventing all unjuſt Claims and quarrelſome Pretenſions for the future [d]. *Thirdly*, if the Conſtitution be alter'd by an unjuſt Rebellion, the Liberty thus uſurp'd ſo long continues unlawful, as the rightful Prince ſhall labour to reduce the Rebels to Obedience, or at leaſt by ſolemn Declaration ſhall proteſt and preſerve his Right over them; till by long Acquieſcence and Silence he may be preſum'd to have given up his Claim. *Fourthly*, if it ſo happen that a City or Country, being in great Diſtreſs and Danger from an Enemy, ſhall in vain beg the Aſſiſtance of its Sovereign, who is unable to afford any Shelter or Support, ſo as to be put on its own Defence, and oblig'd to ſeek for Safety from its own Strength and Counſel; we are of Opinion that the Right of the ſaid Sovereign doth expire, when for a conſiderable time the People have manag'd their own Affairs in a ſeparate manner, and have no Intercourſe, or Communication with their former Governour: Inaſmuch as this manifeſtly argues a *Dereliction* or *Deſertion* on the part of the Sovereign. For

Mr. BARBEYRAC'S *NOTES on* §. IV.

[1] *Ubi. ſupra.* [2] *Comp.* Grot. *l.* 2. *c.* 4. *ſ.* 14. *&* l. 1. c. 4. ſ. 19. [3] Comp. *Grot.* l. 2. c. 4. ſ. 14. *&* l. 1. c. 4. ſ. 19.

[a] *Vide* Juſtin. *l.* 4. *c.* 2. *n.* 3. Ed. *Græv.* [b] *De Civitate*, l. 2. c. 9. ſ. 4. [c] *Vide* Juſtin. *l.* 3. *c.* 5

[d] *Vide* Baudium *de Induciis Belli* Belgici, l. 3. p. 178.

tho' a King, or a Commonwealth ſhould be forc'd by the moſt preſſing Neceſſity, thus to abandon a City or a Country under their Dominion, to its own Care and Defence [a]; yet ſo ſoon as they recover out of that Neceſſity, they ought immediately to return to the Exerciſe of their former Sovereignty. Otherwiſe how can he pretend to be my Prince, who for a long time hath neglected every part of his Princely Office towards me, when 'twas in his power to have perſom'd it [b]?

VI. The manner of acquiring Sovereignty by *Election* is, when a People already incorporated, or now about to incorporate, do, by their own free Choice and Judgment, *deſign* or *nominate* a certain Perſon for the ſupreme Command; who, upon receiving ſuch a Decree of the People, or of their Repreſentatives, together with the Promiſe of their Obedience, and having accepted the Offer, is thereby inveſted with the governing Power. *Election* is uſually divided into *free* and *limited*. By the former any Perſon, without Exception, may be *deſigned*, who either is at preſent, or probably will be hereafter, in all natural reſpects fit for Empire. By the latter no Perſon can rightly be pitch'd upon who is not of ſuch a Nation, or of ſuch a Family, or endued with ſuch a particular Qualification. But indeed, if we conſider the Right of Electing, as it radically and fundamentally inheres in the People, every Election will appear to be in it ſelf *free*. For tho' an Order may have been once made, excluding ſuch a certain kind of Men from the Crown; yet nothing hinders but that this Order may be repeal'd and diſannull'd. But if the People devolve their Right of electing on a few Deputies, they commonly tie them up to certain Laws, defining the Conditions and Requiſites to be conſider'd in thoſe who are Candidates for the Sovereignty. In ſome Places the Government is conferr'd by a kind of Mixture of Election and Succeſſion: When the Crown deſcends, in courſe, to the Sons of the deceas'd Prince, yet ſo as that the Conſent of the People, or of the Nobles, ſhall firſt intervene. Which Conſent is not a bare Ceremony, like that of Inauguration, or of doing Homage, but hath the Force and Virtue of a negative Vote. As ſuppoſing a People to have firſt conferr'd the Government on the Author and Founder of the preſent royal Family under this Condition, that he ſhould tranſmit it to his Deſcendents, provided they appear'd fit to receive it: In ſuch Kingdoms the People or the Nobles aſſemble on the Vacancy of the Throne, not properly to chooſe a new Prince, but only to declare that they find no Objection in the Son to hinder him from inheriting his Father's Crown.

VII. An Election may be made, either in a *riſing* State, now about to be ſet up, or in one formerly erected and eſtabliſh'd. In the former, after the original Compact between the Members thus uniting, after a Decree paſs'd for the introducing of ſuch a Form of Government; the Community or the deputed Repreſentatives proceed to Election. Which being finiſh'd, and the Grant accepted, and a Covenant thereupon ratified between the Prince elect, and the People, there immediately commenceth a State perfectly monarchical. But, in a Kingdom already eſtabliſh'd, it may happen that a Monarch deceaſeth before his Succeſſor is appointed; and then the Nation is ſaid to ſuffer an *Interregnum* [1]. Now what Frame a State falls into during ſuch an Interval, may eaſily be apprehended, if we conſider what thoſe Bonds were which held it together, in its former more regular and perfect Condition. Since then the Intrinſick *Perfection* of the State, and the actual Exiſtence of the ſovereign Power, were both owing to the *latter* Compact between the Prince and People; it follows, that the Perſon in whom the Sovereignty properly reſided being extinct, the Kingdom ſinks into an *imperfect* Form, and is united only by the *firſt* antecedent Pact, by which we conceive the particular Members of the Community to have agreed to incorporate in one Society. Not but that this primitive Pact uniting the general Body, is during the time of an *Interregnum* conſiderably ſtrengthen'd and aſſiſted, by the Endearment of a *common* [c] *Country*, and that kind of Relation or Affinity which reſults from thence: Together with this Conſideration, that the Fortunes of moſt Men are fix'd and rooted in that particular Soil, and the Effects of others not eaſily to be tranſported or removed [d]. And this too is the reaſon why a Commonwealth, under an *Interregnum*, holds more firmly together than an Army (eſpecially if compos'd of Mercenaries) when it hath loſt its General: Inaſmuch as the Perſons, who compoſe the latter Body, are ſuch as either have no proper Country, or elſe a Country at a Diſtance. But now the wealthy part of a Nation, to preſerve and ſecure what they poſſeſs, will be ever moſt forward in maintaining a good Agreement, and moſt induſtrious in re-eſtabliſhing and ſetttling a Government.

Mr. Barbeyrac's *NOTE on* §. VII.

[1] See a Diſcourſe of our Author's, *De Inter-regnis*, which is amongſt his Academical Diſſertations.

[a] *Vide* Liv. *l.* 3. *c.* 6. *l.* 23. *c.* 21.

[b] *Vide* Liv. *l.* 35. *c.* 16.

[c] See a Diſcourſe of our Author's, *de Obligatione erga patriam*, which is in the ſame Work of his juſt now mention'd.

[d] Lyſias *contra* Philon. *Orat.* 30. c. 2. p. 471. *Thoſe who are natural Subjects, but yet of ſuch an Opinion, as to eſteem any Country their own where they can promote their own Intereſt and Gain, muſt certainly neglect the common Good of the State, to ſerve their own private Advantage: Since 'tis not the Place where they were born, but the Fortunes and Riches they poſſeſs, which they look upon as their Country, and their deareſt Concern.* Livy, *l.* 2. c. 1. well obſerves, *That* Brutus *would have done the* Roman *Commonwealth a bad* Office, *if through a too eager deſire of Liberty, he had driven out one of the firſt Kings, before the Minds of that vaſt Multitude of People, which were gather'd together from all Parts, had been engaged and united by the dear Pledges of Wives and Children, and by a kind of natural Affection to the Soil where they had ſo long taken Root.*

Antiphon, *Orat.* 16. *Nor was it an eaſy thing for him to deſert the City; his Children and his Wealth being ſufficient Pledges for his Stay.* Hence, as *Plutarch* remarks (*in Mario*, p. 401. *A.*) the *Romans* choſe Men in their Army according to their *Eſtates*; *theſe being Pledges and Securities for Fidelity, whilſt they ſeem'd now to have pawn'd or ſtaked all they were worth.*

Tho' we may, with *Livy* [a], call a Nation, during an *Interregnum*, *A State without Government*, and as it were, an Army without a General; yet becauſe Communities at their firſt uniting, before the Sovereignty hath been conferr'd, either on a ſingle Man, or on a Council, ſeem to bear the Semblance of Democracies [1]; and farther, ſince it is natural that all Perſons upon the Deceaſe of him to whom they committed their Guidance and Safety, ſhould take Care of themſelves; therefore an *Interregnum*, regularly ſpeaking, hath the Appearance of a kind of temporary Democracy: At leaſt ſo far, as that the Conſent of the whole People is to determine all Points, both in regard to the Adminiſtration of publick Affairs, and to the Creation of a new Prince; unleſs they are more inclin'd to introduce ſome other Frame and Conſtitution. And yet it is not properly a perfect Democracy; in as much as no Decree hath yet paſs'd to fix the Sovereignty in a Council of the whole People, by perpetual Right; and becauſe the Laws and publick Inſtitutions are ſtill adapted to monarchical Government. Tho' it may likewiſe happen, that when a Kingdom conſiſts of very large integral Parts, as ſuppoſe of diverſe Nations, Provinces, or great Cities, it ſhall, in caſe of an *Interregnum*, appear like ſome collective or *ſyſtematical* Form [2].

Hence 'tis evident in what ſenſe we are to expound that Aſſertion laid down by *Grotius* [b] and others, *That when a King dies without a Succeſſor, the Sovereignty returns to the People.* That is, altho' during an *Interregnum*, the ſovereign Authority may ſo far be ſaid not to be properly in the People, as that they have not receiv'd it in a formal manner, or by a perpetual Decree; yet they may in the mean time, either by themſelves, or their Delegates, exerciſe all thoſe Acts of Sovereignty, which appear conducive to their Safety and Preſervation. For thoſe Authors are manifeſtly in an Error, who aſſert, that upon the Extinction of the royal Family, the *Sovereignty* doth not return to the People, but only the Power of deſigning and chooſing a new King. As if, in the Caſe of an *Interregnum*, the People were neceſſarily obliged to conſtitute another Monarch! And as if they could not confer the ruling Power on a ſelect Council, and ſo make an Ariſtocracy; or, eſtabliſh the preſent Democracy, for a regular and ſtanding Government!

VIII. But thoſe States have conſulted their own Peace in the ſafeſt manner, which to avoid the Inconveniences uſually ariſing from an *Interregnum*, have ordain'd beforehand on what Perſons the chief Adminiſtration ſhall fall, when there happens to be a Vacancy in the Throne. And theſe, by whatever Names or Titles they paſs, whether of *Interreges*, Protectors, Regents, or the like, are temporary (or, as we may ſay, *proviſional*) Magiſtrates, who, by the Authority of the whole People, are to perform during the preſent Exigency, the Acts of the ſupreme Power; at leaſt ſuch as are neceſſary to hold the Community together; yet ſo as to be accountable for their Management to the People; which account the new King doth, as in the Name of the People, demand. The Power of theſe Officers, upon the Election of another Prince, or the ſetting up another Form of Government, preſently expires.

In thoſe Kingdoms where there are conſtant and perpetual *Senates*, yet ſuch as in the Lifetime of the Prince do not hold the ſovereign Authority; upon the Prince's Death, the Senate cannot, by any proper Right, claim that Authority which before they wanted. Yet 'tis moſt convenient, that in caſe of an *Interregnum*, the chief Adminiſtration of Affairs ſhall for that time be delegated to them; as they were before imploy'd by the King to aſſiſt him in his Counſels and his Cares. But then the Power which they exerciſe on this Occaſion, ſhall be ſuppoſed to be conferr'd on them by the Grant of the whole People. For whatever Authority they receiv'd from the King, as a Body of Magiſtrates, expires upon his dying without a Succeſſor [c]; and if they are allow'd to proceed in the Exerciſe of their former Function, the Privilege is not owing to the Commiſſion of the Prince, but to the Favour of the People [d]. And therefore they can hold their Power no longer than the Community pleaſeth; much leſs can they challenge a perpetual Sovereignty, or, by their own Authority, erect themſelves into an *Ariſtocratical* Body, or a ſelect governing Council. For 'tis the Prerogative of the Community, to eſtabliſh what Frame of Government they think fit; unleſs they have, by Oath, obliged themſelves to avoid ſome particular Conſtitution. *Dionyſius Halicarnaſſeus* [e] reports, that when the frequent Changes of the *Interreges* diſpleas'd the *Romans*, who ſeem'd thus to have brought a hundred Kings upon themſelves by getting rid of one, the Senate referr'd it to the Judgment of the People to put the Commonwealth into the hands, either of Kings, or of annual Magiſtrates; as ſhould ſuit beſt with their Inclinations. Tho' indeed we find the People returning the Complement, and leaving this Option to the Senate [f].

IX. To give farther Light to this Enquiry, it may be worth our while to examine the *Caſe* which Mr. *Hobbes* [g] puts, and the Iſſue of his Opinion upon it. *If*, ſays he, *the People aſſembled deliver the Sovereignty to one particular Man to hold, only during Life; and when they have ſo done, depart, without ordering any thing about the Place where they ſhall meet to make a new Election after his Death; they will be no longer one compound Perſon, but a looſe independent Multitude: In which it ſhall be*

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[a] L. 1. c. 17.

[b] L. 1. c. 3. ſ. 7. *Numb.* 2.

[c] *Vide* Conneſtag. *de Unione* Luſitan. *l.* 3. *p.* 116.

[d] *Add.* Bodin. *de Republ.* l. 3. c. 2. p. 417.

[e] *Vide* l. 2. & Liv. *l.* 1. *c.* 17.

[f] See the Hiſtory of the *Interregnum* in *Poland*, upon the Death of King *Sigiſmund in* Paul. Piaſec. *ad Ann. Chriſti*, 1632.

[g] *De Cive*, c. 7. ſ. 15, 16.

Mr. BARBEYRAC'S *NOTES on* §. VIII.

[1] See above in Ch. 5. S. 6.

[2] Upon this ſee above in Chap. 5. S. 16. See alſo a Diſcourſe of our Author's *De Syſtematibus Civitatum*, which is amongſt his Academical Diſſertations.

lawful for any Man to meet and conſult with any others, at any Time, and at any Place. Whence he concludes, that ſuch a Monarch is, by the Law of Gratitude, obliged to take Care that the State be not diſſolv'd upon his Deceaſe; either by fixing a certain Time and Place, when and where as many of the People, as think fit, may meet and form an Aſſembly; or elſe by nominating a Succeſſor, according as the Intereſt of the Commonwealth, ſhall ſeem to require. Now here Mr. *Hobbes* is in a Miſtake, whilſt he thinks, 'That the People, by departing from one Aſſembly, without appointing the Time and Place 'for another, do diſband and ſeparate into a 'diſorderly Multitude; applying it, as he doth, to thoſe who, in chooſing a King, have eſtabliſh'd themſelves into a regular and perfect State; and not to thoſe who have it ſtill under Doubt and Conſultation, what State or political Syſtem they ſhall introduce. For when a Multitude come together on the laſt account, and depart without agreeing to meet again, 'tis plain they are diſſolv'd *re infectâ*, and conſequently remain in the ſame divided independent Condition, in which they were before. But they, who have once incorporated themſelves into a regular Commonwealth, and have ſubjected themſelves to a King, have fix'd all their Fortunes in this Seat, and cannot be preſum'd guilty of ſuch a Folly as to deſire, that, upon the King's Deceaſe, the State ſhall likewiſe be extinct, and themſelves thrown into the natural Condition of Anarchy, not without manifeſt Danger of loſing the Security, which they enjoy under the preſent Eſtabliſhment. Therefore, if they have not conferr'd the Sovereignty on the Prince, with the Right of Inheritance, or with a Power to diſpoſe of the Succeſſion as he ſhall think fit, they muſt be ſuppoſed, at leaſt, to have tacitly agreed, that immediately upon the Prince's Death they will hold an Aſſembly, either at the uſual Place, or where the Prince kept his Court. Nor will there be wanting, in a whole People, ſome Perſons of great Authority and Worth, whoſe Influence will be able to keep the Multitude in good order, and to bring them as ſoon as poſſible to a general Conſultation, for ſettling the Commonwealth. Hence too it is evident, how far we are to admit of another Aſſertion of Mr. *Hobbes* [a], that *When a Monarch renounces and abdicates the Government for himſelf and Heirs, the Subjects return to their abſolute and natural Liberty.* For it can never be true in this Senſe, that the People, on ſuch an Occaſion, relapſe into a confuſed Multitude, without any Tye or Relation to each other; but only that they receive an abſolute Right of liſting and diſpoſing themſelves anew, under any Frame and Conſtitution.

X. In hereditary Realms there ariſeth ſome Semblance of an *Interregnum*, when the King dies leaving his Queen with Child, or, at leaſt under probable Hopes of Breeding. Now by the Conſent of moſt Nations, a Right may be transferr'd even on un-born Heirs, ſo as to give them the juſt Title and Property, tho' as yet incapable of the Uſe or Exerciſe [b]. But now, whereas there is a proper *Subject*, in which the ſupreme Authority reſides, there cannot be really an *Interregnum*. On which account neither the Minority, nor the Captivity of Princes create an *Interregnum* in the ſtrict Senſe of the Word. Yet as to the latter Caſe it hath been a frequent Practice in the World, for the Relations of a captive Prince to hold him for dead, and to proceed accordingly; whereas they ought rather to adminiſter the Government in his Name, 'till he ſhall return from his Impriſonment, or die under it [c]. Now altho', before the royal Iſſue be brought into the World, it cannot certainly be known whether the Child will prove alive or dead, a Son or a Daughter (in Nations where the fair Sex is excluded from the Crown) yet till this Point is clearly determin'd by time, the People can by no means challenge ſuch a Right, as they obtain in a proper *Interregnum*; but the Kingdom muſt, in the mean while, be govern'd in the ſame Method as is wont to be obſerv'd, during the Minority of a Prince [d].

XI. By the way of *Succeſſion* or Inheritance, the ſovereign Right which one Perſon hath obtain'd or receiv'd, is continued to his Poſterity. This Succeſſion [1] is appointed, either at the Pleaſure of the Prince, or at the Pleaſure of the People [2]. Thoſe Princes who poſſeſs their Realms after the manner of *Patrimonies*, have a Right to diſpoſe of the Succeſſion, according to their own Inclinations; and when they have once declared their Pleaſure in this Point, it ought no leſs ſtrictly to be obſerv'd, than the laſt Will of any Teſtator. And in this Caſe a King may divide his Dominions amongſt his Children by equal Portions, and without regarding the Difference of the Sex. Or if his legitimate Iſſue fail, he may tranſmit the Crown to his natural [a], or to his adopted Son; nay, if he thinks fit, to one no way related to his Family [b]. But when ſuch a Monarch hath made no Proviſion about the Succeſſion, it muſt then be conſider'd, what Perſon the common Courſe and Order of Nature calls to inherit the Throne. For though the Prince, in his Life-time, did neither by Teſtament, nor any other way, ſignify his Reſolution in this Affair; yet we muſt preſume, that he did by no means deſire the State ſhould upon his Deceaſe fall into Anarchy; common Humanity not ſuffering him to leave his Subjects in a Condition of Miſery and Ruin. Eſpecially ſince, if he purpoſely declin'd to make a future Settlement, it had been eaſy for him to have given the People Notice; ſo that, upon this Intimation they might have agreed on ſome Expedient for their own Security. Beſides, we ought in Reaſon to ſuppoſe, that Princes, as well as other Perſons, are unwilling that the Rights or the Poſſeſſions, which they have acquired, ſhould at their Deceaſe, either be imbezel'd, or left as it were to the firſt Taker; but that they would have them devolve entire to their deareſt Friends. Therefore when ſuch an Omiſſion happens in patrimonial Kingdoms, the ſame Order is to be obſerv'd as in private Inheritances; except ſo far as the Diſpoſition and Safety of the Nation made it adviſeable to recede from that Method. For although 'tis very likely, that a Father bears an equal Affection towards all his Children; yet if he be wiſe, he will ſo far moderate and reſtrain it, as not to weaken the hereditary Eſtate, on which the Security and Honour of a Family in a great meaſure depend: and he ſhall be preſumed to have taken this Reſolution, if he hath not expreſly declar'd any thing to the contrary. From theſe Conſiderations it follows, that ſuch a Prince as we are now ſpeaking of, is deſirous to have the monarchical Frame of Government preſerved after his Death; in as much as he ſhew'd his Approbation of it by his own Example, and did not afterwards reverſe, or alter it, by his Word or Deed. And farther, ſince Men are naturally inclin'd to wiſh beſt to thoſe, from whoſe Succeſs ſome Honour and Glory is reflected on themſelves, rather than on others; and ſince the Power of Children caſts the brighteſt Glory on Parents after their Deceaſe; it muſt be concluded, that a Father is more heartily concern'd for the Happineſs and Greatneſs of his own Iſſue, than of Strangers. If he had any other Deſign, he ought in expreſs manner to have declared it: ſince, commonly ſpeaking, we do not ſuppoſe a Man to have been ſo little Maſter of his Wits, as to deprive his Children of ſo fair an Advantage, and to leave it, as it were, on purpoſe to create Quarrels and Diſputes. But Mr. *Hobbes* is in the wrong, when, amongſt the Tokens which a reigning Prince may give of his Reſolution not to tranſmit the Crown to his Family, he reckons [c] for one, *long Cuſtom*, 'In as much as he who ſays nothing about his Succeſſion, is ſuppoſed to conſent to the ordinary Cuſtom of the Kingdom; which Cuſtom, whether it derives its Original from the primitive Founder of the Race, or from any of his Poſterity, hath in time paſs'd into the Force and Authority of a fundamental Law. But the Enquiry which we are now upon is, What Order is to be obſerv'd in the Succeſſion, when it is neither determin'd by the Appointment of the laſt Prince, nor by the Law or Cuſtom of the Nation? To proceed then, our *ſilent* Monarch muſt be preſumed to deſire, not only that the Kingdom ſhall preſerve its regular Frame, that is, that the Sovereignty ſhall not be divided into Shares amongſt his Sons, or near Relations, nor yet held in Common by them all, with equal Power; but likewiſe that the State ſhall not be parted into diſtinct Governments, and many Kingdoms introduced inſtead of one: In as much as either of theſe Alterations would draw after it, not only the exceeding great Hazard and Detriment of the Realm, but alſo the utter Convulſion of the royal Family. The next thing which, in this Caſe, muſt be preſumed to have been the Will of the Monarch, is, that notwithſtanding the Prerogative of Age, his Sons ſhould be preferr'd before his Daughters; becauſe Men are, for the moſt part much fitter to command, and the Government of Women is generally attended with a long Train of Inconveniences, which muſt needs be increas'd, if the Brothers are to be ſet aſide to make room for a female Sovereign. Another thing to be taken for granted on theſe Occaſions muſt be, that amongſt Children of the ſame Sex, the eldeſt is to be advanced rather than any of the reſt: and this not only, becauſe he is judg'd to excel the younger in Wiſdom, as well as in Years, but becauſe, if we conſider them with Relation to the Father, all Brothers are equal: And were the Crown to be beſtow'd on the moſt worthy of them, they could not avoid falling into irreconcileable Differences and Contentions. A famous Inſtance of which Truth we have in the Revolutions, that not long ſince happen'd in the Empire of the *Mogul*, deſcribed at large by Monſieur *Bernier*. To prevent therefore all ſuch Confuſions, it is the beſt and ſafeſt Method to follow the Order of Birth, which is embraced by the univerſal Agreement of all Nations, as a Rule which Nature her ſelf ſeems to have preſcribed [d]. Yet here it will be neceſſary, that the eldeſt Son, who is thus preferr'd to the Crown, take effectual Care for the honourable Subſiſtence and Support of his younger Brothers. But that he ſhould be obliged to make their Fortunes as large, as if the Kingdom were to have been divided into equal Shares, is both needleſs and indeed impoſſible. For let us ſuppoſe four Brothers; whence can the elder, who is to fill the Throne, procure ſo much

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[a] *Leviath.* c. 21.

[b] Hence the *Perſians*, when their Prince *Hormiſdas* died, leaving his Queen with Child, proclaim'd the unborn King, and crown'd him too, by fixing the Diadem on the Royal Burthen: Nay, they voted the Infant a particular Name, firmly believing it would be a Son. And this proved the great *Sapores*, ſo renown'd in Story. *Agathias*, l. 4. 10.

[c] *Vide*, Juſtin. *l.* 36. *c.* 1. *Trebell. Poll.* in *Gallien*. c. 1. We have a Story to this purpoſe in *Dion Caſſius*, l. 36. *Tygranes*, the *Armenian* Prince, had vaſt Treaſures, laid up in the fortified Places of *Sophene*. When *Pompey* demanded all his Wealth to be delivered up to him, by thoſe who had it in Charge. their Anſwer was, *That they would do nothing without expreſs Orders from their Maſter.* And when *Tygranes*, though againſt his Will, commanded them to open the Caſtles, they ſtill refuſed to comply, urging that the King laid this Injunction on them, not voluntarily, but through Compulſion. Yet they afterwards were oblig'd to deliver all up, when they found their Prince was ſeverely uſed, and thrown into Chains upon their Refuſal. *Demetrius*, being made a Priſoner by *Seleucus*, commanded his Son, with his Captains and Friends that were at *Athens* and *Corinth*, not to believe his own Writing or Seal, when they ſhould be ſhewn to them: But to keep for *Antigonus* his Towns, and the Remains of his Kingdom, as if he were actually dead. *Plutarch.* in *Demet.* p. 914. *D.*

[d] *Vide* Serran, *Hiſt.* Gall. *in* Philipp. Valeſ. *ab init.*

Mr. BARBEYRAC's *NOTES* on §. XI.

[1] *Vide* Grot. *l.* 2. *c.* 7. s. 12, 13.

[2] See Mr. *Budde*'s Diſſertation *de Succeſſione Primogenitorum*, *Sect.* 22. &c. and alſo that *De Teſtamentis ſummorum Imperantium, & ſpeciatim* Caroli. II. *de* Hiſpan. *Reg.* c. 1. ſ. 21, *&c.* ſee likewiſe *Sidney* upon Government, c. 3. *s.* 18. and Tom. V. of the *Reponſe aux Queſtions d'un Provincial* by Mr. *Bayle*, p. 138, *&c.*

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[a] Thus *Alphonſus*, King of *Arragon*, gave the Kingdom of *Naples*, which he had conquer'd, to his baſe Son *Ferdinand*: whereas others pretended, that it ought to have been united to *Arragon*, by the Arms and Wealth of which Nation it had been ſubdued. *Guicciardin.*

[b] *Add.* Juſtin. *l.* 41. *c.* 5. *n.* 10. where *Phraates* leaves the *Parthian* Empire to his Brother *Mithridates*, all his own Children being excluded.

[c] *De Cive*, c. 9. ſ. 15.

[d] Add. *Xenophon. Cyropæd.* l. 8. p. 139. Ed. *H. Steph.* in *Cyrus*'s laſt Speech.

Treaſure to pay the Portions of the reſt, as ſhall be equal in Value to three Parts of the Realm [a] ? If, in Monarchies of this kind, the Prince dies without Iſſue, his Brothers or Siſters are to ſucceed ; and upon Failure of theſe, the next in Blood to the deceas'd King ; with due regard ſtill to the Prerogative of Sex, and of Age. Nay the Government may, at length, devolve to thoſe who were actually related to the laſt Poſſeſſor, 'tho of a different Blood from the Author of the regal Line. And this, not only, if the deceas'd Prince thus declared his Will, but if, by the Cuſtom of the Country, the ſame Method of Succeſſion obtains in private Inheritances: for then, we muſt ſuppoſe, that the Prince would have the Cuſtom hold in regard to his own *Prtrimony* [b], as well as to thoſe of others, when he hath made no expreſs Diſpoſal to the contrary.

Mr. *Hobbes* ſeems to have carried this Point a little too far, when he tells us [c], *By the ſame way as the Sovereignty deſcends, the Right of Succeſſion likewiſe deſcends : For in caſe the eldeſt Son dies before his Father, he ſhall be ſuppoſed, unleſs the Father hath made any other Settlement, to tranſmit the Right of Succeſſion to his own Children ; and therefore the Nephews and Nieces ſhall ſooner come into the Succeſſion, than their Uncles by the Mothers* (he means by the Fathers) *ſide*. It cannot indeed but be acknowledg'd, that this Right of the Children to *repreſent* their Father and come into his place, looks very fair and equitable [d] ; and that his untimely Death ſhould not be the Cauſe of a new Loſs and Prejudice to them, ſeems to be but a reaſonable Favour. And yet, ſince the Son, during the Father's Life, hath not a full Right to the Inheritance, but only a juſt Hope and Expectation ; and ſince it doth not appear, that this bare Hope can be ſo well tranſmitted to Children, as the Right it ſelf might be ; we may with more probability conclude, that by the meer Right of Nature the Nephews have not the Precedency of their Uncles ; unleſs their Title is ſtrengthen'd and ſupported by the Laws or Cuſtoms of the Kingdom [e].

XII. But in Kingdoms which were firſt conſtituted by the voluntary Act of the People, the Order of the Succeſſion doth likewiſe originally depend on the Peoples Will. And if they expreſly confer on the Prince, not only the Sovereignty, but likewiſe the Right of nominating his Succeſſor (which is ſeldom done, unleſs upon a very extraordinary account) then he ſhall leave his Crown to whom he pleaſeth. But, if the People themſelves ſettled the Succeſſion, they either were willing to have it paſs in the uſual way of other Inheritances, ſo far as that Method can conveniently be applied to Kingdoms ; or elſe they appointed a particular Courſe, by which it ſhould be regulated and determin'd. Now the Safety of the State requires, that the Succeſſion of a Kingdom, *ſimply Hereditary* (or where it is barely appointed that the Crown ſhall paſs from each Prince to the next of his Kin) ſhould vary from the Order and Method of private Inheritances [f], chiefly in the following reſpects. *Firſt*, That the Kingdom ſhall not be divided amongſt ſeveral Brothers, or other Joint-heirs [g], equally diſtant in Blood from the deceas'd Prince. In as much as this Prohibition is highly conducive to the Agreement of the Subjects, and to the Support of the Nation and Government. *Secondly*, That the Succeſſion ſhall ſtop at thoſe Perſons who are deſcended directly from the Monarch ; and not paſs to the collateral Line, much leſs to the Degrees of Affinity [h]. For the People, by their primitive Grant, deſign'd only to confer the Kingdom on ſuch a Perſon and his Poſterity ; upon Failure of which they again recover the Right of ſettling the Commonwealth, as they judge convenient. *Thirdly*, That no Perſon ſhall be capable of *ſucceeding*, but ſuch as are born according to the Laws of the Country. By which Caution are excluded *natural* or *baſe* Sons, however they ſtand in the Father's Affection, who may perhaps equal them to his legitimate Iſſue. For in thoſe Nations at leaſt, which have any Honour or Spirit, ſuch Men muſt lie open to Contempt, whoſe Mothers were not thought worthy of legal Matrimony, and were uſed rather for occaſional Inſtruments of Pleaſure, than for agreeable Companions of Life. Beſides, ſince the Ladies of that Profeſſion are ſeldom famous for Conſtancy and Fidelity, and ſince they want the Advantage of a fix'd Cohabitation, it cannot ſo very certainly be known, whether the Prince be really the Father of this unworthy Progeny, which they charge upon him. But now 'tis highly expedient, that the Perſon of a King ſhould be awful and venerable, and as little as poſſible expoſed to Controverſy and Doubt [i]. For which reaſon, 'tis the Cuſtom in ſome Nations for the Queen to be *deliver'd* in an open Chamber, to take off all Suſpicion of a ſuppoſititious Birth. And we read that Queen *Conſtance*, Mother of *Ferdinand* the Second, was brought to Bed of him, when ſhe was paſt Fifty Years old, in a Pavilion erected in a moſt publick Part of the City, before a large Aſſembly of the Nobility of both Sexes [k]. *Adopted* Sons come likewiſe under this Rule or Excluſion; as well becauſe to be deſcended from the true regal Line makes a Prince more reſpected, and fills the Subjects with better Hopes, that he will reſemble his great Anceſtors, no leſs in Virtue than in Blood; as becauſe the People originally conferred the Crown on the immediate Race of the firſt Poſſeſſor; deſigning, when that ſhould prove extinct, to reſume the Power of ſettling the Government for the future. But allowing Adoption to give a Right to the Kingdom, this Power of theirs might be for ever foreſtall'd and eluded. *Fourthly*, That in the ſame Degree of Kindred, whether amongſt the Children or the Grandchildren of the laſt Monarch, the Males ſhall be preferr'd to the Females, tho' the latter happen to be their Superiors in Age [a]. *Fifthly*, That in the ſame Degree, and the ſame Sex, the Advantage ſhall be given to the Elder [b]. *Laſtly*, The Succeſſion of ſuch Realms differs from the Courſe of vulgar Inheritances in this, that altho' they are deliver'd, as it were, *from hand to hand*, and do not devolve to a new Poſſeſſor, 'till the Death of the former; yet of theſe Perſons, the one is the *Occaſion* only, and not the proper Cauſe of tranſmitting them to the other; whereas common Inheritances paſs to a *new* Proprietor by the Right, and Will, and the Favour of the *laſt*. For 'tis not the Pleaſure of the Prince, under theſe Governments, which beſtows the Crown on the next Wearer; but it deſcends in the royal Line, by virtue of the original Act and Conſtitution of the People. And for the ſame reaſon it is not neceſſary, that the Prince who ſucceeds, though the neareſt in Blood, ſhould take upon himſelf the private Affairs, Incumbrances, and Debts of the deceas'd. But, if he thinks fit, he may take Poſſeſſion of the Kingdom, and refuſe the Inheritance of the private Patrimony [1], to which that nobler Right of the Crown is by no means inſeparably united; but is of it ſelf an entire, diſtinct, and tranſcendental Inheritance. For the People muſt be ſuppoſed willing to have the Crown deſcend by a clear and unqueſtion'd Title; but as for the peculiar Eſtate and Fortune of the Prince, they are not in the leaſt concern'd or affected with it. Beſides, it might prove a Burthen to the Nation, were the royal Heir, at his Entrance on the Government, obliged to diſcharge ſuch Debts as his Predeceſſor perſonally contracted; ſince in Caſe the private Patrimony would not hold out, the Deficiency muſt be ſupplied by the publick Stock. To conclude, the chief Reaſons which move any People to eſtabliſh ſuch an Order of Succeſſion, as we have been all along deſcribing, ſeem to be theſe: That the Throne may be fill'd without any Controverſy or Doubt; and the Inconveniences of new Elections avoided: that the Splendor of the Prince's Birth may increaſe his Reſpect, and his Race and Education give the Promiſe of more illuſtrious Virtue; and that the reigning Monarch may ſtill govern the Kingdom with more Vigilance, and defend it with more Courage, whilſt he is to deliver it down to thoſe Perſons, who on the Score of natural Affection, are the deareſt to him in the World [c].

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[a] *Add.* Bœcler *ad* Grot. *l.* 2. *c.* 7. *ſ.* 13.

[b] V. *Grot.* L. 2. c. 7. ſ. 11. n. 2.

[c] *De Cive*, c. 9. ſ. 19.

[d] See above in B. 4. c. 11. ſ. 12.

[e] *Add.* Bodin. *de Repub.* l. 6. c. 5. p. 144. *&c.*

[f] *V.* Grot. *d. l.* ſ. 14, *&c.*

[g] This is a Remark which the Hiſtorian *Juſtin* attributes to the Soldiers of *Dionyſius*, Tyrant of *Sicily*, who after the Death of that Prince, advanced to the Throne *Dionyſius* his Eldeſt Son. *Extincto in* Sicilia Dionyſio *Tyranno, in locum ejus Milites maximum Natu ex filiis ejus, nomine Dionyſium ſuffecere ; & naturæ jus ſecuti, & quod firmius futurum eſſe regnum, ſi penes unum remanſiſſet, quam ſi portionibus inter plures filios divideretur, arbitrabantur.* Juſtin. Lib. XXI. Cap. 1.

[h] *Add.* Bœcler *ad* Grot. l. 2. c. 7. ſ. 15.

[i] See a famous Inſtance of this in *Martinius*'s Hiſtory of *China*, l. 6. c. 1. p. 202. When *Perſeus* and *Demetrius* diſputed which ſhould ſucceed *Philip*, it was urged on behalf of the latter, that although he was the younger of the two, yet he was born in honeſt Wedlock, whereas *Perſeus*'s Mother was only a Miſtreſs of the King's : and that, for Evidence of this Diſtinction, *Perſeus* had no Mark of *Philip* in his Body, whilſt *Demetrius* exactly reſembled his Royal Father, *Livy*, l. 39, c. 53. Add the Story of *Ferdinand* King of *Naples* in *Paul. Jov.* Hiſt. *Neapol.* l. 2.

[k] *Pandulf Collenut.* Rer. *Neapol.* l. 4.

XIII. But ſince, in this way of Succeſſion, which we call *ſimply hereditary*, it may eaſily happen amongſt Perſons, far remov'd from the Author of the Race, that it ſhall not be clearly known which of the many ought to be preferr'd, if the Crown fell thus abſolutely to him who was next in Blood to the deceas'd Prince; eſpecially ſince the Favour of *Repreſentation* (or of letting the Children *repreſent* their Parents in *Right*) quite vaniſheth in theſe diſtant Degrees: to prevent any ſuch Controverſy, many Nations have introduced a more accurate Succeſſion, which they term *lineal* [2]. Now according to this, all the Deſcendents of the royal Founder are conceiv'd to form a Number of perpendicular Lines, each of which approacheth nearer to the Throne, according as the Perſons, in the ſame Degree, ſtand poſſeſs'd of thoſe natural Advantages, the Prerogatives of Sex and of Years. And the Kingdom ſhall not paſs into another Line, till the former is quite exhauſted and extinct. It is needleſs therefore for perſons in this Liſt of Succeſſion, to ſhew in what Degree they are related to the laſt Poſſeſſor, or to appeal to the Right of *Repreſentation*; but according as they are born, the Law gives them a perfect Right of inheriting, in their proper Order: which Right, tho' they ſhould happen themſelves not to wear the Crown, they tranſmit in the ſame Order to their Children. Here then the firſt regard is to be paid to the Children of the deceas'd Prince, and not to the living only, but to the dead, in caſe they have left Iſſue in any Degree whatſoever; for ſuch Iſſue ſhall exclude all others, if their Parents were the neareſt lineal Heirs: yet ſo as ſtill to allow, in the ſame Degree of the ſame Line, a due Preference firſt to the Advantage of Sex, and then to that of Age. (For that the bare Prerogative of Age ſhould out-weigh and overrule the Prerogative of Sex, can perhaps be inſtanc'd in no Example of Hiſtory.) If

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[a] *Add.* Bœcler *ad. d. l.* Grot. *s.* 17.

[b] Thus *Perſeus* urgeth againſt his Younger Brother *Demetrius*, Competitor with him for the Crown, 'That he endeavour'd to invert the Order of Age, of Nature, of the Cuſtoms of *Macedon*, and of the Laws of Nations. *Livy.* l.40. c. 11.

[c] The *Perſians* had a very extraordinary Cuſtom, by which One ey'd Perſons, and thoſe who labour'd under any other Corporal Blemiſh were excluded from the Crown. *Procop.* de B. *Perſ.* l. 1. c. 11.

Mr. BARBEYRAC's *NOTES* on §. XII, and XIII.

[1] This is *Grotius*'s Opinion, Lib. II. Cap. VII. Sect. 19. *Gronovius* in his Note upon this place finds fault with his incomparable Author, but without the leaſt appearance of Reaſon. *Grotius* is ſpeaking only of what a Prince has borrowed, or owes upon any other Account whatſoever, not as Head of the State, but as a private Perſon; ſo that his own private Patrimony which he poſſeſſes independent of the Crown-Lands, are as it were mortgaged for the Payments of ſuch Debts and Incumbrances. Whereas all *Gronovius*'s Reaſons only prove, that a Succeſſor is obliged to diſcharge all Debts and Incumbrances that were contracted by his Predeceſſor as Head and Governour of the People, and for the Occaſions of the State, as could eaſily be proved, if the Thing were not evident to any one who with never ſo little care will examine that Note. Now this is what *Grotius* does not deny: On the contrary he confirms it himſelf ſufficiently at large in Chapter XIV. of the ſame Book, Sect. 11, 12. See what our Author ſays after him, Book VIII. Chap. X. Sect. 8.

[2] See *Grot.* B. 2. c. 7. ſ. 22, 23.

the laſt Poſſeſſor dyed childleſs, the account paſſeth back to the next Line above him, and ſo on; ſtill *aſcending* from the *deceas'd*; and not *deſcending* from the firſt *Progenitor*: with the ſame Allowance as before to the two Prerogatives of Nature.

The two Species of *lineal* Succeſſion, commonly aſſign'd, are what they term *cognatical*, and *agnatical* [1]: The former kind which, on account of its being receiv'd in the Kingdom of *Caſtile*, goes likewiſe by the Name of *Caſtilian*, hath its Peculiarity in it, that in the ſame Degree of the ſame Line, the younger Males are preferr'd to the elder Females; yet ſo as that no Tranſition is made from one Line to another on the bare Obſtacle of Sex. Thus it doth not exclude the Women, but poſtpones them to the Men; and runs back to the Female again, in caſe the Males, who were ſuperior or equal to them in other reſpects, ſhall happen to fail together with their Iſſue. By Conſequence therefore, a Granddaughter by a Son comes before a Grandſon by a Daughter, a Niece by a Brother before a Nephew by a Siſter. The other kind of lineal Succeſſion, or the *agnatical*, differs from this, in that it excludes from the Crown, the Females and their Deſcendents for ever. A Cuſtom which ſeems chiefly to have been taken up, to hinder the Kingdom from paſſing by Marriage to Strangers; and to maintain the antient Stock in its due Veneration, which might be in danger of growing weak and deſpicable, by ſuffering ſo many foreign Graffs. This is commonly known by the Name of *French Succeſſion*, having long obtained in that Nation. In ſome places the *agnatical* Method is temper'd with this Reſerve, that in caſe all the Male Line fails, the Right returns to the Females [a].

We may remark in general of lineal Succeſſion, that ſince 'tis ſo very plain and eaſy, it might be a principal means of deciding Controverſies in Kingdoms, to enquire firſt of all, what kind of Succeſſion hath been there by Cuſtom eſtabliſh'd. A remarkable Inſtance of this the Hiſtory of the laſt Age preſents us with in the Diſpute about the Succeſſion to the Crown of *Portugal*; when *Raynutius* of *Parma* ſtood on the Right of *lineal*, the other Competitors on the Right of *ſimple* Inheritance [b].

XIV. Another Method of Succeſſion [2] may be introduc'd, by Virtue of which he ſhall always ſtand neareſt to the Crown, who is neareſt to the Founder of the royal Family. Thus then the Founder's Sons are the firſt in the Liſt, according to their Age; next to them his Nephews, with regard ſtill to their Father's Age, and to their own: upon Failure of all theſe, the Founder's Grandſons come in, then his Grand Nephews, and ſo on. This was the Courſe obſerv'd of old in *Numidia*, as we may gather from *Livy* [c]. The like is practis'd in the Kingdom of *Siam* [d]; and hath been in *Fez* and *Morocco* [e]: as it was heretofore amongſt the *Curacs*, or petty Kings in *Peru*, under the Empire of the *Yncas* [f]. Thus in many Parts of the Eaſt *Indies*, eſpecially on the Coaſts of *Malabar*, 'tis the Cuſtom for the Father to be ſucceeded not by his own Son, but his Siſter's Son: the People fanſying themſelves to have more evident Proof, that the latter is of the royal Blood [g]. In *Hiſpaniola*, the Nephews by the Siſter are admitted for the ſame Reaſon; tho' not till the direct Line fails [h]. And amongſt other *Indian* Nations, in that Neighbourhood, even in private Inheritances, the preſent Poſſeſſor prefers his Siſter's Children to his own; excepting the Family of the *Yncas*, where the Son conſtantly ſucceeds the Father [i]. The ſame Rule is follow'd in *Canada*, with regard to Honours as well as to Eſtates [k]. *Strabo* [l] reports a very ſtrange way of Succeſſion amongſt the *Chatramotitæ*, a People of *Arabia*. *The Crown paſſeth*, ſays he, *from the preſent Poſſeſſor, not to his Son, but to the firſt Nobleman that was born in his Reign. For as ſoon as every new Monarch is ſettled in the Government, a Liſt is taken of all the Wives of the Nobility, who appear then to be with Child; and Keepers are ſet over them to obſerve which Lady is firſt brought to Bed of a Son: and the Child which thus gets the ſtart is declared lawful Heir, and educated in a royal Manner againſt the next Vacancy in the Throne.*

XV. 'Tis a Queſtion uſually canvaſs'd, who ſhall be judge of the Controverſy between two or more Competitors for a Crown; eſpecially if the Kingdom be not patrimonial [3]? For to try out an uncertain Title by the Sword, is a manifeſt Breach of the Law of Nature. Here then it is evident, in the firſt place, that Diſputes of this kind cannot poſſibly be determin'd in the way of Juriſdiction, or proper Sovereignty; and that therefore they muſt be left to that Method of Deciſion, which holds amongſt Perſons living in a State of natural Liberty, in ſubjection to no judicial Authority [4]. In which Senſe we ought to underſtand what *Grotius* [m] hath deliver'd on this Point. Now

Mr. BARBEYRAC's *NOTES on* §. XIV, and XV.

[1] Theſe Names come from the Words *Cognati* and *Agnati*, the former whereof ſignifies the Kindred by the Mother's ſide; the latter, the Kindred by the Father's ſide. The latter only inherit the Crown by an *Agnatical* Succeſſion, but one or other may obtain it by a *Cognatical* Succeſſion.

[2] *Vid.* Grot. l. 2. *c.* 7. *s.* 24.

[3] The beſt way is to refer it to an Arbitrator that is of the ſame Royal Family. *De Offic. Hom. & Cive.* l. 2. c. 10. ſ. 12.

[4] If then the King or People, find that either of the Competitors refuſes to make uſe of ſuch amicable Methods of deciding Controverſies, as are practis'd by Perſons living in a State of natural Liberty, and that he endeavours to involve the Commonwealth in Civil Wars, only to gratify his own Ambition; they may certainly bring him to reaſonable Terms by forcible means, tho' the Determination be not in the way of Judicial Sentence. If *Gronovius* had minded that, he would not have thrown away ſo many Words in cenſuring his incomparable Author, on whom he puts a wrong Conſtruction in his Note upon Lib. II. Cap. VII. Sect. 27. for I doubt not but that *Grotius* ſuppos'd what I have juſt now ſaid. I likewiſe find that Mr. *Hertius* takes Notice pretty near of the ſame Thing in his *Notes*, which were publiſh'd almoſt at the ſame time of the firſt Edition of *mine*.

[a] *Vide* Guicciardin. *l.* 12. *p.* 367.

[b] *Vide* Conneſtag. *de Unione* Luſitan. *l.* 3.

[c] L. 29. c. 29.

[d] Jodoc. Schouten *in Deſcript. Regn.* Siam.

[e] Thuanus *l.* 65. *ad Ann.* 1578. & Conneſtag. *de Unione* Luſitan. *l.* 1. the laſt of which Authors ſeems to hint, that this proceeded from a particular Compact between the Brothers.

[f] Garcilaſſ. de la Vega, *l.* 4. *c.* 10.

[g] Petrus de Valle, *Itin.* Par. III. Epiſt. 6. & *Hieron. Oſorius*, in ſeveral Places of his Work.

[h] Franc. Lopez *de* Gomora, *Hiſt.* Ind. *Occidental.* c. 28.

[i] *Idem* c 12.

[k] Franc. Creuxius *Hiſt.* Canad. *l.* 1.

[l] L. 15. p. 528. Ed. *Genev. Caſaub.*

[m] L. 2: c. 7. ſ. 27.

thoſe are ſaid to live in a State of Nature, who are neither ſubject one to the other, nor both to a common Lord. And tho' the *Parties* themſelves may perhaps, whilſt they are contending, acknowledge a Sovereign; yet the *Cauſe* is of ſuch a Nature, as not to bear the Sentence of any Perſon under the Notion of a Superior. Firſt, a Foreigner cannot pretend to interpoſe as a Judge. Nor, Secondly, is the King himſelf, if the Controverſy happen'd to be ſtarted in his Life-time, a ſufficient Arbitrator; in as much as the People, in theſe Monarchies which we now ſpeak of, are not ſuppoſed to have left the Method of Succeſſion to the Pleaſure of the Prince. Not but that we have many Examples in Hiſtory of Kings, who relying on their own Authority and Worth, have aſſumed greater Power in this reſpect, than the Conſtitution of free Kingdoms would otherwiſe allow. Thus *Darius* in *Herodotus* [a], decides the Quarrel between his own Sons: And in *Plutarch* [b], *Arſicas* and *Cyrus* ſubmit to their Father's Determination [c]. And laſtly, it may be maintain'd, that neither the People themſelves can have ſuch a Competition in an authoritative manner. Yet not for the Reaſon aſſign'd by *Grotius*, *becauſe the People have transferr'd all their Juriſdiction to the King and royal Family, and therefore can claim no Reliques of it for themſelves, whilſt any of that Line ſurvive.* For Succeſſion in ſuch a Caſe doth not belong to that Juriſdiction, which the People conferr'd on the King: And if a Quarrel of this kind ſhould ariſe during an *Interregnum*, the People cannot be debarr'd, at leaſt, from a temporary Juriſdiction. But the true Reaſon muſt be drawn from the Nature of theſe Diſputes. For the Effect of judicial Power, as exercis'd over Subjects, is, that they ſhall be obliged to acquieſce in the Sentence given, and upon Refuſal, ſhall by virtue of the ſovereign Authority be compell'd to ſubmit. And this, becauſe 'tis one part of civil Subjection, to expect from their Superior the Deciſion of any Controverſy that may happen between them and their Fellows. But now, if we run over all the various Doubts which may be rais'd on the Point of Succeſſion, we ſhall find that not one of them is capable of being ſolv'd by the People, in the ſame commanding manner, as the Cauſes of private Perſons are ended by the Ordinary Judge. For ſuppoſe a Prince already ſettled in the Throne, with the Approbation of the People, ſhould have a Claim put in againſt him by another of the royal Family, who pretends to be the nearer Heir: In this Caſe, the People having acknowledged the Prince in Poſſeſſion, it cannot be imagin'd, that the new Claimant will appear, or ſtand to their Verdict. Nor, on the other ſide, will the Poſſeſſor of the Throne ſubmit to be judg'd by thoſe who have already own'd him for their Sovereign. Much leſs have the People a ſufficient Power to give Judgment, when they refuſe to own the Perſon who puts in his Pretenſions. But if, upon a Vacancy in the Throne, two Competitors offer themſelves, and engage in a Diſpute about their Title, and the People only ſtand ready to receive him for their Prince, who ſhall have the better Right; there is here no need of *Judgment* properly ſo call'd, or ſuch as is given by the Sentence of the Court, to compoſe Matters between private Men. For in this Caſe the controverted Point muſt be one of theſe two; either barely, which of the Rivals ſtands in the neareſt Degree, or elſe which Degree ought to have the Preference? When the former happens to be the Queſtion, the contending Parties are to clear their Deſcent as well as they are able; and he who ſhall appear to the People to make out his Claim moſt evidently, ought to carry the Day. Now tho', in this Method of proceeding, the People's Vote weighs conſiderably towards turning the Scale, yet it is not pronounced like a Sentence from the Tribunal, but only in the way of a bare Approbation; as a Debtor who is ready to pay, deſires only to ſee the Bill, and to ſatisfy himſelf in the Truth of what he is charged with.

But if the Diſpute be, which Degree or which Line ought to have the Preference, this ſhall be adjuſted by the common Declaration of the People, ſince every one is preſumed to underſtand what way he likes beſt; and ſince the *People* is ſtill reckon'd the ſame as it was heretofore, when the Order of Succeſſion was originally eſtabliſh'd. Thus the Controverſy between *Edward* King of *England*, and *Philip Valois*, as likewiſe that which happen'd before between *Jane*, Daughter to *Lewis Hutin* and *Philip* the *Long*, was diſcuſs'd before an Aſſembly of the Eſtates of *France* [d]. Thus we find in *Mariana* [e] nine ſelect Judges ſettling the Succeſſion in the Kingdom of *Arragon*. And in *Dionyſius Halicarnaſſ us* [f], the People end the Differences between *Sylvius* and *Iülus*, in favour of the latter; chiefly on this Argument, *That he was born of a Mother who had been the true Heireſs of the whole Kingdom.* And yet, this Declaration hath no more of the Nature of a judicial Sentence in it, than when a Perſon, who hath firſt conferr'd a Grant, afterwards explains ſome Terms that were thought ambiguous or obſcure in the Inſtrument of Donation.

In Caſe either of the Competitors ſhall repreſent it as a Grievance, that the Affections of the People ſeem prejudiced in favour of his Rival, it may be the moſt ready Expedient to refer the Conteſt to proper Arbitrators; ſuch as are neither inclin'd to one Party more than to the other, and in regard to whoſe Intereſt, 'tis an indifferent Matter which of the Two gets the Victory [g].

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[a] Polymnia, *init.* Yet *Juſtin* (l. 2. c. 10. n. 9, 10.) reports that the Cauſe was referr'd by the Conſent of the Brothers to their Uncle *Artaphernes* as to a *Domeſtical Judge.*

[b] Artaxerx. *init.*

[c] Add 1 *Kings* i. 5, *&c.*

[d] See the *French* Hiſtorians, and *Polydor. Virg.* Hiſt. of *Engl.* l. 19. *init.*

[e] Hiſt. *Hiſpan.* l. 20. c. 2, 3.

[f] L. 1.

[g] *Vide* Conneſtag. *de Unione* Luſitan. *l.* 3. *&* 5. The moſt uſual Controverſies that occur on this Head, ſee in *Grotius*, l. 2. c. 7. ſ. 28, *&c.* Arniſæus *Relect. Polit.* l. 2. c. 2. ſ. 10, *&c.* and in other Authors.

CHAP. VIII.

The Supreme Power is to be held Sacred in Civil States.

I. *The ſupreme Power not to be reſiſted in lawful Commands.*
II. *Whether a Private Member can ſuffer Injury from the State.*
III. *Subjects very prone to unjuſt Complaints againſt their Governours.*
IV. *How many ways a Sovereign may injure his Subjects.*
V. *Whether in the Caſe of grievous Injury and Oppreſſion a lawful Prince may be reſiſted.*
VI. *The Name of a Tyrant does not juſtify the uſe of Violence in the Subject.*
VII. *Grotius's Opinion.*
VIII. *No Princes are to be held ſacred, but ſuch as are truly inveſted with royal Authority.*
IX. *In what Caſe an Uſurper may be acknowledg'd for a lawful Prince.*
X. *How far the Commands of an Uſurper oblige the Subjects, while their lawful Sovereign is alive, tho' in an exil'd condition.*

I. AS civil Empire, or Sovereignty, was firſt introduced to guard the Safety of Mankind, and to take off the almoſt infinite Miſeries of a State of Nature, ſo that it be held ſacred and inviolable by all Men, is highly the Intereſt of the whole World[a] [1]. And thus much indeed every Man in his Wits will confeſs, that 'tis a Sin to oppoſe a lawful Ruler, whilſt acting within the Limits of his Authority. In as much as it appears evidently from the Nature and Deſign of Government, that there muſt of Neceſſity be join'd with it an Obligation to Non-reſiſtance; or to a ready Obedience in performing or omitting any thing, which it ſhall command or forbid. The main Queſtion therefore muſt be, whether in caſe the Sovereign ſhould enjoin the Subjects what is unlawful, or treat them in an injurious manner, he is then alſo to be eſteem'd *Sacred*; and ſo, that the Subjects ought not in a violent way to reſiſt and repel the Injury?

II. Mr. *Hobbes*[b] indeed maintains, that *A State cannot do Injury to a Subject, as neither can a Maſter to his Slave.* And he builds his Notion on this Argument, 'That no Covenant hath paſs'd between the State and the Subject (all Injury, according to him, conſiſting in the Violation of a Covenant) and that the Will of the Subject is entirely ſubmitted to the Will of the State; ſo that whatſoever the State acts is ſuppoſed to be done with the Subject's Conſent. But now that what a Man willingly conſents to receive, can be no Injury to him, is a Maxim that every Body is acquainted with. But we have already evinced[2], both that Injury doth not barely conſiſt in the Violation of a Covenant, and that there doth really a Covenant[3] paſs between the Monarch and his Subjects. And as for Subjects ſubmitting their Will to the Will of the State, this muſt be interpreted and reſtrain'd according to the true End and Deſign of civil Communities; and then the whole Matter will come to this Iſſue: Every Subject ſubmits his Will to the Will of the State in all thoſe Affairs which reſpect the common Intereſt and Safety; and in any Buſineſs of this kind a private Member cannot complain of Injury, tho' he ſhould happen to diſlike the publick Proceedings. But ſince it is very poſſible, that the ſovereign Power may enjoin the Subject ſuch Performances, or inflict on him ſuch Evils, as bear no regard to the publick Welfare, but intrench on the particular Perſon's Right, whether acquired by Covenant, or by the univerſal Law of Humanity; there appears no reaſon why we ſhould not affirm that a private Member is capable of being *injur'd* by the State, to which he belongs.

III. But here it ought well to be conſider'd, that turbulent and querulous Subjects are wont to cenſure many Actions of their Prince as Injuries, which are by no means ſuch. Every thing is by them condemn'd for Oppreſſion and Miſmanagement, that doth not exactly ſuit with their private Judgment. Now as the great Variety of Mens Inclinations and the Irregularity of their Aims and Wiſhes, make it impoſſible that the publick Adminiſtration ſhould be equally grateful to all Perſons; ſo he who exclaims againſt all Proceedings as injurious, which do not hit his particular Humour, is either contriving to overthrow the Conſtitution, or hath a Mind to be tampering in the Government himſelf. The laſt is the Caſe with many Murmurers; who are diſcontented only becauſe the Commonwealth is not in their own Hands. Of this Number was *Avidius Caſſius*[c], who boaſted that he took up Arms againſt *Marcus Antoninus*, becauſe he was diſpleas'd at the Prince's Greatneſs, and *could not bear the Name of an Emperor*. The ſame Pretence was made uſe of by *Peſcennius Niger*[d], and by *Clodius Albinus*[e], in their Rebellions againſt *Severus*. Many complain of their Prince for imploying bad Miniſters; when if we ſearch into the Bottom of their Diſcontent, we ſhall find it to be only that they are not themſelves preferr'd to a Share in the Miniſtry. The common People often grumble at the Hardſhip of Taxes, when no more is demanded than what the preſent Occaſions of the Publick, or ſuch Neceſſities as are likely to ariſe hereafter, ſeem to require. And what Anſwer they ought to receive, Mr. *Hobbes* [a] will inform us. As for the ſtrict and ſevere Execution of the Laws, no Perſon can make this the Ground of his Diſſatiſfaction, but ſuch an one as deſires a Liberty of committing Wickedneſs. After all, in caſe any Man looks on thoſe Burthens as intolerable, which the Affairs of the Commonwealth make neceſſary, he hath the Privilege of quitting the State. And if he is not inclined to make uſe of that Privilege, he hath nothing to blame but the common Condition of Mankind, who are not to expect in this World any Degree of pure and untainted Felicity. But ſhould he think it allowable for him, on this account, to rid himſelf of the lawful Government by violent means; 'twere the ſame thing, as if he ſhould reſolve to improve his Fortune by Rapine and Theft, becauſe he thinks it a Hardſhip to maintain himſelf by his own Induſtry and Labour.

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[a] *Add.* Diodor. Sic. *l.* 1. *c.* 90.
[b] *De Cive*, c. 7. ſ. 14. & c. 8. ſ. 7.
[c] In *Vulcat. Gallican* c. 1.
[d] In *Ælian Spartian.*
[e] In *Jul. Capitolin.*

Mr. BARBEYRAC's NOTES *on* §. I, and II.

[1] V. *Grot.* l. 1. c. 4. ſ. 2. And two *Latin* Diſcourſes of Mr. *Noodt*'s Publiſh'd in *French* by Mr. *Barbeyrac* in the beginning of the Year 1707, Entituled, *Du Pouvoir de Souverains, & de la Liberté de Conſcience*, at *Amſterdam.*

[2] In the ſeventh Chapter of the firſt Book, *Sect.* 13.

[3] See above in the ſecond Chapter of this Book, *Sect.* 8, *&c.*

IV. Tho' all this muſt be acknowledg'd to be true; yet there is no doubt, but that a State, or the ſovereign Ruler of it, may do an *Injury* to a private Subject: Since here the Parties are both under the ſame common Law of Nature at leaſt, which is ſufficient to make them capable of being *injured* one by the other. Now a Sovereign may be conceiv'd to *injure* his Subjects two ways, if in his Dealings with them he violates either the Duty of a *Prince*, or the Duty of a *Man*; that is, if he either treats them *not as Subjects*, or *not as Men.* The Duty of a Prince reſpects either the whole People, or particular Perſons. Thus much a Prince owes to the whole People, that he procure the Good and Safety of the Community, either by his own Judgment, in caſe he be abſolute, or if his Power be limited by Laws, according as thoſe Laws ſhall direct and preſcribe. Therefore he *injures* the whole People, if he quite throws off all Care of the Government, in his own Perſon, and doth not ſo much as ſee that the publick Buſineſs be diſpatch'd by his Miniſters. As for Inſtance, if he ſhould neither undertake the Defence of the Kingdom againſt foreign Enemies, nor by a due Execution of the Laws ſecure its inward Peace; and yet, in the midſt of all this Neglect, ſhould continue to enjoy the Title and Revenues, and ſhould judge the Greatneſs of a Prince to conſiſt in the unbounded Extent of his vicious Pleaſures. For if, together with the Adminiſtration, he lays aſide the Honours and Profits of the regal Office, he ſhall be ſuppoſed to have plainly abdicated the Government. Which Privilege of reſigning the Crown ought to be allow'd him, unleſs he hath firſt, by evil Counſels, put the State under great Difficulties, and then would deſert it in the midſt of its Danger. And this muſt be own'd for a manifeſt Injury, thus to diſcharge no part of a Duty, and yet to deſire the Reward and Advantage of it. But it will be a much greater Injury, ſhould he with hoſtile Intentions directly endeavour to overthrow the common Safety, and put on the Perſon of an Enemy, which cannot poſſibly conſiſt with the Perſon of a Sovereign [1]. But ſuch a Caſe as this can never happen, where a Prince is Maſter of his own Reaſon. For who, in his Wits, would ruin what belongs to himſelf [2]? Or where will *he* meet with *Subjects*, who uſeth them as *Enemies?* Yet indeed, if he happens to enjoy two Kingdoms at once, 'tis poſſible that he may ſeek the Deſtruction of the one, to advance the Intereſt and Greatneſs of the other [3]. But we have an Inſtance even of the former Madneſs, in the Story of a certain King of *Peru*, in the laſt Age, who by the Practice, as 'twas reported, of ſome Magicians, was poſſeſs'd with ſo utter an Averſion to his Subjects, that he took up a Reſolution to make them all away; and in order to this, commanded that no Perſon, under Pain of Death, ſhould till the Ground for the ſpace of Three Years. Which occaſion'd ſo grievous a Famine, that the People murther'd each other for Food [b]. Again a Prince injures the Community, if he ſubverts the fundamental Laws without the Conſent of the People, and upon no urgent Neceſſity; or if he go about to change the manner of holding the Government. As likewiſe, if he ſhould ruin the publick Patrimony; or if, by impoſing greater Tributes than the Occaſions of the State require, he ſhould firſt imploy the Subjects Purſes, and then ſquander away the Money in Extravagance, or ſend it out of the Realm; with many Acts of the ſame Nature. To all which may well be applied the ſmart Concluſion of the Old *Greek* Epigram [c].

'Αλλὰ λύκους ἔργει· τὶ δὲ τὸ πολέον, εἰ τὸ φύλαχθεν
Ὄλλυται, εἴτε λύκοις, εἴθ' ὑπὸ τοῦ φύλακος;

But he keeps off the Wolf; *we own the Deed;*
But where's the Difference, if the Sheep muſt bleed,
Whether the Keeper, or the Wolf they feed?

The Duty which a Prince owes to his particular Subjects is, that he permit them to enjoy the ſame Rights with others of their Rank and Order; that he protect and defend them, and adminiſter Juſtice to every one, ſo far as his regard to the publick Safety will allow him. If he fails in any of theſe Performances towards particular Perſons, when the Condition of the Commonwealth would give him leave to diſcharge them, he certainly does the reſpective Perſon an Injury [d]. An Old Woman who came with a Petition to the Emperor *Adrian*, and was by him told that he had no leiſure at preſent to hear her, in a very angry mood made him this ſmart Reply, *Ergo noli imperare, Therefore don't pretend to Govern* [e].

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[a] *De Cive*, c. 12. ſ. 2.

[b] Joan. Moquet. *Itiner.* l. 4.

[c] Antipater *in Antholog.*

[d] V. *Juſtin.* l. 9. c. 6. near the end. Tho' indeed *Pauſanius*'s Action is by no means to be commended.

[e] Xiphilin. *Epit.* Dion. & Zonar. *T.* 2.

Mr. BARBEYRAC's *NOTES* on §. IV.

[1] As the Emperor *Caligula*, who wiſh'd that the *Roman* People were but one Head, that he might daſh its Brains out, as we have it related in *Sueton.* c. 30.

[2] V. *Grot.* l. 1. c. 4. ſ. 11.

[3] This is what *Philip* King of *Macedon* formerly did, as is related in *Livy*, B 40. c. 3, *&c.*

That Duty which the Prince ſtands under as a Man, he may violate ſeveral ways, in his Tranſactions with particular Subjects. As ſuppoſe he ſhould undeſervedly brand an honeſt Perſon with Diſgrace and Ignominy; if he ſhould withhold the Reward promis'd to his Service; if he ſhould refuſe to diſcharge his Debts, or to fulfil his other Contracts or Engagements, or to repair a Damage which he hath occaſion'd by ſome extravagant Humour; if he ſhould aſſault the Honour of chaſt Virgins ſhould defile his Subjects Beds by Adultery, ſhould hurt their Bodies, ſeize or deſtroy their Goods; laſtly, if he ſhould take away the Life of an innocent Perſon, either by direct and downright Violence, or by ſuborning falſe Witneſſes againſt him, or compelling the Judges through Threats and Promiſes, to paſs an unjuſt Sentence of Death: *Ammianus Marcellinus*[a] hath made a very ſenſible Reflexion on the Grievances laſt mentioned. *Amongſt Arms and Trumpets*, ſays he, *the Equality of Condition makes the Danger ſeem lighter; and the Power of martial Valour either poſſeſſeth it ſelf of what it attempted; or, if taken off by the Surprize of unexpected Fate, carries no Mark of Infamy alone with it, but concludes Life and Pain together. But when the Pretence of Rights and Laws ſerves to cover and diſguiſe wicked Counſels, when the Judges ſit maſqu'd in the ſevere Gravity of* Cato *or* Caſſius, *but act every thing according to the arbitrary Pleaſure of their inſolent Maſter, and the whole Affair of Life and Death is weigh'd and determin'd by his Humour, nothing elſe can enſue but capital Deſtruction and precipitate Ruin.*

V. But 'tis a Point of greater Difficulty to explain, whether Subjects are obliged to endure all thoſe Injuries without reſiſting, or whether in ſome Caſes they may not repel them by Force? Our Judgment on the Matter is this: Since ſuch is the Condition of human Life, that it cannot be exempt from all Inconveniences, and ſince 'tis not eaſy to find a Man in the whole World, who is ſo nicely exact in his Behaviour, as to give a compleat and univerſal Satisfaction; 'twould be equal Folly and Impudence to oppoſe a Prince for every Fault; eſpecially ſince we our ſelves on the other hand are not ſo very punctual in the Diſcharge of our Duty towards *him*; and ſince even in private Perſons the Laws are wont to paſs over ſlight Miſcarriages. Therefore how much more juſt and reaſonable muſt it be to overlook the pardonable Failings of a Prince, on whoſe Care the Tranquillity of the whole Nation, and the Security of every Man's Life and Fortune depends? And ſo much the rather, ſince Experience informs us, with how fatal a Deſtruction of the People, and how miſerable a Convulſion of the State, the very worſt of Princes have been dethron'd. We are to forgive then the ſlighter Injuries of Rulers; as well in regard to their high and noble Office, and to the many Benefits we conſtantly derive from them in other reſpects, as out of a due Concern for our Fellow Subjects, and for the whole Commonwealth[b] [1]. *We ought to bear*, ſays *Tacitus*[c], *with the Tempers of Princes; ſince frequent Alterations can never turn to the Advantage of a State.* 'Tis a ſenſible Argument, that which *Cerialis* (in the ſame Author[d], uſeth to the Rebellious *Treviri*. *As you would endure*, ſays he, *the Barrenneſs of a Soil, the immoderate Force of Rain, and the other Inconveniences of Nature, ſo endure the Luxury or the Avarice of your Rulers. There will be Vices in the World ſo long as there are Men; but then theſe are not perpetual, and are amply recompenſed by the Intermixture of better Qualities. Plato*[e] ſpeaks admirably to the ſame purpoſe, *We ought never to uſe Violence to our Parents, unleſs they are depriv'd of their Reaſon: But if we diſlike their manner of Living we muſt not provoke them by unprofitable Remonſtrances, or cheriſh in them by ſervile Flattery and a criminal Compliance, the Vices to which we would not be ſubject our ſelves. A wiſe Man will take up this Reſolution in regard to his Country; then only to reprehend the Miſcarriages in the State, when his Reproof is likely to meet with good Effect, and not to draw down Ruin on himſelf: But when a Reformation cannot be wrought without the Expulſion and Slaughter of many Perſons, he will never attempt to introduce a Change in the Government by violent means; but will give himſelf up to Quiet and Retirement, and pray for his own and the publick Happineſs*[f]. Beſides, a Man conſults his own ſafety, when he chooſeth rather to diſſemble the Affronts of too powerful an Oppreſſor, than to draw on himſelf ſome greater Miſchief, by unreaſonable Reſentments and Complaints[g]. Add to this, that as we are commanded by the Holy Scriptures[2], ſo are

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Mr. BARBEYRAC's NOTES on §. V.

[1] V. *Grot.* l. 1. c. 4. ſ. 4. That muſt be duly conſider'd. For the Sovereign has never any Right to do the leaſt Injuſtice. If then we ought not to reſiſt him but in the laſt Extremity, 'tis not for his Sake, or by Virtue of his Power, but on account of the Intereſt of the State; which would by that means be expos'd to Troubles and Commotions. Beſides that (as *Gronovius* obſerves, in his Notes upon *Grotius*, Lib. I. Chap. III. *Sect.* 8. *Num.* 15.) it often happens that a People upon the Expulſion of one bad Prince, fall under the Dominion of another worſe than the former; the *ſpecious* Name of *Liberty* ſerving thoſe for a Pretence who are ambitious of bringing them under their Subjection. 'Tis a Reflection which *Tacitus* puts into a General's Mouth, *Cæterum Libertas & ſpecioſa nomina prætexuntur, nec quiſquam alienum ſervitium & dominationem ſibi concupivit, ut non eadem iſta vocabula uſurparet*, Hiſt. Lib. IV. Cap. LXXIII. Another *Latin* Hiſtorian gives us an Inſtance of it in the Perſon of *Sandrocottus*, who made himſelf Maſter of the *Indies*, after the Death of *Alexander the Great*. *Auctor Libertatis* Sandrocrottus *fuerat*; *ſed titulum Libertatis poſt victoriam in ſervitutem verterat.* Juſtin. *Lib.* XV. *Cap.* IV. *Num.* 13.

[2] 1 Ep. *Pet.* ii. 17, 18.

[a] L. 26. c. 13.

[b] V. *Juſtin.* l. 15. c. 4.

[c] *Ann.* 12. c. 11,

[d] *H.* 4. c. 74.

[e] *Epiſt.* 7. *p.* 1281. D. Ed. *Wech.*

[f] *Cicero* produceth this Paſſage out of *Plato* in the Ninth Epiſtle of his Firſt Book *ad Familiares.*

[g] See the Sentences cited to this purpoſe by Grotius, *ubi ſupra.* ſ Æſchylus Prometh. *Vinct.*

——οὐκ οὖν πρὸς κέντρα, &c.

——When a ſelf-will'd Lord
Too big to be controul'd and fiercely bent
On Cruelty and Rage, aſcends the Throne;
Strive not in vain, nor kick againſt the Goad.

we adviſed by ſound Reaſon, patiently to ſuffer the Moroſeneſs and Severity of our Parents and Maſters [a] [1].

Nay farther, this too is moſt certain, That when a Prince with plain hoſtile Intentions, threatens the worſt and moſt cruel of Injuries, it is better if we can to withdraw our ſelves from the Stroke, and either to ſecure our ſelves by Flight and Concealment, or to remove into another Country and Government for Protection. But what if a Prince ſhould with this hoſtile Fury attempt to deſtroy an innocent Subject, without leaving any Poſſibility of Eſcape? Many as to this Caſe are not able to conceive how the ſame Man can thus bear the *Perſon* of a Prince, and of an Enemy together, in repect of the poor Sufferer, or with what Face he can claim the Privilege of being held inviolable, who thus is bent on ſacrificing a guiltleſs Member of the State, as a miſerable Victim to his Luſts. But they are of Opinion, that if he who owes another his Protection and Patronage, ſhall upon no Cauſe at all, or upon an unjuſt one, aſſume the Mind of an Enemy towards him, he releaſeth the other Party from his Duty of a Client or Dependent; ſo far at leaſt, as that it ſhall be lawful for the latter to make uſe of Force in defending himſelf from the unreaſonable Cruelties of the former. Which Defence may the better plead for Favour, the greater the Number is of thoſe whom the Prince endeavours thus injuriouſly to deſtroy. But ſince 'tis hardly poſſible to find any Examples of Princes, who entertain a Deſign againſt the Lives of innocent Men, and openly profeſs that they do it out of meer arbitrary Pleaſure; a greater Doubt ariſeth, what Courſe can be lawfully taken, when a Prince goes about to exerciſe Cruelty under the Pretence and Colour of Right; as ſuppoſe, in way of Puniſhment, for the Neglect of an unjuſt Command. Now here we firſt of all take it for granted, that ſince in conferring any Power there is a *Salvo* made to the Right of all Superiors, therefore the Subjects, upon the eſtabliſhing a ſovereign Civil Authority, neither could, nor would by that Act renounce the Subjection which they before ſtood under to Almighty GOD, and conſequently that they are not bound by any Injunctions of the civil Power, plainly repugnant to the Divine Commands. What a Subject ought to do in this Caſe, if threatned with Violence on the account of his Chriſtian [2] Profeſſion, it is not our Buſineſs to determine [3]: In as much as the ſame Scriptures, in which that holy Doctrine is deliver'd, may fully inform any Perſon how infinitely it concerns him, not really, nor ſo much as ſeemingly to act any thing contrary to his Religion [b], and at how great a Price, if Occaſion be, he ought to purchaſe his Innocence. But that, upon the Apprehenſion of certain Death, a Man may undertake the Performance of an Action in it ſelf repugnant to the Law of Nature, without any Sin on his part, we ſhall by and by make out [4]. Yet if the Action enjoin'd be ſuch, as I cannot perform without deriving Guilt on my ſelf, or ſuch as I eſteem to be, in its own Nature more bitter than Death, and at the ſame time no reaſon is ſhewn, nor ſo much as Probability pretended, either from ſome Fault of mine, or from the publick Good, why I ſhould be put under this Neceſſity of doing what might either have been done by another, or ought not to be done at all; it is manifeſt, that the whole Deſign of ſuch a Command is, that I may be deſtroy'd, who have committed no Offence, purely to gratify the Will of the Enjoiner, and his cruel Diſpoſition towards me. By which Act, ſince he lays aſide the *Prince* to put on the *Enemy*, he is ſuppos'd at the ſame time to have remitted the Obligation, which lay on the part of the Subject. But ſtill as far as 'tis poſſible, we are to avoid this Danger by Flight, and to ſeek the Patronage of ſome third Perſon, who is not by any Ties engaged to the ſame Prince. Nay, if all means of eſcaping are cut off, we ought rather to be kill'd than to kill [5]: yet not ſo much out of Veneration to the Perſon of ſuch a Ruler, as out of regard to

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Mr. BARBEYRAC's *NOTES on* §. V.

[1] *Ut Parentum ſævitiam, ſic Patriæ, patiendo ac ferendo, leniendam eſſe*, Livy, *l.* 27. *c.* 34. See *Epictet. Enchirid.* Cap. XXXVII. and *Juſtin.* Lib. XV. Cap. III. *Num.* 10. *Plato* in the Dialogue, Intituled, the *Criton*, compares likewiſe the Patience wherewith we ought to ſuffer any Injuſtice we receive from our Country or the Commonwealth, to the manner in which a Child ought to bear with the Moroſeneſs and Severity of his Parents, or a Slave the ill Uſage of his Maſter. Nay, he even ſays, that the Subject ought to ſuffer with ſo much the more Reaſon, as the Obligation which we are under with reſpect to the State, is greater than that which a Man owes to a Maſter, and to thoſe from whom he receiv'd his Being. Ἢ πρὸς ἄρα σοι τὸν Πατέρα οὐκ ἦν τὸ δίκαιον, *&c.* Tom. 1. p. 50, 51. *Ed. Steph.*

[2] As it cannot be prov'd, neither by the Principles of the Law of Nature, nor by the Holy Scripture, that Sovereigns are veſted with a Power to hinder any one from ſerving God in a peaceable manner, according to the Dictates of his Conſcience (ſee above, *Chap.* IV. *S.* 11. *Note* 2.) it follows from thence, that the People have as natural and as unqueſtionable a Right to defend their Religion by Force of Arms againſt a Sovereign, who endeavours to compel them to renounce it, or to forbid them the free Exerciſe of it, as to defend their Lives, their Eſtates, and Liberties againſt the Attempts of a Tyrant. This Right is even more allowable than any other, in as much as it regards the greateſt of all Intereſts, and the ſtrongeſt of all Obligations, or rather that which is the Foundation and Source of all others, I mean, the indiſpenſible Neceſſity that obliges every Man to follow the Light of his own Conſcience. 'Tis to no purpoſe for *Grotius*, after having approv'd of the Conduct of the *Macchabees*, to maintain however that the Chriſtian Religion leaves its Followers no other Remedy but Flight, or Patience. The Paſſages which he produces regard only private Perſons who are not in a Capacity to reſiſt. But (as Mr. *Bernard*, *Nouv. de la Rep. des Lettres*, *Mai* 1700. p. 557, obſerves) Jeſus Chriſt *moreover gives People the Liberty of defending their Rights by the common ways of Juſtice.* See alſo *Gronovius*'s long Note upon *Grotius*, Lib. I. Cap. IV. Sect. 7. *Num.* 8. and Mr. *Vander Muelen*'s Diſſertation de *Sanctitate ſummi Imperii civilis*, &c. p. 70. &c. Mr. *Rechenberg* the preſent Profeſſor of Divinity at *Leipſick*, likewiſe publiſh'd a Diſſertation *de Religione armis defenſa* in the Year 1689. at the ſame time that he had a Profeſſorſhip in another place. He applies the general Propoſition to the *Proteſtants* in particular.

[3] See Sir *George Mackenzie*'s *Jus Regium*, p. 113, *&c.*

[4] B. 8. c. 1. ſ. 6.

[5] V. *Grot.* l. 2. c. 1. ſ. 9. *cum not.* Gronov.

[a] *Pliny*, L. 3. Ep. 14. ſpeaking of Maſters being murther'd by their Slaves, ſays, *Non judicio, ſed ſcelere perimuntur*, They are kill'd, not in the Method of Judgment, but of Villainy.

[b] See *Matth.* x. 31, *&c.*

the Commonwealth, which on ſuch an occaſion, cannot but be imbroil'd in the moſt unhappy Troubles. But when a Ruler proceeds againſt a Subject in way of puniſhment for a real Crime, altho' here the Subject is not bound to meet the Miſchief by voluntarily appearing and offering up himſelf; yet the Reaſon why he cannot, in this Caſe, defend himſelf by Force is, that the Prince acts nothing here but what is conſiſtent with his Right; and therefore it would be highly injurious, whatever the Pretence might be, to offer him any Hurt on ſuch an account. It ought farther to be obſerv'd, that altho' we ſhould grant never ſo fully, that a particular Subject may, in ſome Caſes, guard his Safety by Violence againſt the injurious Aſſaults of his Superior, and this without Sin; yet it doth not hereby become lawful for the other Subjects to throw off their Allegiance, or protect the innocent Party by forcible means. For beſides, that they ought not to make Inquiſition into theſe Acts of the Prince, which he exerciſeth as it were by Virtue of his judiciary Power, and that many guilty Perſons, to draw *Odium* on the Government, make high Pretenſions to Innocence; tho' the Perſon ſhould happen to be really injured, the reſt of the People are not at all releas'd from their Obligation to Obedience. And that for this Reaſon, Becauſe, in the firſt Contract, every particular Subject engageth the Prince's Care and Protection only for himſelf, and doth not ſuppoſe it a Condition of his own Obedience, that all and each of his Fellows ſhall be juſtly treated. Nor is the Fear of being hereafter uſed in the ſame manner, ſufficient to break off this Obligation in the other Subjects; Firſt, becauſe it is uncertain; and, Secondly, becauſe 'tis poſſible the Prince's Hatred to this Perſon might be founded on ſome particular Reaſons, which do not appear in others. But whilſt the Subject's Obligation towards the Prince remains in Force, it ſhall not be lawful for him on what Pretence ſoever, to make any violent Reſiſtance.

VI. Now, as what hath been hitherto deliver'd is, in the Opinion of many Men, not at all derogatory from the Sacredneſs of Princes; ſo, on the other hand, thoſe Perſons are not to be endured, who aſſert in groſs, that a King, when he degenerates into a Tyrant, may be deprived of his Crown, and brought to Puniſhment by the [1] People. For ſince the Acts of civil Government are for the moſt part ſo obſcure, that

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Mr. BARBEYRAC'S *NOTE on* §. VI.

[1] When we ſpeak of a Tyrant that may lawfully be dethron'd by the People, we do not mean by the Word *People* the vile Populace or Rabble of the Country, nor the Cabal of a ſmall Number of factious Perſons; but the greater and more judicious part of the Subjects of all Ranks in the Kingdom. Beſides, the Tyranny muſt be ſo notorious, and evidently clear, as to leave no body any room to doubt of it. See what Mr. *Buddeus* ſays to this Matter, upon *Tarquin the Proud*, in his Diſcourſe Intituled, *Juriſp. Hiſtoricæ Specimen*, Sect. 35. *&c.* Among the *Selecta Jur Nat & Gent.* See likewiſe Mr. *Le Clerc* upon *Judges* iii. 20. v 24. Now a Prince may eaſily avoid making himſelf ſo univerſally ſuſpected and odious to his Subjects: For, as Mr. *Locke* ſays, in his ſecond Treatiſe of *civil Government*, Chap. XVIII. *Sect.* 209. *It is as impoſſible for a Governor, if he really means the Good of the People, and the Preſervation of them and the Laws together, not to make them ſee and feel it; as it is for the Father of a Family, not to let his Children ſee he loves and takes care of them.* And therefore the general Inſurrection of a whole Nation does not deſerve the Name of Rebellion. We may ſee what Mr. *Sidney* ſays upon this Subject in his *Diſcourſe concerning Government*, *Chap.* III. *Sect.* XXXVI. Neither are Subjects bound to ſtay till the Prince has entirely finiſh'd the Chains which he is preparing for 'em, and has put it out of their power to oppoſe. 'Tis ſufficient that all the Advances which he makes are manifeſtly tending to their Oppreſſion, that he is marching boldly on to the Ruin of the State. In ſuch a caſe, ſays Mr. *Locke* admirably well, *ubi ſupra*, Sect. 210. *How can a Man any more hinder himſelf from believing in his own Mind which way things are going, or from caſting about how to ſave himſelf, than he could from believing the Captain of the Ship he was in, was carrying him and the reſt of his Company to* Algiers, *when he found him always ſteering that Courſe, tho' croſs Winds, Leaks in his Ship, and want of Men and Proviſions did often force him to turn his Courſe another way for ſome time, which he ſteadily returned to again, as ſoon as the Winds, Weather and other Circumſtances would let him?* This chiefly takes place with reſpect to Kings, whoſe power is limited by fundamental Laws. ‘If it is objected that, the People being ignorant and always diſcontented, to lay the Foundation of Government in the unſteady Opinion and the uncertain Humour of the People is to expoſe it to certain Ruin; the ſame Author will anſwer you, that on the contrary, People are not ſo eaſily got out of their old Forms as ſome are apt to ſuggeſt. *England*, for Inſtance, notwithſtanding the many Revolutions that have been ſeen in that Kingdom, has always kept to its old Legiſlative of King, Lords, and Commons: And whatever provocations have made the Crown to be taken from ſome of their Princes Heads, they never carried the People ſo far as to place it in another Line. But 'twill be ſaid, this Hypotheſis lays a Ferment for frequent Rebellion. No more, ſays Mr. *Locke*, than any other Hypotheſis. For when the People are made miſerable, and find themſelves expoſed to the ill Uſage of arbitrary Power; cry up their Governors as much as you will for Sons of *Jupiter*, let them be ſacred and divine, deſcended or authoriz'd from Heaven; give them out for whom or what you pleaſe, the ſame will happen. The People generally ill treated, and contrary to Right, will be ready upon any occaſion to eaſe themſelves of a burden that ſits heavy upon them. 2. Such Revolutions happen not upon every little Miſmanagement in publick Affairs. Great Miſtakes in the ruling part, many wrong and inconvenient Laws, and all the ſlips of human Frailty will be born by the People without Mutiny and Murmur. 3. This Power in the People of providing for their Safety a-new by a new Legiſlative, when their Legiſlators have acted contrary to their Truſt by invading their Property, is the beſt Fence againſt Rebellion, and the probableſt means to hinder it, For Rebellion being an Oppoſition, not to Perſons but Authority, which is founded only in the Conſtitutions and Laws of the Government; thoſe whoever they be, who by Force break through, and by Force juſtify the Violation of them, are truly and properly Rebels. For when Men by entring into Society and civil Government have excluded Force, and introduced Laws for the preſervation of Property, Peace, and Unity among themſelves; thoſe who ſet up Force again in Oppoſition to the Laws do *rebellare*, that is, do bring back again the State of War, and are properly Rebels as the Author ſhews. In the laſt place he demonſtrates, that there are alſo greater Inconveniencies in allowing all to thoſe that govern, than in granting ſomething to the People. But it will be ſaid, that ill-affected and factious Men may ſpread amongſt the People, and make them believe that the Prince or Legiſlative act contrary to their Truſt, when they only make uſe of their due Prerogative. To this Mr. *Locke* anſwers, that the People however, is to be Judge of all that; becauſe no body can better judge whether his Truſtee or Deputy acts well, and according to the Truſt, repoſed in him, than he who deputed him. He might make the like Query (ſays Mr. *Le Clerc* from whom this Extract is taken) and ask whether, the People being oppreſs'd by an Authority which they ſet up but for their own Good it is juſt that thoſe who are veſted with this Authority, and of which they are complaining, ſhould themſelves be Judges of the Complaints made againſt them? The greateſt Flatterers of Kings dare not ſay, that the People are obliged to ſuffer abſolutely all their Humours, how irregular ſoever they be; and therefore muſt confeſs, that when no regard is had to their Complaints, the very Foundations of Society are deſtroy'd; the *Prince* and *People* are in a *State* of War with each other, like

the Multitude cannot apprehend the Equity or the Neceſſity of them, and often, through Prejudice or Paſſion, will not apply their Minds to a Diſcovery of the Truth; and ſince, generally ſpeaking, it makes for the Intereſt of the Commonwealth to let the Reaſons of the State and the Grounds of publick Counſels and Proceedings be known by a very Few: it will be a moſt difficult Task to point out exactly thoſe ſeveral Actions, on the Performance of which a Prince may juſtly be call'd a Tyrant, and as juſtly be oppoſed by the People, with any Violence whatſoever [a]. Whence it may eaſily come to paſs, that an *Odium* of this Nature ſhall be brought even on a good Prince, by ſuch as either diſlike his Perſon, or the preſent Conſtitution; ſince Men have been now long accuſtom'd in the Uſe and Signification of Words, to make them ſtand not only for the real Nature of Things, but for their own Humour or Affections. Thus much is acknowledg'd by general Opinion, that neither private and perſonal Vices, nor ſmaller Neglects in the publick Adminiſtration, are ſufficient to denominate a Tyrant. Are heavy Taxes impoſed? The Subjects who are not admitted to Council, cannot poſſibly judge whether the Neceſſity of the State requires this Proviſion, or not. Are ſevere Penalties executed? Why, if this be done upon ſome precedent Offence, and according to the Laws, no Man can with Juſtice complain; tho' perhaps the Caſe would better have allow'd of Mercy and Pardon. Are ſome great Men innocently taken off, on the account of private Hatred or Suſpicion; which, in vulgar Eſtimation, paſſeth for the higheſt and moſt provoking Grievance? yet if Plots againſt the Prince's Government, or other Crimes are, in pretence at leaſt, laid to their Charge, or the ordinary Courſe of Judgment obſerv'd in condemning them; although perhaps the Perſons themſelves, and ſome few others may be throughly ſatisfied of their Innocency; yet how is it poſſible that the reſt of the People ſhould have the ſame Certainty and Aſſurance? Eſpecially ſince the Preſumption of Juſtice always lies on the Prince's ſide. Well, but perhaps, Promiſes are broken, or Privileges formerly granted retrench'd. Still, if the Prince be abſolute, 'tis but to alledge ſome Offence in the Parties, or ſome ſignal Advantage to the Commonwealth, and then he ſhall be ſuppoſed to have acted according to his ſovereign Right; and whether theſe Pretences be real, or no, the Subjects are not able clearly to judge. And all Privileges muſt be conſtrued with this Limitation and Exception, *Unleſs the Safety or Neceſſity of the Publick forbid them to hold any longer.* No ſmall part of the Arguments, uſually brought for the oppoſite Opinion, fall of their own accord, if it be well conſider'd, that theſe are two very different things; A People have power of applying Force to their Rulers, and of reducing them to Amendment, when they do not govern according to their Will; and, There is in the People, or in particular Perſons, a Right of defending their Life and Safety againſt their Prince, upon the Approach of extream Danger, and when the Prince is manifeſtly turn'd an Enemy towards them. For the Reaſons which prove the latter of theſe Poſitions do not in like man-

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‘ two Independent States that are doing themſelves Juſtice, and acknowledge no perſon upon Earth who in a ſove-
‘ reign manner can determine the Diſputes between them. *Bibliotheque Univerſal.* Tom. XIX. pag. 591. Mr. *Sidney* in
‘ his *Diſcourſe upon Government*, Chap. III. Sect. 41. ſays, ‘ They who create Magiſtracies, and give to them ſuch
‘ Name, Form, and Power, as they think fit, do only know whether the End for which they were created, be per-
‘ form'd, or not. They who give a Being to the Power which had none, can only judge whether it be employ'd to
‘ their Welfare, or turn'd to their Ruin. They do not ſet up one or a few Men that they and their poſterity may
‘ live in Splendor and Greatneſs; but that Juſtice may be adminiſter'd, Virtue eſtabliſh'd, and proviſion made for
‘ the publick Safety. No wiſe Man will think this can be done, if thoſe who ſet themſelves to overthrow the Law are
‘ to be their own Judges. If *Caligula*, *Nero*, *Vitellius*, *Domitian* or *Heliogabalus* had been ſubject to no other Judgment,
‘ they would have compleated the Deſtruction of the Empire. If the Diſputes between *Durſtus*, *Evenus* the Third,
‘ *Dardannus*, and other Kings of *Scotland*, with the Nobility and People might have been determin'd by themſelves,
‘ they had eſcap'd the puniſhments they ſuffer'd, and ruin'd the Nation as they deſign'd. Other Methods were
‘ taken; they periſh'd by their Madneſs; better Princes were brought into their places, and their Succeſſors were,
‘ by their Example admoniſh'd to avoid the ways that had prov'd fatal to them. If *Edward* the Second of *England*
‘ with *Gaveſton* and the *Spencers*, *Richard* the Second with *Treſilian* and *Vere*, had been permitted to be Judges of their
‘ own Caſes, they who had murther'd the beſt of the Nobility, would have purſu'd their Deſigns to the Deſtruction,
‘ of ſuch as remain'd, the enſlaving of the Nation, the Subverſion of the Conſtitution, and the Eſtabliſhment of a
‘ meer Tyranny in the place of a mix'd Monarchy. But our Anceſtors took better Meaſures. They who had felt
‘ the ſmart of the Vices and Follies of their Princes, knew what Remedies were moſt fit to be applied, as
‘ well as the beſt Time of applying them. They found the Effects of extreme Corruption in Government to be ſo
‘ deſperately pernicious, that Nations muſt neceſſarily periſh, unleſs it be corrected, and the State reduced to its firſt
‘ Principle, or alter'd. Which being the caſe, it was as eaſy for them to judge whether the Governor who had
‘ introduced that Corruption ſhould be brought to Order, or remov'd if he would not be reclaim'd; or whether
‘ he ſhould be ſuffer'd to ruin them and their poſterity; as it is for me to judge whether I ſhould put away my
‘ Servant, if I knew he intended to poiſon or murder me, and had a certain Facility of accompliſhing his Deſign;
‘ or whether I ſhould continue him in my Service 'till he had perform'd it. Nay, the Matter is ſo much the more
‘ plain on the ſide of the Nation, as the diſproportion of Merit between a whole People, and one or few Men
‘ entruſted with the power of governing them, is greater than between a private Man and his Servant.’ To this let
us add the following Verſes of an antient *Greek* Poet.

A. Σέβειν δὲ τοὺς κρατοῦντας νόμος.
B. Οὐ παντελῶς δεῖ τοῖς πονηροῖς ἐπιτρέπειν,
Ἀλλ᾽ ἀντιτάττεσθαι, εἰ δὲ μὴ, τ᾽ ἄνω κάτω
Ἡμῶν ὁ βίος λήσει μεταστρέφεις ὅλος.

An Atnient Law commands us to obey
Thoſe who in Government do bear the Sway:
But wicked Magiſtrates we may reſiſt,
Nor ſuffer them to do what e'er they liſt;
For then the World would in Confuſion lie,
And Civil States be Scenes of Anarchy.
Philemon in Adelph. Fragm. IX. *Edit. Cleric.*

[a] *Comp.* Bœcler. *ad* Grot. *l.* 1. *c.* 4. *ſ.* 14.

ner evince the former: And yet many Men confound the one with the other. And thus too when it is ſaid, that a People who have given themſelves up to Slavery, have not thereby loſt all Right of reſcuing themſelves into Liberty and Security [2]; the Aſſertion will hold true only in this Senſe, that a People may defend themſelves againſt the extreme and unjuſt Violence of their Prince: Which Defence, if it ſucceeds proſperouſly, brings Liberty along with it as a neceſſary Attendant. In as much as the Lord, by thus changing himſelf into an Enemy, ſeems to abſolve the Subjects from their Obligation towards him: So that they are not bound to return under his Yoak, tho' he ſhould alter his cruel Reſolutions. Excepting in this Caſe, a People who have given themſelves up for Slaves, or rather who have put themſelves under the Command of an abſolute Sovereign, have no more a Right of regaining their Liberty by Force, than I have of recovering a thing by Force, which I have already upon Bargain deliver'd to another Man. For this civil Servitude is not ſo abhorrent from Nature, as ſome imagine; as that a Perſon, who at one time, to avoid a greater Evil, finds it neceſſary for him to conſent to it, may afterwards, when Occaſion favours him, throw it off again, by the Right and Privilege which Nature allows him. And although the State of Slavery ſhould be contrary to the Inclinations of a particular People, either from the beginning, or upon the changing of their Minds; yet 'tis by no means lawful, barely on this account, to deprive the Prince of that Right which he hath already obtain'd: No more than it is lawful for the Seller to take away from his Chapman what he before deliver'd to him upon Contract; tho' he ſhould happen to find that the Sale did not prove to his Advantage.

VII. *Grotius* [a], in adjuſting theſe Matters, hath taken a Courſe not very different from that which we have here follow'd. Amongſt other things he well obſerves, that whether or no the extreme Injuries of Sovereigns may be forcibly

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Mr. BARBEYRAC'S *NOTE on* §. VI.

[2] No Man can ſo far part with his Liberty as to give himſelf up wholly to an arbitrary Power, to be treated abſolutely as that Power thinks proper; for this would be to diſpoſe of his own Life, of which he is not Maſter. Much leſs has a whole People ſuch a Right, as every one of thoſe who compoſe it, is entirely deſtitute of. 'The natural Liberty of Man is to be free from any ſuperior Power on Earth, and not to be under the Will or Legiſlative Authority of Man, but to have only the Law of Nature for his Rule. The Liberty of Man, in Society is to be under no other Legiſlative Power, but that eſtabliſh'd by Conſent in the Commonwealth; nor under the Dominion of any Will, or Reſtraint of any Law but what the Legiſlative ſhall enact, according to the Truſt put in it. Freedom then is not what Sir *Robert Filmer* tells us, *A Liberty for every one to do what he liſts, to live as he pleaſes, and not to be tied by any Laws*: But Freedom of Men under Government, is to have a ſtanding Rule to live by, common to every one of that Society, and made by the legiſlative Power erected in it. A Liberty to follow my own Will in all things, where the Rule preſcribes not; not to be ſubject to the inconſtant, uncertain, unknown, arbitrary Will of another Man: As Freedom of Nature is to be under no other Reſtraint but the Law of Nature. This Freedom from abſolute arbitrary Power is ſo neceſſary to, and cloſely join'd with a Man's Preſervation, that he cannot part with it but by what forfeits his Preſervation and Life together. For a Man, not having the power of his own Life, cannot by Compact, or his own Conſent, enſlave himſelf to any one, nor put himſelf under the abſolute arbitrary Power of another, to take away his own Life, when he pleaſes. No body can give more Power over it. Indeed, having by his Fault forfeited his own Life by ſome Act that deſerves Death; he, to whom he has forfeited it, may (when he has him in his power) delay, to take it, and make uſe of him to his own ſervice, and he does him no Injury by it. For, whenever he finds the hardſhip of his Slavery outweigh the value of his Life, 'tis in his Power, by reſiſting the Will of his Maſter, to draw on himſelf the Death he deſires. This is the perfect Condition of Slavery, which is nothing elſe but the State of War continu'd between a lawful Conqueror and a Captive. For, if once Compact enter between them, and make an Agreement for a limited Power on the one ſide, and Obedience on the other; the State of War and Slavery ceaſes, as long as the like Compact endures. For, as has been ſaid, no Man can by Agreement paſs over to another Nation, that which he hath not in himſelf, a Power over his own Life. I confeſs, we find among the *Jews*, as well as other Nations, that Men did ſell themſelves; but, 'tis plain, this was only to Drudgery, not to Slavery. For, it is evident, the Perſon ſold was not under an abſolute, arbitrary, deſpotical Power. For the Maſter could not have power to kill him at any time, whom at a certain time he was obliged to let go free out of his Service; and the Maſter of ſuch a Servant was ſo far from having an arbitrary Power over his Life, that he could not at pleaſure ſo much as main him, but the Loſs of an Eye or Tooth ſet him free. Mr. *Locke* of *Civil Government*, Book II. Chap. IV. Let us add the following Reflections of Mr. *Abbadie*. The natural Right of our Preſervation is altogether unalienable, that is to ſay, ſuch as we can never renounce entirely and abſolutely. It is true, that when I confederate my ſelf with other Men to form a Society, 'tis upon this Condition, that I ſhall expoſe my own particular Perſon for the preſervation of the whole; there would be no way for a Society to ſubſiſt, if every one conſulted his own Safety only; and I ſhould loſe the ſupport that I meet with for my own preſervation, in my Union with others. But we cannot ſay that Soldiers, who maintain themſelves in their Ranks, and fight valiantly in War, do renounce the natural Care of their preſervation, ſo we cannot ſay that private Perſons renounce the Right of their preſervation, when for the Love of their Country, they expoſe themſelves to the Danger of periſhing. 'Tis a Contradiction that we ſhould for ever alienate this Right. How have Men, who enjoy the Privileges of civil Society, renounced this Right of Self-preſervation, when thoſe who are cut off from Society, as Criminals condemn'd to Death, do not renounce it? So that if they make their Eſcape, and are taken again, they ſhall ſuffer the puniſhment that their former Crime deſerv'd, in Execution of the Sentence that was pronounced againſt them before; but there will be no Indictment brought againſt 'em for their being willing to ſave themſelves, which is founded upon this Principle, that as Nature always returns, ſo the Rights of Nature are never loſt—A Man, that finds himſelf ill, may, and ought to make choice of a skilful Phyſician, to whom he will give a power apparently arbitrary over his Body. I put my ſelf into your Hands, *he will ſay*, do with me what you pleaſe, I will not contradict your Preſcriptions, and when I would do ſo I deſire that my Servants may execute your Orders and not mine, and that you may have the ſole power in this Matter. I am certain that you would believe that ſuch a Man has notwithſtanding all that renounced neither the Right nor the Care of his preſervation; if the power which he gives over himſelf, unlimited in appearance, were ſo in reality; and if it were evident that the Phyſician would poiſon the ſick Man, might he not oppoſe him without breaking his Word and his Engagements? Is it not apparent that there are in that Caſe two Extremities to be avoided? That a ſick Man ought not to be ſuffer'd to be Maſter of his Phyſician; but that 'tis alſo juſt for him to oppoſe the Phyſician, when it is notorious that he would poiſon the ſick Man? If it were not juſtifiable to dethrone a King who is evidently endeavouring to ruin and undo us, it would follow that the Right of deſtroying us, without being capable of loſing the Crown on that ſcore, paſſing from Father to Son, we ſhould have loſt, or alienated for ever the Right of our own Preſervation. *Defence de la Nation Britannique*, p. 260, 261. See the Homily of the Church of *England* againſt Rebellion, the ſecond Part.

[a] L. 1. c. 4. §. 7.

reſiſted, is beſt to be underſtood by conſidering, as well the Nature of Sovereignty, as the preſumed Deſign of thoſe who firſt incorporated themſelves in a civil State. As for the former, 'tis not in the leaſt repugnant to the Nature of Sovereignty, that all the Actions of the Subjects ſhould by it be directed towards the publick Good, and that thoſe who oppoſe its Decrees, ſhould undergo the ſevereſt Puniſhment; without allowing it the Power to murther Men out of meer Humour, ſo as on no account to be reſiſted. Nor is there any natural Connexion between an abſolute Power of procuring a Man's Safety, and an abſolute Power of deſtroying a Man at pleaſure. And 'tis impoſſible to make out what ſuch a Power in the Sovereign, or ſuch an Obligation in the Subject, can contribute to the Peace and Security of the Commonwealth. On which Score it is evident, how falſe that Inference is which ſome Men make; the ſupreme Authority is accountable only to God, therefore we have ſufficient Reaſon to conclude, that the Perſons who firſt united in a Community, deſigned to reſerve to themſelves no Degree of Right which ſhould hold good againſt the ruling Power. As if to defend one's Life againſt an injurious Aſſailant, were to proceed againſt him in a judicial manner [a]! Nor is their Scruple of any Moment, who diſallow the Liberty of reſiſting Governors, in Caſes of barbarous Cruelty, on this Argument, *Becauſe we cannot frame to our ſelves any lawful Call, that the Subjects have to take up Arms againſt the chief Magiſtrate; ſince no Mortal can pretend to have a Juriſdiction over a Perſon of that Character.* As if Defence were the Effect of Juriſdiction! Or, as if he who ſets himſelf to keep off an unjuſt Violence, which threatens his Life, had any more need of a particular *Call*, than he who is about to fence againſt Hunger and Thirſt with Meat and Drink [b]!

As to the latter Conſideration propoſed by *Grotius* about the Deſign of Societies, he rightly judgeth, that if thoſe Perſons, who by incorporating themſelves in States, gave the firſt Riſe to ſovereign Power, had been ask'd whether they intended to lay this Burthen on all their Conſciences, that they ſhould rather chooſe to die, than in any Caſe to oppoſe by Arms the unjuſt Violence of their Superiors; they would certainly have anſwer'd, that it was never in their Thoughts to enjoin ſuch a Hardſhip. For this would have been a greater Inconvenience, than that which they endeavour'd to avoid by entring into a civil Community. For before they lay open to the Injuries of many, but ſtill with the Right and Power of reſiſting them: Whereas by this means they muſt have bound themſelves quietly to ſuffer any Injuries from him, whom they had arm'd with their own Strength. And no doubt Fighting and Contention is a leſs Evil than certain Death.

VIII. But this Sacredneſs which we have been hitherto touching upon, doth not belong to any Kings, but thoſe who are really and ſtrictly ſuch. It cannot therefore be claim'd by thoſe, who though they bear the Title of Kings [1] are yet ſubject to the Power of the People; as were the ancient Kings of *Sparta*, and many elſewere; inveſted rather with the Authority to perſuade, than with Power to command [2]. Such a King was *Mezentius* in *Virgil*, [c] againſt whom

——furiis ſurrexit Etruria juſtis,
Regem ad ſupplicium præſenti morti repoſcens.

By juſt Revenge the *Tuſcans* ſet on fire,
With Arms their King to Puniſhment require.

Thoſe Princes do likewiſe forfeit this Sacredneſs, who have either laid down their Dignity [3], or have utterly deſerted and abandon'd the Kingdom; againſt whom, in caſe of grievous Injuries offer'd by 'em to others, it is lawful to proceed altogether in the ſame manner, as we might againſt private Perſons. As for the Example of *Semiramis*, who having prevail'd with her Huſband to reſign the Sovereignty to her for Five Days, made uſe of the Grant to take away the Life of the Giver; this Story proves nothing elſe but the great Wickedneſs of the Wife, and the no leſs Folly of the Husband [d]. Yet it ſometimes happens, that thoſe who have either voluntarily laid down their Authority, or have been deprived of it by ſome Misfortune, are ſtill permitted to enjoy that formal Veneration of the People, which uſed to be paid to Princes, and all other external Badges of Majeſty. Which Privilege, as it is to be look'd on as meer Imagery, made up of nothing but the regal Trappings and Ornaments; ſo unleſs it hath been confirm'd by ſome Pact and Agreement, it muſt be conceiv'd to depend entirely on the Favour and Complaiſance of others [e]. Thus *Labardée*, in his Hiſtory of *France* [f], rightly obſerves, that whilſt *Sedan*, and the Territories depending on it, was neither feudatary to the Emperor, nor to the King of *France*, nor to any other Monarch, or State, the Lords and Proprietors were truly ſovereign Princes. But after that *Frederic Maurice*, Duke of *Bouillon*, had reſign'd this City, with its Dependencies, to *Lewis* the Thirteenth of *France*, receiving in lieu of it certain Lands belonging to the *French* Crown; he required Security to be given him, that he and his Poſterity ſhould retain the Title and Character of the former Dignity: Which could not be afterwards reckoned a true independent Honour, ſuch as accompanies ſovereign Power; but only a nicer Shadow of princely Greatneſs, having no farther Effect, than the obtaining ſuch a certain place among the noble Families of *France*, and ſome other ornamental Privileges. And the

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[a] *Comp.* Bœcl. *ad* Grot. *d. l.*

[b] *Comp.* Ziegler *ad Grot. d. l.*

[c] *Æn.* 8. *v.* 494, 495.

[d] *Diodor. Sic.* l. 2. c. 18.

[e] An Inſtance of which we have in *Dairo* of *Japan.*

[f] L. 10. p. 684.

Mr. BARBEYRAC'S *NOTES on* §. VIII.

[1] V. *Grot.* l. c. 4, ſ. 8.

[2] This is what *Tacitus* relates of the antient Kings of *Germany*; *Mex Rex vel Princeps, prout Decus bellorum, prout facundia eſt, audiuntur, auctoritate magis ſuadendi, quam jubendi poteſtate. De Morib. Germanor.* c. 11. *Vide etiam*, c. 7.

Truth of this appears evidently from that Act of the Duke, in deſiring Security for his Titles, when he gave up his Dominions. Since thoſe who truly and properly poſſeſs the ſovereign Dignity, have no need thus to bargain for the Enjoyment of it.

Another way by which a King falls back[1] into the Condition of a private Man, is in caſe his Kingdom be ſeiz'd upon as forfeited either by *Felony*, committed againſt him whoſe *Fief* it is; or by virtue of ſome Clauſe inſerted in the Donation of the Crown, importing that if the King ſhould act thus or thus, the Subjects ſhould be immediately releas'd from all Obligation to Obedience. So likewiſe if in conferring the Sovereignty it were expreſly agreed, that the Prince in ſome particular Deſigns or Practices might be reſiſted; ſuch a Covenant may no doubt be put in Execution. Laſtly, if a Prince conſtituted by the People ſhall go about to alienate his Kingdom, or to change the manner of holding the Government, 'tis manifeſt not only that any ſuch Act of his is null and void; but likewiſe that in caſe he endeavour to compaſs his Deſign by Force, the People may oppoſe him in the ſame manner[a].

IX. It is another difficult Queſtion what may lawfully be done, and what not, againſt Invaders and Uſurpers of Sovereignty; and this, not after that long Poſſeſſion, or ſome ſubſequent Pact, hath given them a proper Right to govern, but ſo long as the unjuſt Cauſe of their poſſeſſing the Throne continues, and whilſt they ſeem to be ſupported only by Strength. On this Head we are firſt of all to enquire, whether the Commands of ſuch Uſurpers, whilſt in Poſſeſſion, have the Power of obliging? And here we muſt recollect from what hath been formerly obſerv'd, that no Obligation to Obedience can be produced in me, unleſs the other Party had a lawful Authority over me. Meer Violence may indeed lay on a Man ſome extrinſecal Neceſſity of doing this or that; but it cannot impoſe an Obligation, which is an intrinſecal Engagement ſo binding to the Mind, as to make the Neglect or Omiſſion of it ſinful. When therefore a Man is threatned with Violence from a ſtronger Hand, he is perhaps compell'd to perform thoſe things to which he hath no Obligation, and which he really hates and abhors. But if he afterwards find Opportunity, no Man will cenſure him for breaking his way through theſe unjuſt Impoſitions. But what is to be done, if a Perſon, who at firſt indeed ſeiz'd upon the Government by Violence and evil Arts, would yet be thought to obtain it by Right, and tho' he repoſeth his Confidence in Arms, yet profeſſeth to be no Enemy, but a true and proper Prince? As to ſuch Caſes this ſeems in general to be the moſt probable Solution, that he who actually poſſeſſeth the Sovereignty, by whatſoever means he acquires it, is ſo long to be acknowledg'd by the Subjects for their lawful Prince, as there appears no one who can claim the Crown by a better Right. For then it is conſonant to Reaſon, that the Poſſeſſor's Power ſhall hold good, provided he act like a legal Governor: It being the common Intereſt of the People, that the Care and Direction of the State ſhould rather lie in any one Perſon, than that, on the account of having no certain Head, it ſhould be involv'd in endleſs Diſputes and Diſturbances. Since therefore the Subjects muſt be, in this Caſe, ſuppoſed to have, at leaſt tacitly, conſented to the Authority of their new Maſter, they ſhall be truly oblig'd to yield Obedience to him[b]. Thus 'tis well known by what means the Family of the *Cæſars* rais'd themſelves to the imperial Dignity; and yet St. *Paul*[2] aſcribes the ἐξουσία, the proper Power to them, as thoſe who were to be obey'd for *Conſcience ſake*. And 'twas our Bleſſed Saviour's Command, *Render unto* Cæſar *the things that are* Cæſar's[3]. For at that time there was no particular Perſon who had a better Title to challenge the ſupreme Authority; and as for the *Senate* and *People* of *Rome*, they had receded from their ancient Right, though more out of Fear, and for want of Strength to make Oppoſition, than becauſe they approved of this Alteration in the Government. It was a remarkable Law of *Henry* VII. of *England*, which enacted, that no Perſon who had follow'd the Party of the Prince then reigning, ſhould be ever impleaded or condemn'd for that Act as a Criminal, either by legal Proceſs, or by Act of Parliament[4]. The Reaſons of which are diſcuſs'd by my Lord *Ba-*

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[a] Add. *Bœcler* ad *Grot.* l. 1. c. 4. ſ. 10.

[b] *Ariſtophanes (in Ranis,* Act. 5. Sc. 4. v. 21, 22, 23.) hath a notable Remark to this Purpoſe: 'Men ſhould not breed up a Lion's Whelp in their City; but if he be once bred up, 'his Temper muſt be complied with.

Mr. BARBEYRAC'S *NOTES on* §. IX.

[1] *Vide* Grot. *ubi ſupra,* Sect. 12. See our Author in the ſixth Chapter of this Book, *Sect.* 10, 11.

[2] *Rom.* xiii. 1, 5.

[3] *Matt.* xxii. 21.

[4] 'They who have more regard to the prevailing Power than to Right, and lay great weight upon the Statute of *Henry* the Seventh, which authorizes the Acts of a *King de Facto*, ſeem not to conſider that thereby they deſtroy all the pretended Right of Inheritance; that he only is *King de Facto* who is receiv'd by the People; and that this Reception could neither be of any value in its ſelf, nor be made valid by a Statute, unleſs the People and their Repreſentatives who made the Statute, had in themſelves the Power of receiving, authorizing, and creating whom they pleaſe. For he is not *King de Facto* who calls himſelf ſo, as *Perkin* or *Simnel*, but he who by the Conſent of the Nation is poſſeſs'd of the Regal Power. If there were ſuch a thing in nature as a natural Lord over every Country, and that the Right muſt go by Deſcent, it would be impoſſible for any Man to acquire it, or for the People to confer it upon him, and to give the Authority to the Acts of one who neither is nor can be a King, which belong only to him who has the Right inherent in himſelf, and inſeparable from him. Neither can it be denied, that the ſame Power which gives the validity to ſuch Acts as are perform'd by one who is not a King, that belongs to thoſe of a true King, may alſo make him King; for the Eſſence of a King conſiſts in the validity of his Acts. And 'tis equally abſurd for one to pretend to be a King, whoſe Acts as King are not valid, as that his own can be valid if thoſe of another are; for then the ſame indiviſible Right which our Author, and thoſe of his Principles aſſert to be inſeparable from the Perſon, would be at the ſame time exercis'd and enjoy'd by two diſtinct and contrary Powers. Moreover it may be obſerv'd, that this Statute was made after frequent and bloody Wars concerning Titles to the Crown; and whether the Cauſe were good or bad, thoſe who were overcome were not only ſubject to be killed in the Field, but alſo to be proſecuted as Traitors under the Colour of Law. He who gain'd the Victory was always ſet up to be King by thoſe of his Party, and he never fail'd to proceed againſt

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een in his Hiſtory of that Reign [a]. After the ſame manner in an hereditary Kingdom, when the Right ſeems to lie doubtfully between two or more Competitors; whilſt the Controverſy is yet in Agitation, and 'till ſuch time as it may be determin'd, either by an amicable Accommodation, or by Arms, 'tis the ſafeſt Courſe to obey him who hath the actual Poſſeſſion [b]. And much more will this Conduct be juſtifiable in Strangers, whom it doth not concern to examine the Titles by which the Sovereignty hath been obtain'd, but who barely go along with the Poſſeſſion; eſpecially when the Poſſeſſor is ſupported by great Strength and Power.

X. But when a Perſon, driving out the lawful Prince, ſeizeth the Government, and ſets himſelf up for King, tho' he be really the Uſurper of another Man's Right; what Courſe ſhall an honeſt Subject take under this Difficulty; in as much as he ſeems ſtill to owe Allegiance to his rightful Sovereign during his Life? On which Point it appears reaſonable to affirm, that things may often come to ſuch an Iſſue as ſhall make it not only allowable, but good and neceſſary to obey the Ruler in Poſſeſſion by what means ſoever the Poſſeſſion was gain'd. As if the lawful Sovereign be reduced to ſuch Streights, that he can no longer exerciſe any part of the regal Office towards his People. For then, tho' the Commands of the Uſurper, being deſtitute of legal Power, are not in themſelves obligatory; yet it becomes a wiſe Man to conſult the Welfare of himſelf and his Affairs, to make Proviſion againſt the Future, and with Warineſs and Caution to reflect on his preſent Condition; that he may not raſhly thruſt his Life and Fortunes into Danger: As he would do, ſhould he by vain Obſtinacy and Oppoſition, draw the Uſurper's Rage upon his own Head, without procuring the leaſt Advantage, either to his Country, or to the ejected Prince. Some are willing to deduce this Doctrine from the 13th Chapter of the Epiſtle to the *Romans*, where the Apoſtle ſays we ought to obey, οὐ μόνον διὰ τὴν ὀργὴν, not *only for wrath*; as if he ſhould have told us, it was not the part of a prudent Perſon to provoke the Anger of him, who bears the Sword, by an unneceſſary Stubborneſs; and that therefore, out of regard to our own Safety, we ſhould be ſubject ταῖς οὔσαις ἐξουσίαις, *to the Powers that are in being*, that is, which have the preſent Poſſeſſion. Since then a State, cannot ſubſiſt without ſome Government, and ſince he who actually wears the Crown, doth at leaſt in ſome tolerable Meaſure, maintain the publick Security; an honeſt Man and a Lover of his Country ought not, when the Poſture of Affairs requires this Proceeding, by an uſeleſs Reſiſtance, to give Occaſion to farther Troubles. But what ſeems hardeſt of all to be reſolv'd is, how the Subjects can at the ſame time keep up two contrary Obligations, one to the lawful Prince now expell'd, and the other to the Poſſeſſor, who hath conſtrain'd them to ſwear Allegiance to him, and for the preſent executes the regal Office. For how can a Man pay Fidelity to two together, who are bent upon mutual

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‘ his Enemies as Rebels This introduced a horrid *Series* of deſtructive Miſchiefs. The Fortune of War varied often; and I think it may be ſaid, that there were few, if any, great Families in *England*, that were not either deſtroy'd, or at leaſt ſo far ſhaken, as to loſe their Chiefs, and many conſiderable Branches of them: And Experience taught, that inſtead of gaining any Advantage to the publick in point of Government, he for whom they fought ſeldom prov'd better than his Enemy. They ſaw that the like might again happen, 'tho the Title of the reigning King ſhould be as clear as Deſcent of Blood could make it. This brought things into an uneaſy poſture; and 'tis not ſtrange, that both the Nobility and Commonalty ſhould be weary of it. No Law could prevent the dangers of Battle; for he that had Followers, and would venture himſelf, might bring them to ſuch a Deciſion as was only in the Hand of God. But thinking no more could juſtly be required to the full performance of their Duty to the King than to expoſe themſelves to the Hazard of Battle for him; and not being anſwerable for the Succeſs, they would not have that Law which they endeavoured to ſupport, turned to their Deſtruction by their Enemies, who might come to be Interpreters of it But as they could be exempted from this Danger only by their own Laws, which could authorize the Acts of a King without a Title, and juſtify them for acting under him, 'tis evident that the Power of the Law was in their Hands, and that the Acts of the Perſon who enjoy'd the Crown, were of no value in themſelves; the Law had been impertinent, if it could have been done without Law, and the Intervention of the Parliament uſeleſs, if the *Kings de Facto* could have given Authority to their own Acts. But if the Parliament could make that to have the Effect of Law which was not Law, and exempt thoſe that acted according to it from the Penalties of the Law, and give the ſame force to the Acts of one who is not King as of one who is, they cannot but have a power of making him to be King who is not ſo; that is to ſay, all depends entirely upon their Authority. Beſides, he is not King who aſſumes the Title to himſelf, or is ſet up by a corrupt Party; but he who according to Uſages requir'd in the Caſe is made King If theſe are wanting he is neither *de Facto* nor *de Jure*, but *Tyrannus de Titulo*. Nevertheleſs, this very Man, if he comes to be receiv'd by the People, and placed in the Throne, he is thereby made *King de Facto*. His Acts are valid in the Law, the ſame Service is due to him as to any other: They who render it are in the ſame manner protected by the Law: that is to ſay, he is truly King. If our Author therefore do allow ſuch to be Kings, he muſt confeſs that Power to be good which makes them ſo, when they have no Right in themſelves. If he deny it, he muſt not only deny that there is any ſuch thing as a King *de Facto*, which the Statute acknowledges, but that we never had any King in *England*; for we never had any other than ſuch, as I have proved before. By the ſame means he will ſo unravel all the Law, that no Man ſhall know what he has, or what he ought to do or avoid; and will find no Remedy for this, unleſs he allow that Laws made without Kings are as good as thoſe made with them, which returns to my purpoſe: For they who have the power of making Laws, may by Law make a King as well as any other Magiſtrate And indeed the Intention of this Statute could be no other than to ſecure Mens *Perſons* and *Poſſeſſions*, and ſo far to declare the power of giving and taking away the Crown to be in the Parliament, as to remove all Diſputes concerning Titles, and to make him to be a legal King whom they acknowledge to be King. *Sidney*'s Diſcourſe upon Government, Chap. III. §. 35.

[a] 'Tis *Irene*'s Advice in the Hiſtorian (*Nicet. Choniat.*) *Nec imperatorem qui abſit quærendum, nec qui adſit pellendum eſſe*; Neither to ſeek after a Prince who hath deſerted the Crown, nor to diſturb a Prince who poſſeſſeth it.

[b] *Caſſius Clena*, who had ſtuck to the party of *Niger* againſt *Severus*, thus makes his Defence to the latter: ‘I own'd neither You nor *Niger* for my proper Maſter; and tho' I appear'd on the other ſide, yet my Aim and Endeavour was not to oppoſe You, but to vanquiſh *Julian*. Since then my deſign was the ſame with Yours, I am in this reſpect certainly Guilty of no Fault. Nor am I more worthy of Blame for not revolting afterwards to Your Party. For You would not Your ſelf have been willing that any Friend of Yours ſhould have relinquiſh'd Your Cauſe, and gone over as a Deſerter to *Niger*. Xiphilin. *Epit.* Dion. *ad Ann.* 194. & Zonar. *Tom.* 2.

Deſtruction? And yet, on the other Hand, the Covenant made with the Uſurper by the Subjects, and the Faith which they have ingaged to him, ſeem utterly unable to take away the Rights and Pretenſions of the lawful Sovereign: as the Compoſition which a Countryman makes with Robbers, to hinder them from waſting his Eſtate, is incapable of extinguiſhing his Landlord's Right and Property. *Grotius*'s Opinion on the Caſe is this, that *Whilſt the Uſurper is in Poſſeſſion, the Acts of Sovereignty, which he exerciſeth, have a Power of obliging; not by Virtue of his Right (for Right he hath none) but becauſe 'tis in the higheſt Degree probable, that he who hates the juſt Right to the Throne, had rather, as things now ſtand, that the Commands of him who is thus in Poſſeſſion ſhould hold good, than that by the ceaſing of all Laws and Juſtice, the Commonwealth ſhould be thrown into utter Confuſion* [a].

And indeed, we ought by all means to preſume, that every Prince hath ſo much Humanity, as to deſire that his Subjects ſhould be preſerv'd by any Method whatſoever, rather than by ſtriving in vain with their ill Fortune and unſeaſonably expreſſing an Affection without Strength to ſupport it, they ſhould give themſelves up for a fruitleſs Sacrifice [b]. When the *Romans*, being themſelves in Diſtreſs, were petition'd by their Allies the *Petilini* for Relief, their Anſwer was, ‘They confeſs'd themſelves to be no longer in a Condition of ſupporting their diſtant Dependents, and therefore deſired the Petitioners to return Home, and ſince they had already given the utmoſt Specimen of their Fidelity, to conſult amongſt themſelves for the future how to make the beſt of their Affairs’[1] [c]. There appears nothing therefore that can with more probability be affirm'd in the Point before us, than this, that if the lawful Prince be brought into ſuch Streights, as that neither he himſelf is able to afford his Subjects due Protection, nor they on the other hand able to reſiſt the Uſurper, without their imminent Ruin; it muſt be taken for granted, that he hath for a while releas'd his Subjects from their Obligation towards him, till ſuch Time as Providence ſhall open a way to his Reſtoration; ſo far as is neceſſary to ſecure them from Deſtruction and Danger. And thus too the Fealty promis'd to the Uſurper, ſeems ſo far only to be binding, as that it ſhall be a kind of temporary Engagement, to expire ſo ſoon as the expell'd Prince ſhall recover his Dominions; and conſiſting not ſo much in any internal Neceſſity laid upon the Conſcience, as in the Force of that Terror under which they now ſtand. *Grotius* [d], in another Caſe, allows of *external* Right and Property; and we ſee no Reaſon why there may not be admitted ſome kind of *external* Obligation, not affecting the Conſcience [e]. If we put all theſe Conſiderations together, we ſhall find, that there is ſcarce any Caſe, in which a private Perſon may, by his own Authority diſturb an unjuſt Poſſeſſor of the ſovereign Dignity: eſpecially ſince Experience witneſſeth, that ſuch Conſpiracies do commonly exaſperate the uſurping Powers to greater Violence and Oppreſſion [f] [2].

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[a] L. 1. c. 4. l. 15. Add. l. 2. c. 4. ſ. 14.

[b] Comp. 2 *Sam.* xv. 25, 26. 1 *Kings* iii. 26.

[c] Add the Speech of King *Ferdinand*, when he fled from *Naples*, in *Guicciardine*, Book I. near the latter End.

[d] L. 3. c. 7. ſ. 6.

[e] See 1 *Kings* ii. 2 *Chron.* xxiii. on which place Mr. *Hobbes* rightly obſerves that *Athaliah* was dethron'd, not by any Right which the High Prieſt had in that Capacity, but by the Right of the young King. *Leviath.* c. 44. What Opinion we ought to entertain of thoſe Laws which permit or reward the killing of Tyrants, ſee in *Bœcler*. on *Grot.* l. 1. c. 4. ſ. 17.

[f] *Vid. Juſtin.* l. XVI. c. 5. ſub. fin.

Mr. BARBEYRAC's *NOTES* on §. x.

[1] Vid. *Livy*, L. 23. c. 20.

[2] As this whole Chapter regards one of the general Duties of Subjects, I think I cannot do better before I proceed to the following one, which treats of the *Duties of a Sovereign*, than to ſet down here in a few Words the principal *Duties of Subjects* of what Rank and Condition ſoever. Our Author has ſaid nothing of 'em in this Work: But he has given us a conciſe and clear Idea of them in the laſt Chapter of his Abridgment *de Officio Hominis & Civis*, which I ſhall here tranſlate, and add ſomething to it here and there, which will clearly be diſtinguiſh'd by Crotchets. The *Duties of Subjects*, ſays he, are either *general* or *particular*. The firſt ariſe from the common Obligation which they are all under as ſubmitting to the ſame Government, and as Members of the ſame Civil State. The others reſult from the different Employments and particular Offices, with which each Subject is entruſted by his Sovereign. I. The *General Duties* of Subjects reſpect their Behaviour either towards the *Governours of the State*, the *whole Body of the People*, or their *Fellow Subjects*. 1. As to the *Governours*, every Subject owes them the Reſpect, Fidelity and Obedience which their Character demands: So that conſequently they ought to live eaſy under, and be ſatisfied with the preſent Government, and not to form any Cabals or ſeditious Practices againſt it; to be attached to the Intereſt of their Prince, to reſpect and and honour him more than any other, to ſpeak and think favourably and with Deference of him and all his Actions. [We ought even to have a Veneration for the Memory of good Princes: But for thoſe who have not been ſuch, behold the judicious Reflections of *Montagne*: ‘Among thoſe Laws, *ſays he*, which relate to the Dead, I take that to be the beſt, by which the Actions of Princes are to be examin'd and ſearch'd into after their Deceaſe. They are equal to at leaſt, while alive, if not above the Laws: So that what Juſtice could not inflict upon their Perſons, is but reaſonable ſhould be executed upon their Reputation, and the Eſtates of their Succeſſors, things that we often value even above Life it ſelf. This is a Cuſtom of ſingular Advantage to thoſe Nations where it is obſerv'd, and by all good Princes as much to be deſired, who have Reaſon to complain that the Memories of the Tyrannical and Wicked ſhould be treated with the ſame Honours and Reſpects as theirs. We owe indeed Subjection and Obedience to all our Kings alike, for that reſpects their Office; but as to Eſteem as well as Affection, thoſe are only owing to their Virtue. Let it be allow'd then, that according to the Rule of Politicks we are patiently to endure unworthy Princes; to conceal their Vices, and to aſſiſt them in their indifferent Actions as long as their Authority ſtands in need of our Support. But the relation of a Prince and Subject being once ended, there is no Reaſon why we ſhould deny to our own Liberty and common Juſtice, the publiſhing of our real Wrongs and Sufferings; and to forbid good Subjects the Glory of having with Reſpect and Faithfulneſs ſerv'd a Prince, whoſe Imperfections were to them ſo well known, were to rob Poſterity of ſo uſeful an Example. And thoſe, who out of regard to ſome ſecret Obligation, do contrary to their own Knowledge and Conſcience, eſpouſe the Quarrel and vindicate the Memory of a faulty Prince, do a particular Act of Juſtice at the Expence of, and to the Diſadvantage of the publick one. *Livy* with abundance of Truth ſays, that the Language of Men educated in Court, was always full of Vanity and Oſtentation, and that the Characters they give of their Princes are ſeldom true; every one indifferently magnifying his own Maſter, and ſtretching his Commendations to the utmoſt extent of Valour and ſovereign Grandeur. And perhaps ſome may condemn the Boldneſs of thoſe two Soldiers, who, the one being ask'd by *Nero*, *why he did not love him*, anſwer'd him plainly to his Face,

‘ *I lov'd thee whilſt thou wert worthy of it, but ſince thou art become a Parricide, an Incendiary, a Waterman, a Player, and a Coachman, I hate thee as thou doſt deſerve:* The other, *Why he ſhould attempt to kill him,* as warmly reply'd, *Becauſe I could think of no other Remedy againſt thy perpetual Miſchiefs.* But the publick and univerſal Teſtimonies that were given of him after his Death, and will be to all Poſterity, both of him and all other wicked Princes like him, his Tyrannies and abominable Deportment conſider'd, who in his right Senſes can blame? I am ſcandaliz'd, I own, that in ſo ſacred a Government as that of the *Lacedemonians,* there ſhould be mixt ſo hypocritical a Ceremony at the Interment of their Kings; where all the Confederates and Neighbours, and all ſorts of degrees of Men and Women, as well as their Slaves, cut and ſlaſh'd their Foreheads in Token of Sorrow, and repeated in their Cries and Lamentations, that that King (let him be as wicked as the Devil) was the beſt that ever they had, by this means attributing to his Quality the Praiſes which only belong to Merit; and that which is properly due to the ſupreme Merit, tho' lodg'd in the loweſt and moſt inferior Subject. *Eſſais,* Lib. I. Chap. III.] 2. With Reſpect to *the whole Body of the People,* 'tis the Duty of every good Subject to make it an inviolable Law to himſelf, to prefer the Good of the Publick to any other Motive or Advantage whatſoever; chearfully to ſacrifice his Fortune, Life, and even all that he values in the World for the Preſervation of the State; and to employ all his Wit, Induſtry and Addreſs to advance the Honour, and to promote the Advantage of his own Country. [But we muſt here obſerve, that a private Intereſt is not always oppos'd to that of the Publick. Moreover, the common Duties of Subjects anſwer in this reſpect to one another, ſo that the Engagement of every particular Perſon does in ſome manner depend upon the performing of what the reſt are oblig'd to do, as well as himſelf, for the publick Good. For, indeed, the publick Good is only the Conſequence of the united Forces and Services of many conducing to the ſame End. If then, in a State, it is as it were become cuſtomary for the Generality openly to prefer their own private Intereſt to that of the Publick; a good Subject will not in that caſe be to blame in the leaſt, in not caring to expoſe his Perſon or his Fortune, by a Zeal impotent and uſeleſs to his Country. *Titius Obſerv.* DCCXXVIII.] 3. And laſtly, the Duty of a Subject towards his *Fellow-Subjects* is to live with them in a peaceable and friendly manner; to be good-humour'd and complaiſant to 'em in the Affairs of Human Life, to give Mankind no Uneaſineſs by peeviſh and obſtinate Tempers; and in ſhort, not to envy or oppoſe the Happineſs or Advantages of any one.

II. The *Particular Duties* of Subjects are annex'd to certain Poſts and Employments, the Diſcharge of which influences in ſome meaſure either the whole Government of the State, or only one part of it. There is one general Maxim which ſerves for all of 'em, and that is, that no one aſpire to any publick Employment, or even preſume to accept of it, when he knows himſelf not duly qualified for it. [‘ Thoſe few wiſe and good Men who are Members of the Commonwealth, would doubtleſs be better pleas'd to retire into themſelves and live at Eaſe; full of that ſweet Content, which excellent and intelligent Perſons know how to give themſelves, in the Contemplation of the Beauties of Nature, and the Works of Providence, than to ſacrifice all this Satisfaction to Buſineſs and a publick Poſt; were it not that they hope to do ſome good in being ſerviceable to their Country by their own Endeavours, and in preventing the Adminiſtration of Affairs from falling into ill or unſkilful Hands. This may and ought to prevail with Perſons of this Character, to conſent to the trouble of being Magiſtrates: But to cabal and make Parties, and court Employments of Truſt with Eagerneſs and Paſſion, eſpecially ſuch as are judicial, is a very baſe and ſcandalous Practice, condemn'd as ſuch by all good Laws, even thoſe of pagan Republicks (as the *Julian* Law among the *Romans* abundantly teſtifies) unbecoming a Man of Honour; and the ſhrewdeſt ſign that can be, that the Perſon is unfit for the Truſt he ſeeks ſo vehemently. To buy publick Offices is ſtill more infamous and abominable, the moſt ſordid, and the moſt villanous way of Trading in the World: For it is plain, he that buys in the piece, muſt make himſelf whole by ſelling out again in Parcels. Which was a good Reaſon for the Emperor *Severus,* when he was declaiming againſt a Fault of this Nature, to ſay, *That it was very hard to condemn a Man for making Money of that which he had given Money for before.*—Juſt for all the World as a Man dreſſes and ſets his Perſon in Order and Form, putting on his beſt Face before he goes abroad, that he may make a Figure, and appear well in Company; ſo is it fit that a Man ſhould learn to govern his own Paſſions, and bring his Mind to good Habits, before he preſume to meddle with publick Buſineſs, or take upon him the Charge of governing other People. No Man is ſo weak, as to enter the Liſts with an unmanag'd Horſe, or to hazard his Perſon with ſuch an one in any Service of Conſequence and Danger; but trains and teaches him firſt, breeds him to his hand, and uſes him to the Exerciſe he is deſign'd for: And is there not the ſame Reaſon that this wild and reſtleſs part of our Soul ſhould be tamed and accuſtomed to bear the Bit? Should be perfectly inſtructed in thoſe Laws and Meaſures which are to be the Rules of our Actions, and upon which the good or ill Conduct of our Lives will depend? Is it not reaſonable, I ſay, that a Man ſhould be Maſter of his own private Behaviour, and expert in making the beſt of every Accident and Occaſion, before he venture out upon the publick Stage; and either give Laws to others, or correct them for the Neglect of thoſe they have already? And yet (as *Socrates* obſerv'd very truly) the manner of the World is quite otherwiſe: For, tho' no body undertakes to exerciſe a Trade, to which he has not been educated, and ſerved a long Apprenticeſhip; and how mean and mechanical ſoever the Calling be, ſeveral Years are beſtowed upon the Learning of it; yet in the caſe of publick Adminiſtrations, which is of all other Profeſſions the moſt intricate and difficult (ſo abſurd, ſo wretchedly careleſs are we) that every body is admitted, every body thinks himſelf abundantly qualified to undertake them. Theſe Commiſſions are made Compliments and things of Courſe, without any Conſideration of Mens Abilities, or regarding at all, whether they know any thing of the Matter; as if a Man's Quality, or the having an Eſtate in the Country, could inform his Underſtanding, or ſecure his Integrity, or render him capable of diſcerning between Right and Wrong, and a competent Judge of his poorer, (but perhaps much honeſter and wiſer) Neighbours. *Charron de la Sageſſe,* Liv. III. Chap. 17. Sect. 1, 2.] But we muſt ſtill ſay ſomething more. 1. *Miniſters of State,* or *Privy Counſellors,* ought with the greateſt Application to ſtudy and perfectly know the Affairs and Intereſts of the State in all the parts of Government: and to propoſe faithfully, and in the moſt proper manner, whatever appears to them to be advantageous to the Publick, without being influenced by either Affection, Paſſion, or any ſiniſter Views: The publick Good ought to be the only deſign of all their Advice and Endeavours, and not the Advancement of their own private Fortunes, and the promoting their own Greatneſs and Power. Nor muſt they ever by vile and nauſeous Flattery, countenance or encourage the criminal Inclinations of the Prince. They ſhould never be engag'd in any Faction or Party whatſoever; keep nothing ſecret that ought to be diſcover'd, nor diſcover any thing that ought to be kept ſecret, ſhould ſtill ſhew themſelves above the Power of all Temptations; and never neglect the Affairs of the State for their Pleaſures, or their own private Concerns. [‘ Now in Perſons thus to be choſen and employ'd, ſeveral Qualifications are neceſſary: As, firſt of all, it is neceſſary to chooſe ſuch as are faithful, and fit to be truſted; that is, in one Word, Men of Virtue and good Principles. *I take it for granted* (ſays *Pliny*) *that the better Man any one is, the more ſtanch and true he is, and more ſafe to be depended upon.* 2. They muſt be Perſons of Ability, and proper for this Office, not only in regard of their Knowledge and Learning in general, but upon the Account of their Skill in Politicks, and that expreſs Form of Government in particular; ſuch as have been uſed and try'd before, and have come off with Honour and Succeſs, verſed in Buſineſs, and accuſtomed to Difficulties: For Hardſhips and Adverſities are the moſt uſeful and improving Leſſons. *Fortune,* ſays *Mithridates* in *Saluſt, in the room of many Advantages which ſhe has torn from me, has given me the Faculty of Advice and Perſuaſion.* And in one word, they muſt be wiſe and diſcreet, moderately quick, and not too ſprightly and ſharp, for ſuch Men will be always projecting. And *Men of Fire* are more for Change than for ſteady Management. Now in order to theſe Qualifications, it is neceſſary they ſhould be Men of ripe Years, to give them Staidneſs, Experience and Conſideration: Nay, I may add, to inſpire them with Caution too, for it is one of the many Unhappineſſes attending Youth, that Perſons then are eaſily impos'd upon; of which the Tenderneſs and Softneſs of their Brain may perhaps be one Reaſon, that may diſpoſe them the more eaſily to receive any Impreſſion, and conſequently to Credulity and Eaſineſs of Temper. It is for the convenience of a Prince to have notable Men of all ſorts about him; both thoſe that excel in Subtilty and Cunning. The former indeed ought to be more numerous, and are more eſpecially requiſite, becauſe they are more for the Honour of their Maſter, and of more conſtant uſe; for theſe are the managers of all regular and ordinary Proceedings. The Men of Art are for caſes of Neceſſity and extraordinary Emergencies, to help at a pinch, and to countermine a Danger. A third Qualification neceſſary for privy Counſellors, is Openneſs and Freedom and Courage in all their Behaviour, when conſulted with. They muſt uſe their utmoſt Care that all their Propoſals be for the Honour and Advantage of their Prince; and, when once they have ſecured this point, that the Advice be wiſe and good, all Flattery and Diſguiſe ſhould be laid aſide; all Equivocations and Reſervations, and Craftineſs of Expreſſion deteſted and deſpiſed, by which they may ſeem to aim at ingratiating themſelves, or to contrive that what they ſay may be acceptable to their Maſter. Theſe are the Men *Tacitus* deſcribes, who accommodate their Language as they ſee occaſion, and *do not ſo properly diſcourſe with their Prince, as with his preſent Inclinations and Circumſtances.* They conſider him as a great Man, as one able to make their Fortunes; they obſerve what he would do, not what is beſt for him to do. Whereas, indeed, all theſe Regards ought to be utterly baniſhed their Thoughts, they ſhould have a conſtant Eye upon the Sacredneſs of their Office, and the Importantce of the Truſt repoſed in them; and looking no further than the Reaſon, and Juſtice, and Convenience of the Thing, ſpeak the Truth, and ſpare not: For however harſh and diſtaſteful this Liberty, and Openneſs, and honeſt blunt dealing may be at the preſent to thoſe Perſons, whoſe Opinion and Inclinations it happens to croſs; yet there will ſoon come a time when 'twill obtain Reſpect and Eſteem. *Oppoſition is offenſive juſt at the inſtant; but upon cooler thoughts the very Perſons you oppoſed, will commend and admire your plain dealing.* A Man ſhould likewiſe take care to be conſiſtent with himſelf, firm to his Principles, without veering and wheeling about perpetually, as oft as other Peoples Humours ſhift into a freſh Quarter. But as he muſt not be changeable and obſequious in a baſe compliance with the Paſſions and Pleaſures of others, ſo neither muſt he be ſtiff and peremptory in his own Opinions. There is always a decency to be obſerved, and great difference to be made between Conſtancy and Contradiction. For Opiniatrety and Fierceneſs confounds all manner of Deliberation; and therefore I am far from deſiring my good Counſellor to be inflexible; as knowing very well, that hearkening to other Mens Reaſons, and changing our own Opinions upon them, is ſo far from deſerving the Reproach of Raſhneſs and Inconſtancy, that it ought rather to be looked upon as a Teſtimony of Modeſty, and Ingenuity, and great Prudence. *For although the wiſe Man always walks in the ſame way, and by the ſame rule, yet he does not always go the ſame pace, nor tread in the ſame ſteps; change he does not then ſo properly as accommodate and mend himſelf;* like the skilful Sailor, who plies to every Wind, and whoſe excellency lies in trimming the Sails that way that the Gale blows freſheſt. Thus the Man muſt often go about to make the Port he deſigns, when there is no coming at it by a ſtraight Courſe. And it ſhews the Dexterity and Addreſs of a Stateſman, to be able to change his Methods, when thoſe which were firſt choſen are either diſapproved, or by ſome Accident rendred uſeleſs and ineffectual. Another neceſſary Accompliſhment for this Poſt, is the making of a Conſcience of revealing any Debates he ſhall be privy to. For Silence and Secrecy are exceeding neceſſary in the management of all publick Affairs: Inſomuch, that a great Author has pronounced it impoſſible for that Man to manage any matter of Conſequence, who is not ſo much Maſter of himſelf as to keep his own Counſel. For *how ſhould he ſupport the weight of Publick Buſineſs, to whom even Silence is a Burden?* But upon this occaſion the concealing what one knows is not ſufficient, I muſt likewiſe caution him againſt knowing too much. A curious and inquiſitive Temper, which loves to be buſy and inform it ſelf of other peoples Actions and Concerns, is no commendable Quality in any caſe; but to pry into the Affairs of Princes, and to value one's ſelf upon knowing their Secrets, is as dangerous as it is unmannerly: And as *Tacitus* has well obſerv'd, *nothing is more hazardous, nothing more unfit for us, than officiouſly to dive into, and be bold with their retired Thoughts and Intentions.* And therefore whatever a Man knows of this kind ſhould come freely and without his ſeeking; nay, I make no difficulty to affirm, that it is commendable in a Man to decline the Opportunities of having ſuch things imparted to him, and to know as little of them as poſſible he can. This argues Reverence and Modeſty, prevents all Jealouſies, and ſuits the diſtance between a Prince and his Subjects. Thus have I given my Reader a ſhort Account of thoſe good Conditions which ſeem neceſſary for the qualifying Men to be Politicians or privy Counſellors. And by theſe he will be able to tell himſelf, what are thoſe ill Qualities which incapacitate a Man for ſuch a Truſt. That a Prince in making his choice ſhould be ſure to reject all ſuch as are of confident, aſſuming, and preſumtuous Tempers; becauſe theſe Vices make Men hot and arrogant in Debates, poſitive and bold in their own ſenſe: And a wiſe Man, quite contrary, will be content to allow ſecond and third Thoughts, to examine every thing over and over. It is the Character of ſuch a one to ſuſpect himſelf, to be jealous of the conſequence, fearful in adviſing and reſolving, that ſo he may afterwards be more vigorous and aſſured, when he comes to execution. *For the mind that knoweth how to be afraid, and undertakes warily, will act more ſecurely, and go upon ſurer grounds.* Fools, quite contrary, are eager and aſſured, blind and bold in Debate; but when they come to Action, cowardly and tame. Advice given with Heat and Confidence, looks fair and gay at firſt ſight; but the Execution of it is hard and deſperate, and the Event of it full of grief and diſappointment. Next to this preſumptuous Vanity and Heat, Paſſion is improper for ſuch Miniſters of State; all Anger and Envy, Hatred and Spight, Avarice and Ambition, all ſelfiſh Narrowneſs of Spirit and private Intereſt; for theſe are all of them Corrupters of the beſt Senſe, the very Bane of all ſound Judgment; Integrity and faithful Diſcharge of a publick Character cannot dwell in the ſame Breaſt with theſe perſonal Piques, and private Affections. *Private Advantage ever did, and ever will obſtruct and confound Publick Counſels, and each ſingle Man's Profit is that which poiſons all good Senſe, and kind Inclination to the Common Good.* One thing more remains abſolutely neceſſary to be avoided, and that is *Precipitation*; an irreconcileable Enemy to Prudence and good Counſel; and fit for nothing but to put Men upon doing amiſs, and then being aſham'd and unfortunate upon that Account. *Charron de la Sageſſe*, Liv. III. Ch. II. Sect. 17.'] 2. The Clergy as being the *publick Miniſters of Religion*, ought to diſcharge their Function with the utmoſt Gravity and Application; ſhould teach no Doctrine, nor advance any Opinion in Religion, which does not appear to them to be ſincerely true; ſhould be themſelves a ſhining Example by their own Deportment of thoſe Inſtructions which they deliver to the people; nor ſhould ever diſhonour their Character, or loſe all the Advantage and Efficacy of their Calling, by the Diſgrace of a ſcandalous and irregular Life. [' Since then the *Clergy* are, or ſhould be at leaſt, the publick Maſters of Virtue for the People, who gladly hear them, and put a mighty confidence in them; it is of great moment to make a good choice of them, eſpecially in places that are very full of People. They are in ſome meaſure, like the *Demagogues* among the *Greeks*, and the *Tribunes* among the *Romans*; with this Exception, that they do not meddle, or ought not to meddle with, State-Affairs. Thoſe who gain the Hearts of the Populace, can often ſet 'em in a Flame, and retain 'em juſt as they pleaſe, can raiſe them in what paſſion they have a mind to, or on the contrary perſuade them to Moderation and Peace. If the People, from ſome Accident or Opinion, take the Opportunity of making Diſturbances, 'tis not ſo much the People whom we ought to condemn, as thoſe who ſpirit them up and excite them to it. One ſhall rarely hear of any Commotions in a Town, unleſs backed by them whoſe Buſineſs it is to teach in publick or privately. Thoſe who take upon themſelves to diſcharge with Reputation ſo difficult an Employment, ought chiefly to be endow'd with two Qualifications. The firſt, is their *having a Knowledge*, and being acquainted with Religion, that is to ſay, that they have with Care and Diligence applied themſelves to the Study of the Holy Scriptures, and meditated ſo upon them, as to be able perfectly to underſtand all the Duties of Chriſtianity, and all their Conſequences, together with the Grounds on which they are built. This ought to be the Foundation of their Studies, and the End to which all their Reading and all their Meditations ſhould be directed. To this purpoſe all their Knowledge in *Hiſtory*, in *Morality*, in *Philoſophy*, in polite Learning, and all in general that they make their ſtudy, ought to be employ'd by them, nor ought they to eſteem any thing but according as it may be of ſervice in putting them in a Condition to perſuade Men to the Obedience of the Goſpel. The ſecond Qualification neceſſary for them to have, is that *their Behaviour be conſiſtent with what they* teach, ſo that they be a Pattern of thoſe Chriſtian Virtues which they inſtruct others in. For tho' an Angelical Perfection, as being above the Power and Abilities of Human Nature, is not to be required of them, and one ought to excuſe their Frailties as well as thoſe in other Men; yet it is certain that Mankind expect from them and with good Reaſon too, not only more Knowledge and Learning, but more Virtue alſo. An *Honeſt* Man, when we ſpeak of ſuch as follow another way of Living, is a Man who acts nothing that is ſcandalous, or puniſhable by the Laws, and who performs the external Duties of Societies, ſo as not to deſerve to be reproach'd by the World with any thing that's baſe and infamous, according to the manner of Living and the Cuſtom of the Country for Perſons of his Rank and Circumſtances. This Notion of an *Honeſt Man* is conformable to all the vicious Cuſtoms, and all the Corruptions of the Times and Places where thoſe who made it, happen to be educated in; and tho' the Depravation of Manners is not every where equal, nor it may be the ſame, yet it is too true, that there is no place whatſoever, where Men do not forgive in each other a great many Vices, and even to a degree far beyond what the *Evangelical* Rule allows of. For example, a Man may be immoderately ambitious, or aim at Employments that he is not qualified for, and endeavour to get into them by all the Methods that are not liable to Puniſhment; and this purely to gratify his own Vanity, and not with a deſign to be ſerviceable to the Publick; yet not be reputed a diſhoneſt Man, nor be looked upon by any with ſcorn and indignation. A Man may, and ſtill maintain this very Character, be infinitely more covetous, and more addicted to his Pleaſures than the Goſpel ſuffers, or do any thing that does not give any occaſion of ſcandal in places where he lives, either to improve his Fortune, or to waſte his Time in greater Variety of Voluptuouſneſs. But a great deal more is required to make ſuch a kind of *Honeſt Man* paſs for a *Good Man*, according to the Precepts of the *Goſpel*, or indeed according to thoſe of *Moral Philoſophy*: They, whoſe Profeſſion it is to inſtruct others in the Principles of Religion, muſt not be ſatisfied with being *Honeſt Men*, in the ſenſe which thoſe Words are generally taken; but muſt be *Good Men* in the Goſpel Senſe; that is, they muſt be ſubject to no habitual Sin, but eſpecially to ſuch as are upon all Accounts inconſiſtent with true Piety and Devotion. Now if the Perſons who are choſen, in this Affair, are not of the cleareſt Characters, two Evils muſt neceſſarily ariſe from thence. The firſt is, that their bad Example will do abundantly more Miſchiefs, than their good Sermons can do good. Mankind are by Nature much more inclin'd to follow the World; and therefore a *Clergyman*, who lives a regular Life, does by his Manners much better convince the People, that 'tis their Duty to live well, than the greateſt Orator could do by the moſt ſtudied and Rhetorical Diſcourſe; as on the contrary, if he leads a diſorderly one, his vicious manners will make a deeper Impreſſion upon their Minds, than all he can be able to ſay to 'em. There is no need of producing Inſtances to prove this; 'tis what daily Experience tells the whole World. And therefore adviſe People as much as you will, to do as ſuch Men ſay, and not as they do; they will always be ſure to follow the Ill they do, and forget all the Good they ſay. Never did a Perſon of an ambitious and wrangling Temper, inſpire by his Diſcourſes, a Contempt for the Grandeur of the World, or the Love of Peace. Never did a covetous Preacher make his Hearers liberal. Never did a voluptuous *Clergyman* perſuade any one to abſtain from Pleaſures, or to uſe them with Moderation; at leaſt when thoſe Perſons were diſcovered to be what they really were. *Parrhaſiana*, Tom. II Pag. 235, *&c.*] 3. The *Publick Profeſſors* and *Maſters of Arts* and *Sciences*, muſt not teach any thing that is falſe or pernicious to the Minds of the People whom they are employ'd to inſtruct; nor advance any Principle tho' never ſo true, that they do not prove by ſolid and convincing Reaſons, ſufficient to enlighten the Underſtanding of their Scholars; muſt carefully avoid broaching any Opinion that may be likely to diſturb the Government; and ought to look upon all Human Learning that is not uſeful to Mankind either in private or publick Affairs, to be vain and empty Speculations. 4. *Magiſtrates*, and all *other Officers of Juſtice*, ſhould be eaſy of Acceſs to every Body; protect the common People againſt the Oppreſſions of the more powerful ones; be as forward in doing Juſtice, and that with the ſame Impartiality to the Mean and the Poor, as to the Great and Rich; not ſpin out a Cauſe to an unneceſſary length; never ſuffer themſelves to be corrupted by Bribes and Solicitations; examine thoro'ly into the Matter before 'em, and then determine it without Paſſion or Prejudice; regardleſs of every thing while they are doing their Duty. [' Magiſtrates have a mixt Quality, and are placed in a middle Station between ſovereign Princes, and private Subjects. Theſe Subalterns therefore have a double Task incumbent on them, and muſt learn both how to command and how to obey. To obey the Princes, who truſt and employ them, to ſubmit to, and truckle under the paramount Authority of their ſuperior Officers; to pay Reſpect to their Equals; to command thoſe under his Juriſdiction, to protect and defend the poor, and thoſe who are unable to contend for their own; to ſtand in the Gap and oppoſe the powerful Oppreſſor; and to diſtribute Right and Juſtice to all ſorts and conditions of Men whatſoever. And, if this be the Buſineſs of a Magiſtrate, well might it grow into a Proverb, that the Office diſcovers the Man, ſince no mean Abilities, no common Addreſs, can ſuffice for the ſuſtaining ſo many Characters at once, and to act each part ſo well as to merit a general Applauſe and Approbation. As to the Sovereign, by whoſe Commiſſion the Magiſtrates act, his Commands muſt be the rule of their Behaviour. Some of his Orders they ought to execute ſpeedily; ſome again they muſt by no means comply with; or be in any Degree inſtrumental in the Execution of them; and in others the moſt adviſeable Courſe of the Matter to the Magiſtrate, ſuch as thoſe of *Oyer* and *Terminer*; and in all others where there is this Clauſe (*ſo far as to you ſhall appear*) or any other Clauſe equivalent to this, inferred; on which, tho' they do not refer the Cogniſance to him, yet order ſuch things, as are either manifeſtly juſt, or at leaſt lawful or indifferent in their own Natures, he ought readily to obey, and without demur; for here is no difficulty, nor any ground at all for a juſt and reaſonable Scruple. In ſuch Commiſſions and Orders, as do not leave the Cogniſance of the Matter to him, but only decree ſome point of executive Obedience; as in thoſe particularly, which we commonly call Mandates and Warrants; if they be contrary to any poſitive Law, which the Sovereign has power to diſpenſe with, and there be clauſes of *Non-Obſtante* for that purpoſe, to ſave the party harmleſs; he is obliged to obey his Orders without more to do. Becauſe, according to the Civil Conſtitution, and the Laws of the Land, the Sovereign has a Liberty reſerv'd to him of relaxing, or ſetting aſide the Laws in ſuch particular Caſes. And the having ſuch a Power over all Laws whatſoever, is the very thing in which abſolute and unlimited Sovereignty conſiſts In caſes contrary to Law, or ſuch as manifeſtly make againſt the publick Good (tho' there ſhould be an indemnifying Clauſe) or where the Magiſtrate knows his Orders to be obtain'd by ſurpriſes or upon falſe ſuggeſtions, or by corrupt Methods, he ought not, in any of theſe caſes, to be haſty in the executing his Orders; but let them lie by a while, and with all Humility remonſtrate againſt them; and, if occaſion be, repeat thoſe Remonſtrances a ſecond or a third time; but if the Command be peremptory, and unalterable, and repeated as often; then he is to comply ſo far as in Honour and good Conſcience he may, and for the reſt to excuſe himſelf as well as he can. In matters contrary to the Law of God and Nature, he muſt lay down his Office, and be content to quit all; nay reſolve to ſuffer the worſt that can come, rather than be inſtrumental in, or conſenting to them. I cannot ſo much as allow him to deliberate, or once to doubt in ſuch Circumſtances what to do; for natural Juſtice cannot be hid, it ſhines clearer and brighter than the Sun; and all Men muſt ſee it, except thoſe who wilfully ſhut their Eyes, and wink hard againſt it. All this Advice relates to things in agitation, and intended or ordered to be done; but, as for thoſe which the Sovereign has done already, let them be never ſo wicked and unreaſonable, a Man had better diſſemble the Matter as well as he can, and try to wipe out all Remembrance of it, than loſe all by provoking and expoſtulating with a Prince to no purpoſe; as *Papinian* did. For it is the very extremity of Madneſs to ſtrive *againſt a Stream; where no Ground is got, nor any thing but Hatred and Diſfavour for our Pains.* As for their Duty, when conſidered in their other Capacity, and with regard to the private Subjects under their Government, Magiſtrates muſt always remember whoſe their Authority is, and from whence they derive it. That this is none of their own proper Right, but meerly a Truſt; that they hold it from and under the Prince; that he has the Fee, and is the Lord and conſtant Proprietor; but they are Tenants and Stewards at Will, put in to exerciſe this part of his Juriſdiction for ſo long a Term only, as their Commiſſion purports; or during his pleaſure, and no longer. Now hence it is very natural and obvious to infer, That a Magiſtrate ought to be eaſy of acceſs; always ready and at leiſure to hear and receive the Petitions and Complaints preferred to him: That his Doors ſhould be open to all Comers, and he as ſeldom out of the way as poſſible; but eſpecially not ſo wilfully, and by contrivance; for he ſhould conſider himſelf, as no longer at his own diſpoſal, but a Servant of the Publick, and devoted to the uſe and benefit of the People: And this was the Reaſon why *Moſes*'s Law commanded that the Judges ſhould keep their Seſſions, and decide Controverſies in the Gates of their Cities; that ſo Juſtice might offer it ſelf to all that went out and in, and none might find any Difficulty in addreſſing for, or obtaining it. He ought to receive the Applications of all Perſons and Conditions alike; and be open and kind to all, the mean as well as the great; and the poor no leſs than the rich. Upon which Account it is, that one of the Philoſophers compares a Magiſtrate to an Altar; to which all People have recourſe in their Affliction and extreme Neceſſity, pour out their Souls there, and depend upon Relief and Conſolation for their Troubles from ſo doing. But, though in point of Juſtice, he ſhould be free and open, yet in Friendſhip and Acquaintance he ought to be exceedingly reſerv'd, not to make himſelf cheap and common, not to admit any one into his Familiarities, and intimate Converſation, except ſome very choice Perſons, ſuch as are known to be Men of ſound Senſe, and ſtanch Virtue; and theſe too but privately. For, a large and general Acquaintance debaſes the Authority of his Character; and abates of that Firmneſs and Vigour which is neceſſary for the diſcharge of it. When *Cleon* was choſen and admitted to the Government, he called all his Friends together, and ſolemnly renounced from that time whatever Friendſhip had been formerly between them, as thinking the continuing under ſuch Engagements by no means reconcileable with the Truſt he had now taken upon him; and *Cicero* obſerves accordingly, that a Man muſt put off the Character of a Friend and lay that quite aſide, before he can do Right to the part of a Judge. There are two things, wherein the Office of a Magiſtrate conſiſts; the one is, to preſerve and keep up the Honour and Dignity, and juſt Right of the Prince who has employ'd him, and of the Publick, whoſe Repreſentative he is, with a becoming State, with Gravity, authoritative Behaviour, and a well-tempered Severity. Next, he is to act like a true and faithful Tranſcript, from the Original; an Interpreter and Executor of his Maſter's Will; and to ſee that this be duly declared, and diligently obſerv'd. By his Will, I mean the Law; for this is the authentick Will of the Prince, and the only Declaration of it, which Subjects are bound to take notice of. Of this the Magiſtrate is to exact a faithful Account and punctual Obſervance; for which Reaſon we often find him termed by Authors, *The Living and the Speaking Law.* Now, tho' it be the Duty of a Magiſtrate, and an excellent Qualification in him, to temper Juſtice with Prudence; and Severity with Gentleneſs and Forbearance; yet, it muſt be confeſs'd much more for the common Advantage, to have ſuch Magiſtrates as incline to the Exceſs of Sharpneſs and Rigour, than thoſe who are diſpoſed to Mildneſs, and Eaſineſs, and Compaſſion. For even God himſelf, who highly recommends, and ſo ſtrictly enjoins all thoſe human and ſoft Diſpoſitions upon other Occaſions, yet poſitively forbids a Judge to be mov'd with Pity. The ſtrict and harſh Magiſtrate is the better Reſtraint, the ſtronger Curb; he contains people in bounds, and preſerves a due Awe and Obedience of the Laws. The mild and merciful one expoſes the Law to contempt; makes Magiſtracy cheap, and leſſens the Prince who made both the Law and the Magiſtrate, in the Eyes and Eſteem of his People. In one word, there muſt go two Qualifications to the capacitating a Man for the diſcharging this Office compleatly, Integrity and Courage; the firſt cannot ſubſiſt alone, but ſtands in need of the ſecond to ſupport and back it; the former will be ſure to keep the Magiſtrates Hands clean from Avarice and Partiality, and Reſpect of Perſons, from Bribery and Gifts, which are the Bane, and utter Exterminators of Truth; and from any other Violation of Juſtice; which *Plato* calls (which indeed it ought to be) a pure unblemiſh'd Virgin: This will alſo be a Guard to him againſt his Paſſions; the Averſions or Affection he may bear to the Parties concerned; then he will find great occaſion for Courage too, to ſtand his Ground againſt the Menaces and imperious Solicitations of great Men, and Requeſts and Importunities of Friends, who fanſy they have a ſort of Right to diſpoſe of him, and will not take a reaſonable refuſal: To harden him againſt the Prayers and Tears, the loud Cries and bitter Complaints of the miſerable and afflicted; for all theſe are very moving and forcible Inducements, a great Violence, upon Reaſon and Duty; and yet ſo committed, that there is plauſible Appearance of both, in the very diverſion they labour to give us from both. And the Truth is, this Firmneſs and inflexible Conſtancy of Mind is the moſt maſterly Virtue, and particular Excellence of a Magiſtrate; that he neither be terrified and ſubdued by Greatneſs and Power, nor melted by Miſeries and deplorable Circumſtances. Theſe are what very brave Men are often tranſported by; and therefore it is the greater Praiſe to continue proof againſt them. For, though being ſoften'd by the latter, it have an Air of good Nature, and is more likely to prevail upon the better ſort of Men; yet either of the extreams are ſinful, and both foreign to the Merits of the Cauſe, which is the only thing that lies upon a Judge. The Motives of Pity then are very dangerous Temptations; and what a Man in Authority ought as much to ſtop his Ears againſt, as Promiſes or Threatnings; for even that God himſelf, who is Love and Mercy in perfection, has diſcountenanced this unſeaſonable Compaſſion. And the ſame Legiſlator, who ſaid, *Thou ſhalt not receive a Gift to blind thine Eyes therewith, neither ſhalt thou accept the Perſon of the Mighty*, found it no leſs neceſſary for the good of Mankind, and the equal Diſtribution of Juſtice, no leſs agreeable to his Goodneſs, to add that other Command, *Thou ſhalt not favour a poor Man in his Cauſe.* Charron de la Sageſſe, *Liv.* 3. *Chap.* 17. *Sect.* 3, *&c.*'] 5. The *Generals, Captains*, and other *Officers in the Army* ought to exerciſe their Soldiers carefully and at convenient Times, to inure them to bear the Hardſhips and Fatigue of War; ſhould ſtrictly obſerve all the Rules of Military Diſcipline; never expoſe, nor hazard their Troops, but when there is an abſolute neceſſity for it; ſhould take care as far as in them lies, that their Soldiers have a conſtant regular ſupply of Proviſions, and not defraud them of their Pay and Allowance; never ſtrive to win their Affection to the prejudice of the Government, but always inſpire them with Sentiments conformable to the Good of the Country and the publick Welfare. 6. *Soldiers*, on the other hand ought to be content with their Pay, and not plunder, nor abuſe in any manner whatſoever, either Citizens, or the Country-people; ſhould chearfully and with reſolution expoſe themſelves to the Fatigues and Hazards to which they are called for the Defence and Honour of their Country; ſhould as much avoid the imprudent Ardour of running into unneceſſary Dangers, as the baſe Cowardiſe of flying when there is occaſion for their ſtanding; ſhould ſhew their Valour and Intrepidity upon the Enemy, and not upon their Comrades; ſhould valiantly maintain their Poſts, and prefer a glorious and honourable Death to an ignominious Flight and Life. 7. *Ambaſſadors, Plenipotentiaries*, Envoys, and others *that bear any Publick Character abroad*, ought to behave themſelves with great Prudence and Circumſpection; to be Perſons of deep Penetration, carefully to diſtinguiſh Solidities from Trifles, and Truth from Falſhood; inviolable in keeping a Secret, and proof againſt any Corruption or Temptation that might make them neglect or abandon the Intereſt of their Prince. [' A publick Miniſter, or a Plenipotentiary, is a *Camelion*, a *Proteus*; ſometimes, like a cunning Gameſter, he diſſembles his very Humour and Temper, as well to avoid the Conjectures and Penetration of others, as to prevent any Secret eſcaping thro' Paſſion or Weakneſs; is always ready to put on that Shape his Deſigns and Occaſions require, and artificially appears what it is his Intereſt to be thought. Thus when he deſigns to diſſemble that his Maſter is very Formidable or very

‘ Low, he is reſolute and inflexible, to prevent any large Demands; or eaſy and complaiſant, to give others occaſion to make them, and to ſecure the ſame Liberty. At other times he is profound and ſubtil, to conceal a Truth in the very publiſhing of it; becauſe it concerns him to divulge it, and that it ſhould not be believed: Or elſe free and open, that whenever he ſhall have occaſion to conceal what muſt be kept ſecret, People may not ſo much as ſuſpect him; but on the contrary, believe he has diſcover'd whatever he knew. In like manner he is warm and verboſe, to excite others to talk, or to hinder their ſpeaking what he deſires not to hear, or their acquainting him with what he would be ignorant of; talks of indifferent Things which ſoften and deſtroy one another, and leaves the Mind confounded betwixt Confidence and Diſtruſt; that he may make amends for one loſt Opportunity by dextrouſly gaining another: Or he is cool and ſilent to engage others to talk; hears patiently a tedious while to obtain the ſame Favour himſelf; talks with ſuperiority and weight when he deſigns to make ſuch Promiſes or Threats as may carry a great ſtroke with them, and make a ſtrong Impreſſion upon ſuch to whom they are directed. Sometimes he ſpeaks firſt, the better to diſcover the Oppoſitions and Contradictions, Intrigues and Cabals of foreign Miniſters, upon the Propoſitions he has to advance, and take his Meaſures from their Anſwers. At another Meeting he ſtays till the laſt, that he may be ſure not to loſe his Labour; to be more exact; to obſerve every thing that may be ſerviceable to his Maſter, or his Allies: To know what to ask, and what he can obtain: He knows how to be clear and expreſſive, or obſcure and ambiguous; can uſe equal Words and Turns, which he can render more or leſs forcible, as his Intereſt and Occaſions require. He asks little, becauſe he won't grant much; or his Requeſts are large, that he may be ſure of a little: Deſires ſmall things which he pretends to be of no value, that they may not hinder him of greater; avoids the gaining an important Point at firſt, as it is like to hinder him of ſeveral, which, tho' in themſelves of leſs value, yet united exceed the other. His Demands are extravagant, with deſign to be denied, that he may be furniſh'd with a juſt Excuſe for refuſing thoſe he knows will be made: As induſtrious to aggravate the Enormity of theſe, and as warmly to urge the Reaſons why he cannot hearken to them, as earneſtly to endeavour to enervate thoſe which they pretend for their Denial: Equally concerned to aggrandize the little he offers, as to ſlight openly the little they are willing to grant. Feigns extraordinary Proffers, which beget a Diſtruſt, and oblige them to reject what indeed accepted would be uſeleſs; this ſerves to colour his exorbitant Demands, and to throw the blame of the refuſal upon them: He grants more than they can ask, to get more of them; ſhews himſelf very hard and unwilling to grant trivial things, that he may quaſh all Hopes and Expectations of better from him; or if he is perſuaded to part with any thing, 'tis on ſuch Conditions that he may ſhare the Advantages of it. He directly or indirectly eſpouſes the Intereſt of an Ally, as he finds it profitable, or as it tends to advance his Pretenſions; talks of nothing but Peace and Alliances, the publick Good and Tranquillity; in all which he means nothing but his Maſter's Intereſt; ſometimes he reconciles diſagreeable Parties, at other times he divides thoſe he found united; terrifies the ſtrong and potent, and encourages the weak: Unites ſeveral feeble Intereſts againſt a powerful one, to render the Balance equal; joins with the former, that they may deſire his Alliance and Protection which he ſells at a dear rate: knows how to intereſt thoſe with whom he treats, and by a dextrous Management, by fine and ſubtil Turns, makes 'em ſenſible of their private Advantage, the Riches and Honours they may hope for by a little Eaſineſs which will not in the leaſt claſh with their Commiſſions, nor the Intentions of their Maſters. And that he may not be thought impregnable on this ſide, betrays ſome ſmall Concern for his own Fortune; diſcovers by this their moſt ſecret Intentions, the moſt profound Deſigns, and laſt Efforts; which he turns to his own Advantage. If he is injur'd in any conſiderable Article, he is very loud, but if he finds he is not ſo, is yet louder, and throws the injur'd on their Juſtification and Defence. All his Meaſures were order'd, his Steps pointed out, and his leaſt Advance preſcrib'd by the Court, yet he appears as complaiſant and free in the moſt difficult Conteſts, as if all his Compliances were *extempore*, and purely owing to his condeſcending Temper. He dares even engage to an Aſſembly that the Propoſals ſhall be approv'd of, and that his Maſter will not diſown him. He ſpreads falſe Rumours concerning thoſe things which he alone is entruſted with; he cloſely reſerv'd ſome particular Inſtructions, theſe he never diſcloſes, but at ſuch Extremities as to neglect the uſe of them would be pernicious. All his Intrigues tend to ſolid and ſubſtantial Ends, for which he willingly ſacrifices Punctilio's, and imaginary Points of Honour. He has a great deal of Phlegm, and is arm'd with Reſolution and Patience; fatigues and diſcourages others, but is himſelf unwearied. He's forewarn'd and fortified againſt all tedious Delays and Affronts, Jealouſies and Suſpicions, Difficulties and Obſtacles; fully perſuaded that Patience and an happy Conjuncture will influence their Minds and accompliſh his deſired Ends. He feigns a ſecret Intereſt to break off the Negotiation, when he paſſionately deſires its Continuance; but on the contrary, when he has ſtrict Orders to uſe his laſt Endeavours to break it off, thinks the beſt way to effect it is to preſs its Continuation. After a very great Event, he is either ſtiff or eaſy, according as it is advantageous or prejudicial; and if by a vaſt Prudence he can foreſee any thing advantageous to the State, he follows it cloſe, temporizes and manages himſelf according to the Hopes, Fears, and Neceſſities of his Maſter; takes his Meaſures from Time, Place, and Occaſion, his own Strength and Weakneſs, the Genius of the Nation he treats with, and the particular Temper and Character of their Miniſters. All his Maxims, Deſigns, and moſt refin'd Politicks tend only to prevent being deceiv'd, and to deceive others. Mr. *de la Bruyere*'s *Characteres* at *Chap. du Souverain & de la Repulique.* This indeed is a very fine Deſcription of a publick Miniſter, or a Plenipotentiary; but, however ſuch a Deſcription in which every particular is not to be imitated. We may alſo conſult Mr. *Wicquefort*'s Book intitled, *L'Ambaſſadeur & ſes Fonctions.*'] 8. The *Commiſſioners*, or Receivers of the Revenues belonging to the State, and in general all thoſe who have the Management of the publick Money, ought to take care not to uſe any unneceſſary Severity, nor to exact more of the Subjects than what they are tax'd at, to enrich themſelves, and burden others; ſhould apply none of the publick Treaſure that paſſes through their Hands to their own uſe, and ſatisfy thoſe whom they have Orders to pay out of it, without making them ſtay a long time for their Money. But all *theſe particular Duties* of Subjects ceaſe with the publick Poſts and Employments from whence they flow. Whereas the *General Duties* remain ſtill in force, as long as Men are Subjects and live under any Form of Government.

CHAP. IX.

Of the Duty of Sovereigns.

- I. *The Office and Duty of Sovereigns, whence to be diſcover'd.*
- II. *The Obligation that Princes have to be well inſtructed in it.*
- III. *The People's Safety is the ſupreme Law.*
- IV. *The Subjects are to be train'd up in good Manners.*
- V. *Fit Laws are to be enacted,*
- VI. *And put in Execution.*
- VII. *Penalties are to be inflicted with Juſtice and Moderation.*
- VIII. *The Subjects are to be reſtrain'd from mutual Injuries.*
- IX. *An able and honeſt Miniſtry is to be imploy'd in State Affairs.*
- X. *Taxes are to be equally laid, and rightly gather'd.*
- XI. *The Wealth of the State is to be advanced.*
- XII. *Factions to be prohibited.*
- XIII. *A ſufficient Force to be kept up for the oppoſing of foreign Invaders.*

IT remains that we take a View of the Duty of Sovereigns; which ought to be explain'd with eſpecial Care and Diligence; as well in regard, that the Ignorance or Neglect of this Duty is the Occaſion of ſo many Miſchiefs in the World, as becauſe to deliver the Rules and Meaſures of it, is the proper Buſineſs of this general Part of civil Knowledge, it being placed beyond the Bounds of municipal Laws. Yet in as much as others have frequently inculcated theſe Points, we ſhall reckon our Task diſcharg'd, in barely repeating the chief Heads [a]. The Precepts then which unite in the making up of this Duty, may eaſily be gather'd, by examining the Nature and End of civil Communities, and the proper Offices belonging to the ſovereign Power.

II. Here then it is before all things neceſſary that Princes induſtriouſly apply themſelves to the underſtanding of every thing, that falls under the compleat Diſcharge of their Truſt; ſince no Man can manage with Commendation what he hath not firſt rightly learn'd and conſider'd [b]. And as the [c] Art of Government is ſo very difficult as to require the whole Man, tho' of the greateſt Parts and Abilities [2], they

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[a] See Lord *Bacon*'s Serm. *fid.* c. 19.

[b] See 1 Kings iii. 9. *Virg. Æn.* 6. v. 852, 853. *Iſocrates* has a wiſe Remark on the ſame Subject; It is, *ſays he*, 'that according as Princes cultivate their own Minds, ſo they muſt expect to find their Kingdom. And therefore no Champion at the Games has ſo much need to excerciſe his Body, 'as a Governour has to exerciſe and improve his Wit, *Ad Nicoclem.* And the Admonition of the Satyriſt, as it belongs to Mankind, ſo it eſpecially affects Princes.

Diſce ———— — — ——— ————
———— ————*quem te Deus eſſe*
Juſſit, & humanâ qua parte locatus es in re.
Perſ. Satyr. III. v. 71, 72.

Study thy ſelf, what Rank or what Degree
The wiſe Creator hath ordain'd for Thee,
And all the Offices of that Eſtate
Perform, and with thy Prudence guide thy Fate.
Mr. DRYDEN.

See alſo *Philip de Comines*, Lib. 1. p. 342. & Lib. III. p. 388.

[c] That thoſe things which appear neceſſary to be known, in order to the well-governing of a State, are not ſo very trite and vulgar, ſo obvious to all Capacities, may be gather'd from what Mr. *Hobbes* has particularly deliver'd on this Point. *De Cive* c. x. ſ. 10.

Mr. BARBEYRAC's *NOTES* on §. I, and II.

[1] 'How happy is that Poſt which every Minute furniſhes Opportunities of doing good to thouſands! How dangerous is that which every moment expoſes to the injuring of Millions! (*Characteres de la Bruyere*, Chap. *du Souverain & de la Republique*, p. 337. *Ed. de Bruxelles* 1697) the Good which Princes do, reaches even to the moſt diſtant 'Ages, as the Evils that they occaſion are multiplied from Generation to Generation to lateſt Poſterity. Theſe are the Archbiſhop of *Cambray*'s own Words in his *Avantures de Telémaque* (Page laſt but one of the laſt Tome) a Work from whence I ſhall take ſeveral fine Paſſages, with which the Reader, I preſume, will not be diſpleaſed to have his Memory refreſhed, to renew the Pleaſure which he took in the firſt reading of ſo many excellent Precepts, where the Solidity of the Thoughts, and the Beauties of the Expreſſion, ſtrive in emulation of each other, which ſhall moſt charm thoſe who have a taſte of fine Things.

[2] 'The moſt painful and difficult Employment in the World, in my Opinion (ſays *Montagne*) is worthily to diſcharge 'the Office of a King. I excuſe more of their Failings than Men generally do, in conſideration of the inſupportable 'weight of their Office, which amazes me. 'Tis hard to keep meaſure in ſo unmeaſurable a Power. Whether it is, 'that it is to thoſe who are of a leſs excellent Nature, a mighty Incitement to Virtue to be fix'd in a place where you 'cannot do the leaſt good that is not put upon Record; and where the leaſt Benefit accrues to ſo many Perſons; and 'where your Capacity, like that of Preachers, is principally addreſs'd to the People, no very exact Judge, eaſily imposed on, and eaſily contented. *Eſſais*, Liv. 3. *Chap.* 7. *de l' incommodite de la Grandeur*, p. 681. in *Fol.* See alſo *Lib.* 1. *Chap.* XLII. where there is in the Margin, *Sceptre de Grand poids.* Here are Mr. *de la Bruyere*'s Thoughts, which are as beautiful as ſolid. 'There are, *ſays he*, no general or certain Rules of governing well; they depend on Times and 'Conjunctures, the Prudence and Deſigns of the Governours: So that perfect Government is the Maſter-piece of 'the Underſtanding, and perhaps it would be impoſſible to arrive at it at all, did not Subjects contribute one Moiety 'to the Work by an Habit of Dependence and Submiſſion.——If the care of a ſingle Family be ſo burdenſom, if a 'Man has enough to do to anſwer for himſelf; what a weight, what a load is the charge of a whole Kingdom? Is the 'Sovereign recompenſed for all his anxious Cares by the Proſtrations of his Courtiers, or the Pleaſures an abſolute 'Power ſeems to afford? When I think on the troubleſom, hazardous, and dangerous Paths he is forc'd to tread, to arrive 'at *publick Tranquillity*; and when I reflect on the extreamly difficult, tho' neceſſary, Methods he is frequently oblig'd to 'uſe to compaſs a good End; that he is accountable to God even for the Felicity of his People, that Good and Evil are 'in his hands, and that Ignorance is no Excuſe; I can't forbear asking my ſelf, Wouldſt thou reign? Would a Man 'meanly

ought therefore as it were to forget their own Perſons, and live only for the Sake of the People. From theſe Conſiderations it follows, that Princes ought to [3] renounce all thoſe Studies and Purſuits which contribute nothing to this good End, much more are they obliged to retrench their Pleaſures and uſeleſs Diverſions, ſo far as they intercept their main Employment: For the ſame Reaſon they ought to admit into their Familiarity none but Men of Wiſdom and Experience [4]; and on the contrary, to diſcountenance and chaſe away all flattering

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' meanly happy in a private Condition, quit it for a Throne? Is it not even to one, who comes to it by Hereditary Right, almoſt inſupportable to be born a Monarch?——There is a ſort of Commerce or Reciprocal Return of the Duties of the Sovereign to his Subjects, and of theirs to him. Which are moſt ſtrongly binding, or moſt difficult in the Performance, I won't determine: 'Tis not indeed very eaſy to judge between the ſtrict Engagements of Reverence, Aſſiſtance, Service, Obedience and Dependence on the one ſide; and the indiſpenſible Obligations to Goodneſs, Juſtice and Protection on the other. To ſay the Prince is the ſupreme Diſpoſer of the Lives of the People, is to tell us only that the Vices of Mankind have entailed on them a natural Subjection to Juſtice and the Laws, with the Execution of which the Prince is entruſted: To add that he is abſolute Maſter of his Subjects Goods, without any Reaſon or legal Proceſs, is the Language of Flattery, the Opinion of a Favourite, who will recant it when he feels Death upon him. When on a fine Evening you ſee a numerous Flock of Sheep ſpread over a little Hill, quietly grazing on the fragrant Thyme; or in a Meadow, nibbling the ſhort and tender Graſs that has eſcap'd the Mower's Scythe, the diligent and careful Shepherd, you obſerve, is always amongſt them, ſuffers 'em not to go out of his Sight, leads 'em, follows 'em, changes their Paſture; if they wander, he fetches 'em in; if the greedy Wolf appears, he ſets his Dog on, to beat him off; he nouriſhes and preſerves them; the Morning finds him in the open Field in which the Sun left him: What Care! What Vigilance and Slavery is this! Which Condition looks to you the moſt delightful and free, that of the Sheep or the Shepherd? Was the Flock made for the Shepherd, or the Shepherd for the Flock? The genuine Image of this is of a good Prince and his People. There is no Occaſion (on the contrary) for Arts and Sciences in the Exerciſe of Tyranny; the Policy which conſiſts only in Bloodſhed, is very ſhallow, and has nothing of Fineneſs in it. It prompts us to murther all whoſe Lives are Obſtacles to our Ambition; and this a Man, naturally cruel, does with Eaſe. 'Tis the moſt barbarous and deteſtable way of ſupporting and aggrandizing our ſelves. *Caractéres ou Moeurs de ce Siecle.* Chap. *du Souverain & de la Republique.* See likewiſe *les Avantures de Telemaque*, Tom. V. p. 18. *Ed. de Bruxelles. Xenophon*, as our Author has remark'd, ſaid a long time ſince, That *Man is able more eaſily to govern all other Creatures, than thoſe of his own kind*; Ὡς ἀνθρώπῳ πεφυκότι, πάντων τῶν ἄλλων ζώων εἴη ῥᾷον ἢ ἀνθρώπων ἄρχειν, *Cyrop. lib.* 1. *init.* See alſo in *les Choſes memorables, Socrates*'s Diſpute with a Youth, named *Glaucon. Iſocrates* (ad Nicoclem) in the Beginning, calls a Kingdom the greateſt of humane *Affairs, and ſuch as requires more than ordinary Degrees of Prudence and Foreſight*; and ſays, that the Cauſe of all the Misfortunes which Kings are expoſed to, and of the Diverſity of Opinions about their Condition is, *That People think that all the World is as capable of reigning, as of diſcharging the Offices about the Temple.* Ταυτης δὲ τῆς ἀνωμαλίας, ϗ, &c. Yet nevertheleſs, adds our Author, there are many that think the *Italian* Proverb not altogether groundleſs, that *there needs but a very little Brains to rule the whole World*; nor this other *Latin* one, *The World does not know what little Wiſdom it is that governs it*: Upon which I have read a Diſſertation of a Profeſſor at *Leipſick*, named Mr. *Adam Rechenberg*, printed in 1676. He might add, that if they mean by that, that generally the Government of States is the Thing of the World in which the leaſt Ability, Care, and Application is employed, one might admit of theſe Proverbs. But it muſt likewiſe be acknowledged, that if the Rulers of States would diſcharge their Duty as they ought to do, they would be more ſenſible of the Weight of Government than they are; and that if they would inform themſelves of the Rules of ſo nice and difficult an Art, and practiſe them exactly, the World would be much better governed than it is, and the People infinitely more happy.

[3] 'Tis a ſort of an Affront and Mockery to extol a Man for Qualities miſbecoming his Rank and Condition, tho' otherwiſe commendable, and for Qualities alſo that ought not to be his principal Endowments: As if a Man ſhould commend a King for being a good Painter, a good Architect, a good Markſman, or a Runner; Commendations that do him no Honour but when mentioned together, and in the Train of thoſe that are more properly belonging to him, to wit, his Juſtice, and his Knowledge in governing his People, both in Peace and War. 'Twas after this Manner that *Agriculture* was an Honour to *Cyrus*, and the Knowledge of Letters to *Charlemagne*——*Demoſthenes*'s Companions in the Embaſſy to *Philip*, extolling that Prince as being handſome, eloquent, and a ſtout Drinker, were anſwered by *Demoſthenes*, that theſe were Commendations more proper for a Woman, an Advocate, or a Spunge, than a King.

' *Imperet bellante prior, jacentem*	Firſt, let his Empire from his Valour flow,
' *Lenis in hoſtem.*	And then by Mercy on the proſtrate Foe.
' *Horace* Carm. Sæcul. V. 51, 52.	

'Tis not his Profeſſion to know either how to hunt, or how to dance well.

' *Excudent alii ſpirantia mollius æra,*	Let others better mold the running Braſs,
' *Credo equidem, vivos ducent de marmore voltus:*	And ſoften into Fleſh a marble Face;
' *Orabunt cauſas melius, cœlique meatus*	Plead better at the Bar; deſcribe the Skies;
' *Deſcribent radio, & ſurgentia ſidera dicent:*	And when the Stars deſcend, and when they riſe.
' *Tu regere imperio populos, Romaue, memento.*	*Roman*, 'tis thine alone with awful ſway,
(Virg. Æneid. VI. 846, &c.)	To rule Mankind, and make the World obey.
	DRYDEN.

' *Plutarch* ſays moreover, that to appear ſo excellent in theſe leſs neceſſary Qualifications, is, to produce a Witneſs againſt a Man's ſelf, of his having miſpent his Time, and applying his Studies ill, which ought to have been employed in the Acquiſition of more neceſſary and uſeful things. So that *Philip*, King of *Macedon*, having heard *Alexander* the Great his Son ſinging at a Feaſt, in Emulation of the moſt skilful Muſicians there, *Art thou not aſhamed*, ſays he to him, *to ſing ſo well?* And to the ſame *Philip*, a Muſician with whom he was diſputing about his Art; *Heaven forbid, Sir, that ſo great a Misfortune ſhould ever befal you, as to underſtand* thoſe things better than I. A King ſhould be able to anſwer, as *Iphicrates* did the Orator, who preſs'd hard upon him in his Invective, after this Manner; *And pray what art thou, that thou doſt ſwagger at this Rate? Art thou a Soldier, doſt carry a Musket, art thou a Pikeman? I am none of all this, but I am one who knows how to command all theſe.* Eſſais de Montagne, *Liv.* I. *Chap.* XXXIX.

[4] ' The wiſe *Mentor* ſays to *Idomeneus*, in *les Avantures de la Telemaque*, Do you not ſee that Princes who are corrupted by Flattery, take every thing to be harſh and auſtere that is free and ingenuous? They are become ſo nice, that every thing that is not Flattery, offends and provokes them. But let us proceed a little further: Suppoſe that *Philocles* is really harſh and auſtere, is not his Auſterity much better than the pernicious Flattery of your Counſellors? Where will you find a Man without Faults? And ſhould not you fear, leaſt of all, the Fault of one who tells you the Truth a little too boldly? But is not this a Fault neceſſary to the Correction of your own Faults, and to the con-

Paraſites [5], all trifling Genius's, and ſuch as are skilled in nothing but what is empty and inſignificant [6]. But now to render themſelves capable of applying as they ought the general Maxims of State Policy, Princes muſt be perfectly acquainted with the Conſtitution of the State [7], and

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conquering that Averſion to Truth which Flattery has raiſed in you? You ought to have a Man about you, that loves nothing but Truth, and who loves you better than you know how to love your ſelf; who will tell you the Truth in ſpite of you, who will force through all your Intrenchments; and this neceſſary Man is *Philocles*. Remember, that a Prince is extremely happy, when but only one Man of ſuch an Elevation of Mind is born in his Reign, and who is certainly the moſt valuable Treaſure of his Kingdom; and that the greateſt Puniſhment he ought to fear from the Gods, is to loſe ſuch a Man, if he renders himſelf unworthy of him, for want of knowing how to make uſe of him. As for the Faults and Errors of good Men, you ought not to be ignorant of them; but however you ſhould make uſe of their ſervice Set them right; but be not implicitly managed by their raſh and indiſcreet Zeal; give them a favourable hearing, honour their Virtue, and ſhew the publick that you know how to diſtinguiſh it; but more eſpecially take care that you be not like thoſe Princes, who, contenting themſelves with deſpiſing corrupt Men, do notwithſtanding employ them, truſt in them, and heap Favours upon them; and who, pretending to have Judgment to know virtuous Men, yet give them nothing but empty Commendations; not daring to truſt them in any Employments, nor to admit them into their familiar Converſation, nor to beſtow any Kindneſſes upon them, *Tom.* III. p. 3, *&c. Iſocrates*, as our Author obſerves, gave likewiſe this Advice to *Nicocles*: *Φίλους κτῶ μὴ πάντας τοὺς βουλομένους, ἀλλὰ, &c. p.* 34. *Ed. Par. min.* Receive into your Friendſhip not every Body, but ſuch only as are worthy of your high Birth and Station; not thoſe with whom you might paſs your Life moſt pleaſantly, but thoſe by whoſe Aſſiſtance you may beſt govern the Commonwealth. Uſe your ſelf to take Delight in ſuch Company, as may both increaſe the Stock of your Wiſdom, and raiſe the Character of your Virtue among others.——Rely upon the Fidelity, not of thoſe who praiſe every thing you ſay or do, but of thoſe who admoniſh you when you commit any Fault. Suffer wiſe and prudent perſons to ſpeak with Freedom to you, that when you are in any Difficulty you may find people that will endeavour with you to clear Matters up. Diſtinguiſh artful Flatterers from ſuch as ſerve you with Affection; that Rogues may not have a larger ſhare in your Favour than Men of Honour and Honeſty.

[5] ‘A King is not to be believ'd when he boaſts of his Conſtancy in ſtanding the Shock of an Enemy for his Glory, if for his Good and Amendment he cannot ſtand the Liberty of a Friend's Advice, which has no other power than to wound his Ear a little, the reſt of its Effects being ſtill in his own Hands. Now there is no Condition of Man whatever that has ſo great Occaſion for true and free Informations as theirs. They ſupport the publick Life, and are to pleaſe the Opinion of ſo many Spectators, that, as it has been cuſtomary for Men to conceal from them whatever might have power to divert them from the Courſe they are taking, they find themſelves inſenſibly involv'd in the Hatred and Deteſtation of their People, often upon ſuch trivial Occaſions as they might eaſily have avoided, and without the leaſt prejudice even to their Pleaſures themſelves, had they been adviſed and ſet right in Time. Their Favourites have commonly more regard to themſelves, than to their Maſters; and certainly 'tis their Intereſt to do ſo, foraſmuch as the greateſt part of the Offices of true Friendſhip, when uſed to a Sovereign, are eſteemed to be a rude and hazardous Undertaking: And therefore there is Occaſion not only of very great Affection and Freedom, but for Courage too.----There is none of us all that would not be worſe than Kings, if ſo continually corrupted as they are by ſuch kind of Vermin. *L'Eſſais de Montagne*, Liv. III. *Chap.* XIII. *p.* 803. 804. There follows in that Place ſome ſolid Thoughts upon the Way that ought to be taken to inform Princes of their Faults, and to make them give Ear to Truth. *See* alſo Two *fine Chapters of Charron*, in his Treatiſe *de la Sageſſe*, Liv. III. c. 9, 10.

It were indeed to be wiſh'd, that *Carneades*'s Obſervations were not too often found true, that *the Sons of Princes, and other wealthy and great Men, learn no Art well but that of Horſemanſhip, becauſe their Horſe cannot flatter them.* Add *Diodor. Sic.* Lib. I. cap. 71. & Lib. XII. cap. 12. Where the ſame Author reports, that *Charondas* among his other Inſtitutions, order'd an *Action of ill* Company, and ſet a very ſevere Penalty on thoſe, who, being proſecuted upon this *Action*, ſhould be convicted. See *Plutarch de Deſcrim. Amic. & Adulator.*

[6] The reſt of this Paragraph is not in the Original, but is taken from our Author's Abridgment *de Offic. Hom. & Civ. Lib.* II. *c.* 11. §, 2.

[7] ‘In the firſt place he muſt apply himſelf to Study, and underſtand the Humour and Complexion of his people. For this Knowledge will be a very great Direction, and model the Perſon to whoſe Government they are committed. Now the reigning Qualities of the People in general——are Fickleneſs and Inconſtancy; a Spirit of Faction and Diſcontent; of Impertinence and Folly; Love of Vanity and Change; Inſolence and inſupportable Pride in Proſperity; Cowardiſe and Dejection of Mind in Adverſity. But beſides theſe Characters, which are common to Perſons of that Condition every where, a Man muſt be ſtill more particularly inſtructed in the Temper and Complexion of that Country, and thoſe Subjects, where himſelf is concerned. For the Diſpoſitions of Men differ extremely, and are almoſt as various as the Towns wherein they dwell, or the Perſons that inhabit them. Some Nations are in a peculiar and diſtinguiſhing Manner, paſſionate or cholerick, bold and warlike, cowardly or luxurious, addicted to Extravagance, to Wine, to Women; laborious or ſlothful, frugal or expenſive. And of thoſe who agree in theſe Qualities, there is a Difference in the Meaſure; in ſome they are more, in others leſs predominant. So neceſſary is that Rule, *noſcenda natura vulgi eſt, & quibus modis temperanter habeatur.* That the common people muſt be ſtudied, firſt to know what they are, and then what is the beſt Method of dealing with them. And in this ſenſe it is, that we are to underſtand the old Philoſophers, when they pronounce Subjection and Obedience a neceſſary preparation to the Art of Ruling: *Nemo bene imperat, niſi qui ante paruerit imperio.* No Man (ſays *Seneca*) ever governs well, who has not firſt liv'd under Government, and known what it is to be commanded himſelf. Not that we are to infer from hence any Neceſſity, or indeed ſo much as a poſſibility, that all Princes ought to be rais'd to that Dignity from an inferior Condition; for ſeveral of them are born Princes; and a great many Governments paſs on in a Line, and come by Succeſſion and Proximity of Blood: But the true Importance of that Maxim is, that whoever is deſirous to be a good Governour, muſt inform himſelf of the Humours and Inclinations of his Subjects, and underſtand which are the reigning Qualities in them, as perfectly well as if he had been one of the ſame Rank himſelf, and had felt and had been acted by them in his own perſon. But then it is no leſs neceſſary, that the Condition of the Government ſhould be likewiſe thoroughly underſtood, and that not only what Sovereignty and Power is in general; but the Frame and Temper of that Government and that State in particular, where this perſon himſelf preſides, what the Form and Conſtitution of it is, how it was fix'd and adjuſted, and what Extent of Power is veſted in him; whether it be an old or later Eſtabliſhment; whether it deſcends by Inheritance, or whether it be conferr'd by Election; whether it were obtained by regular and legal Methods, or whether acquired by Force of Arms; how far this Juriſdiction reaches; what Neighbours are about him; what Strength and what Conveniences he is provided with. For according to all theſe, and a great many other Circumſtances, too tedious to be ſpecified here, a different ſort of Conduct will be found neceſſary. The Sceptre muſt be ſway'd, as ſuch Conſiderations ſhall declare; one and the ſame Method will not ſerve all alike; but the Rules and Adminiſtration muſt be ſuited to the Temper of the Beaſt, and as this proves to be harder or ſofter mouth'd, ſo the Rider muſt take Care to keep a ſtiffer or a ſlacker Rein. *Charron de la Sageſſe*, Liv. III. Chap. 2. *Sect.* 1. We ſhall ſee the Uſefulneſs of theſe Inſtructions, when we come a little farther to treat of the Manner in which Laws ought to be made. (*Sect.* 5.) *Plutarch* likewiſe gives it as the *firſt Maxim* to thoſe whoſe Buſineſs it is to govern the State, to ſtudy the

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the **Temper** of their Subjects [8]; they ſhould alſo in a more particular manner endeavour to excel in ſuch Virtues [9] as will be of Service to them in ſupporting the weight of ſo difficult and

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‘ Diſpoſition of the People, and to accuſtom themſelves to it as much as poſſible, or elſe, ſays he, if they ſhould endeavour to introduce Changes and Alterations in it all at once, they would be engag'd in an Affair that is neither eaſy nor ſafe, and that requires a great deal of Time, and a Power firmly eſtabliſh'd. Τρέπεσθαι χρὴ πρὸς κατανόησιν, &c. *Præcept. Reip. gerendæ*, p. 749. *B. Ed. Wech.* There are in the reſt of this Treatiſe many excellent Maxims for the Art of Government.

[8] ‘ After the Knowledge of the State and Government, which is in the Nature of a Preface or Introduction, the next both in Order and Dignity, is Virtue. And no Man can wonder that ſo honourable a Place is aſſign'd to this, among the neceſſary Qualifications of a Governour, who at all conſiders how abſolutely and indiſpenſibly needful it is to a Prince, and that both upon his own account, and for the Benefit of the Publick. Firſt of all it is highly reaſonable, as *Cyrus* well obſerves, that he who is above all the reſt in Honour and Authority, ſhould be ſo in Goodneſs too; this is no more than what ſuch a great and elevated Station may juſtly ſeem to require of him. Then his own Reputation is nearly concern'd in it; for common Fame makes it one great part of its Buſineſs to pick up and diſperſe every thing our Governours do or ſay: The Prince ſtands expoſed to the publick View, every Eye is upon him, and he is curiouſly watch'd. There is no ſuch thing in Nature as Privacy in Princes; they can no more be hid than the Sun in the Firmament. They are the conſtant Subject of Diſcourſe in every Company, and ſo are ſure to have a great deal of good, or a great deal of ill ſaid of them. And it is of exceeding great Conſequence to any Governour both with reſpect to his perſonal, and the common Intereſt and Safety, what Opinion the World have of him. Nor is it enough, that the ſupreme Governour be virtuous in his own Temper and Converſation, but he is likewiſe obliged to take good Care that the Subjects be like him in Goodneſs. And how deeply this concerns him I appeal to the univerſal Conſent of all good and learned Men, who, with one Voice, declare it impoſſible for that Kingdom or Nation, that City or leſs Society of Men, to proſper; nay, ſo much as to ſubſiſt long, who have baniſhed Virtue from amongſt them. And thoſe nauſeous Flatterers prevaricate much too groſly, who pretend that it is for the Advantage and Security of Princes, that their Subjects ſhould be abandon'd to Wickedneſs and Vice. Becauſe they ſay, this emaſculates their Minds, and renders them more tame and ſervile in their Diſpoſitions. So *Pliny* in his Panegyrick (Chap. XLV) ſays, *Patientiores ſervitutis, quod non decet eſſe niſi ſervos.* They are more patient under Slavery, who are fit to be nothing but Slaves. For, quite contrary, we find by unqueſtionable Experience, that the more vicious Men are, the more do they flinch and grow unruly under the Yoke: The good and the gentle, the meek and ſweet temper'd Men, theſe are much better qualified to live in Fear and Awe of Authority themſelves, than to be an Awe or give Occaſion of Jealouſy to their Governours. *Peſſimus quiſque aſperrime rectorem patitur* (Saluſt. ad *Cæſar.* de Rep. Ordinand. Orat. 1. init.) Every Man is more ungovernable, *in proportion as he is a worſe Man.* Mutiny and Diſcontent, and perpetual Uneaſineſs are the ſure Attendants of a profligate Mind. *Contra, facile imperium in bonos, qui metuentes magis quam metuendi.* On the other Hand, good Men are very eaſily kept in order; they give their ſuperiors little Trouble, but had rather *ſubmit with Reverence and Fear than be a Terror and Diſturbance* to them. Now there cannot be a more powerful Motive, a more efficacious Means of bringing over the People, and forming them unto Virtue, than the Example of the Prince. For (as daily Experience ſhews) every one affects to be like him; and the Court is the ſtandard of Manners, as well as of Faſhions. The Reaſon is, becauſe Example is what Men are ſooner mov'd with, and ſooner wrought upon by, than Laws; for this is a Law in dumb-ſhew, but has more Credit and Authority than the Voices of the Law ſpeaking in Commands. *Nec tam imperii nobis opus, quam exemplo* (Plin. Paneg. *Cap.* XLV. *num.* 6.) *& mitius jubetur exemplo.* We do not want Precepts ſo much as Patterns, and Example is the ſofteſt and leaſt invidious way of commanding. Now if all Example be a mighty Inducement, that of great Perſons muſt be ſo in a degree proportionable to their Quality and Station. For all the little ones fix their Eyes and Hearts here, and take their Obſervations from thoſe above them. They ſwallow all without chewing; admire and imitate at a venture; and conclude, that their Superiors would not be guilty of any Behaviour unbecoming their Character; and if they do any thing, it muſt be excellent and good. And on the other hand, Governours are ſo ſenſible of the Force of this Motive too, that they think their Subjects are indiſpenſibly obliged to thoſe Rules which they are content to be governed by themſelves; and that their own doing what they would have done by others, is ſingly a ſufficient Inducement to bring it into practice and common Vogue, without the Formality of a Command to enforce it. From all which it is abundantly manifeſt, that Virtue is exceeding neceſſary and advantageous to a Prince, both in point of Intereſt, and in point of Honour and Reputation. *Charron de la ſageſſe*, Liv. III. Chap. 2. §. 2. Let us add to this the following Reflection of *Montagne*: I know not how 'tis, but the World requires of Princes more than other Men, to hide and conceal their Faults: For what is only reputed in us Indiſcretion, the People eſteem in them to be Tyranny, and a Contempt of the Laws. And beſides their propenſity to Vice, are apt to cenſure, that, as a heightning pleaſure to their Crimes, they inſult over and trample under Foot the publick Ordinances. *Plato* indeed, in his *Gorgius*, defines a Tyrant to be one who is at his Liberty in a State to do whatever his own Will leads him to. And 'tis by reaſon of this Impunity that the publication of their Vices does often more Miſchief than the Vice it ſelf. Every one fears to have his Actions diſcover'd, and to be cenſur'd in his Pleaſures: But Princes are even to their very Geſtures, Looks, and Thoughts, the Obſervation of the People, who think they have a Right and Title to be Judges of them. Beſides that, the Blemiſhes of the Great naturally appear greater by reaſon of the Eminence and Luſtre of the Place they are ſeated in; as a little Scar, or a Wart in the Forehead, is a much greater Deformity than a conſiderable Gaſh any where elſe. And this is the Reaſon why the Poets feign the Amours of *Jove* to be perform'd in the Diſguiſe of ſo many borrow'd ſhapes, that among thoſe many amorous Intrigues, there is but only one, as I remember, where he appears in his own Majeſty and Grandeur. *Eſſais* Liv. I. Chap. 42. p. 190.

[9] The Virtues proper for this Purpoſe are, 1. *Piety*, which is the Foundation of all Virtues; but it muſt be a ſolid and reaſonable Piety, free from Hypocriſy, Superſtition, and Bigottry. 2. *The Love of Juſtice and Equity.* For the chief Deſign a Prince was made for, is to take Care that every Man has his Right. This obliges him to ſtudy, not only *that Part of human Learning which qualifies thoſe famous Civilians that are fit to be Legiſlators themſelves; who go up to that Juſtice which at firſt regulated human Society, who exactly know what Liberty Nature has left us in Civil Governments, and what Freedom the Neceſſity of States take from private People, for the Good of the Publick: But that part of the Law too, which reſpects the Rights, and deſcends to the Affairs of particular Perſons.* ‘This is a part of Education which is left the Gentlemen of the long Robe, and is not admitted into that of Princes, as being beneath them, tho' they are every Moment of their Reign to paſs Judgment upon the Fortunes, Liberties, and Lives of their Subjects. Princes are perpetually talk'd to of Valour, which is of no Uſe but to deſtroy; and of Liberality, which is good for nothing but Extravagance, unleſs regulated by Juſtice. 'Tis true, every Temper muſt be inſtructed, if I may ſo ſay, in a Virtue proper for its reſpective Occaſion; the Covetous muſt be aſpir'd with Generoſity, the ſoft and the ſlothful muſt be inflam'd with the Deſire of Glory, and the Ambitious muſt, as much as poſſible, be reſtrain'd within the Rules of Juſtice. But whatſoever Variety there may be in the Diſpoſition of Princes, Juſtice is always the moſt neceſſary; for that Virtue keeps up Order in him who does it, as well as in thoſe to whom it is done. 'Tis not any Conſtraint that limits the Powers of the Prince, ſeeing that at the ſame Time that he renders it to others, he teaches them to return it to himſelf, and that willingly too, tho' his Power neceſſarily obliges us to receive it from him. (St. *Evremond*, Tom. III. *p.* 74, 75.) From whence it follows, that he ought eſpecially to be a religious Obſerver of

his Word. Let us hear what the Oracle of *Gaſcoigne* ſays farther upon this Subject. 'Thoſe of our Time, who have conſidered in the Eſtabliſhment of the Duty of a Prince, the Good of his Affairs only, and have preferred that to the Care of his Faith and Conſcience, might ſay ſomething to a Prince, whoſe Affairs Fortune had put into ſuch a poſture, that he might forever eſtabliſh 'em by only once breaking his Word; but 'twill not go ſo. They often buy in the ſame Market; they make more than one Peace, and enter into more than one Treaty in their Lives. Gain tempts them to the firſt Breach of Faith, and almoſt always preſents its ſelf, as in all other ill Acts, Sacrileges, Murders, Rebellions, Treaſon, as undertaken for ſome kind of Advantage: But this firſt Gain is attended with infinite miſchievous Conſequences; throws the Prince out of all Correſpondence and Negotiation, by ſuch an Inſtance of Infidelity. *Solyman* of the *Ottoman* Race, a Race not very ſolicitous of keeping their Words and ſtanding to their Articles, when, in my Infancy, he made his Army to land at *Otranto*, being inform'd that *Mercurino de Gratinare* and the Inhabitants of *Caſtro* were detain'd Priſoners, after they had ſurrendred the Place, contrary to their Articles of Capitulation, order'd them to be ſet at Liberty, ſaying, *That having other great Enterprizes in Hand in thoſe Parts, this Perfidiouſneſs, tho' it carried with it a ſhew of preſent Advantage, would for the future bring on him a Diſcredit and Diſtruſt of infinite Prejudice.* (Eſſais Liv III. Ch. 7. p. 478.) 'To whom ought not Treachery to be hateful, when *Tiberius* refuſed it in a thing of ſo great Importance? He had word ſent him from *Germany*, that if he thought fit, they would rid him of *Ariminius* by Poiſon. This *Ariminius* was the moſt potent Enemy the *Romans* had, who had ſo baſely beaten them under *Varus*, and who alone put a ſtop to the Growth of their Power in thoſe Countries. *Tiberius* returned Anſwer, *that the People of* Rome *were always uſed to revenge themſelves of their Enemies* by fair and open Ways, with *their Swords in their Hands*, and not clandeſtinely and by Fraud. He quitted the advantageous for the honeſt Part. You will tell me he was a Deceiver, and did not ſpeak as he thought. I believe ſo too, and 'tis no great Miracle in Men of his Profeſſion. But the Acknowledgment of Virtue is of no leſs Importance for being in the Mouth of one that hates it; ſince it is Truth that forces it from him; and if he will not inwardly receive it, he at leaſt puts it on to make himſelf outwardly fine. *Liv.* III. *Ch.* 1. at the Beginning. See what *Telemachus* ſays to diſſuade his Allies from making uſe of the Treaſon of a certain Citizen of *Venuſium* who offer'd to deliver up to them one of the Gates of the Town by Night, *Tom.* 8. p. 41, *&c.* 3. Valour is likewiſe a very neceſſary Qualification in a Prince; but then it muſt be managed by Prudence. *Mentor* gives *Telemachus* very excellent Advice upon this Matter. Go, *ſays he*, into the greateſt Dangers, as often as it is neceſſary you ſhould go. A Prince diſhonours himſelf more by avoiding the Dangers of a War, than by never going to it at all. The Courage of him who commands others ſhould never be doubtful: It is neceſſary for a People to preſerve their General and King, it is ſtill more neceſſary for them not to ſee him in an uncertain Reputation of Valour—But then on the other Hand do not run headlong into Danger, when there's no Neceſſity for it; for Valour can no longer be a Virtue, than as it is managed by Prudence; otherwiſe 'tis a ſenſleſs Contempt of Life, and a brutal Ardour. *Inconſiderate Valour* is always unſecure; he that is not Maſter of himſelf in Dangers, is rather fierce than brave. He is forc'd to be beſide himſelf, that he may be rais'd above Fear; becauſe he cannot overcome it by the natural Diſpoſition of his Heart; now in this Caſe, if he does not run away, he is at leaſt confounded; he loſes the liberty of the Mind, which would be neceſſary to him in making uſe of Opportunities to defeat the Enemy, or ſerve his Country. If he has all the Courage of a Soldier, he has none of the Prudence of a Captain; nay, he has not even that of a private Soldier; for a Soldier ought, during the time of Action, to keep ſuch a Preſence of Mind, and ſuch a Moderation as is neceſſary to obey Orders. He that raſhly expoſes himſelf, diſcompoſes the Order and Diſcipline of the Troops, ſets an Example of Temerity, and often expoſes the whole Army to very great Dangers. Thoſe who prefer their vain Ambition to the Safety of the *common Cauſe*, deſerve *Puniſhments* inſtead of *Rewards*. Take care then not to ſearch after Glory with too much eagerneſs: The moſt certain way of finding it, is patiently to wait a favourable Opportunity: Virtue gains ſo much the more Reſpect and Eſteem, as ſhe ſhews her ſelf, plain, modeſt, averſe to Pride and Oſtentation; and the greater the neceſſity of expoſing your ſelf to Danger grows, the greater ſtill your Courage and Foreſight ought to be. *Tom.* 8 p. 43, *&c.* See likewiſe *Montagne's Eſſais* (Liv. I Chap. 14. and Liv. II. Chap. XVI. that treats of *Glory*.) 4. A Prince ought *to be very reſerved in diſcovering his Thoughts and Deſigns.* This Virtue is apparently neceſſary to all thoſe who are concern'd in Government. It includes a wiſe Miſtruſt and innocent Diſſimulation. See *Charron de la ſageſſe*, Liv. III. Chap. 2. ſ. 6, 7. And what our Author has ſaid above, *Book* IV. *Chap.* 2. Sect. 17.) 5. A Prince muſt above all things *accuſtom himſelf to moderate his Deſires*: For having it in his power to ſatisfy them, if once he ſhould give a looſe to them, he would be tempted to proceed to the laſt Exceſs, and by ruining his Subjects, would, in the End, ruin himſelf. To prevent theſe terrible Inconveniencies, and to form himſelf to this Moderation, nothing can be more proper for him than to accuſtom himſelf to Patience. ''Tis the moſt uſeful of all Virtues for thoſe who are to command. A Man muſt be patient, if he will become Maſter of himſelf and others. Impatience, which appears to be the ſtrength and vigour of the Soul, is only its weakneſs. He that can't wait and ſuffer, is like one who can't keep a Secret: Both of 'em want *Reſolution* of Mind to contain themſelves, as a Man that runs a Race in a Chariot, and has not a Hand ſtrong enough to ſtop where he ought, his unruly Courſers—An impatient Man, by his mad ungovernable Deſires, is thrown into an Abyſs of his Misfortunes: The more powerful his Authority is, the more fatal to himſelf is his Impatience. He will not ſtay, he will not allow himſelf time to meaſure any thing; he forces all things to ſatisfy his Pleaſures; he tears off the Boughs, to gather the Fruit before it is ripe; he breaks down the Gates, rather than ſtay till they are open'd to him; he will be a reaping while the prudent Husbandman is but ſowing; every thing that he does in a hurry, is ill done, and has no longer Duration than his own fickle Inclination. Such are the fooliſh projects of a Man who believes that he is at liberty to do every thing, and who is entirely governed by his Paſſions, to the Abuſe of his power. (*Avant. de Telemaque*, Tom. V. p. 179, 180.) The Philoſopher *Arrian* (*de expedit. Alex.* Lib. IV. cap. 7.) ſays, That it is eaſy to ſee by the Example of *Alexander*, that whatever fine Actions a Man performs to outward appearance, it ſignifies nothing to true Happineſs, if one does not know at the ſame time how to rule and moderate ones ſelf. Τούτων οὐδέν τι ὄφελος ἐς εὐδαιμονίαν ἀνθρώπου, εἰ μὴ σωφρονεῖν ἐν ταὐτῷ ὑπάρχει τούτῳ τῷ ἀνθρώπῳ τῷ τὰ μεγάλα, ὡς δοκεῖ, πράγματα πράξαντι. 6. *Goodneſs* and *Clemency* are alſo Virtues, very proper in and very uſeful to a Prince. 'Let him ſhine bright (ſays *Montagne*) in Humanity, Truth, Fidelity, Temperance, and eſpecially in Juſtice; Marks that are rare, unknown, and exiled. 'Tis by no other Means but by the ſole good Will of the People that he can do his Buſineſs; and no other Qualities can attract their good Will like thoſe, as being of the greateſt Advantage to them. *Nihil eſt tam populare quam bonitas.* Nothing is ſo popular as Goodneſs (*Cicer.* Orat. *pro Ligar.* cap. XII.) Eſſais Liv. III. Chap. 17. p. 477. See *Charron de la ſageſſe* (Liv. III. Chap. 2. Sect. 12.) 7. Liberality, well underſtood and well applied, is ſo much the more neceſſary for Princes, as Avarice and Niggardlineſs are a Diſgrace to a Perſon whom it almoſt coſts nothing to be liberal. But then alſo there are no People that ought to take more care in regulating the Uſe of this noble Virtue. As this requires abundance of Circumſpection, and ſuppoſes moreover very commendable Diſpoſitions in Princes, who know how to place their Favours as they ought to do, and to confer them on deſerving Perſons; one can't, in my Opinion, abſolutely ſay with *Montagne*, that Liberality is not in its true Luſtre in the Sovereign's Hand, and that private Men have the moſt Right to it; that it is a very improper Subject to be preached up to young Princes; and that it is but of little value in compariſon of other royal Virtues. However, there is nothing more ſolid than the Reflections which this Author makes in the ſame place. 'To take it exactly, *ſays he*, a King (as King) has nothing properly his own; he owes his very ſelf to others. Authority is not given in the Favour of a Magiſtrate, but of the People. A Superior is never made ſo for his own profit, bus for the profit of the Inferior: And the Phyſician for the ſick Man, and not for himſelf. All Magiſtracy, as well as Art, has its End without its ſelf. *Nulla ars in ſe verſatur*—A Prince being to give, or, to ſay better, to pay and render, to ſo many People according to what they have deſerved, ought to be a truſty and prudent Diſpoſer of what he has to lay out. If the Liberality of the Prince be without Bounds or Diſcretion, I had much rather he were covetous; Royal Virtue ſeems to conſiſt moſt in Juſtice, and of all the parts of Juſtice, that beſt denotes a King, that accompanies his Liberality; for that they have particularly reſerv'd to themſelves, whereas all other ſorts of Juſtice they remit to the adminiſtration of others.

important a charge [10]; and alſo learn how to regulate their outward Behaviour in a manner ſuitable to the Grandeur and Dignity of ſo exalted a Station.

III. The general Rule which Sovereigns are to proceed by, is, *Salus Populi ſuprema lex eſto*; *Let the Safety of the People be the ſupreme Law.*' Tis *Plato*'s Deſcription of a Prince, that *He neither thinks, nor commands, what may advance his own private Intereſt, but what may promote the Benefit of his Subjects: and whatever he ſays or does, is ſaid or done for their Advantage, and for their Ornament and Grace.* For the Authority which Governours bear, was firſt conferr'd on them with this Intention, that it might prove a Means of procuring that End for which civil Societies were eſtabliſh'd. And therefore they ought to eſteem nothing as contributing to their own private or

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‘others. An immoderate Bounty is a very weak means to gain them good Will; becauſe it balks more people than it encourages. *Quâ (largitione) quò in plures uſus ſis, eò minus in multos uti poſſis--Quid autem eſt ſtultius, quàm quod libenter facias, curare ut id diutius facere non poſſis?* (*Cicer. de Offic.* Lib. II. cap. 15.) *By how much you uſe it to many, by ſo much leſs will you be in a Capacity to uſe it to many more —— And what greater Folly can it be than to order it ſo, that what you do willingly, you cannot do long?* And where it is conferred without due reſpect of Merit, it puts them out of Countenance, on whom it is beſtowed, and is receiv'd without a juſt acknowledgment, and that grateful Senſe which the Bounty of a Prince ought to meet with. Some Tyrants have been ſacrificed to the Hatred of the People, by the Hands of thoſe very Men whom they have unjuſtly advanced —— The Subjects of a Prince, profuſe in Gifts, grow exorbitant in their Demands; and accuſtom themſelves not to Reaſon, but Example —— The more a Prince exhauſts himſelf in giving, the poorer he grows in Friends. How ſhould he ſatisfy Deſires, which ſtill increaſe the more they are filled? He who has his Thoughts fix'd upon getting, never thinks of what he has already received. Covetouſneſs has nothing ſo properly its own as Ingratitude. *Eſſais*, Liv. III. Chap. 6. p. 669, *&c.* The reſt may be ſeen in the Original; for it would be too much to tranſcribe it all. See alſo Mr. *le Clerc*'s Reflections upon Happineſs and Misfortune, *&c.* Chap. XII. p. 282, *&c.* and *Charron de la Sageſſe.* Liv. III. Chap. 2. Sect. 13. Here is a general Idea of Virtues which are moſt neceſſary for a Sovereign, beſides thoſe that are common to him with private Perſons, and of which ſome are included even in thoſe we have been mentioning. *Cicero* is not very wide of theſe Ideas in the following Enumeration. *Fortem, juſtum, ſeveram, gravem, magnanimum, largum, beneficum, liberalem* [*dici*]; *hæ ſunt regiæ laudes.* Orat. *pro Rege Deiotar.* Cap. IX.

[10] 'Tis thus that I thought the *Latin, moreſque ad tanti faſtigii dignitatem* ought to be rendred. For beſides that the Author plainly diſtinguiſhes *Manners* from *Virtues*, I am mightly tempted to believe, that he form'd all this little Addition upon *Charron*'s Notions in the Chapter I have ſo often quoted, and to which he himſelf refers in the ſecond Edition of my Original. Here is what *Charron* ſays. The next thing that comes under our Conſideration, after the Prince's ‘Virtue, is what they call his *Manners*, that is, his Behaviour and Way of Living; the Mien, the Port, the Addreſs that ſuit with the Majeſty of a Prince; and all thoſe profound Reſpects ſo neceſſary to be kept up. —— Now tho' Nature contributes a great deal to this in the Form, and Temper, and Perſon, yet all that Nature does is capable of Amendment and Improvement, both by the additional Helps of Induſtry and Art. Under the Head we are now upon, we may reckon the Air of his Face, the Compoſure of his Countenance, his Faſhion and Behaviour, his Gate, his Tone and manner of Speech, his Clothes and Dreſſing: The general Rule to be obſerv'd in all theſe particulars, is ſuch a Mixture of Sweetneſs and Moderation, of Staidneſs and Gravity, as may win upon Mens Minds, and move their Affections pleaſantly; ſuch as may keep the middle way between Familiarity and Fear; engage their Love, and yet command their Honour and Reſpect. His Court and Converſation are likewiſe worth taking Notice of. For the former, it is convenient that it ſhould be very publick, that the Palace he dwells in ſhould be noble and magnificent, fit for Reſort and Correſpondence; and that if it can be well contriv'd, not far from the Middle of his Country, or at leaſt the moſt ſignificant part of it; that ſo his Eye may command all his Quarters; and like the Sun in the midſt of the Firmament, pierce, enlighten and warm all round about him with the influence of his Beams. For when a Prince reſides in ſome very remote Corner of his Dominions, his Diſtance emboldens thoſe in the contrary Extremity to behave themſelves inſolently and grow tumultuous and unruly. As for his Converſation, that ſhould be very reſerved, his Confidents and familiar Friends but few, his Progreſſes and other Appearances in publick but ſeldom; that the People may be glad to ſee him: For the ſhewing himſelf often, and giving too eaſy acceſs to his Perſon, will mightly leſſen the Majeſty of his Character. *Continuus aſpectus minus verendos magnos homines ipſa ſatietate facit* [*Majeſtati major ex longinquo veneratio.* Tacit. Annal. l. 47. quia *omne ignotum pro magnifico eſt.* Idem. *Agricol.* Cap. XXX.] The being always admitted to the ſight and preſence of great Perſons, does mightily impair and diminiſh our Reſpect, by glutting our Curioſity. Majeſty is always moſt reverenced at a diſtance; for Nature forms all our Ideas bigger than the Life; and what we are not acquainted with, is always fanſy'd to be very great and ſtately. *Charron de la Sageſſe.* Liv. III. Chap. 2. Sect. 15.

[1] The Words our Author uſes, after ſeveral others, to expreſs this common Maxim, are taken from *Cicero*; *Ollis ſalus populi ſuprema lex eſto.* De Legib. *Lib.* III. *Cap.* 3. Here is what a great Emperor ſays to this Matter. Δύο ταύτας ἑτοιμότητας ἔχειν, *&c.* that is, according to Mr. *Dacier*'s Tranſlation, *you ought always to have theſe two Maxims in view; to do for the Good of Mankind all that the Condition of a Legiſlator and a King requires of you: And the other, to change your Reſolution, whenever Men skilled in ſuch Matters give you better Advice. But ſtill the change muſt be made from the Motives of* Juſtice, *and the publick Intereſt, and never for your own Pleaſure, your own Advantage, or your own particular Glory*, Marc. Antonin. *Lib.* IV. *Cap.* 12. You will find ſeveral excellent things upon the ſame Subject, in the *Cyrop.* and in the 3*d* Book of *Socrates*'s *Choſes memorables* by *Xenophon*; as likewiſe in the Works of *Plato* and *Ariſtotle*. According to theſe wiſe Heathens, whoſe Ideas are very different from thoſe of many Chriſtian Princes, who rather follow *Machiavel*'s Politicks, *a good Prince is one who endeavours to make his Subjects happy*; ὁ εὐδαίμονας ποιῶν ἀνὴρ ἡγεῖται [*Socrat. ad Xenophon. ubi ſupra*] *a Tyrant*, on the contrary, *is one who has nothing but his own private Intereſt in view*, ἡ μὲν γὰρ τυραννίς ἐστι μοναρχία πρὸς τὸ συμφέρον τὸ τοῦ μοναρχοῦντος. *Ariſtot. Polit.* Lib. III. Cap. 7. See *Cicero de Offic.* Lib. I. Cap. 25. *Plin.* Panegyr. Cap. 67. and the *Parrhaſiana*, Tom. 1. p. 212, *&c.* of the firſt Edition. But after all, the Maxims of good Politicks have nothing in them contrary to natural Right; and our Author has alſo written a fine Diſſertation in 40 pages in *Octavo*, in which he proves in a few Words that they are very agreeable to the Precepts of the Goſpel. This Diſſertation is entituled, *De concordia veræ Politicæ cum Religione Chriſti*, and is among his *Academical Diſſertations.* One may alſo ſee that of Mr. *Buddeus*, which is entituled, *Concordia Religionis Chriſtianæ Statuſque Civilis*, where he has treated more exactly of this Matter, for it conſiſts of a hundred and forty Pages in *Quarto.* It was printed at *Hall*, in 1701. and is very well worth reading. But as the Actions of Sovereigns, and the Body of a State, ſeem often to depart from the Rules of thoſe Duties, which private perſons are obliged to obſerve towards each other, our Author had a Deſign to compoſe a Treatiſe, to ſhew expreſly how far what is call'd a *Piece of Policy*, or ſomething done for a *Reaſon of State* may be juſtifiable; as he informs us himſelf in his little Preface to the ſecond Edition. It was indeed to be wiſh'd for the ſake of the publick, that Death had not prevented his executing that project, and ſeveral others. I find in *Charron* ſome Thoughts upon the ſame Subject, which, I preſume, no one will be diſpleaſed to ſee here. ‘The Juſtice, and Virtue, and Probity of a Prince is not in all points tied up to the ſame Methods and Manner of proceeding with that of Perſons in a private Capacity. It has a larger range, and freer ſcope allow'd; and all this Latitude is Indulgence little enough; no more than is abſolutely neceſſary for the weighty and hazardous Office our Governors are engaged in, and the infinite inconceiveable Difficulties that ariſe in the Adminiſtration. This makes it reaſonable for 'em to be in a Way

perſonal Good, which is not at the ſame time profitable to the Commonwealth [2]. *Would it not ſeem a Wonder to You* (ſays *Socrates* to *Xenophon* [b], *if he ſhould be owned for a good Herdſman, who leſſens the Number, or multiplies the ill Qualities of his Drove? 'Tis a much greater Wonder, if he who hath the Command of a State, and both waſtes the Strength, and corrupts the Manners of his Subjects, doth not bluſh at his Miſmanagement, and confeſs himſelf an ill Governour.*

‘ by themſelves; the common and direct Tract is too narrow; they are obliged to ſhift, and dodge, and wheel about, and whatever Cenſures People, who underſtand not the Nature of the Caſe, may paſs, as if every thing that is unuſual and indiſcreet, were preſently wicked and unjuſt; yet thoſe, who are capable of conſidering, and competent Judges of the Matter, muſt admit it to be lawful and allowable, as well as prudent and needful for them ſo to do. For Prudence muſt be mix'd with Juſtice; ſome Feints and Stratagems, and little Slights made uſe of and (as they commonly expreſs it) when the Lion's Skin is not big enough of its ſelf, it muſt be eked out, by tacking a Fox's Skin to it! Nor would I be ſo miſtaken here neither, as to be thought a Juſtifier of theſe crafty Dealings at all times, and in all Caſes indifferently. By no Means; this is not a ſtanding Rule of Action, but muſt be reſerved for ſpecial Occaſions, and particularly there muſt be three Conditions to warrant it. The firſt is abſolute Neceſſity, or at leaſt, ſome evident and conſiderable Advantage to the publick —— And this muſt by all means be conſulted and the chief Aim. This is a natural and indiſpenſible Obligation: For the publick Good is a Condition paramount to all others; and the Man who is procuring it, cannot but be doing his Duty. *Salus populi ſuprema lex eſto.* The ſafety of the People muſt be the ſupreme Law. The ſecond Qualification which theſe Methods muſt have to recommend them, nay, indeed to acquit them of Blame, is, that they be uſed defenſively only, and not offenſively; with a Deſign to preſerve a Prince or a State, but not aggrandize them, and oppoſe others. For this Reaſon they ſhould ſeldom or never be begun with, but only return'd back again; and are then in proper Time and Place, when employ'd to ſave the Publick from Snares and ſubtil Deſigns, and not to conceal, but to diſcover and defeat miſchievous and wicked Practices. For one Trick may be anſwer'd with another. and it is reaſonable to play the Fox with the Fox. The World is exceeding full of Malice and Cunning: And *Ariſtotle*'s Obſervation is moſt true, that the Subverſion of Kingdoms and States is uſually owing to Treachery and Deceit. What then ſhould hinder? What forbid? Nay, in ſuch Exigencies, what can excuſe the Conſervators of the *publick Safety*, from preventing and diſappointing ſuch Calamities and villanous Intentions by countermining? Why may not the State ſave it ſelf by the ſame Methods that were practis'd to ruin it, and retort the Artifice of Factions and wicked Male-Contents back upon their own Heads? For a Man to be too ſqueamiſh in theſe Caſes; to play conſtantly above board, and upon the ſquare; and to deal with thoſe Men according to the Rules of that rigorous Equity and plain dealing, which Reaſon and Conſcience require from us in private Affairs, is inconſiſtent with the Nature and the Meaſures, nay, with the very End of all Government; and the Event would often be the betraying and loſing all, and ſacrificing the Publick to an unreaſonable Scruple. The Third Qualification is, that theſe Methods be uſed moderately and diſcreetly; as they are not fit for all Times, nor all Occaſions; ſo neither are all Perſons fit to be truſted with them. For they are capable of great Abuſes: And if abuſed will prove of ill Example and ill Conſequence, by miniſtring occaſion to ill Men, to practiſe and juſtify their Frauds and indirect dealings, and to give Countenance to Wickedneſs and Injuſtice, even in private Commerce and Tranſactions: For a Man is never at Libery to forſake Virtue and Honeſty, to follow Vice and Injuſtice; theſe things are ſo far from indifferent, that there is no poſſibility of reconciling thoſe diſtant Extremes, no ſatisfaction capable of being made for ſo ill a Choice. And therefore away with all Injuſtice and Infidelity, all treacherous and illegal Proceedings, and curſed be the *Principles* and *Politicks* of thoſe Men who would poſſeſs ſovereign Commanders with a Belief that all things are lawful, if they be but expedient for them. There is a vaſt Difference between ſuch an arbitrary Notion of Right and Wrong, and the Rules of Limitations I have here laid down. Reaſons of State may ſometime make it neceſſary to temper Honeſty with Profit, and try if theſe two can be ſo mingled together as to make a good Compoſition. But, tho' we may try to compound and ſoften the Matter a little, yet we muſt never act in Oppoſition to Juſtice: We may, nay, we muſt ſometimes wheel off a little, and fetch a Compaſs about it; but we muſt never loſe ſight of it, much leſs turn our backs upon it, and caſt all Regards for ſo ſacred a thing behind us. For there is a Cunning very conſiſtent with Virtue and ſtrict Honour, ſuch as St. *Baſil* the great calls a *great and commendable Cunning* (*magna & laudabilis aſtutia*) ſuch as tends to good; and may be uſed as Mothers and Phyſicians deal by their Children and their Patients, when they tell them fine Stories to amuſe and entertain them, and by Degrees cheat them into Health. In ſhort, many things may be acted ſecretly and in the Dark, which are not fit for publick View, and will not bear an opener proceſs. Prudence and Stratagem may be added to Courage and Strength; Art and Wit may ſupply the Defects of Nature and Force, in Caſes which theſe are not ſufficient to manage: A Governour may, nay he ought to be, as *Pindar* calls it, a Lion in the Field, and a Fox at the Council-Table; or as that divine Saviour, who was Truth it ſelf, has expreſs'd himſelf upon another Occaſion, he may be a ſubtil Serpent, but ſtill a harmleſs Dove, *Liv.* III. Chap. 2. §. 2. The Author afterwards proceeds to particulars in this Affair; but how nice and delicate ſo ever the Speculation of them may be, the Practice is infinitely more difficult; and there are but few Princes who keep themſelves, on many Accounts, within the juſt Bounds there mentioned. See Mr. *Bayle*'s *Diction. Hiſtor. & Crit.* Tom. II. p. 114. *Col.* A. 2 *Edit.*

[2] The Truth of it is, that the very Intereſt of the Sovereign requires that he ſhould direct all his Actions to this End.

Qui ſceptra duro ſævus imperio regit,
Timet timentes; metus in auctorem redit.
Senec. *in Oedip.* verſ. 705, 706.

The following Words of Mr. *de Cambrai* will ſerve to explain and illuſtrate this Sentence. ‘ Where the ſovereign Command is moſt abſolute, there Princes are leaſt powerful. They take, they ruin every thing, and are the ſole Poſſeſſors of the whole State; but then the State languiſhes, the Country is unmanur'd and almoſt deſert, the Towns every Day decay and grow thin, and Trade is quite loſt. The King who can neither be ſuch by himſelf, but muſt be ſuch with regard to his People, undoes himſelf by degrees, by inſenſibly undoing his Subjects, to whom he owes both his Riches and his Power; his Kingdom is drain'd of Money and Men, and the Loſs of the Latter is the greateſt and moſt irreparable of all Loſſes. His arbitrary Power makes as many Slaves as he has Subjects; they all ſeem to adore him, and all tremble at the leaſt Motion of his Eye: But ſee what will be the Conſequence upon the leaſt Revolution; this monſtrous Power rais'd to too exceſſive an Height, cannot long endure; it wants ſupplies from the Hearts of the People; it has wearied out and exaſperated the ſeveral Ranks of Men in the State; and forces all the Members of that Body to ſigh with equal Ardour for a Change. At the firſt Blow the Idol is pull'd down, and trampled under Foot. Contempt, Hatred, Fear, Reſentment, Jealouſy; in a Word, all the Paſſions combine together againſt ſo injurious and deteſtable a Power. The King, who in the Days of his vain Proſperity could find no perſon that durſt tell him the Truth, ſhall not find one in his Adverſity that will vouchſafe to excuſe him, or defend him againſt his Enemies. *Tom.* III. p. 74, 75.

[b] Απομν. L. 3.

IV. In order to the internal Tranquillity of States, it is neceſſary that the Wills and Inclinations of the Members be ſo moderated and directed, as ſhall appear conducive to the Safety of the whole Body. Hence it is the Duty of ſupreme Rulers, not only to preſcribe Laws fit for the obtaining of this End, but likewiſe ſo to keep up the Strictneſs of publick Diſcipline, [1] eſpecially as to what relates to the Education of Children, as that the Subjects may conform to the Laws, [2] not ſo much out of fear of Puniſhment, as out of Habit and Cuſtom: In as much as bare Penalties are not ſo apt to produce a Care of doing well (this being the proper Effect of Reaſon and Inſtitution) as a Solicitude to avoid Diſcovery in doing ill.

Towards the accompliſhing of ſo good an End in States, where Chriſtianity [3] is profeſs'd, this Religion it ſelf doth in a high manner contribute; provided it be ſuch as is preſerv'd in its primitive Sincerity, purg'd from human Corruptions, and inculcated both by the Doctrine and Example of a learned and pious Clergy: In as much as that holy Inſtitution doth not only comprize all the Points conducing to Eternal Salvation, but likewiſe the moſt perfect Scheme of moral Precepts, which are admirably uſeful in diſpoſing the Minds of Men to a Compliance with civil Life, and yet which cannot ſo conveniently be eſtabliſh'd by the bare Force of civil Laws. For this Reaſon, in all Chriſtian Governments, which we are acquainted with the exhortatory Part of the Law of Nature is given in Charge to the Miniſters of the Church, to be by them preſs'd and enforced upon the Conſcience; tho' the dogmatical Part belongs rather to thoſe who have made this Science their peculiar Profeſſion [h]. Of great Advantage to the ſame Deſign are publick Schools, if imploy'd for the teaching not of uſeleſs Trifles, and the Inventions of idle Brains, the Reliques of *the Kingdom of Darkneſs* [a], but ſolid Learning and Knowledge, the Uſe of which, diffuſeth it ſelf through all the Buſineſs of Life. Amongſt theſe Studies, the chief is that which, upon ſound and rational Principles, explains the Right of Sovereigns, and the Obligations correſpondent to it in the Subjects [b]. Another thing which adds Strength and Vigour to publick Diſcipline, is the Example of thoſe who hold the ſupreme Authority. *The Manners of the whole State* (as *Iſocrates* [c] well obſerves) *are drawn and expreſs'd from the Pattern of the Prince.* And therefore *Spartian* [1] had Reaſon to ſay of *Caracalla*, when he married his Mother in Law, *He engaged in ſuch Nuptials, as, had he underſtood himſelf to be a true Lawgiver, he, of all Men, ought to have prohibited.* To ſee then, that all theſe Particulars are duly regulated in a Commonwealth, ſhould be the Care of the Supreme Directors.

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[1] Ὄφελος γὰρ οὐθὲν τῶν ὠφελιμωτάτων νόμων, &c. 'The beſt and moſt uſeful Laws, and which are approved of by all ſuch as are ſubject to them, are of no uſe, unleſs Subjects be trained up and educated in a Manner of living conformable to Government, *Ariſtot. Polit.* V. *Cap.* IX. *Plato* ſays, that to lay the Foundation of a good Government, we muſt firſt begin by the Education of Children, and muſt make them as virtuous as poſſible: As an experienc'd Gardiner employs his Care about the young and tender Plants, and then goes on to others. Καὶ φαίνεταί μοι τῶν πολιτικῶν μόνος ἄρχεσθαι ὀρθῶς. ὀρθῶς (*Harry Stephens* corrects it ὀρθὸν, but without any Neceſſity, as might be demonſtrated, if this were a proper Place to do it) γάρ ἐστι τῶν νέων πρῶτον ἐπιμεληθῆναι, ὅπως ἔσονται ὅτι ἄριστοι, ὥσπερ γεωργὸν ἀγαθὸν τῶν νέων φυτῶν εἰκὸς πρῶτον ἐπιμηλεθῆναι, μετὰ δὲ τοῦτο καὶ τῶν ἄλλων. *Euthyphron.* p. 2. *Ed. Serrani.* 'Children belong leſs to their Parents than to the Publick, ſays *Mentor*; they are the Children of the People, they are the Hope and Strength of the State: 'Tis too late to mend them, when they are ſpoiled; it ſignifies nothing to debar them from Employments, when they have render'd themſelves unworthy of them; it is much better to prevent the Evil, than to be obliged to puniſh it. A King —— who is the Father of all his People, is ſtill more particularly the Father of all the Youth, who are the Flower of the whole Nation; and it is in the Flower that Fruits are prepared. Let not the King then diſdain to watch over them, and make others do the ſame alſo in their Education; let him take Care that the Laws of *Minos* be duly obſerv'd, which ordain that Children be taught to contemn Pain and Death; to place an Honour in the Neglect of Pleaſures and Riches; to look upon Injuſtice, Lying, and Slothfulneſs to be infamous Vices; that from their tendereſt Infancy they be inſtructed in ſinging the Praiſes of Heroes who were belov'd by the Gods, who have done glorious things for their Country, and who ſignaliz'd their Valour in Battle; let the Charms of Muſick ſeize their Souls, to make their Manners gentle and fine; let them learn to be tender of their Friends, faithful to their Allies, and juſt to all Men, even to their moſt inveterate Enemies; let them learn leſs to fear Death it ſelf, and all manner of Torments, rather than the Stings of Conſcience. If Children are inſtructed betimes in theſe noble Maxims, and if they are inſtilled into them gently, there will certainly be few but what will be inflamed with the Love of Glory and Virtue.——It is of the higheſt Importance alſo to eſtabliſh publick Schools, to accuſtom Youth to robuſt Exerciſes of the Body, to hinder them from growing lazy and effeminate, which will ſpoil the beſt Tempers in the World. There ought to be a great Variety of Games and publick Shews to animate the People; but eſpecially to exerciſe their Bodies, to make them ſprightly, ſupple, and vigorous, with Rewards and Prizes to inſpire them with a noble Emulation. But what is chiefly to be wiſh'd for, to encourage good Manners, is, that young People ſhould marry early, and that their Parents, without any baſe or ſordid Proſpect of Intereſt, ſhould leave to them the Choice of their Wives, ſuch as are moſt agreeable to them both in Body and Mind, with whom they might live for ever happy. *Avant de Telemaque*, Tom. III. at the End.

[2] *Quid Leges ſine moribus*
Vanæ proficiunt?
Horat. Lib. III. Ode XXIV. 35, 35.

Laws without Manners are but Words and Wind.

Upon which ſee Mr. *Dacier*'s Note. The Method of the ancient *Athenians*, which an Orator of that Country makes an Encomium on, in a Place which our Author has quoted after that of *Horace*, is indeed admirable, and deſerves to be propoſed as a Pattern to all Princes. Ἀλλὰ γὰρ οὐκ ἐκ τοιούτων, &c. 'They cenſur'd thoſe as guilty of extreme Ignorance, who imagin'd, that where there were the moſt accurate Laws, there muſt be the moſt excellent Men; when 'tis evidently ſo very eaſy a Matter to borrow and tranſcribe the good Regulations of other States. Therefore they did not believe, that Virtue deriv'd ſo much Advantage and Aſſiſtance in its Growth from good Statutes, as from Cuſtom and Practice. That the greateſt part of Men muſt, of Neceſſity, frame their Minds according to thoſe Patterns by which they were firſt taught and inſtructed; but that a numerous and accurate Eſtabliſhment of Laws was really a Sign of the ill Condition of the Commonwealth: Edicts and Ordinances being then heap'd upon one another, when Governments find themſelves obliged to endeavour the reſtraining of Vice, as it were by Banks and Mounds. That it became wiſe Magiſtrates, not to fill the publick places with Proclamations and Decrees, but to take care that the Subjects ſhould have the Love of Juſtice and Honeſty firmly rooted in their Minds. That not the Orders of the Senate or People, but good and generous Education, was the Thing which made a Government happy: In as much as Men would venture to break through the niceſt Exactneſs of political Conſtitutions, if they had not been bred up under a ſtrict Obedience to them: Whereas thoſe who had been form'd to Virtue, by a regular and conſtant Diſcipline, were the only perſons, who, by their juſt Conformity, could make good Laws obtain a good Effect. The principal Deſign of the *Athenians*, when they made theſe Reflections, was not how they might puniſh Diſorders, but how they might find a Way of making the people to be willing not to do any thing that might deſerve puniſhment. This laſt View ſeem'd to them worthy of themſelves and their Employment: But as for the other, or an exact Application to puniſh people, they thought it a Buſineſs proper only for an Enemy; and therefore they took care of all the Subjects in general but particularly of the Youth. *Iſocrat. in Areopagit.* p. 254, 255. *Ed. Pariſ. min.* What follows in the ſame place very well deſerves to be read. See alſo *Maxim. de Tyr.* Diſſ. III. p. 64. *Ed. Davis*, and *Jamblique* de Vita Pythagor. §. 171, *&c.*

[3] We muſt not here forget the following Reflection of *Montagne*: 'The Chriſtian Religion has all the Marks of the exacteſt Juſtice and the greateſt Uſefulneſs: But none more manifeſt than the ſevere Injunction it lays indifferently upon all to yield Obedience to the Civil Magiſtrate, and to maintain and defend the Laws. Of which what a wonderful Example has the divine Wiſdom left us, who, to work and eſtabliſh the Salvation of Mankind, and to carry on his glorious Victory over Sin and Death, would do it no other Way than at the Mercy of our ordinary Forms of Juſtice, ſubmitting the Progreſs and Iſſue of ſo high and ſalutiferous an Effect, to the Blindneſs and Injuſtice of our Obſervations and Cuſtoms, ſuffering the innocent Blood of ſo many of his Elect, and ſo long as

V. Of great Service and Benefit it is, in order to the ſame End, to have a Syſtem of juſt, plain, and perſpicuous Laws, for the ſettling of ſuch Affairs, as the Subjects are moſt frequently concern'd in with one another, and [2] ſuitable to the Condition and Genius of the People they are preſcribed to. 'Tis the Advice of *Iſocrates* [d] to a young Prince, *As for Laws, ſeek thoſe in general which are equitable and uſeful, and ſuch as may render the Differences amongſt the Subjects, as few as poſſible, and the Accommodation of them no leſs eaſy and expeditious.* The Marks which the ſame Orator hath ſet [e] to diſtinguiſh good Laws, are, that they be *Few in Number* [3], *yet ſatisfactory and intelligible to thoſe who are to uſe them; juſt and profitable, and conſonant to each other; and rather directed towards keeping up the publick Inſtitutions, than towards preventing the petty Frauds of private Dealings* [f]. It ought to be a ſettled Rule in this Point, not to enact more Laws than conduce to the Good of the Subject and of the State. For ſince Men, in their Deliberations about what they ought, or ought not,

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‘ Loſs of many Years to the maturing of this ineſtimable Fruit? *Eſſais Liv.* I. *Chap.* 22. towards the End.

[h] Add *Grotius, de Imperio Summ. Poteſt. circa Sacra*, Chap. I. Num. 13.

[a] Vide *Hobbes* Leviath. c. 46. &c. *Lucret.* l. VI. v. 981.

[b] *Vide* Hobbes *Leviath. c.* 30. There is a famous Paſſage, relating to the Inſtruction of Youth, in *Dio Caſſius* (l. 52) in *Mæcenas*'s Speech to *Auguſtus*. Add the Diſpute about ſuppreſſing the Univerſity of *Conimbra* in *Conneſtag.* De Unione *Lucitan.* l. 8. Nor is that to be diſregarded which *Gramond* in his Hiſtory of *France* (l. 3.) offers concerning the Number of Schools.

[c] *Ad* Nicoclem, *p.* 36.

[d] *Ibid.* c. 32.

[e] *in* Panathen. *p.* 453.

[f] Lycurgus (*Orat. contra.* Leocrat.) ſays, that *Laws, by Reaſon of their Brevity, do not* teach (as is done in the Science and Study of the Law) *but* command *Men how to act.* *Quintil.* Declam. 264. *Where's the Difference, whether there be no Laws, or ſuch as are ambiguous and uncertain?* To this let us add what *Cicero* ſays, ‘ That the Uſe of Laws having been eſtabliſhed for the Good and Advantage of States, and to make Mankind better and happier; no Law that is unjuſt or prejudicial to a State, can have the Force of a Law. nor deſerve to be call'd by that juſt and equitable Name. *Conſtat profecto ad ſalutem civium*, &c. de Legib. Lib. II. cap. 5.

Mr. BARBEYRAC'S *NOTES on* §. IV, V.

[1] C. 10.

[2] 'Tis upon this Account, that thoſe who make Laws, and govern States, ought thoroughly to know the Diſpoſition of the people they have to command, as we have obſerv'd above §. 2. Note 5. Legiſlators and Magiſtrates, who are not ſufficiently inſtructed in this Matter, fall unadvoidably into a very grievous Inconveniency, which is this; ſuppoſing the people to be of a Temper and Complexion quite different from what they really are, they give them Laws which they cannot obſerve; upon which either a vaſt Number of people muſt be puniſhed, without the State reaping any Benefit from it; or elſe they muſt behold the Authority of the Law contemn'd, that is, the Conſtitution upon the Brink of Ruin. On the contrary, when they give a people no Laws but ſuch as are fitted to their Capacities, and ſuch as ſuppoſe them to be what they are, they have the ſatisfaction of ſeeing them obſerv'd by every Body, without proceeding but rarely to the puniſhments which thoſe that violate them are made to ſuffer: And they peaceably enjoy all the Advantages that reſult from the Obſervation of thoſe Laws. The Fault I have been now mentioning, was notorious in the *Roman* Commonwealth, which could not ſubſiſt but upon ſuppoſition that thoſe who poſſeſs'd the chief Employments in the State were exempt from Ambition, Luxury, and Avarice: This was a ridiculous ſuppoſition, and what ruin'd that Government in a very ſhort time, after it was arriv'd at the laſt period of its Greatneſs. The Conſuls and Pretors, who generally govern'd large Provinces, and who often commanded powerful Armies, were abſolute in their Governments and in their Armies, during the Time of their power; ſo that there was no Appeal, either from their Judgment, at leaſt in Favour of the people of the Provinces, or any way of making them alter their Conduct, by any Authority whatſoever---without even being aſſur'd of having Juſtice at *Rome*, when the Time of their Magiſtracy was expired——But beſides, their puniſhment was very inconſiderable, and to be fear'd only by ſuch as had been guilty of the moſt horrible Exceſſes; as we may be inform'd by *Cicero*'s Harangues againſt *Verres*——If, on the contrary, we compare the Laws of *Moſes* to the Genius of the people to whom he gave them, we may remark, that God ſuited himſelf, if I may ſo ſpeak, to the Temper of the *Jews*, and that he tolerated ſome things, which he would never have ſuffer'd in a more enlightened Nation, and which are at this Day likewiſe forbidden under Chriſtianity. For Example, our Lord tells us that he had not allow'd of Divorce (*Mat.* xx. 8.) *but for the Hardneſs of their Hearts*: And he has forbidden it Chriſtians, except in one Caſe only. The ſame Commendation is alſo given to *Solon*, who, before he undertook to preſcribe Laws to the *Athenians*, had ſtudied their Tempers, and managed himſelf thereupon accordingly, as far as the Good of the State would permit him:——*Being afterwards* ask'd, *whether he believ'd he had given the* Athenians *the beſt Laws that it was poſſible to give them*; *he reply'd, he had given them the beſt Laws that it was poſſible to make them receive* (Plutarch. p. 86. C. (in *Solon.*) I have taken all this from Mr. *le Clerc*'s Reflections *ſur ce que l'on appelle Bonheur & Malheur en matiere des Loteries*, Chap. X. Pag. 127, *&c.* But it would be well to read all the reſt of that Chapter.

[3] A Multiplicity of Laws is a Sign of an ill govern'd State. *Corruptiſſima Republica plurimæ Leges*, ſays *Tacitus*, Annal. Lib. III. Cap. 27. *The more the* Roman *Government was corrupted, the more Laws there were.* See *Strabo*, Geogr. Lib. VI. p. 260. *Ed. Pariſ.* 399. A. *Ed. ult. Amſt.* and the *Parrhaſiana*, Tom. II. p. 300. *&c.* As for whatever relates to Laws and the Adminiſtration of Juſtice, we may conſult Mr. *Buddeus*'s *Philoſoph. Practic.* Part III. Cap. 5. §. 4. There are alſo a great many excellent things in a Diſſertation of Mr. *Thomaſius*'s entituled, *Morum cum Jure ſcripto contentio*, and printed at *Hall* in 1701.

to do, are more frequently guided by their natural Reaſon, than by reflecting on the publick Conſtitutions [a]; wherever there are more Laws than can eaſily come within the Compaſs of their Memory, and thoſe prohibiting ſuch things as Reaſon, of it ſelf, doth not prohibit, here the Subjects muſt through meer Ignorance, without any ill Intention, fall into the Laws as into ſo many Snares. And by this means, the Government brings the People under an unneceſſary Inconvenience; which is contrary to the original Deſign of civil States. Moreover, the ordinary Form and Courſe of Juſtice ought to be fix'd in ſuch a Manner, as that every Subject may recover his Right, by as ſhort and as cheap a Proceſs as can be contrived. The *Perſians* have a Proverb, that *Short Injuſtice is better than tardy and tedious Juſtice.*

VI. And becauſe 'tis in vain to enact Laws, if Governours ſuffer them to be tranſgreſs'd with Security; it is therefore their Part carefully to put their own Decrees in Execution, and to inflict due Puniſhments [1], according to the Nature and Circumſtances of the Fact, and the Intention and Malice of the Offender. In which Affair they ought ſo to proceed, as that the true Force of the Laws may be exercis'd, not only upon the Subjects of moderate Fortune and Condition, but upon the Wealthy and Powerful; whoſe Riches and Honours ought on no account to give them the Privilege of inſulting over their Inferiors with Impunity; eſpecially ſince Commonwealths are never in more Danger, than from the Fury of the Populacy, exaſperated by unreaſonable Oppreſſions [b]. Nor ought Indulgences or Pardons to be allow'd without any ſufficient Cauſe [c]: ſince not to treat alike thoſe who, *cæteris paribus*, have deſerv'd alike, is not only unjuſt, but hath alſo a peculiar Efficacy towards inflaming the Minds of the Subjects [d].

VII. But as nothing is to be guarded with penal Sanctions, which doth not contribute to the Advantage of the State, ſo in the annexing of thoſe Puniſhments, ſuch Moderation is to be uſed, as that they may bear a juſt Proportion to the ſame End; and conſequently that they may be no more to the Grievance of the Subject, than to the Benefit of the Publick. In general, if it be deſired, that Puniſhments ſhould obtain their due Effect, they ought to be rais'd to ſuch a Degree of Severity, as that the Pain and Sharpneſs of them may outweigh the Profit, or Pleaſure, which might ariſe from the Tranſgreſſion [e].

VIII. Farther, ſince Men firſt incorporated themſelves in Communities, to obtain Security againſt the Injuries of others [2]; it concerns every Government to forbid the mutual Injuries of Subjects, ſo much the more ſtrictly and ſeverely, as their perpetual living together affords more eaſy Opportunities of Hurt and Miſchief. Neither ought the Diſtinction of Orders, or Dignities, to be allow'd ſuch a Force, as to encourage the great and powerful in tyrannizing over thoſe of meaner Condition The way to purchaſe an *honeſt Popularity* [f], is (in *Iſocrates*'s Words) *neither to let the Commonalty grow extravagant and abuſive, nor to let them ſuffer from the Inſolence of the ſuperior Order*; *but to beſtow Honour*

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[a] *Hobbes* De Cive, c. 13. ſ. 15. Leviath. *c.* 30.

[b] Leviath. *ibid.*

[c] See the *Pharraſiana*, Tom. II. p. 178, *&c.*

[d] Pindar. *Olymp. Od.* 13. *v.* 6, *&c.*

Εὐνομία βάθρον πολιῶν, *&c.*

Good Law, the Baſis of a State,
Here with her Siſters takes her Seat;
Strict *Juſtice*, with unſhaken Mind,
And *Peace*, engaging to be kind,
Through their fair Hands the Treaſure flows,
Which Heaven on craving Men beſtows;
Daughter of *Themis*, who preſides
In Councils, and wiſe Motions guides.

[e] Add *Hobbes* Leviath. c. 30.

[f] *Ad* Nicoclem, *p.* 31.

Mr. BARBEYRAC's *NOTES on* §. VI, and VIII.

[1] 'The Crimes and Diſorders that are not to be prevented, muſt be immediately puniſh'd with ſeverity: 'Tis an 'Act of Clemency to put a ſtop to the Courſe of Iniquity, by making early Examples of thoſe who preſume to of'fend. A little Blood ſhed in due time prevents the ſhedding of a great deal, and makes a Prince to be dreaded 'without making uſe of ſeverity too often. *Avant. de Telem.* Tom. III. p. 73. We ſhall treat of *Puniſhments* more 'at large in the Third Chapter of the following Book. See Mr. *Buddeus*'s *Philoſoph. Pract.* Part III. cap. 5. ſ. 5. concerning the Manner of the Diſtribution of Puniſhments.

[2] 'What ſignifies it to me or to any of my Fellow-Subjects, that my Sovereign is ſucceſsful, that the prudent 'Management of his Miniſters, nay, that of his own perſonal Merits, exalt him to the higheſt Pitch of Glory; 'that my Country is powerful, the Terror of all the neighbouring Nations? What ſhould I be the better for all 'theſe things, if I were forced to labour under the diſmal and melancholy Burthen of Poverty and Oppreſſion? 'If, whilſt I was ſecur'd againſt the Sallies from without of a cruel Enemy, I was expos'd within the Walls of Cities 'to the Barbarity of a treacherous Aſſaſſin? If Rapine and Violence were leſs to be feared in the darkeſt Nights, 'and in the wideſt Deſerts, than at a mid Day in the Streets? If Safety, Cleanlineſs, and good Order had not rendred 'living in Towns ſo delightful, and had not added to the Plenty the Means of our converſing with ſo much Eaſe 'one with another? Or if being weak and defenceleſs, I were encroached upon in the Country by every neigh'bouring great Man? If there was not a Proviſion made to protect me againſt his Injuſtice? If I had not at hand ſo 'many Maſters, and thoſe eminent Maſters too, to breed up my Children in thoſe Arts and Sciences which will one 'Day raiſe their Fortunes? If the promoting of Trade had not made good ſubſtantial Stuffs for my Clothing, and 'wholeſome Food for my Nouriſhment, both plentiful and cheap? If, to conclude, the Care of my Sovereign had 'not given me reaſon to be as well contented with my Fortune, as his extraordinary Virtues muſt needs make him 'with his? *Characteres ou Mœurs de ce Siecle, par Mr. de la* Bruyere, *p.* 334.

always on Perſons of the greateſt Merit, and to ſee that the reſt are not wronged or trampled upon. 'Tis a good Saying of the Hiſtorian [a], *Tho' it be enough for private Men to do no Injury themſelves; yet 'tis the Duty of Princes to take care farther, that others do none.* It is likewiſe repugnant to the End of Government, to allow Subjects in revenging, by their own private Force, the Injuries which they think themſelves to have ſuffered.

IX. Beſides, altho' a ſingle Ruler cannot, in Perſon, diſcharge all the Affairs of an extended Realm, ſo that he muſt of Neceſſity aſſume Miniſters into the Partnerſhip of his Cares; yet theſe, as they derive all their Authority from their Maſter's Commiſſion, ſo whatever they act, whether well, or ill, muſt finally be ſet to his Account. And therefore *Iſocrates* [1] prudently adviſeth, *So appoint others over the Buſineſs which you can't excuſe your ſelf, as conſidering, that whatever they perform, will be aſcribed to you.* And again, *If you happen to obtain a Magiſtracy, never uſe the Service of a wicked Perſon in exerciſing your Office; for in whatſoever Point he offends, the Guilt will be laid to your Charge* [b]. For which Reaſon, and becauſe as the Miniſters are, ſo the Buſineſs will be well or ill managed [c], Governours are obliged to imploy, in publick Truſts, Men of Integrity and Ability; often to inſpect their Proceedings, and to reward, or puniſh them, according as they find them deſerve; to the End that the reſt may underſtand how ſtrictly they ſtand engaged, to apply no leſs Fidelity and Diligence to the Affairs of the State, than they would to their own perſonal Concerns. The *Chineſe*, to avoid all Inconveniences that might ariſe from Favour on the one hand, and from Reſentment on the other, allow no Man to bear an Office in the Place where he was born; it being moſt likely that he ſhould there meet with Perſons whom he particularly loves, or hates. Thus too, ſince wicked Men are tempted to the Commiſſion of the greateſt Sins, through Hopes of Impunity, which they eaſily entertain, where the Judges lie open to Bribery and Corruption; it's the Duty of Sovereigns ſeverely to puniſh ſuch Judges, as the Patrons of all thoſe Villanies which diſturb the publick Security [d], and to revoke their unjuſt Sentences and Proceedings. For the Practice ſaid to be obſerved in *Arragon*, ſeems reaſonable; to puniſh the Judges for a falſe Sentence, and yet to put the ſame Sentence in Execution. Beſides, tho' the ordinary Management of Affairs is entruſted in the Hands of Miniſters, yet the ſupreme Rulers themſelves ought never to diſdain the lending a patient Ear to the Complaints, or Requeſts, of their Subjects.

What Qualifications Sovereigns ought to regard in thoſe, whoſe Advice they would uſe [2] in the Diſpatch of publick Buſineſs, and what ſeems the moſt convenient way of getting out their Opinion, Mr. *Hobbes* [e] hath ſhewn at large. As to the latter Point, there's a remarkable Inſtance in *Davila*'s Hiſtory of the Civil Wars of *France* [f], where the Pope conſults the Cardinals, not in a Conſiſtory, but each apart, about the Abſolution to be granted King *Henry*. *Iſocrates* [g] calls a Counſellor, *The moſt uſeful of all Treaſures, or Poſſeſſions, and the moſt worthy of a King.* *Neuhof* [h], in his Deſcription of *China*, reports many things very worthy of Obſervation, concerning the Magiſtrates of that wiſe People. Nor ought we to undervalue the Directions of King *James* the Firſt of *England*, in his Βασιλικὸν Δῶρον [i]; that a Prince ſhould chooſe his Counſellors chiefly by his own Judgment, not at the Pleaſure of others; and that he ſhould take them indifferently out of all Orders of the People, in as much as he is the common Father of all. In the ſame Piece, the King hath aſſign'd the Reaſons, why Men of moderate Condition ſhould be pitch'd on, for the Offices relating to the publick Money [k].

X. Since the Subjects are obliged to the bearing of Taxes, and the like Burthens, on no other account, but as they are neceſſary to defray the publick Expences in War, or Peace; it is the Duty of Sovereigns, in this reſpect, to draw no farther Supplies [3], than either the

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[a] Xiphilin. *Epit.* Dion. *in* Galba. See alſo the *Parrhaſiana*, Tom. II. p. 283, *&c.* where it is ſhewn, that every Man ought to have Juſtice done him.

[b] *Themiſt.* Orat. 8. p. 117. *Mentor* gives *Telemachus* very excellent Advice and very judicious Rules relating to this Point (*Tom.* 5. p. 124, *&c.*) but as this Chapter is already clogged with Notes, it would be too much to copy it out here. See alſo *Charron de la ſageſſe*, Lib. III. Chap. 2. ſ. 16, *&c.* And Mr. *Buddeus*'s *Philoſoph. Pract.* Part III. Cap. 5. ſ. 6. Our Author has here cited that Verſe of *Martial*, *Principis eſt virtus maxima, noſſe ſuos.* Lib. VIII. Epigr. 15. But it relates to quite another thing: For the Poet means that the great Virtue of a Prince conſiſts in the Knowledge how to gain the Affections of his People, as it plainly appears from the Deſign and Fancy of the Epigram: The following Example is more to the purpoſe. ——— When *Satibarzanes* petitioned his Maſter *Artaxerxes* for the Government of a certain Province, of which he was very incapable, together with the Sum of three Thouſand pieces of Gold; the King granted the latter part of his Requeſt, but denied the former: for, *ſays he*, to give you ſo much Money will not make me more indigent, but to give you ſuch a Government, would make me more unjuſt. *Euripides* (in *Rheſ. v.* 626) Every Man ought to be aſſigned that part in which he is capable of doing moſt ſervice. *Libanius* (Legat. ad *Julian.*) According as the Man is, whom you place in the Box, accordingly the Chariot will be guided.

[c] *Add* Xenophon. Cyropæd. *l.* 8. *poſt princip.*

[d] *Vid.* Diodor. Sic. *l.* 2. *c.* 75, 76.

[e] Leviath. c. 15, 30.

[f] L. 14. p. 966.

[g] *Ad* Nicoclem.

[h] Deſcript. *gen. Sinic.* C. 1.

[i] L. 2.

[k] *Add* Liban. *Orat.* 5. *De* Aſſeſſoribus.

Mr. Barbeyrac's NOTES on §. IX, X.

[1] *Ad* Nicoclem, *p.* 35.

[2] *Charron*, d. l.

[3] Too great Exactions do conſiderably leſſen the publick Revenues, tho' at firſt ſight they ſeem to increaſe them. The Reaſon of it is, that Trade is thereby quickly ruined, and ſo that Source of the publick Revenues is entirely, or in part, dry'd up. For when there is very little to be got by Trading, People grow tired of it, and traffick as little as poſſible. Being by degrees deſtitute of Money, or having no conſiderable Sum by them, they can undertake no great Enterprize; ſo that Trade is at laſt, by degrees, reduced to what is only neceſſary for the ſupport of Life, and brings but a ſmall Matter to the Prince's Treaſury. This is what one of the moſt antient *Greek* Poets above a thouſand Years ago ſays, ſpeaking of his Brother, who had bribed the Judges, who, in thoſe Days, were called Kings, that he might have a larger ſhare in the paternal Eſtate than *He-*

meer Neceſſity, or the ſignal Benefit and Intereſt of the State ſhall require [a]. And then they are to ſee that theſe Impoſitions be levied according to the juſteſt Proportion; and that no Immunities or Exemptions be granted to certain Perſons, to the defrauding or oppreſſing of the reſt [b] [1]. Farther, that the way of gathering them be with as little Charge as poſſible, and that much do not ſtick to the Collectors Fingers: Leſt it ſhould happen to the Treaſury, as it fares with Buckets in a Fire; they are fill'd to throw upon the Flames, but by paſſing through ſo many Hands, and being frequently ſhook from ſide to ſide, they are ſcarce half full, when they reach the Place, which requires their Service. 'Twas a notable Anſwer, that which *Hybreas* the Orator gave *Mark Antony* the *Triumvir*, when order'd by him to double the Tribute in *Aſia*; *You ſhould, at the ſame time, command us* (ſays he) *to have a double Summer; and a double Autumn this Year* [2]. Care ought likewiſe to be taken, that what is collected, be laid out on the Occaſions of the Commonwealth, and not waſted in Luxury, Donatives [c], ſuperfluous Magnificence, or idle Vanities. Laſtly, Matters are to be ſo ordered, as that the Expences, as near as poſſible, keep a Proportion to the Revenues; or where they fail, the Defect muſt be made up by frugal Management, and by retrenching unneceſſary Charges. 'Tis of pernicious Conſequence to affect more Pomp and State than the ordinary Income will ſupport; and he doth, in Reality, live *great* enough, who gives every one their due. Nor ought we to be moved with that Sentence of *Tully* [d] *'Tis no great Commendation in a Prince to be reputed a frugal Man*: Which Mr. *Hobbes* [e] thus explains; *Frugality, tho' in poor Men a Virtue, maketh a Man unapt to atchieve ſuch Actions, as require the Strength of many Men at once; for it weakens their Endeavours, which are to be nouriſh'd and kept in Vigour by Reward.*

XI. Tho' Rulers are not bound to afford Suſtenance to their Subjects (only, ſo far as Charity commands them to have a particular regard to thoſe, who, by ſome undeſerved Calamity, are rendred inſufficient for their own Support [f]) yet, in as much as the Sums, neceſſary to the common Safety, are collected from the Ability of private Perſons; farther, ſince the Strength of a State conſiſts in the Valour, and the Wealth of the Subjects; and becauſe,

——gravis eſt domino, quæ ſervit egeſtas [3];

Poor Vaſſals are a Burthen to their Lord;

therefore, ſo far as in them lies, they are to take care, that the Eſtates and Poſſeſſions of their People be well cultivated and improved. *Iſocrates* [g] is admirable in his Advice to this purpoſe; *Keep a ſtrict Eye* (ſays he) *over the Fortunes of private Men; believe the Prodigal to ſpend out of* your *Stock, and the good Hubands to increaſe* your *Wealth. For all the Subſtance of the People is (as it were) the domeſtick Treaſure of a good Prince.* It will contribute much towards this End, if the Subjects be encouraged to take as plentiful Supplies as poſſible, from the Land and from the Water; to improve induſtriouſly the Materials of their own native Growth, and never to hire other Hands for thoſe Works which they can conveniently perform themſelves; and this is done by furthering, and promoting Manual Arts. And, in purſuance of the ſame Deſign, it will be of mighty Uſe, to advance the Exerciſe of Merchandiſe and Navigation in Maritime Countries [h]. Nor is it enough to baniſh Idleneſs, but Men are to be brought to a frugal Method of living by *Sumptuary* Laws [4], which may forbid all unneceſſary Expences; eſpecially thoſe by which the Wealth of the Natives is tranſlated to Foreigners. 'Twas a Saying of *Mæcenas*, that *great Riches are gathered, rather by ſpending little, than by receiving much* [i];

ſiod: We have formerly, ſays he, *divided our Inheritance; but you took from me what did not belong to you, by preſenting many Gifts to the Kings, who are greedy of 'em, and pretend that they determin'd the Cauſe. Blind Wretches, who know not that one half is much better than the whole!*

Νήπιοι ὐδ' ἴσασιν ὅσῳ πλέον ἥμισυ παντός.
(*Oper. & Dier.* verſ. 40. upon which ſee *Le Clerc.*)

' He means, that it were better for Kings to be ſatisfied with one half of what they exact from the People, than to ' extort from them all that they have, and by that Means render them incapable of contributing any more to the ' ſupplying of their Wants. *Parrhaſiana*, Tom. I. p. 281, 282. See what follows; and in Tom. II. p. 291, &c. As alſo *Charron de la ſageſſe*, Liv III. Chap. 2. ſ. 20.

[a] *Vide* Phil. *De* Comines, *l.* 5. *c.* 18. *circa fin. Grotius* on *Luke* III. 13. 'Tis the Duty of Princes to adjuſt the publick Burthens, according to the publick Neceſſities; ſo as that they may lawfully provide for their own Support, in a way agreeable to their Quality; but not to make the Luxury and the Luſt of themſelves, and their Court-Slaves, the Meaſure of what they demand, which are indeed without meaſure.

[b] *Add.* Tho. Mori *Utop l.* 1. [c] *Drepan* Panegyr. c. 27. *It is the laſt Defence and Refuge of wicked Princes, to take away from ſome, what they may beſtow on others. Add* Montagne's *Eſſ. l.* 3. *c.* 6. p. 175. *Add.* Machiavel *Prin. c.* 16. Plin. *Panegr. c.* 4.

[d] Orat. pro Rege *Deitotaro*, c. 9.

[e] Leviath. c. 11.

[f] The *Yncas* of old in *Peru*, amongſt all their Titles, delighted chiefly to be ſtyl'd *Lovers of the Poor*, as *de la Vega* informs us (*Comment. Reg. l.* 2. *c.* 14.) who likewiſe reports (*l.* 4. *c.* 7.) that the Lands of Widows, in that Kingdom, had more Privileges than thoſe of their *Yaca* himſelf.

[g] *Ad* Nicoclem, *p.* 33.

[h] See an Inſtance of this, in the Diligence of *Seſoſtris*, by which he rendred *Egypt* capable of Trade, and convenient for the Communication of Goods and Products. *Diodor. Sic.* l. 1. c. 57. See alſo upon this whole Matter, the *Parrhaſiana*, Tom. I. 264. *&c.* Tom. II. p. 291, *&c.* And *les Avant. de Telemaque*, Tom. I. p. 85, *&c.* Tom. III. p. 50, *&c.* And Mr. *Buddeus's Philoſoph. Pract.* Part III. cap. 5. ſect. 8. Where he alſo treats of what relates to Money. Add the Rules laid down by Mr. *Hobbes* (Leviath. c. 30.) to be obſerved in relation to the *Companies* of Merchants.

[i] *In* Dion. Caſſ. *l.* 52.

Mr. BARBEYRAC'S *NOTE on* §. X, XI.

[1] V. *Hobbes* De Cive, c. 13. ſ. 0.

[2] *Plutarch.* in *Marc. Antonin.* p. 926. *B.* See alſo upon this whole Matter, the *Philoſoph. Pract.* of Mr. *Buddeus*, Part III. cap. 5. ſect. 7.

[3] *Lucan.* Pharſal. L. 3. v. 152.

[4] See the next Book, c. 5. ſ. 3.

Yet, in this Reſpect, the Example of Sovereigns hath more Efficacy, than the Force and Authority of any Laws [a]. But if a Country abound with Men and Money, it is there convenient to tolerate ſome unneceſſary *Conſumptions*, and ſuch as may ſeem to border upon Luxury; that the common People may hence be furniſh'd with Opportunities of maintaining themſelves, and that the vaſt Stock of Money may not lie dead and uſeleſs. Provided, that no Encouragement be given to Extravagance and Exceſs, and that thoſe Commodities be not idly waſted at Home, which might be exported with Advantage to foreign Parts.

XII. Farther, ſince the internal Health, and the firm and robuſt Habit of a Commonwealth depends on the Unity of the Subjects [1], the more exactly this Unity is obſerved, the more effectually the Force and Authority of Government diffuſeth it ſelf through the whole Body of the State; it is, for this Reaſon, incumbent on Sovereigns, to prevent all Factions amongſt the People [2], from which 'tis but an eaſy Slip into Sedition, and Civil War; a Condition ſo much worſe than a War carried on, with univerſal Conſent, againſt Foreigners; as War is in general leſs amicable than Peace [b]. As likewiſe to take care, that the Subjects do not bandy and aſſociate themſelves by particular Covenants and Engagements [c]; and that neither the whole People, nor any Part of them, place a greater Dependence, or rely more for Defence and Succour on any other Perſon, within or without the Realm, under any pretence whatſoever, whether ſacred or civil, than on their lawful Prince. And that, on the contrary, there be no Perſon to whom *Seneca*'s Deſcription may be applied,

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[a] *Tacitus* Ann. L. 3. c. *Veſpaſian* was the principal Author of theſe ſtrict and grave Faſhions; himſelf uſing the antient Habit, and the antient Diet: Hence there aroſe in Men a Deſire of expreſſing, by ſuch Obſervances, their Duty to their Prince, accompanied with a Love of Emulation, ſtronger than any Fear of Law or Puniſhment. Add *Bernier*'s Deſcription of the Empire of the *Mogul*, near the End, where he ſpeaks of the Cauſes contributing to the great Conſumption of Gold in that Kingdom.

[b] *Herodot.* (*Uran.*) init. Add *Evagrius* (*H. E. l.* 4, *c.* 13.) concerning *Juſtinian*'s Favour to the *Factio Veneta*, with the Miſchiefs that aroſe from it; as likewiſe *Procop. Hiſt. Arcan. & De Bell.* Perſ. *l.* 1. *c.* 24. & Bacon's *Serm. fid. c.* 15. & 49.

[c] *Vide* Diodor. Sic. *l.* 1. *c.* 21.

Mr. BARBEYRAC's *NOTES* on §. and XII.

[1] ‘No Body doubts that Union will make a Nation flouriſh, and that Diſſenſion is very dangerous to it; but there muſt be Care taken to have a juſt Notion of the Meaning of thoſe Words. An Union ſerviceable to a Monarchical or Ariſtocratical Government, is what deſigns the univerſal Good of thoſe who live under it. If in a Monarchical State, where the Power of the Sovereign is limited by the Laws, the principal Subjects of the State ſhould willingly, or by Force, conſent to ſubmit all the Laws to the Prince's Pleaſure, ſuch an Union would not be advantageous to him in any Reſpect. It would change a Society of free People into a Company of miſerable Slaves. The ready Compliance of the *Chineſe*, to obey their King blindly, does but ſtrengthen his Tyranny, and add to their Miſery. For thoſe who depend on the Will of one Man, addicted to a thouſand Paſſions, whoſe Fancies are above the Reſtraint of Law, can be certain of nothing; ſuch a Man has ſome Favourites, who have other Favourites of their own, and ſuffer themſelves to be bribed; and ſuch a Form of Government is only a Subordination of Tyrants, every one of them endeavouring to get ſomething by the Subjection of the People. But it is aſſerted, that the general Obedience of the *Chineſe* is of ſervice to preſerve the Peace of their Country, and that they enjoy by it all the Advantages that the ſtricteſt Union can procure. They mean, all Advantages that can be poſſeſs'd in Slavery. But ſure there is not a Freeman but had rather ſee more frequent Commotions, than ſuffer an eternal Slavery. Moreover, 'tis falſe to affirm that there are no inteſtine Wars under ſuch a Form of Government. The moſt enſlaved People will, in Time, grow weary of an exorbitant Tyranny, and upon the firſt Opportunity ſhew, that the Deſire of Liberty is not quite ſtifled in their Souls. This has happen'd often among the *Chineſe* and *Turks*. As there are few People concern'd in ſupporting arbitrary Power in a particular Family, or a particular Perſon, and the generality having Reaſon to complain of it, ſo few will be againſt a Change in the Government, and others believe that if they get nothing, they will loſe no great matter by it. The ſame ought to be ſaid of an Ariſtocratical Government. The Union of thoſe who govern ſuch a State, would be uſeleſs, if it did not procure the Obſervation of the Laws, and the univerſal Good of the Commonwealth. This we may underſtand from the Hiſtory of the *Thirty Tyrants* of *Athens*, and the *Decemviri* of *Rome*. The Union of thoſe Men ſerv'd only to cruſh the People, and make them miſerable; becauſe their principal Deſign was to gratify their Paſſions, without having the leaſt Reſpect to the publick Good. *Union* may alſo be conſider'd with Regard to the People, who, when the State is ſo fixed as that they may peaceably enjoy the Fruits of their Labours by obeying the Laws of their Country (which are not to be chang'd or tranſgreſs'd by any Member of the Society at his Pleaſure) ought to eſteem themſelves happy, and to obey unanimouſly the Commands of the ſupreme Power. Now to keep the Populace in ſo firm an Union it is requiſite that not only they may be the better for it, but alſo that they ſhould be ſenſible of their own Happineſs. Without that, there will be always ſome turbulent Men, who, having waſted all their Subſtance in Debaucheries and Idleneſs, would endeavour to recover it by ſome new Commotion. Such Men will eaſily induce People, who fanſy they live unhappily, to take up Arms againſt their Prince at the firſt Opportunity. On the other hand, when the People are of Opinion that they cannot mend their Condition by a Turn of Affairs, and that they ſhould venture loſing a great deal by it, 'tis a very difficult Matter to ſeduce them——The Agreement and Union both of Governours and People ought to tend to the publick Good; from whence it follows that whatſoever has not ſuch a Deſign, is injurious to it, and ought rather to be term'd a Conſpiracy than an Union; ſince the Name of a Virtue cannot with Reaſon be attributed to a thing which injures and ruins a Society. What has been ſaid of the Civil, may alſo be ſaid of the Eccleſiaſtical Society, which can only flouriſh by the great Number of its Members, and by Learning (which is in that Society what Riches are in the other) and by Union. Not to mention here the Number and Learning of ſuch a Society; I ſhall only take notice, that the Union of thoſe who govern'd it, ought not to be a tyrannical Combination, which deſtroys it. Such is, for inſtance, the Union of the Inquiſitors in *Spain* and *Italy*, who perfectly agree among themſelves: But to do what? To hinder both Lay-Men, as they term 'em, and Eccleſiaſticks (who might diſcover the Errors that were introduced into Religion, through Ignorance, or the Abuſes crept into the Diſcipline out of Ambition or any other Paſſion) from propoſing a Reformation, be there never ſo much Occaſion for one; and of courſe, to keep every Body in extreme Ignorance, or a ſinful Diſſimulation and Hypocriſy. It would be more for the Advantage of the Church, that there were many Conteſts, rather than a perpetual Tyranny, that quite overthrows the very End of its Eſtabliſhment, which was, to be taught the Principles of the Chriſtian Religion, and convinced of the Certainty of it, by very ſubſtantial Reaſons. *Parrhaſiana*, Tom. I. p. 289, &c.

[2] See *Hobbes* de Cive, c. 13. ſ. 12.

—*Stat ingens arbor, atque umbrâ gravi*
Sylvas minores urget [a].

———He ſtands a mighty *Tree*,
The *Underwood* oppreſſing with his Shade [1].

XIII. Laſtly, ſince the Condition, under which different Nations and Kingdoms ſtand, in regard to each other, is but a deceitful kind of Peace, and ſuch as cannot be relied on with any Security; it is a part of the Office of ſupreme Governours to take care, that as well the Courage of the Subjects, as their Skill in Arms, be kept up and improved [2]; and that all things neceſſary to be imploy'd againſt an invading Enemy, as fortified Places, Arms, and Men, be provided betimes: For, to uſe the old Proverb in *Plautus* [b], *'Tis a lamentable Work to begin digging a Well, when we are almoſt dead with Thirſt.* But to be the Aggreſſor in a War, how juſt ſoever the Occaſion of it may be, is what ought not to be practis'd [3], unleſs a very fair Opportunity offer it ſelf, and when the State of the Commonwealth may with Convenience bear ſuch an Undertaking. To the ſame End, the Counſels and Motions of the Neighbouring Governments are nicely to be dived into and obſerv'd (in which Reſpect the *perpetual Reſidence*, now fix'd in moſt Courts, are of very great Uſe) and Friendſhips and Alliance prudently to be contracted [c].

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[a] *In* Oedip. *v.* 542, 543.

[b] *In* Moſtellar. *Act.* II. *Sc.* 1. *v.* 32, 33.

[c] *Vide* Marſelaer *Legat. l.* 2. *c.* 11. *Add* Hobbes *De Cive, c.* 13. *ſ.* 7, 8. *and* Bacon's *Serm. fid. n.* 29.

Mr. Barbeyrac's *NOTES* on §. XII.

[1] *Vide* Bacon's *Serm. fid. c.* 35.

[2] See the *Avantures de Telemaque*, Tom. IV. p. 5, *&c.* and *Charron de la ſageſſe*, Liv. III. Chap. 3. ſect. 18, *&c.*

[3] 'Ah! with what Deliberation ought Princes to conſider every thing before they begin a War. The Motives of it ought to be juſt; nor is that ſufficient, they ought to be neceſſary: The Blood of a People muſt not be ſhed, unleſs for their own Preſervation in Caſes of Extremity. (*Avantures de Telemaque*, Tom. IV. p. 91.) The Evils of a War exhauſt a Nation, and always put it in danger of being deſtroyed, even while it is moſt victorious: With what Advantage ſoever they may undertake a War, they are never certain of concluding it without being expoſed to the moſt tragical Reverſes of Fortune; whatever Superiority you have in the Fight, the leaſt Miſtake, a ſudden Terror, a meer Nothing ſnatches the Victory out of your Hands, and carries it to the Enemy: Nay, tho' you ſhould hold Victory chain'd as it were in your Camp, you ruin your ſelf in ruining your Enemy; you depopulate your Country, let the Ground be almoſt uncultivated, put a Stop to Trade; and which is worſe, you weaken your Laws, and ſuffer Corruption of Manners. The Youth no longer apply themſelves to Learning; the preſſing Neceſſity of your Affairs makes you tolerate pernicious Liberties in your Army; Juſtice, Order, every thing ſuffers by this Diſorder. A King who ſheds the Blood of ſo many Men, and occaſions ſo many Miſchiefs, only to gain a little Glory, or to extend the Bounds of his Kingdom, does not deſerve the Glory he is in Prusuit of, but rather deſerves to be depriv'd of what he poſſeſſes, for deſiring to uſurp what does not belong to him, *p.* 4, 5. *of the ſame Tome*.

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OF THE
LAW of NATURE
AND
NATIONS.

BOOK VIII.

CHAP. I.

Of the Power to direct the Actions of the Subject.

I. *Of the Nature of Civil Laws in general.*
II. *Whether a Civil Law may contradict the Natural?*
III. *Whether the Definitions of Crimes is left arbitrarily to the Determination of the Civil Laws?*
IV. *The Precepts of the Decalogue whether Civil Laws.*
V. *Whether any thing was juſt antecedently to the Civil Laws?*
VI. *Whether a ſinful Command of a Superior may at any time be obey'd without Sin?*
VII. *No Sin lawfully committed at the Command of a Superior.*
VIII. *Whether a Subject may lawfully bear Arms in an unjuſt War, at the Command of his Prince?*

I. HAVING explain'd what related to the Nature of *Sovereign Power* in general; I come now to conſider the moſt material Difficulties that ariſe upon the particular Parts of it. And ſince I at firſt ſuppoſed, that the Power to direct the Actions of the Subject, was that from which all civil Laws were deriv'd; to what I have already ſaid of Laws in general [a], I now ſhall add what more particularly relates to Laws *civil*, and the Commands of the *ſovereign Power*. A Law therefore is call'd *civil* either with reſpect to its *Authority*, or to its *Original*. In the former Senſe, all Laws may be call'd *civil*, which are the Rules for the Adminiſtration of Juſtice in *civil Courts*, from whatever Original they ariſe [b]. The Laws of God and Nature, it muſt be own'd, are of univerſal Obligation, and they that break them muſt expect to be puniſh'd by divine Juſtice But it is the *civil Power* that gives them the force of Laws in *civil Courts*. And the ſame Power muſt determine, what Crimes are to be puniſhed by the *civil Juſtice*, and what ſhall be left to the *divine*; as alſo, upon what natural Obligations an *Action* may commence in the *civil Court*; and what will not bear an *Action*, but muſt be left to the common Ingenuity and Probity of Mankind. Hence under *civil Government* no Man is call'd to account, or can, properly ſpeaking, be *puniſhed* for the Violation of thoſe Laws of *Nature*, which have not the Authority of *civil Laws* ſtamp'd upon them. For the Evils that attend ſuch Crimes are only ſuch as are uſually called *Natural Puniſhments* [c]. Thoſe Laws of *Nature* indeed, upon the Obſervation of which the common Quiet of Mankind entirely depends, have in all Commonwealths the force of civil Laws. But there are others that have no ſuch force allow'd them, either in expreſs *Terms*, or in any *Practice of civil Courts*; as well becauſe the Controverſies about the Violation of them would be very perplex'd and intricate, as to prevent the Multiplication of litigious Suits; and alſo that the Good and Virtuous might not be deprived of the moſt valuable part of their Character, the doing well out of Reverence to their Creator, without regard to the Fears of human Penalties; for this they muſt neceſſarily loſe, when there is no Diſtinction made whether a Man doth well out of Love to Virtue, or out of Fear of Puniſhment. ‘And indeed, as *Seneca* ſaith, how cheap a thing is it to be good only as far as the Law obligeth us, when the Rule of our Duty is of ſo much wider Extent? For how many things do Piety, Humanity, Juſtice, and Fidelity require of us, which yet are without the Reach of the Law [d] [1]? *Civil Laws* with reſpect to their *Original*, are ſuch as flow entirely from the Will of the *ſupreme civil Power*, and reſpect only ſuch things as are left indifferent by the *Laws of God* and *Nature*, and which particularly conduce to the Benefit and Advantage of the Commonwealth. And theſe demand the ſame Obedience from the Subject as other Laws do; ſince it muſt evidently be more for the good of Society, that in indifferent things the Determination of the Government ſhould take place, and the Subjects ſhould look upon that to be good, which is thought ſo by their Governors, than that there ſhould be endleſs Diſputes between them about it, which do not uſually end but in War and Bloodſhed, certain and undeniable Evils. ‘The publick Good, ſaith *Cicero*, ought to be the End of all Laws, and is the beſt Comment upon, and Interpretation of them; and we do not deſire the Preſervation of our Laws meerly for the ſake of the Laws themſelves, but for the common Intereſt and Advantage [a]. And hence the Conſtitutions of particular Commonwealths, made for the Publick Good, are call'd by ſome, *Appendages* to the *Law of Nature* [b]. But it muſt be obſerv'd, that tho' all theſe Laws put together, are commonly call'd the *Civil Law*, yet, that there are ſeveral Particulars contain'd in the *Bodies* and *Codes* of the *Civil Law*, which are not properly and ſtrictly Laws. For beſides *thoſe Commands* which the *ſovereign Power* lays upon the Subject for the particular Utility of the Commonwealth, there are many other things inſerted, which ſhould be reduc'd properly to the *Law of Nature*. What belongs more particularly to the *Civil Law* [1], may be reduc'd to theſe two Heads: Firſt, to certain *Forms* preſcribed, and certain Methods to be obſerv'd in civil Affairs, either in *transferring Rights*, or elſe in laying Obligations upon *Perſons*, which ſhall be look'd upon to be valid in the *Civil Court*: And Secondly, To the ſeveral Ways how a Man is to *proſecute* his *Rights* in the ſame *Courts*. So that, if we give the *Law of Nature* all that belongs to it, and take away from the *Civilians* what they have hitherto engroſs'd and promiſcuouſly treated of; we ſhall bring the *Civil Law* to a much narrower Compaſs; not to ſay at preſent, that whenever the *Civil Law* is deficient, we muſt have recourſe to the *Law of Nature*; and that therefore in all Commonwealths the *natural* Laws ſupply the Defects of the *Civil*. For which reaſon *Hobbes* calls the Law of Nature, *the unwritten Civil Law* [c].

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[a] B. 1. chap. 6.

[b] *Vid. Grot. de Imper. ſummar. Poteſt. circa ſacra*, c. 3. n. 4, 11. &c. c. 4. n. 1.

[c] See above in B. 2. chap. 3. §. 21.

[d] *Sen.* de Ira, l. 2. c. 27.

Mr. BARBEYRAC'S *NOTES on* §. I.

[1] *Quod non vetat Lex, hoc vetat fieri Pudor. Senec.* Troad. v. 332. *Grot.* L. 3 c. 10. §. 1. See likewiſe what has been ſaid above in B. 3. c. 4. §. 6.

II. But notwithſtanding, *Hobbes de Cive* c. 14. §. 10. will maintain this ſtrange ſort of Opinion, ‘That it is impoſſible any *civil Law* ſhould be made repugnant to that of Nature, except it be to the Diſhonour of God. The Argument he uſes to prove it, is this: Men, ſaith he, [d] when they enter into *civil Societies*, oblige themſelves by *Compact* to obey *his* Commands, who hath the *ſovereign Power*, that is, to obey the *civil Laws*; and this *Compact* they are obliged by the *Law of Nature* to obſerve. But ſince the *Compact* it ſelf, and conſequently the Obligation to obey the *Civil Laws*, was antecedent to the *Promulgation* of the *Laws* themſelves; by the force of the ſame *Law of Nature*, which commands not to violate the *Compacts*, we are obliged alſo to obey every *civil Law*. For where we are obliged to Obedience before we know what will be commanded, there we are obliged to obey *univerſally* and in every Reſpect”.

But the Truth is, it muſt be preſum'd, that when Men enter into *civil Societies*, they have already a competent Knowledge of the *Law of Nature*; and that one of the chief Ends of erecting civil Governments was, that the *Laws of Nature*, upon which the common Peace of Mankind is eſtabliſhed, might be obey'd without Danger. And in ſhort, that there is nothing in the *Laws of Nature*, which is any way repugnant to the Nature and End of *civil Society*; but on the contrary, that they are entirely neceſſary to aſſiſt and promote it. And therefore when Men form'd themſelves into *civil Societies*, and oblig'd one another by Compact to obey the *civil Laws*, we muſt ſuppoſe that they took it for granted, that nothing would be eſtabliſh'd by the *civil Law*, which was contrary to the *natural*; and that the particular Advantages of the Commonwealth could not be contrary to the common End of all Government. It is poſſible indeed that a *civil Law* might be made in Oppoſition to the *natural*; but no Man in his Wits would ever attempt to make ſuch a Law, unleſs he reſolv'd to ruin and overturn the whole Commonwealth. And therefore *Stratocles* was

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[a] *Cic.* de *Invent.* l. 2. c. 38.

[b] *Philo Judæus* de *Joſepho* p. 351. B. *Ed. Paris.*

[c] *De Cive*, c. 14. §. 14. Vid. *Quintil. Decl.* 252. *Actio inſcripti Maleficii*; *upon which Law* Quintilian *ſays*, That the old *Romans* ſeem'd to have made it with the greateſt Wiſdom poſſible: For ſince, ſaith the Declaimer, they knew that no Prudence or Foreſight could be cautious enough to prevent all the ſeveral Ways of Miſchief that bad Men deviſe, they made this Law for an univerſal Security, that what Crimes eſcap'd the others might fall under the reach of this.

[d] Ibid. Sect. 9.

Mr. BARBEYRAC'S *NOTE on* §. I.

[1] Beſides, as there are a great many things which the *Law of Nature* preſcribes only in a general and indefinite Manner; ſo the *Time*, *Manner*, *Place*, Application to ſuch or *ſuch Perſons*, and the like Circumſtances, are left to the Diſcretion and Prudence of every private Man. The *Civil Laws* generally regulate all that matter, for the Order and Tranquillity of the State; ſometimes they propoſe Rewards to thoſe who by the Natural Bent of their own Inclinations would willingly perform ſuch Actions, to which they are not determinately bound, in ſuch and ſuch a particular Caſe. They alſo explain whatever may happen to be obſcure or doubtful, either in the Maxims of the *Law of Nature*, or their Application; and private Men are bound to ſubmit to the Deciſions that are made by publick Authority, even tho' they ſhould not find 'em upon Examination to be very juſt. In ſhort, they limit in ſeveral Reſpects, the Uſe of thoſe *Rights* which naturally belong to every one; which they ought not to do any farther than the Good of the State requires it. Moreover, every private Man is oblig'd to comply with all theſe Regulations, as far as they contain nothing that is manifeſtly contrary to the *Divine Laws*, whether Natural, or Reveal'd; and that not only through Fear of the Puniſhments which are annex'd to the Violation of 'em, but even upon a Principle of Conſcience; and alſo by the Virtue of a Maxim of the *Law of Nature*, which commands to obey our lawful Sovereign in every thing we can do without committing a Crime. The Author's Abridgment, *De Offic. Hom. & Civ.* B. 2. c. 12. Sect. 6, 7, 8.

very juſtly taken for a Madman, when he publiſh'd his Law at *Athens*, that whatever King [a] *Demetrius* commanded, *ſhould be Law to Gods and Men.* And *Paryſatis* was guilty of deteſtable Flattery, when ſhe perſuaded *Artaxerxes to marry his own Daughter, and deſpiſe the* Greek *Law; adding, that Heaven had made him the* Perſian *Law, and the proper Judge of Good and Evil* [b].

III. The ſame *Author* argues further in defence of his Opinions, *de Cive*, c. 6. §. 16. c. 14. §. 9. 10. 'That tho' *Theft*, *Murther*, *Adultery*, and all kinds of *Injuries*, are forbidden by the *Law of Nature*; yet that what is to be call'd *Theft* in a Subject, what *Murther*, what *Adultery*, and what an *Injury*, is not to be determin'd by the *Law of Nature*, but by the *Civil Law*. For barely the *taking away* what another Man is in Poſſeſſion of, is not *Theft*, but only to take away that which of *right* belongs to another. But what of *Right* belongs to me, and what to another, is a *Queſtion* of the *Civil Law*. And in the ſame manner, barely to *kill a Man* is not *Murther*, but to *kill* him the *Civil Law* forbids. And ſo alſo, no *Act of Generation* is *Adultery*, but that which the *Civil Law* declares ſuch; and laſtly, *Breach of Promiſe* is indeed an *Injury*, where the *Promiſe* it ſelf is lawful; but where there is no *Right* to make an *Agreement*, there no *Right is* transferred, and conſequently no Injury follows; but what we may make *Agreements* about, and what we may not, depends upon the *Civil Laws*. To which I anſwer, that all that believe the *Scriptures*, as to ſeveral ſorts of Crimes, are ſufficiently aſſured, both from the Laws of the *Jews*, which were of divine Inſtitution, and from other Parts of the holy Books, how God, the Author of the *Law of Nature*, would have them *defin'd*; ſo that tho' the civil Government ſhould *de facto* make ſome particular Acts not criminal, yet they would nevertheleſs be contrary to the Law of God. Eſpecially ſince there can be no ſufficient Reaſon given, why God in his Laws ſhould give ſuch Definitions of ſuch Actions, unleſs they ought equally to be obſerv'd in all Nations. The *Spartans* allow'd the frigid and impotent to ſupply their Deficiency in the Conjugal Duties, by the Aſſiſtance of the young and vigorous [1]: And this was done at *Sparta*, without any bad Imputation of the Husband, the Wife, or the Gallant, when they had no Hopes of Children otherwiſe: Becauſe the *Civil Laws* of that State did not comprehend that Method of anſwering the Husband's Part at his own Requeſt, under the Name of Adultery. And yet, ſince it is evident from the Laws of God, that by the Law relating to Adultery, any Familiarity of the Bed with a Woman actually married to another is forbidden; it is evident, that thoſe Aſſiſtances alſo were contrary to the Law of Nature. But if it be reply'd, that the *Definitions* of particular Acts in the Scriptures were intended for, and only belong'd to the *Jewiſh* Commonwealth, and ſo are of poſitive Inſtitution; yet thus much however muſt be allowed, that the *Civil Law* ought to have ſo cautious a Regard to the *Definitions* of Acts forbidden by the *Law of Nature*, as not to defeat the Intention and End of it, the Preſervation of a peaceable *Society* and honourable *Correſpondence* among Men. And therefore if any *Definitions* of the *Civil Law* be oppoſite to this End, it muſt be granted, that it is alſo contrary to the *Law of Nature*. For Example; if the *Civil Law* ſhould define Adultery to me, by telling me that it is *when a Man invades another's Bed againſt his Wife's Conſent*; or of Theft, that it is, *when a Man takes away ſomething from another by Night*; or of Murther, that it is *when a Man openly aſſaults another, and kills him*: It is manifeſt, that the publick Quiet and Security of the Commonwealth could not long ſubſiſt under ſuch Methods of Government. For we are not to imagine, that the *Univerſality* of ſuch *Definitions* would ſufficiently ſecure the publick Peace; that is, that though particular Perſons might perhaps ſometimes be ſenſible of Inconveniences from them, yet that at other times they might find Advantages proportionable to the Inconveniences; and that the *Equality* of *Right*, which ſuch Laws would ſettle among the Subjects, would take off all occaſion of Complaint: For tho' perhaps a Man might deſire that ſome particular things might be lawful only for himſelf; yet if others ſhould have as large Immunities granted them in Oppoſition to him, he would ſoon be willing to throw up his Privilege. And ſhould the *Civil Laws* make any ſuch Eſtabliſhments, it muſt be impoſſible that the Peace and Order, which Nature intended, ſhould be preſerv'd. And if the *Equality* of ſuch Laws alone were Reaſon enough to introduce them, why muſt we any longer be confin'd by any Laws at all, ſince by taking them wholly away [2], we ſhould make the greateſt Equality? Which it is impoſſible any Man in his Wits ſhould think of doing. In ſome Accounts of the *Tartars* [c] we are told, that they are utter Strangers to all Juſtice; and that when any of them wants any thing, he may take it without fear of Puniſhment wherever he finds it: [3] And when the Party robb'd complains to the Magiſtrate of the Injury done him, the other doth not deny the Fact; but pleads only that he wanted what he took; and then 'tis uſual for the Magiſtrate to give Sentence, That the Party who complains, may, if he pleaſes, right himſelf in the ſame manner upon others. There are others indeed [a] who give a more favourable Account; telling us only that the *Tartars* are very free in communicating what they have to Strangers; but that they will expect a Return of the ſame kind, or elſe will take it by force. A *Tartar*'s *Definition* therefore of *Theft* would be, When ſomething is taken away without the Conſent of the Proprietor, which the other had need of; a *Definition* evidently imperfect, and which manifeſtly ſubverts the *Law of Nature* relating to *Theft*. 'Tis certain, none but the worſt of Men could wiſh for ſuch a Law, ſince it might often happen, that a Man might have the ill Fortune to be robbed of that, which of all things he was moſt unwilling to loſe, and which he either might never find another Man poſſeſs'd of, or elſe ſo ſecured, that he muſt deſpair of being ever able to take it from him. But beſides, the Suppoſition Mr. *Hobbes* goes upon is falſe; that what belongs of *Right* to me, and what to another Man, is a Queſtion of the *Civil Law*; and that out of civil Government there is no *Propriety*: For tho' Men that live under it have a more ſecure Enjoyment of their *Proprieties*, than they that live out of it; ſince the *firſt* are defended in their Rights and Fortunes by the united Strength of a Number of Men, beſides the Aſſiſtance of the Magiſtrate; and the latter can ſupport themſelves only by their own ſingle Power; yet notwithſtanding, there can be no Grounds of Proof to aſſert, that there was no *Propriety* before the Inſtitution of *Civil Government*. For all ſovereign Princes and Commonwealths are now actually in a *State of Nature*, and their *Proprieties* are not determin'd by any common *Law* or *Judge*, but ſolely by Compact, and the natural means of *Acquiſition*; and yet I believe no Body ever imagin'd, that Princes might ravage, or ſteal from one another, without incurring the Guilt of *Rapine* or *Theft*. So that admitting, that a Man cannot make any Compact that will be valid about what is forbidden by the *Civil Law*, yet certainly it cannot be denied, but that they who live in a *Liberty of Nature*, may make certain Compacts, which it will be an Injury to violate. And therefore it is falſe to ſay, we muſt be oblig'd entirely to the *Civil Law*, to know what an *Injury* is. Beſides, neither will it, I think, be denied, that a Man is guilty of *Homicide*, tho' he be only under the Government of the *Law of Nature*, when he takes away another's Life without making War upon him, or in his own defence. Nor is it difficult to underſtand barely by the Law of Nature, without any Aſſiſtance from the *Civil*, that *Adultery* is the *Violation of conjugal Faith*: But that the *Civil Laws* may ſuperadd certain *Obligations* to the *matrimonial Contract*, for want of which the Marriage may be look'd upon to be deprived of certain *Effects*, was never deny'd. But further, it may be neceſſary to diſtinguiſh between what is commanded by the *Civil Law*, and what is only permitted [1] and not forbidden by the *Sanction* of any Penalty to be inflicted by *civil Juſtice*. For a *Prohibition* of the *Law of Nature*, and a *Permiſſion* of the *civil* about the ſame thing, are not oppoſed to one another; for a *Permiſſion* of the *Civil Law* doth not make any Act not to be contrary to the *Law of Nature*, that really is ſo, or excuſe the Man that is guilty of it from Sin againſt God: But it only declares, that the *Civil Power* hath laid no reſtraint upon the Perſon that will commit ſuch Acts; that if a Man doth commit them, he is not to be puniſhed on that account; and that *human Juſtice* alloweth ſuch Acts to have the ſame Effects with other Acts, that are agreeable to the *Law of Nature*. And therefore the Laws of *Tartary* do not, 'tis preſumed, command Men to ſteal, nor, I ſuppoſe, forbid the *Proprietors* to defend their own: Only the Perſon that robs is not liable to be puniſh'd, nor oblig'd to make Reſtitution; ſo that according to the common Juſtice of that Nation, Robbery and Stealing are look'd upon to be lawful ways of *Acquiſition*. And the ſame may be ſaid for the *Children* at *Lacedemon*; for we need not tranſlate that Sentence of *Plutarch* [b] κλέπτειν νενομισ[illegible] παῖδας, *the Children were commanded by the Law to ſteal*; ſince the Senſe of it may as well be, that *they were permitted by the Law*. *Xenophon* indeed ſays, *That it was ſo far from being thought ſcandalous for the Children to ſteal at* Sparta, *that they were under a neceſſity of doing it*: But this was ſpoken only in a way of Raillery, and to mortify *Chiroſophus* the *Lacedemonian*. Neither was that Practice ſo inexcuſably bad as ſome believ'd it, or deſerved ſo ſevere an *Invective* as *Iſocrates* gave it [d]. For the Truth of the matter was, that the Liberty the *Boys* were allowed in was only that of robbing Orchards, and ſtealing Victuals; and then too if they were taken, they pay'd ſeverely enough for it [e]. We are told too

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[a] Plut. Demetrius, p.900,901. [b] Plut. Artaxerxes, p.1022.B. [c] Sigiſmund. Baro Herberſtein de Rebus Moſcov.

Mr. BARBEYRAC's *NOTES* on §. III.

[1] *See above in* B. 6. c. 1. §. 15. *It was ſometimes common among the* Romans *to lend their Wives to Perſons comely and well-born.* *See* Plutarch. *in* Numa, *p.* 76. D. *&* *in* Catone, *p.* 771. A.

[2] 'Tis neceſſary to obſerve here, that tho' ſome Nations, that were not much enlightened, have permitted and authoriz'd in ſome Meaſure, Things manifeſtly contrary to the *Law of Nature*, it was not through Ignorance of this Oppoſition; much leſs ſtill out of a Conceit that the Sovereign had a Power to determine the Nature of Crimes according to his own Fancy; but moſt commonly on account of ſome Circumſtances which made 'em judge it proper to let ſome Crimes go unpuniſh'd, to prevent greater Inconveniences.

[3] *This Permiſſion takes place likewiſe in* Cholchis; *See* Busbequius's *3d. Ep. p.* 155.

[a] Haytho de Tartaris, c. 48. [b] Plut. Apophth. Lacon. p. 175. F. [c] Xenoph. περὶ ἀναβάσ. l. 4. [d] Iſocr. Panathen. [e] Vid. Plut. Lycurgus. Xenophon de Repub. Lacedæmon. Busbequius *gives a much worſe Account of the Liberties allow'd among the* Mengrelians, Ep. 3. p. m. 155. Vid. Lib. 11. c. 5. l. 1. D. de Aleator.

Mr. BARBEYRAC'S *NOTE on* §. III.

[1] "There are certain *Evils* in a Commonwealth, that are ſuffer'd to remain in it, becauſe they hinder, or prevent greater Evils. There are other Evils, which are only ſo by their Eſtabliſhment; and which being in their Original, an Abuſe, or ill Cuſtom, prove leſs pernicious in their Conſequences, than a Law or Cuſtom which is more juſt and reaſonable. There is a ſort of Evils that might be corrected by a Change or Innovation, which is a very dangerous *Evil*. There are others, which are hidden and ſunk like Ordure in a Common-Sewer, I mean buried between Shame, Secreſy, and Obſcurity, ſo that one cannot ſtir or rake into 'em, without their caſting forth Poiſon and Infamy. The wiſeſt ſometimes doubt whether 'tis better to underſtand theſe *Evils*, than to be ignorant of 'em. Sometimes a great *Evil* is tolerated in a State, but it is ſuch as prevents a Million of little *Evils*, or Inconveniences, which were all inevitable and irrecoverable. There are *Evils* under which every private Man groans, and which however become a publick Good: Tho' the publick is nothing but a Combination of private Men. There are alſo perſonal *Evils*, which concur toward the Good and Advantage of each Family. There are ſome which afflict, ruin, and diſhonour Families; but they tend to the Good and Conſervation of the Machine of State and Government. *La Bruyere, Caracteres ou Mœurs de ſe ſiecle*, Chap. *du Soverain & de la Republique*, pag. 316, 317. See alſo a Fragment of *Philemon*'s, related by *Athenæus*, Lib. xiii. pag. 569. and a paſſage of St. *Auguſtin*, cited by Mr. *Le Clerc*, p. 298. which ſhews the Reaſon why a State is ſometimes oblig'd to tolerate *Curteſans*. See alſo the Diſſertation of *Velthuyſen*, entituled, *Diſquiſitio de tolerando malo in Republica*.

of *Dionyſius* the Tyrant, That tho' he puniſh'd other Crimes very ſeverely, yet he would often pardon them that ſtole Cloaths, in hopes that by this Method he might reſtrain the *Syracuſians* from the Riot and Drunkenneſs they were given to. Neither do I think, that the Law of *Sparta* before-mention'd, laid any Command either on the Husband, or Gallant; that matter ſeems to have been no more, than that if they two agreed, the Law did not interpoſe; but look'd upon the Children ſo begotten to be legitimate, and admitted them Heirs to the Eſtate of the Family. So alſo, where *Duelling* is permitted, the Blood which is ſhed in them may be excuſed from the Puniſhment of Murther at the Bar of *civil Juſtice*, but will not be ſo acquitted hereafter at the *divine Tribunal*. That the *civil Power* may with Juſtice permit things of ſuch a nature, and that not by bare Silence and Connivance only, but by expreſs mention made in the *publick Laws*, is what I dare not affirm; by ſuch a Method the *civil Power* would ſeem almoſt to invite the Subjects to tranſgreſs the *Laws of Nature*: Poſſibly it may be excuſable to diſſemble things, where the Times or the Humour and Diſpoſitions of the People will not endure a Reformation by direct Remedies. And ſo there was good Reaſon why the *Roman Law* [1] call'd that, *Actio rerum amotarum*, when there was indeed a real *Theft* committed.

IV. Our *Author* alſo, de Cive c. 14. §. 9. affirms, 'that the *Precepts* of the *Decalogue* are 'merely *civil*, and not *natural Laws*, and that they are to be explain'd after this manner: *You ſhall not deny your Parents the Honour the civil 'Law alloweth them. You ſhall not kill any Man, 'the Law forbids you to kill. You ſhall avoid e'very unclean Act which the Law forbids. You 'ſhall not take away what belongs to another Man 'againſt his Conſent. You ſhall not fruſtrate the 'end of Law and Judgment, by bearing falſe Wit'neſs.* But it will here be eaſily obſerv'd, that he depends upon an utterly falſe *Hypotheſis*, and ſuppoſeth what will never be allowed, that there was no *Propriety*, no *Marriage*, and that *every thing was lawful for every Man* before the Inſtitution of *civil Governments*. It is certain, the Precepts he ſpeaks of, are obligatory, and bind even thoſe Perſons to one another, who do not live under any common Government, but only in a *State of natural Law*. For certainly Men could, and actually did divide things between one another by Compact even in ſuch a State; and therefore would have ſinn'd as much againſt the Eighth Commandment, if they had neither openly or ſecretly robb'd one another, as they do that rob their Fellow Subjects in civil Governments. It may alſo be perhaps denied, that a Man in a State of *Nature* is guilty of *Adultery*, when he violates his Neighbour's Bed: But the anſwer may be ſeen, *Gen.* xx, 3. xxvi, 10. And further, ſince *Arbitrators* muſt be often made in a *State of Nature*, to decide Diſputes about *matters of Fact*, by intervention of *Witneſſes*, as Mr. *Hobbes* admits himſelf, *de Cive* c. 3. §. 23. we may hence find the uſe and neceſſity of the *ninth Commandment*. In general, the *Precepts* of the *Decalogue*, it is evident, may be reduced to the *Law of Nature*; but when they are conſider'd as written in *two Tables*, and promulg'd to the *Iſraelites* by *Moſes*, they may properly enough be call'd *Civil Laws*, or rather the *general Heads of the Jewiſh Civil Law*, which are afterwards divided into particular Laws, with penal *Sanctions* added to them [a]. Upon which Account, *Grotius* ſaith [b], the *Decalogue* does not in expreſs Words comprehend every Crime, not even all thoſe which are puniſhable by the *Civil Law*, but only ſuch in every kind as are moſt heinous and malignant. For there is no mention made of *Wounding*, but only of *Murther*; nor of any other ſort of *Gain made by another's loſs*, but that of *Theft*; nor of any *other Falſity*, but *Falſe Witneſs*.

V. It may be proper in the next place to conſider, that the ſame Author in his Book *de Cive*, c. 12. §. 2. among thoſe ſeditious Doctrines he ſuppoſes to be the internal Diſeaſes, and Cauſes of the Diſſolution of the Commonwealth, ſets down this for the Firſt: 'That every private 'Man is Judge of good and evil. For, 'ſaith he, the Meaſure of good and evil, 'of juſt and unjuſt, is the Civil Law, and 'whatever the Legiſlator commands muſt be 'look'd upon as juſt and good, whatever he 'forbids, as unjuſt and evil; and therefore it is 'a very ill Maxim, that we are to obey our Sovereign only, when his Commands are juſt. 'There was nothing juſt or unjuſt before Ci'vil Government; their Nature relates to the 'Commands of the Sovereign: and every Acti'on is in its own Nature indifferent; that it be'cometh juſt or unjuſt, is owing to the Will of the 'Sovereign. And therefore lawful Princes make 'thoſe things juſt, which they command, by 'commanding them; and thoſe things which 'they forbid, unjuſt, by forbidding them. But 'while private Men aſſume to themſelves the 'Cognizance of good and evil, they affect to 'be like the Sovereign, which it is impoſſible 'ſhould be conſiſtent with the Quiet and Peace 'of any Commonwealth. In Anſwer to him, it may be readily allow'd, that *ſovereign Princes* have indeed Power, by annexing or taking away the Penal Sanction, to give or take from the Laws of Nature the Force of *civil Laws* in human *Courts of Juſtice*; as alſo to make many things, which do not belong to the Law of Nature, *juſt*, by commanding, and *unjuſt*, by forbidding them. But to ſay that before *civil Governments* were erected, there was nothing *juſt* or *unjuſt*, either *defin'd* by *Nature*, or obliging Mens *Conſciences*, is as falſe, as to aſſert, that *Truth* it ſelf hath only a precarious arbitrary Dependence upon the

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Mr. BARBEYRAC's *NOTE* on §. III.

[1] 'Twas when a Husband or a Wife, upon their ſeparation, had kept back ſomething that ought to be reſtor'd to the Party it belong'd to, after the Divorce; but becauſe of the ſtrict Union that was between 'em, by their Marriage, they ſoften'd the Notion of *Theft*, which he is guilty of in reality, that does not reſtore whatever he is not the lawful poſſeſſor of, and only barely call'd it, *the detaining another's Goods*. Vid. Digeſt, Lib. 25. Tit. 2. *De Actione rerum amotarum*. And Mr. *Noodt*, in his *Julius Paulus*.

[a] Vide Philon. Judæum, de Decalogo.

[b] Grot. ad Math. v. 27.

Pleaſure of Men, and is not founded in the *Nature* of things; or that *Sovereign Princes* may faſhion and diſpoſe the nature of things as they pleaſe, or that the ſame Truth may be different from it ſelf. And indeed the thing it ſelf ſufficiently confutes *Hobbes*. For is it at all probable, that thoſe *Maſters of Families*, who at firſt united, and form'd themſelves into Commonwealths, ſhould, all the time they liv'd ſeparately, behave themſelves only like ſo many wild Beaſts; break all manner of Compacts they ever made; rob one another of Life and Fortune at pleaſure, upon every pretence of a Right, and that all their Actions were to be thought purely indifferent? Upon the ſame grounds, *ſovereign Princes* now, who are ſtill with reſpect to one another in a *State of Nature*, ſhould not be thought guilty of Injuſtice, when they break their Compacts, and invade one another's *Rights*: And yet it is certain, they are not ſubject to *civil Laws*. But on the contrary, it is not to be conceiv'd, that *civil Governments* could ever have been eſtabliſh'd, or after their Eſtabliſhment, preſerv'd; if there had not been ſomething *juſt* or *unjuſt* antecedent to their Exiſtence. For 'tis certain, Compacts muſt have been made uſe of at the firſt forming of Commonwealths. But how could Men perſuade themſelves, that ſuch Compacts could be of any Force, except they knew before, that it was juſt to obſerve them, and unjuſt to do otherwiſe? And if it be no Juſtice to ſtand to Compacts antecedently to the *Definition* of the *Civil Laws*, there can be no reaſon why Subjects may not, when they pleaſe, renounce their Obedience, diſſolve *civil Government*, and ſo utterly aboliſh all the Diſtinction between *juſt* and *unjuſt*. For it is extravagant to imagine, that ſuch Numbers of Men, as a Commonwealth conſiſts of, will always be kept in Subjection by no other Reſtraints, but Fear and Power. Nor therefore can I believe there was ever any Prince heard of, ſo far depriv'd of Reaſon, as to have commanded what the general *Laws of Nature* forbad, or forbid what they commanded; for Inſtance, *that it ſhould* be unlawful to perform Truſt or Promiſe, or to give any Man his due; that *it ſhould be a Crime to live with any Reſpect to Reaſon or Juſtice, that every Man might have full Liberty to do all the Miſchief he could*, and the like. But now, why might not ſuch Laws have been made, if there had been nothing *juſt* or *unjuſt*, antecedent to the Determinations of the *civil Laws*? 'Tis certain the Command of the *civil Power* may as well make Poiſon it ſelf wholeſome and neceſſary Food, as make ſuch Things as theſe *juſt* and *good*. And therefore *Polybius* was equally in the wrong, when he ſeems to derive the Original of Juſtice and Injuſtice from *civil Government* [a]. In *another Senſe* indeed, what Mr. *Hobbes* ſaith, may be ſafely enough admitted; that is, ſuppoſing that by *good* and *evil* we underſtand no more than the *advantage*, or *diſadvantage* of the Commonwealth. For then it will really appear to be a *ſeditious Doctrine*, that *every private Perſon is Judge of good and evil*, meaning by it, what is for the *Advantage* or *Diſadvantage* of the Commonwealth; that is, that every *private Man* is a competent Judge, whether thoſe are proper Means, which the *Prince* commands ſhall be made uſe of in promoting the *publick good*; and that, in Conſequence, every Man's Obligation to Obedience may depend upon that Judgment. For it is neceſſary that Subjects (as *Otho* in *Tacitus* told his *Soldiers*) *ſhould be ignorant of ſome things as well as know others. For if every one ſhould have the Liberty to diſpute what he was commanded, Obedience and Authority would ſoon ſink together* [b]. It was *Cato's* Saying, that *the Tenant ought not to think himſelf wiſer than his Landlord*; and of *Plato*, that *no Man ſhould pretend to be wiſer than the Laws* [c].

VI. Our next Conſideration ſhall be, whether a *Subject* may be guilty of Sin, in executing the Commands of his *Prince*; ſuppoſing he pretends, that he barely undertook the *Performance* of the *Action*, and left the *Deſign*, *Contrivance*, and the *Neceſſity of Account*, entirely upon *him* who gave the Command? For there is a Difference between the *Laws* and the *Commands* of *Princes*: The *Laws* are general Precepts, which affect every Subject; the *Commands* are only occaſionally impoſed upon particular Perſons; but have the ſame effect the Laws have in obliging thoſe they are directed to. In this Caſe it is the known Opinion, that a Man may ſometimes ſin by obeying the *Commands* of the *civil Sovereign*, and therefore that *the Subject* may and ought to examine ſuch *Commands* by his own Conſcience rightly inform'd [1]. For certainly it ought to be ſuppoſed, that good Men promiſe Obedience upon certain Conditions only; that, ſince they are ſure to give an Account of their Actions at the *Divine Tribunal*, and ſince all the Governments of this World are under an infinitely great overruling Power; they are always ready to obey the *Commands* of their *Sovereign*, except when they contradict or interfere with the *Law of Nature*, or the *manifeſt* Laws of God. For with-

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[a] Polyb. l. 6. *where he is tranſcrib'd with very little Judgment*, by Machiavel, Diſc. in Liv. l. 1. c. 2. Vid. R. Cumberland, de Leg. Nat. l. 5. c. 5.

[b] *Tam neſcire quædam milites, quam ſcire oportet, Tacit. Hiſt.* L. 1. c. 83. H. L. 2. c. 39. It is one part of the Character of a good Soldier, that he had rather put his General's Commands in Execution, than make any Debates upon them. *Cato de Repub.* c 5. *And ſo far* Terentius *was in the right.* Tacit. Ann. 6. c. 8. We are not to examine whom you prefer, or upon what account Heaven hath given you the ſupream Diſpoſal of things, and it is our Glory to obey.

[c] *Plat. Polit.* p. 555. D. Ed. *Wech. Ariſt. Rhetor.* l. 1. c. 15. To endeavour to be wiſer than the Laws, is what the beſt Laws take care to forbid. That is to be underſtood in Reference to the written and perpetual *Laws*, eſtabliſh'd by the conſent of the People; whereas in this place the matter in Queſtion is chiefly concerning particular Orders given by a Prince, according to the preſent Circumſtances, and poſture of Affairs.

Mr. BARBEYRAC'S *NOTE on* §. VI.

[1] An ancient *Greek* Poet in one of his Tragedies, makes *Antigone*, who had buried her Brother *Polynices*, contrary to the Prohibition of *Creon* King of *Thebes*, anſwer that Prince, when he demanded of her, how ſhe durſt act contrary to his Laws, "I could not think, that the Edicts of a Mortal Man, as you are, could be of ſuch Force, as to oblige me "once to violate the fix'd unwritten Laws of Heaven; for they are not of yeſterday or to day, but ſubſiſt perpetually, "and for ever; and no one knows from whence they came. I ought not then, for fear of any Man, by violating "them to expoſe my ſelf to the Puniſhment of the Gods. *Sophocles Antigone*, v. 458, &c. *Ed. H. Steph.*

out Diſpute, ſhould a *Prince* give out any Command contrary to the *Civil Laws*, he may be obey'd without Sin. But on the other Hand, Mr. *Hobbes de Cive* c. 12. S. 2. declares this for a ſeditious Doctrine, 'That Subjects are guilty of 'Sin, when they obey thoſe Commands of their 'Sovereign, which they think unjuſt. And it may indeed be allowed to be dangerous not only to the Commonwealth, but alſo to the Conſciences of private Subjects, to believe, that upon any Scruple or Doubt, concerning the Equity of what is *commanded*, Obedience may lawfully be refuſed. For ſhould this Doctrine be admitted, it muſt often neceſſarily happen, that a Man muſt be reduced to a Neceſſity of Sinning; if he obeyeth, he muſt act contrary to his *Conſcience*; and contrary to his *Allegiance*, if he doth not. For I think it is on all Hands allowed, that in Caſes where the Conſcience is doubtful, the beſt reſolution a Man can come to, is, to take that Side where there will be leaſt danger of Sin. But now the danger of Sin is in a much nearer View, when upon an uncertain Doubt, a Man quits his *Allegiance* which he hath expreſly ſworn to keep; ſince the Commands of Superiors are always attended with the *Preſumption* of being juſt, and are often built upon Reaſons, of which private Perſons cannot be allowed to be Judges. And therefore what the ſame Author ſays a little after in the ſame Book, may deſerve to be conſider'd, 'That '*that* is my *own* Sin, which when I commit, I 'think my own; but that which I think is *another Man's* Sin, I may ſometimes commit with-'out deriving any Guilt upon my ſelf. For if I 'am commanded to commit that which muſt be 'the Sin of him that commanded it, ſo he be my 'lawful Governor, I do not ſin if I obey him. So *an Ambaſſador is ſuppoſed to ſpeak the Sentiments of his Maſter; and whatever bears an ill Senſe in them, it is not to be imputed to him that ſpeaks, but to him that gave him his Inſtructions. Since ſuch Miniſters are under a Neceſſity of conforming to the Directions of them that ſend them* [a]. I will not deny but a Man may engage barely [1] in the *Execution* of an *Action* commanded by his *Prince*, the Guilt of which ſhall be imputed ſolely to him who commanded it, and not to him who was the *Inſtrument* in the *Execution* of it. But then it will be neceſſary for him

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[a] *Procop. Hiſt. Goth.* l. 1. p. 175. Ed. *Auguſt. Vindel. Senec. Tro.* v. 868, 869. The Guilt of a Crime forc'd upon a Man, recoils back upon the Authors of it. Vid. Lib. 3. t. 2. l. D. de his qui infam. not. Quique ſuo nomine non juſſu ejus, *&c.* M. *Senec.* l. 4. *Contro.* 27. That Woman is not immodeſt that hath been corrupted in her Chaſtity by a Tyrant, neither is he guilty of Sacrilege, that takes the Offerings of the Gods, and brings them to the Tyrant; or that ſets up his Statue among the Images of the Deities.

Mr. BARBEYRAC's *NOTE* on §. VI.

[1] This Diſtinction does not remove the Difficulty. For in what manner ſoever the Subject acts, whether in his own Name, or in that of his Prince, his Will always conſents in ſome ſort, to the unjuſt and criminal Action, which he executes by the Order of his Sovereign. So that we muſt either always impute theſe ſorts of Actions partly to him, or elſe never any of 'em. And it would ſignify nothing to ſay, That in the Caſe our Author is ſpeaking of, the Action is of the Number of thoſe that are call'd *Mixt*; or to alledge in their defence, the Laws and Privileges of Neceſſity. Vid. Remark, Book 1. Chap. 5. Sect. 9. Note 3 and Book 2. Chap. 6. Sect. 12. Note 5. The ſureſt way then is to maintain in general, and without any Reſtriction, that the ſevereſt Menaces in the World ſhould never induce us to act, even by the Order, and in the Name of a Superior, the leaſt thing that manifeſtly appears to us to be unjuſt or criminal; and that tho' we may be very excuſable before the *Human Tribunal*, for having been conquer'd by ſo ſevere a Tryal, we ſhall not be entirely ſo, before that of the *Divine*. There is but one ſingle Caſe, where we may conſcientiouſly obey the Orders of a Prince, which plainly appear to be unjuſt; and that is, when the Perſon concern'd in the unlawful Action which the Prince commands to do, diſpenſes himſelf with our expoſing our ſelves in his Favour, to the grievous Conſequences of a Refuſal: provided the Buſineſs in hand is a Thing, as to which 'tis in his Power to conſent to the Miſchief that the Sovereign commands to be done him, or the Violation of any Right, which it is lawful for him to renounce. For if any one ſhould give me leave, for example, to kill him, I could not however innocently make my ſelf the Miniſter of my Prince's Anger; becauſe no Man is Maſter of his own Life. Yet, nevertheleſs, our Author pretends (in his own Apology, Sect. 20.) that if we do not admit of the Opinion which he here maintains, we ſhall neceſſarily be forc'd to acknowledge, that all Soldiers, Executioners, and other inferior Officers of Court, ought to underſtand *Politicks*, and the *Civil Law*; and that they may excuſe themſelves from their Duty of Obedience, upon pretence that they are not ſufficiently convinced of the Juſtice of what they are commanded: which would reduce the Authority of a Prince to nothing, and render him incapable of exerciſing the Functions of Government. But that only proves, that Subjects may not, nor ought not, always to examine all the Orders of the Sovereign, to know if they are juſt, or not. If that were to be done, I muſt own, there would be ſcarce one Soldier in the World, that innocently follow'd his Trade. How few are there that know the true Reaſons of a Prince, for whom they fight? And ſuppoſe they did know, how few are capable of judging of 'em? Thus generally ſpeaking, the greateſt Part of thoſe whom the Sovereign liſts in his Dominions, may not excuſe themſelves on account of their Doubts of the Juſtice of the War, whither they are order'd to march; becauſe that demands an Examination much above their Capacity; whereas they have no need of any great Knowledge or Penetration, to be clearly convinc'd of the Obligation they lie under, of obeying their Prince. But if a Commander that is skill'd in Politicks, and thro'ly acquainted with the Affairs and Intereſt of the State, plainly perceives that his Prince is engag'd in an unjuſt, or an unneceſſary War; ought he not to ſacrifice every thing, nay even his own Life, rather than ſerve in ſuch a War as that? There is not always an occaſion of any great Penetration, or the admittance into the Cabinet-Council, to diſcover the Injuſtice of the Wars that ambitious Princes undertake. The Manifeſto's they publiſh themſelves, compar'd a little attentively with thoſe of their Enemies, are often ſufficient to ſhew to any one that has but a moderate ſhare of good Senſe and Honeſty, the Weakneſs of their Reaſons, and the Iniquity of their Cauſe. In ſuch a Caſe as that, we are not only exempted from our Duty of Obedience, but we ought alſo to forbear, and refuſe doing it upon any Terms whatſoever. The ſame thing muſt be ſaid of a Parliament whom a Prince commands to regiſter an Edict which is manifeſtly unjuſt; of a Miniſter of State whom a Prince will oblige to diſpatch or put in execution an Order full of Iniquity or Tyranny; of an Ambaſſador to whom his Maſter gives Inſtructions, attended with an apparent Injuſtice; of an Officer whom his King commands to kill a Man in ſecret, whoſe Innocence is as clear as the Day, *&c.* And they are not only Perſons of a diſtinguiſh'd Condition, or of Parts and Underſtanding above the common Level of Mankind, that may and ought to excuſe themſelves from obeying the above-mention'd Reaſon; but ſometimes, tho' very rarely, the moſt ſimple and ignorant find themſelves alſo under an indiſpenſible Obligation to deny their Sovereign the Miniſtry of their Arms, at the hazard even of their own Lives. Such was the Caſe of the Soldiers that were ſent by King *Ahaziah* to apprehend *Elijah*, and who were puniſhed for it by the Fire which came down from Heaven upon them, at the Prayer of that Prophet, and conſum'd them all, ii *Kings* c.i. v. 9. A Tip-ſtaff, or a Serjeant at Arms indeed is not, generally ſpeaking, bound to enquire, whether the Magiſtrate that orders him to take the Body of ſuch an one into Cuſtody, has any juſt reaſon or no, for commanding him to execute that Order; that is not his Buſineſs, and he ought to have a favourable Opinion of thoſe that adminiſter Juſtice, as long as there are no evident

Proofs

to take with him theſe Cautions: Firſt, That he be commanded barely to execute the Action, that is, only to apply the Strength of his Body to the Performance of the Action, and neither give Occaſion to it, or furniſh Pretext, or make uſe of any Excuſe for it; but undertake it as an Action that belong'd wholly to another Perſon, and which he will not take upon himſelf. *Secondly*, That he ſhould ſhew his unwillingneſs to be employ'd in ſuch a Service, and deſire earneſtly to be excuſed from it [a]. And *Laſtly*, That upon declining the Action, he be threaten'd with preſent Danger of Life, or ſome other great Evil, which he is not obliged either in Juſtice or Charity, to ſuffer for another Man, and which the Perſon that commands him hath Power to inflict; and eſpecially if he ſees that tho' he refuſeth his Aſſiſtance in the Action, it will be executed by other Hands. It is undoubtedly true indeed, that no Commands of Men, contrary to the Law of God, can have any binding Force, that is, lay an intrinſick Neceſſity of Obedience on the Conſcience, and that therefore it can be no Crime to refuſe to obey them. But there is a wide Difference between being bound in Conſcience to do a thing, and being able to do a thing without Sin. to avoid ſome very great Evil. For there are ſeveral things which we are under no manner of *intrinſick* Obligation to do; which yet upon preſſing Neceſſity we may lawfully undertake. And in this Caſe the Queſtion is, not whether we are bound to do ſuch a thing, but whether we can do ſuch a thing without any Guilt of our own, when we ſee we muſt otherwiſe loſe our Lives to no purpoſe. Neither is any thing I have here ſaid, in the leaſt weakn'd by what *Pliny* ſaith, Ep.9. l.3. ‘Where he tells his Friend of a very ill Cauſe he had been engag'd againſt, that he had prov'd before the Senate, that it was criminal even to have aſſiſted in it. (*Miniſterium etiam crimen eſſe*)’. For the Perſons he pleaded againſt, had not been barely the Inſtruments of another Man's Crimes, but had charg'd innocent Perſons with falſe Crimes, that the Proconſul might take occaſion to ſeize on their Fortunes and Eſtates; and their informing againſt, and wrongfully accuſing them, was entirely their own Act; the Impeachments they made, were all in their own Names, and not in the Proconſul's, nor were they pretended to have been made at his Command; neither were they forced to be Delators, by any immediate fear of Death, if they had refuſed to be ſo. They pleaded indeed, that they were provincial Subjects, and therefore were obliged by Fear to be abſolutely at the Command of the Proconſul. But what look'd moſt probable was, that the Expectation of the Gain they hoped to make, was their greateſt Encouragement; tho' perhaps it might be true too, that the Proconſul had given them reaſon to be afraid, if they refuſed to obey him; yet it is not likely he ſhould threaten them with Death, and there was no other poſſible Method left for them to eſcape it [b]. And in this Caſe, the Deſires, or Intreaties of Superiors muſt not be ſuppoſed to have the ſame Force in them, as Neceſſity or their Commands [c], though in others it may ſometimes be true, that *the Intreaties of Tyrants are mixt with a ſort of Neceſſity*. Neither is the Example of *Doeg*, 1 *Sam.* xxii. 18. any Objection againſt what has been ſaid. For it was expreſly added, that a Man onght to deſire earneſtly to be excuſed, as *Paul*'s Guards very honourably did (And thus the Midwives were commended for defeating the barbarous Command of *Pharoah*, tho' it were with an Untruth, *Exod.* i.) But *Doeg*, on the contrary, ſhew'd himſelf ready and willing to put the King's Command in Execution upon the Prieſts, tho' we do not find that any Threats were added to it, when he had himſelf

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Proofs of the contrary. But ſuppoſing they had in reality ſuch Proofs, I maintain they ought not in that Caſe to obey. And this Suppoſition contains nothing that is impoſſible. It may happen, for example (and every one will eaſily conceive it) that an Officer of Juſtice may fully know the Innocence of a Perſon falſly accus'd, of either Murther, or Robbery, who is infallibly ruin'd, if ever he ſhould once be taken. In the late Perſecutions in *France*, could not they plainly ſee, that were ſent againſt thoſe poor Creatures whoſe only viſible Crime was ſerving God according to the Dictates of their Conſcience, the tyrannical Injuſtice, and barbarous Cruelty of the Orders they receiv'd, and ought they not to have ſeen it? If in thoſe Caſes, they can reconcile their Intereſt with their Conſcience, by pretending to ſearch after thoſe unfortunate Creatures, whom they will not find, and at the ſame time, contriving under hand, the Means for 'em to make their Eſcape; Well and Good. But I cannot perſuade my ſelf, that Men can punctually execute ſuch Orders, without making themſelves Accomplices of the Iniquity of him that gives 'em. The ſame muſt be ſaid of Executioners. Upon which conſult *Grotius* Lib.ii. cap.xxvi. *Sect*.4. *Num*.9. as alſo Mr. *Sidney's Diſcourſe upon Government*, Ch.III. Sect.xx. and the Apology of *Socrates* by *Xenophon*. In which there are ſeveral fine Paſſages which ſhew that we ought never to obey our Superiors to the prejudice of our Duty; but very far from it, and unleſs we are in an entire Incapacity to reſiſt 'em, we ought to exert our ſelves to the utmoſt of our power, and endeavour to hinder thoſe that would oppreſs the Innocent, from doing them any Miſchief. *Saul*'s Guards refuſed to put to the Sword a great Number of Prieſts, whom that Prince ſacrificed to his Anger againſt *David*, 1 Sam.xxii. 19, *&c.* but as Mr. *Le Clerc* has obſerved, they would have been ſtill more commendable, if they had interceded with the King in behalf of thoſe innocent Perſons, by repreſenting to him in the beſt manner they could, that he had commanded a Thing that was forbidden by the Laws, both Divine and Human; and if, after all their Prayers and Repreſentations had prov'd ineffectual, they had ſeiz'd upon the King as a mad Man, and ſecur'd him till the Prieſts had made their eſcape. Since the firſt Edition of this Note, one Mr. *Adam Rechenberg*, a Profeſſor at *Leipſick*, has publiſh'd a Diſſertation, Entituled, *de Miniſterio, quod crimen eſt, Diſquiſitio politica*. In which the ſame Opinion that is here advanc'd, is maintain'd, and confirm'd by ſeveral Examples and Authorities. There is alſo a Diſſertation *de injuſto Pontii Pilati judicio*, written by Mr. *Thomaſius*, againſt a Civilian nam'd *Stellerus*, who was willing to juſtify *Pilate*, in a Treatiſe call'd *Pilatus defenſus*, upon this Principle, among the reſt, that the Governour of *Judea*, in condemning JESUS CHRIST to Death, had only acted as a bare Executor of the Sentence of the *Jews*. This Diſſertation of *Stellerus* was Printed in 1674, but it was ſuppreſs'd by publick Authority.

[a] *We have a particular Inſtance of this Nature in* Olearius*'s* Travels into Perſ. l. 5. c. 32.

[b] *Vid. Tacit. Ann. L.* 13. *c.* 43. Where *Silius* pleads that he had done nothing out of any Deſign of his own, but that all was entirely out of Obedience to his Prince. Afterwards he pretended the Commands of *Meſſalina*, and wav'd his Defence. For why was there no body elſe made choice of that would ſell his Voice to oblige that cruel and impudent Woman? But it is neceſſary that the Inſtruments of Oppreſſion and Tyranny ſhould be puniſh'd: For when they have receiv'd the Rewards of their Wickedneſs, they ſhift the Crime over upon ſome body elſe: and *therefore* Jul. Græcinus *very well deſerv'd Commendations, who was commanded to accuſe* M. Silanus, *and was kill'd for refuſing*. Tacit. Agricola; *and* Seneca *gives him a very great Encomium*. De Benef. l.2. 21.

[c] Plato Epiſt. 7.

before falſly accuſed them, inſinuating that they had entred into a ſecret Conſpiracy with *David*, againſt the King: For it is evident from *Pſal.* lii. that he had brought ſome falſe Accuſations againſt them. But notwithſtanding, it muſt be confeſs'd, that there are ſome Actions, the bare execution of which a Man would rather die, than undertake: Such as to *murther* Parents, or Children; to commit Inceſt with a Mother, or a Daughter, or to lie with a Beaſt. A ſmall Stock of Courage would make a Man prefer Death to the guilt of being an Inſtrument in ſuch Actions. And I cannot but think it was a noble Spirit of Conſtancy and Bravery in thoſe *Romans*, ‘Who when ſingled out by *Hannibal*, to fight with one another, Brothers with Brothers, Fathers with their Children, and Kinſmen with their near Relations, choſe rather to die under Torture, than be ſtain'd with Blood which Nature had ſo nearly ally'd.’’ [a] Neither can I think it at all lawful, that to ſave my own Life, I may aſſiſt to take away another Man's; for that would be to make another's Life the *Price* of my own: And there are many things which we cannot do for *Price*, which upon other *Conſiderations* we may [b].

VII. But in general, that a Man may not at the *Command* of a *Superior* undertake an Action, as his own, which is repugnant to the Dictates of a good Conſcience, is what no Man that hath any Senſe of Religion can deny. The *Judges* therefore *Joſephus* ſpeaks of [c] (to conſider ſome Examples under this Head) refus'd to condemn the innocent *Zacharias*, tho' they were ſenſible what danger threaten'd them from the Fury of the Zealots. And on the other hand, the *Judges* mention'd, 1 *Kings*, ch. xxi. were certainly guilty of a very great Sin; becauſe they paſs'd Sentence not by *Order* from the King, but as the pure Reſult of *judiciary Proceſs* upon the Evidence of the Crime; nor can the *Witneſſes* be excuſed from an equal ſhare of guilt. Nor were the Detectors Perſons leſs guilty, whoſe Buſineſs it was to charge falſe Accuſations upon the great and rich, that ill Princes might have a Pretence to ruin them in Circumſtances leſs criminal. *Marcellus Eprius* was once a Perſon very well known by that Character, but more particularly infamous, for the *Impeachment* of *Thraſeas*: Tho' *Tacitus* tells us he pleaded in his Excuſe for that, that his Accuſation charged no more upon *Thraſeas*, than what the Judgment of the whole *Senate* confirm'd; which was only to ſpread the Crime wider, not clear himſelf. 'Tis true indeed, as the Hiſtorian ſays, That *Nero endeavour'd only to diſguiſe his own natural Cruelty, under the Formality of ſet Accuſations* [d]. But ſtill it was the Avarice and Ambition of ſuch auxiliary Villains, which provoked and encouraged him. Others engaged in the ſame Practices excuſed themſelves by ſaying, that in thoſe Times they were under a neceſſity to do what they did, to *ſecure their own Honour and themſelves*: A kind of *Defence* which means no more than that they choſe rather to *expoſe others to Danger*, than *hazard themſelves*. Neither did *Curtius Montanus* [e], as the ſame Hiſtorian ſays, allow it to be a *tolerable* Excuſe, becauſe he thought the Perſons that uſed it not to be criminal in the Occaſion of it; but in a *Rhetorical* way he choſe to paſs by *ſome things*, that he might preſs *others* with more Vehemence. And the ‘Senate acted with great Juſtice, when after *Nero*'s Death, they decreed his Inſtruments the Informers ſhould be puniſh'd as a Race of Miſcreants, who lived upon the Ruin of private Men [f].’ The Emperor *Titus* with the ſame Juſtice commanded all ſuch Perſons to be publickly whipt and beat in the *Forum*, then dragg'd through the Amphitheatre, made Slaves, and ſold; and ſome of them to be tranſported to uninhabited Iſlands; and after him *Trajan* ſent away Numbers of them in a few ſhatter'd Veſſels, that they might be left to the Mercy of the Sea, and be ſhipwrack'd where ever the Waves threw them [g]. Neither could the *ſecret Command* of *Tiberius* excuſe *Piſo* from the Guilt of *Germanicus*'s Death, if he was *really* the Cauſe of it: And if he had confeſs'd ſuch a Command in the Senate, tho' that muſt have been enough to have put even *Tiberius* to the bluſh, and depriv'd him of all his Shifts, to excuſe himſelf from commanding ſo barbarous an Action; yet the Senate had ſtill Power very juſtly to condemn him as the Criminal, becauſe he did not pretend any publick Authority for it, but voluntarily undertook an Action which *Tiberius* had not the leaſt Pretence of Juſtice to command, only that he might engage the Emperor to him, by ſuch an Act of Villany [h]. Neither do I think that *Joab* was abſolutely free from the Guilt of *Uriah*'s Murther, 2 *Sam.* xi. 14, 15, 16. tho' *Chap.* xii. 9. *David* only is mention'd as the Principal in it. And it was very brave in *Papinian* to refuſe to defend the Murther of *Geta*, with that noble Saying, *That it was eaſier to commit Parricide, than to excuſe it*. Others tell the Story, that he refuſed to ſpeak an Oration for the Emperor, in which he would have had him inveigh againſt his Brother; and that he excuſed himſelf by ſaying, that *to accuſe a murther'd innocent Perſon would be a* ſecond *Parricide*. But *Spartinaus* in his Life of *Caracalla* [1], denies this Account, becauſe he ſays, *Papinian* could not, as being Prefect, make any ſuch Oration (tho' it doth not appear why it might not have been extraordinarily commanded by him) and only adds, that it was certain he was put to Death, for being a Favourer of *Geta*. However this be, that Man is certainly in the right, who refuſes to proſtitute Wit and Parts to defend Wickedneſs, tho' the Defence be publiſh'd afterwards in another's Name. For the Invention of ſpecious Arguments, ſet off with the Art and Dexterity of an Eloquent Speaker, can never be ſuppoſed to be barely the Execution of another Man's Action. In this particular Caſe the Thing would have appear'd otherwiſe indeed, if *Caracalla* had only commanded ſome Perſon to have recited ſuch an Oration in the Senate, as a Piece of his own, or ſome other Man's Compoſure, under a capital Penalty, if he refus'd it [b]. But ſtill it muſt be remember'd, that where the Actions of Princes do not plainly appear to be unjuſt, Subjects ought to be very cautious, and eſpecially publick Miniſters, how they give them an ill Character; becauſe it is their Duty, always to preſume for the Juſtice of their Maſter [c].

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[a] Vid. *Diod. Siculum* l. 25. *in excerpt. Peireſcianis.* Vid. *Laonic Chalcondyl.* l. 1. where *Amurath* Emperor of the *Turks*, commanded that the Parents of all thoſe who had been in the Inſurrection with *Sauzes*, ſhould kill their Sons with their own Hands. There were two Fathers that would not obey ſo cruel a Command, and were therefore cut to pieces at the ſame time with their Sons. For *Amurath* uſed to ſay, That the Sons would not have join'd with *Sauzes*, without the Advice of the Parents.

[b] *Abr. Rogerius, in his Account of the* Bramins, *ſaith*, That the *Bramins* believe that the Wife may do any thing, tho' never ſo bad, which the Husband commands her, without Sin; for the Sin, they ſay, cannot be imputed to her, but is to be charg'd upon the Husband, whom ſhe is oblig'd to obey.

[c] *Joſephus* de Bello Judaic. l. 4. c. 19. The Author here takes an occaſion of praiſing the Intrepidity of the ſeventy Judges mentioned by *Joſephus*, who choſe rather to expoſe their own Lives, than unjuſtly give Sentence of Death againſt *Zacharias* the Son of *Baruc*, one of the moſt conſiderable *Jews* at that Time, whom the *Zealots* would fain have deſtroy'd upon any Terms. But this Example does not well ſuit with this place; for thoſe *Zealots* were nothing but a ſet of factious and wicked Perſons, that had no Authority over the ſeventy Judges, whom they had choſen out from among the People, to try and deſtroy *Zacharias* with ſome colour of Juſtice, ſuppoſing that they would have ſeconded their furious intentions againſt him.

[d] *Tacit.* Hiſt. 4. c. 8. [e] *Tacit.* Hiſt. 4. c. 42. [f] *Tacit.* Hiſt. l. 4. c. 30.

[g] *Suetonius*, *Titus* c. 8. *Plin. Pan.* 34, 35. [h] *Tacit.* An. l. 3. c. 16.

VIII. Upon the ſame grounds we may determine, whether a Subject may lawfully bear Arms in an unjuſt War, at the Command of his Prince. *Grotius*, L. 2. Cap. 26. §. 3, 4. is of Opinion, that when it manifeſtly appears that the War is unjuſt, it is not lawful for a Subject to maintain ſo bad a Cauſe: And that when the Caſe is doubtful, he ought to take the ſafeſt ſide, which is to ſit ſtill, and not engage himſelf at all in the War. But I think, a Man ought to be very cautious, how he reſolves in ſuch a manner, about Things of ſuch Conſequence as theſe. When according to this Opinion, the Power of the civil Sovereign, and the Obedience of the Subject, in a Caſe of ſo great Importance, are made to depend upon every particular Man's Judgment; and when, eſpecially, it would be eaſy for a Man to pretend ſcruple of Conſcience, only to diſguiſe his Fears and Cowardiſe [2]. 'Tis true, where a Man is admitted to the Counſels and Debates, and hath a Right to give his Voice in them, if he is not obliged by the Determination of the Majority, without his own Conſent, he cannot, with Juſtice, ſo much as undertake any thing manifeſtly unjuſt. Which will hold true too, if it be left to his Choice, whether he will take Arms, or not: But if he ſhould be commanded ſimply to obey, in this Caſe it muſt be conſider'd, that all Nations, acted by any Senſe of Juſtice or Honour, before they engage in a War, always ſuppoſe, that the Cauſe of it is juſt; and where they do not, it is to no purpoſe to talk of Conſcience. But the Point in diſpute turns chiefly upon this, Whether in regard of certain particular Circumſtances, it be convenient for the Government to begin a War, notwithſtanding the truth of ſuch a Pretence? In this Caſe, the Perſon particularly intruſted with the Government of the Commonwealth, and entirely acquainted with its Strength, muſt be preſumed to ſee better what will be for the Advantage of the Publick, than any private Man can. And if a Man, admitting the Juſtice of the Cauſe, ſhould yet doubt whether it might not be better to neglect, or forgive, the Injury done the Commonwealth, than revenge it with a War; it muſt be told him, that this is by no means a ſufficient Reaſon, for a Subject to refuſe to obey his Sovereign, and provoke him to uſe Severity upon him; that he ſuppoſeth his Sovereign hath not obſerved a certain Virtue, which hath only the Force of an imperfect Obligation. And therefore the ſafeſt Method a Subject can take, is ſimply to obey [3], and leave his Sovereign to anſwer for the Juſtice of the War before God [c]. But yet it muſt be obſerv'd, that what hath been ſaid affects only Subjects, who take Arms at the Command of their *Sovereign*. For they that voluntarily put themſelves into the Service of a *foreign Prince*, ought by all means to be ſure of the Juſtice of the Cauſe they engage in. And therefore the ſenſible part of the World will always juſtly condemn thoſe that ſet their Lives out to hire, without any manner of *Conſideration* of the *Cauſe* they fight for [d].

Mr. **BARBEYRAC's** *NOTES on* §. VII, VIII.

[1] Chap. 8.

[2] See our Author's Diſſertation *De Obligatione erga Patriam*, ſ. 19.

[3] Vid. What has been ſaid concerning Soldiers in Note 4. Sect. 6. Yet Mr. *Buddeus* however pretends, that upon a bare Doubting of the Juſtneſs of the Cauſe, the Subjects are not bound to obey their Prince when he commands 'em to ſerve in the Wars; yet after all, he does not deſtroy the Reaſons that our Author makes uſe of to eſtabliſh the contrary Opinion.

[a] *There are ſeveral Paſſages in* Plato's *Defence of* Socrates, *which might be applied this way: And to this we may refer the Account* Dio Caſſius *gives of* Salluſt. l. 43. who he ſays was made Prefect of *Numidia* by *Cæſar*, upon pretence of his taking the Adminiſtration of that Province, but in reality only that he might ſqueeze all that he could from it. But after he was come home, he was accus'd of Extortion and Corruption, and of ſeveral Oppreſſions in the Province; and ſo was look'd upon to be more particularly infamous, becauſe having wrote an Hiſtory, where he frequently, and very ſeverely reflects upon ſuch as made their Fortunes by publick Rapine in their Governments, he himſelf had not made his Actions agreeable to his Writings, and therefore tho' he was acquitted by *Cæſar*, yet he ſufficiently publiſh'd his Crimes, by the lively Character he had drawn of them, in his own Writings.

[b] See the *Solœciſm* in Politicks, *Aligrius* Chancellor of *France* was guilty of. *Gramond.* Hiſt. of *France*, l. 16.

[c] *Hector* in *Homer* ſaith very well, *Iliad.* 12. v. 243.

Εἷς οἰωνὸς ἄριστος, ἀμύνεσθαι περὶ πάτρης.

In *Tacitus* Hiſt. L. 3. 25. it is call'd a publick Crime, when a Son had kill'd his Father in the Fight. Vid. L. 9. c. 4. l. 2. 1. *D. de noxal. act. L.* 9. *t.* 2. *l.* 37. D. Ad L. *Aquiliam.*

[d] *Gunther. Ligurinum*, l. 7.

Ære dato conducta cohors, & bellica Miles,
Dona ſequens, pretioq; ſuum mutare favorem
Suetus, & accepto pariter cum munere bello,
Hunc habuiſſe, dator pretii quem juſſerit, hoſtem.

Lur'd to the Field by Pay, and hopes of Spoil,
In ſervile Arms the Mercenaries toil;
Inconſtant, Falſe, and Faithleſs to their Truſt;
The Cauſe that is moſt Gainful ſeems moſt Juſt:
He that firſt hires, commands them to the Wars,
And thoſe he calls his Enemies, are theirs.

CHAP II.

Of the Power of the Sovereign over the Lives of the Subject, in Defence of the Commonwealth.

I. *The Sovereign may hazard the Lives of his Subjects in War.*
II. *Whether lawful to refuſe bearing Arms upon a Compact with an Enemy.*
III. *No Man to make himſelf unfit to bear Arms.*
IV. *The Obligation of a Soldier what?*
V. *Whether the Commonwealth may give up an innocent Subject?*

I. THO' the End Men propoſed to themſelves, by entring into civil Societies, was to provide, not only for the Security of their Eſtates, but more eſpecially of their Lives; yet it was found neceſſary to the Preſervation of civil Government, that the Sovereign ſhould have ſome Power over the Lives of his Subjects; and that for theſe two Ends: *Firſt*, To Guard the Commonwealth from Evils and Dangers; and *Secondly*, To ſuppreſs Diſobedience to the Laws. By the *Firſt*, The Sovereign hath Power to hazard the Lives of his Subjects in Defence of the Commonwealth, and to aſſert the Rights that belong to it; ſince in War Men always propoſe to take away one another's Lives. And ſince the Art of War it ſelf is not to be learn'd without Experience, it was *Plato*'s Opinion [a], that the Lives of the Subjects might be expoſed to ſome Danger for the Attainment only of the military Accompliſhments (tho', I confeſs, I am not of his mind) and accordingly he propoſes, that the Weapons uſed in all military Exerciſes ſhould differ little from the real and dangerous ones, ſuch as might ſtrike ſome Apprehenſions of Fear into the Perſons that uſed them; and he afterwards adds a Law, *That if any Man happen'd to be kill'd in thoſe Exerciſes, that the Perſon who kill'd him ſhould be acquitted by the Law, and be look'd upon as innocent.* For, ſaith he, *the Legiſlator ought to conſider, that tho' perhaps he may loſe ſome few of his Subjects by this Method, yet that the reſt will ſuffer nothing by it; but that if there were no Apprehenſions of Danger in theſe Exerciſes, there wou'd be no way to diſtinguiſh between the Brave, and the Coward; and the want of ſuch a diſtinction would certainly be of worſe Conſequence to the Commonwealth, than the other Evil.* And ſuch Military Exerciſes we are told are now in uſe in *Japan* [b]. *Demoſthenes* mentions an *Athenian* Law [c], by which *if a Man kill'd another accidentally in any Exerciſe, he was not to be baniſhed:* 'The reaſon of which was, ſaith he, becauſe Law doth not conſider the Event, but the Intention of the Perſon, which was only to overcome his Adverſary, not to kill him: But if his Adverſary was too weak to bear the Fatigue a Victor muſt expect, the Law thinks him the Cauſe of the Misfortune which befalls him. And indeed there is very good Reaſon that even the Exerciſe in military Duties ſhould be under a ſevere Diſcipline, ſince in War the Fate of things may frequently turn upon a very ſmall Neglect. And therefore tho' *civil Courts* are ſometimes eaſily induced to make Allowance for thoſe Paſſions, that have generally a violent Influence upon us, yet a Court martial hardly will ever afford them any Favour. And hence military Judicature makes it capital to deſert the Poſt a Man is commanded to, tho' perhaps to avoid preſent Death [d]. (Though ſome have thought the Shame of ſome ignominious Puniſhments might be a better Expedient to prevent Cowardice) And therefore to refuſe to Liſt into the Military Service hath in ſome Nations been ſeverely puniſhed [e]. There was a Law at *Sparta*, which made *it Death for any Man to refuſe to hazard himſelf for his Country*; ſo that as the Orator ſpeaks upon it, 'The Occaſion of their Fear was made their Puniſhment; and there being two ſuch Extremities in View, there would be hardly any Man who would not ſooner venture the loſs of Life among Enemies, than ſuffer it to be taken away by the Laws in his own Country [f].' 'Tis true there are few Nations in which there are not Numbers of Subjects by their Years and Strength of Body fit to bear Arms, who have nevertheleſs Immunities from that Service granted them, either out of Reſpect to their way of Life, or upon ſome particular Indulgence of the State; but it muſt be underſtood that all ſuch Privileges are to continue no longer in force, than while there are other Subjects enough, or elſe Allies, or hired Forces in readineſs to defend the Commonwealth: In Caſes of the laſt Extremity, they muſt be ſuperſeded; and they that enjoy them muſt arm, as well as others, in the common Defence. For certainly it is more reaſonable that ſuch Privileges ſhould be laid aſide for a time, than that, by an unreaſonable Superſtition for them, the whole Commonwealth ſhould be ruin'd. And therefore at *Rome* all Exceptions from military Service, allowed to the Old, and the Prieſts, always ceaſed upon Expectation of a *Gallick* Invaſion [g]. That ſhould too be obſerv'd, as a wiſe and good Inſtitution made by *Solon* or *Piſiſtratus* (which is mentioned by *Plutarch* in the Life of *Solon* [h]) *That ſuch as were diſabled in the Wars ſhould be allowed Penſions out of the publick Treaſure.* And indeed if the State of the Commonwealth will permit, there is all the Reaſon in the World that they ſhould have ſome Conſideration made them, who are upon hard Duty, while others ſit at eaſe, and are not only forced to neglect the Concerns of their Families, but to undertake a larger ſhare of Service for the Publick, than other Subjects [i].

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[a] *De Leg.* l. 8. p. 907. *A.B.* Ed.*Wech.*

[b] *Vid.* Bern. Varen. *Deſcr.* Japon. *c.* 19.

[c] *Orat. adv.* Ariſtocrat.

[d] *Vid.* Liv. *l.* 5. *c.* 6. *Fuſtuarium meratur, qui ſigna relinquit, aut præſidio decedit.* He deſerves the *Baſtinado* that flies away from his Colours, or deſerts the Poſt he was commanded to. *Mich. Montagne*'s Eſſays, *l.* 3. *c.* 12. *p.* 775. *Juſtin.* l. 32. c. 3. *in fin. Ferdinandus Pinto*, c. 10.

[e] Lycurgus *Orat. contra* Leocrat.

[f] *Vid. Leg.* Longobardorum, *l.* 3. *Tit.* 13. *s.* 1

[g] Appianus *de Bello Civili*, l. 2. p. 523. Ed. *H Steph. Vid.* L. 10. t. 48. l. *ult.* C. *de quibus muneribus Nem. lic. ſe excuſare.* Andræas Maurocenus *Hiſt.* Venet. *l.* 4. *p.* 147.

[h] Pag 96. C.

[i] Vid. *Diodorum Siculum*, l. 1. c. 73. *where he gives an Account of the Egyptian Laws relating to the Soldiery.*

II. And here it may be inquired, whether, if a Man detain'd Priſoner by an Enemy, to obtain his Freedom, promiſeth *that he will never for the future bear Arms againſt him*, his own Country can afterwards oblige him, contrary to his Promiſe, to draw his Sword againſt the ſame Enemy? Some, I know, ſuppoſe, that ſuch a Compact in it ſelf is *void*, becauſe it is contrary to the Duty every Subject owes the Commonwealth: But, I ſhould not think it ſo ſufficient an Anſwer, to ſay that every thing contrary to Duty is therefore immediately void and null; as to deny that it is contrary to the Duty a Subject owes the Commonwealth, to procure himſelf Liberty, by promiſing that which is already in the Enemy's Power. For except the Enemy give the Captive his Liberty, he can never bear Arms againſt him. And therefore the Commonwealth loſeth nothing by ſuch a Compact; for unleſs the Captive recover his Freedom, he muſt be conſider'd as loſt already. And therefore when the Commonwealth receives him again from his Captivity, it is ſuppoſed to receive him upon ſuch Terms, as leave him power to keep his Promiſe with his Enemy, eſpecially if he gain'd his Liberty by his own Intereſt only, without any publick Aſſiſtance from the Commonwealth. But cannot the tranſcendental Power of the Sovereign reſcind ſuch an Obligation, when the common Safety requires it; as ſuppoſe the Commonwealth be in eminent Danger, except he in particular take Arms? In this Caſe, I think, that ſince it is next to a Contradiction for me to be a Subject, and yet to be under an Obligation which muſt make me unſerviceable to the Commonwealth in the greateſt publick Extremities; no leſs abſurd is it for me to imagine it poſſible, that I ſhould be obliged by a ſimple Compact, not to reſiſt the unjuſt Violence of a Perſon, that attempts the Ruin of my ſelf and all that belongs to me: therefore the Force of ſuch a Compact extends to the offenſive only, and not to the defenſive Wars; eſpecially if the hazard of the common Safety of the whole State be like to endanger mine too. For to what purpoſe did my Enemy grant me my Liberty, if he intended to tie me up ſo that I could have no power left me to make any oppoſition againſt him, if he ſhould ever after, deſign any thing againſt my Life and Fortunes? And therefore ſuch a Compact is no Objection againſt my taking Arms at my Sovereign's Command in Defence of the Commonwealth. It is a Queſtion ſomething like this, Whether a Captive that hath his Freedom given him by his Enemy upon a certain Condition, upon Non-performance of it, [a] be obliged to return to his Captivity? And it is affirmed of private Perſons: But *Buſſiere's Hiſt. Franc.* l. 16. ſpeaking of King *Francis*, doubts whether it may be ſo of ſovereign Princes. I ſhall not determine the Controverſy: But I think it would be the ſafeſt and wiſeſt way, not to let a captive Prince have his Liberty, before the Conditions of it are actually performed.

III. From what hath been ſaid it follows, That tho' the Neceſſities of the Commonwealth do not at preſent require military Service from the Subject, yet that it is a Crime which ought to be ſeverely puniſhed, for a Man to make himſelf or others unfit for that Service: For *tho' other parts of my Body*, as *Seneca* ſaith, [b], *are my own, yet my hands belong to the Publick*. Inſtances of this ſort of Cowardice are frequent to be found even among that martial People, the *Romans* themſelves. *Suetonius* tells us the reaſon why *Tiberius* reform'd the Houſes of Correction in *Italy*, was, *becauſe the Keepers of them were ſuſpected, not only to have often taken up Travellers, but to have conceal'd Perſons that fled to ſuch Holes for fear of being impreſt Soldiers* [c]. And this might perhaps be the reaſon why the Emperor *Hadrian* afterwards ſuppreſs'd all thoſe Houſes [d]. *C. Vettienus* was known to have cut off the Fingers of his left Hand, that he might be excuſed from ſerving in the *Italick* War; and his Goods were confiſcated for it by the Senate, and himſelf condemned to perpetual Impriſonment. And *Auguſtus* expoſed a *Roman* Knight, with all his Eſtate to Sale, for cutting off his two young Sons Thumbs, that they might not be forced into the Wars [e]. And therefore *Ammianus Marcellinus*, ſpeaking of the Diſpoſitions and Manners of the *Gauls*, ſaith, *That none of them ever cut off their Thumbs, to make themſelves uncapable of military Duties as the* Italians *had done*. And accordingly there were ſeveral Laws made among the *Romans*, to reſtrain ſuch practices. *Trajan* made a Law, *That the Perſon who diſabled his Son, when any Levy was made for War, ſo that he could not be fit for military Service, ſhould be baniſhed* [f]. And there is another of *Conſtantine*'s extant to this purpoſe. *That the Sons of veteran Soldiers fit for the Service of the War (ſome of which have refuſed to liſt themſelves out of Sloth and Lazineſs, and others have been ſo cowardly as to maim themſelves, only to avoid the neceſſity of that Duty) if they are thought uncapable to ſerve in the Army, ſhall be forced to attend the moſt ſervile Offices about the Court* [g]. *He that thinks to excuſe himſelf from bearing Arms, by cutting off his own Fingers, ſhall not eſcape what he deſigned to avoid, but ſhall with that Mark of Infamy be forced to undergo the Drudgery of the Service, ſince he refuſed the Honour.* And further, *Thoſe provincial Subjects, that by ſuch Practices are forced to make their Levies weaker, ſhall be allow'd ſo much favour as to bring two maim'd Perſons for one whole.* But the ſevereſt Law is that *in D. ubi ſupra, l. 5. de* Re Mil. *If there be any Perſon that, to avoid being impreſt for the War, hath, as he thinks, ſecured his Body from danger by cutting off his Fingers,*

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[a] Vid. *Grotius* Lib. III. cap. xxi. Sect. 6. and Mr. *Buddeus* in his *Specimen Juriſpr. Hiſtor.* Sect. 6. among his *Selecta Juris Naturæ.* But when the Effect of the Condition fails, without any Fault of the Perſon; as if, for Example, a Priſoner of War, that is to be exchang'd for one that has been releas'd, ſhould happen to die before the Exchange was made. In that Caſe (ſays *Grotius*) he that is at Liberty ought not to return to Priſon, but only pay the Price of what he cannot effect, that is, give for his Ranſom as much as would have been given for the Perſon that is dead.

[b] *Seneca*, l. 1. Controv. 7. [c] *Suetonius*, Tiber. c. 8. [d] *Spartianus*, c. 18. Vide Not. *Salmaſ.* in loc. *Valer. Max. l. 6.* c. 3. [e] *Suetonius*, Auguſt. c. 24. *Am. Marcellinus*, l. 15. ſub fin. [f] L. 49. t. 16. l. 4. ſ. 12. D. de Re Militari. [g] V. *Theod.* d. fil. militar. apparitor, & veteran. l. 1. Et de Tironibus, l. 4. 10.

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be ſhall be condemn'd to be burnt, and the Maſter that doth not hinder him, ſhall incur a ſevere Penalty. But it is probable that this Puniſhment was to be inflicted only on *Slaves*, but the Laws before mention'd comprehended the *Freemen.* For it is very well known, that the *Romans* would not at firſt permit their *Slaves* to bear Arms, but in Caſes of the greateſt *Extremity.* Tho' it is manifeſt, that this was not obſerv'd in the latter End of the Empire, as appears from *l.* 16. *C. Theodoſ. Tit. eod.* where there is this Law of the Emperors, *Arcadius* and *Honorius* : *Againſt the Irruptions of the Enemy we command, that not only the Perſons, but their Abilities ſhall be regarded ; and tho' we believe, that Freemen may be moved with a more generous Concern for their Country, yet by the Authority of this Edict, we command the Slaves alſo to liſt themſelves with all ſpeed for the War, and if they are found fit for the Service, they ſhall be rewarded with their Liberty,* &c. For that *Law* in the *Eleventh Book* under the ſame *Title*, which is alſo extant in the *Twelfth Book* of the Codes of *Juſtinian*, *Tit.* 44. *l.* 2. ſpeaks of *Slaves* that were *alieni juris*, *belong'd to other Men, that the Perſon that offered to ſend them to the Wars, ſhould be forced to pay a Libra of Gold into the Treaſury.* But the *Eighth Law* in the *Theodoſian Code*, under the ſame *Title*, doth not ſimply forbid the levying of *Slaves* for Soldiers, but only commands *that no Slaves ſhould be taken into the choice Companies.* And † *Vegetius* complains, that, *either by the Favour or Connivance of the Officers, the new liſted Men all paſs'd the Muſter, and that ſuch as were not fit for their Maſters Service, were taken to ſerve the Publick.* But ſome will have it, that the *Italians* and *French* derive their word *Poltrones* from this cutting off the Thumbs : But I am inclin'd to think *Menage* is more in the right [a], in deriving it from the *Italian* word *Poltro*, which ſignifies one that always lyes at home upon his Couch.

IV. A Man therefore that is obliged to *attend* the *War*, is bound to defend the *Poſt* his *Commander* appoints him to, tho' perhaps he foreſees he muſt in all probability loſe his Life in it. And tho' in the general, all ***Burdens*** ought to be laid proportionably on the Subjects, ſo that they may aſſiſt one another in the bearing them ; or where that cannot be, or there is no neceſſity of it, that they may relieve one another by Turns, or elſe excuſe themſelves by an Equivalent another way, or elſe appoint every one his ſhare by Lot ; yet the Nature of War will not permit, that thoſe dangerous Poſts ſhould always be appointed by *Lot.* And therefore it muſt be left to the *Commander* to chooſe the Perſons he thinks fitteſt, or if there be any Number fit, which of them he pleaſeth. Unleſs there be any that will voluntarily undertake the danger, as *Calpurnius Flaccus* did [b], and before him *Decius Mus* [c]. And no Man of *Bravery* or Spirit will ever complain that he is commanded upon ſuch Duty, but will rather commend his General's Judgment and Conduct in it [d]. And beſides, ſince 'tis by the Protection of the Commonwealth that we enjoy our Lives for a long ſpace of time, which, if we had been expoſed to a State of Nature, we ſhould ſoon have been deprived of ; we muſt not think it a ſevere piece of Duty to part with them in defence of the Commonwealth, eſpecially ſince we are ſo many other ways indebted to it. And therefore it is not at all unjuſt, that upon an extraordinary Command of the Commonwealth, and in its greateſt Extremities, we ſhould hazard that Life in its Defence, which it doth in effect beſtow upon us every day ; and eſpecially, ſince in a State of Nature every Man muſt be forced to defend himſelf with his own ſingle Strength, unleſs he will chooſe to die, or be enſlaved. But now in Commonwealths it is much better to hazard our ſelves with a Number, not only becauſe the hopes of Victory are greater, but becauſe, tho' a Man be kill'd in the fight, yet by the protection of the Commonwealth his Goods and Fortunes will be preſerv'd for his Relations ; which in a State of Nature there could be no hopes of. But however, it ought to be obſerv'd, that the Deſign of ſuch Commands is not, or at leaſt ought not to be, to take away the Lives of the Soldiers directly : I ſay, ought not to be ; for we have an Inſtance in *David*, that Generals are ſometimes guilty of ſuch Crimes, 2 *Sam.* xi. 15. and he is therefore call'd a Murtherer, Ch. xii. v. 9. And it is not uncommon to expoſe ſuch as are leſs beloved where they muſt inevitably be cut off by the Enemy [e], as *Micipſa* ſent *Jugurtha* to *Numantia*, that either his own Valour or the Enemy's might be fatal to him. But the Deſign of ſuch ſevere Commands ought to be, either to avert ſome great Evil, or to procure ſome great Good to the Commonwealth, and then the Soldiers may juſtly be engaged in ſuch hard Parts of Duty ; tho' it may happen, that they may fall in the Enterprize. For the Conditions of a deciſive Combat are either, kill your Enemy, or die with him : For this is better than to fall alone. And therefore I think thoſe Commanders at Sea may juſtly be quitted from the Guilt of Self-Murther, that upon the expreſs Order of their Superiors, or at leaſt upon a Preſumption of it, from the State of the Engagement, blow themſelves up with their Ship, rather than be made a Prize to the Enemies. For let us ſuppoſe the Number of Ships equal on both ſides ; when one of ours is taken, the Enemy hath an Advantage of two Ships more than We : If ours only be loſt, then they have but one more ; but if both ſink together, the Strength on both ſides will ſtill be equal. And 'tis ſcarce poſſible if our Ship be blown up, but it muſt ruine one or more of the Enemy's with it. For the greateſt Danger of being taken, is when the Ships are Grappling, ſide by ſide ; and generally the Enemy muſt ſuffer more than we by ſuch an Act : For 'tis evident they muſt have much the Advantage of us, when they force us to fly to ſo deſperate an Expedient. But to blow up only to avoid being ſunk, is I think, a very ill Choice; becauſe a Man may have ſome Hopes of eſcaping by *ſwimming* [a]. It was an old Law among the *Chineſe*, *That the General ſhould forfeit his head, that had the Miſfortune to ſucceed ill in the Fight, tho' not through his own Fault*, by which they deſign'd to oblige their Commanders, whenever they engaged an Enemy, to think of nothing but Victory, or Death [1].

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† *Vegetius* de Re Militari, l. 1. c. 7.

[a] In Origin. Ling. Franc.

[b] *Flor.* l. 2. c. 2.

[c] *Liv.* l. 7. c. 34

[d] *Seneca* de Provid. c. 4. ' Why are the Braveſt Men in the Army commanded upon the moſt difficult Enterprize? It is the Choice of the Troops that the General ſends out to ſurprize the Enemy by Night, to obſerve their Motions, or to force a Party to diſlodge them ; and yet none of them that are ſent, complain that their Commander deals hardly with them, *&c.*

[e] Vide Q. *Curtium*, l. 7. c. 2. *Polyb.* l. 1. c. 9. *Diod. Siculum*, l. 14. c. 83. Et. l. 19. c. 48. *Juſtinum*, l. 12. c. 5. n. 8. *Zonar.* T. 2. in Maurit. *Salluſt.* B. *Jugurth.* c. 7.

V. But what if the Life of a Subject be demanded without the Hazard of a Fight; for Inſtance, to appeaſe a powerful Neighbour, and in conſequence to divert ſome imminent Evil, or perhaps prevent the Ruine of the Commonwealth? In ſuch a Caſe it muſt be conſider'd, what Reaſons ſuch a Neighbour may have to demand the Subject to be yielded up to him. If it be for any Crime he hath been guilty of, tho' perhaps there may be ſome eaſy way, or other, for him to eſcape, yet he ought to be particularly cautious how he expoſes the Commonwealth to Danger upon this Account. And therefore though we may ſuppoſe, that a Man under ſuch Circumſtances is not obliged to deliver himſelf up to his Enemy; yet he is bound to diſpoſe of himſelf ſo as to bring no Inconveniences upon them that give him Reception. And I make no doubt but his own Country and Commonwealth may for that reaſon eject him againſt his Conſent: For perhaps it may be thought leſs Cruelty to do ſo, than to ſurrender him up. But it may be ſuppoſed that the Lives of certain Subjects may be demanded for ſome publick Crime, of which thoſe particular Perſons are wholly innocent. Such a kind of Calamity is related to have befallen the *State* of *Athens* for the Death of *Androgeos*; in Revenge of which *Minos*, after he had ſubdued the *Athenians*, demanded of them, by way of Tribute, Seven young Men, and as many young Women, to be devour'd by the Minotaur [b]. And in a Caſe like this I do not ſee how any Subject can refuſe to take the Chance which falls to his Lot (which is the faireſt way of Deciſion between Equals) unleſs there be a *Theſeus* found, who will voluntarily undertake to conquer the Monſter. But the Difficulty will be greater, if we ſuppoſe the Life of an innocent Perſon to be demanded, or ſuppoſe ſome other Evil threatned him as great as Death, without any pretence of publick Guilt, or private Crime. We have an Inſtance of a Caſe in *Libanius*, Tit. 1. Decl. 27. where a Tyrant demands a certain beautiful young Man of a neighbouring City, threatning War if he was denied. The City chooſeth to hazard a War, rather than deliver him up. But when it was cloſely beſieged by the Tyrant, the Father of the young Man kills his Son, and throws him over the Wall; and afterwards when the Siege was rais'd, he is accuſed of Murther [c]. I ſhall not here either accuſe, or defend the Father: He might poſſibly make a better *Defence* for himſelf than *Virginius* did in *Livy*, *L* iii. *c*. 50. however, I think it is paſt diſpute, that the Commonwealth is not obliged to protect ſuch a Perſon to its own Ruine: For ſo the Commonwealth muſt be deſtroy'd, and the innocent Perſon be far from being ſecured by it. Neither can any Man deſire that the whole Commonwealth ſhould periſh with him, and upon his Account. The only Refuge ſuch an unhappy Perſon can take, muſt be either to provide for himſelf, if he can, by flight; or elſe by attempting ſome bold and dangerous Enterprize. When all fails, he muſt ſubmit to unavoidable Miſfortune, in which it may be poſſible at leaſt for him to preſerve his Mind innocent [d]; ſince it is utterly unlawful for a Man to deſtroy himſelf to avoid the moſt injurious Uſage. And the Commonwealth (after it hath defended ſuch an unfortunate Perſon to the utmoſt of its Power, and endeavour'd as far as poſſible to aſſiſt his Eſcape ſome way or other; and all proves to no purpoſe, and imminent Ruine cannot be well otherwiſe avoided) may at the laſt forſake him; that is, not hinder his Enemy from taking him: For it is a cheap Peace that can be bought with the loſs but of one Subject. But that the Commonwealth ſhould deliver him up to his Enemy, or force him to ſurrender himſelf, is, I think, neither lawful nor neceſſary. We have an Example of this Nature in *Megacles* of *Meſſana*, *Marſelaer Legat*. l. 1. c. 33. and of ſomething greater in the Story of *Sperthias* and *Bulis*, who voluntarily ſurrend'r'd themſelves up to *Xerxes* to ſatisfy him for the Injury the *Lacedemonians* did him in killing his Ambaſſadors [e]. But however the Commonwealth ought to ſet a greater Value upon the Lives of the Subjects, than to ſquander them away profuſely upon the Fear of uncertain Danger, or upon proſpect of unneceſſary Good; neither is any *Subject* obliged to ſacrifice himſelf upon ſuch Occaſions. And therefore the two Brothers, the *Philæni*, did more for their Country than could have been deſired of them [f]. And *Caiaphas* made a very ill Application of what was otherwiſe a good Saying, *John* xi. 50. implying that it was lawful to take away an innocent Perſon's Life, that the *Romans* might not be jealous of any Revolt among the *Jews*, and ſo take an Occaſion to bring a War upon them; eſpecially ſince it would have been eaſy to have prevented ſuch Suſpicions by Meaſures much gentler than that of the Death of an innocent Man. And I do not ſee how the Action of *Darius* was excuſable, when he threw away ſo many thouſand Lives only to gain *Zopyrus* Credit among the *Babylonians* [g].

VI. It is alſo often neceſſary, that for the Ratification of publick Compacts, ſome of the Subjects be given for Hoſtages [2]. And the civil Power may force them to undertake this Duty, when there are none that offer themſelves voluntarily. And if any over powerful Enemy demand certain particular Subjects for Hoſtages, they cannot, I think, upon any pretence refuſe. But where there is any Number of Perſons proper to be given for Hoſtages, and it is indifferent to the Party we make the Agreement with, or our ſelves, which of them be given; to take away all Occaſion of Complaint, or Suſpicion of Partiality, the proper Method will be to determine the Matter by Lot And if the Hoſtages are to be detain'd for any long time, it will be reaſonable to relieve the firſt, by ſending new ones in their places: As alſo to take Care, that the extraordinary Service the Hoſtages undertake, more than other Subjects, ſhall be compenſated to them ſome other way. And here it may be enquired, Whether the Lives, or only the Liberties of Hoſtages are engaged? And, I think it ſufficiently appears, by giving up the Hoſtages, that thus much is actually done and intended: ‘ We deliver theſe Perſons into your hands as a part of the Commonwealth we particularly value, and if we break the Articles of Compact, we leave it entirely to your Mercy to do with them what you think fit. Thus the City of *Liege* gave *Hoſtages* to *Charles* Duke of *Burgundy*, upon Condition, *That if they did any thing contrary to the Agreement, he might freely give himſelf Satisfaction upon the Hoſtages*; tho' the Duke afterwards diſmiſs'd them [a]. And therefore ſince the Breach of Compacts of this Nature is a juſt Reaſon for levying War againſt the Party which is guilty of it; it is manifeſt, that after ſuch Breach of Compact, and after the War is begun, that the Hoſtages themſelves may be look'd upon to be Enemies, in the ſame manner, as all the Subjects of that Commonwealth, comprehending ſuch as were no way acceſſary to the Occaſion of the War. And 'tis certain that Hoſtages have often ſuffer'd in the ſame manner as profeſs'd Enemies. Tho' on the other hand there have been many others, who have thought it barbarous and inhuman, to revenge the Injuries others have done, with the Deaths of innocent and unhappy Perſons [b]. And it is certainly falſe to ſay, that the Hoſtages are given with Intention that they ſhould ſuffer Puniſhment for the Compacts violated by the Commonwealth. For I cannot ſee how the End Men ought to propoſe to themſelves from puniſhing, can poſſibly be obtain'd by the Puniſhment of an innocent Hoſtage, who did not properly conſent to the Violation of the Compacts, but only did not refuſe to ſuffer Evil in another's ſtead, which in it ſelf is no Crime. And the Hoſtages will notwithſtanding be a ſufficient Caution, tho' by the Law of Nature they cannot properly be puniſhed for another's Default: For it is enough that they are in ſuch a State, as leaves them at any time expoſed to the Liberties of War, and that their Security depends ſolely upon the pleaſure of an injured and angry Enemy. But however, the Truth is, the Commonwealth directly engageth only the corporal Liberty, and not the Lives of its Hoſtages; becauſe it firmly reſolves (or at leaſt ought to do ſo) to obſerve its Faith; and therefore morally ſuppoſeth no ſuch Caſe by which it ſhall give the other Power over the Life of the Hoſtage. And without diſpute, the Commonwealth offers great Injury to the Hoſtages, either by unjuſtly breaking Compacts, and expoſing them to the Mercy of the Enemy; or by giving them up, only with a Deſign to betray him into Security, and ſo make the greater Advantages upon him. But on the other hand, let us ſuppoſe the Party that receives the Hoſtages may take Advantage from thence, either to imploy them in ſome ſecret Treachery againſt us, or to provoke us with open Injuries, threatning Death to them, if we reſiſt him: In ſuch a Caſe it muſt be thought reaſonable, that if the Injuries are ſo great, as to make it more ſupportable, to hazard the Lives of innocent Hoſtages, rather than the Commonwealth ſhould ſuffer them, we may very juſtly neglect the Conſideration of their Danger, and make all the Strength we can to reſiſt the Enemy. And the Commonwealth in ſuch a Caſe doth no greater Injury to the Hoſtage, than it doth when in War; it appoints particular Subjects to certain Poſts, in a brave Defence of which they muſt either die, or be made Priſoners. And the Hoſtages ought patiently to ſubmit to ſuch fatal, unavoidable Misfortunes, and not be diſſatisfied with their Country, ſince it could not be ſuppoſed to foreſee ſo unexpected a Caſe [c]. Neither ought we upon this Account to ſet the leſs Value upon a civil State, ſince ſuch extraordinary Caſes ſeldom happen in it; when in a State of Nature, it is impoſſible but ſuch Inconveniences muſt be very frequent. And this Reaſoning muſt determine the Caſe that happen'd to the People of *Utica*; ſome of the Subjects of which City *Agathocles* intercepted, and tied in certain *Engines* which he placed in the Front of the Battle, that ſo their Fellow Subjects might be under a Neceſſity of killing them, whenever they attempted to beat him back [d].

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[a] *Lucan*, l. 3. v. 701, 702.

———Non perdere letum.
Maxima cura fuit.———

———Whoſe greateſt Care
Was not to be depriv'd of Death.

[b] *Vide* Virg. *Æn.* VI. 20. *Hygin.* Fab. 41. *Ovid.* Met. VIII. 170. *Plut. Theſeus.*

[c] *Vide* Bœcler *in* Grot. *L.* 1. *c.* 1. *ſ.* 6. *p. m.* 95.

[d] *Vide* L. 3. t. 1. l. 1. ſ. *6.* D. *de Poſtulando.*

[e] *Herodot. Polymn. Grot.* l. 2. c. 25. ſ. 3.

[f] *Vide* Salluſt. *de Bell.* Jugurth. Pomp. Mela. l. 1. c. 7.

[g] Herodot, Thalia, *in fin.*

Mr. BARBEYRAC'S *NOTES on* §. IV, VI.

[1] See our Author's Abridgm. *De Offic. Hom. & Civ.* l. 2, c. 13. ſ. 2.

[2] See hereafter in C. 8. ſ. *6.* and *Grot.* l. 3. c. 20. ſ. 52, *&c.*

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[a] *Phil. de Comines*, l. 2.

[b] V. *Grot.* l. 3. c. 11. ſ. 18.

[c] V. *Ammian. Marcellinum*, l. 28. c. 6.

[d] V. *Diod. Sicul.* l. 20. c. 55. *Gunther. Ligurinum*, l, 10. *Grot.* l. 3. c. 20. ſ. 52. *&c. Bæcler.* in. *Grot.* l. 1. c. 1. p. m. 102.

CHAP.

CHAP. III.

Of the Power of the Sovereign, over the Lives and Fortunes of the Subjects, in Criminal Caſes.

I. *The Power of Life and Death, whether, and how transferr'd, from particular Men to the Commonwealth.*
II. *In a Liberty of Nature no human Puniſhment;*
III. *But only in a Commonwealth.*
IV. *Puniſhment what.*
V. *Puniſhing, to what Species of Juſtice reducible.*
VI. *That one Man ſhould puniſh another not unjuſt.*
VII. *The power of puniſhing where lodg'd.*
VIII. *Human Puniſhment ought to have ſome End.*
IX. *The firſt End of Puniſhment the Amendment of the Offender.*
X. *Whether lawful for any Man to correct any.*
XI. *The ſecond End of Puniſhment, caution for the Injured.*
XII. *The third, the general Security.*
XIII. *How far private Men are allowed to inflict Puniſhment.*
XIV. *What Offences it is needleſs for human Juſtice to puniſh*
XV. *Whether lawful at any time to pardon.*
XVI. *How far this is lawful antecedently to the Civil Law.*
XVII. *How far after it.*
XVIII. *The Quality of the Crime to be eſtimated from the Object of it.*
XIX. *And from the Paſſion that gave the Impulſe.*
XX. *And from the force of the Inclination and Intention.*
XXI. *And from the Obſtinacy and Reſolution of the Criminal.*
XXII. *And laſtly, from Cuſtom and Habit.*
XXIII. *What to be regarded in demanding the Quantity of the Puniſhment.*
XXIV. *The Meaſure of Puniſhments what.*
XXV. *In Puniſhments the Perſon of the Sufferer to be regarded.*
XXVI. *The Jewiſh Law whether an univerſal adequate Meaſure of the Puniſhment.*
XXVII. *Of Retaliation.*
XXVIII. *A Corporation or Community how puniſh'd.*
XXIX. *The Crimes of Corporations wear out in courſe of time.*
XXX. *Every fatal Evil not an human Puniſhment.*
XXXI. *Difference between Damage ſuffer'd directly and by Conſequence.*
XXXII. *Difference between the Occaſion and the Cauſe of Evil.*
XXXIII. *No Man to be puniſh'd for another's Crime.*

I. THE civil Sovereign hath alſo a Power over the Bodies and Lives, as well as Fortunes of the Subjects, in criminal Caſes, which is uſually call'd in ſhort, *The Power of Life and of Death* (a Power manifeſtly different from that which God hath over his Creatures, *Pſal.*xc.3. or that of Men over Beaſts.) And the firſt Diſpute that riſeth upon this Subject, is, How ſuch a Power could by Compact, from particular Men, be transferr'd to the Commonwealth? For ſince Puniſhment is an Evil inflicted againſt the Conſent of the Party puniſhed, and that which a Man inflicts upon himſelf, cannot be ſaid to befall him againſt his Conſent; it will be ſome Difficulty to account, how a Man can have a Power to puniſh himſelf, and conſequently be in a Capacity to transfer ſuch a Power to another. For the Severities of the monaſtick Life, and the Pains Men inflict upon themſelves by *eccleſiaſtical Diſcipline*, are either no Puniſhments properly ſpeaking, but are rather applied by way of Phyſick to ſuppreſs the Force of Luſt, or elſe are wholly involuntary and impoſed by the Prieſts upon the Pretenſions of the Divine Authority of their Office. And therefore it makes no Alteration in the Nature of the Puniſhment, that the Stripes are inflicted with their own hands, becauſe the Fear of a greater Evil threatned to the Diſobedient, forces them to execute that Rigour upon themſelves; as we ſee Malefactors go to the place of Execution, who would be dragg'd thither, if they refuſed. So it is the Cuſtom in ſome Nations for the condemn'd Criminals to diſpatch themſelves [a]. And therefore as to the matter in Diſpute, it will be eaſy to conceive, that as in natural Bodies the Mixture and Temperament of ſeveral ſimples forms a compound, in which we often perceive ſuch Qualities as cannot be found in any of the Ingredients that compoſe the Mixture: So Bodies politick, which are compounded of a number of Men, may have a Right reſulting from ſuch a Compoſition, which no one of the particulars was formally poſſeſs'd of; which Right, derived from the Union, is lodged in the Governors of ſuch Bodies [b]. Thus it was never pretended, that every particular Man hath a power to make Laws for himſelf, and yet when every Man ſubmits his Will to one, 'tis confeſs'd there commences a Power to preſcribe Laws to all. After the ſame manner the Head of a Body politick may have a Power to inflict Puniſhments on the particular Members, though the Members had no ſuch power before themſelves. And this will be eaſy to account for, ſince every particular Man obligeth himſelf, not only to defend the Perſon that is to be puniſhed, but if need be, to aſſiſt the Sovereign as far as he is able againſt him [c] [d]. And from hence the reaſon is evident, why it does not follow, as ſome ſuppoſe, that whatever the Sovereign takes away from the Subjects by way of Puniſhment, is done by their Conſent, becauſe they at firſt conſented to allow of, and confirm every Action of the Sovereign; becauſe, ſince that particular Caſe, which gives the Sovereign a power over the Life of the Subject, is left entirely in the power of the Subject himſelf, ſo as he may for ever prevent it, if he pleaſes; therefore ſuch a Caſe is never conſider'd by particular Men as ever like to happen. *Hobbes* indeed in his *Leviathan*, c. 28. in the beginning aſſerts, That the Right the Commonwealht has to puniſh is not grounded on any Conceſſion, or Gift of the Subjects, but that the Foundation of that Right is built upon that other, which, before the Inſtitution of Commonwealths, every Man had to every thing, and to do whatever he thought neceſſary to his own Preſervation. And therefore that that Right was not given, but left to the Commonwealth; which yet, ſince it has power ſufficient, it may make uſe of, as it pleaſes, to the Security of the Subject. To which it may be anſwer'd, That the Right of Puniſhing is different from the Right of Self-preſervation : and by the Exerciſe of it upon Subjects, we can never underſtand what a State of Nature allowed, where there is no Subjection. But I muſt farther add, That the Puniſhments I here ſpeak of, are ſuch only as human Legiſlators arbitrarily preſcribe againſt *Offenders*, and as are diſtinguiſh'd from thoſe Evils which are the natural Conſequences of Sin.

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[a] *Diod Siculus*, l. 3. c. 5. ſpeaking of the *Ethiopians*, ſays, One of the Officers is ſent to the Criminal to carry him the Signal of Death, upon the Sight of which he goes home and kills himſelf.

[b] L. 41. t. 3. l. 46. D. *de acquir. rer. domin.* The Author here cites a Law of the *Digeſts*, which does not concern the *Rights* that belong to whole Societies in general, tho' the particular Members of which they are compos'd are not inveſted with 'em; but which only ſhews that we may make over to another, a Right that we have not our ſelves; as for Example, a Creditor that ſells his Debtor's Pledge, makes the Purchaſer Maſter of the Pledge, tho' he himſelf had no property in it. *Non eſt novum, ut qui Dominium non habet, alio Dominium præbeat. Nam & Creditor, pignus vendendo, cauſam dominii præſtat, quam ipſe non habuit.*

[c] *Conf.* Hobbes *de Cive*, c. 2, ſ. 18,

[d] See above in B. 3. c. 7. ſ. 5.

II. But in treating of the Right of puniſhing the Subjects, I will premiſe that I intend to confine my ſelf to that Right only which one Man exerciſes over another, without Regard to the Methods and Proceedings of *Divine Juſtice*, which it muſt be allowed is in many Caſes of a Nature much different from human Judicature [a]. To begin therefore as high as we can ; it muſt be obſerved, that, in general, in almoſt every Sin, but eſpecially in ſuch as bear Relation to another Perſon, there are two things conſiderable ; *Firſt*, the Defect or Deviation from the Law : *Secondly*, the Harm or Damage another Perſon ſuſtains, either *directly*, or *indirectly* by it. And ſo far we may be certain, that every Man is obliged by the Law of Nature to make ſatisfaction for the Harm or Damage another ſuffers on his Account ; and in caſe it proceeded from malicious Deſign, to give *Caution* for his good Behaviour for the future. But there is a Difference indeed between ſuch Caution, when it is to be given by Men that live in a Liberty of Nature, and them that are *Subjects* of a *Commonwealth*. The Law of Nature ſeems to oblige the Firſt to give no other Caution, than that after they have expreſs'd a *Concern* for what they have done, and voluntarily offer to compenſate the Damage, they ſhould either by ſimple Aſſeveration, or at fartheſt by Oath, oblige themſelves to forbear the like Injuries for the future. For a voluntary Repentance is a ſufficient Evidence of an Alteration of Mind, and that their Reſolution to abſtain from Violence for the future is ſincere [1]. And therefore if the injured Party refuſes to accept of ſuch an Accommodation, and is either ſo diffident, or ſo perverſe, as to endeavour to force upon them Articles of larger Extent ; ſince the others are not obliged by the Law of Nature to comply ſo far ; the Blame of Breach of Peace muſt lie on his ſide, and the others may juſtly reſiſt him. And in ſuch Circumſtances the Juſtice of the War muſt be determined for them that offer'd the Injury, and the Injuſtice will be on his ſide that receiv'd it. But when a Man will give no *Satisfaction*, unleſs he be forced to it, ſince from thence he ſufficiently diſcovers the obſtinacy of his Temper ; and when no Terms of Compoſition will be accepted, unleſs the Party injured has Strength enough to overpower the injurious ; it muſt be left to the Pleaſure of the Conqueror, to inſiſt upon what Propoſition he thinks moſt likely to ſecure his future Quiet. And when the difference is grown to that height, the Conqueror may take the liberty, not only to diſarm his Enemy, to demoliſh and take Poſſeſſion of fortified Places, to condemn him to perpetual Impriſonment, and the like ; but may alſo put him to Death, upon ſufficient Aſſurance, that if ever he recovers Liberty, he will renew his Outrages, and there can be no other effectual way found to prevent it. But then, as this Caution is demanded rather in a way of War, than Puniſhment properly ſo call'd (tho' 'tis uſual with ſome to call all manner of Evils, whether ſuch as are the natural Conſequents of Sin, or thoſe that are inflicted in a Liberty of Nature for Injuries committed, by the Name of Puniſhments, in a more looſe Senſe of the Word) ſo it cannot properly be ſaid that a Man is obliged † to ſtand to it. Becauſe it ſuppoſes and implies a ſort of Blemiſh and Stain upon the Mind, and a Sin againſt the Law of Nature, in the Perſon 'tis extorted from, *viz.* his refuſing to give a voluntary Satisfaction, and a violent Defence of his Fault. Nay, ſince the Evils that are the Effects and Incidents of War, cannot properly be call'd Puniſhments (as will ſufficiently appear from what follows) it is manifeſt that human Puniſhments in a ſtrict Senſe, or ſuch as are derived from human Authority, cannot affect them that live in a Liberty of Nature, though it cannot be denied, but that they too are ſubject to thoſe Evils which flow by a natural Connexion from Sin.

III. But in Commonwealths if a Man ſuffer Harm or Damage, it is not only recovered with much greater Eaſe, than in a State of Nature, by a War that muſt be ſupported by his own ſingle Strength ; but there is before hand as much Care taken, as the Nature of human Affairs will permit, to prevent Injuries or Harm that he offer'd the Subject, by awarding Puniſhments to be afflicted by publick Juſtice on all Offenders againſt the Law. For ſince the Wills and Inclinations of Men are ſo eaſily byaſs'd either to Good or Ill, it was certainly the moſt effectual Expedient that could have been pitch'd upon, to direct, or reſtrain them, to ſet in View the dread of ſome preſent Evil.

IV. *Puniſhment* therefore, in general may be thus defined ; *It is an Evil of ſuffering, inflicted for an Evil of doing*, Or, *it is ſome uneaſy Evil inflicted by Authority, in a compulſive Way, upon View of antecedent Tranſgreſſion* [2]. For though 'tis common to enjoin ſeveral ſorts of Labour in Puniſhment ; as ſuppoſe a Man be condemn'd to the *Mines*, to the *Gallies*, to the *Work-houſe* ; to raiſe a *Fortification*, to cleanſe the *common Sewers*, or the like ; yet theſe are to be look'd upon only, as they are Hardſhips, or ſervile laborious Employments, and cauſe an Uneaſineſs in the Perſon who is forced to ſubmit to them ; and therefore may be reduced to Sufferings. It is ſaid therefore, that *Puniſhment is inflicted upon view of antecedent Tranſgreſſion.* And hence it follows that none of thoſe Inconveniences a Man ſuffers by an infectious Diſtemper [3], by an infirm or maim'd Body [4], or by any Uncleanneſs [5], can properly be call'd Puniſhments. Many of this Nature are mention'd in the *Jewiſh* Law ; as when the *Lepers* are commanded to be *ſeparated*

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[a] And this *Plutarch* ſeems in ſome meaſure to be ſenſible of, *L. de Sera Num. vindict.* p.449. F. A Man can hardly conceive any thing Good with better Aſſurance, than that he is one that exactly knows the proper time for the Cure of Vice, that Puniſhment is the uſual Remedy he applies to every Sin, which he does not always diſtribute in the ſame Proportion to all, or at the ſame time.

Mr. BARBEYRAC's *NOTES* on §. II, and IV.

[1] See above in B. 2. c. 5. ſ. 3. towards the End. † The Author here follows a falſe Idea of the Nature of the Obligation. See the 8th Note on the 4th Section. [2] V. Grot. L. 2. c. 20. ſ. 1. [3] See *Levit.* Ch. xiii. [4] See *Deuter.* xxiii. 1. [5] See *Levit.* Ch. xv.

from the reſt of the People; and when ſuch as were maim'd or blemiſh'd in any Limb, were to be excluded the Prieſthood, and the like [a]; which are no more Puniſhments, than it is for a Stranger, or a Perſon of mean Quality, to be made uncapable of certain Offices in the Commonwealth, or than it is for a Man to be in pain at the ſetting a broken Leg. Tho' ſometimes ſuch Misfortunes are improperly call'd Puniſhments, by the Reſemblance they bear to the real. As we ſay in common Diſcourſe of Perſons extreamly infirm, or miſerably deform'd, that *their Life is a Puniſhment to them*. And hence it alſo follows, that Impriſonment, the Deſign of which is only the ſafe Cuſtody of the Party accuſed, is not properly Puniſhment, becauſe no Man can be ſuppos'd to be juſtly puniſh'd, before he be judicially heard. And therefore whatſoever Hurt a Man ſuffers by Bonds or Reſtraint, before his Cauſe be heard, and he be declar'd guilty, more than is a neceſſary to ſecure his Perſon, is againſt the Law of Nature, and ought to have Satisfaction, or at leaſt ſome Allowance [1] made for it in the ſubſequent Puniſhment. I add, inflicted by [2] Authority, to diſtinguiſh Puniſhment from thoſe Evils a Man ſuffers, either by War, particular Quarrels, and Self-defence, or by private Malice. And therefore, there is no real Diſgrace in loſing an Ear, ſuffering the Blows of a Cudgel, or the like, but only in the Cauſe of it. 'Tis *Selden's* Opinion indeed [b], *That the Slaughter and Spoils committed in War are a ſort of Puniſhments*; which may be true enough in this Senſe, that a juſt War, begun upon juſt Provocations, and the Calamities the injurious Party ſuffers by it, may be look'd upon as natural Puniſhment, and that a conſcientious Warrior ſhould endeavour to reduce the Outrages of War to the ſame Calmneſs and Proportion the civil Court ob-

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[a] *Solent præſides in carcere continendos damnare, aut ut in vinculis contineantur. Sed id eos facere non oportet: Nam hujuſmodi pœnæ ſunt interdictæ: carcer enim ad continendos homines, non ad puniendos haberi debet. D.* l. 48. t. 19. *De Pœnis*, l. 8. ſ. 9.

[b] *De J. N. & G. ſec. Heb.* l. 4. c. 11.

Mr. BARBEYRAC'S *NOTES on* §. IV.

[1] See *Levit.* xxi. 17, *&c.*

[2] By a Reſcript of the Emperors *Honorius* and *Theodoſius*, it is ordain'd, that thoſe who were condemn'd to Baniſhment, ſhould be releas'd and diſcharg'd from the Puniſhment, provided it was found upon Examination, that during their Impriſonment the Term of their Baniſhment was expir'd. *Omnes, quos damnationis conditio diverſis exiliis deſtinatos, metas temporis præſtituti in carceris impleviſſe cuſtodia deprehenderit, ſolutos pœna vinculiſque laxatos, cuſtodia liberari præcipimus, nec formidare miſerias ullas exilii. Sit ſatis immenſorum cruciatuum ſemel luiſſe ſupplicia, ne hi qui diu privati ſunt auræ communis hauſtu, & lucis aſpectu, intra breve ſpatium catenarum ponderibus prægravati, etiam exilii pœnam ſuſtinere compellantur.* Cod. Lib. 9. Tit. 47. de pœnis. Leg. xxiii.

[3] The Author here leaves *Grotius*, and in my opinion, without any Neceſſity; tho' he is very much follow'd in that reſpect, by thoſe Authors that have lately written Treatiſes of the *Law of Nature*, and even by Mr. *Titius*, who alſo extols abundance of things in his Obſervations on his Abridgement *de Officio Hom. & Civ.* However I will contradict 'em both, with ſo much the more Confidence, ſince beſides the Advantage of defending *Grotius*, I ſhall have nothing to do but to follow the Opinion of Mr. *Lock*. The *Laws of Nature* (*ſays that great Philoſopher, in his ſecond Treatiſe of Civil Government*, Chap. ii. Sect. 7. *&c.*) as well as other Laws that are impos'd on Men here below, would be entirely uſeleſs, if in the State of Nature, no body had the Power to put 'em in Execution, and puniſh thoſe who break 'em, whether with reſpect to private Perſons, or in reference to Mankind in general, whoſe Preſervation is the end of thoſe Laws which are common to all Men. Perhaps they will ſay, That in the *State of Nature* there are ſome *Evils* annex'd to ill Actions by a neceſſary Conſequence, and which our Author calls upon that Account, *natural Puniſhments* (ſee above Book ii. Chap. iii. Sect. 21.) without ſpeaking of the Puniſhments which God exerciſes beſides at his own Pleaſure, by virtue of his being our Sovereign Legiſlator, and Author of the *Law of Nature*. Mr. *Lock* has not thought fit to obviate this Objection: But if it had been propos'd to him, he would have anſwer'd in all appearance, that neither of theſe two ſorts of Puniſhments are ſufficient to reſtrain human Malice, or procure the *Peace and Tranquillity of Mankind*; as it appears by the Complaints that have been made in all Ages, of the Proſperity of the Wicked, and the unfortunate Condition of the Good. '*Moreover* (*ſays Mr.* Bernard, *in his Novel. de la Rep. de* '*Lettres Juin.* 1706. pag. 648.) neither thoſe who ſuffer the Puniſhments here in Diſpute, nor thoſe who are Eye-wit'neſſes of 'em, do regard 'em as Puniſhments inflicted for ſuch or ſuch Crimes. How many Diſtempers and Illneſſes 'are there occaſion'd by Debauchery, which no body imputes to the true Cauſe that produced 'em? This is ſtill more 'true in the Puniſhments that God inflicts, and whoſe Crimes are not the phyſical Cauſe. Thus he cauſes an Adulterer, 'an Uſurer, or a Murderer, to periſh by a Shipwrack, or break their Limbs by a Fall; but yet it is very ſeldom, that 'either the Perſon to whom theſe Accidents happen, or thoſe who ſee 'em happen, ever gueſs the true moral Cauſe of ''em. Now that the Puniſhment inflicted for a Crime may work ſome Effect, both upon him who ſuffers it, and upon 'them that are Witneſſes of it; both muſt throughly be perſuaded, that the Puniſhment was inflicted for ſuch and ſuch 'a Crime'. One cannot then forbear acknowledging, that in the *State of Nature*, it is requiſite to have ſome Body here below, to puniſh Crimes; and if ſo (*continues Mr.* Lock) then every one is inveſted with that Power with reſpect to any other, ſince all Men are by Nature equal. However, this is not abſolute and arbitrary: We muſt never ſuffer our ſelves to be ſo far tranſported with Paſſion, as to puniſh a Crime with too much Severity. All that is to be done on this Occaſion, ought only to tend towards the Reparation of the Injury, and preventing them for the future, from doing the like. When any one violates the *Laws of Nature*, he in ſo doing demonſtrates to the World, that he tramples under Foot the Maxims of Reaſon and Equity, which are the Rules God has preſcrib'd to human Actions, as a common Security to Men; and thus he becomes dangerous to Mankind. As then every one has a *Right* to take care of every thing that relates to the Preſervation of human Society, he may, by following the Light of quiet Reaſon, inflict on ſuch a Perſon, what Puniſhment he thinks moſt likely to produce Repentance in him, and hinder him from falling again into the ſame Crime, or to deter others by his Example. When a Man kills another on purpoſe, he ought to be deſtroy'd himſelf, like *Lions*, *Tygers*, and other wild Beaſts, with whom no Society or Security is to be had. *Who ever ſhall meet me, will kill me*, is the voice of Nature, which the Remorſe of Conſcience forced from *Cain*, after he had ſlain his Brother *Abel*, *Gen.* Chap. iv. v. 14. By the ſame Reaſon, we may puniſh, out of any *civil* Community, the leaſt Infringement of the *Law of Nature*, as well as in a State, if it be neceſſary to the End for which indicting of Puniſhments ought to be deſign'd. The very ſame Laws that forbid the Crime, preſcribe alſo the *Manner* and *Degrees* of the *Puniſhments*; and theſe Laws are however, as intelligible and plain to every one that conſults the Light of Nature, as the poſitive Laws which often have no other Foundation than the capricious or vicious Paſſions of the Legiſlators of the Earth. If any one thinks it ſtrange, that we give to every individual *Perſon*, in the Independency of the *State of Nature*, a Right of puniſhing thoſe who are guilty; let 'em tell us, by what Right Sovereigns puniſh, even with Death, any Stranger that has committed a Crime in their Dominions: For the Laws have no Force in relation to Foreigners: and Sovereigns, or Magiſtrates of Civil Communities, have no more power over thoſe who are not Members of 'em, than each Perſon has in reference to another in the State of Nature. However, the Practice we are here ſpeaking of, is very common and univerſally allow'd. Yet, I fancy our Author would not have fail'd to have anſwer'd this laſt Reaſon of Mr. *Lock's*, that every Foreigner, that enters into a State, either by way of Travelling through, or to make ſome ſtay in it, tacitly ſubmits to the Laws of the Country, and becomes in ſome meaſure a Subject to the Prince, as long as he reſides in his Dominions. (*See above in Book* 7. *chap.* ii. *Sect.* 200.) But it may be anſwer'd, that this tacit

ſerves in inflicting Puniſhments. But 'tis evident, there are other Diſtinctions between the Evils of War, and Puniſhments; ſince, as *Tacitus* obſerves, *In time of Peace the Cauſe and Merits of the Perſon are always regarded, when in War the Sword makes no Difference between the criminal and the innocent.* Neither does the civil Court look upon thoſe Evils to be Puniſhments, that are only the natural Conſequents of Sin; as when a Man loſes his health by committing any unlawful Act, or by aſſaulting another, is beat himſelf; for theſe are Evils not inflicted by the Authority of the civil Sovereign. And therefore if a Man by ill Courſes happens to weaken his Conſtitution, impair his Eſtate, or loſe the good Opinion of his Friends, from whom otherwiſe he might poſſibly have expected Favours; this does not make him the leſs liable to Puniſhment. And laſtly, it was neceſſary to ſubjoin, that the *Penalty was to be inflicted in a way of Compulſion*, or *by Force*: Becauſe otherwiſe it would be impoſſible to attain the End deſign'd by puniſhing; which is to deter Men from offending by the Severity of the Puniſhment. And therefore ſome have not thought it proper to allow the Criminals the Choice of their own Puniſhment; becauſe, as the Declaimer ſays [a], ' It might ſeem to give Countenance to Vice; and becauſe it would take off thoſe Fears that are generally the ſtrongeſt Guard upon Mens Innocence, to allow *Delinquents* to ſuffer what way they pleas'd. For, as he reaſons, a Man allowed the Liberty before-hand to compoſe himſelf to an obſtinate reſolute Temper of Mind, may defy all our Racks and Tortures. 'Tis a Miſtake to meaſure the Security of the Puniſhment by the Terrour only of the Name of it, for there can be no Puniſhment but that which a Man ſuffers unwillingly and with Regret. And there can be no Pain but that which our own Impatience gives us. 'Tis our Fears only that make Cruelty it ſelf look terrible. How can we call that a Puniſhment, which Men will meet half way, and which they are ready to demand? Condemned Criminals ſhould be drag'd to Execution, and not left to go as they pleaſe". But after all, ſuch a Choice does not alway make the Puniſhment involuntary, but only perhaps mitigates the Degree, or alters the Manner of it; ſtill the Puniſhment, whatever it be, that at laſt determines the Choice, is certainly involuntary and the Effect of Force [b].

Submiſſion does not ſeem to extend to the giving the Sovereign a Power of puniſhing a Foreigner with Death, eſpecially for certain Crimes committed in ſecret, or which are not hurtful to the State, but by the ill Example they give the Subjects; as Sodomy, Beſtiality, *&c.* would be. All that could be done with reſpect to a Foreigner would be to oblige him to make reparation for the Injury he had done to any of the natural born Subjects of the State, and then force him to depart from thence. If then Sovereigns put a Foreigner to Death, in form of Puniſhment; it muſt certainly be by virtue of a *Right*, that every one naturally has, of puniſhing the Violation of the *Law of Nature*. 'Tis thus that I anſwer'd before-hand the Reaſon alledg'd by Mr. *Hertius* in his Diſſertation, *de Socialitate, primo Juris Naturalis Principio.* Sect. iii. xxv. which I had not ſeen before the firſt Edition of this Work. All that the ſame Author ſays there farther, is nothing to the point, ſince he will not prove that in the State of Nature, the Intereſt of Human Society, and the Laws of Sociability do not require the Puniſhment of the Wicked, tho' the injur'd Perſon, would not, or could not, either by himſelf, or the aſſiſtance of Friends, do them any Miſchief: certainly we ought to concern our ſelves for the general good of Mankind, without any Exception; and to prevent as much as poſſible, the *Evils* to which they might be expoſed: And if ſo, 'tis alſo our Duty, to reſtrain, or diſcourage the Malice of thoſe, who either by themſelves, or by their ill Example, or through hopes of Impunity, will probably be the Occaſion of doing an Injury to ſomebody, in defiance of the *Laws* both of *Nature* and human Society. 'Tis true, that in the State of Nature, theſe ſorts of Puniſhments are not inflicted by Authority; and 'tis the ſource of their Illuſion, who will not bear to have the *Right* of puniſhing out of civil States mentioned in their hearing. Yet, however, the Reality and Foundation of this Truth is no leſs certain for all that. But to return to Mr. *Lock*. He obſerves farther, that beſides the *Right* which is common to all Men in the State of Nature, to puniſh the Violation of the *Laws of Nature*, he that is directly injur'd, or that receives ſome immediate damage by a Crime, has an entire and particular Right to demand Reparation for the Injury that has been done him. And if another Perſon find his Complaints and Pretenſions to be well grounded, he may join with him, and aſſiſt him to make the offender give him ſatiſfaction. (*It is alſo much more honourable and generous*, as *Grotius* very well obſerves upon this Subject, Lib. II. Chap. xx. Sect. 40. Num. 7.) *to purſue the Reparation of Injuries done to another, rather than to demand Satiſfaction for thoſe done to our ſelves, which is more to be fear'd on Account of the laſt, that an Exceſs of Reſentment ſhould make us exceed the Bounds of a juſt Revenge, or at leaſt fret our Spirits too much.*) Of theſe two ſorts of *Rights*, the Firſt, I mean that of puniſhing the Violation of the Laws, is intirely conferr'd upon the Magiſtrate, to whom, every one upon his entrance into any State, immediately ſubmits, ſo that whenever the good of the Commonwealth allows it, he may, barely upon his own Authority, ſhew Mercy to the Guilty: But he has not the ſame *Right* or *Power* to demand Satisfaction for an Injury, or Reparation of a Damage done. The Magiſtrate cannot excuſe the Offender; and the injur'd Perſon ſtill keeps his *Right*, ſo that they do him wrong, if they hinder him from the Reparation that is due to him. Mr. *Lock* afterwards makes an Objection himſelf againſt the *Power* which he gives to every particular Perſon, in the *State of Nature*, of putting the *Laws of Nature* in Execution, and puniſhing thoſe that infringe 'em; which is, that Men being by this Means become Judges in their own Cauſe, and being beſides full of Paſſions, eſpecially the Spirit of Revenge, they would generally exceed the bounds of Equity; from whence a thouſand Evils and Diſorders follow. I own (*anſwers he*) that the Civil Government is a proper Remedy for theſe Inconveniencies, which without diſpute are very grievous. But if the *State of Nature* is to be diſannulled upon that account, we ought to think the ſame thing of a Government, where one Perſon alone, having a ſupreme and abſolute Authority, is Judge in his own Cauſe, and executes what he pleaſes, without being liable to be call'd to an account, or oppos'd by any one. If we muſt always ſubmit to whatever he commands, by what Principle ſoever he does it, whether he acts reaſonably or no; we ſhall find our ſelves in that reſpect, in a worſe State, than that of Nature, in which we are not bound to ſubmit to every one, after that manner.

[a] *Quint.* Decl. 11. p. 156, 157. Edit. *Lug. Bat.*

[b] *Senec.* L. 4. Controv. 24. p. 234. Ed. *Gronov.* Impriſonment was no Puniſhment to me, I came thither of my own accord. *Arrian. Epict.* L. 1. c. 12. Where-ever a Man is detain'd againſt his Will, that Place is his Priſon. *Add. Charron de la Sageſſe*, L. 1. c. 6. ſ. 8. & c. 39. ſ. 9.

And therefore it may be further inferr'd, that it is an improper Expreſſion to ſay, a Man is obliged to be puniſhed, or that ſuch a one owes a Puniſhment; becauſe Puniſhment ſignifies Harm inflicted againſt a Man's Conſent, and implies an Averſion of the Will to it. But now it is always ſuppoſed, that what we are properly obliged to, we ought to be ready and willing to perform. And therefore the Reaſon is plain, why, for inſtance, in working upon a Fortification, a Servant at the Command of his Maſter, without any particular Wages, and a Malefactor condemn'd to that Labour, may be imploy'd in the ſame Service, and the Work be a Puniſhment to one, and not to the other; becauſe the Servant undertakes it upon the Obligations he is under to his Maſter, and is therefore ſuppoſed to do it voluntarily; but it is impoſed upon the other as a Task, which he cannot ſubmit to, but with Unwillingneſs and Reluctance [c]. And when we are told that in ſome Countries (as particularly in *Japan*) the condemn'd Criminals are their own Executioners, we are not to look upon that as a voluntary Action, any more than that with us they uſually go to the place of Execution; or than that in *Spain*, the Executioner ſuffers his Priſoner to be unbound, and only commands him to follow him; or when (as it was the old Cuſtom in *Lithuania*) the Malefactors are forced to erect their own Gibbets, and hang themſelves. For theſe can never be ſuppos'd to be properly the Acts of the Criminals themſelves, but to be only Compliances they ſubmit to, in hopes of avoiding greater Evils that might be the Effects of the Refuſal. Thus it was very particular when *Gracchus*, in *Livy* [a], is ſaid to have made ſome of his Soldiers, who had not behaved themſelves with the ſame Bravery as the reſt of his Army, take an Oath, *That they would not eat or drink in any Poſture but ſtanding, as long as they ſhould be in the Service.* For as they could not refuſe the Oath, ſo they thought they ought rather to bear the Diſgrace than be perjured. But further, neither can a Man properly be ſaid to be puniſhed, who is bound for another, and is afterwards forced to pay the Bond. For the other Man's Miſdemeanour is only the bare Occaſion of his ſuſtaining that Damage, but the Obligation which he voluntarily took upon himſelf, is the proper and immediate Cauſe of it. Moreover from what has been ſaid it follows, that, as a Man is not oblig'd to inform againſt himſelf [b], that

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[a] *Ictus fuſtium infamiam non importat, ſed cauſa propter quam id pati meruit, ſi ea fuit, quæ infamiam damnato irrogat. In cæteris quoque generibus pœnarum eadem forma ſtatuta eſt.* L. 3. t. 2. l. 22. D. *de his qui Infam. not.*

[a] L. 24. c. 6.

[b] All that our Author ſays here and a little farther, upon the Subject of Obligation, cannot be admitted but in this Senſe, that Men are not oblig'd to go before a Magiſtrate and inform againſt themſelves: For that is not neceſſary to the End for which the Eſtabliſhment of Puniſhments was deſign'd. But he is in the wrong to deny, that there is abſolutely an Obligation, in reference to the Puniſhment in the Perſon committing a Crime puniſhable by the Law. It is certain, that the *Sovereign* has a *Power* to puniſh Criminals; and one cannot conceive a *Right* annexed to a Perſon, without ſuppoſing at the ſame time, an Obligation in him, towards whom he may lawfully exerciſe that *Right*. Our Author diſtinguiſhes, in another place, Book iii. Chap. v. Sect. 1. *between what one has a Right to demand of another, and what one has a Right to do, with reſpect to him*; the Firſt, according to his Opinion, always impoſes a true Obligation on him, from whom we may demand to have ſomething given us, or ſomething done in our Favour, but the other does not always ſuppoſe an Obligation anſwerable to it. For my Part, I do not ſee, by virtue of what the firſt *Right* does not take away the Obligation, as well as the laſt; if I can lawfully do a Thing, in Reference to a Perſon, methinks he is bound to ſuffer it, or not to reſiſt me, when I make uſe of my Power; otherwiſe it would be uſeleſs and of no Effect. Mr. *Titius* (Obſerv. DCXLI.) ſeems to make the Obligation of a Criminal, with reſpect to Puniſhment, conſiſt only in our not doing him any wrong in puniſhing him, and in his not complaining of our Uſage. But we muſt go farther, in my Opinion. 'Tis already granted, that when the Queſtion is concerning a bare *pecuniary Puniſhment*, to which we have lawfully been condemn'd, we ought to pay it, without expecting to be compelled by the Magiſtrate to do it: we are oblig'd to it, not only by the Maxims of Prudence, becauſe it would be to no purpoſe to refuſe doing what we may be forced to, but ſtill more by the Rules of Juſtice, which require us to make Satisfaction for the Damage, and to obey a lawful Magiſtrate. The greateſt difficulty in this Point then regards *Corporal Puniſhments*, and eſpecially thoſe that tend to taking away Life. Now I muſt here own, that the *publick Good*, and the Power of him who holds the mighty Sword of Juſtice in his Hand, do not require, that a Criminal ſhould go merrily to ſuffer the Puniſhment that is inflicted on him; or that he ſhould not endeavour to make his Eſcape, provided he can do it, without doing any miſchief to any Body. But at the ſame time, it is juſt without diſpute, that when the Criminal has been taken, and condemn'd upon a thorough Hearing of the Cauſe, in Form of Law, if he finds no way to eſcape, either by breaking open the Priſon, or ſome other Statagem, he ſhould ſuffer the Puniſhment without murmuring, and having Recourſe to any unlawful means, to get away, or oppoſing the Magiſtrate in the lawful Exerciſe of his *Power*. Neither ought he to reſiſt or defend himſelf, againſt thoſe who endeavour to hinder him from making his Eſcape, as he would have a Right to do againſt an unjuſt Aggreſſor, or Magiſtrates of Juſtice, whom ſuppoſing their being convinced of his Innocence, he finds manifeſtly endeavouring to deſtroy him, and cannot avoid being unjuſtly condemn'd, if once he falls into the Hands of Judges that are exaſperated and prejudiced againſt him. The Reaſon our Author alledges for acquitting Criminals of all Obligations in relation to Puniſhment, has nothing in it that is ſolid; and if it were allow'd of, it would as well prove, that a Criminal is no more oblig'd to pay a Fine, or make Satifaction for damage done, becauſe the generality of Mankind have much ado to perſuade themſelves to it, and violent Means muſt be uſed to force 'em to do it; we ſhould conclude from thence, againſt what our Author himſelf maintains, that a Soldier is not oblig'd to go to, or defend a Poſt, where, according to all Appearance, there is but little hopes of eſcaping with Life. See the former Chap. §. 4. & B. iii. c. vii. §. v. Moreover, tho' I yet ſee no reaſon, why I ſhould here change my Opinion;

I will

that the Penalty the Law appoints may be put in Execution upon him, after he has made Satiſfaction for the damage or harm he has done; ſo for the ſame Reaſon he may lawfully endeavour to eſcape from it, either by denying the Matter, concealing himſelf, or flying, without the Violation of any Obligation whatever [9].

Bœcler indeed in his Preface before *Grotius* writes very obſcurely upon this Subject, *p. 9.* “The Merits of human Puniſhments, ſays he, belong to the Law of Nature, both as it is a Law, and as it is natural. If it be a Law, it produces an Obligation; but there can be no Obligation, neither can it be conceiv'd how there ſhould be, without ſome Penalty attending the Violation of the Law”. 'Tis beyond Diſpute, that ſuch as tranſgreſs the Law of Nature muſt expect to be puniſhed, becauſe Puniſhments are unavoidably annex'd to every Law; and it is not in the leaſt repugnant to Nature [a], that a Man that does Evil, ſhould ſuffer Evil. But it would be falſe Reaſoning to infer, that becauſe the Law produces an Obligation, therefore every Man that breaks it, is obliged voluntarily to deliver himſelf up to be puniſhed by the civil Sword. *Hobbes* in his Book *de Cive*, c. 14. § 7. ſays very well, That the ſecond Part of the Law, which is call'd the penal, is mandatory, and ſpeaks only to the publick Miniſters. There is no particular Clauſe in the Law, which commands the Criminal to go voluntarily to the place of Execution; but there is a particular Injunction to the Magiſtrate, to take care that Malefactors be executed. And therefore the Delinquent is not in fault, if he be not put to death, but the blame lies wholly upon the Magiſtrate, who neglects a Matter of ſuch Concern and Importance to the Commonwealth. *Socrates*, when *Crito* perſuaded him to make his Eſcape out of Priſon, told him [b], that *that would be to break the Laws of his Country, which every good Subject was bound to obey; that every Man ought to yield to the Sentence the Government paſſes upon him; and not return the Injury upon the State, or pretend to ſhew it has been unjuſt.* But theſe are only noble Sayings, which perhaps, in ſome particular Circumſtances, a Perſon truly brave and innocent might reſolve to practiſe, but which can be of no Force (as I can ſee) againſt any thing here aſſerted. And therefore we may further conclude, That as no Man is bound to accuſe himſelf in the civil Court, or to make any voluntary Confeſſion of his Crime, ſo it is unjuſt in criminal Caſes to put the Priſoner to declare his Innocence upon Oath: Tho' this Cuſtom was uſual at *Athens* [c], and the thing might look very dreadful, when the Party was obliged at the ſolemn Sacrifice of a Boar, a Bull, and a Ram, to imprecate, as the Form ran, *Deſtruction to himſelf, his Race, and Family.* And hence *Hobbes* infers, *de Cive*, c. 2. § 19. “That the Anſwers which are forced from a Man in Torture, are no Evidence to the Fact; but only helps to find out the Truth. So that a Man has a Right to give a true or falſe Anſwer, or if he pleaſe, not to anſwer at all [10]”. 'Tis an odd Story to the purpoſe we have in *Cteſias*'s Account of

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I will inform the Publick, that ſince the firſt Edition of this Work, I have ſeen two Treatiſes written by Mr. THOMASIUS; in one of which he refutes the Opinion I have here eſtabliſh'd, and in the other maintains it himſelf. See his *Inſtit. Juriſp. div.* Lib. iii. chap. vii. and his *Fundamenta Jur. Nat. & Gent.* See what alſo the ſame Civilian has ſaid in his Notes upon *Huber. de Jure civitatis*. Lib. ii. Sect. vi. cap. i. ſect. xx, *&c.* where they had undertaken to refute our Author upon the Queſtion in debate.

[a] V. *Grot.* l. 2. c. 20. ſ. 1.

[b] *Plato* in *Criton.* p. 37, *&c. Ed.* Wech.

[c] Demoſthen. *contra* Ariſtocrat.

Mr. BARB. *NOTES on* § IV.

[9] *Quintil. Declam.* 314. All Confeſſion is of ſuch a nature, that a Man would be thought Mad that were guilty of it. *Id. Declam.* 328. Neither is there any Man ſo deſperate, or that hath ſo little love for himſelf, that doth not commit his Crimes with a deſign to deny them.

[10] *Vid.* L. 48. t. 18. l. 1. ſ. 23. D. *de Quæſtionib. Charron. de la Sageſſe*, L. 1. c. 4. ſ. 6. “This Invention of the Rack is a dangerous Invention; and ſeems rather a trial of Patience than Truth. And he that can bear, and he that cannot bear it, conceals the Truth. For why ſhall Pain make me rather confeſs what is, than force me to ſay what is not? And, on the contrary, if he, that has not committed the Fact of which he is accus'd, is patient enough to ſuffer theſe Torments, why will he not be ſo that has, when ſo great a Reward as Life is propoſed to him? I believe that the foundation of this Invention was owing to the conſideration of the effort of Conſcience. For to the Guilty it ſeems to aid the Torture, to make him confeſs his Crimes, and to enfeeble him; and, on the other hand, to fortify the Innocent againſt it. To ſpeak the Truth, 'tis a Method full of Uncertaimy and Danger: For what would not one do, what would not one ſay, to avoid ſuch intolerable Pains? *Etiam innocentes cogit mentiri dolor.* Publ. Syr. ver. 191. From whence it happens, that he, whom the Judge has put to the Rack, that he may not put him to Death innocently, dies both innocent and rack'd. Thouſands and Thouſands have loaded themſelves with falſe Accuſations; among whom I place *Philotas*, conſidering the Circumſtances of *Alexander*'s Perſecution againſt him, and the manner of his Torture. But however, ſay they, 'tis the leaſt Evil that human weakneſs could invent; very inhuman however, and in my Opinion, very uſeleſs. Several Nations, leſs barbarous in that reſpect, than the *Greeks* or *Romans* that call'd 'em ſo, hold it horrible and cruel to torment and tear a Man in pieces, for a Crime of which you are ſtill in doubt; what can it be but the Effect of your Ignorance? Are you not unjuſt, who rather than not kill him without a Cauſe, do worſe to him than killing it ſelf? Let it be ſo, ſee how often he had rather die without a Cauſe, than to undergo this Scrutiny, which is more painful than the Puniſhment; and often by its Severity, antedates both the Puniſhment and Execution of it”. MONTAGNE's Eſſays, Book ii. chap. v. GROTIUS in one of his Letters (Let. DCXCIII. Printed at *Amſterdam* in 1686.) ſays, that there are infinite Examples of People that have been put to Death unjuſtly, upon a Confeſſion extorted from 'em by the Rack; and therefore he does not at all wonder that there have been ſeveral grave and pious Perſons of Opinion, that *Chriſtians* ought not to make uſe of Torments, to force Men to a Confeſſion of Crimes, ſince it is certain, that there is no ſuch thing in the Law of *Moſes*; that in *England* People live in as great Security as in any other Nation, tho' the Rack is not uſed there, and that during the time that *Rome* preſerv'd her Liberties, no Citizens could be put to the Torture. It may not be improper to add here the Reflection of Mr. LE CLERC, on this Subject; in his Abridgment of a Book, where 'tis maintain'd, that the inevitable neceſſity of uſing the Rack, for the preſervation of the State, has made it lawful, as War, and other violent Remedies, are imploy'd againſt the Enemies of the publick Tranquillity. “This Reaſon, ſays he, may prevail when they are perſuaded that there are ſeveral Perſons, that are Accomplices in a Crime, and when it is neceſſary to diſcover 'em, in order to defend our ſelves from 'em; but certainly, where they uſe the Rack, only becauſe the Formality of the Law requires a Confeſſion from a Criminal before he is puniſh'd, there it is an uſeleſs Cruelty: Since if there are ſufficient Proofs, they need ſearch for no more, and ſince a Criminal, who knows that he is in no leſs danger of being put to Death, tho' he does not confeſs, than if he does, ſuffers not himſelf to be put to the Torture to confeſs the Truth, when he finds that the Judges are convinced of his Crime. On the contrary, when the Fact is doubtful, and he knows that by reſolutely ſuffering

of the *Indies*; he ſays, “ That there is a Spring in *India*, the Water of which, as ſoon as drawn, turns into a Curd like that of Cheeſe, and that if a very little Quantity of this be infuſed in Water, and ſo drank, there will follow a Diſtraction upon it, which, the ſame day, will certainly make a Man diſcover every thing he hath been concern'd in. He adds, the King takes the Advantage of this Water, when he would make a full Diſcovery, whether the Party accuſed is really guilty of the Crimes he is charged with, or no; and if a Man diſcovers himſelf to be guilty of what he is indicted, he is forced to be his own Executioner; but if his own Confeſſion proves nothing againſt him, he is immediately acquitted. But it ſhould be carefully obſerv'd, that generally in all Laws the diſpoſitive part, or that which contains the matter of the Law, and the comminatory, or that which comprehends the penal Sanction, are expreſs'd by two diſtinct forms of Words; as thus, *You ſhall not do this*; and, *He that does ſo, ſhall ſuffer the Penalty.* In ſome Law the latter part ſeems to be no more than the Condition of the forgoing Prohibition, thus, *You ſhall not do ſo and ſo, except you pay ſo much by way of Mulct.* And in Laws of this nature, that which looks like a penal Sanction, is in reality no more than a Tax since it is left to the Diſcretion of Subjects, whether they will pay the Money the Law demands, or forbear ſuch a particular Act. And this is generally the method obſerv'd in ſumptuary Laws; the deſign of which is commonly alternative, either to induce the Subject to a frugal way of Life, or to enrich the publick Treaſury, For to allow of any price for Privilege, or exemption from the Law of Nature is abſolutely unlawful. But the common deſign of other Laws is only to diſpoſe Men to Obedience by the fear of Puniſhment. And therefore that Perſon knew nothing of the true nature of Puniſhment, who when he had ask'd the Magiſtrate what was the Fine for ſtriking a blow on the Face, threw down the Money, and ſtruck the Magiſtrate himſelf. For the Laws were made to redreſs Injuries, not to allow of Diſpenſations to commit them upon the Payment of a Sum of Money. And therefore it is evident, that thoſe Laws only, where the prohibition is alternative or conditional, excuſe a Man from the Offence who has paid his Mulct, or is in a readineſs to pay it; which he is likewiſe obliged to do upon Demand; but not in other Laws, where the Interdict laid is abſolute. But it muſt be confeſs'd, that there ought to be no ſuch Laws as the purely penal, or ſuch as propoſe no other End, but to make Advantage by the Fine. Some indeed call ſuch a Law purely penal, which barely annexes a Penalty to a plain Command, and neither expreſly commands or forbids any thing; and this is given for an Inſtance, *A Perſon elected Mayor of a Town, refuſing the Office, ſhall le fined an hundred pounds to the Publick.* But in my Opinion, this and all other Statutes of the like nature, imply ſome ſuch Precept as this: *No Man, when he is lawfully elected, ſhall refuſe to aſſiſt the Commonwealth*; ſo that, that before ſeems to be a penal Clauſe annex'd to this [a].

V. But further, ſince we look upon a Judge to be juſt, when he inflicts Puniſhments agreeably to the demerit of the Offender; and ſince Juſtice is ſaid to be adminiſtred, whenever the Penalties are duly allotted; it has from hence been diſputed among Philoſophers, what Branch of Juſtice the Impoſition of Puniſhments belongs to; whether to the commutative or diſtributive; or as *Grotius* [b] changes the Terms, to the expletive or attributive. They that refer the Infliction of Puniſhments to diſtributive Juſtice, give us theſe Reaſons for it, that in the Diſtribution of Puniſhments, as well as Goods, there is a proportionable regard had to the greater or leſs deſert of the Perſons. And ſince, according to their Opinion, diſtributive Juſtice is concern'd in all thoſe Things, which the whole applies to the Parts, or the Commonwealth to particular Subjects; it is evident that the Commonwealth inflicts the Puniſhments on particular Subjects. But it may be replied, That it is a Miſtake to ſuppoſe that diſtributive Juſtice takes place, as often as there is an Equality to be made between more than two Terms [c], or whenever any thing is to be divided proportionably between more than One. For in Partnerſhip, the Dividends of the Profit are ſhared among every one of the Members, according to their different Proportions; and yet in this Contract, the Dividend of the Profit becomes due a quite different way from that of Rewards and Puniſhments. For I think it is manifeſt, that Puniſhments are not conſequent upon force of Compact, and that no Man, when he ſubmits himſelf to Government, makes any particular Agreement to be puniſhed for the Crimes he may commit [1]. And therefore the Impoſition of Puniſhments does not any way agree with the Deſcription of diſtributive Juſtice which I gave before. But farther; it is only by Conſequence, and purely accidental, that greater Criminals are puniſhed with greater Rigour, and leſs, with proportionable Severity, not that it was primarily and in it ſelf intended. For there is no neceſſity that in awarding Puniſhment to any particular Crime, the Magiſtrate ſhould make a Compariſon between that Offence and ſome other, and ſo proportion the meaſure of the Puniſhment for both, according to their different degrees of Malignity: But every Crime has, as it were, a ſeparate Puniſhment allotted to it with more or leſs Severity, as the publick Benefit requires it; tho' it uſually happens, that the Puniſhment is

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“ the Torture without confeſſing, they will do nothing to him, how great ſoever their Preſumptions againſt him may be; the deſire of avoiding the Puniſhment he deſerves, makes him often reſolve to ſuffer that ſevere Tryal, to ſee if he can bear it, and thus it renders him more obſtinate and harden'd.” There are ſeveral Inſtances of *Jews*, that have eluded the *Spaniſh* Inquiſition, by maintaining in the midſt of their Torments, that they were *Chriſtians* in reality. *Bibliot. Univerſ.* Tom. xvii. pag. 484. See the Example of *Iſaac Orobio* mention'd in the vii. Tom. of the ſame Journal, pag. 289, *&c.* and the *Dict. Hiſtor. & Critique* of Mr. BAYLE, Tom. ii. pag. 1399. 2 Edit. as alſo a curious Diſſertation written by Mr. THOMASIUS, *de Tortura ex foris Chriſtianorum proſcribenda.* Printed at *Hall* in 1705.

Mr. BARB. *NOTES on* § V.

[1] This is true: But, ſince upon a Sovereign, the Right of Life and Death, or, the Right of the Sword is conferr'd: His Subjects are obliged not to reſiſt him, tho' he makes Uſe of it upon their own Perſons.

[a] *Vide* Sanderſon *de Obligat. Conſcient.* Prælect. 7. ſ. 13. *ſeqq.*

[b] See above in B. 1. c. 7. ſ. 11.

[c] See *Grot.* B. 2. c. 20. ſ. 2.

either increas'd, or alleviated, according to the different degrees of the Tranſgreſſion.

Some Perſons that reduce Puniſhment under commutative Juſtice, conſider it, as if Puniſhment were ſomething aſſign'd to the Delinquent in the ſame manner as is uſual in Contracts. A Miſtake they were led into upon a common Expreſſion, *that Puniſhment is the due of every Offender*; which is manifeſtly an improper way of ſpeaking. For a Man that has any thing due to him, has a right over the Debtor to oblige him to the Payment of it. But I think there will be no body ſo abſurd as to ſay, that the Delinquent has a right to challenge his Puniſhment of the Magiſtrate. And therefore the meaning of that Saying is only this, that the Magiſtrate may juſtly puniſh a Criminal as the Law directs. *Grotius*, l. ii. c. 20. § 2. ſays, "That the Diſtribution of Puniſhments does originally and principally belong to expletive Juſtice, for this reaſon; becauſe no body can puniſh another lawfully, unleſs he has a right to do it; which right ariſeth from the other's Crime." But he was impos'd upon by the doubtful meaning of the Word *Right*. For there is a very wide difference between a right to do a thing, and a right to receive ſomething from another. The meaning of the former right is this, I have a Power to exerciſe this particular Act, and no body ought to hinder me in it; the ſenſe of the latter is this, I have a right to receive ſomething from another, and he at the ſame time is under an Obligation to let me have it. Now when the Diſcourſe relates to expletive Juſtice, the Word *Right* is not to be taken in the former Signification, but in the latter. And this right is fix'd in him that receives the Thing, and not in him that beſtows it; as for inſtance, when I pay my Servant his Wages, I am engaged in an Act of expletive Juſtice; not becauſe I have a right to pay him his Wages, but becauſe he has a right to demand it of me. Thus, I may ſafely ſay I have a right to command my Servant to take off my Shoes; but certainly 'twould be ſtrangely impertinent to infer from thence, that therefore to command him that Service was an Act of Juſtice. And it is an Argument much of the ſame nature, to ſay, that becauſe Puniſhment cannot lawfully be inflicted but by a Perſon that has authority to do it, therefore puniſhing is a branch of expletive Juſtice. Another Argument produced by *Grotius*, is this, "That in Crimes and Penalties there is ſomething that much reſembles the nature of Contracts; for as the Seller of any Commodity is ſuppoſed to have obliged himſelf to every thing natural to the Sale, tho' he mention nothing particularly; ſo every Delinquent ſeems voluntarily to oblige himſelf to be puniſhed; for every Man's Reaſon tells him, that it is abſolutely neceſſary that every great Crime ſhould be puniſhable; and therefore a Man that chooſes to trangreſs, directly and deliberately, may by conſequence be ſaid to conſent to be puniſhed: And therefore in Scripture we find that Sin is frequently call'd by the name of a Debt, which we are as much obliged to diſcharge, as they that are under Bond to their Creditors [2]. To which I anſwer, That thus much is certain, that if a Man knows the Penalty the Law appoints for ſuch a particular Crime, and yet is wilfully guilty of it, he can have no reaſon to complain of unjuſt uſage, or to think himſelf hardly dealt with, when he is brought to Puniſhment. But it cannot from hence be inferr'd, that a Man gives a direct and immediate conſent to his own Puniſhment; or rather, that he has obliged himſelf by his own conſent to ſuffer it; ſince no Man is ever guilty of a Crime, but he has ſome hopes, either by concealing himſelf, or ſome way or other to ſecure himſelf from Juſtice [3]. *Vaſquius* indeed [a] attempts to prove, that Criminals are obliged by their own conſent to ſuffer Puniſhment, becauſe the penal Laws, as well as others, are made by the conſent of the Subject; or at fartheſt, becauſe the legiſlative Power is derived originally from the conſent and agreement of the People. But I think there is little or no force in the Argument: For as I have proved elſewhere, Laws are not Compacts or Agreements. And I think there is no abſurdity in the thing, that I ſhould give my conſent to the Eſtabliſhment of a Power, which may perhaps afterwards exerciſe certain Acts upon me, whether I will my ſelf, or no. Only, I can pretend no reaſon of Complaint, if I do afterwards feel its ſeverity, becauſe I conſented to ſuch a Power. But Sin is compared to a Debt, not becauſe a Man is oblig'd to conſent to his own Puniſhment, but becauſe the Legiſlator has the ſame right to challenge the Penalty of the Delinquent, as a Creditor has to demand the Money lent to the Debtor; and becauſe the Body and Goods of the Offender are no leſs liable to the Magiſtrate on a criminal Account, than the Goods of the Debtor are to the Creditor in caſes of Debt. In the Elements of the *Roman* Law, [b] Obligations are divided into ſuch as ariſe from conſent, and ſuch as are the reſult of Tranſgreſſion; but it ſhould be obſerv'd, that from Tranſgreſſion there ariſes an Obligation, only to make Satisfaction for the harm that is done, but not to ſuffer the Puniſhment: And that Obligation it ſelf is not properly founded upon a Man's conſent to the Penalty; but upon that neceſſity of Reſtitution, which, upon a Settlement of Property, evidently flows from the Law of Nature. Thus *Ariſtotle* diſtinguiſhes Contracts into the voluntary, and the involuntary [c]. But his meaning may be thus explain'd; that as in Contracts of Duty there is a return made of equal for equal, ſo in criminal Caſes, the Satisfaction ought to be an Equivalent to the Damage. But the reaſon why he calls the Obligation to make Satisfaction, an involuntary Contract, is becauſe, for Example, in caſes of Debt, it depends upon the Creditor's pleaſure whether the Debtor ſhall receive the Money, or no: But, for Example, the Obligation a Thief is under, to reſtore me what he has robb'd me of, or the value of it, bears no manner of relation to any conſent of mine, but he brings it upon himſelf much againſt my Will. For 'tis certain, I had rather he ſhould have left me in quiet Poſſeſſion of what was my own, than have given me the trouble of bringing an Action of Theft againſt him, eſpecially where there is no hope of recovering more than barely the principal by it. But it may be further conſidered, that generally every Right has an Obligation that anſwers it in another Perſon. And therefore upon Commiſſion of the criminal Action, the Party that is injured has a right to demand reparation for his Loſs, or the harm he has ſuffered; and the injurious is under Obligation to make him Satisfaction; and this is the matter which expletive Juſtice relates to. But as the criminial Action is a deviation from the Law; the Governors of the Commonwealth have power to puniſh as they think neceſſary; but the Delinquent is under no Obligation to offer himſelf voluntarily to be puniſhed. For which reaſon the Infliction of Puniſhments cannot fall under expletive Juſtice. So that it may be ſaid, upon the whole, that Puniſhment does not belong to either Species of Juſtice, but makes a particular branch it ſelf. Unleſs it may be thought more proper to ſay, that both the impoſition of Puniſhments and the diſtribution of Rewards, which have not been determined beforehand by particular Compact, are parts of Prudence neceſſarily belonging to the Government of others, and therefore ſhould be rank'd under Juſtice in general.

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[2] V. L. 49. t. 14. l. 34. D. de *Jure Fiſci*. L. 9. t. 8. l. ult. C. ad L. *Juliam Majeſtatis*. In *Tacitus*, Ann. 12. c. 53. The Woman that married another Man's Slave without the Knowledge of his Maſter, is ſaid to have conſented to her own Slavery.

[3] THUCYDIDES, l. 3. c. 45. Edit. *Oxon.* init. There are ſeveral Crimes which the Commonwealth hath forbid under pain of capital Puniſhment; and yet Men have Hopes ſtrong enough to perſuade them to venture and run that riſque; and there is no Man that will undertake an hazardous Enterprize, when he deſpairs of the Succeſs of his Plot. And we never heard that one State revolted from another, which did not imagine it ſelf ſtronger and better prepar'd for War.

[a] *Vaſq.* Controv. Illuſtr. *l.* 1. *c.* 28. *n.* 12, 13. [b] *Inſtitut.* L. 3. t. 4. *De Obligat.* ſ. 2. [c] See above in *B.* 1. *c.* 7. *ſ.* 12.

VI. It will therefore, I think, be allowed by every Man that pretends to Reaſon, that tho' by Nature all Men are upon the level, and Puniſhment it ſelf ſeems to be a ſevere and rigid ſort of Diſcipline, while Men endeavour only to afflict and ruin one another; and tho' the wiſe Creator of the World hath ſo diſpoſed the nature of Man, and the events of Things, that ill Actions are generally purſued by ill Conſequences, which in a manner revenge themſelves upon the Cauſes of them: yet that poſitive human Puniſhment, after all, hath nothing in it repugnant to natural Equity; but that, on the contrary, it is abſolutely neceſſary to the common Quiet and Security of Mankind. For as it was requiſite to the publick Peace of the World, to put an end to the equality of Nature, by erecting civil Governments; ſo in the general Looſneſs and Corruption of Manners, and natural Averſion to Virtue, the force of Government would ſoon be diſſolved, if bad Men were not confin'd, and frighten'd into obedience, by the dread of ſome preſent Evil. And ſince every Man is beforehand told publickly what he ought to do, and what forbear doing, and what Puniſhments will be inflicted on ſuch as act otherwiſe, no Man can blame any body but himſelf, if, by a wilful Tranſgreſſion of the Laws, he falls under the Severity of the Puniſhment.

VII. As to the Perſons the right of puniſhing is to be lodg'd in, and exerciſed upon, 'tis *Grotius*'s Opinion, *l.* ii. *c.* 20. § 3. "That Nature has not "given any Determination upon it. So far indeed, "ſays he, we may diſcover from Nature, that 'tis "moſt convenient, ſome Superior ſhould be im"power'd with it; tho' that is not abſolutely neceſ"ſary neither; unleſs we take the Word *Superior* in "ſuch a ſenſe as will imply, that a Man which is "guilty of a criminal Action, ſhall be thought to "have made himſelf inferior to all the reſt of Man"kind by that very Act. The conſequence of "which is, that no Man ought to be puniſh'd by "one equally guilty with himſelf [a]. But I confeſs I cannot be perſuaded but that the power of Puniſhing is a part of Sovereignty, and conſequently that no body can properly be ſaid to inflict Puniſhment upon a Man, unleſs he has [b] Authority over him. For tho' upon a view of the ill Diſpoſitions of Men, and how eaſily they are inclin'd to injure and moleſt one another, we find it abſolutely neceſſary to the Preſervation of Society in the World, that Puniſhments ſhould be inflicted; and tho' every Man ought to direct his Actions to the ſupport of Society, as the general good of all Mankind; yet it does not follow that every Man is obliged to undertake every Action that tends to advance that end; ſince that would be to no purpoſe, without a concurrence of certain other particular Requiſites. Thus, it is neceſſary Men ſhould be under ſome ſort of Government or other; tho' no body imagines, that it is left at random for any Man to aſſume a Right or Power over others as he pleaſes. Now then, every Evil which is inflicted upon antecedent Tranſgreſſion, cannot properly be call'd Puniſhment, but that which was threatned before, and is inflicted after the Crime is known. And therefore the Evils of War, and all Acts of Hoſtility, muſt not be call'd Puniſhments, tho' tis true that we procure Caution againſt future Injuries by them; for in a State of War, every Man provides Caution for himſelf by his own force, and in what manner he pleaſes; but the Caution an injured Perſon receives from Puniſhments muſt be procured by the power, and according to the determination of the Superior; in War the injured Party only is directly concern'd to puniſh and ſuppreſs his Enemy: but in civil Government the whole Commonwealth is as much concern'd, as the Party that is injured, to puniſh a Criminal. Again, 'tis left to the Diſcretion of the injured only, whether he will revenge himſelf upon his Enemy, with a War or not; but 'tis left entirely to the Superior, whether Puniſhment ſhall be put in Execution, or not; nay, he has Power to inflict it, tho' the injured Party deſire the contrary. And laſtly, the quantity of the Puniſhment is generally determined, before the Fact is committed; but in War the Caution muſt be ſettled according to the Circumſtances of my own, or my Enemy's Condition. But beſides, tho' Nature has not determined, whether I, or any other particular private Man ought to have the right of inflicting Puniſhments, any more than it has deſign'd us to be Princes; yet I think it is ſufficiently clear from Reaſon, that Puniſhment, as it is the Execution of a judiciary Sentence, ought to be derived from ſome Superior, or from a Perſon who has Authority over the Criminal. Neither is there any reaſon why we ſhould be ſo nice in the Explication of the Word *Superior*; for 'tis abſolutely falſe, that every Sin leaves ſuch a blot upon a Man's Honour and Character, that he muſt preſently be thought no better than a Beaſt. Neither is it good reaſoning to infer, that becauſe ſuch a Man is guilty of ſuch a Crime, therefore I have power to puniſh him. For if I ſuffer by the criminal Action, in a liberty of Nature, I may demand Satisfaction of him for the Injury, and Caution for the future in a way of War: If the Action does not affect me, but ſome other Perſon whom I am not particularly obliged to defend, I can have no more pretence to engage my ſelf in his Cauſe, than I have to preſcribe Laws to thoſe that owe me no Subjection. *Ex.* ii. 14. It was a Saying of *Democritus*, That *it was moſt agreeable to Nature, that the moſt deſerving Perſon ſhould govern*; which is perhaps true enough in this ſenſe, that where the Government is to be conferr'd upon a ſingle Perſon elected by a plurality of Voices, and no one Man has any particular claim of Right to it more than another, it would be the moſt rational way of proceeding, to make choice of a Perſon of the greateſt Merits, and that ſeemed to be beſt acquainted with the Arts of Government. But ſuch a Perſon can pretend to no Authority over others, except they voluntarily ſubmit to him. As for what *Grotius* ſays, That *a Criminal ought not to be puniſhed by a Perſon as guilty as himſelf*; this does not properly concern them that have publick Authority to puniſh, but only affects ſuch People as love to cenſure and impeach others, barely upon their own private Authority, and out of a pretended hatred to Vice, without Warrant from any Obligations they are under by the Duties of their Office and Place. Tho' without diſpute it is very unbecoming, and muſt neceſſarily leſſen the reſpect that is due to the Magiſtrate and the Laws, when the Perſon that adminiſters Juſtice, is guilty of the ſame Vices he puniſhes in others, for a Man that puniſhes that in others, which he allows himſelf to be guilty of, does not ſeem to be out of love with the Crime, but to envy others the enjoyment of it [a]. Yet I don't think it had been unlawful for *Nero* himſelf, after he had kill'd his Mother, to have put others to death that had been guilty of the like Crime [b]. And in this, *Hobbes* is of the ſame Opinion, *Leviath.* Chap. xxviii. that Puniſhment is derived from the Superior as ſuch. The Definition indeed, which he gives of Puniſhment is hardly ſo full as it ought to be, containing only thoſe Puniſhments that are inflicted by the civil Power, and making mention but of one End only. *Puniſhment*, ſays he, *is an Evil inflicted by publick Authority on him that has done or omitted that which is judg'd by the ſame Authority to be a Tranſgreſſion of the Law, to the end that the Will of Man may thereby be the better diſpoſed to Obedience.* But he rightly infers from thence; that neither *private Revenges*, nor *Injuries of private Men*, nor *Pains inflicted by publick Authority without precedent publick Condemnation*; nor *Evil inflicted by uſurped Power*, nor *Harms inflicted on the Subject without regard to future good, are properly Puniſhments, but rather acts of Hoſtility.* But it muſt be obſerv'd, that ſuch falſe Puniſhments as theſe do not immediately place us in a State of War, or give us Licence to make uſe of the Liberties of an Enemy, or that a Man who has ſuffered ſuch Evils is left to his Freedom to return Hoſtilities upon thoſe that inflicted them. The ſame Author alſo excludes thoſe Evils from being Puniſhments, which are the natural Conſequences of evil Actions; as when *a Man in aſſaulting another*, *is himſelf ſlain or wounded*, or when *he happens to fall ſick upon the Commiſſion of ſome unlawful Act*; *tho' this indeed will look like a Puniſhment from God.* Again, he ſays, that when *the harm inflicted is leſs than the benefit that naturally follows the Crime committed, it is rather the Price or Redemption, than the Puniſhment of a Crime.* And among his Acts of Hoſtility, he mentions the exceſs of Puniſhment; or when *a greater Puniſhment is inflicted than the Law allows of*; and when *hurt is inflicted for a fact done before any Law forbad it*; and when *any Evil is inflicted on the Sovereign*; and when *Harm is inflicted upon a declared Enemy.* But what he adds to this afterwards; that *one who has been a Subject, and declares himſelf an Enemy, is not to ſuffer as a Subject, but an Enemy, and therefore that ſuch as are guilty of Treaſon, may be made to ſuffer whatſoever the Repreſentative of the Commonwealth will, or as Enemies.* I cannot agree with him; becauſe whatever Puniſhment is inflicted upon Treaſon, is inflicted upon the Force of Authority, and proceeds from the ſupreme Power, tho' the Traitor himſelf may rebel and deny his Authority, and ſometimes put the Commonwealth to a Neceſſity of Suppreſſing him by Arms, before he can be proceeded againſt as a Criminal; as when a Man is in purſuit of his Slave who is run away, he does it by a right of Property, and not of War. I may further add, that the Evils an Enemy ſuffers, are none of them thought to be infamous, whereas the Infamy of it is a particular addition to the Puniſhment of Traitors.

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[a] See *John* Ch. viii. v. 7. *Rom.* ii. 22.

[b] See what has been ſaid in Note 2. Sect. 4. All the Reaſons our Author alledges, prove nothing, unleſs we allow of his Definition of the Word *Puniſhment*.

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[a] Vide *Plin.* L. 8. Epiſt. 22. *Plato Minoe.* He is a wicked Man that does one thing himſelf, and commands another. Add. *Gratian*, Cauſ. 3. Queſt. 7. c. 3, 4. *ſeqq.*

[b] But yet not for *Domitian* to puniſh Women convicted of Adultery, when he Himſelf had debauch'd them. *Zonaras*, Tom. 3. To this we may refer that which *Medea* ſaith in *Seneca*'s Trag. *v.* 500, *&c.*

He did the Crime, that hath th' Advantage of it,
He's Innocent to You, who only was
Your Inſtrument.

And certainly all voluntary Informers and Cenſurers of others, ought to take care how they fall under the reach of what *Juvenal* ſaith, *Sat.* 2. v. 23, *&c.*

Loripedem rectus derideat, Æthiopem albus.
Quis tulerit Gracchos de ſeditione querentes?
Quis cælum terris non miſceat, & mare cælo,
Si fur diſpliceat Verri, aut homicida Miloni,
Clodius accuſet mæchos, Catilina Cethegum,
In tabulam Syllæ ſi dicant diſcipuli tres?

Let him cry Blackmoor-Devil, whoſe Skin is White,
And Bandy-legs, who treads himſelf upright;
Let him reprove that's Innocent. ------ In vain
The *Gracchi* of Sedition muſt complain.
'Twould make you ſwear the Planets from their Spheres,
Should *Verres* peach Thieves, *Milo* Murtherers,
Clodius tax Bawds, *Cethegus Catiline*;
Or, *Sylla*'s Pupils *Sylla*'s Rules decline.

And again the ſame Satyr, *v.* 38.

-------*Felicia tempora; quæ te*
Moribus opponunt; habeat jam Roma pudorem.
Tertius é cælo cecidit Cato.

--------Bleſt times!
That made thee Cenſor of the Age's Crimes!
Rome now muſt needs reform, and Vice be ſtopt,
Since a third *Cato* from the Clouds is dropt.

Mr. Tate.

Seneca, Controv. *l.* 2. *contr.* 14. There is nothing more deſpicable than a Man that chaſtizes Vice, and yet imitates it. *Cic.* Tuſc. Quæſt. *l.* 3. *c.* 30. It is the particular Character of Folly, that it diſcovers another's Faults, and forgets its own. *Plaut.* Trucul. *Act.* 1. *Scen.* 2. *v.* 58. He that accuſeth another of a diſhoneſt Action, ought to be cautious himſelf. *Ovid.* Faſt. *l.* 6. *v.* 647.

Sic agitur Cenſura, & ſic exempla parantur,
Cum Judex, alios quod monet, ipſe facit.

Unenvied he a brave Example ſtands,
Who by his Deeds confirms what he commands.

VIII. The next Thing that falls under Conſideration, is the End [a] of Puniſhment, which every Man ought to propoſe to himſelf in inflicting it, after Satisfaction made for the Damage, or when the Nature of the Caſe will not admit of Satisfaction. And here my firſt Aſſertion is, that though it does not appear to be unjuſt in it ſelf, that the Man that did Evil ſhould ſuffer Evil, [b] yet that Puniſhment ought never to be inflicted without a proſpect of making ſome advantage from it. And therefore *Hobbes* makes this one of his Laws of Nature, *de Civ.* c. iii. ſ. 11. *That in Revenges or Puniſhments, Men ought not to look at the greatneſs of the Evil paſt, but the greatneſs of the Good to follow; whereby we are forbidden to inflict Puniſhment with any other deſign than for the Correction of the Offender, or the Admonition of others.* And 'tis *Plato*'s Judgment [c], *That a Man that acts with Prudence, will never puniſh barely for the paſt Offence; for it is impoſſible for him to undo what is done already; but he will always regard what is to come, either to prevent the ſame Offender from being guilty a ſecond time, or elſe to frighten others from tranſgreſſing by his Example* [d]. It is indeed abſolutely neceſſary, that ſome regard ſhould be had to the Crime committed, becauſe, without that, 'tis evident there can be no Puniſhment; but then the end of Puniſhment ought alſo to be conſidered, that a Man may not ſuffer Evil for what is too late for him to remedy; for tho' he be a Criminal, yet he is of the ſame Fleſh and Blood with other Men. And *Hobbes* proves this Law by theſe two Reaſons; firſt, *Becauſe a Man is obliged by the Law of Nature upon Caution for the future, to pardon them that repenting deſire it;* and ſecondly, *Becauſe Revenge, as it reſpects only the paſt, without regard to the Example and Profit to come, is only a triumph and glorying in the Hurt of another, tending to no End, and is therefore vain and contrary to Reaſon.* It might perhaps be a Saying proper for an *Attila* [e], that *he knew nothing ſweeter than Revenge, and thought no Satisfaction in nature greater:* But a Judge when he is forced to puniſh, ought by no means to take pleaſure in the Sufferings of the Criminal [f].

Qui fruitur pœnâ ferus eſt, legumque videtur
Vindictam præſtare ſibi; diis proximus ille eſt,
Quem ratio, non ira movet: qui facta rependens
Conſilio punire poteſt.---

'Tis cruel Pleaſure to enjoy the Pain
Our Sentence dooms the guilty to ſuſtain;
Juſtice forgets her firſt and great intent,
When to Revenge ſhe turns the Puniſhment.
But 'tis a Godlike happineſs of Mind,
Freely to judge, with Paſſion unconfin'd;
To reaſon calmly, and as things appear
In their true light, be gentle, or ſevere.

And therefore *Auguſtus* ſtruck out the Names of ſuch Criminals, that by their meanneſs could afford their Enemies no other Satisfaction, than that of Revenge [g]. And thus, *when the Magiſtrate puniſhes a Criminal with Death or Ignominy, it is not becauſe he takes any delight in their Puniſhment, but becauſe he intends ſuch Examples for publick Inſtruction, and that the Commonwealth may make ſome advantage by their Death, that did it no Benefit in their Lives* [h]. But I am not ſo far of *Hobbes*'s Opinion, as to call it an Act of Hoſtility, whenever the Government puniſhes without conſidering the true end of Puniſhment; ſo the Puniſhment in other reſpects be inflicted according to the Laws of the Commonwealth [i].

IX. But the true and genuine end of Puniſhment is precaution againſt Injuries; which is obtained, either by the amendment of the Offender, or by deterring others by his Example from offending for the future; or by inflicting ſuch Puniſhment on the Party peccant, as ſhall deprive him of a Capacity of tranſgreſſing any more; which *Grotius*, in other words, in the Second Book, *Ch.* 20. *Sect.* 6. expreſſes thus, *Puniſhment either reſpects the Perſon's good that offended, or his, whoſe Intereſt it was he ſhould not have offended: or indifferently, the good of every one* [k]. The firſt ſort of Puniſhment is that which deſigns the amendment of the Offender, or to correct his bad Inclinations by a contrary Method of Cure. For ſince every Action, and eſpecially one which is deliberate and repeated, is apt to biaſs our deſires, to give us a hankering after it, and to grow into what we call an habit; it will be neceſſary to deprive Vice, as ſoon as we can, of all that looks tempting in it [l]. *And therefore,* as *Socrates* ſaid, *of all Delinquents he is certainly the moſt unfortunate, who never ſuffered for his Crimes, and he's ſure to be leſs unhappy, whenever he does; ſince then he ſatisfies the Juſtice of God and Man; for he that ſuffers diſchargeth the guilt of his Conſcience* [m]. *Correction,* as *Seneca* ſays, *well deſign'd, and uſed with Judgment, is ſometimes abſolutely neceſſary; there being no ſuch hurt in it as is commonly imagn'd; for under an appearing Evil it carries with it a very ſucceſsful Remedy. For a vicious Diſpoſition is reform'd by Pain and Uneaſineſs inflicted on the Body, after the ſame manner, as it is uſual*

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[a] See *Grot.* B. 2. c. 20. Vid. *Bacon.* Serm. fid. *c.* 4.

[b] *Pindar.* Nem. Od. 4. v. 52.

Ῥέζοντά τι καὶ παθεῖν ἔοικε.

He that doth Ill, 'tis juſt ſhould ſuffer.
When you have had the guilty Confidence
To do a Crime, learn to ſubmit and bear
The Puniſhment. *Euripid.* Hecub. *v.* 1250, *&c.*

[c] *Plato* Protag. p. 226. A. B. Edit. *Wech.*

[d] *Seneca* de Irâ, l. 1. c. 16. ſpeaks to the ſame Senſe.

[e] *Jornandus* de Rebus Geticis, *c.* 39.

[f] *Claud.* de Conſ. Mallii, v. 223, &c. *Valer. Max.* l. 2. c. 9. ſ. 3. *Vulcat. Gallicanus* in Avid. Caſſ. *c.* 12. It never looks well for a Prince to be guilty of Revenge, purely to ſatisfy his own Reſentments.

[g] *Suetonius* Aug. *c.* 32.

[h] *Senec.* de Ir[illegible] *l.* 1. *c.* 16.

[i] Leviath. *c.* 28. Add. L. 18. t. 7. *in fin.* l. 7. L. *de ſervis exportandis.*

[k] Conf. *Senec.* de Clem. *l.* 1. *c.* 22.

[l] *Plato,* Gorgias, 325, &c.

[m] *Seneca* de Irâ, *l.* 1. *c.* 5.

to bring crooked Timber to ſtraitneſs, by plying it over Fire, or by opening its parts for uſe, by the Wedge and Sawe. Though we need not go ſo far, as to agree to what the ſame Author ſaith in another place; *That when either by our Selves, or by Friends, we have injured another Perſon, it is our duty immediately to apply our ſelves to the Magiſtrate to be puniſh'd, as we would to a Phyſician; leſt the injurious Diſtemper ſhould ſo far infect us, as to ſettle in an incurable Diſeaſe:* For a Man that is of ſo good a Diſpoſition, as to be in a readineſs to deliver himſelf up to Juſtice to puniſh his own Faults, has no need of making the Magiſtrate his Phyſician, but may be ſafely truſted with his own Cure [1].

X. As to the Perſon who is to inflict this ſort of Diſcipline, *Grotius* thinks [a], "That 'tis naturally free for any Man to exerciſe that ſort of Puniſhment, which deſigneth only the Reformation of the Offender; provided he be Maſter of a good Judgment, and not guilty of the ſame Faults, or others of the like nature himſelf." (*For they are certainly the moſt unpardonable Criminals, who have the Impudence to impeach others of Crimes they are guilty of themſelves; and if a Man would reform others, he muſt firſt mend himſelf* [1]. "But that as to other ſorts of Puniſhments which are of a compulſive nature, ſuch as Whipping, Beating, and the like; Nature hath made no Diſtinction between the Perſons that may, and thoſe that may not, inflict them upon others; except it be, that Reaſon hath particularly allow'd Parents the uſe of this right over their Children, upon the force of natural Relation. And therefore generally the civil Laws, to prevent Confuſion and Diſturbances, have juſtly reſtrain'd the common Affinity of Mankind, only to the nearer branches of Blood." But there does not ſeem to be much Satisfaction in this; for, as I ſaid before, no Puniſhment, whatever the end of it be, can be inflicted, but by the Authority of the Sovereign: And therefore all Reproof by Words looks rather like Counſel and Advice, than Puniſhment; which when vehemently delivered and preſſed in harſh Language, ſeems to be founded rather upon the particular Laws of Friendſhip [b], than upon any common right. And the truth of this appears from the common return that is made to any Man, who undertakes to reprove a Perſon he has no acquaintance with (as *Terence* [c] repreſents it) *Have you ſo little Buſineſs of your own, as to intrude into another's, and meddle with what doth not concern you?* And therefore *Chremes*, in that Author, when he juſtifies his reprimanding *Menedemus*, appeals to the right of a Neighbour, which, he ſaid, he thought *might claim the next title to Friendſhip* [2]. But beſides, 'tis a very neceſſary part of Prudence, to know how to apply our Reproof; for an unſeaſonable miſtake of this nature may be of very ill conſequence to a Man's ſelf, and harden the Perſon he intended to reform in the vicious courſe he was in before. Parents [d] indeed have a right to correct their Children upon a double Account; both becauſe the Methods of Education, which Nature obliges them to beſtow upon their Children, would be to no purpoſe, if they had not the Liberty, as they ſee occaſion, to uſe them with a little Sharpneſs and Severity; and becauſe, out of civil Government, they would have an abſolute Sovereignty over them. And though in many Commonwealths this Power is reduced to a very little compaſs, yet they have ſo much almoſt every where left them, as giveth them leave to correct their Children at Diſcretion, for thoſe petty Misbehaviours, which are the Effects rather of the levity and imprudence of Youth, than of any inveterate ſettled ill habits of the Mind; and which more diſturb domeſtick Quiet, than the publick Peace. And 'tis as neceſſary, that ſuch as in the Parents ſtead have the care of educating young People committed to them, as Tutors, Governors, and Maſters [e], ſhould be allowed the ſame Power; becauſe they can never diſcharge their Duties as they ſhould, without the moderate uſe of gentle Diſcipline [3].

Mr. BARB. *NOTE on* § IX.

[1] *Apuleius* de Dogm. *Plat.* p. 615. Edit. *in uſum Delph.* There is more diſquiet and uneaſineſs in the Impunity a Delinquent enjoys, than there is in the moſt ſevere Puniſhment. *Plato* de LL. *l.* 9. in the beginning. No Puniſhment appointed by Law is intended for an Evil, but only to effect one of theſe two Things, either to make the Offender better, or at leaſt not ſo bad as he was. *Ariſtot.* Eth. ad *Nicom.* l. 2. c. 2. p. 20. Ed. *Pariſ.* Puniſhment is a ſort of Phyſick, and Phyſick commonly works by contraries. *Alcinon.* de Doctrin. *Platon.* c. 32. 'Tis as neceſſary for an Offender to be puniſh'd, as it is for a ſick Man to apply himſelf to the Phyſician: For Correction is a ſort of Remedy for a vicious Mind. *Tacitus*, Ann. iii. c. 54. A debauched, a crazy and violent Temper, muſt be cooled and kept under by Reſtraints as ſtrong as the force of its Luſts. *Plato* in *Critias*, in the beginning. The proper Puniſhment for one that tranſgreſſeth out of Negligence, is that which makes him cautious.

Mr. BARB. *NOTES on* § X.

[1] *Iſocrat.* de Permutatione, p. 539. Edit. *Pariſ.* *Lactantius* Div. Inſt. *l.* 4. *c.* 23. *When* Criſpus *in* Tacitus, *Hiſt l.* 2. *c.* 10. towards the end, *Condemn'd* Fauſtus, *tho' he himſelf had been employ'd and rewarded for bringing in Accuſations of the kind before, 'tis ſaid,* That Puniſhment of the Crime did not grieve *Fauſtus* ſo much, as it did that ſuch a one ſhould inflict it. *Arnobius* adv. *Gentes*, L. 1. It is a great Injuſtice in you, to make that Criminal in us, which you do your ſelves; or to allow your ſelves in the Practice of thoſe things, which you ſtrictly forbid to others.

[2] *Q. Curtius*, l. 3. c. 12. n. 16. ſpeaking of *Hepheſtion*, No one could take that Liberty to reprove the King which he did, which yet he was ſo tender of uſing, that the King ſeem'd rather to allow him in it, than he to aſſume it. *Cic.* Off. l. 1. c. 17. Advice, Perſuaſion, Exhortation, Conſolation, and ſometimes Reproof, are particularly uſed in Friendſhip. *Hom.* Iliad. L. 11. v. 792. Ἀγαθὴ δὲ παραίφασίς ἐστιν ἑταίρου. And to this we may refer that of *Muſonius Rufus* in *Tacitus*, Hiſt. l. 3. c. 81.

[3] SENECA de Irâ, *l.* 2. *c.* 27. The Corrections of Parents and Maſters muſt be look'd upon to be of the ſame nature with Cutting and Abſtinence, and other ſevere Methods of Cure, which do us good when they hurt us. *What Power other Relations have over others in this Caſe, may be ſeen* L. 9. t. 5. C. de Emendatione propinquorum. PLATO de LL. l. 7. p. 893. A. *decrees, that in his Commonwealth,* Since young People are as intractable as the wildeſt of Beaſts, thoſe Children that were Free ſhould be ſubject only to the Correction of thoſe that had the Charge of their Education. But that any Freeman ſhould have the Liberty to chaſtiſe any Slave, whether Boy, Maſter, or Tutor, if he took him in any Fault. *Xenoph.* de Repub. Lacedæmon. *Lycurgus* made a Law, That no Man ſhould command his own, or another Man's Children, to do any thing but what was juſt. And that if a Child ſhould be beaten by another, and complain of it to his Father, it ſhould be thought mean and irreputable, if the Father did not Correct him again. *But what,* Xenophon *ſays,* l. 5. περὶ ἀναβάσ. (That, if I ſtrike any Man for his own good, I own I deſerve to be puniſh'd, but then it muſt be ſo as Parents are puniſh'd by their Children, or Maſters by their Scholars: For thus Phyſicians are allow'd to cut and burn their Patients, when it is in order to their Cure) *was only to excuſe that ſeverity and moroſeneſs of humour that was obſerv'd in him. But what may be lawful for a General or a Commander to do, is not therefore lawful for every one elſe.*

[a] L. 2. c. 20. ſ. 7.

[b] Vid. *Terent.* Heautontimor. Act. 1. Sc. 1. v. 24, &c.

[c] *Ibid.* Act. 1. Sc. 1. v. 23, &c.

[d] V. L. 47. t. 10. l. 7. ſ. 3. *D. de Injuriis.* *Libanius* Declam. 20.

[e] See Mr. *Noodt*'s Treatiſe *ad Legem Aquiliam*, c. 6.

But this ſort of Puniſhment, *Grotius* ſays, *ought never to proceed ſo far as Death*; ſince 'tis very abſurd to hope to reform a Man by throwing him into a Condition, in which 'tis impoſſible for him to expreſs any amendment: though 'tis the Opinion of ſome, that when a Man is grown incorrigibly vicious, 'tis juſt and reaſonable to deprive him of Life; eſpecially ſince ſuch ſort of Perſons are generally very bad Neighbours to others. So *Seneca* ſays, " That Death is the beſt Remedy for an incorrigible Diſpoſition; and that 'tis the ſafeſt way for him to leave the World, who is never like to be Maſter of himſelf in it [4]." And *Plato* ſays, " That a wicked Man had better not live, ſince he is under a Neceſſity of living ill." *Sulpitius Aſper*, in *Tacitus*, gave this Reaſon for his engaging in the Conſpiracy againſt *Nero*, *that it was impoſſible for him to ſtop his Cruelties otherwiſe*; or as *Suetonius* telleth the Story in his Life of *Nero*, *ſome of the Conſpirators charg'd all the guilt of the Plot upon* Nero *himſelf*; *as if they could not have better expreſs'd the reſpect they had for him, than by killing him, after he had diſhonour'd himſelf by ſuch variety of Wickedneſs* [5]. Yet Charity ſhould perſuade us not to be too eaſily prevail'd upon to give any Man over for deſperate. But this ſort of Puniſhment may alſo promote the good of others. For 'tis certainly ſufficient Caution to others, when a Man reforms upon the ſenſe of the ſeverity of his Puniſhment; and when an incorrigible Perſon ſuffers Death, greater Security cannot be given that he will never create freſh Diſturbances. And that none but ſuch incorrigible Perſons ſhould ſuffer Death, may perhaps be well enough admitted, in Crimes of a lower rank, and leſs malignity; but Crimes of a deeper ſtain muſt not be allowed the ſame Privilege. For ſince no Man is to be declared incorrigible, till he hath been frequently guilty of the ſame Fault, it would be but little for the advantage of the Commonwealth, to defer the puniſhment of a Criminal, till he had frequently repeated perhaps the worſt of Villanies.

XI. Another end of Puniſhment is his good, whoſe Intereſt it was the Criminal ſhould not have offended, or who ſuffer'd by the other's Offence; that he may not for the future be in danger of the like injury from him, or any one elſe [a]. And this is to be obtained theſe three ways: *Firſt*, by the Death of the Criminal; or *Secondly*, if he be allowed Life, by depriving him of Power to hurt; as by keeping him in Cuſtody, taking his Arms, and other Inſtruments of Miſchief from him, ſecuring him in ſome diſtant place, and the like: or elſe *Thirdly*, by obliging him to learn, at his own Peril, not to incur further guilt, or offend any more; which falls in with the amendment, I before treated of. But now there can be no effectual way to ſecure the Party injured from ſuffering the like from other Hands, but by ſuch a Puniſhment, as ſhall be publick, conſpicuous, and make the Criminal an Example. And for this reaſon Malefactors are ſeldom executed in Priſon, but in places of common reſort, and with ſuch frightful Solemnity, as may ſtrike Terror into the Multitude. And this is an end ſo natural to Puniſhment, that when, in heat of Paſſion and Revenge, a Man thinks he hath had ſufficient Satisfaction from the Perſon that had abuſed him, 'tis uſual to add, *as you like this, provoke me another time*. But however, the Sovereign only has juſt power to inflict this Puniſhment: Though Legiſlators in ſeveral Commonwealths, in compliance with the fierce and obſtinate Tempers of their People, have made ſeveral Allowances and Indulgences to that ill-natur'd Paſſion, which urges Men to proſecute their own Reſentments, and do themſelves Juſtice. The Revenger of Blood in the divine Law ſeemeth to have been eſtabliſh'd by ſuch an allowance [b]; except we rather think this to have been ſome remainder of the State of Nature. And ſome think they diſcover a Cuſtom like this in *Homer*, in that Paſſage which relates to *Theoclimenus*. Indeed, I think the Law *Euripides* mentions, can hardly be explain'd in any other ſenſe [c], φυγαῖσιδ᾽ ὡσίουν, ἀνταποκτεῖναι δὲ μὴ that is, *they made Satisfaction by Baniſhment, and did not kill one another*; implying that the old Cuſtom of private Revenge was abrogated, to prevent the danger of its going too far; which, in Puniſhments inflicted by the Magiſtrates, there is no fear of. It appears indeed from *Homer*, that it was uſual to buy off the Baniſhment, by paying a pecuniary Mulct to the next of Kin to the Party kill'd [d]. And at this Day, in *Morocco*, 'tis permitted the Kindred of the murther'd Perſon, either to compoſe all difference by an agreement with the Murtherer, or to diſpatch him without formal Proceſs, if publick Juſtice hath not apprehended him before; becauſe it is there taken for a ſettled Rule, that Revenge is no Sin. And *Tacitus*, in his *Account of the Germans*, c. 21. tells us, *That the Father, or the next of Kin, are under a neceſſity of engaging in the quarrel*; *but the difficulty of an Accommodation* (ſaith he) *is not great, for 'tis uſual to expiate a Murder, by a Preſent of a certain number of Sheep, and other Cattle, and then all of the Family will be fully ſatisfied* [1].

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[4] Seneca de Irâ, l. 1. c. 16. in the beginning. You are now grown incurably Wicked, and are perpetually adding one Crime to another; you no longer give your ſelf the trouble to bring Excuſes (which ill Men are ſeldom without) for your Vices, but think the Sin it ſelf reaſon enough for you to ſin on. You have ſuch a Thirſt after Wickedneſs, and have indulged, and pleaſed your ſelf in it ſo long, that it is impoſſible you ſhould quit it, till you take leave of your ſelf. You will one time or other endeavour to lay violent Hands upon your ſelf. Well; we will be your Friends, and remove that Madneſs from you, which ſo diſorders you; and ſince you are ſo deeply engaged in your own and other Mens Puniſhments, will ſhew you all the good that is now left for you, and that is, Death. *Senec.* de Benef. *l.* 7. *c.* 20. *Plato* in *Gorgia*, p. 349. B. *Tacitus* Ann. xv. c. 53.

[5] *Sueton. Nero*, c. 36. *Jamblicus* in Protrept. *c.* 2. As it is ſafer to apply Cauſticks to a Swelling, than leave it to it ſelf; ſo 'tis better for a wicked Man to die than live, *Roſar. Perſic.* c. 1. When a Man is never Innocent but in his Sleep, 'tis better he ſhould die than live, as Plato will have it, *de LL.* l. 9. p. 928. D.

[a] See *Grot.* B. 20. c. 2. ſ. 8.

[b] *Numb.* xxxv. *Deut.* xix. Vide *Selden* de J. N. & G. ſec. Hebr. l. 4. c. 2. *Grotius* upon *Exod.* xxi. 12. Add *Rochefort Deſcr. Antill.* p. 2. c. 19. *Homer.* Odyſſ. ο' v. 276.

[c] *Euripid.* Oreſtes, *v.* 512.

[d] *Homer.* Iliad. 9. v. 628. Vid. *Apoll. Rhod. Argonaut.* l. 1. v. 90.

XII. The third end of Puniſhment is the good of all indifferently; the Severity of the Puniſhment being ſufficient Caution for every Man's Security [1]. The deſign of which ſort of Puniſhment is, either to prevent Malefactors that have done Injuries to ſome, from doing the like to others; an effect to be obtain'd, either by putting them to death, by confining or diſabling them in ſuch manner, as ſhall deprive them of the Power of doing harm [2], or by the rigour of the Puniſhment, overcoming their Inclinations to tranſgreſs: or elſe to better others, that might be encouraged by the impunity of Delinquents, from hurting and diſquieting their Neighbours. And this may be effected by publick Executions, or as they are uſually call'd, publick Examples, at the ſight of which others are to take warning [3]. And the more publick the Puniſhment is, the greater effect it is like to have in reforming others. The *Lacedemonians* had a Cuſtom contrary to the reſt of the World, in puniſhing their Criminals in the Night [a]; thinking perhaps that the darkneſs added ſomething to the Terror of the Puniſhment [b]. And under this end of Puniſhment we may compriſe all thoſe Advantages, which reſult from the Support and Preſervation of the Authority of the civil Government, among all the impudent and violent Invaſions upon the Laws, which ſo frequently diſturb and weaken it. For 'tis the Intereſt of the whole Commonwealth, to be concern'd for the preſervation of the ſupreme Authority; and as long as that continues entire, the moſt profligate Criminals may be kept under reſtraint. But beſides theſe ends of Puniſhment I have here mention'd, I ſee no neceſſity of allowing thoſe other *Selden* mentions *de J. N. & G. l.* 1. *c.* 4. as the *ſatisfactory, purgatorial,* or *expiatory,* or either that the *deviation* from the Law may in ſome meaſure be made up, and the inequality of the Action be corrected. The Arguments he produces from Scripture, ſeem to relate only to divine Juſtice, or the particular Sanctity of the *Jewiſh* Nation.

XIII. As to thoſe Exceptions which *Grotius* [c] adds to this Propoſition, *That the Infliction of all exemplary Puniſhments ought to be lodged in the Government of every State*, it muſt be obſerved, that whatever is inflicted in certain Places, and on certain Perſons, which are not ſubject to any determinate Court of Judicature, as for example, upon Pirates, muſt be reduced under the right of War, which is utterly different from the Power of puniſhing. For Pirates and Freebooters are common Enemies, and every Man may draw his Sword againſt them. 'Tis good Advice indeed which *Grotius* gives afterwards [d], that it would be the moſt proper method for Merchants and Seamen, before they begin their Voyage, to procure Commiſſions for themſelves from publick Authority to take all Pirates, where ever it be their fortune to come up with them, that ſo, when they are obliged to it, they may engage them, not as by their own, but upon the publick Authority. The Law mentioned *Deuteronomy*, Chap. xiii. *v.* 9. doth not give every private Man right to kill the Perſon that would lead him into Idolatry; but only to bring him forth to Juſtice, that upon cognizance of the matter, the People ſhould ſtone him. But yet, admitting that every private Man had Power given him to puniſh one convicted of ſuch a Crime, the eſtabliſhment of ſuch a Power by a previous Law makes the private Perſon an Inſtrument of the Government; and what Actions he undertakes on this account, muſt be look'd upon as commanded by publick Authority [e]. The Action of *Phineas* [f] tho' favour'd by God's particular approbation, is not an Argument to be inſiſted on; for ſuch a Zeal allow'd to any Man indifferently at other times would ſoon confound and diſtract all civil Order, and give Colour and Protection to every one's Raſhneſs and Paſſion [g]. The Power of Life and Death, which in ſome Commonwealths, Maſters of Families have over their Children and Servants, tho' it does not originally flow from the Commonwealth, yet under civil Government we may imagine it to be a branch of publick Authority, which the Sovereign permits Heads of Families to exerciſe over thoſe under their Charge. And there is no reaſon to the contrary,

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Mr. BARB. *NOTE on* § XI.

[1] Vid. *Dionyſ. Halicarnaſſ.* l. 1. p. 68. Edit. *Lipſ.* Leaving *Numitor* to inflict the Puniſhments as he pleas'd, becauſe he thought it reaſonable, that the Party that was injured ſhould have the Right to puniſh.

Mr. BARB. *NOTES on* § XII.

[1] PLATO de LL. 11. p. 977. B. Criminals are puniſh'd, not becauſe they have offended, for what is done can never be undone; but that for the future the Criminals themſelves, and ſuch as ſee their Crimes puniſh'd, may take warning, and be put out of love to Vice. TULLUS in *Livy*, l. 1. c. 28. Let others at their Peril, attempt the like afterwards, when I have made him an Example to all Mankind.-------And let the World learn, by your Puniſhment, to think thoſe things ſacred which you have violated. *Liv.* l. 1. c. 33. *Ancus* built a Priſon in the middle of the City, juſt by the *Forum*, to frighten the growing boldneſs of Vice. Add. *Agathias*, l. 4. init. *Lucian. Phalaris*, 1. p. 735. *in fin.* It would be to no purpoſe to expect any benefit from any thing, if Malefactors were not perpetually terrified by the fears and expectations of Puniſhments.

[2] Gunth. Ligurin. *l.* 1. *v.* 527, &c.

Nec melius ſtultæ, furor atque ſuperbia, plebis
Puniri poterat, quam tanti ut cauſa tumoris
Eriperentur opes, ut, quos opulentia dudum
Fecerat elatos, in ſe revocaret egeſtas.

What happier Art could he have us'd t'aſſwage
A haughty Town, and a bold Faction's Rage;
Than to deprive them of that Wealth, from whence
The fatal Ills unhappily commence?
Seditions are by Wealth and Eaſe maintain'd,
But ſoon by Want and Poverty reclaim'd.

Speaking of the Citizens of Utrecht, *who had been fined a great Sum of Money by* Frederick, *for an Inſurrection there.*

[3] *Vide* L. 9. t. 27. l. 1. *C. ad L. Jul. repetund.* L. 9. t. 20. l. 7. *C. ad L.* Fabiam *de Plagiar.* Quintil. *Declam.* 274. When Criminals are executed, the moſt publick Places are choſen, where there will be the greateſt Number of Spectators, and ſo the moſt, for the fear of Puniſhment to work upon 'em. *Senec.* de Irâ, *l.* 3, *c.* 19. The more publick the Puniſhments are, the greater Effect will they have upon the Reformation of others.

[a] *Herodot.* Melpom. p. 107. Edit. *H. Steph.*

[b] Comp. *Val. Max.* l. 2. c. 9. ſ. 3.

[c] L. 2. c. 20. ſ. 9.

[d] *Ubi ſupra*, ſ. 14.

[e] See *Grotius* upon the Place.

[f] *Numb.* xxv.

[g] V. *Selden* de J. N. & G. &c. l. 4. c. 4.

why there may not be a Magiſtrate in every Commonwealth, who in certain Caſes may be allow'd Power to puniſh Criminals extraordinarily, without any judicial hearing, provided care be taken he ſhall not abuſe an Authority of ſo large extent. Thus when the Government ſets a certain price upon the Head of a Traytor, the Perſon that kills him, is ſuppoſed to do it by publick Authority; for altho' ſuch a Declaration has not always the force of a Command, yet when the Traytor is kill'd upon a view of that encouragement, the action may be defended as undertaken by publick Allowance and Authority [a]. *Grotius*, in his Comment upon *Eſther*, Cap. ix. v. 10. obſerves, *That it was an Opinion which obtain'd among the* Jews, *that if any Man attempted to betray an* Iſraelite, *or his Eſtate, to the* Gentiles, *or put any publick Affront upon the whole Body of their Nation, that it would be no Sin for a* Jew *to kill him, his Eſtate being left his Heirs.* But the Liberty which the *Jews* at that Time took in the Execution of their Revenge, does not ſeem to be agreeable to the nature of the civil Government. There is a Law mention'd in *Andocides*, Orat. 1. *That if any Perſon attempted the Subverſion of the Democracy at* Athens, *or if any Perſon, upon the diſſolution of the popular form of Government, ſhould create any Magiſtrate, he ſhould be pronounced an Enemy to the State; and no body that kill'd him ſhould be puniſhable*; and then follows the Oath which all the *Athenian* Tribes engag'd in, to kill the Perſon that ſhould do ſo. And *Valerius* inſtituted a Law at *Rome*, *That no Magiſtrate ſhould ever be created, from whom there ſhould lie no appeal; and that it ſhould be lawful to kill any Perſon that ſhould make ſuch a Magiſtrate. And that it ſhould not be capital for any Man that did kill him* [b]. And the *Panchæi* are ſaid to have lookt upon it as unlawful for their Prieſts to paſs the borders of their conſecrated Country; and if any Man found them without thoſe Limits, he was allow'd to kill them [c]. Here therefore we may obſerve, that in theſe, and all other Laws of the like nature, upon ſuch evidence of the fact, as admits of no ſcruple and diſpute, the general Edict has the force of a poſitive Sentence of Condemnation; and the Death of the Perſon that follows upon it, ſeems to be authorized by the command of the Magiſtrate [d]; and if a private Man, upon the influence and inſtigation of ſuch a Law (ſuppoſing the Reaſons of it be juſt) ſhould kill the Party, he will not only be indemnified in the civil Court, but may be fairly acquitted by his own Conſcience, ſo he was not induc'd to that action by any private grudge or reſentment, but barely by a belief, that by ſuch an action he ſhould do good to his Country; and eſpecially, if the reaſon why the Law permitted or commanded any Man to be the Executioner of the Penalty was, that the Commonwealth was in imminent Danger from ſuch treaſonable Attempts. But the Caſe is different as to the Blood which is ſpilt upon an Indulgence, the Law ſometimes alloweth to a juſt Concern and over violent Paſſion; which only takes off the civil Puniſhment, but doth not excuſe the guilt of the act. Of this nature are the Laws which permit Husbands to kill Adulterers and their Wives, when they ſurprize them in the Act; for human Laws pardon only the violence of a Diſcontent conceiv'd upon the moſt ſevere Injuries. Though poſſibly it might be a more convenient way, to leave ſuch Injuries to be puniſht by the Magiſtrate, ſo the Commonwealth might be in no danger by the delay of the Revenge [e].

XIV. But notwithſtanding, from the ends of Puniſhment, and the State of human Nature, 'tis manifeſt, there may be ſome Actions in themſelves evil, which yet it wou'd be needleſs, and to no purpoſe for human Juſtice to puniſh. Such as are, *firſt*, Acts meerly internal, as ſinful Thoughts, evil Inclinations and Deſires; though it may afterwards happen, they may (as ſuppoſe by a ſubſequent Confeſſion) be diſcover'd [f]. For ſince no Man is injur'd by ſuch an internal Motion, no Man can be concern'd for the Puniſhment of it [g]. 'Tis true indeed, as *Philo* ſaith, *That while we entertain, tho' it be only, our Imagination, with bad Thoughts, we are guilty of thoſe Thoughts*: but this holds true with Relation only to divine Juſtice. Though *Grotius* in his Comment upon the 5th of St. *Matthew*, v. 28. ſhews from ſeveral Teſtimonies of Heathen Writers, that ſuch Thoughts, from bare Reaſon only, may be proved to be real Sins [1]. But 'tis a quite different thing, when the internal Acts are conſidered in Conjunction with the external; for the influence theſe have upon the Quantity and Quality of our Actions, is very conſiderable. And therefore many Crimes are puniſh'd, which have yet been ſtopt in the Attempt, and fail'd of final Succeſs [h]. But beſides, it would be too rigorous to make every Peccadillo ſubject to the ſeverity of human Puniſhments, ſince, in the preſent ſtate of human Nature, the greateſt Caution and Intention imaginable, is not ſufficient to guard us from a Multitude of

Mr. BARB. *NOTE on* § XIV.

[1] Add. *Bodinus* de Repub. l. 4. c. 7. p. m. 734. *Ammianus Marcellinus* gives us a very ſtrange Inſtance of Calumny, *l.* 15. *c.* 2. The Story he tells is of one *Mercurius*, whoſe Practice it was, when any Man happen'd to tell his Friend his Dreams, (and Dreams in Nature we know uſe to be odd and extravagant) to paint them in the worſt Colours his Malice could give them, and then repreſent them to the ſuſpicious Emperor: upon which the Dreamer was Indicted, as guilty of as great and high a Miſdemeanour, as if he had actually committed ſome unpardonable Fact. So that when this came to be publickly known, People were ſo far from telling their Dreams before ſtrange Company, that they would hardly own that they had been aſleep. And ſome Learned Men were concern'd, that it was not their Fortune to be born among the *Atlantæi*, where they ſay, no body Dreams.

[a] Add. C. L. 3. t. 27. *Quando liceat unicuique, ſine judice ſe vindicare, vel publicam devotionem.* L. 1.

[b] *Liv.* l. 3. c. 55.

[c] *Diodorus Siculus*, l. 1. c. 46.

[d] Vide *Grot.* L. 2. c. 20. ſ. 17.

[e] Vide *Gratian* Can. quicunque, *&c.* Cauſ. 33. Qu. 8. *Senec.* Controv. *l.* 1. Controv. 4. *l.* 4. Controv. 24. *Xenoph.* de Educat. *Cyri.* l. 3. p. 41. Edit. *H. Steph. Valer. Max.* l. 6. c. 1. ſ. 13. *Bœcler* ad *Grot.* l. 2. c. 1. ſ. 14. *Ant. Matthæus* de Criminib. ad *L.* 48. *D. t.* 5. *Grot.* in flor. ſparſ. ad *Jus Juſtinian.* ad *L.* 48. *t.* 5. *D. l.* 22. *ſ.* 4. ad *L. Jul.* de Adult.

[f] Ad. *Grotius* Imper. de Summar. Poteſt. circa ſacra, *c.* 3. *ſ.* 1.

[g] *Cogitationis pœnam nemo patitur.* Vide L. 48. t. 19. l. 18. *de Pœnis. Philo Lib.* quod. det. pot. inſid. The *Origines Juris Civilis* by Mr. *Gravina*, Lib. 3. p. 584. & *ſeqq.* and the *Obſervationes Jur. Civil.* by Mr. *Bynckerſhoek*, Lib. 3. Chap. 10.

[h] *Vide* Grot. *in Flor. ſparſ. ad* Lib. 48. t. 8. l. 14. *D. ad L.* Cornel. *de Sicariis.*

Slips and Infirmities. And therefore *Themiſtius*[a] when he had divided Mens Failings into three ſorts, *viz. Miſfortunes*, *Miſtakes*, and *criminal Actions*, very juſtly adds, that a Prince ought to pity the firſt correct the ſecond, and puniſh the third[b]. 'Tis ſaid of *Alphonſus* King of *Arragon*, "That having carefully read over the whole Body of the *Portugueze* Laws, he highly commended the Wiſdom, and the Order, and Adminiſtration that was obſerved in the Commonwealth; but was as much diſpleaſed to find ſo many particular Laws calculated for the moſt trivial and minute Caſes; and to expoſe the ſcrupulous exactneſs of them, he ask'd the *Portugueze*, in way of raillery, How a Man was to be puniſhed that ſet his Foot to the Ground[c]? *Grotius*, in his *2d Book*, *C.* xx. § 19. ſpeaking to this Subject, ſeems not to have ſaid what is exactly proper, or true: *Our ſlips and failings*, ſaith he, *can hardly be call'd ſins; becauſe, if we conſider them in the general, they are not committed with that liberty, which in particular they ſeem to be:* for I can't think it is a Conſequence, that if it be morally impoſſible, but a Man muſt fall into ſome Sins; therefore ſuch Sins of daily Infirmity, or Incurſion, as they are call'd, ceaſe to have the nature of Sin. He adds in the ſame Chapter, that thoſe Sins do not deſerve puniſhment, which neither directly, nor indirectly, bear any relation to human Society, or other Perſons; for that there can be no reaſon, why we ſhould not leave ſuch Sins to be puniſhed by GOD Almighty, who has the higheſt Wiſdom to know them, the greateſt Juſtice to examine them, and the moſt abſolute Power to puniſh them; and that therefore 'tis without any proſpect of Advantage, and conſequently to no purpoſe for Men to inſtitute ſuch Puniſhments. Though, I think, it may be very well made a Queſtion, whether there be any ſuch Sins as thoſe he ſpeaks of, if we except Thoughts before they are produced into Action. Beſides, the civil Laws deny to ſome Acts the power of producing an Action, or exempt them from human Penalties; either for publick Peace and Quiet, or upon other reaſonable Accounts; ſometimes it may be ſuppoſed that a certain Action would look better, if it could not ſeem to have been undertaken upon fear of human Puniſhment, ſometimes the matter may be too frivolous to give the Judges the trouble of hearing it; or perhaps be too perplext and intricate, to be determin'd; or when the evil is grown inveterate, and ſo rooted in the Temper of the People, that it is not likely to be ſuppreſs'd without a Convulſion, which might prove fatal to the Commonwealth[d]; or elſe to prevent an unreaſonable Increaſe of Suits at Law[e]. In fine, it is abſolutely neceſſary, that all thoſe Diſorders of the Mind, which are the Effects of the common Corruption of Mankind, ſhould be exempted from Puniſhment; ſince they are ſo general, that 'tis impoſſible but all civil Government ſhould be diſſolv'd, if ſuch Sins ſhould fall under the Severity of human Penalty, before they diſcover themſelves by an open Enormity; ſuch as are Avarice, Ambition, Inhumanity, Ingratitude, Hypocriſy, Envy, Detraction, Pride, Anger, Diſcord, and the like: all which Vices, it was our Saviour's great Deſign, by the Holineſs of his Doctrine, to extirpate and ſuppreſs. For 'tis certainly true, as *Seneca* ſays, "That if every Man was to be puniſh'd that was of a wicked and depraved Diſpoſition, none could be excuſed from Puniſhment[f].

XV. But neither is it always neceſſary that ſuch Miſdemeanours, as may properly be puniſhed by the civil Court, ſhould therefore always be puniſh'd by it[g]; but there may be ſometimes room left for Pardon. The *Stoicks* indeed, as *Stobæus*[h] repreſents them, were violent againſt this Opinion: For a wiſe Man, they ſaid, ought never to pardon any Body; becauſe the Perſon that pardons muſt ſuppoſe that it was not the Offender's Fault that he tranſgreſs'd; tho' tis certain, that every Man's own natural Depravity is the cauſe of his Tranſgreſſion: And therefore 'tis ſtill true, that Offenders ought not to be pardoned. What they meant by this Argument ſeems to be this: Either 'tis a Man's own Fault that he offends, or is it not; if it be not his Fault, there is no Offence committed, ſince every Man tranſgreſſes from his own natural Depravity, and therefore in this caſe there is no need of Pardon; and if it be a Man's own Fault, then he can't be admitted to Pardon, becauſe Pardon is not to be allowed to any wilful Tranſgreſſors. Which Reaſon manifeſtly begs the thing in diſpute. They add, that a good Man is not to be compaſſionate or merciful; for a compaſſionate or merciful Man deprecates and endeavours to alleviate the Puniſhment a Criminal deſerves, but every Man ought to have Retribution made him, according to his Deſerts. But now, the nature of Deſert or Merit is different with reſpect to good, and with reſpect to evil. The good which is due to a Man cannot in Juſtice be denied him; but the Nature of evil is ſuch (it not intending the Benefit of the Perſon that muſt ſuffer it) that it is no Injury to deny it him. They argue further, that a Man cannot be inclinable to Mercy, without thinking that the Puniſhments, which the Law appoints for Delinquents, are too ſevere; or that the Legiſlator has preſcrib'd Penalties without due regard to Fact. But this is ſtill but weak Reaſoning. For 'tis no Contradiction, that the

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[a] *Orat. IX. ad* Valentin. Jun. *Add.* Sanderſon. *de Juram. Oblig. Prælect* 3. ſ. 18.

[b] *Hier* Oſorius, *l. X.*

[c] *Julianus* in *Cæſaribus* de Probo. 'Tis very difficult for a Man to govern an Horſe, or any other Beaſt, and much more Men, without indulging them in ſome things they have an Inclination to; as Phyſicians uſually allow their Patiens in little Irregularities, that they may be the ſtricter in the Obſervation of the great and chief Preſcriptions. The great Lord SHAFTSBURY, in an imperfect Piece of Mr. *Lockes*, ſays, "That in every Perſon, there are two Men, the one Wiſe, and the other a Fool; and you muſt allow 'em the Liberty of following their Genius, each in his turn. But if you pretend to have the Wiſe, the Grave, and the Serious one, always ſit at the Helm, the Fool will grow ſo uneaſy and troubleſome, that he will diſorder the Wiſe one, and render him incapable of doing any thing: You muſt let the Fool alſo in his turn, have the Freedom to follow his Whims, to play, and divert himſelf according to his own Fancy, if you will have your Affairs go on ſmoothly and eaſily.

[d] To this purpoſe is *Tiberius*'s Epiſtle about Luxury, *Tacitus*, Ann. iii. 53.

[e] *Add.* Seneca *de Clementia* L. 1. c. 22.

[f] *De Irâ*, l. 2. c. 31, *in fin.*

[g] *Vid.* Grot. *ubi ſupra*, ſ. 21.

[h] *Stob.* Serm. XLIV.

Puniſhments preſcrib'd by the Law may be juſt, and yet may ſometimes be mitigated; for the Law determines only in general, what Puniſhments are to be inflicted on ſuch and ſuch Crimes, without conſideration of the particular Circumſtances which may ſometimes happen, in certain Perſons, in certain States and Conditions of the Commonwealth. But particular Men are pardoned for certain Reaſons, which do not take place either in all Offenders, or at all Times. *Seneca* [a], in his Book *de Clementia*, ſays, That *Pardon is a Remiſſion of the Puniſhment which is due (pœnæ debitæ)* but that a wiſe Man always doth what he ought to do. But here the Miſtake lies in the word *due (debitæ)* for if it be meant, that Puniſhment is due to Offenders; that is, that an Offender may be puniſhed without injury or juſt occaſion of Complaint; in this ſenſe it will not follow, that if a Man doth not Puniſh an Offender, he doth what he ought not to do: For a Man may very juſtly and lawfully do many things, which he is not always neceſſarily obliged to do. Beſides, as it is a miſtake to ſay, that Puniſhment is due to an Offender, meaning by it, that there is an inherent Right in the Delinquent which the Puniſhment is to ſatisfy (for I think no Man ever complain'd that his Puniſhment was remitted; except it may be ſaid, that a Man may wiſh that ſuch Correction, as might have reclaim'd him when he was young, was neglected, when he finds that his childiſh Levities and Faults are grown up into bold and manly Vices) ſo 'tis improper to ſay, that a Delinquent ought to ſuffer Puniſhment *(pœnam dare)* meaning by it, that he is under an Obligation to ſuffer it: the reaſon of which I have explained before. But if by the Word *due (debita)* it be underſtood, that a wiſe Man is obliged to inflict the Puniſhment; I anſwer, firſt, That no Man can be under any ſuch Obligation, unleſs the executive Power of the Laws be either publickly or privately committed to his Care. And, ſecondly, That the Obligation which lies upon the Governors, doth not relate to the Delinquent, but to the whole Commonwealth or Society, whoſe ſafety they are bound to provide for, and eſpecially this way, by puniſhing the Inſolence of Offenders; which if they neglect to do, there is no Injury done the Criminals, but they have violated the Obligations which they owe to the Commonwealth. But 'tis evident, that the Peace and Safety of the Commonwealth is ſo far from being ſubverted, that it is ſometimes ſecured and eſtabliſh'd by granting Pardon, in proper Times and Places.

XVI. *Grotius*, l. ii. c. 20. Sect. 21, 22. ſays, That there is room for Pardon even antecedently to the penal Law; but this ought to be dexterouſly explain'd, otherwiſe it will appear to be but a very vulgar Thought, that where there is no Law, there is no Puniſhment, no Trangreſſion, or Pardon of Tranſgreſſion. And a penal Law is not only a Law, which defines the particular ſort of Puniſhment; but that Law alſo is a penal Law, which leaves the Determination of the Quality and Quantity of the Puniſhment to the Diſcretion of the Judge. Here therefore it muſt be obſerv'd, that in Commonwealths which have no written Laws, the Laws of Nature ſerve inſtead of civil Laws, and Juſtice is adminiſtred according to them; and Perſons tranſgreſſing them are puniſh'd at the Pleaſure of the Judge: but even, where the civil Laws are written, yet ſince it is impoſſible they ſhould be ſo expreſs and particular, as to compriſe all that variety and compaſs of Action, in which Mens Impieties may be diſcover'd; it is neceſſary that Reaſon and the Law of Nature ſhould ſupply the Defects of the civil Law: and where the expreſs penal Sanction is not ſufficient, it muſt be left to the Diſcretion of the Judge to determine the Penalty [b]. And thus we may underſtand how Puniſhment came to take place antecedently to the penal Laws [c]. But although, in ſuch Commonwealths, the Magiſtracy hath Power to inflict Puniſhment on Malefactors, yet this is no Reaſon why every Malefactor ſhould be puniſh'd; but that muſt depend upon the Connexion there is between thoſe Ends for which Puniſhments were at firſt inſtituted, and the Puniſhment it ſelf. And therefore, if in a particular Caſe, thoſe Ends, upon a moral Eſtimation, do not appear to be neceſſary; as ſuppoſe, firſt, 'tis thought moſt adviſable, that ſuch a particular Crime ſhould not be divulg'd; or, ſecondly, if there be other oppoſite Ends of no leſs Utility and Neceſſity, as ſuppoſe, the ſame, or a greater Good might be obtain'd by omitting the Puniſhment; or, laſtly, if the Ends propoſed by puniſhing, may be more conveniently obtain'd ſome other way; I can ſee no direct Obligation that lies upon the civil Court to inflict Puniſhment [d]. To inſtance in the firſt Caſe, we muſt imagine ſome Sin, which is not yet grown into common Acquaintance, and in conſequence, the publick Impeachment and Proſecution of which will appear neither neceſſary, nor ſafe: for many Mens Obedience depends more upon their Simplicity and Ignorance of Vice, than any real Love they entertain for Virtue; and the puniſhing ſuch a Crime, ſo new and ſtrange, would not frighten ſo much, as ſolicite and provoke their perverſe Curioſity, to make an Experiment upon it too, and to love what is forbidden them. For this reaſon, 'tis ſaid, *Solon* inſtituted no Law againſt Parricide, that he might not ſeem by forbidding it, to have put People in mind of it [e]. And *Busbequius* tells us, "That the *Turks* ſeldom make Inquiries "after ſecret Criminals, for fear they ſhould only "find Occaſion for Scandal; but that every open "Breach of Law they ſeverely puniſh [f]. An Inſtance to the ſecond Caſe may be conceiv'd in a

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[a] Senec. *de Clementia*, l. 2. c. 7. *in fin. Vid.* Ciceron. *Orat. pro* Muræna, *C.* 29.

[b] *Lycurgus* contra *Leocratem*. It was not through any overſight in the Legiſlators, that the Puniſhments for ſuch Crimes happen'd to be omitted; but becauſe in the firſt Times there were no ſuch Actions ever heard of.

[c] And from hence that Paſſage in *Cicero* may be explain'd, *l.* 1. in *Verrem.* c. 42. No Law takes cognizance of the Time paſt, except it be in a Thing in its own nature criminal and wicked, ſo that if there were no Law in force, it ought nevertheleſs to be abſolutely avoided.

[d] V. *Gratian.* Cauſ. 23. Quæſt. 3. c. 18, 24.

[e] *Apuleius Metamorph.* L. 10. p. 319. *Edit. in uſum Delph.* 'Tis the ſame thing almoſt, not to be, and not to be known. *Add.* Senec. *de Clement.* l. 1. c. 23. *Busbeq.* Ep. 3.

[f] Which is almoſt the ſame with the Counſel *Mæcenas* gave *Auguſtus* concerning the Impoſition of Puniſhments. *Dio. Caſſius*, l. 52.

Criminal who pleads his own, or his Parents, or his Anceſtors Merits to balance his preſent Tranſgreſſion; for it may ſometimes be equally, or perhaps more beneficial to the Commonwealth, to reward a brave Action of a particular nature, than to puniſh a bad one: and the Expectation of future Benefits, as well as the Memory of paſt, may be thought ſufficient to expiate the [1] Crime, *For though what is once ill done can never be remedied, yet it may be atoned for by the brave Actions of the ſame Perſons afterwards, and ſo be honourably forgotten* [a]. An Inſtance in the third Caſe may be taken from a Man who is won by good Advice to reform, makes a verbal Satisfaction to the Perſon injur'd, and giveth Security that there ſhall be no further occaſion of Puniſhments to theſe ends, and that his Fault ſhall not be of any miſchievous Influence. And then *Seneca* himſelf ſays [b], “ That a wiſe “ Man will be very ready to pardon a guilty Per-“ ſon, when his Sorrow for his Fault giveth him “ promiſing hopes of amendment; and when he “ perceives he acted not by Principle, but only “ out of Raſhneſs and Folly; nor will the Impu-“ nity ſo given either be dangerous to the Perſon “ that receives, or to him that gives it.” From all which, by the way, it appears how far a Crime may be releaſed by Compoſition and Agreement with the Accuſer or injured Party; namely, that they may ſafely remit and forgive it, ſo far as their private Concerns are engaged in it; but that no particular Compoſition with them can ſuperſede or prejudice the right of the Commonwealth. And therefore ſuch agreements between private Men may take away the ſecond end of Puniſhment, but not the third [c]. But to this Caſe we may reduce thoſe Miſbehaviours which we commonly call Follies of Youth, which any Man of candid Temper is willing to pardon; ſince, when the warmth of that Age is over, Men uſually admit of cooler and more ſober Thoughts [d]. And ſo alſo, when a Man has been injured [e], as he thinks the Injury much the leſs, if the injurious Party confeſs, that it was a raſh and inconſiderate Action; ſo in all ſuch Caſes he will be more inclined to pardon than puniſh [f]. For ſince all ſorts of Puniſhment, and eſpecially the more ſevere, ſeem to have ſomething in them, which, conſider'd in its ſelf, is, though not repugnant to Juſtice, yet contrary to that Love and Affection, which ſhould be the reſult of the common Affinity of Mankind; upon this account Reaſon will eaſily permit the Puniſhment ſhould be ſometimes ſuperſeded. And ſo we find *Plutarch* reaſoning [g], “ Why, ſays he, were the “ Rods and Ax always carried tied and bound up “ before the *Roman* Magiſtrates? unleſs either to “ ſignify to us, that their Anger ought not to be “ left looſe and unconfin'd; or elſe that the ſlow “ unbinding the Inſtruments of Execution might “ give them occaſion to demur and delay Sen-“ tence; and, as it hath ſometimes happen'd, to “ reverſe the Puniſhment, after it hath been pro-“ nounced [h]? For ſome Vices are curable, o-“ thers are paſt Remedy; the Rods are to cor-“ rect thoſe that may be reform'd, and the Ax “ cut off what there is no hopes of amending ”. For ſometimes a greater and juſter Charity forces Juſtice to inflict the Puniſhment, that the pardoning one Man might not incommode many others: For 'tis but cruel Compaſſion to ſpare one Malefactor to the wrong and hazard of a number of innocent Perſons [i]. King *James* in his *Donum Regium*, l. ii. gives us this Catalogue of Crimes that ought never to be pardoned; namely, *Sorcery, Robbery, Inceſt, Sodomy, Witchcraft, falſifying the Coin, Oppreſſion or publick Violence.* In theſe Caſes I have mentioned, therefore, the *Stoicks*, ſay, *A wiſe Man would ſpare, and not pardon* [k].

Mr. BARB. *NOTE on* § XVI.

[1] The Words which our Author here makes uſe of, ſhew that he had in view a Paſſage of SENECA's, quoted by GROTIUS, Sect. 22. Numb. 1. But as that great Man has manifeſtly cited it without Book (for he does not ſo much as mention the Treatiſe where it is) ſo he entirely changes and perverts the Thought of the *Stoick* Philoſopher, in writing *Injuriam* inſtead of *Injuria:* And it is ſurprizing, that this over-ſight was not taken notice of by GRONOVIUS, who, before his writing a Comment on *Grotius de Jure Belli & Pacis*, had publiſh'd an Edition of *Seneca*. The Philoſopher handles this Queſtion, whether we are oblig'd to ſhew any acknowledgement of gratitude to a Perſon, who, after he has been ſerviceable to us, does us an Injury? And he concludes, that the Injury effaces the former Service or Benefit. *Quomodo ſi quis ſcriptis noſtris alios supernè imprimat verſus, priores litteras non tollit, ſed abſcondit; ſic beneficium* SUPERVENIENS INJURIA *adparere non patitur. De Benefic.* Lib. vi. Cap. vi. *in fine.* GROTIUS on the contrary, makes him ſay, That the Benefits efface the Injury. But this laſt Maxim will be better illuſtrated by the following Paſſage in CICERO, to which GRONOVIUS refers in his Notes, and which that great Orator made uſe of in an Oration in favour of *Julius Cæſar*; *Si jam violentior aliquâ in re C. Cæſar fuiſſet, ſi eum magnitudo contentionis, ſtudium Gloriæ, præſtans Animus, excellens nobilitas, aliquo impuliſſet -----maximis rebus, quas poſtea geſſit, obliterandum. Orat.* in *Vatin.* Cap. vi. To which may be added, that Law of the *Digeſts*, that allows Pardon to a Deſerter, who ſince his Deſertion has diſcover'd a conſiderable Gang of Robbers, or ſeveral other Deſerters. L. xlix. tit. xvi. *de re militari* Leg. v. Sect. 8.

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[a] *Procop.* Hiſt. *Vandal.* l. 2. c. 16.

[b] Seneca *de Ira*, l. 1. c. 16. p. 20. Edit. *Gronov.*

[c] *Tacitus*, Ann. iii. c. 70. There was Reaſon why he ought to be ſlow in pardoning the Indignities offer'd to himſelf, that he might be cautious how he forgave thoſe that injured the Publick.

[d] *Juvenal*, Sat. viii. *v.* 166, *&c.*

Quædam cum prima reſecantur crimina barba.

Some Faults of courſe with Childhood end.

Vid. Ariſtot. *Rhet.* l. 2. c. 3. *init.*

[e] *Vid.* Arrian. *de Expedit.* Alexand. *magn.* l. 7.

[f] V. *Grot.* l. 2. c. 20. ſ. 22.

[g] *Plut.* Quæſt. *Rom.* 82.

[h] *Juvenal*, Sat. vi. *v.* 220. *Nulla unquam de morte hominis cunctatio longa eſt.*

[i] *Julian.* in fin. *Miſopog.* p. 371. Ed. *Spanhem.* 'Tis an Encouragement to the growth of Wickedneſs, to ſhew any Favour to Thieves and Villains. *Appianus Alexand. Mithrid.* Bello, *p.* 250. Ed. *H. Steph.* There is nothing more ungrateful than a pardon'd Criminal. *And therefore none ought to be pardon'd, but ſuch as repent of their Wickedneſs.*

[k] *Gunth. Ligurin.* l. 1. v. 478, *&c.*

------Plus ſæpe nocet ſapientia Regis,
Quam rigor: ille nocet paucis, hic incitat omnes
Dum ſe ferre ſuos ſperant impune reatus.

Exceſs of Mildneſs in indulgent Kings,
More Danger, than the ſtricteſt Rigour brings.
Some few perhaps may by Injuſtice die,
But who can any pleaſing Sin deny,
Secure of Pardon and Impunity?

Sadus Roſar. Perſ. c. 8. 'Tis brave and generous to forgive. But there is no Reaſon we ſhould find a Cure for his Wounds, who hath been a publick Enemy. A Man ought to think it an Injury to Mankind to let go a Serpent. To this relates what *Lepidus* ſaid in *Tacitus*, Ann. 2. when he was againſt dealing ſeverely with the fooliſh Poet; If he be pardon'd, the Commonwealth will be in no Danger by it: and if he be puniſh'd, his Example will have no Effect.

But 'tis a ridiculous Nicety to refuſe to call that a pardoning with the reſt of the World, which they themſelves will have to be ſparing; and 'tis certainly beneath Men of Senſe to diſpute about Words, when the Senſe of the thing is agreed upon.

XVII. But after the Eſtabliſhment of the penal Law, the Difficulty ſeems to be greater, how the Delinquent can be excuſed from Puniſhment [a]. For there ſeems to be more room left for Pardon, where the Penalty is arbitrary, than where 'tis expreſly determin'd by a Law; and that, not ſo much, becauſe 'tis expected that the Legiſlator ſhould act conformably to his own Laws; as becauſe the Authority of the Laws will be loſt, if the due Execution of them is without good reaſon neglected; and becauſe the Magiſtrate himſelf would ſeem to invite others to tranſgreſs, when the hopes of Pardon which he gives the Criminal is equal, or greater than the fear of Puniſhment [b] [c]. Therefore, though the force of human Laws depends upon the Will of Man, not only as to their Original, but alſo as to their Continuance; yet they ought not, but upon very urgent and weighty Reaſons, to be alter'd or repeal'd. For this would be a breach of the Rules of Prudence in the Art of Government. But I don't know whether it be not a more dangerous Miſtake, without very good Reaſon, to ſuſpend the Execution of a Law ſtill in force, for the ſake of certain Perſons; than utterly to abrogate it: ſince generally, none of the common grievances of Men ſeem more inſupportable than this, that Perſons of equal Merit are not uſed with equal Juſtice. But notwithſtanding, as the Sovereign may, when he ſees good reaſon for it, repeal an intire poſitive Law; ſo he has Power to ſuſpend its Effect, with regard to certain Perſons, and certain Crimes, the Law in other reſpects being ſtill in force. The Sovereign I ſay; for ſubordinate Judges are not to make or alter Laws, but only to paſs Sentence, according to thoſe already made [d]. *Grotius*, in the Chapter beforemention'd, *Sect.* 25, 26. diſtinguiſhes the Reaſons of Pardon given after the penal Law, into intrinſick and extrinſick. The intrinſick Reaſon, according to him, is, when the Puniſhment would not be unjuſt, as being before lawfully enacted and promulg'd, but however has the Appearance of too much Severity, when ſet in Compariſon with the Fact; though I confeſs, I ſhould think, that if the Penalty the Law enforces be in general too ſevere, it would be a wiſer Method to correct the Law it ſelf, than to Pardon ſome few, and leave others expos'd to the Rigour of the Puniſhment. But undoubtedly Judges are obliged, upon all rules of Equity, if not entirely to remit, at leaſt to mitigate the Puniſhment, when they find, in certain particular Facts, a Concurrence of Circumſtances, that alleviate the Crime, as to the Quantity and Quality the Law ſuppoſes. In which Caſes the Fact it ſelf hath the intrinſick Grounds, though not of Pardon, yet of ſome Mitigation of the Penalty adherent to it. And therefore, I am of Opinion, 'twould be much more proper, to allow of no other but the external Cauſes of relaxing Puniſhment; ſuch as the former Deſerts of the Criminal himſelf, the Merits of his Family, or Relations, or ſome other commendable Action or Thing; or laſtly, the Hopes that the Delinquent may make amends for his Fault by many good Actions afterward. And therefore, *Tully* ſaith [e], *That a Man that petitions for Pardon, ſhould firſt of all put the Judges in remembrance, what good things he hath formerly done, and ſhew how they overbalance the Guilt of his preſent Crime; and that, in ſhort, he has been the Cauſe of more Good, than Evil: And then*, ſaith he, *in the next place, he ſhould recount the good Actions of his Family, whatever he thinks proper to be inſiſted on, and then he is to prove that he did not commit the Fact either out of Malice, or Cruelty, but out of Raſhneſs, or from ſome other Perſon's Inſtigation, or upon any other creditable or honourable Cauſe, which engag'd him in it; and after all make what Promiſes, and give what Aſſurance he is able, that the Senſe of his Crime, and the Lenity of the Judges in pardoning him, ſhall have ſuch an Influence upon him for the future, as ſhall entirely reſtrain him from ever attempting the like again.* And thus it hath been uſual to Pardon ſome Criminals, upon the Deſert and Merit of their Anceſtors, or at the requeſt of Men in favour. 'Tis related of the Emperor *Hadrian*, that he alleviated the Puniſhment of Criminals, according to the number of Children they had [f]. And ſome have been acquitted, becauſe they happen'd to be the laſt of noble and illuſtrious Families. *Phryne*, an *Athenian* Courtiſan, when ſhe was tried for her Life, was brought off by the Art of *Lyſias* the Orator [g], who took off her upper Garment, and expos'd her naked Breaſt to the Court. And *M. Antony* the *Roman* Orator, brought off *M. Aquilius*, when he was plainly convicted of Bribery, by the like Art. For bringing him in publick View into the Court, at the Cloſe of his Defence he open'd his Boſom, and ſhew'd the People the honourable Wounds he had receiv'd there [h]. *Polydore Virgil* relates it, as a Cuſtom which obtain'd formerly in *England*, that no Criminals, except ſuch as were convicted of Treaſon, ſuffer'd Death, but were condemned only to perpetual Impriſonment, if they could but read [i]. And theſe Reaſons will appear more Satisfactory, if upon Examination of the Fact, it ſeems to be particularly exempted from the Reaſon of the Law. The general Reaſon indeed, for the Obſervation of every Law, is the Authority and Will of the ſovereign Legiſlator;

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[a] *Vid.* Grot. *l.* 2. *c.* 20. ſ. 24.

[b] See above in *B.* 1. *c.* 6. *ſ.* 17.

[c] *Arnob* l. 7. The Number of Criminals certainly increaſeth, according to the Hopes they have of buying off their Crimes; and Men are leſs ſcrupulous of offending, when they ſee the Favour of a Pardon is eaſily purchas'd.

[d] *Lyſias* ii. Orat. 13. c. 3. in *Alcibiad. Themiſtius*, Orat. 9. de Humanitate *Theodoſii*. There is a great difference between the Power and the Duty of a Prince, and a Judge; the latter is to be directed by the Laws, the former may amend and alter them, alleviate and ſoften their Rigour and Severity; as being himſelf a living Law, *L.* 40. *t.* 9. *l.* 12. *ſ.* 1. *qui, & a quibus manumiſſ.* & L. 49. t. 8. l. 1. ſ. 2. *D. quæ ſentent. ſine Appellat. reſcind.*

[e] Cic. *de Invent.* l. 2. c. 35.

[f] *Vid.* Xiphilin. *Epit.* Dion. *Vid.* Liv. *L.* 8. *c.* 35.

[g] The Orator was *Hyperides* and not *Lyſias*, V. *Athen.* l. 13.

[h] *Herodot. Thali*, p. 112. Ed. *H. Steph.*

[i] *Polyd. Virg.* Hiſt. *Angl.* l. 26.

which, when there appears no other Reaſon, is Reaſon ſufficient; but the particular is either ſome Benefit likely to accrue to the Commonwealth, or ſome Inconvenience which may be avoided, by the Obſervation of the Law; as for Example, let us imagine ſome place where ſumptuary Laws are in force; the general Reaſon of theſe Laws is the Will of the Legiſlator; the particular, that the Eſtates of the private Subjects may not be waſted or ſquandered away by extravagant and unneceſſary Charges; and in this Inſtance, though the general Reaſon of the Law may be enough to ſupport the Authority of it; yet when the particular Reaſon of it ceaſes, the Puniſhment may juſtly be remitted with greater Eaſe, and leſs Diſcredit to the Authority of the Law; as for Example, in this Caſe, if we ſuppoſe the Offender in ſuch plentiful Circumſtances, as to be out of Danger of being reduced to Poverty by the Vanity and Laviſhneſs of his Expences. Rigid Governments indeed will hardly bear Neglect in the Execution of their Laws or Commands, only becauſe the particular Reaſon of them is ceas'd. As 'tis ſaid, *Cambyſes* was very well pleas'd that *Crœſus* was ſaved, but yet put the Perſons to Death that ſpared him, for their Remiſneſs in Executing his Commands. Again, it may be a reaſonable Plea for Pardon, either when a Man is intangled in a Crime through Ignorance, though perhaps not ſuch an Ignorance as wholly diſchargeth the Fault, but ſuch as might proceed from Remiſneſs or Negligence; or if he were taken with any ſudden Weakneſs or Diſorder of Mind, which could not be eaſily prevented or overcome. Under the firſt of theſe we may place the Misfortune of *Charondas*, in *Diod. Siculus*, who came through Inadvertency with a Sword on into a Publick Aſſembly, contrary to a Law he himſelf had made; and therefore I think he had no Reaſon, upon that Account, to lay violent hands upon himſelf [a]. There is another Story in the ſame Author, of *Diocles* the *Syracuſian* [b], who inſtituted a Law, by which it was made Death for any Man to be ſeen arm'd in the *Forum*, without any Allowances to be made for Inadvertency, or any other Circumſtances; and yet he, upon the news that the Enemy had made an Incurſion into his Territories, arm'd himſelf, and hearing that there was a Sedition rais'd in the *Forum*, went thither with his Sword on; but being told of it by a private Perſon, kill'd himſelf with it. But indeed there was no Pity due to him, becauſe in his Law he had cut off all Exceptions of Inadvertency, or any other Circumſtances of the like nature. Neither is what has been ſaid of this Point, in the leaſt refuted by all that tedious Diſpute of *Matthæus, de Criminibus ad* L. 48. Tit. *19. c. 5. D.* To what has been already ſaid it muſt be added, That as the meaſures of Puniſhment in human Judicature muſt be taken by the Advantages of the Commonwealth; ſo the ſame Rule may make it neceſſary to admit Criminals to Pardon upon account of their Numbers. For tho' in general 'tis no Excuſe to plead, that there were others guilty of the ſame Crimes [c] [d]; yet every wiſe Government ought to take care that Juſtice, which is intended for the Preſervation of human Society, ſhould not prove the Ruin and Deſtruction of it.

> *Cautius ingentes morbos, & proxima cordi*
> *Ulcera Pæoniæ tractat ſolertia curæ,*
> *Parcendoque ſecat; ferro ne longius acto,*
> *Irrevocandus eat ſectis vitalibus error.*

The ſkilful Surgeon all his Care applies,
When nigh the Heart the burning Ulcer lies;
With gentleſt Touch he tries th' affected Part,
And probes the throbbing Wound with cautious Art,
Nor wide th' Inciſion makes, but ſpares th' Unſound,
For fear the Vitals ſuffer by the Wound [e] [f].

And therefore 'tis a very good Character of a Prince, *Ovid* gives us, *L.* i. *de Ponto* [g], the *He reforms more Vices by threatning Puniſhment, than by Puniſhment it ſelf.* Beſides, 'tis frequently neceſſary either to ſoften the rigour of ſome Laws, or elſe ſuffer them to grow out of uſe. So *Tacitus* ſaith, *Ann.* l. iii. [h], "That it was propos'd to reform the Law called *Papia Poppæa*, becauſe the Number of Perſons obnoxious increas'd, and every Family lay at Mercy, ready to be ruin'd upon the Suggeſtion of the Informers; and becauſe, *as he ſaith afterwards*, the Informers had advanced themſelves ſo far, that they had prevail'd not only in the City, but alſo over all *Italy*, and over every Citizen they could find any where elſe; ſo that many were already ruin'd, and almoſt every one was under the ſame Apprehenſions. And thus *Tiberius*, in his Letter to the Senate [i], tells them, that he thought it a more proper Method *to paſs by the head-ſtrong overgrown Vices, than by attempting to correct them, to diſcover only what Crimes they had not Strength enough to maſter*; that it would be beſt *to reform them firſt in themſelves*, and then to be content *to wait till Shame had corrected them in the Nobility, Neceſſity in the Poor, and the Rich ſhould grow weary*

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[a] V. *Diodor. Sicul.* l. 12. c. 19.

[b] L. 13. 33.

[c] *Vid.* Iſocrat. *laudat.* Buſirid. *circa fin.* p. 397.

[d] *Quæ ſit auctoritas ejus, qui ſe alterius facto, non ſuo, defendat?* Cicer. *Orat. in* Vatin. *C.* 6. *p.* 243. *Ed.* Græv.

[e] Claudianus *de Bello* Getico. *v.* 138, *&c.*

[f] Lucanus *Pharſal.* l. 2. v. 141, *&c.*

---------- Dumq; nimis jam putrida membra recidit,
Exceſſit medicina modum, nimiumq; ſecuta eſt,
Qua morbi duxere, manus: periere nocentes,
Sed cum jam ſoli poſſent ſupereſſe nocentes.

While he, the ſound, freed from th' infected part,
With diligence ſevere, and barbarous Art,
The weaken'd Body ſank beneath the Smart.
The Guilty only were of Life depriv'd,
But when the Guilty only had ſurviv'd.

Tot ſimul infeſto juvenes occumbere leto,
Sæpe fames, pelagiq; furor, ſubitæq; ruinæ,
Aut cœli terræq; lues, aut bellica clades
Nunquam Pœna fuit.---------Ib. v. 198.

In Plagues and Famines, and relentleſs Seas,
By Earthquakes, and by common Enemies,
Rome oft her nobleſt Lives in numbers ſpent;
But ne'er before gave up to Puniſhment.

Senec. *de Ira*, l. 2. c. 10. There is a Neceſſity of Pardon when the whole Army deſerts.

[g] Epiſt. 2. v. 127. *Multa metu pœna, pœna qui pauca, coercet.*

[h] C. 25. 28.

[i] Tacit. *Ann.* l. 3. c. 54.

of them. For Men were not made for Puniſhment, but Puniſhment for Men. And therefore, if they who have the right to inflict Puniſhment are under Apprehenſions of imminent Danger upon the infliction of it, they can be no more oblig'd to puniſh, than a Man is to lay violent Hands upon himſelf. In a Ship, if a Pilot ſhould commit a Crime, when no Body but he underſtands the Management of the Veſſel, 'tis plain that the Man that would do Juſtice upon him muſt unavoidably ſhipwrack himſelf, and all the reſt of the Paſſengers. And ſo alſo the Magiſtrate may lawfully wink at ſome Crimes, the Puniſhment of which would be of dangerous Conſequence to the Commonwealth; and eſpecially, when the Perſons guilty are neceſſary to the common Safety and Preſervation. Though the Magiſtrate ought never to make any direct Agreement for the Permiſſion of Vice, much leſs make publick Gain by it [a]. In *Italy* Pardons are ſometimes publickly promis'd to any of the *Banditti*, that ſhall bring with him the Head of another of the ſame Gang. (Tho' *Harry Stephens* [b] ſeems to have diſapproved that Cuſtom, and ſays, that the reaſon of it might appear agreeable enough in an *Ariſtotle* or a *Plato*, but could never become a Chriſtian.) Upon ſuch a Promiſe that the Villains might have a Jealouſy of one another, and be hinder'd from uniting into Bodies, and from doing ſo much miſchief as otherwiſe to the Commonwealth. (Sir *Thomas Moor* was of a contrary Opinion in his *Utop.* l. 2.)

XVIII. I ſhall in the next place enquire into the Method of rating Penalties, or what Meaſure of Puniſhment it is reaſonable to allot to particular Crimes. And here beſides what I have before [c] ſaid concerning the quantity of Actions, 'tis obvious to obſerve, that in civil Courts the meaſures of criminal Actions are taken chiefly, firſt, from the Object they are concern'd in: and ſecondly, as their Malignity doth more or leſs harm to the Commonwealth; and thirdly, from the Intention and Malice of the Delinquent, which may be diſcovered by variety of Circumſtances. The greater therefore and more noble the Object injured is, the greater and more criminal is the Fact eſteem'd. As therefore, as of all Objects, God Almighty is the greateſt and moſt excellent, ſo any Action which tends to his Diſhonour, is of all others the moſt wicked and deteſtable. And as the Obedience and Reverence due to him, which conſiſts chiefly in the Actions of our Minds, ought to influence and govern our whole Lives; ſo (as he himſelf has diſcover'd his Pleaſure) thoſe Actions by which we expreſs our external Reverence to him may be ſuperſeded, when they come in Competition with thoſe, which deſign any extraordinary benefit to Mankind, or to avert any great Evil from them, where there is danger in the delay. *Luke* xiv. v. 5. The Actions next in remove from theſe, are ſuch as affect the whole Body of Mankind; and then ſuch as diſturb the publick order of the Commonwealth. Afterwards follow thoſe criminal Actions, that affect only particular Men; and under this Rank, the civil Court ſets thoſe foremoſt, that ſtrike at Life, the Foundation of all our temporal Happineſs; and next ſuch as concern the Members, not vital, but without which Life it ſelf would be an uneaſy Burden; and which are to be valued according to the dignity of their uſe [d]. The next Claſs of criminal Actions are thoſe, that diſorder the quiet and honour of private Families; the Foundation of which is Matrimony (though *Philo* the *Jew*, in his Book *de Decalogo* & *de Special. Leg.* places the Command againſt Adultery, before that againſt Murther) and in the next place, we may rank thoſe that rob us of, or deny us thoſe Bleſſings, which make up the Neceſſaries and Conveniencies of Life; and that either directly or indirectly, by depriving us of them out of wicked deſign. And in the laſt place, we may reckon ſuch as deprive us of our Reputation, or civil Character and Eſteem. In the particulars of theſe Crimes, ſuch are of the firſt Rank, which have reach'd to the greateſt height of a conſummate perpetration. The Inferior are thoſe that terminate in ſome Acts, and are not arrived at their full growth. And in theſe the Degrees of Malignity differ according to the pitch they have arrived at. And here we may obſerve, that naturally, a Deſign and Inclination to tranſgreſs, in any particular Act, muſt not be conſider'd under the ſame Degree of Enormity, with the Fact it ſelf actually finiſhed; becauſe Evil preſents it ſelf to the Mind under more odious and diſagreeable Colours, when we come to cloſe with the Commiſſion of it; and conſequently a Man muſt have greater Obſtinacy and Reſolution to overcome it, than when it lies, as it were, at a Diſtance, and he hath but newly entertain'd the thoughts of the Attempt. When therefore we ſay the *Will is the ſame with the Deed*, we muſt underſtand, that this is meant only of ſuch an Act of the Will which is united with the utmoſt Endeavour, ſo that no new Operation of the Will intervene between this and the Event of the Crime, though the ſucceſs of the Action fail; as ſuppoſe a Man takes aim at another to ſhoot him, tho' he ſhould miſs his Mark [e]. And therefore Sir *Thomas Moor*, Eutop. *l.* ii. ſaith, "That there is no leſs Danger in having "attempted any one's Chaſtity, than in having "actually violated it. For in every criminal "Action a ſettled and determinate endeavour, "is equal to the Deed. For 'tis not reaſonable, "that that Man ſhould have any allowance made "him for what was wanting to the completion of "his Action; ſince 'twas far enough from his intent "that any ſuch defect ſhould happen. But the generality of ſuch kind of Evils are rated higher or lower, according to the Diſparity of the Subjects they happen to light upon, as to their State and Condition, Happineſs or Infelicity, Age, Time, or Neceſſity, or any particular Paſſion or Affection, that might byaſs to ſome particular Good, or give an Averſion to ſome ſpecies of Evil. Neither muſt we only barely conſider, what are the direct and immediate Conſequences of any Action, but alſo what elſe may probably enſue; as in Fire, and Inundations, the Miſeries and Deaths of a number of unfortunate People, are always to be conſider'd [a]: And therefore the *Chineſe* make it Death, for any Man to be the occaſion of the breaking out of Fire, tho' it were only by his neglect.

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[a] See 2 *Pet.* ii. 15. One might here put the Queſtion, whether Magiſtrates may hire and command private Perſons, to turn Informers, as was practis'd by the antient *Romans*, at leaſt in reference to ſome certain Sorts of Crimes? Conſult *Huber. de Jure civil.* Lib. 3. Sect. 2. Cap. 4. Sect. 27. and Mr. *Hertius*'s Diſſertation, *de Hærede occiſi vindice*, cap. 4. Sect. 3. in the third Tome of the Collection, publiſh'd in 1700.

[b] Apolog. pro *Herodot.* c. 18.

[c] B. 1. c. 8.

[d] See *Grot.* B. 2. c. 20. ſ. 30.

[e] See hereafter in Section 27. towards the End.

XIX. The intenſeneſs or remiſneſs of the Will and Inclination are to be meaſured principally by the Cauſes and Motives, which engage Men in Sin [b]. There is hardly any Man wicked, without cauſe or deſign [c]; for if a Man be in love with Vice, purely for its own Sake, and Sin only out of Vanity and Affectation, or *has no other reaſon to give for his Vices, than that they are unaccountable and incredible* [d], he muſt certainly be arriv'd at the higheſt pitch 'tis poſſible for human Impiety and Impudence to reach. And therefore, *we never find any Malefactor ſo confident, but he will either deny the Fact, or pretend ſome plauſible reaſon for excuſe, and extenuate it from ſome pretence of Nature* [e]. 'Tis certain, the greateſt part of the World are perſuaded into Sin by their Paſſions. Some of theſe preſs us with a ſort of Violence, to eſcape preſent or imminent Evil. And 'tis reaſonable theſe ſhould be allowed to excuſe or extenuate the Crime. And therefore ſuch Crimes as are the Effects of the fear of Death, Impriſonment, or any great Diſcontent, Pain, or Paſſion, or of extream Poverty, are always look'd upon to be excuſable. The wiſe *Hebrew* pronounces, That the Thief, whoſe mean Circumſtances tempt him to Steal, is a more excuſable Criminal than the Adulterer. So Theft, in caſe of Hunger, is a leſs Crime, than the ſame, when it is the effect of unmeaſurable Avarice; and Perjury upon fear of Death is more excuſable, than only upon the view of Gain, or to betray a Truſt. And thus, as the Author *ad Herennium* ſpeaks, B. 2. [f]. *'Tis a greater Crime to debauch a Woman of Quality, than commit Sacrilege; becauſe 'tis poſſible Extremity may force a Man upon the one, but the other can be the effect only of ungovernable Luſt* [g]. And therefore Bawds that live by encouraging and ſupplying the Luſts of others, deſerve more ſevere Puniſhment, than any Man that purſues only his own Pleaſure. It is the Opinion of the Emperor *Antoninus* [h], That thoſe Crimes which Anger gives occaſion to, are more excuſable than thoſe that ariſe from Luſt. *For*, ſaith he, *a Man that yields to the Paſſion of Anger, ſeems to break with the Laws of Reaſon, with ſome Regret and ſecret Reluctance of Mind; but one that ſins in complaiſance to his Luſts, gives himſelf up to Pleaſure, and therefore is more intemperate, as well as more ſoft and effeminate in his compliance.* And as another obſerves [i], *Anger has a much ſtronger and a more violent influence upon us, than Love; for that gives us time to deliberate and conſider with our ſelves; but Anger raiſes ſuch Storms in Mens Breaſts, as hurry them beſides themſelves, and is never quiet, till it is ſatisfied.* The Biaſs of the other Paſſions inclines Men either to ſome real or imaginary Good; the things that are really good, can have no natural tendency in them to tempt us into Sin; ſuch as are all kind of Virtues, and the Actions which flow from them. Other things may indeed be good in themſelves, but may be alſo Inducements to Sin, according to the Diſpoſition of the Man's Mind, who is in Poſſeſſion of them. Of this kind, ſome are pleaſing and delightful; others inſtrumental only in the procurement of Delights, which are ſuch as we call uſeful. Now every Crime committed in purſuit of any of theſe things, is (*cæteris paribus*) look'd upon to be more excuſable, the more that good which was in view, appears to be agreeable to Nature, or the more uneaſy Men are without it [1]. The imaginary good Things are ſuch as Men owe the Credit and Value of, either to their Folly, their Vanity, or their Vices; among theſe, we may rank vain Glory, or an Opinion of more than common Worth, neither bottom'd upon Virtue, nor with any mixture of real Profit joyn'd to it; as alſo Revenge, as it propoſes to it ſelf nothing elſe but the harm of the injurious Perſon. And the leſs of Nature there is in Theft, and the eaſier it is for a Man to be without them, the more criminal are thoſe Actions judg'd that flow from the purſuit of them [k]. It is alſo certain, that all Crimes which are the reſult of clear and diſtinct Knowledge, are greater than thoſe which ariſe from Error and Miſtake; and that thoſe Errors are more dangerous and criminal, which a Man runs into through an obſtinate purſuit of his own Principles, and falſe Reaſon, than thoſe which he imbibes from publick Teachers. And it is alſo well obſerv'd by *Hobbes*, *Leviath.* c. 27. *That the ſame Fact committed upon a preſumption of Power, Friends, or Riches, by the aſſiſtance of which the Offender hopes to reſiſt the publick Miniſters of Juſtice, is a greater Crime*

Mr. BARB. *NOTES on* § XIX.

[1] 'Tis upon this account, that there are ſome Crimes which appear little in themſelves, and which indeed are ſo, as they relate to a thing of ſmall value; which nevertheleſs are more heinous, when conſidered in reference to the Diſpoſition of him that committed 'em, than if they concern'd a thing of a conſiderable Price. Thus an antient Orator, in his Accuſation againſt a Man, ſtrenuouſly inſiſted upon his Baſeneſs of having defrauded of three Farthings, certain poor Workmen employ'd in building a Chapel, over whom he was appointed as their Pay-Maſter. ARISTOTLE obſerves (Lib. 1. Chap. xiv. p. 244. *Edit. Victor.*) upon this Occaſion, that it is quite the contrary in good Actions; that is to ſay, that a Man, for example, that returns a large Sum of Money that has been depoſited in his Hands, is more commendable, than if the Charge was leſs conſiderable: Becauſe that demonſtrates a larger Stock of Honeſty, as the Proſpect of a ſmall Gain, that is capable of inducing a Perſon to commit a Crime, diſcovers in him a larger ſhare of Malice, than if he had been tempted to it by the Allurement of a greater Gain.

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[a] Vid. *Grot.* d. l.

[b] Vid. *Grot.* d. l. ſ. 29.

[c] V. *Senec.* de Benef. L. 4. c. 17. V. Auctor. ad *Herennium*, L. 2. c. 19.

[d] *Calpurn. Flaccus*, Declam. 2. Princip.

[e] *Cicer.* de L L. l. 1. c. 14.

[f] *Chap.* 30. towards the end. See hereafter, Sect. 21. towards the end.

[g] Add. *Val. Max.* l. 8. c. 1. in fin.

[h] L. 2. c. 10.

[i] *Libanius*, Declam. 23.

[k] *Grot.* d. l. ſ. 29.

than when it proceeds from hopes of not being diſcovered, or eſcaping by Flight; for the one is an open Contempt of the Law, the other not [a]. And therefore *Ariſtotle* ſaith [b], “ Such as deny and perſiſt in their Crimes are puniſh'd with more Severity; but ſuch as think themſelves juſtly dealt with, deſerve to be us'd with Gentleneſs and Lenity; and the Reaſon is plain, becauſe 'tis impudence to deny what is plainly prov'd; and impudence is Contempt and wilful Oppoſition ”. *And upon this View* (*ſays* Seneca [c]) *a wiſe Man will ſometimes pardon a great Crime eaſier than a leſs, if he finds that that was the Effect rather of Weakneſs and Infirmity, than of Rancour and Malice; and that this is the product of a cloſe deſigning, inveterate Craft. Neither will he puniſh the ſame Crime after the ſame manner, in different Offenders, when what the one committed through Indiſcretion and Negligence, the other did induſtriouſly and deliberately.*

XX. Another Argument of the great force and violence of the Inclination and Intention, is, when beſides the common Reaſons that ought to be ſufficient to reſtrain a Man from Sin, there happen to be other particular Reaſons founded either in the Perſon of the Delinquent, or in the Perſon of him who was injured in the Fact, or in any other Circumſtances. Thus as *Juvenal* ſaith [d],

Omne animi vitium tanto conſpectius in ſe
Crimen habet, quanto major qui peccat habetur.

———More publick Scandal Vice attends,
As he is great and noble, who offends.

And thus the ſame ſort of Sin, committed by a Churchman, is look'd upon to be a greater fault than by any one elſe, becauſe 'tis expected he ſhould be a Pattern of a pious and unblameable Life to others: *For a Man that neglects himſelf, what he perſuades others to do, confutes his own Counſel by his Practice; for the force of his Example by which he diſſuades, is much ſtronger than all the Arguments by which he would convince* [e]. *Tully* ſaith, “ The Guilt there is in the Vices of a Prince, is not ſo much to be conſider'd (tho' that too may be great enough) as the Conſequences that attend them, that there will be always great numbers ready to imitate them; and therefore Princes of bad Morals deſerve very ill of the Commonwealth; not only as they are vicious themſelves, but as they ſpread and propagate Vice: not only as they are wicked themſelves, but as they do more harm by their Example than by their Sin [f].” Thus *Tacitus* [g] ſaith of *Capito*, *That he was the more remarkably ſcandalous, becauſe being ſo great a Maſter in the Knowledge of human and divine Laws, he had forfeited his publick Character, and diſgraced his own private Skill.* And *Tully* ſaith in another place [h], “ As it would be unpardonable in a Man that profeſt himſelf a Grammarian, to ſpeak improperly, or in one that profeſt to have Skill in Singing, to ſhew none in the Practice of it; becauſe theſe are Faults in the Arts they pretend to: So a Philoſopher that is guilty of Miſbehaviour in the Conduct of Life, is the moſt inexcuſable; becauſe he is deficient in thoſe Duties he affects to be thought a Maſter of; and commits Miſtakes in the Art of Life, which he profeſſeth [i].” In *Peru*, under the Empire of the *Ynca*'s, a Magiſtrate found guilty of any Crime was puniſhed with greater Severity, than any private Offender: for this Reaſon, that he was expreſly preferr'd to the Adminiſtration of Juſtice, and plac'd in an Office of Truſt, upon the Preſumption that he was a Man of more than common Probity and Goodneſs [k]. Upon this account the Injuries of a Friend affect us more, than thoſe of an Enemy [l]. And on the other ſide, a Benefit conferr'd by an Enemy is more pleaſing, and more valued, than the Kindneſs of a Friend: Notwithſtanding what *Terence* ſaith, *That when a Man ſtands in need of a good Turn, he is glad to receive it at any Hand; but 'tis double Pleaſure to receive it from one he has reaſon to expect it from* [m]. For the ſame Reaſon, an Affront from a Man of mean Circumſtances is more inſupportable, than from an Equal or Superior [n]: or from a Man's own Children or Servants, than from another's. There are alſo ſome particular Crimes, which are branded with particular Infamy, as conſiſting in the violation of ſuch Acts of Duty, which Men are obliged to pay to certain particular Perſons, [o] and are therefore judg'd to be more highly wicked; ſuch as Diſobedience to Parents, [p] Inhumanity, and Rudeneſs to Relations, Ingratitude to Benefactors; which are look'd upon to be more heinous, than if they terminated in any other Perſons [q]. In fine, 'tis a material Aggravation, to conſider the time, and place, when, and where the Fact was committed. And thus the ſame Crime committed in a publick Place, before Witneſſes, is greater, than when a Man endeavours to conceal it; both becauſe, what is acted with the advantage of Secreſy, at leaſt, gives leſs Scandal; and becauſe, 'tis a ſtrong Preſumption, that that Man is a bold and harden'd Offender, who has the impudence to out-face the World, and to ſin, as it were, in defiance to all the good and ſober part of Mankind [a]. Thus it is a greater ſin, to be guilty of unchaſte Actions in a Church, than in a Tavern; to ſtrike in the Court, than in a private Houſe; and to be guilty of Intemperance on an ordinary Day, *cæteris paribus*, is more excuſable, than on days ſet aſide for Devotion [b]. Thus *Cicero* ſeverely aggravates *Antony*'s Crime, for coming into the Court ſo diſorder'd with Wine, as to be forc'd to vomit while he ſate on the Bench [c]. Thus the Declaimer ſaith [d], "That though Rudeneſs in any other place may perhaps be excuſable, yet in the Temple, where we ſet a guard upon our Words, where we compoſe our Souls, and confine even our Thoughts, to offer an injury, or affront there, with the ſame boldneſs, as in an unfrequented, private place, is unſufferable [e]. Laſtly, The Methods and the Inſtruments uſed in the commiſſion of the Fact, ſeem to be acceſſory to the aggravation or extenuation of the Crime; becauſe 'tis uſual to infer from them the force or weakneſs of the intention. And therefore 'tis a greater Crime to rob a Man of his Goods, by forcing his Houſe, by digging through his Walls, or artificially picking his Locks, than by going in boldly at an open Door.

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[a] Add. *Ariſtot.* Rhet. l. 1. c. 12. & 14.

[b] Rhet. l. 2. c. 3.

[c] *Senec.* de Irâ, l. 1. c. 16.

[d] Sat. viii. v. 140, 141. *Dio Chryſoſt.* Orat. 1. de Regno, *p.* 9. *C.* Any Vice in a Prince is more heinous, and more in View. *And to this Senſe we may apply that of* Pliny, *Nat. Hiſt.* l. 5. c. 1. Men are never more credulous and eaſy of Belief, than when any Falſity is promoted under the Authority of a great Man.

[e] *Libanius,* Declam. 29.

[f] *Cicer.* de LL. l. 3. c. 14. *Senec. Hercul. Fur.* v. 745, 746. The Crimes of Princes are of deeper Stains.

[g] Annal. iii. 70.

[h] *Tuſc. Quæſt.* l. 2. c. 4.

[i] *Quintil.* Declam. 3. p. 38. 'Tis the Misfortune of Superiors to be thought to command others, what they do themſelves: and Evil is always moſt pernicious when the Author of it is Great and Powerful.

[k] Garcilaſſ. *de la Vega Com, Reg.* l. 2. c. 14.

[l] *Petron.* One that offers Violence to a Stranger is a Villain, but a Man that injures his Friend is little leſs than a Parricide. *Among the* Celtæ, *according to* Nic. Damaſcenus, de Moribus Gentium, *a Man that kill'd a Foreigner was puniſh'd more ſeverely, than if he had kill'd a Subject. The Puniſhment of the firſt was Death, of the ſecond, only Baniſhment.*

[m] *Terent. Adelph.* Act. 2. Sc. 3. v. 1, 2.

[n] Vid. L. 47. t. 10. l. 17. ſ. 3. *D. de Injur.*

[o] *D. ubi ſupra,* l. 7. ſ. 8.

[p] Vid. *Grot.* L. 2. c. 20. ſ. 30. & 2 *Sam.* c. xvi. v. 11.

[q] *To this purpoſe is that Paſſage in* Lyſias, *ſpeaking to the* Athenians, *Orat.* 4. contra. *Andocid.* c. 6. Ye ought to ſhew your ſelves more ſevere to your own Subjects, when they profane the Rites of your Religion, than to Foreigners; becauſe the Crime, as thoſe commit it, ſeems to come from Abroad; in your own People 'tis Native and Inteſtine.

XXI. Another thing which aggravates or extenuates the Crime, is the Power or Ability the Perſon was Maſter of, to forbear the Fact [f]. For ſome Men have clearer and more lively Apprehenſions of the Reaſons, why they ſhould decline ill Acts, than others. And ſome have ſtronger Propenſities than others to ſome particular ſorts of Sins, which may be accounted for, either by the particular mixture and conſtitution of the Body; or elſe by the Age, Sex, Education, or other Circumſtances [g]: For 'tis eaſy to obſerve, that young People, Women, and Men of groſſer natural Parts, or that have had no advantages of Education, do not ſo accurately diſtinguiſh between juſt and unjuſt, lawful and unlawful; and know very little of the meaſures of them, or how to weigh and conſider them [h]. In Perſons where Choler is the prevailing humour in the Body, Anger is the governing Paſſion; others of more and warmer Blood, are eaſily inclined to Luſt: Age turns our Deſires one way, and Youth another [i]. Again, the nigher any Evil ſeems to threaten, the ſtronger is the fear it cauſes, and the more difficult it is to reſiſt it. A freſh Reſentment ſtrikes us with more Violence, than that which hath been cool'd by interval of Time. And though Grief and Diſcontent will not always be ſilenc'd at firſt by Reaſon, yet they have not the ſame excuſe, when they have had time to be compoſed and quieted. In general, it is more criminal to go ſedately and calmly to commit ſin, than in a diſorder and diſturbance of Paſſion [k]. And therefore *Ariſtotle* ſays, *That every Man muſt think him leſs excuſable, who engages in a bad Action upon weak Temptations, than one, that is guilty of the ſame, upon the violent perſuaſions of ſtrong Paſſions. And that when a Man ſtrikes in cold Blood, he is more criminal, than if he were angry; for how far would ſuch a one proceed,* ſaith he, *if he were heated into a Paſſion?* It was Pittacus's Law indeed [l], *That ſuch as abus'd others in their Wine, ſhould pay double the Sum they ſhould do, if they had been Sober:* "For ſince People in that condition (ſaith *Ariſtotle*) are generally inclined to be more abuſive than others, the Law doth not ſo much regard the Pardon which ought rather to be allow'd to Men in the diſorders of Drink, as the publick Good [m]. But Crimes that ariſe from Paſſions are look'd upon to be leſs odious, when they are the effects of a Paſſion alarm'd and rouz'd in us at the appearance of Evil; and ſuch as ariſe from an appetite or eager purſuit after Pleaſures, eſpecially the more needleſs ones, to be more criminal. For Pleaſure doth not affect us ſo ſenſibly, and may be eaſier delay'd, or ſatisfied more innocently ſome other way without Guilt. And (*Ariſtotle* ſaith) therefore, *That 'tis a greater uneaſineſs to bear Pain of any Sort, than to deny Pleaſure.* For (ſaith he in another place) *Pain diſtracts and weakens Nature in the Perſon that ſuffers it; but Pleaſure hath a different effect, and of-*

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[a] Vide *Ariſtot.* Probl. ſ. 29. q. 14. Vide D. *De injuriis*, l. 7. ſ. 8.

[b] *Ibid.* l. 9. ſ. 1. D. *de Injuriis*, &c.

[c] *Cicer.* Orat. *Philip.* 2. c. 25.

[d] *Quintil.* Declam. 252. If any Injury be done to the Magiſtrate, it is an Act of Hoſtility againſt this State; if to an Ambaſſador, Satisfaction muſt be demanded by War, and the Laws of Nations. The ſame Sum of Money taken from a private Man, is Theft; from the Altar, or Temple, Sacrilege. And ſo one that violates another's Chaſtity, ſhall pay to the Party demanding barely Satisfaction for Virginity, ten thouſand Seſterces; but one that hath been publickly Guilty of the ſame Crime, and raviſh'd a Candidate to the Prieſthood, muſt not be allow'd the ſame Terms. *Quintil.* Decl. 264. Add. *Inſtit. Orat.* l. 6. c. 1.

[e] *Demoſthen.* adv. *Midiam.* I was abuſed by my Enemy, in cold Blood, in the Morning, out of Malice, not upon any heat of Wine, publickly, before Strangers, as well as Citizens, and that in the Temple, whither I was obliged to go by the Duty of my Office.

[f] Vid. *Grot.* l. 2. c. 20. ſ. 31.

[g] Vid. L. 48. t. 13. l. 6. D. ad *L. Juliam* peculatus, *&c.* in Princip.

[h] *Procop.* Hiſt. *Vandal.* *l.* 2. c. 14. As it is very unuſual, ſo it would be the more commendable, for the Son to lay aſide that Falſeneſs and Violence of Temper which run through the Family, and to take up a contrary Coolneſs and Probity.

[i] *Gramond.* Hiſt. *Gall.* *l.* 13. Young People ſeldom trouble themſelves to be Wiſe, becauſe they look upon it to be their Privilege to do what they pleaſe. *Libanius* Decl. 21. p. 531. C. D. Ed. *Pariſ.* It borders very much upon Youth, to neglect the Obligation of Duty, and to be ignorant of what is Juſt and Honourable. *Ibid.* In all Nations their Age is made the Excuſe for young People.

[k] *Cic.* Off. *l.* 1. *c.* 8. Thoſe Faults which are the effects of any ſudden Commotion, are more excuſable than ſuch as are premeditated and deſigned. *Philo Jud.* de Specialibus Legib. *p.* 791. B. Edit. *Pariſ.* ſays, That it is an imperfect Crime which is not the effect of much Deliberation, *Plato* de LL. *L.* 9. *p.* 931. C. Ed. *Wech.* They that kill a Man upon propenſe Malice, are to be puniſh'd more ſeverely, than ſuch as are guilty of Manſlaughter only out of a ſudden Raſhneſs.

[l] *Ariſtot.* Polit. *l.* 2. *c.* 12.

[m] *This Law is alſo mention'd by* Plutarch *in* Conviv. 7. Sapient. *p.* 155. F.

fers it ſelf fairer to our choice, and therefore ought to be thought more criminal and opprobrious [a]. Laſtly, Another motive to alleviate the Penalty, is when a Man's Friends and Relations perſuade him to tranſgreſs the Laws [b].

XXII. 'Tis alſo uſually conſidered, whether the Malefactor were himſelf the firſt of the Kind, or were ſeduced by the Examples of others; whether this be the firſt time he is found guilty, or whether he be an old Offender. For in every Commonwealth, the firſt Man that has the boldneſs to commit a Crime, which is like to be of ill Example, and which he does in a manner inform others in, is more highly criminal, than another that has been encouraged by frequent Precedents in the like Crime before [c]. Again, the ſame Fact, if it hath been conſtantly puniſh'd in other Men, is a greater Crime, than if there have been frequent Inſtances of Impunity; becauſe the firſt is greater Contempt of the Government and Laws, than the latter. But the more or leſs frequent Repetition of the ſame Action doth not make it in it ſelf better or worſe, any farther than as it diſcovers it to proceed from inveterate Cuſtom or Habit [d]. And ſince regard is principally had to the frequency of the Repetition, in the making an eſtimate of moral Actions (ſince from thence 'tis uſual to meaſure the force of a Man's Reſolution; and therefore it is commonly ſaid, that ill Habits are worſe than ill Acts) it ſufficiently appears why a good Action, which a Man has frequently repeated, is look'd upon to be better than one he has but newly begun, or very ſeldom practiſed: and on the other hand, why a bad Action often reiterated is judg'd a greater Crime, than one the ſame Perſon has but once or twice been found guilty of [e]. To this purpoſe was the Emperor *Julian*'s Law againſt Lyars [f]; *If any of my Servants be found guilty of a Lye, the firſt time, I pardon it; if he preſume a ſecond time, I bear with him: if it be proved upon him a third, he has not abſolutely incurr'd my Diſpleaſure; but if he venture the fourth time, I forbid him my Preſence.* But the *Peruvians*, under the Government of the *Ynca's*, took particular care to puniſh the firſt Eſſays of their Criminals, becauſe by this Method they thought they might prevent the return of the ſame Crime another time. For unleſs the Weeds are rooted up, when they firſt appear, it muſt be expected that they will plentifully increaſe. And where Juſtice moves ſo ſlowly as not to reach the Offender, till he has repeated his Crime, private Subjects are apt to grow impatient, and to take the liberty to redreſs themſelves, to the prejudice of the publick Peace [g]. Neither is it any Objection, that a good Habit gives an eaſineſs to good Actions; or that on the contrary, an ill Habit makes it difficult to forbear doing ill. For that labour it muſt coſt a Man to attain the good Habit at firſt, is a ſufficient reaſon why the value of it ought not to be leſſen'd, though the exerciſe of it be eaſy and pleaſant. And on the other ſide, the averſion to Sin ought to be therefore the greater, becauſe by a frequency in doing ill a Man ſhall contract ſuch a familiarity with Vice, as he will hardly ever be able to renounce, and by repeated Tranſgreſſions will be abandon'd to Impudence, and forget the Senſe of Shame. For the common Infirmities of human Nature will excuſe ſome Errors and Slips in the conduct of Life; but to be often guilty of the ſame Miſcarriages is a degree of Madneſs not to be born with. [h] *The Faults a Man is guilty of at ſixteen will not appear the ſame, tho' all other Circumſtances be ſuppoſed to continue, as when he is forty; for by that time, beſides that his Habit appears inveterate and inexcuſable, the maturity of his Judgment muſt cut off all pretences of excuſe and plea for pardon.* And all theſe things are, with good reaſon, to be conſidered in levying Puniſhment. For a Crime of no extraordinary Malignity, upon the firſt commiſſion, may be more eaſily pardon'd; or at leaſt puniſh'd with leſs Rigour, than one which has been the common Practice of the Delinquent [i]. Sometimes alſo future Reformation is made the condition of pardon for paſt Offences; and in defect of that, the Puniſhment of the paſt is join'd with that of the repeated Crime; and former Miſdemeanours are again brought under the reach of Juſtice [k]. From whence it appears, in what Senſe that common Aphoriſm is allow'd to be true, *That the Eſtimation of a Crime is never increas'd by any after Act* [l]. And here it might be alſo enquired, how far that Cuſtom of the *Perſians*, which *Herodotus* ſpeaks of, was agreeable to natural Equity, when, in criminal Caſes, the whole Courſe of the Delinquent's Life was examin'd, together with his particular Offence; and if upon the whole it appeared, that there was an over-balance of good Actions, the Crime was pardon'd. But upon a ſtrict View, it muſt appear that all that ſignified nothing to the intrinſick eſtimation of the Crime; and therefore 'tis probable, this Method was not us'd in Crimes of an higher Quality, and where there were manifeſt Proofs of the propenſe Malice of the Criminal, but as *Grotius d. l.* §. 30. thinks, was, or at leaſt ought to have been, confin'd to ſuch Caſes only, where the Delinquent, being not otherwiſe notoriouſly vicious was unwarily betray'd, by ſome Satisfaction or other, he conceiv'd he ſhould find in the Commiſſion of the Fact, or elſe, where the Proof of the Fact lay intricate and perplext, a view of the Criminal's Life might be neceſſary to give the matter ſo much Light, as to diſcover whether it were probable, he was guilty, or not; ſince a Man muſt make ſeveral Steps, before he can come to the higheſt pitch of Guilt [a]. Yet *Herodotus* [b] gives us an Example of *Sandoces* a *Perſian* Judge, whom *Darius* commanded to be crucified for taking Bribes, and giving wrong Judgment; but when he call'd to mind, that the Services and good Offices he had done him, were more than his Crimes, he order'd him to be taken down, and admittted him again to favour. And *Cicero*, in his Defence of *Sulla*, reaſons the ſame way, *In all Matters of Importance and Concern*, ſaith he, *we are not to meaſure a Man's Intentions, Thoughts, or Actions, by the Fact it ſelf; but by the Circumſtances of his Life: And the reaſon*, ſaith he, *is, becauſe, according to the Opinion we receive of a Man's Morals, we generally conjecture how far he may be guilty, and how far not* [c]. And for this reaſon it was uſual in the the old *Roman* Judgments, for the Accuſer to begin with a Cenſure upon the Life and Behaviour of the Criminal; and on the other ſide, the *Patroni* either made excuſes for him themſelves, or brought in the *Laudatores*, Perſons that ſhould give Teſtimony of his good Behaviour. And there was good reaſon for the Practice; for conſidering the general Depravation of Mankind, a Judge ought to be very cautious, how he takes away the Life of any Subject, who upon the whole, may rather be thought a good, than a bad Man. But it is to be obſerved, that an Inquiry into the Criminal's Morals, and paſt Life, where the Fact is intricate and obſcure, may make the Preſumptions great on both ſides; and therefore, that if any Man has clearly acquitted himſelf of the Crime he was indicted of, he may lawfully plead, *that he was not oblig'd to make a Defence for his Morals, or vindicate his former Behaviour, but only to acquit himſelf, before the Court, of the Crimes his Accuſers directly charged him with* [d]. But yet when a Man that has always been a regular and dutiful Subject, changes his whole courſe of Life, there is good reaſon the Laws ſhould deal ſeverely with him, upon a double Account; both becauſe he hath been guilty of a Crime, and becauſe he has made ſo ill a Choice, as to change a good courſe of Life for a bad one [e].

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[a] *Ariſt. Nicom.* l. 7. c. 8. The Intemperance of Anger is leſs Criminal than that of Luſt. *Id. Magn. Moral.* l. 2. c. 6. A violent inclination for Pleaſure is much more faulty than any exceſs of Anger. For Anger is a very reſtleſs uneaſy Paſſion, and every one that is under the Power of it, finds himſelf diſcompoſed. But the Incontinence that ariſeth from the concupiſcible Appetites is attended with Pleaſure, and therefore is leſs excuſable, becauſe, it ſeems to be the effect of Wantonneſs and Effeminacy. There is a Paſſage like this, in *Marcus Antoninus*, l. 2. ſ. 10. Ad. *Ariſtot.* Probl. ſ. 29. q. 16.

[b] *Vid.* L. 47. t. 16. l. 2. D. *de receptator.* Ad. *Grotius.* d. l. ſ. 29.

[c] *Velleius Paterc.* l. 2. c. 3. Precedents ſeldom ſtop where they begin, but if allow'd never ſo little Liberty, will ſoon make way for themſelves to break out further. Vid. *Gell.* l. 10. c. 19. Polyb. *excerpt. legat.* 93. c. 5.

[d] *Vid.* L. 48. t. 19. l. 28. ſ. 3. D. *de pœnis.* Ant. Matthæus *de crimin. tit. de furtis. ſ.* 9. *ſeqq.* & *L.* 48. *D. tit.* 18. *c.* 4. *ſ.* 27, 28.

[e] Vid. *Grot.* L. 2. c. 20. ſ. 30.

[f] *Libanius Legat.* ad *Julian.*

[g] *Garcilas de la Vega, Com. R. l.* 2. *c.* 10.

[h] Sir *Tho. Browne*'s Relig. Medici, ſ. 41.

[i] V. *Grot.* d. l.

[k] See 1 *Kings* i. 52. ii. 23.

[l] *Nunquam creſcit ex poſt facto, præteriti delicti æſtimatio,* L. 50. t. 17. *De diverſ. reg. Juris,* l. 138. ſ. 1.

XXIII. Now although from what has been ſaid, it ſufficiently appears, that one Crime is greater than another; and that human Juſtice ought not to puniſh every Crime with equal Severity; yet notwithſtanding, it muſt be confeſs'd, that both the preciſe Quantity and Quality of human Puniſhments depend upon the Determination of the civil Sovereign, which is principally to be directed by the advantages and publick Good of every Commonwealth. Upon this view *Anyſis* King of *Egypt* puniſh'd no Criminal with Death in all his Reign; but, according to the Degrees of every Man's Offence, condemn'd him to bring a quantity of Earth, or Rubbiſh to the City he belong'd to. And by this method the Ground the Cities ſtood upon was rais'd higher, and the Cities ſecur'd againſt the Inconveniencies of the Flood upon the riſing of the *Nile* [f]. But indeed there is no Neceſſity, that there ſhould be always the ſame Proportion obſerv'd between the Penalties, as there is diſtance between the Objects injured by the Offender. Every particular Crime may be ſentenced to a particular Puniſhment, as it happens to be moſt agreable to the Circumſtances of the State; without any regard, whether another Crime, which in it ſelf may ſeem greater or leſs than this, be puniſh'd with more or leſs ſeverity. *Plato* propoſes a Law of this nature [g], *That if any Man robb'd the Publick, whether of more or leſs, his Puniſhment ſhould be the ſame.* "For, ſaith he, a Man that takes "away a thing of leſs value, though he doth it "with leſs force than another; that robs the State "of ſomething greater, yet he is guilty of the ſame "ill Principles and Intentions; and a Man that "takes away ſomething of conſiderable worth, "which he never depoſited, can but be unjuſt "and criminal. The Law therefore doth not "inflict greater or leſs Penalties upon the Offenders, from the Compariſon it makes between "the Degrees of their Theft; but becauſe it ſuppoſes, that one is more capable of being reform'd, than the other." 'Tis certain, a Judge ought ſo far to obſerve Equality in the Diſtribution of Puniſhments, as to take care that ſuch as are equally guilty ſhould be equally puniſh'd; and that a Fault which was ſeverely corrected in one Man, ſhould not without very good reaſon be excuſed in another; ſince it muſt be expected that ſuch Partiality would be a certain cauſe to raiſe Diſturbances in the Commonwealth; and becauſe a Puniſhment can have no effect when it is not inflicted upon any view of publick Good, but barely in gratification to private Paſſion. But ſtill an equality of Puniſhment muſt be ſuppos'd only where the Criminals are guilty of the ſame Fact in Specie, and not of different. For 'tis common for human Juſtice to puniſh ſmall Faults with greater Rigour, or to take the contrary Method, as the Exigencies of the State, or the Will of the Legiſlator determines. And the Criminal has no Reaſon to complain of the Partiality, ſince he knew beforehand what he was to expect [h]. For inſtance, though Theft in it ſelf be a much leſs Crime than Murder, yet the Thief has not juſt reaſon to complain, ſhould he be condemn'd to ſuffer the ſame Puniſhment with the Murderer, tho' his Crime was not equal in Degree. The reaſon why Crimes of different Degrees are equally puniſh'd with Death is, becauſe Death is the greateſt and laſt

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[a] *Nemo repente fuit turpiſſimus*------Juven. *Sat.* 2. *v.* 83.

[b] *Polymnia*, c. 13.

[c] *Orat. pro Sulla*, c. 25.

[d] Author. *ad Herennium*, l. 2. c. 3.

[e] Polyb. *l.* 7. *in Excerpt. Peireſcian* But when he took a quite contrary way of Life, and grew every day worſe and worſe; 'twas fit every body ſhould change their Opinions of him.

[f] *Herodot.* Euterp. p. 90. Ed. *H. Steph.* *Diodor. Sic.* l. 1. c. 65. Tho' *Actiſanes* King of *Egypt*, when he built *Rhinocolura*, took care that all thoſe ſort of People, the Scum and Filth of the Nation, ſhould be carried into a Place by themſelves, that they might not infect others, *Diodor. Sic.* l. 1. c. 60.

[g] *Plato* de LL. l. 12. init. p. 982. C. Ed. *Wech.*

[h] *Calpurnius Flaccus*, Declam. 5. When the Conſequences are threatn'd beforehand, the Fault lies no where but in the Sufferer.

Evil Men inflict[1]: unleſs it be that ſometimes the way to it is ſhort and eaſy, and at other times made terrible, and grievous by delay and torture[2]; or that ſometimes diſhonour is done to the dead Body, and infamy fix'd upon the Memory of the Perſon[a], which is ſometimes inflicted a conſiderable time after the Delinquent's Death; and may again be recall'd, and taken off[b]. Beſides, the Will of the Legiſlator is often conſider'd in determining the Penalty, though not in ſo abſolute a Degree, as to exclude the Intereſt and Advantage of the Publick, yet to ſuch a Degree, that the particular Puniſhment ſeems in a manner entirely to depend upon it. There are alſo ſome Crimes of ſo black a Nature, as will juſtify the greateſt Severity that can be us'd upon Criminals, who have contracted the ſlighteſt Acquaintance with them[c]. So *Philo* ſays, *That a Man who attempts only to kill another treacherouſly, is not the leſs guilty of Murder, tho' he fails of Succeſs:* And the written Law in this Caſe commands, *That if a Man come preſumptuouſly upon his Neighbour to ſlay him with guile, thou ſhalt take him from mine Altar, that he may die*[3]. The *Athenian* Judges indeed were too ſevere, when they condemn'd a Boy for pricking out a Bird's Eyes, upon Suſpicion, that it was a ſign of a barbarous Temper, and that he might prove a very ill Member of the Commonwealth, if he were ſuffer'd to grow up to years of Maturity[d]. *But it is not the actual Commiſſion of a wicked Act that makes the Criminal; 'tis enough that a Man has arm'd himſelf, and diſcovers his inclinations to Rob and Murder: For the Wickedneſs doth not always begin, but is exerciſed and improv'd only by the practice.* For as *Paterculus* reflects upon *Caius Cato*'s being condemn'd for a ſmall Offence[e]; *The Inclination and Intent of the Offender may ſometimes be of greater force with the Judge, than the Crime it ſelf. For 'tis natural enough to argue from the Fact to the deſign of the Criminal, and to conſider rather of what nature the Offence is, than how great*[f]. In Caſes of Treaſon and Conſpiracy againſt the State, bare Conſciouſneſs, or Privity without any Aſſent, and Silence only, and the concealment of it deſerves Puniſhment[g]. However in the diſtribution of Puniſhment there ought always to be as much Gentleneſs and Lenity uſed, as is poſſible. And therefore the Severity of *Draco*'s Laws might juſtly appear inſupportable, and deſerve *Solon*'s Corrections[h]. Yet the Courſe of Juſtice in *Peru* was altogether as Rigorous; for there almoſt every Crime was puniſh'd with Death; the Judges not ſo much conſidering the ſimple Nature of the Offence, as that it was a Breach of the Commands of the *Ynca*, whom they look'd upon and reverenced as a God[i]. But there is good Reaſon for enhanſing the ſeverity of the Puniſhment, when juſt Reſentment, and Care for the common Good, makes it neceſſary to ſecure the publick Quiet by puniſhing Malefactors. For Inſtance, Suppoſe the Criminal threaten Danger to the State, if he be not puniſh'd in time. *H. Stephens* gives us a Story[k], of a Man that having begg'd for a Pardon of the King of *France* for the ſeventh Murder he was guilty of, and finding he could not obtain it, boldly told the King, that he would own only the firſt Murder to be his own proper Action; and that the Imputation of all the reſt muſt lie upon the King himſelf; for that he ſhould never have committed the other, if the King had not given him Encouragement, by pardoning the firſt. Sometimes alſo it is neceſſary to make Examples of ſome Malefactors to frighten others; eſpecially where the general Perſuaſives and Inducements to Wicked-

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Mr. BARB. *NOTES on* § XXIII.

[1] *Lycurg.* Orat. contra *Leocras.* The greateſt and the laſt of Puniſhments in Death.

[2] *Ovid. Her.* Epiſt. l. 10.

Morſque minus pœnæ, quam mora mortis habet. Death hath leſs Pain itſelf, than the Delay.

Tho' ſome think a quick Diſpatch an eaſier Puniſhment than a miſerable Life. Vid. *Cæſaris* Orat. in *Salluſt.* Conjur. *Catilin.* and *Tiberius*'s Anſwer in *Suetonius*, c. 61. *To one that deſir'd his Puniſhment might be ſhort, was,* I am not yet reconciled to you.

Senecæ Hercules Fur. v. 512.	Death to the Miſerable is Eaſe.
Senec. Æg. Agamem. v. 989.	He's yet unskil'd in the Arts of Tyranny, That puniſhes with Death.
El. Ibid. v. 996.	Why is there any thing beyond the Grave?
Æg. Ibid.	Yes Life when one deſires to die.
Euripid. Hippol. Coron.	Τὰς γὰρ ἄδης ῥᾷστος ἀνδρὶ δυστυχεῖ. v. 147. Th' unfortunate deſires a ſpeedy End.

Nay, *Charron de la Sageſſe*, l. 1. c. 39. (vi.) ſ. 10. ranks it among the ridiculous Notions of the Vulgar, to think to be reveng'd of an Enemy by killing him. *For this,* ſaith he, *is only to take from him the ſenſe of Misfortune, and to ſecure him from all further Harms; unleſs a Man thinks it neceſſary to his own Security, to leave no body alive that is like to be his Enemy, or to make him uneaſy.* In *Philoſtratus* l. 1. *Apollonius* condemn'd the Eunuch, that lay with the King's Concubine, to live, by way of Puniſhment.

[3] Vide *Philon.* de ſpecialibus legibus, *p.* 791. Tacitus *Hiſt. l.* 2. *c.* 77. *Qui deliberant deſciverunt,* to demur is to deſert. *And to this we may refer that of* Plutarch, Cæſar. Penalties are not always inflicted for the Fact, but ſometimes for the Intention and Deſign. *Quintil.* Declam. 362. The Law lays the Puniſhment upon the Will. *Lyſias* Orat. in *Simonem*, c. 12. It is certain that thoſe we receiv'd our Laws from, did not intend that a Man, who in a Quarrel had done harm to another, ſhould therefore be baniſh'd: But that ſuch as violently aſſaulted and injured a Man with a deſign to take away his Life, tho' they fail'd in the Attempt, ſhould yet ſuffer that ſevere Puniſhment; becauſe they ſuppoſed it juſt, that he ſhould ſuffer as really guilty of the Fact, that deliberately endeavour'd to put it in Execution; for tho' it happen'd that they were miſtaken in the ſucceſs of the Action, yet they purſued it as far as they had Power. *Add. Ælian. Var.* Hiſt. l. 14. c. 27.

[a] *Ælianus* N. Hiſt. l. 4. c. 7.

[b] Vid. *Socrat.* Hiſt. Eccleſ. l. 7. c. 44.

[c] *Vide* Ant. Matthæum *de Crimin. Prolog. c.* 1. *ſ.* 5, 6. & *ad L.* 48. *D. tit.* 5. *c.* 3. *ſ.* 10. & *tit.* 18. *c.* 4. Ziegler *ad* Grot. *d. l. ſ.* 39. Valerius Maximus *l.* 6. *c.* 1. *ſ.* 8. *Vide L.* 47. *t.* 11. *l.* 1. *ſ.* 2. *D. de extraordin. Crimin. D. ad L.* Cornel. *de ſicariis. Vide L.* 48. *t.* 8. *l.* 3. *ſ.* 1, 2, 3. *Philo Judæus* de confuſione linguarum, *p.* 343. C.

[d] *Quintil.* Inſtit. Orat. l. 5. c. 9. *Senec.* de Benef. l. 5. c. 14.

[e] L. 2. c. 8.

[f] Ad. L. 9. t. 8. l. 5. princ. C. ad *L. Jul.* Majeſt. *Grotius* in *Flor.* ſparſ. in *Jus Juſtinian.*

[g] We have an Example of *Thuanius*, in *Benj. Priolus* Hiſt. *Gall.* L. 1. c. 6. and of *David Berchinus*, in *Buchanan.* Rerum. *Scotic.* l. 8. Ad. *Diodorus Siculus*, l. 11. c. 54.

[h] Vid. *Plutarch. Solon.*

[i] *Garcilaſſ. de la Vega*, Com. Reg. L. 2. c. 12, 13.

[k] Apolog. pro *Herod.* c. 17.

neſs are ſtrong [a]; ſuch as are Eaſineſs and Uſe, which nothing but a ſevere Diſcipline can reform. The *Jewiſh* Law lays a greater Penalty on the Perſon that ſteals out of the Field, than one that robs an Houſe, becauſe the firſt is done with greater eaſe; compare *Exod.* xii. v. 1. with the 7th and 9th ver. [b]. And thus the *Scythians* thought no Crime ſo heinous as Theft, becauſe having neither Houſes nor Folds to keep their Cattle in, no Man's Property could be ſecure, if Robbery had any Indulgence. And in ſome Nations Theft is look'd upon to be a greater Crime in a Domeſtick, than in a Stranger [c]. It was Death at *Athens* for a Man to ſteal from the Baths, from the Schools of Exerciſe, or the Market, or any ſuch publick Place; but one that robb'd a private Houſe was only to pay double the worth of what he ſtole [d]. *Q. Curtius* ſays, *There was a Cuſtom among the* Perſians, *that oblig'd them to be ſtrict in concealing any Secret that concern'd their Kings*; and adds, *that neither Hope, nor Fear, could extort any Expreſſion from them that might give Light to diſcover it; the antient Conſtitutions of that Empire obliging them to ſuch Silence, upon pain of Death; and that therefore no Intemperance was puniſh'd ſo ſeverely among them, as that of the Tongue, it being thought that no Man could be capable of any great Attainments, who could think it a pain to be ſilent, when it was plain there is nothing in Nature eaſier.* Further alſo, Cuſtom, or when a Vice is grown popular, or in faſhion (for as to that habitual Cuſtom or Familiarity, particular Men contract by repeated Sins, I have ſpoken already) though it be ſome extenuation of a Crime, yet doth certainly deſerve very ſevere Puniſhment [e].

---------Veteri poſt obruta morbo
Corpora, Pœonias nequicquam admoveris herbas
Non leviore manu, ferro ſanantur & igni, [f].
Ne noceat fruſtra mox eruptura cicatrix, &c.

A crazy Body long inur'd to Pain,
From healing Med'cines ſeeks Relief in vain:
When at the Bone the fretting Ulcer ſmarts,
It fears the Lance, but mocks the gentler Arts.
With Cauſticks and Inciſions force your way,
The treacherous Wound will elſe your Skill betray.
Skinn'd o'er without, it ſeems to heal inclin'd,
But ſtill the Sore lurks feſtering deep behind.
But ſearching Fires the ſecret Faults diſcloſe,
Purſue the watry Humour as it flows;
From ſickly Veins prevent the freſh ſupplies,
And ſtop the Springs whence firſt Corruption riſe.
If obſtinate the Sore, and ſtill unſound,
And dangerous *Gangreens* gnaw within the Wound,
A Limb cut off muſt for the whole compound.

And therefore *Grotius* judiciouſly obſerves [g], that in publick Trials it is ſome Excuſe for an Offender to plead, that his Fault is common; becauſe in all Trials the Point in Diſpute is, what ſhare of Guilt that particular Perſon has contracted; and this without doubt muſt appear the leſs, when the Man was carried away with the Violence of the Stream, rather than the Force of his own Inclinations; but when Laws are to be made, a prevailing Cuſtom is an undeniable Argument, that there is greater need of ſevere Sanctions to ſuppreſs it; becauſe Laws muſt be ſuppoſed to regard the Advantages that may accrue by the Puniſhment in general. However, when a Vice has rais'd it ſelf to ſuch an Head, and Offenders are grown ſo numerous, that if all of them were to fall under the reach of Juſtice, the Commonwealth muſt be much diſpeopled, if not entirely ruin'd by rigorous Executions of Law, the Law muſt yield to the Neceſſities of the State, and rather be neglected, or laid aſide, than occaſion the Deſolation of the Commonwealth [h]. *But Laws are to be applied only where things are capable of being effected, and ſo may very well puniſh Offenders when they are few, and may eaſily be reclaim'd by Puniſhment, but to attempt upon Multitudes is to no purpoſe* [i]. *Laſtly,* where the Neceſſities of the State are preſſing for the purpoſe, if upon an Invaſion and War there ſhould be no other Perſon fit for the Command and Charge of a General, there can be no Reaſon why a Criminal of experienc'd Courage and Conduct might not be releas'd even from capital Puniſhment, when it appears that the State cannot be ſafe without his Aſſiſtance; and therefore there was Reaſon in what *Fabricius* ſaid, when he gave his Vote for *Cornelius Rufinus* a good General, but a very covetous Man, to be Conſul; that he had *rather he robb'd than ſold* [k]. And ſo *Junius* the Dictator after the Defeat at *Cannæ*, publiſh'd an Edict, *That if any Man, whether he was a Priſoner for a capital Crime, or for Debt, would liſt himſelf for the publick Service, under his Command, he would grant him a Pardon, and diſcharge his Debts* [l].

XXIV. From all which I think it is evident, that there is no vindictve Juſtice in the civil Court, which determines what Degrees of Puniſhment ought to be inflicted on particular Crimes, by any Deciſion of Nature. But the true Meaſure of all human Puniſhment muſt be taken from the utility of the Commonwealth; and according as the Ends of Puniſhment ſeem moſt eaſy to be attain'd, the Puniſhment may either be enhanſed or alleviated, according to the Diſcretion of the Government; yet ſtill ſo as that the Method of Puniſhment may admit of great Latitude. And therefore, as it would be too ſevere to inflict a Penalty, when the Ends of puniſhing may be attain'd by gentler Methods [m]; ſo the *Puniſhment* is much too eaſy, when it has not Sharpneſs enough to produce the Ends deſign'd by it, and conſequently to reſtrain the Inſolence of the Subject, or ſettle the internal Security of the Commonwealth; or in ſhort, when it is a Puniſhment the Delinquents themſelves deſpiſe [a]. If the Legiſlator go too far on the one hand, he is liable to the Infamy of being cruel; [b] and if he incline to the other ſide, he makes all Puniſhment inſignificant; and gives abſolute liberty to Vice. For ſince the natural End of all Puniſhment is to *diſpoſe Men to obey the Law*, and, in conſequence, to reſtrain them from Actions contrary to it; and ſince Men, whenever they allow themſelves to conſider, always weigh the Conveniences and Inconveniences which ariſe from the ſame Thing; it is evident, that if the Harm or Pain inflicted, be leſs than the Benefit or Satisfaction that naturally follows from the Crime committed, the Puniſhment will be but a very ſlender Inducement to perſuade any Man to reſiſt the Temptation to Diſobedience [c].

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[a] V. *Grot.* d. l. ſ. 34, 35.

[b] L. 47. t. 17. l. 2. D. de Effractor. *Juſtinus*, L. 2. c. 2. de *Scythis.*

[c] Tho' the *Roman* Law ſeems to have the contrary Method, *L.* 48. *t.* 19. *l.* 11. *ſ.* 1. *D. de pœnis. Vide* Ant. Matthæum *de Crim. tit. de Furtis*, c. 3. ſ. 2, 3. Ad. *Ariſt.* Probl. *ſ.* 29. *Quæſt.* 14.

[d] *Vide L.* 47. *t.* 17. *l.* 1. *D. de Furibus Balnear.* Ant. Matthæum *de Crimin. ad h. t. & t.* 14. *de Abigeis.* Add what *Philo Jud.* urges, to aggravate the Crime of Sorcery, *de Special. legibus, p.* 791, 792. Ed. *Paris.* Q. Curtius, *l.* 4. *c.* 6. *ſ.* 5, 6.

[e] Leg. 16. ſ. ult. D. de Pœnis, ubi ſupra.

[f] *Claudianus* in *Eutropium*, l. 2. v. 11, *&c.*

[g] In the abovemention'd place, *ſ.* 35.

[h] See *Tiberius*'s Epiſtle concerning Luxury, *Tacitus* Ann. 5. c. 54. in the Beginning.

[i] *Plutarch.* in *Solon.* p. 90. Ed. *Wech.*

[k] V. *A. Gellium*, l. 4. c. 8.

[l] *Livy.* l. 23. c. 14. Add. *Grot.* upon 1 *Kings* ii. 6.

[m] See *Montaign*'s Eſſays, B. 1. c. 11. p. 309. Ed. *Pariſ.*

XXV. I am to add farther, That ſince the ſame Puniſhment doth not affect all Perſons alike [d], and conſequently will not raiſe the ſame Diſpoſitions in all to Obedience, it is eaſy to diſcover, that both the general penal Sanction, and the application of it to particular Parties, ought to be made with a ſuitable regard to the Perſon of the Delinquent, and in that, to all thoſe qualities of Age, Sex, Dignity, Fortune, Strength, and the like; which may either increaſe or mitigate the ſenſe of Puniſhment [e]. For the ſame Mulct, for Inſtance, will preſs hard upon a poor Man, which will be no burden at all to a rich; an ignominious Puniſhment will ſit eaſy upon a Wretch mean and deſpicable, when to a Perſon of Honour and Quality nothing will be more inſupportable and afflicting; and Men, and full grown People have more Strength to bear Puniſhment, than Women and Children [f]. And the *Moors* therefore puniſh Women guilty of Unchaſtity, with greater Severity than Men; becauſe they ſuppoſe that generally the Arts and Enticements of the Women firſt give them Encouragement. But yet it doth not from hence follow, that Puniſhment ought to be inflicted in geometrical (or as *Bodinus* [g] affectedly calls it, an *harmonious*) Proportion; all that is intended here is no more than to make a ſimple Equation between the Crime and the Penalty, which the Circumſtances of the Perſon are neceſſary to find out. But if on the account of ſuch Qualities, which neither aggravate the Crime, nor augment the ſenſe of the Puniſhment, Crimes equal in Demerit are unequally puniſh'd, 'tis a ſhameful partiality and reſpect of Perſons; of which *Grotius* doth not always acquit the *Roman* Laws. And ſome produce this for an Inſtance [h], a Man that kills his Wife, when he has taken her in Adultery, if he be a Perſon of inferior Rank, is ſentenc'd to perpetual Baniſhment; but if he be in any Dignity or Office, he is only to ſuffer the *Relegatio* for ſome ſhort time; for a mean Perſon may be as much concern'd and afflicted at the Diſgrace he ſuffers by the falſeneſs of his Wife, as a Man of Honour, and may leave his Country with equal Grief and Regret [i]. And laſtly, it may alſo be obſerv'd, that in ſome Nations certain ſorts of Puniſhment are attended with particular Infamy; thus *Euripides*, [k]

High on the Gallows ignominious Pains
The very Slaves regret and think diſhonourable;
But by the Sword to fall looks generous and brave.

And *Telemachus* in *Homer* [l] would not diſpatch his Maids, Καθαρῷ θανάτῳ, that is, would not kill them by the Sword, but hangs them. The Puniſhment of Strangling, on the other hand, is look'd upon to be honourable by the *Ottoman* Family, who think it infamous that noble Blood ſhould be ſpilt upon the Ground. And the *Jews* thought it a more ignominious Death to be Beheaded, than to be Strangled or Stoned [m]. On the contrary, ſome Puniſhments have had the fortune to be accounted Honourable. And upon ſuch a Notion as this, we are told that the *Athenians* were angry, that ſo mean and contemptible a Wretch as *Hyperbolus* ſhould be baniſh'd by *Oſtraciſm* [n]; *becauſe it was uſually thought an Honour to ſuffer that Puniſhment; and they could readily yield Ten Years Baniſhment to have been really a Puniſhment, when* Thucydides *and* Ariſtides, *and ſuch great Men ſuffer'd it; but they thought it was too great a Credit to* Hyperbolus, *and would only encourage him to boaſt, that he had ſuffer'd the ſame Puniſhment which was inflicted upon the moſt gallant Men of* Athens [o].

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[a] V. *Gellium*, l. 20. c. 1. *de Veratii petulantia*.

[b] *V.* Hobbes *de Cive*, c. 3. ſ. 11.

[c] *Vid.* Hobbes *de Cive*, c. 13. ſ. 16. *Leviathan.* c. 27. *Author. De princip. juſti & decori p. m.* 200. *Cumberland. de Legibus Nat.* c. 5. ſ. 39.

[d] *Vid.* Grot. *ubi ſupra*, ſ. 33.

[e] *Vid.* l. 47. t. 19. l. 4. ſ. 1. & l. 12. ſ. 1. *D. de Incendio, ruina*, &c. & t. 10. l. *ult. D. de Injuriis*, &c. & t. 11. l. 6. *D. de extraord. Crim.* & t. 12. l. *ult. D. de Sepulchro violato*, & t. 14. l. 1. ſ. 3. *D. de termino moto.* L. 48. t. 8. l. 3. ſ. 5. *ad* L. Cornel. *de Sicariis*. In moſt of theſe Laws which are here cited by the Author, there is an unjuſt reſpect of Perſons, which he himſelf blames a little farther, as we ſhall find, if we take the pains to examine 'em. See the *Orbis Romanus* of the late Mr. *Spanheim*, of the Diverſity of Puniſhments among the *Romans*; according to the Difference of Perſons.

[f] *Vid.* L. 48. t. 5. l. 38. ſ. 24. l. 39. ſ. 4. *D. ad* L. Jul. *de Adult.* L. 48. t. 13. l. 6. *D. ad* L. Jul. *Pecul.* & t. 13. l. 5. ſ. 3. *D. ad* L. Jul. *Pecul.* L. 4. t. 4. l. 37. ſ. 1. *D. de minor.* L. 50. t. 17. l. 108. *D. de diverſ. reg. jur.* *Add.* Olearius *Itin.* Perſ. *L.* 3. *c.* 6. of the Pecuniary Mulct, paid among the *Ruſſians* for an Abuſe offer'd, call'd by them *Biſzeſtia*.

[g] *De Repub.* l. 6. c. *ult.*

[h] *V. D.* L. 48. t. 8. l. 1. ſ. 5.

[i] *Vid. Edictum* Theodorici *Reg.* c. 91. *Add.* Zieg. *ad* Grot. *L.* 2. *c.* 20. *ſ.* 33.

[k] *Helena*, v. 306, *&c.* Plin. *Nat. Hiſt.* l. 2. c. 63. Strangling is an odd ſort of Death, by ſtopping the Breath which endeavours to find a Paſſage. *Add.* L. 48. t. 19. l. 28. ſ. 2. *D. de Pœnis.* To this alſo may we apply that of *Dio Chryſoſtom.* Orat. ad *Alexandrinos.* The one is the Death of a Malefactor, the other of an unfortunate Slave.

[l] *Odyſſ.* L. 22. v. 465, *&c.*

[m] Seld. *J. N. & G.* l. 7. c. 6. Thus *Philo Jud.* in *Flaccum*, is very angry that the *Jewiſh* Magiſtrates and Senators at *Alexandria* ſhould be ſcourg'd in the ſame manner, and with the ſame Inſtruments, as the meaneſt *Egyptian* Slaves were. To this we may refer that of *Seneca, de Conſtantia Sapient.* c. 4. There are ſome Slaves that had rather be ſcourg'd than beat. And it was I preſume a very ignominious Puniſhment which is mention'd *Additament.* i. *Leg.* Burgund. *tit.* 10.

[n] Vid. *Plutarch. Alcibiades*, p. 197. B. Where there are theſe Verſes quoted out of *Plato* the Comick Poet.

Worthy to ſuffer what he did, and more,
But not in ſuch an honourable way;
The Abject Wretch the Sentence did diſgrace.

Vid. *Plut. Nicias*, p. 530. *E.* where he ſpeaks of the ſame Matter.

[o] Thus it was ſome ſort of Comfort, *Æneæ magni dextra cadis* -------
Virg. *Æneid.* l. 10. v. 830. & *de la Cerda in loc.*

XXVI. Neither can I ſee any Neceſſity that every Commonwealth ſhould take its Meaſure and Standard for the Puniſhment of Crimes, from the penal Sanctions of the *Jewiſh* Law. Becauſe that part of the Law was the poſitive and civil Law of the *Jews*, and was accommodated to the Genius of that People and Commonwealth. From which, ſince the Conſtitutions and Tempers of other Nations and Commonwealths are very different, there is good Reaſon why the Penalties too ſhou'd be different. Whether this indeed will hold true with reſpect to the capital Puniſhment of Murther, as well as to other Crimes, may bear ſome Diſpute. Becauſe, the Law which determines that Puniſhment, ſeems to have been promulg'd to all Mankind, as well as to the *Iſraelites*. And the Reaſon of the Puniſhment is evident: Becauſe, a Man who is barbarous to that Degree, as to take away any Man's Life maliciouſly, can never give ſufficient Caution to others, without loſing his own [a]. However, I think it ſhould not be thought a Breach of that Command God gives, *Gen.* ix. *6.* [b], if a Murtherer ſhould be releaſed from capital Puniſhment, upon ſome extraordinary Exigence of the Commonwealth. For ſince the Determination of all Puniſhment is of poſitive Inſtitution, and all poſitive Laws may be accommodated to the Neceſſities of the State; that Law may alſo reaſonably be ſuppos'd to admit of the ſame Exception. Some indeed are of Opinion, that that Paſſage is rather a divine Commination than a Law, and that God only declares by it, that he will execute Vengeance upon Murtherers, either by Men, or by ſome other ſevere Method, if they happen to eſcape the Inquiſition, and Rigour of human Juſtice. See *Acts* xxviii. 4. Neither doth *Grotius*'s Interpretation of it, L. i. c. 2. ſ. 5. exclude the Exception which is grounded upon the State of the Commonwealth [c]. But *Selden*, L. iv c. 1. expreſly affirms, that the *Jewiſh* Rabbins did not underſtand that place to be a Law of ſuch Force, as that it ſhould always oblige the Magiſtrate neceſſarily to puniſh Murther with Death; but that it was an expreſs Indication of God's Hatred to that Crime, from the Severity of the Penalty he annexed to it; which it might be lawful for Man, according to the Poſture of Affairs, and Variety of Circumſtances in the publick Government of the State, either to limit, or inflict. And for this Reaſon, the *Jews* (as their Law directs in other Caſes) did not inflict Death upon any of their own Nation that kill'd a Proſelyte of the Gate, or any other *Gentile*. Nay, if any Number of *Jews*, or other circumciſed Perſons, had by Blows or Kicks, or any other way kill'd one of their own Nation, ſo that no one of them ſeparately did any thing which might be the immediate Occaſion of his Death, all of them were acquitted from ſuffering that Penalty which was otherwiſe due by courſe of Law; becauſe neither of them ſingly was guilty of the Murther [d]. However this be, I would not be thought to perſuade the World to an unwarrantable Eaſineſs in diſpenſing with the Puniſhment of this Crime. Neither would I undertake to defend that Expreſſion in one of the Conſtitutions of the Kings of *Poland*, relating to the Puniſhment of [e] Murther in the Nobility, *Nos divini Juris rigorem moderantes*, We mitigating the Rigour of the divine Law [f]. And here I ſhould take ſome Notice of the Diſpute, which ſome ſcrupulous Perſons have rais'd againſt the lawfulneſs of puniſhing Theft with Death. But upon this I refer you to the Opinion of *Grotius*, L. ii. c. 1. ſ. 14. [g]. Yet *Selden* ſays, *De J. N. & G.* L. vii. c. *6.* That among the *Jews* the Puniſhment of a *Gentile*, found guilty of Theft, was Death; but that the natural *Jews* were uſed with more gentleneſs [h]. And *Herod*'s Laws are condemn'd as too ſevere by *Joſephus*, *That ſuch Perſons as were guilty of Burglary, or of breaking up, or digging into Houſes, and ſuch as robbed in the Night, ſhould be ſold out of the Land to Strangers.* By a Law of *Solon*'s at *Athens* it was decreed, *That the Penalty for ſimple Theft, if what was ſtolen was recover'd, ſhould be to pay double; or if it was not recover'd, ten times the Value of it.* But it was added, *That if any Perſon had ſurreptitiouſly taken away out of the* Licæum or Academy, *or the publick Schools, either Clothes, or Cups, or any thing of the leaſt Value, or any Veſſels out of Schools of Exerciſe, the publick Walks, or Portico's, worth more than ten Drachms, he ſhould be puniſh'd with Death* [i]. What Puniſhment the *Roman* Law inflicted is very well known. *Juſtinian* does not allow that a Man who was guilty of no more than ſimple Theft, ſhould ſuffer even ſo much as Mutilation of Members [k]; though otherwiſe it cannot be thought abſurd that every Criminal ſhould be puniſh'd in the Part which offended, ſo *Alexander Severus* puniſh'd a Notary who exhibited a falſe Libel of a Cauſe before the Council, by paſſing Sentence upon him, that the Nerves of his Fingers ſhould be cut, ſo that he might never uſe them to write more [l]. So *Seleucus* paſs'd a Decree, *that an Adulterer ſhould be condemn'd to loſe his Eye, becauſe the Eye makes the firſt Breach upon the Chaſtity, and ſo much forbidden Paſſion may be expreſs'd in Looks, as may eaſily kindle the moſt unlawful Luſts.* And ſo alſo the Law of God commands, *That the Woman's Hands ſhould be cut off, who in any Strife, between her Husband and another Man, drawing near to deliver her Husband out of the Hand of him that ſmiteth him, putteth forth her Hand and taketh him by the Secrets*, Deut. xxv. 11. [a]. However *Anton. Matthæus, De Criminibus, Tit. de Furtis*, C. 2. puts a handſome Interpretation upon *Juſtinian*'s Inſtitution [b] by urging for it, That ſince 'tis generally either Idleneſs, or Poverty, that forces People to ſteal, the Emperor was not willing Thieves ſhould be puniſh'd by loſing the uſe of their Limbs, that they might not be depriv'd of the Inſtruments neceſſary for them to reform their bad courſe of Life; and when they ought rather to be forced upon ſome laborious Imployment. In *Germany*, the Law, that all Thieves ſhould he hang'd, was made by *Frederick* the Second [c]. And it was afterwards confirm'd by *Charles* V. but look'd more ſevere in him than in *Frederick*, becauſe he took no Care of the Value of the Coin which was then ſinking. Upon the whole, though I am of Opinion, that 'tis poſſible for Judges to be too free in inflicting capital Puniſhments, and that ſometimes it might turn more to the Advantage of the State, if ſuch Criminals as are here ſpoken of, were rather condemn'd to ſome uſeful Labour and Service [d]; and ſo we are told *Sabaco*, King of *Egypt*, forced all Malefactors that were condemn'd in capital Puniſhments, to publick Labours; and that the Country was ſoon ſenſible of the Benefit it receiv'd from ſuch an Application of them [e]: Yet I make no doubt but that Theft may lawfully be puniſh'd with Death. And from what has been ſaid, it will be eaſy to anſwer all the Objections urg'd to the contrary, eſpecially thoſe from *Ant. Matthæus*.

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[a] To this Purpoſe is that of *Antiphon.* Orat. 15. All Courts of Juſtice that ſit upon Murder, are always in the open Air, that the Judges may not be forced to come into the ſame place with the Malefactors; and that the Proſecutor may not be under the ſame Roof with the Murderer. *Add.* Libanius, *Progymn. loc. com. contra* Homicidam.

[b] See *Grot.* on that place, and on *Matt.* v. 40.

[c] *Add.* Grot. *in* Flor. *ſparſ. ad Jus* Juſtin. *ad* L. Corn. *de Sicar.*

[d] See more in the ſame place.

[e] See the Abſtract of the *Latin* Letters of *Tollius* in the *Nouvelles de la Republ. des Lettres Avril* 1700. pag. 371, 372. and Mr. *Thomaſius*'s Diſſertation, *de Jure aggratiandi principis Evangelici in cauſis Homicidii.* Chap. iii. Sect. 9. Printed at *Hall* in 1707. alſo another of his *de ſtatuum Imperit poteſtate Legiſlatoria*, &c. Sect. 43.

[f] *Add.* Philo Judæus *de legibus ſpecial.*

[g] *Grot.* Lib. ii. cap. 1. Sect. 14. ſays, *that the Laws have no Right to puniſh with Death all ſorts of Crimes, but only thoſe that are ſo heinous as to make the Offender deſerve to be cut off from the Commonwealth.* But *Gronovius* judiciouſly remarks thereupon, that the ſmalleſt Faults in themſelves may become capital Crimes, when they relate to Things, from which it is eaſy to abſtain, and which there has been good Reaſons to forbid on pain of Death. For in that Caſe, he that violates the Law, ought to complain of no body but himſelf. 'Tis upon that account, that the Severity of military Diſcipline is grounded; and we ſee that God forbid *Adam* and *Eve*, on pain of Death, to eat of the Fruit of a certain Tree, which, in it ſelf, was a very indifferent thing.

[h] *Joſephus* Archæol. *Jud.* l. 16. c. 1.

[i] *Add.* Ariſtot. *Problem.* ſ. 29. c. 14.

[k] Juſtinian. *Novell.* 134. c. *ult.*

[l] *Lampridius*, *Alexander.* c. 28.

XXVII. Neither laſtly, is it neceſſary that a Man ſhould ſuffer in the ſame manner in which he offended, or that a Criminal ſhould always be puniſh'd by [f] Retaliation. This Opinion is commonly aſcrib'd to the *Pythagoreans*, who defined Puniſhment by Ἀντιπεπονθές, or a ſuffering the like. And the Judgment of *Rhadamanthus* is brought to confirm this Method. *Juſtice is duly then adminiſtred* [g]; *when the Offender ſuffers as his ſins.* But *Ariſtotle, Nicom.* l. v. c. 8. proves the Abſurdity of the Ἀντιπεπονθὸς, or Retaliation, by this Inſtance: *If a Magiſtrate*, ſays he, *ſtrikes another Perſon, he is not to be ſtricken again, but if another Perſon ſtrikes a Magiſtrate, he is not only to be ſtricken again, but to be further ſeverely puniſh'd.* As to that Command in *Ex.* xxi. 23. and *Levit.* xxiv. 20. the *Jewiſh* Doctors are generally of Opinion, that it does not oblige to a rigid Retaliation, but that ſuch Crimes may be redeem'd by a pecuniary Mulct. *Bodinus de Repub.* L. vi. C. *ult.* denies that this Law was ever in force. For example, that it was never underſtood, *that when one Man broke another's Leg, his ſhould be broken too*; and he adds, that that Form, *An Eye for an Eye, and a Tooth for a Tooth*, is no Argument to the contrary; becauſe that was only a proverbial Expreſſion, and implied no more, than that the Penalty ought to be proportion'd to the Offence: that what deſerv'd only a Reproof ought not to be puniſh'd with Death; and that ſuch Offences as deſerved Death, ought not to be corrected with a Reprimand; and that this may eaſily be inferr'd from hence, that thoſe divine Laws do not puniſh Theft with Theft, Adultery with Adultery, nor Wound with Wound. But Theft with double or four times the value of the thing ſtol'n; Adultery with Death; and a Wound with a pecuniary Mulct. The ſame divine Law hath alſo reſpect of Perſons; for inſtance, if a Man curſes a private Perſon, the Law preſcribes no ſevere Puniſhment to be inflicted on him; but if a private Man curſes the Ruler, or a Son his Father, the Puniſhment is Capital. On the other hand, *Conſtantius L' Empereur Babakama*, c. 8. § 1. contends for the literal ſenſe of thoſe Words. I ſhall not undertake to determine the Diſpute between 'em; but after all, 'tis confeſs'd however, that it was left to the Power of the Judge to tranſmute the corporal Puniſhment of Retaliation into a pecuniary, according to the nature of the Circumſtances, from that Paſſage of the Law, *Ex.* xxi. 29, 30. where a greater Puniſhment is admitted to be chang'd for a leſs. And *Joſephus* ſays in his *Antiquities*, L. iv. C. 8. *That he that put out another Man's Eyes, was to ſuffer the like, and loſe the ſame himſelf, which he deprived the other of; unleſs the Perſon that loſt his Eye, was content to take a Sum of Money in lieu of that Penalty; the Law allowing the Sufferer to ſet the Rate upon his own Misfortune.* But on the other hand, they that endeavour to prove Retaliation, urge that Paſſage in *Deuteronom.* xix. 19. [h]. But it may be anſwer'd, that the Laws there mention'd cannot with any appearance of reaſon be thought to belong to this Subject; ſince the Puniſhment for Evil-ſpeaking, and Curſing, exceeds all the Meaſures of Retaliation; the bare Endeavour having the full

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[a] Thus *Vulcatius Gallicanus* in *Avidius Caſſius*, c. 4. relates, That he had cut the Nerves of the Deſerters Legs. Add *Cujacius*'s Obſerv. L. 7. c. 13.

[b] *Inſtitut.* l. 4. t. 1. *De obligat. quæ ex delicto naſcuntur*, ſ. 5.

[c] *Feudor.* l. 2. t. 27. ſ. 8. *de Pace tenenda.*

[d] *Vid.* Herodot. *Euterpe*, p. 90. Ed. *H. Steph. Diodor. Siculum*, l. 1. c. 65.

[e] Sir *Thomas More*, Utop. *l.* 1.

[f] See *Grot.* B. 2. c. 20. ſ. 32.

[g] Ovid. *de Arte Amandi*, l. 1. v. 655, 656.

-------Neque enim lex æquior ulla eſt,
Quam necis artifices arte perire ſua.

-------Th' Inventors, as 'tis juſt,
Should feel thoſe Pains themſelves diſcover'd firſt.

Quintil. Decl. 11. p. 154. The Juſtice of Revenge is ſhorteſt whem the Crime is the meaſure of the Puniſhment. And if the Nature of Revenge be conſider'd, a Man is beſt reveng'd, when his Injuries are puniſh'd in the ſame way they were committed. *Senet.* l. 5. *Contr. Præfat.* p. 276. What a Man deſigns for a Puniſhment to another, is often by a very juſt Method of puniſhing chang'd into his own. *Polyb.* l. 12. *in Excerpt. Peireſc.* Since he hath carried himſelf with ſo much Bitterneſs and Moroſeneſs to others, 'tis juſt others ſhould uſe him with the ſame Unkindneſs.

[h] *Conf.* L. 9. t. 2. l. *ult. C. de Accuſat. & Inſcrip.* L. 9. t. 46. l. *ult. C. de Calumn.* L. 9. t. 12. l. 7. *C. ad L. Jul. de Vi Publica. Joſephus Archæol. Jud.* l. 4. c. 8. No *Iſraelite* ſhall have by him any mortal Poiſon: And if any ſuch be found in his Poſſeſſion, he ſhall die, and ſuffer what he was to have done whom the Poiſon was prepar'd for. *Diod. Siculus,* l. 1. c. 77. repeats an *Egyptain* Law of the ſame Nature.

Evil ſet in view. However, in other reſpects the Penalty of that is not unjuſt. *For there is no difference between an Evil-ſpeaker, and one that does ill, but only in the Opportunity* [a]. Thus by the Law of God, a Man that brought an evil Report upon a Virgin, was lookt upon to be equally guilty with one that forced her Honour. *Deuteron.* xxii. 19, 29. [b]. *For there can be nothing more injurious and malicious than Detraction; it maketh us think well of Falſhood, and forces Innocence it ſelf to look guilty* [c]. *And the State of human Affairs muſt be reduced to a very deſperate Condition indeed, if every Man's malice has power to make us criminal: For Innocence can never be happy enough, to eſcape the pernicious Diligence of a ſlanderous Tongue* [d]. In one of the Laws of the Twelve Tables it is inſtituted, that *the Man that breaks another's Limbs, unleſs he can make his Peace, and compound with him, ſhall ſuffer the like.* Upon which Law I refer you to the Diſpute between *Favorinus* and *Sex. Cæcilius* in *Gellius*, [e] L. xx. c. 1. But it is plain, that Retaliation was grown out of uſe at *Rome*, from the 7th Section of the *Inſtitute, De Injuriis* [f]. *Diodorus Siculus*, L. xii. c. 17. gives us an Account of a Law made by *Charondas* to this effect: *If any Man puts out another's Eye, let his Eye alſo be put out.* "It happen'd, that "a Perſon blind in one Eye was ſet upon, and "loſt his other, and conſequently was entirely "depriv'd of Sight: Now in this caſe, tho' the "Criminal was to be depriv'd of one Eye, yet "his Puniſhment was juſtly thought leſs than he "deſerv'd; becauſe, tho' he might ſeem to be "ſufficiently puniſh'd by the Letter of the Law, "yet his Loſs was not conſiderably ſo great as "the others. And therefore it would look more "like Juſtice, where the Penalty was to be laid "equal to the Injury, that the Perſon, who entirely "depriv'd the Man of Sight that had loſt "one Eye before, ſhould loſe both his. The "blind Man grown therefore impatient at his "Misfortune, and the Partiality of the Caſe, "took the Courage to repreſent his Caſe to the "People, bewail'd the unhappy Condition of his "Life, and beg'd them to alter the Law; at laſt "putting the Rope about his Neck (as the Cuſtom "was there upon ſuch occaſions) his Entreaties "had the deſir'd Effect, the Law was abrogated; "a new one better conſider'd was preferr'd, and "he eſcap'd the Death he was ready to have ſuffer'd [g]." But however this be, 'tis certain, that ſo rude a Notion of Retaliation can never be a juſt Meaſure of Puniſhment. For in the firſt place, there are a great many Crimes, which it cannot poſſibly be apply'd to. As I believe, Retaliation was never thought a proper Puniſhment for *Adultery, Raviſhment, Beſtiality, Treaſon againſt the State, Reviling, Detraction, Sorcery, Forgery of Wills or Deeds, Counterfeiting the Coin, impoſing of falſe Births or adulterous Children, procuring Abortion, Kidnapping,* Crimen Ambitus, *Inceſt, Sacrilege, Removing the Landmark, Defacing Sepulchres, Cozenage and Colluſion, Prevarication, and the like.* And by the way, it ſhould be mention'd as an Inſtance of the Wiſdon and Piety of the Emperor *Theodoſius*, that he took off the ſhameful Puniſhment of Women taken in Adultery then uſual at *Rome*, by which they were to be condemn'd to the publick Stews, and were there to be proſtituted to all that came, a Bell ringing all the time they ſuffer'd that Infamous Puniſhment. For though an Ignominy of this Nature might poſſibly produce the ſame Effects, as the moſt ſevere Puniſhment; yet ſince this Puniſhment could not be put in Execution without Sin, it ſeem'd rather to increaſe than take away the Guilt of the Fact it puniſh'd [h]. But admitting that thoſe Laws which ſeem to eſtabliſh Retaliation apply it only to Injuries and Hurts that affect the Body; and admitting that one may imagine a Caſe, where the Crime committed may be well enough turn'd into the Puniſhment of it; and that neither the Perſons, the Place, the Time, Quality, or Cauſe, inhanſe or aggravate the Crime; yet even upon ſuch Suppoſitions ſimple Retaliation will not be a proper Puniſhment. For Inſtance, a common Man ſtrikes another a Box on the Ear, in ſome private Place; now if the Perſon that ſuffer'd the Stroke is to return the other the like, 'tis to be fear'd, he will hardly be exact enough to obſerve a juſt Proportion [i]. And if the Execution be referr'd to a third Perſon, how ſhall he know with what force the firſt Blow was given? Beſides, in many Crimes Retaliation might be too ſevere, if there ſhould be no Diſtinction made, whether the Fact were committed maliciouſly, or not; or if no difference of Perſons be obſerv'd. For Example [k], a Man deſigning to ſtrike another a ſlight Blow in the Face with his Diamond perhaps, or ſome Stone he wears on his Finger, unhappily, againſt his Intention, ſtrikes out his Eye; it would be very ſevere, if ſuch a Perſon ſhould, upon that Misfortune, be condemn'd to loſe his Eye too. So if a Gentleman kick a common Porter or Labourer, it would be too ſevere to ſentence that the Kick ſhould be returned again upon him, becauſe 'tis a Diſhonour to a Perſon of Quality to receive a Kick, and none to one of mean Condition. Again, on the other hand, in many Crimes the Puniſhment of Retaliation ſeems too eaſy: And this may happen particularly from a Diſparity between the Perſons who did, and who ſuffer'd the Injury; or elſe from a Diſparity of Place, Time, and other Circumſtances. But in the general, the Arguments which *Grotius* produces in the Chapter before cited, § 32. entirely confute that wild extravagant Notion of Retaliation; where he alſo with very good Reaſon denies, that when a Man hath deliberately, and without much alleviating Circumſtances, done hurt to another Perſon, he ought to ſuffer juſt as much Harm as he has done, and no more. For 'tis a Contradiction to Equity, that the Fears and Dangers of the innocent and the criminal ſhould be equal. And there would be but ſlender Proviſion made for common Security, if Malefactors ſhould be under no greater Fears from publick Juſtice and the Laws, than good Men are from their Inſolence and Wickedneſs; eſpecially ſince the Hopes of Concealment, of eſcaping by Flight, or by ſome way or other evading Juſtice, are in a manner additional Advantages to every Villain. And beſides, the moſt ſacred Laws themſelves do ſometimes ordain the ſame Puniſhments for imperfect and finiſh'd Crimes, *Deut.* xix. 19. *Exod.* xxii. 9. [a]. It was a remarkable Law which *Strabo* mentions, L. xv. among the *Indians*, *He that deprives Men of the uſe of a Limb ſhall not only ſuffer the like, but ſhall have his Hand cut off alſo. But if any Perſon deprives an Artificer or Mechanick of the uſe of an Hand, or an Eye, he ſhall be put to Death.* And by *Solon*'s Law, the Perſon that put out one of another's Man's Eyes, was to loſe both his own [b]. And ſo alſo a Man that went arm'd with a Deſign to kill any Perſon, fell under the reach of the Law *de Sicariis*, L. xlviii. t. 8. l. 1. D. *ad L. Corneliam.* Now though the Conſequence of this be, that the Puniſhment of a mature finiſh'd Crime ſhould be proportionable to the degrees of its Conſummation, yet ſince human Juſtice can inflict no Puniſhment greater than Death, and it is impoſſible that ſhould be repeated, there muſt neceſſarily be a ſtop made there; though according to the degrees of the Crime, the Puniſhment of Death may be made more painful by Torture, or appear more grievous from the Circumſtances of Ignominy and Diſgrace, which either attend or follow after it.

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[a] *Quintil.* Decl. 331. 'Tis a ſort of Murther to attempt any Man's Life, that ought not to be kill'd. And *Pliny* in his *Panegyr.* c. 35. n. 3. ſpeaking to the Delators, tells them, "That they were to expect Puniſhments equal to the Rewards "they had had before, that their Hopes ſhould be no greater than their Fears, and that they ſhould be as much afraid them"ſelves, as they were fear'd before by others.

[b] Iſocrates *de Permutatione*, p. 540, 541. Detraction makes Judges perjure themſelves; extinguiſhes the Light of Truth, involves all that hearken to it in a Miſt of Lies, and then eaſily finds a way to deprive Men of their Lives.

[c] *Quintil.* Declam. 11. Defamation can have no effect, but by the Injuſtice of the Judge.

[d] Conſtitut. *Sicul.* L. 2. c. 14.

[e] *Noct. Attic.*

[f] Inſtitut. L. 4. t. 4. l. 7.

[g] Demoſthenes *mentions the ſame Law*, adv. Timocratem. *Ariſtot.* Rhet. *l.* 1. *c.* 7. The Puniſhment is not the ſame when a Man puts out his Eye that has but one, and one of his that hath two. *Add.* Pet. Gregor. Tholoſanus *Syntagm.* l. 31. c. 10.

[h] Socrates *Hiſt. Eccl.* l. 5. c. 18.

[i] Add. *Lex Wiſigothorum*, l. 6. t. 4. c. 3.

[k] V. *Ariſtot.* Ethic. ad *Nicom.* l. 5. c. 8.

XXVIII. I proceed in the next place, to conſider thoſe Puniſhments which are inflicted by human Juſtice, for other Mens Crimes. And here, without Diſpute, [c] they that do really partake of the guilt of the Offence, ought to ſhare alſo in the Puniſhment, in proportion to the Influence they may be ſuppoſed to have in the Fact; ſince they ſuffer not for another Man's Fault, but their own. But now how, and by what Method of acting a Man may be ſaid to partake of another's Crime, I have ſhewed before [d] [e]. But it muſt be obſerv'd, that there is this difference between Satisfaction for Damage and Puniſhment, that 'tis more uſual for human Juſtice to condemn an Offender to make Reſtitution, than beyond, and beſides that, to ſuffer Puniſhment alſo: Becauſe Imprudence or Levity of Offence may be ſufficient Motives to ſuperſede Puniſhment, though perhaps not to excuſe Reparation for Damages. It was a remarkable Law which was made by *Thomas Randolf*, Regent of *Scotland* [f] to ſuppreſs the Robberies which were then frequent; and that was, *That all Husbandmen ſhould leave their Plows, and other Inſtruments of Tillage, in the open Fields; and that at Night they ſhould not ſo much as lock or ſecure their Houſes or Barns; and that the Loſſes they ſuffer'd ſhould be paid to them by the Juſticiaries of the Kingdom, who were to be reimburſt by the King, and the King was to ſatisfy himſelf by the Goods and Chattels of the Robbers that were apprehended.* But now as to Crimes contracted by Corporations or publick Bodies, it muſt be obſerved, that though the Decrees, to which the major Part conſents are generally look'd upon to be Decrees of the whole Body; ſo that the leſſer Number diſſenting, ſhall be oblig'd notwithſtanding to ſee them executed [g] [h]; yet if there be any Enquiry made about the guilt of ſuch an Act, thoſe Perſons only are to be ſuppoſed liable, who actually gave their Conſent. And thoſe are innocent, who denied their Agreement to it from the Beginning, and conſtantly perſiſted to diſſent from it [i]. *Alexander* the Great took *Thebes*, and commanded that all the *Thebans* ſhould be ſold for Slaves, excepting only ſuch of them, as were againſt paſſing the Decree to break Alliance with the *Macedonians* [k]. Nay, it is not uncommon to excuſe thoſe at leaſt (as to the higheſt degrees of Guilt) who diſſented at firſt, but afterwards fell in with the prevailing Number, and then purſu'd the Execution of the criminal Decree as far as they had Power. So the *Greeks* were ſaid to have ſpared *Antenor* and *Æneas*, [l] who had perſuaded the *Trojans* to reſtore *Helena*, though the latter of them perform'd many brave Actions in Defence of his Country. It is alſo to be further obſerv'd, that the Puniſhment of a Corporation or Body politick, as ſuch, is different from the Puniſhment of particular Perſons and Subjects. The Puniſhment of a particular Subject is ſometimes Death. And that which anſwers it in the Body politick is Diſſolution [m]; and when a Corporation or Community is thus diſſolv'd, all uſufructuary Advantages are ſaid to be at an end with it, in the ſame manner as in Caſes of Death [n]. Sometimes particular Perſons are, by way of Puniſhment, made Slaves, and the Body politick ſuffers the like, in caſe it were once immediately ſubject to the civil Sovereign only, but is afterwards ſubjected to ſome other ſubordinate Body, or perhaps to a particular Subject. And laſtly, as particular Perſons may be puniſh'd by way of Mulct levied upon their Eſtates; ſo the Body politick, when it commits any publick Crime, is puniſh'd by Deprivation of the publick Goods belonging to it, ſuch as Forts, Naval Stores, Ships of War, Arms, Treaſure, publick Lands, Privileges, and the like. So when the People of *Antioch*, upon the Impoſition of a new Tax, pull'd down the Emperor *Theodoſius*'s Statues in all the publick Places, he puniſh'd them by forbidding them the uſe of the Theatre and the Baths, and by taking from them the Title of Metropolis, which their City enjoy'd before [a]. And ſo *Marcus* the Emperor took away from the ſame People all the publick Shows and other Ornaments of their City (though he afterwards reſtor'd them again) [b]. So *Severus* demoliſh'd the greateſt part of *Byzantium*, ruin'd the Theatres, and Baths, and all the Ornaments of the City, reduc'd it almoſt to a Village, and made it ſubject to the *Perinthians* [c]. And thus the Emperor *Conſtantius* by way of Puniſhment to the ſame City, becauſe they had kill'd his General *Hermogenes*, took away from them the Dole of Corn, which he had uſually before diſtributed among them [d]. But however in Crimes where there are Numbers of Complices, 'tis reaſonable, the chief Promoters and Abettors, ſhould be puniſh'd with greateſt Severity [e]. And in ſhort, in eſtimating the Crimes and Penalties of Corporations and Bodies politick, it ſhould be conſider'd, as *Quinctilian* very well obſerves [f], "That generally whatever a Community undertakes, muſt be aſcribed to the power of the Counſellors that direct it; and that all popular Diſturbances and Inſurrections are of greater or leſs Violence, according as the People are exaſperated. Juſt as all Motion in our Bodies derives it ſelf from our Minds, and our ſeveral Parts are as it were dead and uſeleſs, till put in Action by the Soul. 'Tis the eaſieſt thing in Nature to raiſe any kind of Paſſion in a Multitude; for there was never any Aſſembly, where every Man could perfectly govern himſelf by his own Thought, Senſe and Reaſon. Nor was there ever a Multitude that had the Foreſight and Prudence particular Men have. Whether it be that all Men are leſs affected with publick Concerns; or that every Man is leſs ſolicitous, where he doth not think himſelf in particular anſwerable for the Succeſs. For the Preſumption and Dependence Men have upon others, make them negligent and remiſs themſelves. And ſo *Cicero* ſays, that among the *Romans*, if any Number of Soldiers had offended againſt the Laws military, ſome few of them were puniſh'd as their Lot happened, *That ſo the Terror might reach all, though but few fell under the Puniſhment* [g]. And this is implied in the Anſwer of *Germanicus's* Army to him in *Tacitus*, that he ſhould *puniſh the Guilty, but pardon ſuch as had been Miſguided* [h].

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[a] *V. Edictum Regis* Theodorici, *C.* 13. & 50.

[b] *Diogenes Laert. Solon.*

[c] V. *Grot.* L. 2. c. 21. ſ. 1.

[d] See above in B. 1. c. 5. ſ. 14. and in B. 3. c. 1. ſ. 4, 5.

[e] *Vid.* Jacob. Godofredum *diſc. in* C. L. 9. t. 8. *ad L. Juliam. Majeſt.* l. 5. c. 9. & 10.

[f] Buchanan *Rer. Scotic.* L. 9.

[g] *Vid.* Polyb. l. 5. c. 49. *in fin.* *Plin.* l. 6. Ep. 13. Particular Men at the firſt Propoſition of any Matter may lawfully diſſent; but when the Decree is paſs'd, that which the Majority agreed to, muſt oblige all.

[h] Upon this, ſee above in B. 7. c. 2. ſ. 15.

[i] See *Luke* xxiii. 51.

[k] *Plut. Alexander.* p. 670. D.

[l] V. *T. Liv.* l. 1. c. 1.

[m] Add. *Conſtitut. Sicul.* l. 1. tit. 47.

[n] *Modeſtinus in* L. 7. t. 6. l. 21. *D. quibus mod. Uſufruct. amit.*

XXIX. And here it may be queſtion'd, whether a Crime committed by a Community or Corporation will always leave it under execution of the Puniſhment; for Inſtance, if a Community has been publickly Guilty of ſome criminal Act, perhaps two or three hundred Years paſt [i]? It may perhaps have ſome ſhew of Reaſon for the Affirmative to ſay, That as long as the Community laſts, it continues the ſame [k], though the particular Members in it change, and ſucceed one another. But when the Queſtion is of human Puniſhment, it ought in Truth to be denied. For it is more neceſſary, even in particular Men, to puniſh freſh, and therefore more ſcandalous Crimes, than old forgotten Faults. And therefore, there was very good reaſon for that Preſcription of Crimes which the *Roman* Laws allow'd [l]. Beſides, it is to be obſerved, that ſome things may be immediately and naturally predicated of a Community, as ſuch; for Example, the having a common Stock, common Conſtitutions, Rights, and Privileges, which the particular Members cannot call their own. And again, that there are other things which agree to the Body, only as derived from the particular Members, or which firſt of all inhere in the Members, and afterwards influence and denominate the whole Body. Thus it is uſual to call a Society learned, noble, wiſe, honourable, or contemptible, as the Majority of its Members is learned, noble, wiſe, honourable, or contemptible, tho' perhaps ſome of the Members may be unlearned, baſe, or imprudent. And in this latter Senſe it is, that ſuch Bodies may be ſaid to have incurr'd Puniſhment. For the Demerit adheres to the particular Members, as they are ſuppos'd to be Perſons who have the uſe of their Underſtanding, and are capable of acting with Reaſon and Choice. But a Community, as ſuch, and as it is conceiv'd to be diſtinct from the particular Members, has no Faculties by which it is capable of exerciſing ſuch Actions as primarily and immediately contract Demerit; and which may therefore be ſuppos'd to be diſtinct from thoſe of the particular Members. And therefore it follows, that if the Members, by whom the Body contracted the Demerit, are dead and gone from the Society, and the Guilt has not been continued by any Act of their Succeſſors, that the Demerit it ſelf expires with them; and conſequently that which made the Body liable to Puniſhment; ſince the one cannot be juſtly inflicted without the other. *Plutarch* [m] indeed, in this caſe, appeals to the Methods of divine Juſtice, which ſometimes, as we read *viſits the Sins of the Fathers upon the Children.* But as the Proceedings of divine Juſtice are not always to be made a Pattern to human; ſo neither doth it follow that if it be Equity, to allow Poſterity the Poſſeſſion of thoſe Rewards and Honours which were acquired by the Deſerts of Anceſtors; it is therefore Equity, that they ſhould alſo ſuffer the Puniſhments due to their Anceſtors Offences. For it is the Nature of a Benefit, that it may freely be beſtow'd, at the Pleaſure of the Donor, even upon a Perſon wholly undeſerving; but the Nature of Puniſhment is quite different. The *Romans* (as *Juſtin* tells us) made uſe of the Pretence of an old forgotten Kindneſs, to undertake the Defence of the *Acarnanians* againſt the *Etolians* [n], declaring that the Reaſon why they aſſiſted them was, becauſe the *Acarnanians* did not join with the other Cities of *Greece*, to ſend Forces againſt *Troy*, from which City the *Romans* would be thought to have derived themſelves: Though it was clear this was nothing elſe but Pretence, and was only a Colour to excuſe themſelves for interpoſing in things it did not belong to them to be concern'd in [a].

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[a] *Libanius* Orat. 13.

[b] *Vulcatius Gallicanus* in *Avid. Caſſius* c. 9.

[c] *Herodianus*, l. 3. c. 19.

[d] Socrates *Eccleſ. Hiſt.* l. 2. c. 13.

[e] Vid. *Liv.* l. 28. c. 26. *ab. init.*

[f] *Quintil.* Declam. 11. p. 156. Ed. *Lug. Bat.*

[g] *Cic.* pro *Cluentio*, c. 46. *Tacitus*, Ann. *L.* 1. c. 44. *init.*

[h] Add. *Polyb.* l. 11. c. 27. *in fin.* & *excerpt. Legat.* l. 28. c. 4. Bodinus *de Rep.* l. 3. c. 7. p. m. 527. & *ſeqq.* Ant. Matthæus *de Crimin. ad* L. 48. D. t. 18. c. 4. ſ. 30. *Conſt. Sicul.* L. 1. tit. *ult.*

[i] V. *Grot.* l. 2. c. 21. ſ. 8.

[k] Plutarch *de ſera numinis vindicta*, p. 559. A.

[l] *Vid.* Ant. Matthæum *de Crim. ad* L. 48. t. 19. c. 4. t. 20. c. 4. ſ. 14.

[m] Plut. *de ſera Num. Vind.* d. l.

[n] *Juſtinus*, L. 28. c. 1. *in fin.*

XXX. But however it is ſtill true, that human Juſtice ought not to force a Man to bear part of the Puniſhment of another's Crime, when he was not acceſſory to the Commiſſion of it. The Reaſon is, becauſe all Merit and Demerit are entirely Perſonal, and founded in the Will of each Man; which certainly is, or nothing is, at his Command, and which can't contract any Guilt, but by ſome internal Motion of its own [b]. But becauſe it often happens, that ſome Mens Offences are the Occaſions of Evil to others, that we may not be apt from hence to make a wrong Inference, it is neceſſary to obſerve, in the firſt place, that not every thing that brings Uneaſineſs, Inconvenience, or Loſs, upon a Man, is properly Puniſhment [c]. A Man when his Eſtate is conſiſcated upon ſome criminal Account, and he is reduced to Want and Poverty, may properly be ſaid to have ſuffer'd Puniſhment. But how many Men are there, that come into the World without any other Fortune or Eſtate than their own Perſons? How many are there that by Fire, Shipwrack, Incurſions, and Depredations of Enemies, are ſtripp'd of all, and whoſe Poverty cannot be call'd human Puniſhment, but fatal Misfortune? And I may ſay, that therefore the Evils, for Example, which Subjects ſometimes feel from the Miſcarriages and bad Government of their Princes, ſhould be thought alſo to be of the ſame Nature with thoſe other Inconveniences and Afflictions, which attend human Life; ſuch as ill Conſtitution of Body, Infirmities of Age, unwholeſome Air, Barrenneſs, and the like.

XXXI. And Secondly, it muſt be further obſerved, that there is great difference between the Damage which a Man ſuffers directly by another's hand, and that which falls upon him only by Conſequence. A Man ſuffers the firſt, when he is depriv'd of that which he has already all proper Right to. The other happens, when that Condition is intercepted, without which he could not enjoy ſuch a Right [d]. Thus when the Eſtate the Parents were poſſeſs'd of is forfeited, the Children alſo feel the Loſs of it. But however, that is not a Puniſhment properly with reſpect to the Children, becauſe they cannot come to the Inheritance of their Fathers Eſtate, unleſs their Fathers preſerve it for them till they die. And therefore the Confiſcation or Forfeiture only intercepts the Condition, without which the Children can have no Right to their Father's Eſtate [e]. But however, it was truly an unjuſt and barbarous Law (as *Buchanan* calls it) which was made by *Mogaldus* King of *Scotland*, *That all the Goods and Chattels of condem'd Criminals were to be forfeited to the Crown, excluding their Wives and Children from any Part of them* [f].

XXXII. Again, Laſtly, it ought to be obſerv'd, that ſometimes the Evil a Man may ſuffer, or the Loſs of any Good he may ſuſtain, may be occaſion'd by another Man's Offence, or becauſe another Man has not perform'd his Obligation; but ſtill that this Man's Offence, or Deficiency in Performance of the Obligation, is not the proper and immediate Cauſe why the other ſuffers Evil; nor can any third Perſon pretend any direct Right from ſuch an Offence to inflict Evil upon him [g]. Thus it is common for Fidejuſſors, or Bondſmen, to ſuffer Loſs, when the Debtor they engage for, breaks his Promiſe. But the immediate Obligation that binds the Fidejuſſor or Bondſman to diſcharge the other's Debt, is his own Promiſe. For as a Man that engages himſelf to be bound for a Buyer, is not properly obliged from the thing bought, but from the Promiſe he made; ſo a Man bound for a Criminal is not properly obliged by the other's Crime, but by his own Engagement. From whence it follows, that when the Fidejuſſor or Bondſman is to ſuffer Evil, it muſt not be meaſur'd by the other's Crime, but by the Power he had to promiſe. And therefore when the Delinquent eſcapes, and it is neceſſary his Surety ſhould make Satisfaction to Juſtice, 'tis not to be conſider'd what Evil might have juſtly been inflicted on the Delinquent, but what Degrees of Evil the other could oblige himſelf by his own ſole Conſent to ſuffer for him. And hence it may alſo be inferr'd, how far Bondſmen or Fidejuſſors may be admitted in capital Caſes: And that may be only thus far; either that the Bondſman may promiſe the Magiſtrate (whoſe Duty it is to proſecute the Offender) that he will ſatisfy for the Damage he has done; or elſe that he will take care to bring him to Tryal, upon Condition that the Criminal may be admitted to Bail, if he be already apprehended, may be free from the Inconveniences of a Priſon, and may not be oblig'd to appear at his Tryal in Irons; or if not apprehended, that nothing be iſſued out againſt him in his Abſence, and before he has had a judicial Hearing. But no Man can oblige himſelf to ſuffer Death for a Criminal [h]; ſince no Man hath ſo much Power over his own Life. Neither can the nature of human Juſtice allow ſuch Puniſhments to be inflicted. For the end of Puniſhment is to *reſtrain Men from Tranſgreſſions, and diſpoſe them to Obedience.* But in this Caſe, neither has the Fidejuſſor himſelf offended, neither by his Act of Engagement doth he derive the guilt of the other's Crime upon himſelf. For it can be no Crime in him to deſire that the Criminal ſhould have a fair Hearing in a convenient Place, and be without trouble and diſquiet, before Judgment paſſes upon him; nor is it any to promiſe he will pay the pecuniary

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[a] But the Expreſſions *Mahomet* the II. uſed to Pope *Pius* the II. were more ridiculous than this; That he was ſurprized to find *Italy* joined in a Confederacy againſt him, ſince the *Trojans* were his Anceſtors as well as theirs, and ſince it ought to be their common Concern to revenge *Hector*'s Death upon the *Greeks*, whom the *Italians* had now made an Alliance with, againſt him, (*Mich. Montaigne*'s Eſſays, l. 2. c. 36. p. 556.

[b] This Reaſon is taken from the Beginning of the XXXIII. Section.

[c] V. *Grot.* L. 2. c. 21.

[d] We have an inſtance of this in L. 39. t. 2. l. 24. ſ. *ult.* l. 26. *D. de Damno Infecto*, & L. 35. t. 2. l. 63. *D. ad L. Falcidiam.*

[e] *Vid.* L. 48. t. 22. l. 3. *D. de Interdict. & Relegat.* &c.

[f] Buchanan. *Rerum Scotic.* l. 4.

[g] *Vid.* Grot. *d. l.* ſ. 11.

[h] See above in B. 5. c. 10. ſ. 12.

Mulct impoſed on the Criminal, in what manner the Magiſtrate ſhall think fit to ſet it, when the Criminal is fled from Juſtice. Beſides the End of human Puniſhment cannot be obtain'd by puniſhing the Surety; for if he puniſh'd, he muſt be puniſh'd, not becauſe he himſelf is guilty of any criminal Action; but becauſe he was ſo imprudent as to expoſe himſelf to Danger, upon the preſumption of another Man's Honeſty. And then all the Effect of ſuch a Puniſhment will be this, that other Men will be more cautious for the future how they engage themſelves; not that they will be more careful to avoid the Crime the Offender was guilty of. And therefore ſuch a Puniſhment would ſeem to have no Regard to the Fact of the principal Criminal, but only to the unwary Credulity of the Surety. And therefore the Magiſtrate that puniſhes a Bondſman, or Fidejuſſor, underſtands neither the Nature of Puniſhment, nor his own Duty in inflicting it; except it appear that he deſign'd only to abuſe him, and elude the force of publick Juſtice. And again, ſince no Man has ſuch Right over his own Members, as to take Liberty to deprive himſelf at pleaſure of any of them; it is evident that no Man can oblige himſelf to ſuffer the Puniſhment of Mutilation for another Perſon. But 'tis a different Caſe, when Jaylors, the Keepers of Malefactors, are puniſh'd with Death, who either by Neglect, or Colluſion, gave them Opportunity to make their Eſcape; for they ſuffer for their own criminal Default, not for their Priſoners [a]. Nay further, though it muſt be allow'd, that the free Heads, and Maſters of Families, had the Liberty of ſetting up what ſort of Government or Law they pleaſed; yet it does not ſeem to be a proper Method to baniſh the Fidejuſſors; as well becauſe Baniſhment can harldly be called a Puniſhment; as becauſe it is not the Intereſt of the Commonwealth to drive away ſuch Subjects [b]. There are ſeveral other Caſes, where a Man may ſuffer Inconvenience by another's Offence. For Inſtance, if a Friend be ſo kind to me as to let me live in his Houſe Rent-free, and it happens that my Friend, the Proprietor, be found guilty of ſome Crime for which his Houſe is forfeited; 'tis plain that I muſt be ſenſible of Inconvenience in ſuch a Caſe, becauſe I muſt be forced to provide my ſelf of a new Habitation, when perhaps he would have allowed me to have lived there longer upon the ſame Terms. But the Puniſhment doth not properly affect me. For the Publick, that is ſeiz'd in the Propriety of the Houſe, may when it pleaſes, by its own Right, deny me the Uſe of it, at that Rate I had it before. So alſo Children of Traitors and Rebels are often denied civil Honours in the State. And this indeed aggravaes the Puniſhment in the Parents, ſince their Children (whom they are ſuppoſed to have the greateſt Affection and Regard for) muſt for their Fault live without any publick Character or Mark of Honour and Eſteem in the Commonwealth. But this is in reality no Puniſhment to the Children; becauſe the Government may beſtow Honours where it pleaſes, and therefore may, by its own Right and Authority, exclude ſuch Perſons as have not in the leaſt offended, from all Titles and Dignities it has power to confer, as often as it is thought agreeable to the Rules of Government, and the publick Good.

XXXIII. From theſe Diſtinctions it appears, that no Man can be juſtly puniſh'd by any civil Court for another Man's Offence, when he is free from the Guilt of it. And the Reaſon is, becauſe that aptitude which diſpoſes a Man for Puniſhment proceeds from Demerit, and Demerit in the laſt Reſort is founded in the Will, which is certainly, or nothing is, at a Man's own Command, and which cannot contract any Guilt, but by ſome internal Motion of its own. 'Tis a Miſtake in *Grotius*, in the Chapter before cited, *Sect.* 12. to think that there may be an Inſtance given to the contrary, extrinſical to the Perſon of the Delinquent, in the Perſon of one he hath a violent Affection for. And I think it is nothing to the Purpoſe to ſay as *Plutarch* does [c]; "that the Maſter, by correcting ſome of his Scholars, puts all the reſt in mind of their Duty, and a General, by making a Decimation, puniſhes the whole Army." For both the Youth that is corrected, and every tenth Soldier that ſuffers, is really criminal himſelf. And hence therefore it follows alſo, that innocent Children are not to be puniſh'd for the Crimes their Parents were guilty of [d] [e]. And therefore ſome Interpreters explain *Joſhua* c. vii. v. 24. thus, That *Achan*'s Children were brought out only that they might hear the Inſtructions *Joſhua* gave them, and the reſt of the People; and be adviſed to take warning how they were found guilty of the like Crimes themſelves; not that they were to be ſton'd with their Father. But if this Comment upon the Text will not be allow'd, ſee what *Grotius* ſaith, *de J. B. & P.* l. 2. c. 21. §. 14. *in princip.* [f]

——Ne perge queri, caſuſque priorum
Annumerare tibi. Nec culpa nepotibus obſtat.
Tu modo diſſimilis, rebus mereare ſecundis
Excuſare tuos.

Lament no more, nor to your ſelf miſplace,
The Crimes or Fortunes of a former Race.
Our Parents Guilt but to themſelves extends,
Taints not the Blood, nor to the Sons deſcends;
By your own worth you blot out the Diſgrace,
And raiſe the faded Luſtre of your Race [g].

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[a] See 1 *Kings* xx. 39. *ſeqq.* *Acts* XII. 19.

[b] *Garcilaſſa de la Vega Comm. Reg.* l. 6. c. 3. relates, That the Provinces which bordered on the imperial City *Cozco*, were oblig'd, by way of Tribute, to furniſh the Court of the *Ynca* with Officers and Servants. And that upon any Crime or Neglect they were guilty of, the Provinces that preſented them were to be reſponſible.

[c] *De ſera Numinis Vindict.* p. 561. *A.* Ed. *Wech.*

[d] *Vid.* L. 9. t. 47. l. 22. *C. de Pœnis.* L. 48. t. 19. l. 26. *D. de pœnis.*

[e] *Vid.* Grot. *ubi ſupra*, ſ. 13, *&c.*

[f] Ovid. *Metam.* L. 4. v. 669. 670.

Illic immeritam, maternæ pendere linguæ,
Andromedam pœnas, injuſtus juſſerat Ammon

There partial *Jove* did for her Mother's Crime.
The fair *Andromeda* in Chains confine.

[g] *Statius Thebaid.* L. 1. towards the End.

And therefore that Law of the *Perſians*, by which, when any ſingle Perſon was found guilty of a Miſdemeanour againſt his Prince, his whole Family and all his Relations were to ſuffer with him, was juſtly cenſured by *Ammianus Marcellinus*, as inſupportable, and barbarouſly rigorous, beyond Example [a]. 'Tis certain indeed, that by Puniſhments of ſuch Cruelty Princes intended above all things to provide for their own Safety [b]. For though a Man may have Bravery enough to deſpiſe his own Life (as *Hellanicus*, in *Juſtin*, is ſaid to have done when he was old and childleſs, and was therefore the more animated in his Conſpiracy againſt the Tyrant *Ariſtotinius*, becauſe he had nothing to fear, neither his Age, nor Family) yet he will not be perhaps without Fear, when he knows that his Friends and Relations may be ruin'd with him, and upon his account. And again, it might ſeem to be a further Security to cut off the Sons, to prevent them from revenging their Father's Death. For ſays *Ariſtotle*, *It is but folly to kill the Father when the Sons are ſpared* [c]. Beſides, is not eaſy to be believ'd, that a Man will have the boldneſs to undertake an Enterpriſe of ſo much Danger, without communicating his Deſign to his Relations. For which Reaſon *Arian* ſays [d], *Alexander* put *Parmenio* to Death. And perhaps it may be true as *Caſſius* in *Tacitus* ſaid [e], "That though there is a Mixture of Injuſtice in every exemplary Puniſhment, yet the evil particular Men ſuffer by it, is ſufficiently recompens'd by the Benefit it brings to the Publick. Thus in the ninth Book of the *Codes*, t. 8. *ad L. Juliam Majeſt.* the Sons of Traitors were to ſuffer the ſame Puniſhment as their Fathers, when it was to be fear'd they might be influenced by their Fathers Example [f]. Thus the Children of the *Maratocupeni* (Robbers in *Syria*, who had that Name given them from the place they inhabited) were all cut off with their Parents, for fear they ſhould grow to imitate them. *Hobbes* in his *Leviath.* c. xxviii. gives this Reaſon for Juſtice of this ſort of Puniſhment, "Becauſe ſuch as are guilty of Treaſon againſt the State, are profeſs'd Enemies to it, and therefore it is lawful by the original Right of Nature to make War upon them; but in War the Sword judgeth not, nor doth the Victor make Diſtinction between nocent and innocent, nor has other Reſpect of Mercy, than as it conduceth to the Good of his own People. And beſides, in publick Judgments and Trials in caſe of Treaſon, there is this thing particular, That the Sovereign may ſit Judge in his own Cauſe; and ſometimes, laying aſide the Formalities and Intricacies of Proceſs, begin with the Execution [g]. But yet conſcientious Princes ought to conſider what *Tiberius* ſaid in the Caſe of *Cn. Piſo*, *Tacit. Ann.* 3. c. xii. And indeed, neither in War ought the Sword to be ſo mercileſs, as not to ſpare ſuch as Age and Innocence plead for. And ſince ſuch as are born in the Commonwealth are Subjects, there is no Reaſon why they ſhould be treated as Enemies, unleſs their own Acts make them ſuch. And therefore, there can be no other way of puniſhing an innocent Son for the Treaſons and Rebellions of his Father, than by intercepting thoſe Goods from him which would otherwiſe have deſcended from his Father to him. In *Peru* under the Government of the *Ynca's*, if a *Curaca* were put to Death for any Miſdemeanour, his Son was not therefore denied to ſucceed in his Father's Place and Office, but was ſhew'd his Father's Crime and Puniſhment, that he might take Warning from thence how he offended [h]. But to be denied thoſe Honours which a Man can lay no Claim to, is not properly Puniſhment. But neither do the other Reaſons that are given, excuſe the Injuſtice of this ſort of Puniſhment. As for Inſtance, when the *Greeks* (as *Dionyſ. Halicarnaſſæus* tells us) cut off any Tyrant, they always either kill'd or baniſh'd his Children, upon an Opinion, that it was a Contradiction to Nature, to ſuppoſe good Children could be born of bad Parents, or bad Children of good [i]. Neither can this ſort of Puniſhment be juſtified by any Arguments from divine Threatnings, ſince the Diſpute relates only to human Juſtice [k]. And therefore it was a wiſe and good Conſtitution of the *Egyptians*, that no Woman with Child ſhould ſuffer Death, till ſhe was deliver'd, which is alſo now obſerved in other Nations [l]. And here it may be obſerv'd, that it is an abuſe of the legiſlative Power, when the Legiſlator takes Advantage of the Crimes of particular Offenders, to enact rigorous Laws againſt a whole Sex or Order; though perhaps afterwards, in Tract of Time, the Puniſhment it ſelf may grow into Credit, and the Death inflicted by it be thought honourable. As it happen'd by that Law among the *Indians*; by which the Wife was to be burnt with her deceas'd Husband. The Occaſion of which Law was, that the Women when they were tired, or out of Love with their Husbands, made no ſcruple to Poiſon them to make way for the Embraces of others [m]. And hence alſo it appears, that the Heir is not affected by any Puniſhment inflicted upon the Body, or Reputation of the Delinquent [n]. But a pecuniary Mulct will reach him, tho' in Equity it ought not to exceed the Value of the Inheritance which deſcends to him [o].

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[a] *Vid.* Herodot. *l.* 3. *p.* 235. *Edit.* H. Steph. *de Intapherne*. *Juſtin.* l. 10. c. 2. The *Macedonians* had a Law much of the ſame Nature. *Vid.* Curtium, *L.* 6. *c.* 11. *l.* 8. *c.* 6.

[b] *Juſtin.* l. 26. c. 1. l. 21. c. 4. towards the End. *A. Cæſellius* in *Val. Maximus*, l. 6. c. 2. ſpeaks to the ſame ſenſe.

[c] *Rhet.* l. 2. c. 21.

[d] *B.* 3.

[e] *Ann.* xiv. c. 44.

[f] *Vid.* Ant. Matth. *de Crim.* l. 48. t. 2. ſ. 10. *Am. Marcell.* l. 28.

[g] Add. *Grot.* Comment. upon *Joſhua* i. 18.

[h] *Garcilaſſ. de la Vega Comm. Reg.* l. 2. c. 13.

[i] And it was very well ſaid by *Marcus* in *Vulcat. Gallicanus* in *Avidius Caſſius*, c. 12. And therefore ye ought to pardon *Caſſius*'s Children, his Son-in-law and Wife. But did I ſay pardon? ſince they are Guilty of no Crime.

[k] GOD, being the ſovereign Arbitrator, and abſolute Maſter of Mens Lives; may, when he pleaſes, take away the Life of whomſoever he thinks fit in his Wiſdom; and in the Caſe now in Diſpute, he deſtroys the Children, to puniſh the Fathers, by the afflicting ſight of beholding their Execution. But beſides, the Children themſelves, being guilty before God, on account of their own Sins; he does 'em no wrong in taking away their Lives, which he only ſpar'd, purely as the Effect of his own Clemency. Grot. l. 2. c. 21. ſ. 14.

[l] *Diod. Sicul.* L. 1. c. 77. *Ælian.* V. Hiſt. *L.* 5. *c.* 18. *cum* Schefferi *Notis*. L. 48. t. 19. l. D. *de Pœnis*. L. 1. t. 5. l. 5. ſ. 2. l. 18. *D. de ſtatu hom.* Plut. *de ſera Numin. Vindict.* p. 552. *D. Add.* Quintil. *Declam.* 277. What Severity of Puniſhment on the other hand is uſed in *Japan*, we are inform'd by *Bern. Varenius* Deſcr. *Japoniæ*, c. 18. *Ferdin. Pinto* Itin. *c.* 55. *Varenius* de Relig. *Japan.* c. 11. p. 129.

[m] *Vid.* Cic. *Tuſc. Quæſt.* l. 5. c. 27. *Strabo*, l. 15. *Abr. Rogerius* de *Braminib.* p. 1. c. 19, & 20.

[n] L. 48. t. 19. l. 20. *D. de Pœnis*.

[o] *Vid.* L. 47. t. 1. l. 1. *D. de privatis Delictis*.

CHAP. IV.

Of the Power of the Sovereign in determining the Value of Subjects.

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VI. *Simple Eſteem civil leſſen'd or loſt, either from a certain State*;
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THOUGH there may be diſcover'd certain *Foundations* for the Preference of one Man to another, even in a *Liberty of Nature*, out of *Civil Government*; yet ſince thoſe *Foundations* cannot give any Man a *Right*, unleſs enforced by *Compact*, or the *Definitions* of the *Civil Power*, I think this a proper Place to explain the Nature of thoſe *Diſtinctions*, which are made between Men, according to the *Eſteem* they are differently rated by. Now *Eſteem* is the *Value* which is ſet upon Perſons in common Life, according to which they may be *equall'd*, or *compar'd* with others, and be rated either *higher* or *lower* than thoſe they are *compared* with. For there is a near Affinity between the two moſt noble *Branches* of *moral Quantity*, *Eſteem*, and *Price*. The *firſt* is conſider'd in *Perſons*; the *ſecond* in *Things*: Becauſe as the *one* is the *Rate* of *Perſons* in common Life, ſo the *other* is of *Things*. And as the chief Reaſon why a *Price* was ſet upon *Things*, was, that when they were to be exchanged or removed from one Perſon to another, they might be the better *compared* with one another; ſo the End intended by *Eſteem*, is, that we may be able to form a *Compariſon* between Men, by ſetting, as it were, a *Value* upon them, and, in conſequence, eſtabliſh a becoming *Order* and *Diſtance* between them, whenever they ſhould happen to be *united*; it evidently appearing, that nothing was more abſolutely inconſiſtent with the *Convenience* of Life, than an *univerſal* Equality. Now *Eſteem* may be divided into *ſimple* and *intenſive*. I ſhall conſider both *Parts* of the Diviſion, with the different *Relations* they may bear to ſuch Perſons as live in a *Liberty of Nature* [1], and ſuch as are *Members* of the ſame *Commonwealth*.

II. *Simple Eſteem*, with regard to ſuch as live in a *Liberty of Nature*, ſeems *chiefly* to conſiſt in this; When a Man's Behaviour and Character prove him to be one that acts upon *Principles* of *Conſcience*, one ready to comply with the *Laws* of *Human Society*, and prepared, as far as he has Power, to obſerve the *Law of Nature* towards other Men [2]. For as we ſay of a *Thing* which is of *uſe* in common Life, that it is of *Value*; and, on the contrary, ſay of a *Thing* there is no *uſe* of, that it is *worth nothing*; ſo it may be ſaid, that that Perſon is a Man of ſome *Value*, that will ſuffer himſelf to be treated like a *ſociable* Creature. But when a Man plainly ſhews himſelf *unfit* for *Society*, by diſregarding and confounding the *Law of Nature*, and the *good Offices* he owes to other Men upon the Force of it; he may deſervedly be look'd upon to be a Man of no *Worth* or *Value*.

III. Now this Sort of *Eſteem* may be conſider'd three Ways: *Firſt*, as *entire*; *Secondly*, as *impaired*; *Thirdly*, as *utterly loſt*. It continues *entire*,

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Mr. BARB. *NOTES on* § I, II.

[1] Such are Sovereigns, and Citizens of different States, with reſpect to one another.

[2] This *ſimple Eſteem* anſwers to a perfect Obligation in another, by Virtue of which every Man is indiſpenſibly bound to look upon all thoſe to be Perſons of Honour and Honeſty, who have done nothing to render them unworthy of that good Opinion; and not ſtain their Reputation in the leaſt. Whereas, in the *State of Nature*, the Foundations of *Eſteem of Diſtinction* produce by themſelves but a very imperfect Obligation, as the Author ſhews a little further. We may alſo ſee, upon the Matter in Debate, a Diſſertation, written by Mr. *Thomaſius*, entituled, *De Exiſtimatione, Fama, & Infamia*, printed in 1709. in which, he endeavours to ſet our Author right in ſome certain Particulars.

tire, till a Man, by ſome *Act* of deliberate wilful Malice, out of wicked Deſign, violates the *Law of Nature* to the Prejudice of another Perſon. For the Frailties of human Nature excuſe Sins of Infirmity; and a Man does not by them forfeit the Reputation of being an *honeſt Man*, as long as he continues to have a firm *Sincerity* of Mind, and endeavours to do nothing but what is *juſt* and *virtuous*. And every Man is ſuppoſed to deſerve this *Eſteem*, till his own evil Actions deprive him of it. And therefore it may be ſaid, that all Men *naturally* have an equal Share of this *Species* of *Eſteem*, and before they have been guilty of any *Criminal Action*, muſt be ſuppos'd to be *equally good* and *virtuous* [1]. And this is the Ground for that common Saying [2], *Every Man ſhould be ſuppos'd a good Man, till the contrary is proved*. And this will hold True, notwithſtanding thoſe ill Diſpoſitions *Hobbes* chargeth upon human Nature [3]. If he be in the right, indeed every Man muſt be ſuppoſed an ill Man, till the contrary be prov'd, or rather till he is depriv'd of all Power to do Hurt. But it muſt be ſaid, that the Principle he at firſt lays down, *That all Men have Power and Will to hurt or deſtroy one another*, is far from being univerſally true, as I have prov'd already [a]. But yet becauſe Men may *wiſh* and *endeavour* one another's Hurt and Ruin, therefore it may be ſaid, that every Man may *naturally* be look'd upon to be a good Man; but that it is not impoſſible he may happen to be otherwiſe, and that Men may be kind and friendly to one another, but that it is not ſafe abſolutely to rely upon or truſt them.

IV. The ſame *Species* of *Eſteem* is *leſſen'd* or *impair'd* by *criminal malicious Actions*, eſpecially by thoſe of more than ordinary *Guilt*, and which were intended contrary to the *Law of Nature*, unjuſtly to diſquiet other Men: The Effect of which *Actions* is, that it will not be thought ſafe to give Credit for the future to ſuch a *Deceiver*, or to engage in Buſineſs or important Affairs with him, without *ſolid Caution*. But though a Man's *Eſteem* may be *impair'd*, and his *Reputation* ſink upon ſuch ill Actions, yet it is not *abſolutely loſt*. For though I may juſtly ſuſpect, that a Man will uſe me in the ſame manner, he hath uſed others; yet I cannot be always ſo abſolutely certain of this, but that ſometimes it may fall out contrary to my Expectations. For perhaps there might have been ſome particular Reaſons which moved him to injure other Men, which he may not have againſt me; and a Man may ſometimes be under the Power of violent Paſſions, which at other times he is free from. However, the Blot which a bad action leaves upon a Man's *Reputation*, may be taken off by a voluntary *Tender* of *Reparation* for Damages, or of ſome *Equivalent*; and by giving Evidences of Sorrow and Repentance. For all theſe voluntary unforced Motions may be Conviction enough, that his Intentions are really alter'd, and that he *ſincerely* repents.

V. But a *State* and *Way of Life* which directly tends to the Harm of other Men without Diſtinction, and to make Advantages by manifeſt Injuſtice, utterly *deſtroys* all this *Eſteem*. Now there are in moſt Commonwealths *People*, that, by a particular *Way* and *Manner of Life*, own and profeſs the Exerciſe of certain Vices; ſuch as are, all *Whores*, *Bawds*, *Strolers*, and *ſturdy Beggers*; all thoſe *Plato* baniſheth his Commonwealth [4]. And they are (as *Iſocrates* [b] ſaith) a Diſgrace to *that* they live in [5].

But now, how little Share of *Eſteem* all *theſe* are to have, muſt be determined by the Government that *tolerates* them [6]: When the *Publick* thinks fit to give them Indulgence [7], they cannot certainly, at leaſt, be denied the common *Rights* of Men. So the *Pimp* expoſtulates in *Terence*, *Though I am a Pimp, the common Bane of Youth, a perjur'd Wretch, and publick Nuſance, yet I never did you any Wrong* [8]. 'Tis certain indeed, that a *Way of Life* maintain'd by the Profeſſion of any ſort of Vice, muſt very much tend to ruin all *Natural Eſteem*; but unleſs the particular Vice be alſo attended with Injury to other Men, I do not ſee why the Perſons that profeſs the Practice of it, ſhould be treated as *publick* Enemies to all the World. But where the Profeſſion of a Vice is accompanied with Harm and Injury to other Men; and where the Perſons profeſſing it treat no Man who is not of their own Society with better Uſage than they would Beaſts, declaring *Hoſtility* not againſt any certain Enemies, but againſt Mankind in general, 'tis manifeſt they utterly *forfeit* all that *Eſteem* Men uſually meaſure one another by. And ſuch are all *Pyrates* [c], *Highwaymen*, *Robbers*, *Ruffians*, *Pickpockets*, and the like. And the Difference will not be material, nor will their Characters

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[a] B. 2. c. 2. §. 7, 8.

[b] In *Areopagitico*.

[c] See above in B. 2. c. 2. §. 10.

Mr. Barb. NOTES on § III, V.

[1] *Plin. L. 5. Ep. 3.* The Inequality of the Orders among Men ſhould make no Difference in the Exactneſs of their Behaviour, *Sanctitas morum non diſtat ordinibus.*

[2] See Mr *Bayle's Nouvelles Lettres*, occaſion'd by *F. Maimbourg's Critique de l'Hiſtoire du Calviniſme*. Tom. II. p. 435. and Mr. *Thomaſius's* Diſſertation *de Præſumptione Bonitatis*, printed at *Hall*, in 1700.

[3] *De Cive.* c. 1.

[4] Plato *de LL*, l. 1.

[5] *Atticus*, Biſhop of *Conſtantinople*, in *Socrates's* Eccleſiaſt. Hiſtory, tells *Calliopus*, That he ſhould diſtribute his Charity not among thoſe that made a Trade of begging only for their Bellies, and ſpent their whole Life-time in nothing elſe, but among ſuch whoſe Modeſty would not ſuffer them to ask it, *Socrat.* l. 7. c. 25.

[6] Thus neither were *Beggars* tolerated in *Peru*, under the Government of the *Ynca's*. But they that were diſabled, ſo that they could not maintain themſelves, were kept by the *Publick*. Vid. *Garcilaſſ. de la Veg. Com. Roy*, l. 5. c. 9. & l. 5. c. 11.

[7] But formerly, in *Egypt*, there were *profeſſed Thieves* allow'd of, of whom *Diodorus Siculus*, l. 1. c. 80. gives this Account: "Such as would be employ'd in the Trade of Thieving, enter'd their Names with the Grand-Maſter of the Order, and were obliged by Article to bring all the Things they ſtole to him; and they that loſt any Thing, were to apply themſelves by Letter to him, in which they were to ſignify the Particulars they loſt, together with the Time and Place, when and where they were loſt; and ſo every Thing being eaſily diſcovered, the Perſon robb'd was to pay a fourth Part of the Value of the Things, and take them again. For ſince it would have been impoſſible to prevent all Manner of Thieving, the Legiſlator found out this Expedient, that what was loſt might be recovered, by paying only a ſmall Price for Redemption. But no Queſtion, it would have been a better Method, and leſs inconvenient for the *Subjects*, to have made *ſevere* Laws againſt ſuch ſort of *People*, and to have taken care they ſhould be ſtrictly put in Execution.

[8] *Ter. Adelph.* Act. 2. Sc. 1. ver. 34, 35. *Vid. Conſtitut. Sicul. L. 1. t. 10.*

racters be much better'd, whether ſuch Perſons act always up to the Height of Wickedneſs and Villany, or not; whether a *Robber* will ſatisfy himſelf barely with committing *Spoil* and *Robbery*, and forbear *Bloodſhed*, and be contented only to have taken away my Money or my Goods. For as 'tis no *Juſtice*, ſo it can deſerve no Commendation, not to be an accompliſh'd finiſh'd *Villain*. And without Diſpute, whole *Bodies* and *Clans* of *Pirates* and *Robbers* ought to be rank'd under this *Denomination*, as long as they continue their *Courſe of Life*, notwithſtanding they may ſeem to have ſome Reſemblance of Juſtice among them [1]. Neither will whole *States* and *Commonwealths* deſerve better *Rank*, when they are not content to acquieſce in the Enjoyment of their own *Rights* at *home* [2], but invade and ravage the reſt of the World, without regard to *Faith* or *Compacts* to the contrary. But where *States* or *Commonwealths* are ſo partial, as to be juſt in the Obſervation of *Compacts* with ſome particular *Allies*, but to *all other* their Neighbours, or at leaſt to certain *Nations*, ſhew little Regard in the Obſervation of the *Law of Nature*, and ſcruple not, without juſt Provocation, to break it; their Credit, it is evident, muſt very much ſink, but it would be too ſevere to deny them every Degree of *Eſteem*. Now, the Effects that attend Men under ſuch a *Loſs* of *Eſteem*, are generally ſuch as theſe; that unleſs they leave off their *unjuſt* and *bloody* Way of *Life*, it will be neceſſary for other Men to ſhew them no more Mercy, than they do to Beaſts of Prey; that when they are apprehended, they will be uſed with more *Severity* than any other ſort of *Enemies*, though others might have threaten'd equal Danger; that they will not be look'd upon to deſerve the *common Offices* of *Humanity*; and that all merciful Uſage will be denied them, leſt it may ſeem to encourage them in their Villanies. Moreover, as there can be no Streſs laid upon their *Faith*, ſhould they offer it, ſince the *Habit* of Outrage they live in, muſt have cancell'd all *good Opinion* of them; ſo I doubt not it may very well be maintain'd, that neither are they capable of receiving *Obligations* of *Faith* from other Men, as long as they continue in their *ill Courſe of Life* (which muſt always be preſuppos'd) for I either make a *voluntary* Agreement with ſuch a *Perſon*, or he *compels* me by *unjuſt* Force. I cannot do the *Firſt*, without deriving upon myſelf ſome Share of his *Guilt*, by treating ſuch a Man as a *Friend*, that profeſſes himſelf a *common Enemy* to all the World, except his own Accomplices. Not to ſay further, that it may be often an Injury to other Men to keep their *Faith* with Robbers; for Inſtance, in the Caſe of leaving ſome *Depoſitum* in truſt with them [3]. But if a *Robber* ſhould have done me ſome *good Office*, which it was no Diſcredit to me to receive from ſuch Hands, it can be but reaſonable that I ſhould give him the Reward I promiſ'd [a]; but then he is not the Perſon he was ſuppos'd to be, a *common Enemy* to all Mankind beſides his own Companions. On the other hand, if he *compels* me by *unjuſt* Force to engage my Faith to him, it appears from what has been ſaid before [b], that *Compacts* extorted by Fear are invalid. But after all, *ſuch Perſons* may recover their *loſt Eſteem*, by giving over their infamous *Courſe of Life*, and by taking upon them ſome other *creditable* Profeſſion. And ſo may whole [c] *Bodies* of *Thieves* and *Robbers* by ſuch a *Change*, as well as particular Men. And from that Time they are to be dealt with as Men of *Repute* and *Honeſty*. But they ought firſt of all, either to make *Reparation*, or obtain their *Pardons*, for the Injuries they have done.

VI. *Simple Eſteem, with regard to ſuch as live under Civil Government, is that Sort of Eſteem* by which a Man is look'd upon to be the *loweſt*, a *common*, but a *ſound Member* of the *State*: Or when a Man hath not been declar'd a *corrupt Member*, according to the *Laws* and *Cuſtoms* of the *State*, but is ſuppoſed to be a *good Subject*, and is look'd upon and *valued* as ſuch. And this *Eſteem* may be loſt under *Civil Government*, either, *firſt*, when it is denied to *certain States* or *Conditions*; or, *ſecondly*, when taken away upon a *criminal Account*. The *Firſt* may happen *two* ways; either *1ſt*, when the *State* hath *naturally in itſelf* nothing *bad* or *wicked* belonging to it; or *2dly*, when it *really* deſerves, or at *leaſt* is *thought* to deſerve, ſuch an *Imputation*. Thus a *State of Slavery*, though it implies in its own Nature nothing *bad* or criminal to belong to it, yet in many *Commonwealths* deprives Men of all *ſimple Eſteem*; and *Slaves* are neither look'd upon to be *Civil Perſons*, rated or number'd in *Civil Aſſeſſments*, or *conſidered* or *valued* as *Subjects*. It is well known how *deſpicable* their Condition was among the *Romans* [4]; and the *Eſteem* the *Jews* allow'd their *Gentile Slaves* was not greater [5]. So alſo in *ſome Commonwealths*, 'tis a Diſhonour to be *baſe Born*, though the *Blemiſh* of the *Birth* is certainly only the Parents *Fault* [6]. And thus in *India*, there is a certain *Race* of Men called *Peneas*, which are look'd upon to be *infamous* [7]. A *State* under

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[a] See above in B. 3. c. 6. §. 11. towards the End. [b] See the ſame Book and Chapter, §. 10.

[c] See *Grotius* Lib. iii. Cap. 3. §. 3. and *Specimen Juriſprudentiæ Hiſtoricæ* by Mr. *Buddeus*, among his *Selecta J. N. & Gent.* §. 2, 3, 4, 5. where this Principle is applied to the old *Romans*, whoſe Commonwealth was founded by a Troop of Robbers, and other Rogues of all Sorts.

Mr. BARB. *NOTES on* §. V, VI.

[1] Thus in *Heliodorus's* Ethiopicks. L. 5. c. 15. There is mention'd a Law that was among the *Pirates*, by which he that firſt boarded the Enemy's Ship, and expoſed himſelf to the greateſt Danger in the Fight, was to have his Choice of the Booty. And in the ſame Place we are told, That the *Robbers* obſerve ſome ſort of *Conſcience* among one another, and ſhew Kindneſs and Humanity to thoſe they are acquainted with.

[2] Our Author here ſeems to point at the People of *Barbary*, who never pillage the *Mahometans*, nor commit Piracies upon any but the *Chriſtians*. See the *Parrhaſiana*, Tom. p. 204. 1ſt Edit.

[3] Vid. L. 16. t. 3. l. 31. §. 1. D. *Depoſiti*, &c.

[4] Vid. L. 18. t. 5. l. 6. ad *L. Juliam* de Adulter.

[5] *Joſeph. Archæol. Jud.* l. 4. c. 8. Neither are Slaves permitted to be Witneſſes, becauſe of the Baſeneſs of their Minds; ſince it may juſtly be believed, that their Teſtimonies are corrupted, either by the Hopes of Gain, or elſe out of Fear. Ad *Selden.* de *J. N. & G. ſec. Heb.* l. 5. c. 3. *Lex Wiſigoth*, l. 2. tit. 4. c. 9.

[6] Vid. L. 6. t. 57. l. 5. C. ad S. Ctum *Orficianum* & *Stobæum*. Serm. 75. *Unleſs we perhaps allow there is ſomething in that which is ſaid in* Procopius *Hiſt. Arcan.* That the Infamy of a Woman's Vices not only ſpreads itſelf to her Husband, but deſcends in a greater Degree to the Children, and they are condemn'd to bear a perpetual Mark of Diſgrace, as if Nature had ſtain'd them with the Diſhonours of their Mother.

[7] Vid. *Abr. Rogerium* de *Bramin*, Part 1. c. 2.

under the *latter* Conſideration *takes away* or *leſſens Civil Eſteem*, either becauſe the Perſons that live under it, are imploy'd in Things which cannot be perform'd without the Guilt of ſome Vice or Sin; or elſe are obliged by it to undertake ſuch mean *Offices* and Duties, which none but Perſons of baſe and abject Spirits would ſtoop to be imploy'd in. What *Value* is to be ſet upon thoſe of the firſt Sort muſt be known from the *Laws*, or *Cuſtoms* and Manners of every *Commonwealth* [1], thoſe of the ſecond Sort are *common Hangmen* and *Executioners*, *Bailiffs*, *Goldfinders*, and the like; *Perſons* that in moſt *Commonwealths* are denied the Society of all People of *Faſhion* or *Reputation*. And in ſome States the Laws themſelves have expreſly ſo determined. In *Rome*, *Cicero* ſays [2], "The Executioner "was forbid by the Laws of the *Cenſors*, not only to be ſeen in the *Forum*, but to ſee the Light, "or breathe the Air of that Place, or to have "any Habitation in the *City*;" as if his Preſence would ſtrike Infection and Pollution upon the *publick Aſſemblies*. In other States, it is thought ſcandalous to mix in Company with ſuch Perſons, only upon the force of Cuſtom and common Opinion; it ſeeming natural to ſuppoſe, that Perſons imploy'd in *cruel* and *ſlaviſh Offices*, would have generally Humours and Diſpoſitions ſuitable to their Imployments; and that none but Men of mean and ſervile Tempers could *voluntarily* ſubmit to them. Among the *Romans*, the *Soldiers* indeed were often made uſe of in *publick Executions* in the *City*, as well as in the *Camp*, without *Infamy*, or Diminution of their *Eſteem* [3]. For there is much Difference between doing an *Execution* at the particular Command of a *Superior*, and between doing it by Profeſſion.
 So alſo among the *Jews*, *Criminals* were *ſtoned* by all the People. And *Montaigne* tells us [4], that *Witoldus*, Duke of *Lithuania*, introduced a Cuſtom in that Country, that condemn'd *Criminals* ſhould put themſelves to Death with their own Hands, it appearing unreaſonable to him, that innocent Perſons ſhould be imploy'd to commit *Murther*; though this was but a ſilly Reaſon, for the *Executioner* cannot be ſaid to commit *Murther*, by inflicting the *Puniſhment* the *Law* awards. But others give this better Reaſon for the Law, that none might be forced upon the *Office* of an *Executioner*, to cauſe and to ſee the Agonies of the Criminals, to which the innate Tenderneſs and Compaſſion of *human Nature* muſt give every Man an Averſion.

The *Roman Laws* ſet a *Mark* of *Infamy* upon all Perſons that acted upon the *Stage* for Hire [5], or ſuffer'd themſelves to be hired to fight with *Beaſts* [6]. But the Reaſon why *Infamy* was annexed to ſuch Actions, was not that any Immorality was ſuppoſed in them (for ſuch Actions may, 'tis poſſible, be innocent enough) but the *Gain* made by them was that which made them look diſhonourable and baſe to the natural Gravity of the *Romans*; for 'tis often the *Hire* only which makes the Service mean and baſe. By the *ſame Laws* it was look'd upon to be infamous, for a Man to permit his Daughter to marry while ſhe was a Widow, within the Time of *Mourning*; or to marry any Perſon in ſuch Circumſtances himſelf; or to ſuffer any Perſon under his Charge to marry, or to be married within that Time; becauſe it might ſeem to betray much Levity and Unſettledneſs of Mind, to argue weak Inconſtancy of *Faith*, and wild deſultory Luſt. Among the antient Inhabitants of the *Canary Iſlands* it was thought very great *Ignominy* and *Diſgrace* to be a *Butcher* [7]: And Sir *Thomas Moore* make his *Utopians* of the ſame Opinion [8]. *Selden* tells us, that the *Jews* refuſed to admit four ſorts of Men either to be *Witneſſes*, or to have any hand in *judicial Matters*, becauſe of the ill *Repute* they bore among them; and thoſe were *Gameſters*, *Uſurers*, *Perſons that made Gain by the Produce of the Seventh Year, or Year of Remiſſion*; and *ſuch as taught Pidgeons to fly*. And he adds, they gave this Reaſon for it; becauſe none of theſe ſorts of People apply'd themſelves to any Way of Life which tended to promote publick *Good*, or bring any Advantage or Convenience to *human Life* [9].

VII. Thus the *Loſs* of *ſimple Civil Eſteem* may be owing purely to a *State of Life*. But a *Man* may alſo *entirely* be depriv'd of it *upon a criminal Account*; when for ſome *particular ſort of Crime* he hath committed (for every *Offence* will not deprive a Man of *Civil Eſteem*) [10] the *Laws* of the *Commonwealth* fix a *Mark* of *Infamy* upon him: Which is uſually done, either by taking away his *natural Life* at the ſame Time, and by *condemning* his *Memory*, or by *ejecting* him out of the *Commonwealth* with *Shame* and *Diſgrace*; or perhaps by allowing him to continue in the *Commonwealth*, but not as a *ſound*, but *diſorder'd*, *infected Member*; or, in other Words, by permitting him to inhabit in the Dominions of the *State*, and to enjoy the common Protection of the *Laws*, but by excluding him out of all *publick Offices* and *Imployments*, and all *honourable Societies*, by making him uncapable to make any *Will*, and by diſabling him to do any *legal Act*, which ſuppoſes an *untainted* Reputation. But now what are the *Crimes* which contract all this *Infamy*, muſt be known from the *Laws* of every particular Commonwealth [11]. And here it may be obſerv'd, that according to

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Mr. Barb. *NOTES on* §. vi, vii.

[1] To this Purpoſe is that which is related by *Valerius Maximus*, l. 7. c. 7. of *Q. Metellus* the *Prætor Urbanus*, who would not allow *Vecilius* the Bawd, the Poſſeſſion of *Inventius*'s Goods, though they were left to him by Will; becauſe he would neither ſeem to approve *Inventius*'s Action, in throwing away his Fortune into ſuch a Sink of Lewdneſs, nor allow *Vecilius* the Rights of a true Citizen, ſince he had renounced every honourable Way of Life. And thus in the ſame Author, when *Genucius*, a Prieſt of *Cybele*, had obtained a Decree of *Cn. Oreſtes*, the Prætor, that *Navianus*'s Goods ſhould be reſtor'd to him, the Conſul *Æmilius Lepidus* revers'd the Prætor's Decree, that the Court of Juſtice might not, under the Pretence of his ſuing for his Rights, be polluted by the obſcene Preſence and contaminated Voice of *Genucius*. And to this belongs alſo that, in L. 11. t. 5. l. 1. *D. de Aleator.* Where the Prætor ſaith, He would give no Judgment, if any Perſon ſhould beat or do any Damage to him at whoſe Houſe he ſhould hear they play'd at Dice, or if any ſtole or cheated him of any Thing at that time.

[2] Pro *Rabirio*, c. 5.

[3] Vid. *Petr. Fabr. Semeſtr.* l. 2. c. 6.

[4] Eſſays, l. 3. c. 1.

[5] Vid. L. 3. t. 2. l. 1. D. *de his qui Infam. not.*

[6] Vid. L. 3. t. 1. l. 1. §. 6. D. *de Poſtulando.*

[7] *Aloiſius Cadamuſtus* Navigat. c. 8.

[8] *Utop.* l 2.

[9] *Selden* de *J. N. & G. ſec. Heb.* l. 4. c. 5.

[10] Vid. L. 1. t. 54. l. 1. C. *de modo Mulctarum.*

[11] Vid. L. 50. t. 13. l. 5. §. 1, 2, 3. D. *de extraordin. Cognit. Though in this Place I obſerve, that in ſome of the Exmples, there is hardly any Diſtinction made between the ſimple and intenſive Eſteem. And here we may obſerve a Law of the* Egyptians, *by which* Soldiers that deſerted

the *Civilians*, the *Infamy* which is contracted by any bad *Action* may be either the Effect of an immediate[a] Impoſition of the *Law* itſelf; or of ſome antecedent *Examination* and *Sentence* of ſome *Judge*[b]; or elſe of the *Cenſure* of Men of *Character* and *Eſteem*, which is commonly call'd *Infamy of the Fact*[1]. [2] But I am rather inclin'd to think, this *Infamy of the Fact* is not ſo much the immediate Effect of the Opinions of Men of *Character*, as a Puniſhment which the *Law* alſo inflicts upon that View, that *good Men* always condemn ſuch *Actions*, and look upon them to be *baſe* and *wicked*. For though it may be thought a Diſcredit, to fall under Cenſure of *Perſons* of *approv'd* Lives, and *Reputation*, yet unleſs the *Law* joins with, and confirms that Cenſure, no Man can ſuffer ſo far in his *Civil Eſteem* by the Judgment only of private Men, as to be excluded from any *Rights* and *Advantages* which the *Civil Laws* allow to an *unblemiſh'd* Reputation. And therefore it is evident, that a Man doth not immediately forfeit *Eſteem*, when he is accuſed of, and charged with any Crime of *infamous* Nature and Quality. For as *Julian* rightly anſwer'd *Delphidius* the *Orator*, [c] when he cry'd out, *Who would be guilty, if it were ſufficient to deny the Fact?* 'Who would be Innocent, if it were enough only to accuſe[3]?' But it is then a Crime produceth *Infamy*, when the Perſon is condemn'd for it, or confeſſeth it. And that he is alſo ſuppoſed to do, when he agrees with the Proſecutor to let his *Action* drop: Becauſe all ſuch *Agreement* naturally ſuppoſes *Confeſſion*[4]; except perhaps it may be made appear, that he chooſes to come to Compoſition with the Proſecutor, not out of any Conſciouſneſs of Guilt, but for other juſt Reaſons, as to eſcape the Vexation and Trouble of *Trial*, the Severity or Partiality of the *Judge*, or upon ſome particular Diſlike he bears to his Perſon. To which our Author might have added, that not only the little Share of Honeſty, and the Paſſions of the Judges, but alſo their Prejudices, and Careleſneſs, often loſe the beſt Cauſes[5]. But though a Man's *Reputation* is ſuppos'd to be clear'd, when he is *acquitted* from the Crime which was charg'd upon him; yet to make his Innocence appear the more unqueſtionable, and to puniſh Calumny and falſe Accuſation, 'tis uſual in many States and Commonwealths to force the *Accuſers* to beg Pardon, confeſs themſelves guilty of Falſhood, make their Submiſſions, and pay Reſpect and Honour to the *Party* accuſed, and the like[6].

VIII. From what has been ſaid it may alſo be inferr'd, that it is no *real Infamy* or *Diſhonour*, when a Man hath ſuffer'd an Abuſe either by Words or Actions, not to *revenge* it with his own Sword; as the Cuſtom is in ſome Countries, eſpecially among *Perſons* of *Rank*, and Men of *military Profeſſion*; but puniſh it by the *Magiſtrate*, or paſs it by in Silence, ſuppoſing ſuch *Patience* doth not imply *Confeſſion* of any bad or baſe *Action*. It ſeems to argue indeed much Cowardice and Littleneſs of Spirit, tamely to ſubmit to every Man's Inſults and Injuries, without endeavouring bravely to vindicate and aſſert his *Rights* and *Liberty*; and it ſeems natural, in ſuch Caſes, for every Man to be of the Opinion of *Neoptolemus* in the Poet[7].

> Τεθναίην μᾶλλον, ἢ ἀπτόλεμος καλεοίμην.
>
> I'd ſooner die, than be a Coward thought.

There are certain Injuries, which if a Man chooſes generouſly rather to deſpiſe, than to revenge, he will not bring his Courage in queſtion. Nor can I ſee any Thing in ſuch Conduct that can rob him of his *Natural* or *Civil Eſteem*. And therefore *Hobbes* ſays, "If a Man receive Words of Diſgrace, or ſome little Injuries from another, for which there is no Puniſhment aſſigned by Law, and is afraid he ſhall fall into Contempt, and be obnoxious to the like Injuries from others, and to avoid this, protects himſelf by the Terror of his private Revenge; this is a Crime, and ſuch a Fear will not excuſe it, becauſe the Commonwealth would have the publick Words, that is, the Laws, be of more Force with the Subjects, than the Words of any private Man, which they that made the Laws therefore aſſign'd no Puniſhment for, becauſe they thought it not worthy a Man that had the Uſe of Reaſon to take any notice of them[8]." And much leſs is it any *Diſhonour* for a Man, in a Commonwealth, where the *Laws* expreſly forbid *private* Revenge, to prefer Obedience to the *Laws*, rather than expoſe himſelf at once to the Danger of the *Fight*, and the Severity of *Civil Juſtice*, upon a vain Pretence of *Honour*[9]. Neither

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[a] Vid. L. 3. t. 1. l. 1. §. 8. *De poſtulando.* [b] Vid. *D. d. l.* [c] V. *Ammian. Marcellin.* L. 18. c. 1.

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ſerted, or did not obey the Orders of their Commanders, were not puniſhed with Death, but only with Infamy and Shame. And if they could by their Courage afterwards wipe off the Ignominy, they were reſtor'd to their former Dignity. And thus the Legiſlator, by making Ignominy a greater Puniſhment than Death, taught them to think Infamy the greateſt Evil; and at the ſame Time ſeems to have conſidered, that ſuch as were puniſhed with Death, muſt for ever be made incapable of doing any further Good in common Life; but that ſuch as were only deprived of their Honour, would be always endeavouring to do ſomething that might recover it, *Diodor. Siculus.* l. 1. c. 78.

[1] *Infamia.*

[2] Vid. L. 2. t. 12. l. 13. C. *ex quibus Cauſ. infam. irrog.* Add. L. 37. t. 15. l. 2. D. *de obſeq. Parent. præſtand.* l. 20. & D. l. 3. t. 2. l. 20. *de his qui notant. infam.* Vid. L. 9. t. 9. l. 25. C. ad L. *Jul.* de Adult. *And to this you may refer that which* Rochefort, Deſcript. Antillar. Part. 2. c. 8. *relates of the* Apalachitæ. They have no other Puniſhment, ſaith he, for Thieves, beſides the Reflections that are made upon them in all Company upon that Account; and this is generally taken ſo hard by them, that to avoid it, they will fly away into the moſt uninhabited Deſerts.

[3] *And to this we may apply that of* Plautus *in* Trinum. *Act.* 1. *Sc.* 2. *v.* 44, 45. Not to commit a Crime, is in a Man's own Breaſt; the Suſpicion whether he does not, is in another's.

[4] *Vid.* L. 3. t. 2. l. 5. D. de his qui infam. notant. *Quoniam intelligitur confiteri crimen, qui paciſcitur.*

[5] *Thus in* Iſocrates *adv.* Callimach. *in the Beginning. Some perſwaded the Defendant to compound the Matter with the Plaintiff,* becauſe in Trials there are ſeveral Things which fall out otherwiſe than are expected; and in paſſing the Vote, there is more Chance than Equity. And therefore it is a much ſafer Way to be at ſome ſmall Expence, to get clear of a Crime, than to refuſe to pay any Money, and run ſo great a Hazard.

[6] *It is evident from* Joſephus *de Bello Judaico*, l. 4. c. 39. That the Ignominy of having been in Chains was ſuppoſed to be taken away, if the Chains were not unlock'd, but fill'd aſunder; and this, he ſaith, was the Way, when any one had been put in Chains innocently among the *Romans*.

[7] *Q. Calaber*, l. 9.

[8] *Leviath.* c. 27. Vid. Leg. *Salicam.* tit. 32.

[9] ——*Injuſtum rigido jus dicitur enſe.* Ovid. *Triſt.* L. 5. El. 10.

'Tis cruel Juſtice which the Sword inflicts.

Neither is it always, I preſume, a Sign of Cowardice, for a Man to refuſe to put his Life and Fortunes to the Venture upon every little inſignificant Quarrel, when there may be often leſs dangerous, and more innocent and lawful Occaſions offer'd to ſhew his *Courage*[1]. Thus when *Pyrrhus*, in *Plutarch*, call'd *Antigonus* Villain, and challeng'd to meet him upon the Plain, and fight him for the Kingdom, *Antigonus* anſwer'd, τὴν μὲν αὑτοῦ στρατηγίαν οὐκ ὅπλων μᾶλλον ἢ καιρῶν εἶναι, *That his way of making War conſiſted as much in knowing proper Times and Opportunities, as in Strength; and that if* Pyrrhus *were weary of his Life, he might eaſily find Ways enough to go out of it.* And ſo *Auguſtus* anſwer'd *Antony*'s Challenge, in the ſame *Author*, *That he might eaſily find a Way to die*[2]. And in ſuch Caſes, no prudent, conſiderate Man, hath any Reaſon to be diſturb'd at the Opinions or Cenſures of the *Vulgar*; ſince the *Eſteem* of every Subject is to ſtand and fall by the *Judgment* of his *Sovereign*, and the *Laws* of the State; and ſince 'tis ſufficient Proof of *Bravery* and *Reſolution* to obey the *Laws*, in Defiance to all the *little* Cavils and Calumny of the vain and idle Part of Mankind. And hence it will be no Difficulty to anſwer what *Hobbes* ſays in his *Leviathan*, c. 20. "That it is hardly poſſible, but private *Duels* ſhould be thought honourable, becauſe they are the Effects of Courage, which is *Power*." For why ſhould it not be rather look'd upon to be a Sign of *Greatneſs* and *Bravery* of Spirit, to know how to govern the *Heats* and Paſſions of our Minds, and to give them no other Liberty, but what the *Laws* allow? Though I think the ſame *Author* ſays very well afterwards, c. 30. "That all Laws that forbid *Duels*, ſhould ordain Honour for them that refuſe, and Ignominy for them that make the *Challenge*;" and thus thoſe that refus'd to fight would have an honourable Excuſe. The Remedy the *Sicilian Conſtitutions* propos'd againſt *this* Cuſtom was, by inflicting ſevere Penalties upon them that *offer'd* any *Affront*[3].

An Account, *by the way*, of the *Antiquity* of *Duels*, and whence they at firſt began, we may ſee in *Diodorus Siculus*[4]. "The *Gauls*, ſaith he, in the Height of their Entertainments, upon the leaſt Quarrel that aroſe, would break off their Mirth, take their Swords, and without expreſſing any Value for their Lives, go out and fight. And this they did upon a Belief, that they ſhould enjoy another Life, in a new Body; and therefore eaſily deſpiſed the Care of this; as *Lucan* expreſſeth it:"

----Inde ruendi
In ferrum mens prona viris, animæque capaces
Mortis, & ignavum eſt rediture parcere vitæ[5].

----Hence they ſo bravely dare
Defy the Sword, and all the Dread of War,
Scarce ſatisfied with Death; and think it mean,
To ſpare a Life that muſt return again[6].

IX. But *Further*; It is alſo evident, that the *Government* cannot deprive any Man of his *natural, ſimple Eſteem abitrarily, at pleaſure*, but only upon ſome *antecedent Crime* he hath been guilty of, which is attended with *Infamy*, either by its own *intrinſick Turpitude*, or by *expreſs Sanction* of *Law*. For ſince ſuch a *Power* can no way be ſuppoſed to promote *Civil Society*, or the *Intereſt* of the Commonwealth, it is not to be ſuppoſed it was ever conferr'd upon the *Sovereign* Governors in it. But as the *Civil Sovereign* may unjuſtly *eject* a Subject out of the Commonwealth, ſo he may unjuſtly alſo take away his *Civil Eſteem*, ſo far at leaſt, as to deprive him of all thoſe *Rights* and *Advantages* which attend an *untainted Eſteem* in the Commonwealth. But his *intrinſical natural Eſteem* can no more be taken away from a Man, than his *Virtue* and *Integrity*. Beſides, 'tis next to a Contradiction, that a Man ſhould be declared *infamous* at the *Pleaſure* only of the Government; that is, that a Man ſhould be charg'd with a Suſpicion of being guilty of ſome *diſhonourable* or *criminal* Action, not becauſe he is really guilty, but becauſe 'tis the Pleaſure of the *Government* by ſuch means to uſe an innocent Perſon as if he were criminal. And I think it is alſo beyond Diſpute, that there lies no Obligation upon any Subject, to ſacrifice his own *ſimple Eſteem* and *Character* to the *Civil Goverment*, or to contract any *real Infamy* for the *Advantage* of the *Publick*. For neither hath the Government Power to command any *baſe* or *ill* Action, which will be the Cauſe of *real Infamy*; neither ought a Subject to obey, if it ſhould.

X. Whether indeed, it may not be required of a Subject of *good Character*, to take upon himſelf the *Infamy* of his *Prince*, or his *Country*; or, as it were, make himſelf *criminal* for their *Faults*, is not ſo clear. But here (though I think it hardly poſſible for a Man to counterfeit himſelf a Criminal, without being in ſome meaſure really ſo) I conceive, there ought to be a Diſtinction made between a *Prince*'s *domeſtick* or *private* Faults, and thoſe that are *publick*, or which have an *Influence* upon the whole Commonwealth. Now that a Man ſhould take the *firſt* ſort upon himſelf, and make himſelf *criminal* for his Prince, can neither be *lawfully* and *juſtly* deſired by the one, nor ſafely be complied with by the other; whether with deſign to put ſome plauſible *Colour* upon the Action of the *Prince*, or whether to take the *Blemiſh*, that would otherwiſe be fix'd upon *his natural Eſteem*, upon himſelf. For no body can take away the *Civil Eſteem* of the *Sovereign*, becauſe he is placed above the Reach of any *Civil Judicature*. Thus it cannot be thought that any good Man can approve the *Action* of *Anicetus*, when he declar'd, he had been guilty of Adultery with *Octavia*, only that *Nero* might have Pretence to diſſolve his Marriage with her

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[1] Vid. *Caſ.* Com. de *Bell. Gallic.* l. 5. c. 44. Vid. *Busbeq.* Epiſt. 3. de *Velibego*.

[2] *Plut.* in *Pyrrh.* p. 404. A. & in *Anton.* p. 950. E. *Alexander de Rhodes* Itiner. l. 2. c. 6. relates of the Soldiers in the Kingdom of *Tonquin*, that though they are very valiant againſt an Enemy, and ſet but little Value upon their Lives, yet among one another they never draw their Swords, but are as loving as Brothers: And that when they once ſaw a *Frenchman* and a *Portugueſe* fight a Duel, they were amazed at it and ſaid they never ſaw ſuch Barbarity before.

[3] Conſt. *Sicul.* l. 3. tit. 33. §. 4.

[4] L. 5. c. 28.

[5] *Lucan*, l. 1. v. 455, &c.

[6] Vid. *Appian Celtic.* Where he gives the ſame Reaſon for the Boldneſs and Bravery of the *Germans*.

her [1]. But yet 'tis not uncommon, that when *publick Miniſters*, by ſecret Order from their *Maſters*, enter into *Treaties* with *foreign States*, or oppoſe and form Deſigns againſt them, which, if known to be the Reſult of *publick Counſel* or *Inſtructions*, would bring Danger or Inconvenience upon the State, to avoid the ill Conſequences which might follow, by laying the Fault upon the *Miniſters*, as if they had acted only by their own *private Judgment*. And in ſuch a Caſe, I think no *good Subject* would refuſe to divert the *Evil* from the Commonwealth, by favouring the *Excuſe*, and yielding that what he did, was beyond his Inſtructions, and without *Command*; provided his Puniſhment be no greater than ſome ſmall pretended *Diſgrace* [2]. For to ſuffer *Death* upon that Account, or to be *given* into the Hands of the *injured* Party, would be a Severity not to be born or excuſed. But the pretended *Puniſhment*, whatever it be, may be eaſily either remitted or *compenſated* otherwiſe. For 'tis unqueſtionable, that he that hath Power to inflict *Civil Infamy*, hath alſo Power to remove it [3]. But notwithſtanding, if *Infamy* be inflicted for any *impious* or *flagitious* Action, *Reſtitution* of a Man's *Fame* will only produce the *external Civil Effects* of *an unblemiſh'd Reputation*; but will not in the leaſt wipe out the Blot which lies upon his *natural Eſteem*.

XI. *Intenſive Eſteem* is that Species of Reputation, by which Perſons, otherwiſe equal in the *ſimple Repute*, are preferr'd to one another, according as one poſſeſſes a larger Share than *another of thoſe Things*, whatever they be, which are apt to raiſe in other Men *Reverence* and *Reſpect*. Now *Honour*, which anſwers the *Intenſeneſs* of *Eſteem*, is the *Signification of our Opinion of another Man's Excellencies*. And therefore the *Honour* is not really in him that *receives*, but in him that *gives it* [4]. For though a Man may ſet what *Value* he pleaſes upon himſelf, as the *Seller* does upon his *Commodities*: Yet, as in theſe, it is the *Buyer* at laſt that determines the *Price*; ſo the *Value* of Men is no higher or greater, than as others are pleas'd to ſet it [5]. For as *Hobbes* ſays, *Let a Man (as moſt Men do) rate himſelf at the higheſt he can*; *yet the true Value of him is no more than he is eſteem'd at by others* [6]. But yet every Man is affected more or leſs with the *Honour* others pay him, as it anſwers to that *Value* which he puts upon himſelf [*]. But the *Eſteem itſelf*, or that which gives Men the *Title* of *Deſert* to *Honour*, is often *figuratively* expreſſed by that *Word*. And ſo certain *publick Stations*, and *Places* of *Dignity* attended with Honour, are peculiarly called *Honours*. 'Tis rightly obſerv'd by the *Author* before mention'd [7], "That it is impoſſible any *Society* ſhould be either "great, or of any long Continuance, that at firſt "united only upon ſuch a *Bottom* as a *common* De-"ſire of *Glory*, or upon mutual Obligation to aſ-"ſiſt one another in their Purſuits after *Honour*; "becauſe *Glory*, and the *Honour* that is built upon "it, conſiſt in *Compariſon* and *Preference*; and ſo "what belongs to every body, belongs to no bo-"dy; and becauſe the *Rate* that is commonly "ſet upon a Man, is taken from what he is able "to do without the Aſſiſtance of others [8]." On the other hand, the further *Ignominy* ſpreads, the lighter it ſeems, and the eaſier it is ſupported. Now this *intenſive Eſteem* may alſo be conſider'd, either with regard to ſuch Perſons as live *in a Liberty of Nature*; or ſuch as are *Members of the ſame Commonwealth*. But I ſhall now proceed only to examine the *Foundations* of this *Intenſeneſs* or *Eminence*, as they fall under theſe two Conſiderations: Firſt, as they produce barely an *Aptitude* or *Diſpoſition* in Men to receive *Honours* from others; and Secondly, as they give them a *proper Right* to demand *Honour* as their *Due*.

XII. The *Foundations* of *intenſive Eſteem* in *general* are all thoſe Things, which diſcover, or are ſuppoſed to imply, extraordinary Excellence or Perfection of any kind [9]. The Effects of which are conſonant to the *Laws of Nature*, and the Ends of *Civil Government*. For 'tis unuſual to ſee *Perſons* of diſſolute Morals, and *eminent* for nothing but their Vices, *celebrated* and *admired* by the Multitude. So in particular, are Men of unuſual Strength and Abilities at eating and drinking [10]; of extravagant, inſatiable Luſt; of mad, raſh, ungovernable Humours; dextrous, ingenious, craſty, artful Villains; and in ſhort, all Miſcreants whatever, that are arriv'd at ſome ſignal Proficiency,

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[*] See above in B. 7. c. 1. §. 2. towards the End.

Mr. BARB. *NOTES on* §. X, XI, XII.

[1] Vid. *Tacit.* Ann. XIV. 62. *Euripides, Helena*, v. 106, 107. *Nor for my Brother can I bear that Stain.* In which Caſe, however, the Matter in Diſpute is not about Subjects with reſpect to their Prince. Add the Story of *Anton. Perez.* in *Thuanus*, l. 104.

[2] Add. *Marſelaer.* Legat. l. 1. c. 33. p. m. 200.

[3] See *Cornel. Nepos. Alcibiad.* c. 6. §. 5. *Libanius*, Orat. 7. To diſſolve, and undo Things that are already done, is what we reckon among Things impoſſible; but to take off Ignominy from them that are in Diſgrace, is not ſo difficult a Task; and you are the only Phyſician that can cure this Diſeaſe: *Speaking to* Julian *the Emperor.* See *Juſtin.* B. 5. c. 4.

[4] *Ariſtot.* Nicom. l. 1. c. 3. We ought to think the Honour is rather in thoſe that honour, than in them that are honour'd.

[5] Vid. *John* viii. ver. 54.

[6] *Leviath.* c. 10.

[7] *Hobbes* de Cive, c. 1. §. 2.

[8] *Seneca* Epiſt. 27 de *Calviſio Sabino.*

[9] *Cic.* de Nat. Deor. l. 1. c. 17. Every Thing that excels, may juſtly command a Veneration. "Honour is a Privilege, that derives "its principal Eſſence, and even Virtue, from the Rarity of it; *cui malus eſt nemo, quis bonus eſſe poteſt?* *Martial.* Lib. 12. *Ep.* lxxxi. "We never take notice of a Man, by way of Recommendation, that he is induſtrious and careful in maintaining his Family, becauſe 'tis "a common Action, notwithſtanding it is very juſt and commendable: Nor of a great Tree in a Foreſt, where they are all of the ſame "Bigneſs. I am of Opinion, that a Citizen of *Sparta* ought not to have boaſted of his Courage, ſince it was the popular Virtue of their "Nation; and as little of their Fidelity or Contempt of Riches. There is no occaſion of recompenſing a Virtue, how great ſoever it is, "that is once become cuſtomary; and I know not whether we ſhould ever call that great, which is common. Since then, theſe "Rewards of Honour have no other Worth or Value in them, than what ariſes from the ſmall Number of thoſe that enjoy them; a "liberal Diſtribution of them is the Way to make them contemptible, and bring them to nothing." *Montaigne's* Eſſays, B. II. c. vii. towards the Beginning.

[10] Such as *Juvenal* deſcribes, *Sat.* IV. ver. 139, 140.

——*Nulli major fuit uſus edendi*
Tempeſtate mea.

In Arts of Eating, none more early train'd;
None, in my Time, had equal Skill attain'd. Mr. *Dryden.*

Ariſtoph. Acharnenſ. *Act.* 1. *Sc.* 2. ver. 35, 36. The barbarous People value Men only, as they can eat and drink moſt.

ency, and ſeem to be Leaders in their ſeveral Vices: And who, the more they are accompliſh'd in their different vile Practices, will appear only the more inſupportably wicked to all the good and ſober Part of Mankind [1]. It may poſſibly require much *Strength of Body*, and Readineſs of *Parts* to be compleatly vicious; but 'tis alſo certain, that Vice will govern with greater Power and Violence, where there is more *Vigour* and *ſtronger* Appetites to entertain and ſupport it. From all which it is eaſy to infer, that *Commendation* and *Glory* muſt be *rated* only by the *Valuation* of the Perſons we receive it from. And therefore, that the greateſt *Commendation* is that which comes from Perſons that deſerve it themſelves; and conſequently, that a *wiſe Man will ſet no Value upon their Praiſe (as* M. Antoninus *ſaith) who cannot ſo much as appear pleaſing to themſelves* [2]. But in *particular*, the *Foundations* of this *Eſteem* are ſuch as theſe; *Perſpicacity* of Mind, *Parts* and *Abilities* capable of much Improvement and Variety of Knowledge, eſpecially when great Capacities are anſwered by great Attainments. A Judgment turn'd for Buſineſs, eaſily diſcerning the true State of Things, and Difficulty impoſed upon [3]. *Steadineſs* of Reſolution, unſhaken and unmoved at external Accidents, above Fear, and beyond the Force of *Temptation*. *Eloquence*, or the Power of expreſſing the Thought with much Fluency of Words, and Graceſulneſs of Utterance. And next theſe, *Strength*, *Beauty*, *Comelineſs*, and good *Proportion* of Body; as theſe may be ſuppos'd to be either Inſtruments, or Promiſes and Signs of certain Graces and Perfections in the Mind [4]. Hence it has been vulgarly thought, that extraordinary *Tallneſs* of Body implies a Mind and Perſon *great* and *noble:* And the *Gods* and *Heroes* were therefore repreſented upon the *Stage* in the *Buskin*, that the *Actors* might appear of an unuſual Size. And 'tis obſervable, that there are many Men that wiſh to be *taller* than they are; but that there are very few that would be content to loſe an Inch of their *Stature*. But how ridiculous ſoever this Opnion ſeems to be, it prevail'd ſo far, that upon the Force of it the *Ethiopians* (as *Herodotus* ſaith [5]) *choſe their Kings by a certain Meaſure*. A Method of Election, which would no doubt have been much approved by the *Indian* mention'd in *Montaigne*, who happening to be at *Roan*, while the *Court* was there, in the Reign of *Charles* IX. ſaid, that he thought it very ſtrange ſo many tall Men with long Beards, and ſo bravely arm'd, as they were that ſtood about the King's Perſon (meaning the *Swiſs-Guards)* ſhould be content to obey a beardleſs Boy, and that he wonder'd they did not chooſe one of them King [6]. But it is often ſeen (as the *Poet* ſays) that,

> ----*Natura breves animis ingentibus artus*
> *Finxerit.*----

> Nature large Souls in little Room confines [7].

And that [8],

> ----Ἠνορέη τε
> Ἄπρακτος τελέθει, μέγεθος δ᾽ εἰς οὐδὲν ἀέξει
> Ἀνέρος, εἰ μὴ οἱ πυκινὴ ἐπὶ μῆτις ἕπηται.

> 'Tis fond to hope Succeſs from Strength or Might,
> Except with Force, Prudence and Art unite.

But beſides *theſe* Foundations of *intenſive Eſteem*, there are alſo others to be mention'd, ſuch as the *Goods of Fortune* (as they are call'd) which ſeem either to ſuppoſe Induſtry, Wit, and Prudence, neceſſary to obtain them, or to promiſe *Power*, or to ſupply *Matter* to do great Things. But that which advances Reputation moſt, and is the *Foundation* of the higheſt and moſt *intenſe Eſteem*, is *good Succeſs* and *Fortune* in great and *important* Actions. *This* firſt of all ſeeming to ſuppoſe *intrinſick Worth* and *Excellence*, and then to demonſtrate the Advantages that ariſe from it, and the lawful Ends it may and has been applied to [9]. And as the *Fame* of ſuch *Atchievements* gains Belief in the World, it is properly call'd *Renown*. A *Reputation* of particular *Prudence* and *Conduct* in Difficulties relating to common Life and Practice, or to *ſpeculative abſtracted Truths*, is what is uſually call'd *Authority*; which others more truly call *an Opinion of greater Knowledge, joined with Probity and Sincerity*. And hence thoſe *Degrees of Eſteem*, which *Age* is thought to confer, are *founded* upon nothing more than the common Perſuaſion, that *Experience* and long Obſervation upon Buſineſs and Things, generally produce *Caution* and *Prudence* [10]; though it is not to be denied, that there are Inſtances where *grey Hairs* are are not *Signs* of *Wiſdom* [11]. But now on the other hand, Women generally deſire rather the Complements

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Mr. BARB. *NOTES on* §. XII.

[1] *Philo Judæus* de Migrat. *Abrahami*. p. 413. A. Ed. *Pariſ.* To excel many Things that are bad, is only a more famous Infamy. *Arrian. Epictet.* l. 3. c. 14. If you tell me you kick with a great deal of Strength; I anſwer, You value yourſelf upon that which belongs to an Aſs.

[2] *M. Ant.* L. 3. ſ. 4.

[3] Vid. *Eccleſiaſt*. ix. 15. 1 *Kings* iii. 28.

[4] Vid. *Virg.* Æneid. 5. ver. 344. *Iſocrat.* in Encom. *Hellenæ*. Though he is there a little too much an Orator. Lord *Bacon's* Eſſays, c. 41, 42.

[5] *Thalia*. Vid. *Themiſt.* Orat. 14.

[6] *Montaigne's* Eſſays, l. 1. c. 30. Add. 1 *Sam.* x. 23, 24. And here alſo we may apply to this Senſe, that of *Oppian. Cyneget.* l. 3. c. 68.

> Μείοσι μὲν μείζων τελέθει, μεγάλοισι δὲ μείων.
> The Great excels the Leſs, the Leſs the Great.

[7] *Claudian*, de Bello Getico, ver. 584.

[8] *Q. Calaber*, l. 5.

[9] *Ariſtot.* Rhet. l. 1. c. 3. 'Tis juſt to honour thoſe that do Good; but not ſuch as barely have it in their Power. *Pind. Olymp.* Od. 6. ver. 123, 124. τεκμαίρει χρῆμ᾽ ἕκαστον, The Work diſcovers what the Author is.

[10] Vid. D. L. 50. t. 6. l. 5. init de *Jure Immunitatis*. Q. Calaber, l. 5.

> Αἰεὶ δ᾽ ἐν βουλῇσι γέρων πολυΐδρις ἀμείνων
> Ὁπλοτέρου πέλει ἀνδρὸς, ἐπεὶ μάλα μύρια οἶδε.

> Youth is leſs fit than Age for wiſe Debates;
> On ſacred Wrinkles ſage Experience waits.

Diod. Sicul. l. 19. c. 34. It ſeems more natural, to pay greater Reverence and Reſpect, to Aged, than to young People. *Oppian. Halieut.* l. 1. ver. 683.

> Γῆρας γὰρ ἐναίσιμον ἄνδρα τίθησιν.
> Age makes Men venerably Great.

[11] Such as we apply that of Ovid Metam. l. 9. ver. 436, 437.

> ——*Qui proper amara ſenecta*
> *Pondera deſpicitur, nec quo prius ordine regnat.*

> Who tyr'd with Age and Years oppreſſive Weight,
> Sink to Contempt, and loſe their former State.

And

plements of *Youth* and *Beauty*, than the Reſpect and Honours paid to *Age*. And therefore *Lais*, when ſhe grew old, dedicated her *Looking-glaſs* to *Venus*, adding as it is in the *Epigram* [a]:

----- ἐπεὶ τοίη μὲν ὁρᾶσθαι
Οὐκ ἐθέλω, οἵη δ' ἦν πάρος, οὐ δύναμαι.

The Face I once could boaſt no Glaſs can ſhow,
And that I now have left I would not know.

The *Roman Law* ſeems to allow more *Worth* and greater *Dignity* to *Men* than *Women* [b]. Though in *general*, there are ſome *Foundations* of *Eſteem* common to both Sexes. And there are others which are particular to the *Women*, ſuch as the ſeveral *Accompliſhments* of *Virtues* and *Duties peculiar* to their *Sex*. And there are others again, which are *borrowed* and *derived* to them, when they are ſaid to *ſhine with the Rays of their Huſbands* [c]; or when they value themſelves upon the *Number* or *Worth* of their *Children* [d].

XIII. From *all which* it readily appears what Judgment may be made upon what *Hobbes* ſays in Chap. X. of his *Leviathan*, where he reduces all the *Foundations of Honour* or *intenſive Eſteem* to *Power*, which he calls a *Poſſeſſion of preſent Means, to obtain ſome apparent future Good*. And this he divides into *natural* and *inſtrumental*. "Natural Power (he ſays) conſiſts in the Eminence of the Faculties of Body or Mind, as extraordinary Strength, Beauty, Prudence, Arts, Eloquence, Liberality, Nobility, and the like. Inſtrumental Powers are thoſe which, being acquired by theſe, or by Fortune, are the Means and Inſtrument of acquiring more, as Riches, Reputation, Friends, and good Luck; and in ſhort, any Quality whatever, or the Reputation of any ſuch Quality, as makes a Man to be lov'd, or fear'd of many. *And then he defines Worth*, or *Dignity:* That it is the Value or Price of a Man, or as much as would be given for the Uſe of his Power. And the Manifeſtation of that Value we ſet on one another is that, *he ſaith*, which is called Honouring and Diſhonouring. Thus to value at an high Rate, is to honour a Man; at a low Rate, is to diſhonour him. *Afterwards he recounts* the natural Tokens, or Ways of Honour, as to pray to another for Aid, to obey, to give great Gifts [e], to be ſedulous in promoting another's Good, to give Way or Place to another in any Commodity; to ſhew any Sign of Love or Fear, to praiſe, magnify, or call happy, to ſpeak to another with Conſideration, to appear before him with Decency and Humility, to believe, to truſt, to rely on another, to hearken, to counſel or diſcourſe of what Kind ſoever, to agree with in Opinion, to imitate, to honour thoſe another honours, to imploy in Counſels or Actions of Difficulty. *And further*, Civil Dignity, *according to him*, is that Value which is ſet on a Man by the Commonwealth, which is underſtood by Offices of Command, Judicature, publick Imployment, or by Names or Titles, introduced for diſtincton of ſuch Value. *And he rightly obſerves, that* the Commonwealth may make whatſoever it pleaſes to ſtand for Signs of Honour, though it be otherwiſe in its own Nature indifferent; as for Inſtance, it was a Sign of Honour among the *Perſians*, to be conducted through the Streets in the King's Garments, upon one of the King's Horſes [f]," (as it is alſo to wear certain Marks or Badges). Thus the *Chineſe* ſalute with the *Head* and *Hand*; the *Japoneſe* by putting off their *Slippers*; the *Chineſe* always riſe to any Perſon they deſign to honour. They of *Japan* pay their Honours ſitting on the Pavement, and think it *Rudeneſs*, and *ill Breeding* to *ſtand*, when they perform their *Ceremonies* [g]. However all this be, that *Notion* of his, that *Honour conſiſts ſolely in the Opinion of Power*, is by no means to be admitted; neither what he infers from thence, "That it doth not alter the Caſe of Honours, whether an Action (ſo it be great and difficult, and conſequently a Sign of much Power) be juſt or unjuſt. And that therefore the antient *Heathens* did not think they diſhonoured, but greatly honoured their Gods, when they introduced them in their Poems, committing Rapes, Adulteries, Thefts, and other great, but unjuſt or unclean Acts". For though it might be *granted*, that the *Foundations* of *Honours* may ſo far be properly enough reduced to *Power*, *namely*, as they are naturally apt

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And as *Lucan*, l. 1. ver. 135. expreſſeth it:

——*Stat magni nominis umbra.*

——Retains the Shadow of a glorious Name.

And therefore *Horace* ſaith very well, *Ep. l.* 1. *Ep.* 1. *ver.* 8, 9.

Solve ſeneſcentem mature ſanus equum, ne
Peccet ad extremum ridendus, & ilia ducat,

Wiſely in Time the generous Horſe releaſe,
E're batter'd and decay'd, he loſe the Race.

Antiphanes. Life is like Wine, when it runs low, it will turn ſoure. *Add.* Charron *de la* Sageſſe, l. 1. c. 35. §. 5. *Strabo*, l. 15. p. 488. The *Indians* allow no Pre-eminence to the Aged, unleſs their Prudence deſerve it. *Philo de Abrahamo*, p. 387. A Man ought not to be called Old from the Time he hath liv'd, but from the Way he hath ſpent his Life in. For many that have continued a long Courſe of Years in ill Practices, can only be called Long-liv'd Boys. *And it is ſometimes true, as* Varro *ſaith*, de re Ruſtica, l. 2. c. 2. That is a better Age which is attended with Hopes, than that which is followed by Death. *Quint.* Inſt. Orat. l. 2. c. 1. p. 104. We ought not to value any one according to his Age, but according to the Improvements he hath made. *Iſocrat.* in *Archidam.* init. It is not our Years, but our Parts and Induſtry that makes us wiſer than others. *Philoſtrat.* in Vit. *Appollon. Thyan. l.* 6. *c.* 8. *p.* 287. *Ed. Morel.* Youth doth not hinder a Man from ſeeing Things clearer than even old Age itſelf.

[a] *Antholog.* l. 6. *Quintil.* Declam. 306. p. 462. There is nothing to be lov'd in an old Woman, but the Memory of what ſhe was. *Add.* Ld. *Bacon's* Eſſays, c. 40.

[b] *L.* 1. *t.* 9. *l.* 1. *D. de Senatoribus. Add.* Jac. Godofred *de præcedentia.* Part. 1. c. 5. §. 35.

[c] *Vide l.* 8. *D. de Senatoribus, ubi ſupra.*

[d] *Vide* Ovid. Metam. *l.* 6. *fab.* 4. *ver.* 172. *& ſeq.* Valer. Max. *l.* 4. *c.* 4. §. 1. Plut. in C. Gracch. *Vide* Buchanan *Rerum Scotic. l.* 12. *init. Orat.* Kennedi.

[e] And upon this Foundation I ſuppoſe (though the Reſpect intended was oddly expreſs'd) the Prince of *Zanaga* in *Africa*, as *Leo Africanus*, l. 1. relates it, kill'd a great Number of Camels and Oſtriches, to entertain his Gueſts; which Sort of Proviſion they deſired him to ſpare, he told them, that he ſhould not deal civilly by them, if he treated Gueſts he thought ſo Noble, and that he had never ſeen before, with only the leſſer Sort of Animals.

[f] *Eſther* vi. 8.

[g] *Bern. Varen. Japon.* Deſcript. p. 21. Add. *Neuhof.* in Gen. Deſcript. *China*, c. 4. Vid. *Rochefort.* Deſcript. *Antill.* Part 2. c. 19. where alſo he tells of ſome unuſual Signs of Honour.

apt to produce ſome *Effect* or *other* in *Human Life*; ſince what is of that dull, unactive Nature, as will produe no *Effect* either *good* or *bad*, ſeems to be capable of having no Value one way or other ſet upon it: Yet that *Power* alone, without Relation to, or in Conjunction with *Goodneſs*, ſhould be the *proper* and *natural Foundation* of *real Honour*, is what is contrary to *Reaſon*, and *Hobbes* himſelf: For in his Book *de Cive*, *c.* 15. §. 9. he gives this *Definition* of *Honour*; that *it is an Opinion of the Power of another in Conjunction with Goodneſs*. And thence he infers, that *there are three Affections neceſſarily conſequent upon Honour*; *Love*, *that bears relation to Goodneſs*; *and Hope and Fear*, *that have regard to Power*; and thus that only is *true Honour*, which is attended with all theſe *three Affections* together. Fear alone, excited by a *Power* determined to *Evil*, can never be look'd upon to be a *Sign* of *Honour*. For *Fear* hath always a Mixture of *Hatred* in it; and where a Man *hates*, he naturally wiſheth *Harm* and *Ruin*, and not *Honour* [a]. Thus by the *Chriſtian* Religion we are aſſured of the great *Power* of the *Devil*, but that it is utterly averſe to all Goodneſs, and always bent upon all Evil; but certainly no Man in his Senſes can ſuppoſe that he deſerves *Honour* upon that Account. And therefore *he himſelf*, when he *tempted* our *Saviour*, did not ſhew him his *Force* and *Power*, but his *Gifts*, the *Glories* and *Kingdoms* of the World, *Matt.* iv. 8, 9. Nor can any Man of Senſe think it a good Reaſon, which the People of ſome barbarous Countries in the *Indies* give for their worſhipping the *Devil*, *that he ſhould do them no Harm*. And therefore alſo, methinks, I have no Patience to ſee *Hobbes* mentioning *Flattery* among the reſt of his *natural Signs* of *Honour*. For *Flattery* in every *Kind* of it implies and ſuppoſes ſome *Deficiency*, or *Blemiſh*, both in the Perſon that gives, and in him that receives it; and is an *Act* and *Species* of *Scorn* and *Deriſion*, without the leaſt *Mixture* of *Love* or *Sincerity* in it [b]. But as to the *Fables* of the *Poets*, there are ſome Men indeed that think, that they imply no more than that the *Gods* are above all the Confinement of Laws. And others rather ſuppoſe [c], that *all was Myſtery in them, and that many ſecret Truths were concealed under the Diſguiſe of thoſe Vices and Abſurdities*. But whatever they make of them, it will never by me be conceivable, that *Rapes* and *Adulteries* could be an *Honour* to the Gods, any more than they would be to any ordinary *Mortal* here on Earth [d].

XIV. But after all, *theſe Foundations* of *intenſive Eſteem* produce only an *imperfect Right* to demand *Honour* and *Reſpect* from others; ſo that if a Man *deny it* where it is really *deſerv'd*, he cannot be ſaid to have done an *Injury*, but only to have been guilty of ſome *Diſcourteſy* or *Incivility*: For *among* Perſons that live in a *Liberty of Nature*, where all are *equal*, it doth not appear how any Man can pretend *Right* to demand Honour from another; ſince from that *Love* every Man naturally bears to himſelf, it is very eaſy for him to *imagine* that there are *Qualities* or *Endowments* in in himſelf, *equal* or perhaps *ſuperior* to thoſe which others *value* themſelves upon. For Inſtance, one Man thinks *Age* deſerves *Reverence* and *Eſteem*; another, that *Youth* and *Vigour* have a much better *Title* to it [e]. The Hopes and Expectations of ſome raiſe them to as great a Pitch of Vanity, as the real Succeſs of others. Some *value* themſelves upon *Strength of Body*; others think *Wit* and *Prudence*, the Endowments of the Mind, much *nobler* Qualities [f]. This Man meaſures his *Worth* by the *Largeneſs* of his *Fortune*; another by an *Eaſineſs* and *Freedom* of Mind, which he thinks equal to all the Wealth and Opulence in the World. Some preſume upon their *Learning*; others will ſuppoſe that there is nothing *true and real* in *human Knowledge*, more than *Reſolution*, *Fidelity*, and *Sincerity*; the Τὸ βέβαιον ϗ πιςὸν, ϗ ὑγιὲς, as *Plato* ſtates it [g]. Some inſiſt upon the *Honours* they have attained; others ſatisfy themſelves that *Honour* is not always paid where it is deſerv'd, or deſerv'd where it is paid [h]. And others ſet little Value upon *Greatneſs of Birth*, and deſpiſe it when it is not attended with an anſwerable Greatneſs of Fortune [a]. And certainly the *wiſer Part* of Mankind will always think it as falſe a Method to value [1] Men by their *Riches*, *Dignities*, or *Honours*, or by Things *external* to them, as it would be to take the *Worth* of *Horſes* from the fine Furniture which may belong to them. But beſides, ſince *Honour* is then properly paid, when a Man acknowledges *ſuperior* Excellencies in another, and pays ſome *voluntary* Submiſſions to him upon that Score; and ſince no Man can be *forced* to pay this by outward *Violence*, that Method being more likely to confirm him rather in an obſtinate Refuſal of them; it is evident, that it is a *Miſtake* to allow theſe *Foundations* the *Force* of any ſuch *perfect Right* which might be aſſerted by *Violence* and *Arms*. For the *Reſpect* a Man pays to another upon *Compulſion* and *Command*, is no *Sign* of any *internal* Reverence he has for him, but only that he is afraid of Puniſhment. And further, ſince *external Signs* of *Honour*, unleſs they proceed from *Submiſſion* of Mind, are to be call'd *Shew* and *Mockery*, rather than *Honour*, it would be Folly to threaten Violence when they are denied; eſpecially if the Perſon from whom they are expected declares, that it is not out of Contempt that he omits to pay the *Formalities* of his Reſpect, but only becauſe he would enjoy his *Liberty*, and not be *forced* to do that which ought to be left to his own *Pleaſure* and *Courteſy*. And therefore the *Scythian* Ambaſſadors told *Alexander* the *Great*, "that they hoped it was excuſable "in them that lived in Deſerts, not to know who "he was, and whence he came." And *Arioviſtus*, in *Cæſar*'s *Commentaries*, tells *Cæſar*, "That "if he had been to deſire any Thing for himſelf, "he would have attended him in Perſon; and that "he could not but expect that *Cæſar* ſhould ſhew "him the ſame Reſpect [b]." From all which it ſeems to be evident, that though it be agreeable to natural Reaſon, that *Honours* ſhould be paid to Perſons of *ſuperior Excellencies*; or further, that though it might be alſo allow'd, that it is no leſs a Command of the *Law of Nature* to *honour Perſons*

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[a] *Silius Italicus*, lib. 1. ver. 149,

——— *Et metui demens credebat honorem.*

——— And vainly thought it Honour to be fear'd.

[b] And therefore *Lucan*, l. 5. ver. 385, 386. calls it,

——— *Voces, per quas jam tempore tanto*
Mentimur dominis. ———

The Words with which we have long Time abus'd.
Our Princes. ———

Vid. *Plutarch.* de adulator. & amici diſcrimine. Peſcennius Niger *in* Spartianus, c. 11. *when one was preparing to addreſs him with a Penegyrick upon his being made Emperor, ſtopp'd him by ſaying.* That he ought to write an Oration in Praiſe of *Marius*, or *Hannibal*, or any one of the famous antient Generals, and recommend their brave Actions to the Imitation of the preſent Age. For to commend Perſons that are living, *added he*, is only to deride and expoſe them, and eſpecially *Emperors*, ſince 'tis evident, what you may hope, or what fear from them, ſince they have the Power of the Laws, can do as they pleaſe, and take away your Lives, or ſend you into Baniſhment.

[c] *Salluſtius* Philoſoph. de diis & mundo, c. 3.

[d] Pindar *ſays very well*, Olymp. Od. 1. ἔςι δ' ἀνδρὶ φάμεν ἐοικὸς ἀμφὶ δαιμόνιον καλά. Men ought to ſpeak with Reverenee of the Gods. *Iſocrates* in laudat. *Buſirid.* p. 395. *calls thoſe Fables Blaſphemies*, by which (*ſaith he*) they boldly fix ſuch Things upon the Gods, as no body would dare ſpeak of his Enemy. For they do not only charge them with Thefts, Adulteries, and Slavery to Men; but accuſe them further, of devouring their Children, depriving Fathers of their Genitals, Copulation with Mothers, and a thouſand other wicked Actions. The Authors of which Stories were not indeed puniſhed as they deſerv'd, but yet neither did they altogether eſcape; for ſome of them were Strolers, Vagabonds, and Beggars; others were ſtricken Blind; and others were driven out of their own Country, and forced to make War continually upon their Relations and Friends; and *Orpheus* the chief Inventor of theſe Fables, was torn to Pieces. *Seneca* de brevitat. Vitæ. c. 16. To make the Gods Authors of Vice, what is it but to encourage and inflame our own Luſts, and to bring the Example of the Deities for our Liberty and Excuſe? *Fulgentius* Mytholog, l. 1. p. 55, *&c.* If the Gods were guilty of Theft, Juſtice would have nothing to do with Criminals or Crimes, ſince they would be countenanc'd by Heaven.

[e] *Pind.* Olymp. Od. 4. towards the End.

And Youth ſometimes with hoary Hairs
Before the Noon of Life is crown'd.

[f] *Sophocl. Ajax. Flagell.* p. 69. Ed. *H. Steph.*

The ſtrongeſt have not ſtill the beſt Succeſs,
But Prudence never is unfortunate.

[g] *Plato.* Ep. X.

[h] *Cic.* Ep. ad Fam. l. 3. Epiſt. 13.

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[a] *Euripid.* Phœniſſ. ver. 445. & Electra. ver. 37, 38.

☞ Λαμπροὶ εἰς γένος, χρημάτων δὲ πένητες. Noble in Birth, but miſerably Poor.

[b] *Cæſ.* de B.G. l. 1. c. 34. *And* Vologeſes, *King of the* Parthians, *anſwer'd* Nero, *when he ſent for him almoſt in the ſame Manner.* It is eaſier for you to paſs ſo great a Sea, than me; when you are in *Aſia*, we ſhall eaſily agree when to meet. *Xiphilinus* Epit. *Dionis.*

Mr. BARB. *NOTES on* § XIV.

[1] I have borrowed *Charron*'s own Words, *Treatiſe of Wiſdom*, Book I. Chap. V. Sect. 9. Numb. 5. from whence 'tis viſible that our Author has taken the Thought: But *Charron* himſelf has done nothing, as 'tis uſually his way, but abridged this fine Paſſage, from *Montaigne*. "'Tis ſtrange, that nothing except ourſelves, is valued or eſteem'd but for its own innate Qualities. We praiſe a Horſe for his "being ſtrong and well manag'd, and not for his Furniture: A *Greyhound* for his Swiftneſs, not for his Collar; a *Hawk* for his Wings, "not for his Teſſels and Bells. Why then do we not, in the ſame Manner, eſteem a Man for what is his own? He has indeed a numerous Retinue, a fine Palace, a great Reputation, and a plentiful Eſtate; but all this is about him, not in him. You do not buy a "Pig in a Poke: If you buy a Horſe, you take off the Saddle, and view him naked and uncovered; or, if he is cover'd, as they formerly ſerved Horſes that were ſhewn to Princes to buy, 'tis only upon the Parts which are leaſt neceſſary, that you may not amuſe your "ſelf, with the Smoothneſs of his Coat, or the Largeneſs of his Crupper; but have Time enough to obſerve chiefly his Legs, his Eyes, "and Feet, which are the moſt uſeful Member. (See *Horace*, Lib. 1. *Satyr* ii. *ver.* 86. & *ſeq.*) Why then in your Eſteem of a Man, "do you value him covered and wrapped up as he is? He ſhews us no Parts, but what are by no Means his own; and conceals from us, "thoſe by which only we can truly form a Judgment of his Merit. 'Tis the value of the Sword, not the Scabbard, that you ſeek after: "And perhaps you will not give a Farthing for it, if you ſee it unſheath'd. You muſt judge a Man by himſelf, and not by his Dreſs. "And as one of the Antients ſays, very pleaſantly, (*Seneca Epiſt.* lxxvi. p. 221. *Ed. Gronovii,*) Do you know why you take him to be a "tall Man? You reckon the Height of his Shoes: But the Baſis does not belong to the Statue: Meaſure him without his Stilts. Let "him lay aſide his Riches and Honours, and ſhew himſelf in his Shirt. Is his Body ſound, vigorous, and fit to diſcharge its Functions? "What Soul has he? Is it noble, large, and happily furniſhed with all the Endowments belonging to it? Is it rich in Accompliſhments of "its own, or another's? Does there only want an Opportunity to ſhew, whether it can bravely ſtand the Sight of a drawn Sword; whether it cares not which way Life iſſues out, through the Mouth, or the Breaſt; whether it is ſedate, quiet, and contented? 'Tis this "that muſt ſhew, and by this you muſt judge of the vaſt Difference between us. Eſſays 5. Book 1. Chap. xlii. towards the Beginning. "*Juvenal* has admirably well expreſs'd this Paſſage, which is quoted by *Montaigne*, and applied to the Nobility; in the following Lines.

Dic mihi, Teucrorum proles, Animalia Muta
Quis generoſa putet, niſi fortia? *nempe volucrem*
Sic laudamus equum, facili cui plurima palma
Fervet, & exultat rauco victoria circo.
Nobilis hic, quocunque venit de gramine, cujus
Clara fuga ante alios, & primus in æquore pulvis.
Sed venale pecus Corithæ, poſteritas &
Hirpini, ſi rara jugo victoria ſedit:
Nil tibi majorum reſpectus, gratia nulla
Umbrarum, dominos pretiis mutare jubentur
Exiguis, tritoque trahunt epirhedia collo,
Segnipedes, dignique molam verſare nepotes.
Ergo ut miremur te, non tua, primum aliquid da,
Quod poſſim titulis incidere, præter honores,
Quos illis damus & dedimus, quibus omnia debes.

Great Son of *Troy*, who ever prais'd a Beaſt
For being of a Race above the Reſt?
But rather meant his Courage, and his Force.
To give an Inſtance —— we commend a Horſe
(Without regard of Paſture, or of Breed)
For his undaunted Mettle and his Speed;
Who wins moſt Plate with greateſt Eaſe, and firſt
Prints with his Hoofs his Conqueſt on the Duſt.
But if fleet *Dragon*'s Progeny at laſt
Proves jaded, and in frequent Matches caſt,
No Favour for the Stallion we retain
And no Reſpect for the degenerate Strain;
The worthleſs Brute is from *New-Market* brought
And at an under Rate in *Smithfield* bought,
To turn a Mill, or drag a loaded Life
Beneath two Panniers, and a Baker's Wife.
That we may therefore you, not yours admire,
Firſt, Sir, ſome Honour of your own acquire;
Add to that Stock which juſtly we beſtow
On thoſe *bleſt Shades*, to whom you all Things owe.

Mr. *Stepney.*

Horace, to ſhew the Folly of thoſe who only value and eſteem Men for external Things, appeals to the Judgment of Children at Play; in whom Nature is not corrupted, by Example and Cuſtom.

Si quadringentis ſex ſeptem millia deſunt,
Eſt animus tibi, ſunt mores & lingua, fideſque;
Plebs eris. At pueri ludentes, Rex eris, aiunt
Si rectè facies

Horace Epiſt. Lib. 1. Ep. 1. ver. 57, *&c.*

If you have not ten thouſand Pounds in ſtore,
But want a thouſand, or a little more,
Though you have Virtue, Conſtancy, and Skill,
In Arts, thou ſhalt be thought a *Common* ſtill.
And yet our Boys another Tale will tell
And ſay, you ſhall be King, if you do well.

Mr. *Creech*.

ſons of *Worth*, yet ſtill that this *Duty* muſt be one of *thoſe*, which a Man hath no *Right* to demand from others, but which muſt be left entirely to their *good Nature* and *Civility*. But when a Man pretends *Right* to demand *Honour*, or any *Sign* of it from another, 'tis neceſſary he ſhould either have *Power* and *Authority* over him, or produce ſome *Compact* for his *Right*, or prove it by ſome *Law* made or approved by their *common Lord* and *Maſter*. *Mandeſlo* in his *Travels* [a] relates, that in a *Treaty of Peace*, after a long War between the *Portugueſe* and the King of *Cochin*, it was a long Time before the Diſputes on each Side could be brought to a Concluſion, becauſe the *Indian Nobles* inſiſted, that the *Portugueſe* ſhould give them the Way, as the *common People* of their own Country were obliged to do. But that the *Portugueſe* refuſing ſuch diſhonourable Terms, it was agreed at length, that the Debate ſhould be decided by *ſingle Combat*, in which the Victory happening to the *Portugueſe*, the *Indian Nobility* were obliged to give the Way to the *Portugueſe*, and to ſtand ſtill till they were paſſed by.

XV. But, however, between *private Men*, certainly the nobleſt Conteſt [1] for *Honour* and *Eminence* would be, to diſpute who ſhould expreſs the greateſt Readineſs to pay *Honour* to others, or moſt Modeſty in declining it themſelves. And it is ridiculous enough for Men to grow warm and angry in a Contention about outward *Honour*; eſpecially when there is little or no Profit or Advantage to be made by it, and when it may end perhaps like the *Diſpute* mention'd in the *Epigram* [b], *Who only ſhall go through the Dirt firſt*. It was a good Determination enough which a certain Prince made, when two of the meaneſt of his Servants had quarrell'd which ſhould take place at Church, that the greateſt Fool ſhould ſit firſt. For as to what *Quintilian* ſays, that a *poor Man's Honour is his beſt Eſtate* [c], it muſt be underſtood only of *ſimple Eſteem*. But between *Princes* and *Nations*, the Diſputes about *Eminence* of *Worth* and *Dignity*, and the *Precedence* which depends upon it, have generally, and in all Ages, been managed with greater Shew of Reaſon, and ſtronger Pretences. The Argument uſually urged in *theſe* Controverſies will perhaps deſerve cloſer Conſideration. Thus much therefore is beyond Diſpute, that where a *Prince* depends upon *Another* of *ſuperior Power*, the greater is the moſt *honourable*, and has a *perfect Right* to *Precedence*; tho' perhaps the ſame *Title* may be common to both of them. Thus there are Inſtances of greater *Kings* that have others call'd *Kings* under them, though in reality they are no more than *Magiſtrates* and *Governors* of *Provinces*. Some Princes do *Homage* to others for their *Kingdoms*, as *feudal*; and there are others that hold theirs by other *Titles*. So in *Tacitus*'s Life of *Agricola*, 'tis ſaid to be *an old received Art of* Rome, *to make and maintain Kings to be their Inſtruments of Slavery*. And thus *Adherbal*, in *Saluſt*, ſays, that when his Father *Micipſa* died, he commanded him to think nothing in the *Kingdom* of *Numidia* his own, but the *Adminiſtration* of it, and that the *Right* of it belong'd to the *Roman* Senate [d]. And ſo alſo a *Prince*, that has made an *unequal League* with another, doth by that very *Act* acknowledge a *Superiority* of *Worth* and *Dignity* in the *other*; ſince he obliges himſelf to pay more Reſpect than will be given. And it is, I think, alſo further clear, that where a *Prince* hath obtain'd againſt another a *Right* of *Superiority of Dignity* or *Precedence*, either for his own *Perſon*, or as *Head* of ſuch a *State* or *Commonwealth*, whether by *Compact* or *Cuſtom*, and ſuch a Sort of *Sufferance*, as no other probable Account can be given of, than that he was allowed to be the *greater Prince*; *that Right* may be inſiſted on and maintained, as long as that *Prince* lives, who is, as it were, the *Character* or *Mark* of the *Dignity*, and under whom *that Right* was at firſt obtain'd [e].

XVI. But where no ſuch *Right* has been already fix'd, there Variety of Arguments are uſed to prove *Superiority* of *Eminence* and *Dignity*. The *Antiquity* of *Kingdoms*, *Families*, and *Governments*, the *Extent*, *Riches*, and *Power* of *Dominions*, the *Quality* of that *Power* which the *Prince* holds over his *Subjects*, and the *Magnificence* of his *Title*, are the common and general *Topicks*. That *Antiquity* adds a Sort of *Reverence* and *Veneration* to *States* and *Families*, is an Opinion commonly receiv'd. And they that endeavour to ſupport themſelves upon the Strength of it, uſually urge, they enjoy'd their *Dignity* in full Luſtre long ago, when other *Kingdoms* were ſubject to the baſeſt *Slavery*; or, it may be, when the *Family* which now wears the *Crown*, and triumphs ſo inſolently in its new *Honour*, lay undiſtinguiſh'd among the common Herd of the People; that 'tis unpardonable Arrogance to diſpute *Precedence* with *Princes*, whoſe Predeceſſors might, if they had pleaſed, have made the *Anceſtors* of others their *Slaves*; that it is a ſort of a natural and univerſal *Law*, that *Things* of *later*, ſhould be *inferior* to *Things* of *ealier* Original. And from hence they uſually paſs to a pompous Repreſentation of the ſeveral great Actions in *War* and *Peace*, which have been atchiev'd in that *Kingdom* by the *Princes* of the *Blood Royal*: Few of which Sort thoſe *upſtart Nations* and *Families*

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[a] *Mandeſlo* Itin. Part. 2.

[b] *Mart.* Ep. 10. ver. 8. *Per medium pugnas & prior ire lutum*, Senec. *de Ira. l.* 3. *c.* 37. Becauſe you were placed in a little leſs honourable Seat, you preſently break into a Paſſion, and are angry with the Maſter of the Feaſt, him that invited you, and him that was put above you: How ridiculous is it? What Difference is there, what Part of the Table you ſit at? Can a Seat make a Man more or leſs Honourable?

[c] Declam. 252.

[d] *Salluſt.* Jugurth. Bello.

[e] Vid. *Jac. Godofred.* de Præcedentia, par. 1. c. 1. Add the Diſpute between the *French* and *Spaniſh* Ambaſſadors in *Andr. Maurocenus* Hiſt. *Venet.* l. 8. p. 301, &c. & *Memoirs touchant les Ambaſſadeurs.* By Mr. *Wicquefort.*

Mr. Barb. *NOTES on* §. xv.

[1] In which, however, we ought not to go too far. 'I love, ſays *Montaigne*, to obſerve the Rules of Civility; but not ſo ſervilely, " as to make my Life uneaſy by them. There are ſome tireſome Formalities in them, which provided we omit through Diſcretion, and " not want of Judgment, we are not the leſs Genteel. I have often known Men uncivil by too much Civility, and troubleſome by too " much Kindneſs. This induſtrious and genteel Way of puſhing one's ſelf forward in the World, is in ſhort, a very uſeful Science. It is, as " it were, the Beauty and Grace which makes us acceptable upon our firſt Admittance into Society and Converſation; and by Conſe- " quence, opens us a Door of Inſtruction, by the Example of others, and gives us an Opportunity of producing our own, if there is any " Thing that is inſtructive and communicable." *Montaigne*'s Eſſays, Book I. Chap. 13.

milies can preſume to challenge. Moreover, *Power* adds *Terror* to *Reverence*, and makes it not only Impudence [1], but Raſhneſs and Folly, to contend for *Honour* with thoſe, in whoſe Power it is to do us Good or Harm, as they pleaſe. And without diſpute, 'tis a certain Way to demand and to obtain *Honour*, to tell the World with Sword in Hand, that *if they will not, THAT ſhall give it*. Further, 'tis look'd upon to be an higher *Degree* of *Eminence* to be *free* from all other Reſtraints of *Subjection*, but thoſe which are due to GOD, the *ſupreme Governor* of the World, than to be confin'd by *human Laws*, and to live under *Ties* of *Compact*. And laſtly, ſince the *Title* is commonly uſed to expreſs the *Thing*, the *Magnificence* and *Greatneſs* of it; *that* may be ſuppoſed alſo to imply an Argument againſt *Inferiority* of *Dignity* [a].

XVII. Theſe with Arguments of a like Nature may pehaps be ſpeciouſly urged; but after all, it muſt be confeſs'd, they can produce no more than an *imperfect Right*, unleſs confirm'd by *Compact expreſs* or *tacit*, according to receiv'd Cuſtom. And it will be no Difficulty to deſtroy the Force of theſe and all ſuch Arguments, by anſwering, that *Antiquity* alone can have no *real Honour* in it, ſince it only implies *Tract* of *Continuance*, which may be urged for the moſt *inconſiderable* Things as well as the moſt *valuable*; that all *Kingdoms* are by their own Nature *free* and *independent*; and that it is not material to enquire how long they have been ſo; that it may indeed be allow'd, that when a *Kingdom* hath *long* continued in a flouriſhing Condition, the Strength of its *Conſtitution* and the *Wiſdom* of its *Government* ought not to be queſtion'd; and that it need not be denied, that the *Favour* of *Heaven*, and the *Bravery* of *Subjects*, was ſufficient to defend them againſt foreign Arms. But then, that *Commonwealths* of *later* Growth may poſſibly be *ſettled* as *wiſely*, and *govern'd* as *happily*, as thoſe that have ſtood much longer, nay, perhaps be eſtabliſh'd with greater Wiſdom, and enjoy greater Happineſs, ſince the wiſe and good *Inſtitutions* of *antient States* and *Commonwealths* generally coſt them *dear*, and they of later Date have the Advantage of ſeeing and uſing what others diſcover'd before them; that the Favours of *Heaven* are not in human *Diſpoſal*, or certain to be long *enjoy'd*; but yet that it is not impoſſible to provide ſo far, that the *State* may not fall to ruin of it ſelf, for want of *good* and *wholeſome Laws*. In fine, that all Things ought to be valued according to their *preſent State*; what is paſs'd we have no more to do with, and what is to come doth not yet concern us. That *diſtinct States* and *Commonwealths* never unite into *Syſtems*, or form *General Aſſemblies*, where it may be neceſſary to oblige them of lateſt ſtanding to be content to be placed loweſt. All are allowed to enjoy diſtinctly their ſeparate Freedom. That the *Government* of any *State* ſhould continue in one particular *Family* for a long Courſe of Time, may be allow'd to be ſometimes an Argument, that the *Poſterity* ſucceeded and imitated the Virtues of their *Anceſtors*; but it muſt alſo be allow'd, that great Wealth and Riches only are ſufficient Guards, and not eaſily to be over-power'd. Much alſo in the long Poſſeſſion of a *Throne* muſt be aſcribed to the Diſpoſition and Temper of the *People*, averſe to *Change*; and much in the *Succeſſion* of *good* Princes to the Bleſſing of Heaven alone. But ſtill *Princes* and *States* of larger *Origin*, ambitious to be thought *great*, may eaſily anſwer, that they cannot look upon any Thing as their own, which was not got by their own Induſtry or Power [2]; that it is a very eaſy Thing to take Poſſeſſion of large Eſtates or Dominions, purchas'd by the Succeſs of Anceſtors; but to raiſe a great Fortune, or an Empire, requires Bravery and Virtue; that *others* owe their *Greatneſs* to the Chance of being well born, *they* to their own *Worth* and *Excellencies*; that others can produce nothing for themſelves, but old forgotten *Monuments* of their *Fathers* great *Actions*; theirs is no *borrow'd* Luſtre, but the *freſh* Acquiſitions of their own Virtue and Valour. Laſtly, that no Degree of *Honour* is beyond that of being a *ſovereign Prince*, and that this ſets the lateſt Families upon the Level with thoſe of the moſt antient Date [b].

XVIII. As for *Power* indeed, that may often force the Weaker to pay the *Signs* of *Honour* to the Greater, becauſe it is Madneſs not to yield to them that have Power to do us harm, when they pleaſe. As *Favorinus* in *Spartianus* [c] pleaſantly told his Friends (who were angry with him for giving up a *Word* to the Emperor *Hadrian*, that was uſed in *good Authors) certainly he ought to be allow'd more learned than every Man, that has thirty Legions at his Command* [d]: But if a *Prince* hath Strength enough to defend his own Dominions, he cannot be obliged to yield *Precedence* to any others, however ſuperior in Riches; ſince he has no Reaſon to be afraid of them, or to ask Relief or Protection from them. For where *Liberty* is equal, a Diſproportion in Wealth can make

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[a] Vid. *Andr. Maurocen*. Hiſt. *Venet*. l. 12. p. 484. *Where he talks of the Emulation that happened between the* Princes *of* Italy *upon* Pius Quintus's *preſenting* Coſmus *with the Title of* Great Duke of Tuſcany. Vid. *Paul*. Hiſt. Concil. *Trident*. l. 5. p. 402.

[b] Ovid. *De Faſt*. L. 5. ver. 26.

Quoque die partu eſt edita, magna fuit.

The Day that gave her Birth firſt made her Great.

And to this we may apply that of *Arnobius*, l. 2. Is this a new Thing which we are engaged in? In Time it will be old. Is that old in which you are concern'd? In the Times when it firſt began, that alſo was new.

[c] Hadrianus *in* Spartian. *c*. 15.

[d] *Juvenal*. Sat. 5. ver. 130, 131.

——— *Plurima ſunt, quæ*
Non audent homines pertuſâ dicere lænâ.

——— No Freedom will from him be born,
Whoſe Cloaths are thread-bare, and whoſe Cloaks are torn.
Mr. *Bowles*.

Mr. BARB. *NOTES on* § XVI, XVII.

[1] The greateſt Part of this Chapter is Word for Word, taken out of our Author's Diſſertation *de Exiſtimatione*, which is amongſt his Academical Diſſertations.

[2] *Nam genus, & proavos, & quæ non fecimus ipſi,*
Vix ea noſtra voco ——— Ovid. Metam. *L*. 13. *ver*. 140, 141.

make no Difference. And therefore, if one *Prince*'s *Territories* be ſix hundred Miles in Extent, and another's but one hundred, yet the Difference in the Kingdoms makes none between the *Sovereigns* ; for their *Power* is of the ſame Nature in the greater and in the leſs ; and the *one* may anſwer the Ends of *Government* as well as the *other*. Not to ſay further, that *Power* alone, as it implies Ability to do Harm, doth not include any *Excellence* in it, which is naturally proper to command *ſincere Reſpect* : For all *Reſpect* hath a Mixture of *Love* in it, but *Power* to do Harm can certainly produce nothing but *Hatred*[a].

XIX. Further, *abſolute unlimited Power* may perhaps force from *Subjects greater* Degrees of *Reſpect*, not without a Mixture of *Fear* : But with ſovereign *Princes* it can have no ſuch Effect, ſince they muſt look upon another *Prince*'s *abſolute Power*, as it relates to them, to be no more than *Liberty of Nature*, which in itſelf gives no Man *Pre-eminence* to another, not ſubject to him. And ſince every *Prince* is to be valued, not by his own *Rights* only, but by the State and Condition alſo of the *Commonwealth* he governs ; it will not be difficult to imagine that a *limited Monarch* may from *that* enjoy Advantages, which will make him *greater* and more *conſiderable*, than a *Prince* entirely *abſolute*. Laſtly, *Titles* and Words of all Sorts, take their *Value* as *Money* doth, from *Uſe*[1]. And ſince the higheſt *Dignity* of *Princes* is the *ſovereign Power*, it is ſufficient if that be expreſs'd in its *natural ſimple* Senſe, or according to *common Uſe*. For the *Pomp*, or *Modeſty* of *Words* neither can add to, nor leſſen the *Thing*[b]. So the *Turkiſh Monarch* is uſually called *Emperor*, the *Perſian* no more than *King* ; yet this Diſtinction in itſelf gives no *Preference* one to the other. For an affected Multiplicity of *Titles* added to the proper *Style*, ſeems to have a Sort of *Barbariſm* in it ; and may perhaps ſtrike ſome Awe upon inferior and ignorant Subjects, but can make no Impreſſion upon foreign States and Princes. For how was the *Roman Emperor*, for Example, concern'd, whether *Sapores* King of *Perſia* call'd himſelf *Brother of the Sun and Moon*, as *Ammian Marcellinus* relates, or of *Saturn* and *Venus*[c].

XX. From all which it is ſufficiently clear, that there is no *perfect Obligation*, which preſuppoſes proper *Right* in another, by which a *Prince* really poſſeſſed of *ſovereign Power* is bound to yield *Precedence* to any other *King* or *Prince* as more *honourable*, however *Superior* in the *Particulars* before mention'd ; neither is one *free State* or *Commonwealth* obliged to yield more, though perhaps another is more antient, or more powerful. Nor indeed is a *State* govern'd by the *Populace*, inferior in Dignity to a *State* govern'd by a Prince, though in a *Democracy* there is no *particular* Perſon to be compar'd with a *King*. And hence an *Ambaſſador* from a *free Commonwealth* is not neceſſarily obliged to give *Precedence* to an *Ambaſſador* from a *crown'd Head*. But becauſe *vicarious* and *deriv'd Honour* cannot be ſuppoſed to appear with the ſame Advantage as *original* ; and a *Miniſter* cannot be inveſted with the ſame *Dignity* as a *Prince* ; and ſince *free Commonwealths* can never meet in the ſame Place with *ſovereign Princes*, but by their *Ambaſſadors* and *Deputies* ; 'tis evident, that the *Ambaſſadors* of *free States* ought to yield *Precedence* to all *crown'd Heads*, and *ſovereign Princes*.

XXI. And this *Equality* between the Power inveſted with *ſovereign Power* need not be any Objection againſt *Interviews*, or *Conferences*, to be made either in their own *Perſons*, or by their *Miniſters*, or againſt their *uniting* into an *eſtabliſh'd Council*. For if a *Prince* make a Viſit to another in a *foreign Country*, the *Laws of Civility* give the *Stranger* the *Precedence*, except he comes in the Quality of a *temporary* Subject. For though every *Prince* be *ſupreme* in his own *Dominions*, yet *Princes* in the ſame Manner as *Ambaſſadors*, by a ſort of *Fiction*, ſeem ſtill to continue as Perſons *free*, and within any *Prince*'s *Territories*, to whom and by whoſe Conſent they make a Viſit, without laying aſide or diſguiſing their *Quality*. For 'tis certainly unadviſable and dangerous, for a *Prince* to venture *incognito* into a *foreign Country*, without having firſt procured *Leave*. 'Tis certain *Gramondus*[d] confidently pronounces, that *it is no Violation of any publick Law, to ſeize and detain diſguiſed Princes.* But I confeſs I do not ſee for what Reaſon ; unleſs it be, that to come in *Diſguiſe*, without giving Notice, may ſeem to imply ſome *Suſpicions* of, and *Diſreſpect* to the *Prince* of the *Country*. If *two* or *more* Princes are to meet in a *third* Place, it would not be difficult to diſpoſe Things ſo, that no *Preference* be given to either of them. For the *Rooms* they are to meet in, might be ſo contriv'd, as to leave it abſolutely uncertain, which is the *firſt* and moſt *honourable* Place in it. And upon this View, *round Tables* have been ſometimes uſed upon ſuch Occaſions[e]. *The* Princes may alſo declare before-hand, that the *Congreſs* ſhall be made without regard to *Precedence*, and that they intend to ſit *promiſcuouſly*, or as they pleaſe, or happen to place themſelves. So *Philoſtratus* relates of the *Brachmans* of *India*[f], that they appointed no particular Place for their *Prince* (as the *Greeks* and *Romans* would think it neceſſary to do) but every one ſits where he pleaſes.

But

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[a] Add. *Jacob. Godofred.* d. tit. de præcedent. part 1. c. 3.

[b] Add. *Geor. Bates* Elench. motuum nuperorum in Anglia, part 2. p. m. 246, *&c.* & Author. *Cardinaliſmi*, part 1. l. 3. p. m. 375.

[c] *Ammian Marcellin.* l. 17. c. 5. Add. *Ibid.* l. 23. c. 6.

[d] Hiſt. *Gall.* l. 13.

[e] Auſonius *in ludo ſeptem Sapientum*. ver. 78, 79, 80.

Recte olim ineptum Delphicus luſit Deus,
Quærentem, quiſnam primus Sapientum foret:
Ut in orbe tereti nomina eorum inſcriberet,
Ne primus eſſet, ne velimus quiſpiam.

One to *Apollo* once this Queſtion brought,
Which he the firſt of all the Sages thought?
Write in a Ring their Names, the God reply'd,
And equal Dignity to each divide.

[f] De Vita *Apollon. Thyan.* L. 3. c. 8. p. 134. *C. D. Lucian.* Epiſt. Sat. ad divit. p. 628. 'Tis eaſieſt and moſt agreeable in Entertainments, that all ſhould be equal. Add. *Athenæus Dipnoſoph.* l. 1. c. 4.

Mr. Barb. NOTE on §. xix.

[1] See *Grot.* B. 1. c. 3. §. 10. *And* Algernoon Sidney's *Diſcourſe upon Government*, Chap. iii. Sect. 32.

But this will ſtill be much eaſier to be done, if *Princes* will pleaſe to meet *incognito*, and without their uſual Pomp and Retinue. Nor could they by any other Method more fully declare, that they would not raiſe Difficulties or Diſputes about the *Points* of *Dignity*. Or if this *Method* be not thought the beſt, it may be determin'd by *Lot*; and that two Ways, either with *Condition* that every *Prince* ſhall for the future remain contented with what *Place Chance* determines for him; or elſe that every *Prince*, in *Turn*, ſhall ſucceed in a certain Order ſettled by *Lot*. But Diſputes may be much more eaſily ended, if the *Congreſs* be form'd only by *Ambaſſadors*; eſpecially ſince there is one Way more of preventing Difficulties among *them*, *namely*, if the ſeveral *Princes* their *Maſters* ſend them with *Characters* of different *Value*. For ſince different *Degrees* of *Dignity* ariſe purely by *arbitrary* Impoſition, they may eaſily be *varied* ſeveral Ways [a]. But here it is to be obſerv'd, that the *Value* of ſuch *Characters* muſt be determined by the *common Conſent* of *Sovereign Princes* [b]. For if one *ſingle Prince* ſhould, by his own *Authority* alone, create a *New Character*, to beſtow upon his *Miniſters*, whenever the *Ambaſſador* makes his Demand for any ſuch particular *Honour* from others, they may juſtly except againſt his *Maſter's* Power to *oblige* them to pay it. But after all, it muſt be confeſs'd, that ſuch an Evenneſs of Temper as *Ageſilaus* expreſs'd, when he was placed in an *obſcure Place* in the *Theatre*, is often much the happieſt, in preventing Diſputes: For as he ſaid, *It ſhould not be thought that the Place adds Honour to the Man, but the Man to the Place* [c]. It was a good Method which *Abbas*, *King* of *Perſia*, took to prevent Differences at a *publick Entertainment*; them that were inclin'd to the *Perſian Perſuaſion* he placed on his right Hand; thoſe of the *Turkiſh* he ſeated on his left, becauſe the *Perſians* thought the right Hand the moſt *honourable*, and the *Turks* the left [d]. And it was an artful *Stratagem* enough, which *Alphonſus* XI. uſed to ſilence an old Diſpute for *Precedence* between the *two Towns* of *Burgos* and *Toledo*; when he came to aſk their Opinions in *Council*, before any mention of their *Diſpute* began, They of *Toledo*, I know, *ſaith he*, are ready to comply with my Commands; let them of *Burgos* ſpeak: Which immediately ſilenc'd both; both equally thinking themſelves preferred to each other; thoſe of *Toledo*, becauſe the *King* ſpoke in their Name firſt; and they of *Burgos*, becauſe they were commanded to ſpeak for themſelves firſt [e].

XXII. But if a laſting *Society* is to be erected between a Number of *Equals*; and every particular *Member* be deſirous that the *Equality* ſhould continue, but unwilling to admit the Determination of the *Lot*, or that a conſtant *Succeſſion* in *Turn* ſhould preſcribe their *Places*; there is another *Method* leſt reſembling the Chance of *Lots*, and which can be no way prejudicial to the *Dignity* of any Member; and that is, that every Member ſhould take *Place* in the *common Aſſembly*, in the ſame Courſe and *Order* in which he was *admitted* into it. And this Method is to be particularly obſerv'd with regard to all Members that are admitted into the *Society*, after it is eſtabliſh'd. For they that at firſt conſtitute the *Society*, had better perhaps take *Place* by *Lot*, or by common Conſent and *Agreement*. And becauſe it is generally receiv'd in *Colleges*, and other *Societies*, that every Member is to be *placed* according to the *Order* of *Admiſſion*, *Grotius* gives it for an *univerſal Rule*, *that the natural Order between Fellows of ſuch Societies is to be placed according as they were received into them* [f]. But it muſt be obſerv'd, that in ſuch *Societies Priority* or *Poſteriority* of *Place*, doth not in the leaſt imply *greater* or *leſs* Degrees of *Dignity*, but is only the *Order* of *Equals* in *Honour*. And therefore there is no Difference between the *firſt* and *laſt* in *that Reſpect*. For it is a different Caſe, when the *Preference* is given for *ſuperior Eminence* of *Worth* in the Perſon *preferr'd*; as *Auſonius* tells the *Emperor Gratian*, "'Tis no *Diſhonour* to be *ſecond*, but of two *honourable* Perſons he that hath the *Precedence* is the moſt *honourable* [g]". But it is alſo obſerved by *Grotius*, in the *Place* before mention'd, that in *Aſſemblies* of *Chriſtian Kings* and *People*, met to repreſent the *Body* of the *univerſal Church*, is was the Cuſtom, that they that embrac'd *Chriſtianity* ſhould in all *religious Aſſemblies* have the *Precedence* to others. And upon this Bottom, ſome have taken the Liberty to challenge *Precedence*, and claim the *Superiority* of *Dignity* as their *Right*, in all other *Aſſemblies* of what Nature ſoever. But whatever good Reaſons there might be to introduce Obſervations of ſuch an *Order* in thoſe ſacred Conventions; yet that the ſame ſhould be obſerv'd in all other *Aſſemblies*, and that the *Antiquity* of the *Chriſtian Profeſſion* alone ſhould produce ſuch *Pre-eminence* of *Dignity*, is what I can ſee no Reaſon for; eſpecially ſince it is one of the Commands of the *Religion*, *In Honour to prefer one another* [h]. Beſides, in *Councils* the *Clergy* generally were the Parties *principally* concern'd; the *Lay Perſons* appear'd only as *Aſſiſtants* [1], and were

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[a] See *Mr.* Wicquefort, *des Memoirs touchant les Ambaſſadors. Add.* Jac. Godofred. *de præcedentia*, part 3. *P. Paul.* Hiſt. Con, *Trid.* The Diſpute between the *French* and *Spaniſh* Ambaſſadors at *Trent* and *Rome* about Precedence, l. 8.

[b] See *Mr.* Wicquefort's *Mem. touchant les Ambaſ.*

[c] *Plut. Apoph. Lacon. p.* 208. *D. Damonides* in a like Caſe ſaid, 'Tis very well you have found out a Way to make even this Place honourable. *Ibid. Apoph. Add. Plut. Sympoſiac. l.* 1. c. 2, 3.

[d] Pet. de Valle, *Itin. part* 2. *Ep.* 5.

[e] Hieron. Oſorius *de Rebus geſtis Eman. l.* 1. *Add.* Gramond. *Hiſt. Gall. l.* 3. *init.*

[f] Grot. *l.* 2. *c.* 5. §. 21. *Add.* Bœcler. *in locum, add. L.* 50. *t.* 3. *l.* 1. *D. de Albo ſcribendo. L.* 12. *t.* 3. *l.* 1. *C. de Conſul*, &c. *tit.* 44. *d. l. C. de* Tiron. *l.* 3. *C. t.* 5. *d. l. de Præpoſ. ſacri Cubiculi. l.* 1. *C. t.* 4. *d. l. de Præf. Prætor. l.* 2. *C. L.* 10. *t.* 5. 2. *l.* 10. *de Profeſſ.* Jac. Godofred. *part.* 2. *c.* 3. §. 17, 18. *de præcedentia.*

[g] *Auſon.* Panegyr. ad *Grot.* c. 24. *in fin.*

[h] *Rom.* xii. 10. *Phil.* ii. 3.

Mr. BARB. *NOTES on* §. XXII.

[1] "So that, ſays our Author, in his Diſſertation (*de Exiſtimatione*, §. 27.) Kings and Princes were only looked upon in Councils, as "it were Subjects of Eccleſiaſticks——'Tis perhaps through the Remains of this pernicious Cuſtom, that in certain Places the *Clergy*, in "their publick Prayers for the whole State of Mankind, never fail to mention themſelves firſt; and in ſpeaking of the three Eſtates, or "Orders of the Kingdom, always name the *Clergy* firſt, then the *Nobility*, and laſtly, the *Commonalty*. However Perſons of good "Senſe do not think it very decent nor reaſonable, that a Miniſter, for Example, in the Prayers he makes on *New-Years-Day*, does not pray "to God for the Proſperity of the Prince, till after he hath wiſhed a thouſand Bleſſings to himſelf, and the reſt of his Brethren, as if the "Welfare both of the *Church* and *State*, depended more on the Felicity of the *Clergy*, than that of the *Prince*. So much the more, as this "Prince is not one of thoſe Enemies, or Perſecutors of the Church, to whom nevertheleſs the Apoſtle St. *Paul* commands us, *to render* "*honour*, as well as to others, as a ſort of *Tribute*, (*Romans* xiii. 7.) by Virtue of an indiſpenſible Obligation, but for a Foſter-Father, "and a Protector of the Church, *&c.*"

[2]

however this be, it cannot be Reaſon, that becauſe a Perſon in a *certain Aſſembly*, for a *certain Reſpect*, which hath no Influence upon his *Honour* in general, yields the *Precedence* to another; he is therefore obliged to yield it everywhere, and when there is no Regard had to thoſe *Reſpects*. And thus there are few *States* or *Commonwealths*, in which there are not particular Perſons that are *Members* of ſeveral different *Societies*, and who therefore may in *one* be obliged to give *Place* to a *certain* Perſon; when out of *that*, or in another, they are known to be his *Superiors*.

XXIII. But, however, it is evident, that there is that Force in *ſovereign Power*, which will always give the Perſon inveſted with it *abſolute Right* to the *Preference* to all Perſons ſubject to it. For without Diſpute, *Authority* is *ſuperior* to *Obedience*; and it muſt be allowed to be greater, to controul and command the Wills of others, than to ſubmit and comply one's ſelf. Nor can a Man have Power to deny *Reverence* and *Regard* to that Perſon, to whom he owes his Protection, and who has Power by Puniſhments to compel me to obey him. So that *Government* doth of it ſelf naturally introduce *Inequality* among Men. Tho' it is not unnatural to think, that beſides that *Veneration* which is due to the *Place* and *Office* of the *Sovereign*, good Subjects often ſuppoſe themſelves obliged to pay other particular *Marks of Eſteem*, to the particular Virtues and Excellencies eminent in their *Prince* [a]. But it is alſo further manifeſt, that the greater and more *abſolute* the *Prince*'s *Power* is, the greater will the *Honour* be his Subjects pay him. Nay, long Poſſeſſion of *ſovereign Power*, though in itſelf it can give him no real Strength, doth yet wonderfully raiſe the *Dignity* of the *Prince*. But notwithſtanding, *Subjects* may ſometimes excel their *Princes* in thoſe *Foundations* of *Eſteem*, which produce only an *imperfect Right*. And therefore it was a moſt extravagant Vanity in *Hadrian* the *Emperor*, to make himſelf profeſs'd *Rival* to all the *beſt Maſters* in the *Arts* they were famous for. And it was ridiculous in *Alexander* the Great, when reading that Place in *Homer*, where the *Greeks* wiſh'd the Lot might happen to *Ajax*, or *Diomedes*, or *Agamemnon*, he broke into a Paſſion and ſaid, *He would have kill'd the Perſon that ſhould have nam'd him laſt*. For it is no Diſcredit to a General, to have *Soldiers* under him of more *Proweſs* and *Bravery* than himſelf, though 'tis true, as *Domitian* ſaid, *The Honour of being a good Commander is as great as that of being a good Prince* [b]. But among *Subjects* of the *ſame Commonwealth*, it is left entirely to the *Sovereign* to preſcribe the Meaſures and Limitations of *intenſive Eſteem*; and to grant to ſome Perſons *perfect Right* of *Precedence* to others. And whatever *Station* he thinks fit to aſſign to any Man, that he may lawfully maintain againſt any of his *Fellow-Subjects*, and that he ought to be ſatisfied with [c]. For as the *old Centurion* in *Livy* ſaid [d], *Subjects ſhould think every Poſt honourable in Service*. And though perhaps ſometimes undeſerving Perſons may be preferr'd to Men of *Worth* and *Merit*, yet if a Man ſhould upon that Account be uneaſy and diſſatisfied with his own *State*, or give *them* Diſturbance in theirs, he will deſerve to be puniſh'd for Contempt of the *ſovereign Authority*. For, as *Terentius* ſaid in *Tacitus* [e], "It is not the Subjects Buſineſs to enquire " who their *Prince* prefers, or for what Reaſons " Heaven has placed the ſupream Diſpoſal of " Things in his Hands, and it is their Honour " to obey" [f]. But it might ſeem a good Way to ſilence the Complaints of ambitious Subjects, if *Princes*, when they prefer Perſons to *Places* of *Honour*, would always have regard to thoſe *Foundations* of *Eſteem*, which were before mention'd; and more eſpecially to the particular Services they have done to the *Publick*; which to reward with eminent Degrees of *Eſteem*, rather than with Money, or Reward of like Nature, is generally the politick Art of *Princes* [1]. But ſo much the rather, becauſe, except the *Dignity* and

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[a] *Neſtor* in *Homer* Iliad. l. 1. v, 277, *&c.*

Μήτε σὺ, Πηλεΐδη, ἔθελ' ἐριζέμεναι βασιλῆϊ
Ἀντιβίην, ἐπεὶ οὔποθ' ὁμοίης ἔμμορε τιμῆς
Σκηπτοῦχος βασιλεὺς, ᾧτε Ζεὺς κῦδος ἔδωκεν.

Ceaſe Noble Youth, to Peace your Mind compel,
Nor let your Rage againſt the King rebel;
No Prince like him in God-like Honour reign'd,
That e'er from Heaven his envied Throne obtain'd.

Though *Achilles* rather ſubmitted to the Conduct, than the Power or Command of *Agamemnon*.

[b] *Tacitus* Agricola, c. 39.

[c] Vid. L. 1. t. 14. l. 3. *De Offic. Prætoris.*

[d] L. 42. *c.* 34.

[e] *Ann.* vi. *c.* 8.

[f] To this we may apply that of *Lucian, Judic. Vocal.* 'Tis fit and proper that every Letter ſhould continue in that Order in which it was at firſt placed; and to go out of that, is to break all that is juſt and equitable. And he that firſt made theſe Laws for you, ſettled this Order, by which every Letter was for ever to continue in its own Place and Dignity. *Plin. l. 9. Epiſt. 5.* If the Diſtinctions between Degrees and Dignities were mixed, diſorder'd, and confounded with one another, nothing will be more unequal than Equality it ſelf,

Mr. BARB. *NOTES on* §. XXIII.

[1] Vid *Xenoph.* Cyropæd. l. 8. p. 130. *Ed. H. Steph.* where he ſpeaks of the Order in which he placed his Friends at an Entertainment. " 'Twas a fine Invention, ſays *Montaigne*, and received by moſt Governors in the World, to eſtabliſh certain vain and worthleſs Marks " to reward Virtue with, ſuch as Crowns of *Laurel, Oak*, and *Myrtle*; the Form of certain Robes; the Privilege of riding in a Coach " through the City, or going by Night with Torches; ſome particular Seat in Publick Aſſemblies; the Prerogative of Sirnames, and " Honours, certain Diſtinctions in Coats of Arms, and the like: The Uſe of which has been differently receiv'd, according to the Opi" nion of the People, and ſtill remains. As for our part, we have, as likewiſe ſeveral of our Neighbours, the Orders of Knighthood, " which were eſtabliſhed purely for this End. 'Tis certainly a very good and profitable Cuſtom, to find out a Way to diſtinguiſh the Me" rit of Men of rare and excellent Parts, and to content and ſatisfy them by Payments that are not burthenſome to the Publick, and " coſt the Prince nothing. And it has been always known by Experience, and we ourſelves have formerly ſeen ſomething of it, that " Men of Quality were more jealous of ſuch Rewards, than of thoſe where there was Gain and Profit; and this is very reaſonable and " likely. For if to the Value which ought to be ſimply of Honour, you put Riches and other Commodities of Profit, that Mixture, in" ſtead of enhancing the Worth of it, debaſes and leſſens it. The Order of St. *Michael*, which has been ſo long in Eſteem among us, ne" ver had any greater Advantage, than that of having no Communication with any other Advantage than Honour. That was the Rea" ſon, that formerly, there was no Employment or Eſtate whatſoever, to which the Nobility aſpired with ſo much Ardour and Affection " as they did to this Order; nor any Quality that bore more Reſpect and Grandeur: Virtue embracing, and more willingly deſiring a " Reward purely its own, rather glorious than profitable. For indeed, other Rewards, are not given on ſo noble an Account, ſince " we uſe them upon every Occaſion: With Money we recompenſe the Fidelity of a Servant, the Diligence of a Courier, a Dancing" Maſter, a Tumbler, a Flatterer, *&c.* and the moſt vile Offices they do us; nay, even Flattery, Pimping, Treaſon, and all ſorts of " Vice, are paid with Money: 'Tis no Wonder then, that Virtue receives, and deſires leſs willingly this Sort of common Payment " than that which is proper and peculiar to it, and is all generous and noble. *Montaigne*'s Eſſay, Liv. 11. Chap. vii.

and *Pre-eminence* of great Men among Subjects be meaſured by the *Benefits* and *Aſſiſtance* they give, or at leaſt are capable to give among their *Inferiors*, it will be but inſignificant, and without Reality. But becauſe, if *Princes* were obliged always to place their *Subjects* according to their *intrinſick Worth* and *Merit*, the Trouble would be infinite to make Reviews of them ſo often as it would be neceſſary; and beſides, that no ſuch Review could be made without diſpleaſing the greateſt Part of them, ſince 'tis certain, that the Generality of Men never conſider how many they have left below them, but how many they ſtill ſee above them; it might ſeem perhaps to be the moſt proper and eaſieſt Method to beſtow *Honours* upon the *Subjects*, at leaſt upon them of the *beſt Rank*, according to the *Offices* they bear in the *Commonwealth* [a]. And then again, it will be eaſy to prevent Complaints, if none but Men of *Merit*, and Perſons well *qualified* are put into thoſe *Offices* [b]; and if the *Offices* themſelves are diſpoſed in a natural and proper *Order*. And in general, the moſt juſt and perfect *Order* of *Offices* ſeems to be, when the *Honours* annex'd to Offices are greater or leſs, proportionably, according to the Nature, Weight, and publick Importance of the Affairs and Buſineſs which belong to the Management of them; and according as it requires the greateſt *Parts* and *Accompliſhments* to diſcharge them [c]. In *Homer*, *Dignity of Office* is preferr'd to that of *Blood*, *even of natural Bravery and Courage*. For thus *Neſtor* tells *Achilles*:

Εἰ δὲ σὺ καρτερός ἐσσι, θεὰ δέ σε γείνατο μήτηρ,
Ἀλλ' ὅγε φέρτερός ἐστιν, ἐπεὶ πλεόνεσσιν ἀνάσσει [d].

We own you brave, your Race divine adore,
Him greater think, becauſe his Power is more.

But it ſometimes alſo happens, that ſome *Offices* in the *Commonwealth* have larger Shares of *Honour* annexed to them, than of *Authority* and *Power*; and ſometimes the quite contrary; perhaps, for fear, leſt *Honour* attended with much *Wealth*, and *Power*, might tempt the *Magiſtrate* to take Arms againſt the *Commonwealth* [e]. But in every *Rank* of *Offices*, Men ſhould be thought more or leſs *honourable*, according to the *Dignity* of the *Employment* they have in it. Now though it is unavoidable, that one *Office* will be look'd upon as more *honourable* than another; yet this will be no Reaſon that all and every particular Perſon, entruſted in the more *honourable Office*, ſhould therefore challenge *Precedence* from all and every Perſon in the leſs *honourable*; but only that the *higheſt* Perſon in the *inferior Office* ought to give *Place* to the *firſt* in the *ſuperior*, but may ſtill have *Preference* to all that are *ſubordinate* to the *firſt*. It is but rarely ſeen, that the Perſon gives *Luſtre* and *Honour* to the *Office*. So it happened once at *Thebes*, to the Office of *Tax-gather*, after *Epaminondas* had born it [f]. But as to the *intrinſick Value* of all *Marks* of *Honour* and *Dignity*, *that depends upon the Virtues and Qualifications of the Perſons that wear them* [g]. And this was what *Antiſthenes* meant, when he deſired the *Athenians* to make a *Decree*, that *Aſſes* ſhould be *Horſes*. "For though, *as they told him*, nothing "could be more contrary to common Senſe and "Reaſon; yet, *as he anſwer'd*, to prefer Perſons "to *Places* of *Truſt*, and *Command* in the *Commonwealth*, that are no way qualified for them, "but only by that publick *Act* and *Declaration*, "which puts them into them, is almoſt as abſurd [h]." But if the *Subjects* come to an Agreement among themſelves, about their *Order* of *Place*, or if *Cuſtom* hath introduced any particular *Order*, either Method may be ſuppoſed to have the Force of *Law*, unleſs the *Government* except againſt, or forbid it [i].

XXIV. But if *Compariſon* is to be made between *eminent Men* of different Commonwealths, it is clear, that the *Foundations* of *intenſive Eſteem*, even where ſuch Perſons are concern'd, can produce nothing more than an *Aptitude* to receive *Honour* from others, who have leſs *Pretenſions* to thoſe *Foundations* than themſelves. And that whether the Perſon of *greater Eminence* come into a *foreign Commonwealth*, as a *Traveller* or *Stranger*, or meet others in *a third Place*; it muſt be excepted only, if the *Prince* oblige his *Subjects* to *give place* to the *Stranger*, or if the Diſpute be determined by ſome *third Prince* where they meet, or if it be decided by *Agreement* or *Cuſtom*. And therefore the *Dignity* of an *Office*, which a Man bears in his *own* Commonwealth, gives him no *Right* to *prefer* himſelf to the *Subjects* of a *foreign State* that may perhaps bear *Offices*, which he in his own Country demands *Precedence* upon. For a *Right* which is of Force againſt *Fellow Subjects*, is not therefore of Force againſt *all other Perſons*; for the ſame Reaſon that the *Laws* of *foreign Nations* oblige none but their own *Subjects* [k]. Nor is it any material Objection, that perhaps the *Foreigner* in his own Country may have a greater *Title* than the Perſon he diſputes againſt. For every *State* and *Commonwealth* may ſet what *Value* they pleaſe (within themſelves) upon *Titles* and other *Marks* of *Honour*, whether given by themſelves, or others. Beſides, the *Value* of *Offices*, by the *Greatneſs* of which the *Meaſures* of *Honour* are generally taken, is different in different *Nations*. And even the moſt beneficial and uſeful *Arts* are not every where equally eſteem'd; as it is well known, that in ſome *Countries* the *Arts of Peace* are moſt *valued*, in others thoſe of *War*. Beſides, it is particularly obſervable, that the *Words* by which the different Degrees of *Honour* are expreſs'd, do not only denote different *Dignities* in diſtinct Commonwealths, but have alſo ſometimes *greater Value* ſet upon them, and ſometimes *leſs*, even in the ſame Commonwealths, according to the Alterations of Time, which *raiſes* or *leſſens*, we know, the *Price* of every Thing elſe. For the *external Signs* of *Eſteem* have their determinative *Value* ſet by the *Impoſition* of every particular Commonwealth; but the *Foundations* of *intenſive Eſteem*, taken as they are in their own Nature, and in the Eſtimation of wiſe Men, can never loſe their *Value*. And therefore the World is every where ſo juſt to *Virtue*, to all celebrated *Arts*, *Functions*, and *Employments*, as to pay them *Honour* and *Reſpect*. But by the Poſſeſſion of theſe only a Man hath no *Right* to demand any particular *Marks* of *Honour* in *foreign States*; except he can obtain ſuch a Right by ſome of thoſe *Ways* before mention'd. But, becauſe *Marks* of *Honour* are always preſumed to be given as *Rewards* of *eminent Virtues*; therefore the *civiliz'd Part* of the World *abroad* generally pay almoſt the ſame *Degrees* of *Reſpect* to the *Honours* of *foreign Nations*, that are allowed them at *home* [1]. But ſtill they would be thought to do ſo, more out of Civility and Complaiſance, than from any *perfect Obligation*. But there alſo are ſome States that allow but little *Value* to *foreign Honours*. *Cicero* ſpeaking [a] of ſome particular *Foreigners*, who were of *noble Families*, does not call them *abſolutely noble*, but ſays they were *(domi)* at *home*, or *(apud ſuos nobiles)* among their own People *noble*; the Meaning of which is, that *foreign Nobility* was not allowed the ſame *Value* at *Rome*, that it had in its own Commonwealth. What *Cicero* ſays in another *Place* ſeems more inſolent [b]. *If*, ſays he, *we make a Compariſon between the Men, the meaneſt Citizen of* Rome *is equal to the greateſt Man in* Gallia. The *Honours* that were given them that won the *Prize* at the *Olympick Games* in antient *Greece*, are well known: But it would have been ridiculous for them to have expected the ſame in other Places, where Strength and Activity of Body were not in ſo much *Eſteem*.

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[a] *Add.* Lord *Bacon's* Eſſays, c. 53.

[b] Otherwiſe it will fall out, as *Claudian* ſaith in *Eutropium*, l. 2. ver. 322.

—— *Quis non conſule tali*
Vilis honos?

—— Honour itſelf grows mean,
When ſuch a Conſul rules.

[c] *Ovid.* Metam. l. 13. ver. 366, 368.

—— *Ratem qui temperat, anteit*
Remigis Officium.

'Tis more to rule the Helm
Than ply the Oar.

[d] *Hom.* l. 1. *Iliad.* ver. 280, 281.

[e] Vid. *Bodin.* de repub. l. 3. c. 6. p. m. 501.

[f] *Vid.* Plut. *in precept. gerend. reip.* p. 811.

[g] *Salluſt.* Jugurth.

[h] *Diog, Laertius*, l. 6. §. 8.

[i] *Vid.* L. 12. t. 8. l. 2. *C. ut dignitatum Ordo ſervetur.* And it is a remarkable Place in *Suetonius Veſpaſ.* c. 9. That it might be known, that the two Orders were not diſtinguiſhed ſo much by the Liberties they might uſe one another with, as by their Dignity; upon a Quarrel that happened between a Roman Senator and a Knight, he thus pronounced, That ill Language ought not to be given firſt to a Senator; but that it was lawful enough to return it, when he began it himſelf.

[k] Add *Memoires de Wicquefort touchant les Ambaſſadeurs*, p. 519.

XXV. *Laſtly*, Since almoſt in every Nation ſome Degree of *Dignity* is ſuppoſed to adhere to *Birth*; it will not be improper in this Place to enquire particularly what is implied in *Nobility* of *Blood*, and what Value ought to be ſet upon it, when conſider'd *in itſelf* [c].

And here it will undoubtedly be allow'd, that *Nobility* of *Birth* doth not of itſelf beſtow better *Conſtitution* of Body (though perhaps Goodneſs and Elegance of *Diet* may ſometimes ſeem to contribute to it) neither does it produce more excellent *Diſpoſitions* of Mind, or a *brighter Wit*, or more *vigorous Underſtanding*; but all theſe Endowments may as well attend the *meaneſt* as the moſt *noble Extraction*. *Nature* does not take any other Method in giving *Birth* to *noble*, than ſhe does to common Men. And *conjugal Honour* is, or may be kept as *ſacred* among *common People*, as Perſons of higheſt *Quality*. Nor would it be an eaſy Task to prove, that *noble Families* are leſs corrupted, or expos'd to *Adulteries*, than the *poor* or *mean* [d]. So that if even the *Virtues* of *Parents* could be always ſuppos'd to be *transfuſed* into the *Children*, yet it would be extream difficult for many *noble* Perſons to prove, that their *Blood* deſcended to them *pure* from the firſt *Riſe* of their *Family*, without *ſpurious* or *foreign Mixtures* [e]. And it is ſo far from being always true, that

Fortes creantur fortibus & bonis [2].

The Brave do from the Brave and Good deſcend.

That on the contrary, we ſee nothing more common than *Inſtances* of the *Degeneracy* of the *Children* of the *greateſt Men*. "Our Parents (as *Marius* [f] ſaith in *Salluſt*) may leave us all that it "is poſſible for them to leave, their Eſtates and "Pictures, and an happy Memory of themſelves; but their Virtue they never did nor "can leave; for that alone is what can neither "be given nor received." But further, 'tis poſſible that *common* Perſons may be as well educated as the *noble*; and 'tis not unuſual to ſee the Advantages the *Great* and *Rich* have of cultivating and improving their *Minds*, ſcandalouſly miſpent in Sloth and Luxury, to ſupply and ſupport the moſt extravagant Vices. It may well be preſumed, as *Plato* ſays [g], *That Nobility of Birth, if attended with good Education, may produce eminent Virtues.*

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[a] *Pro M. Fonteio*, c. 8. *in fin.*

[b] *Pro L. Flacco*, c. 13. *in fin.*

[c] And this *Value*, I believe, is ſcarce any where higher, than among the *Indians*, according to the Account we have of it in *Oſorius*, *De rebus geſtis Emanuel*. l. 2. Who tells us, that if any of the *Inferior People* chance to touch a *Nobleman*, they think it a Stain upon their *Nobility*, and a Diſgrace to their *Family*, and revenge it as an *Injury* of the higheſt Nature, by the *Death* of thoſe unfortunate Perſons, that happened upon them. And therefore, he ſays, all below the Rank of *Nobility*, when they take a Journey any whither, are forced to call out and make a Noiſe; and by that the *Nobles*, having Notice of their coming, command them to break the Way, and ſo the *meaner* People eſcape Death, and thoſe of *Quality* the Danger of a perpetual *Blemiſh* to themſelves and *Family*. And as the greateſt Crimes do not deprive the one of their *Nobility*, ſo neither can the greateſt Virtues excuſe *Obſcurity of Birth* in the others, but every Man muſt of Neceſſity ſubmit to the Condition and State his Father left him in. And theſe *Nobles*, we are further told, were allowed the *Privilege* to lie with other Men's *Wives* when and where they pleas'd; and if any of them happen'd to be with another Man's *Wife* (a Sign of which was a *Target* hung up at the Door) the poor *Husband* dared not go into his own Houſe.

[d] *Phil. Baldæus* Deſcript. *Ora Malabar* & *Coromandel*. c. 26. & *de Idolat. Indor*. Part II. c. 16. Mandeſlo *Itiner*. L. 2. c. 10. *Add.* Abrah. Rogerius *de Braminibus*, c. 1, 2. *Diodor. Siculus*, l. 1. c. 74.

In *Euripides Hippolyt. Coron*. ver. 409, 410. 'Tis ſaid of Adulteries,

This Evil firſt from noble Families,
With wide Infection tainted the whole Sex.

[e] *Vid.* Dio. Chryſoſtom. *Orat.* 15. *init. p.* 236. Ed. *Morel. Grotium*. l. 2. c. 7. §. 8.

[f] *B. Jugurth.* c. 89.

[g] *Alcibiad.* I. *p.* 440, 441. Ed. *Wech.*

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[1] V. *Ciceron.* Orat. in *Ver.* l. 3. c. 23. p. 44. Ed. *Grav.*

[2] *Horat.* L. 4. Od. 4. ver. 29.

Virtues. But it is alſo evident *in Fact*, what *Degeneracy noble Families* ſometimes ſink into, and how much the Glory of *Anceſtors* is obſcured by the Blemiſhes of *Poſterity* [a]. And 'tis certain, that many that have been *obſcurely* born, have rais'd themſelves to the *higheſt Honours*, purely upon the Stock of their own *Virtues*. *Iſcrates* [b] took it for a Topick to commend *Nobility*, that it did not, like other Gifts of *Fortune*, ſoon decay, or remove into other Hands, but continued always with the Perſon it once belonged to; and therefore was the beſt Inheritance Men could leave to their Children. But certainly, except a Man can ſupport his *Nobility* by his own *Merits*, or except he enjoys by it ſome particular *Privileges* in the Commonwealth, it can be but a very *worthleſs inconſiderable* Thing. And therefore there is no Neceſſity in the Nature of the Thing, that the *Son* ſhould ſucceed either to the *Places*, or Degrees of *Eſteem* his Father enjoyed, only by his *Birth*; eſpecially, ſince in the *laſt Reſort*, Mankind are deriv'd from the ſame *Original*. For as *Marius* in *Salluſt* ſays [c] “Every Man partakes of the ſame *common* Nature, and the Brave only have the beſt Title to Nobility.” And therefore a Man's own *Virtues*, not thoſe of his *Anceſtors*, ought to recommend him; according to the Character *Tibullus* gives of *Meſſala* [d].

Nam, quanquam antiquæ gentis ſuperant tibi laudes,
Non tua majorum contenta eſt gloria fama,
Nec quæris quid quaque index ſub imagine dicat,
Sed generis priſcos contendis vincere honores,
Quam tibi majores, majus decus ipſe futuris.

For you, tho' grac'd by long deſcending Fame,
Depiſe the dull hereditary Name.
Nor from the dead will borrow ſleeping Praiſe,
Or rob their Monuments your own to raiſe,
Greater than all the Heroes of your Line,
To your own ſingle Merits, you confine
Your Praiſe; and to Poſterity will leave
A greater Name than all your Race could give.

XXVI. But however, it hath obtain'd in many States and Commonwealths, that Perſons of *Merit*, who have been placed by the *Government* in *Stations* to which particular *Privileges*, and peculiar *Degrees* of *Eſteem* are allow'd, might have the *Advantage* of deriving the ſame down to their Children by *Birth*, and in the Nature of an *Inheritance* [e]. For 'tis certain, that *Nature* has made no real Diſtinction between the *Birth* of the *Noble* and the *Plebeian*. The *Difference* between them is grounded entirely on the *Impoſition* and *Indulgence* of the Commonwealth, which allows, that ſuch a particular *State*, to which certain *Rights* and *Degrees* of *Eſteem* are annexed, ſhall deſcend to the *Poſterity* of the Perſon it was firſt conferr'd upon [f], barely by *Birth*, without any new *Grant*. And if this *Impoſition* be taken away, all the Diſtinction of *Birth* ceaſes. And therefore, when a *Prince* removes a *Commoner* into the *Nobility*, he cannot be ſuppoſed to make any Alteration in his *Nature* or *Extraction*, or to infuſe new *Vigour* into his Mind; but only to place him in a *State* oppoſite to the *Commonalty*, and to give him Liberty to entail *that*, and the *Rights* conſequent upon *it*, upon his *Children*. Which was properly enough ſignified by *Amaſis* King of *Egypt*, when to ſhew that the *Obſcurity* of his Birth was no Reaſon why he ſhould be denied his due *Honour*, as he was King, he melted a Baſon of *Gold* into an *Image*, and ſet it up to be *worſhipped* [g]. On the other hand, if any Man be *degraded* from his *Nobility*, either by way of *Puniſhment* for ſome Fault, or becauſe he refuſeth to conform to the *Laws* of the *Nobility*; it is not ſuppoſed, that his *Nature* or *Temper* of Mind is therefore *altered*, or that the *Blood* he derived from his *Anceſtors* is *changed*, neither can it be denied, that he continues to be of *noble Extraction*; but he is only deprived of a certain *State*, and of the *Privileges* that belonged to *it* in the *Commonwealth*. And then he is in all Reſpects no better than a *Commoner*. And in the ſame Manner it muſt be ſaid, that neither *Legitimation* nor *Reſtitution* [1] *in Blood* make any real *Change* in Nature, but only introduce certain *moral* Effects [h]. *Machiavel* in his Hiſtory of *Florence* tells us [i], that after the Tyranny of the Duke of *Athens* was expired, the ſovereign Power being lodg'd in the *People of Florence*, and the *Nobility* excluded by Law from any Share of the *Government*, a certain Gentleman call'd *Beuchi*, of the *noble Family* of the *Boundelmonti*, for his Gallantry and good Services in the Wars againſt the *Piſans*, was preferr'd to be one of the *People*, that is, was made a *Plebeian*. And the ſame Hiſtorian, in another Place, ſays *, that the *ſame Privilege* was granted ſeveral others of the *Nobility*. And, among the *Romans*, *Clodius* left the *ſenatorian Order*, and was *adopted* into the *plebeian*, that he might be capable to be made *Tribune* of the *Commons* [2].

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[a] Ariſt. *Rhetor*. l. 2. c. 15. Nobility conſiſts in Greatneſs of Extraction; Generoſity in not departing from Nature, which all that are *Noble* cannot pretend to; for many of them are Perſons of no Worth or Value. *Add*. Stobæus *Serm*. 84, 85.

[b] *Encom*. Helenæ.

[c] *B. Jugurth*. c. 88.

[d] *Tibull*. L. 4. El. 1. ver. 28, *&c*.

[e] Lesbonactes *Orat. hortat*. The Children of ſuch as have behaved themſelves with Bravery, in Dangers that threaten'd the Commonwealth, are looked upon to be *noble*. ‘The Great ought not to love the firſt Ages of the World; it affords them a melancholy Proſpect to look “into them, and ſee that we were all deſcended from one Brother and Siſter.” *La Bruyere's Manners or Characters of the Age*, p. 308.

[f] *Add*. Huartus *Scrut. Ing*. c. 16. p. m. 488, *&c*.

[g] *Herodot. Enterp*. p. 99. Ed. *H. Steph*.

[h] And in this Senſe we may underſtand that of *Euripides*. *Phœniſ*. ver. 821, *&c*.

ȣ̓ γὰρ ὃ μὴ καλὸν, ȣ̓ ποτ᾽ ἔφυ καλὸν, &c.

For what is once diſhonourable and foul,
Is never otherwiſe, the baſe born Son,
Still on his Mother's black Reproach reflects,
And on his Father's Obloquy and Shame.

[i] *Lib*. 3.

* L. 5.

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[1] *V. C.* l. 6. t. 8. *De jure aureorum annullorum, & de natalibus reſtituendis.*

[2] *Vid*. Livii *Epitom*. l. 103.

XXVII. But however, it muſt be allowed, that generally all Governments, when they beſtow any ſuch *publick Honour* as that of *Nobility* on their Subjects, have regard to Perſons known by ſome diſtinguiſhing *Excellencies*, or extraordinary *Merits*. And as ſuch Perſons juſtly deſerve a larger Share of *Eſteem* than others, ſo 'tis to be ſuppoſed, that their *Virtues* are thought more *valuable*, when the *Rewards* of them are allowed to be derived to thoſe, for whom Nature gives all Men the ſtrongeſt Affection; eſpecially ſince 'tis natural to believe, ſuch Favours may provoke the *Emulation* of other Subjects, and make them ambitious to gain the like *Rewards*. Beſides, it is but natural to expect, that the *Children*, influenced by the Example of their *Parents*, may be proud to rival the *Virtues* of their *Families*, and maintain their *Title* by their *Honours*, by the ſame *Methods* which at firſt gain'd them. Nor is it leſs eaſy to ſuppoſe, that *Parents* may think their *Honour* engaged to take Care, that the State ſhould not have Reaſon to complain, that their *Children* were grown degenerate. Now, when it was allowed therefore, that *Nobility* ſhould be annexed to the *Birth*, and run in the *Blood*, it was to be expected that Perſons would not ſubmit to mix with *Families* of *mean* Extraction; leaſt by marrying beneath themſelves, they might ſeem to debaſe their *Quality*, and cut off thoſe *Rights* which they would deride to their *Children*. It might ſeem alſo prudential, rather to admit the *Daughters* of Equals than Inferiors to ſhare in their *Dignity*; and it might be thought of Moment, that the *rich Tradeſman*'s Daughter might not be capable of being preferr'd before the *poorer* of the *Nobility*. And that *Poſterity* might not diſpute their *Deſcent*, it would ſeem neceſſary to keep an exact account of their *Families* and *Pedigrees*. When, on the other hand, it would be needleſs for Perſons of *meaner* Rank to take the ſame Care to regiſter their *Anceſtors*, since they enjoy no ſpecial *Privileges* upon the Score of *Birth*, but are obliged to ſupport themſelves by their own *Induſtry* and *Virtue*.

XXVIII. Further, to illuſtrate what has been ſaid, it may not be improper to enquire, what particular *Inſtitutions*, relating to *Nobility*, were obſerv'd amongſt the *Romans*. Now *Romulus* therefore, that he might digeſt his *rude diſorder*'d Multitude, into the proper Form of a *Civil Body* or *People*, made Choice of an hundred Perſons out of the *Maſs* [1] to be his *Council*; and theſe he call'd *Patres*, either to expreſs the Nature of their *Station*, or their *Age*; the reſt of the *People* were ſtill no more than *Commons*. The Deſcendents of the firſt were call'd *Patricians*, by an eaſy and plain Denomination, implying, that they were of the *Family* of the *Patres*; or as others ſuppoſe, *That they only could ſhew their Fathers*, the reſt being only a Company of *Fugitives*, that could not tell who their Fathers were, nor prove that they were *free* Parents, and therefore were no better than *Filii Terræ* [a]. And this Suppoſition they attempt to prove, becauſe whenever the *Patricians* were to be aſſembled by their Kings, the *Præcones* or *Criers* call'd every Man by his *own*, and by his Father's *Name*; but that the *Plebeians* were ſummon'd to the Aſſembly by a Trumpet, or *Ox-horn*, the *publick Servants* going through the City, and calling them by that Sound only. *Dionyſius Halicarnaſſeus* indeed, according to his uſual Turn, gives a ſofter Interpretation to this *Cuſtom* [b], telling us that the *Præcones* call'd the *Patricians* by *Name*, by way of *Honour*; and that the *Commons* were ſummon'd by the *Horns* only for Expedition. But 'tis clear that *Decius* in *Livy* ſeems to contradict him [c]. "For was it never heard, ſays he, in what manner theſe *Patricians* were at firſt conſtituted? "that they did not drop down out of the Clouds, "but were only ſuch Perſons as could (*Patrem ciere*) name their Fathers, that is, were no "more than *Free-born*: I my ſelf can now call a "*Conſul* my Father, and my *Son*, his *Grandfather* [d]." From all which it appears, that it was *Title* enough to the *primitive Nobility* of *Rome*, to be born in *lawful Wedlock*, and of *free Parents*; "For indeed in all new erected Commonwealths, "*Nobility* muſt neceſſarily be late, and rais'd by "Virtue [e]. And hence the *Patricians* urged, "that they were the only Perſons that were of "any *Family*, or that were related by *Gentility* "to one another." And therefore *Cicero* in his *Topicks* gives this Definition of the *Gentiles* or Perſons of Extraction and Quality: "They are "Perſons that have all the *ſame Names*, are deſcended from *free Parents*, none of their *Anceſtors* were ever *Slaves*, nor were they themſelves ever depriv'd of *Liberty* [f]." Though in Courſe of Time, 'tis certain the *Plebeians* alſo form'd and aſſerted their *Gentes* or *Families* [g]. And hence the *modern Languages*, derived from the *Latin*, call *Noblemen* and *Perſons of Quality* (Gentlemen) *Gentiles Homines*: But afterwards when the *Plebeians* were allowed to make *Intermarriages* with the *Nobility*, and ſo all the *Diſhonour* and *Baſeneſs* of their *Original*, if there were ever any ſuch, might ſeem to have been worn out; then the *Patricians* found out another *Difference* to diſtinguiſh themſelves from the *Commons*, by inſtituting certain *Religious* Rites particular to each

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[a] V. *Plutarch. Romulus*, p. 24. *D. Et Quæſt.* Rom. *p.* 278. *C. D.*

[b] Rom. *Antiq.* l. 2. c. 8.

[c] *Liv.* l. 10. c. 8. *in fin.*

[d] *Juvenal.* Sat. 8. ver. 272, &c.

Et tamen ut longe repetas, longeque revolvas
Nomen, ab infami gentem deducis Aſylo.
Majorum primus quiſquis fuit ille tuorum,
Aut Paſtor fuit, aut aliud quod dicere nolo.

Boaſt then your Blood, and your long Lineage ſtretch
As high as *Rome*, and its great Founders reach;
You'll find in theſe Hereditary Tails,
Your Anceſtors the Scum of broken Jails;
And *Romulus*, your Honour's antient Source,
Was a poor Shepherd's Boy, or ſomething worſe. Mr. *Stepney*.

[e] *Liv.* l. 1. c. 34.

[f] *Boetius* in *Topicis*. The *Gentiles* are ſuch as bear all the *ſame Name*, as the *Brutus*'s, the *Scipio*'s; but if they are Slaves, they are not *Gentiles*. And though perhaps the Children and Deſcendents of *Freed Men* may have the ſame Name, yet they are not therefore in the Number of the *Gentiles*, becauſe Gentility muſt be derived down from a long Race of ſuch as were *Free-born*.

[g] *Add* Franc. Connanus *Com. Jur. Civil.* l. 2. c. 11.

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[1] V. *T. Liv.* l. 1. c. 8.

each *Family*, and aſſuming a *peculiar* ſort of *Sanctimony* to themſelves. And upon this Account they inſiſted, that all the *Offices* in the *Commonwealth* ought to be given entirely to them, becauſe they only had the proper *Auſpicia*, or *Omens of Succeſs*. But this ridiculous Pretence was ſoon, as it deſerv'd, expoſed and neglected by the *Plebeians*. Though ſome of them too, to ſhew that the *Patricians* had no juſt Grounds to aſſume ſuch a *Prerogative*, ſet up their *private Sacra* and *Family Rites* [a]. Which afterwards growing *burthenſome* upon their *Heirs*, were taken off by *Coemption*, as *Cicero* informs us [b].

XXIX. But afterwards, when the *Senatorian Dignity*, and *great Offices* of the Commonwealth, which had been engroſs'd all by the *Patricians*, were left open and free for the *Plebeians* eſpecially, the *Nobility* of *Rome* was not meaſur'd ſo much by *Date* of *Families*, or *Patrician Deſcent*, as by *Number* of *Images*. And from that Time the *noble Families* of *Rome* were diſtinguiſh'd into *Patrician* and *Plebeian* [c]. The *Equeſtrian Order* was not properly *Noble* by *Inſtitution* of the Commonwealth. *Tacitus* ſays, indeed, in his *Life of Agricola*, that *Agricola*'s *Grandfathers on both ſides* had been *Procurators* or *Solicitors* to the *Emperor*, *which is the Equeſtrian Nobility*: But the right Senſe of that Place is, that as they who were *Senatorian* Families, meaſured their *Nobility* by the great Offices they had born, uſually call'd *Magiſtratus Curules*; ſo the *Procuratorſhip* to *Cæſar* was look'd upon by the *Knights* to have been a ſort of *Nobility*, eſpecially becauſe, beſides that of *Prefect* of the *Prætorian Cohorts*, or the *Emperor's Life-Guards*, there was no higher *Office* which belong'd to that *Order*, *as ſuch*. So that in the latter Ages, the *Nobility* of *Rome* did not conſtitute any particular *Order*, ſeparated from the reſt of the People by peculiar *Rights*, but every Man was allowed to be *noble* upon his own, or his *Anceſtors* Merits, either as he was able to produce their *Statues* or *Images*, or to raiſe himſelf to *Places* of *Honour* by his own *Virtue* [d] [1]. But though many of the *Roman* Offices were no leſs neceſſary and ſerviceable in Times of *War* than *Peace*, as that of *Dictator*, *Maſter of the Horſe*, *Conſul*, *Prætor*; yet ſince *Peace* is, as it were, the *ordinary State* of a Commonwealth, *War* the *extraordinary*; and ſince thoſe *Offices* alſo ſeem, as well by their *Nature* as *Appellation*, to bear a nearer Relation to *Peace* than *War*; it muſt be allowed, that *Roman* Nobility had rather a *civil Original*, than a *military*. And indeed, it would have been a Method altogether *impolitick*, to have confin'd *Nobility* to *ſimple martial Courage*, ſeparated and diſtinguiſhed from the *Office* and *Conduct* of a Leader (ſo as hereby to have conſtituted a *particular Order* enjoying large *Rights* and *Immmunities*) in ſuch a Commonwealth, where *War* was the common *Profeſſion*, as I may call it, of every *Subject*. The *Roman* Nobility therefore did not conſtitute any *peculiar* Rank of Perſons in the Commonwealth; nor did it afford any other Advantage more conſiderable than this, that the *Images* of *famous Anceſtors* uſually made the Way to *Honour* more open and eaſy.

XXX. From all which it is evident, that the *Nature* and *Genius* of *modern Nobility* in moſt of the Kingdoms of *Europe* is much different. For with us the *Nobility* conſtitutes a *particular Order*, diſtinguiſhed from the reſt of the *Subjects* in *Dignity*, and by extraordinary *Rights* and *Privileges*. Beſides that, the Prince frequently confers the *Honour* of *Nobility* without giving any publick *Employment* with it, and that too, not ſo often in Conſideration of *civil* as of *military Accompliſhments* and *Virtues*. One Argument of which, among others, is, that *noble Families* diſtinguiſh themſelves from one another, as well as from *Commoners*, by *Devices* impreſs'd upon *Shields* with an *Helmet* plac'd above; and which are therefore call'd *Arms*. Of the *Antiquity* of which, *Diodorus Siculus* may be thought to give an Account [e], when he tells us, “That the Arms of the *Gauls*, were Shields about the Height of a Man, flouriſhed and emboſs'd with every one's proper Device, as he pleas'd to have it. Some, *he adds*, held before them Images of Beaſts in Braſs, artfully contriv'd to ſerve both for Defence and Ornament. On their Heads they wore Helmets of Braſs, beautified, as they thought, with ſome Mark upon the Creſt of them, which might be ſeen at a Diſtance. Their uſual Ornament was the Horns, or the Head of ſome Bird or Beaſt form'd upon them, or fix'd to them [*].” For what Reaſons this Part of the World ſeems to pay ſo much *Honour* only to the Virtues *military*, when the *Chineſe*, on the other hand, prefer the *Men of Learning* to thoſe of the *Sword*, will not be difficult to reſolve. For it may be conſider'd, that though the Advantages which the *Commonwealth* receives from Men of *civil Life* and *Profeſſion*, are no way inferior to thoſe it gains by Perſons *military* (for certainly, to form good *Laws*; to adminiſter *Juſtice* impartially; to increaſe the Riches of the *State* by Improvement of Trade and Commerce; to be able, by the Force of Eloquence, to compoſe popular Diſcontents, and to incline the Minds of the People what Way ſoever the Poſture of Affairs requires; to diſcover the Counſels and Deſigns of *foreign Enemies*, and to prevent or fruſtrate them; are *Excellences* of the *higheſt Nature*, and that deſerve the greateſt *Honours*) yet

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[a] V. *Liv.* l. 4. c. 2. l. 6. c. 40, 41. l. 10. c. 7.

[b] *Cic.* pro *Murena*, c. 2. *Add.* Godof. *in* Cic. *Epiſt. Fam.* L. 7. Ep. 29.

[c] *Liv.* l. 10. c. 7. The *Plebeians* can number their Triumphs; and it doth not now repent them of their Nobility, *l. 6. c. 37. towards the End.* From that Time the *Commons* will enjoy every Thing the *Patricians* value themſelves upon, Authority and Honour, Glory of War, Deſcent, Nobility.

[d] To this Purpoſe is that of *Claudian*, *De Conſ. Prob. & Olyb. Paneg.* ver. 13, *&c.*

——Quemcunque requires
Hac de ſtirpe virum, certum eſt de Conſule naſci.
Per faſces numerantur avi, ſemperque renata
Nobilitate virent.

Through all the Line, each Worthy you can name,
His noble Birth doth from a Conſul claim,
Th' Imperial *Faſces* each Deſcendant grace,
And add repeated Honours to the Race.

[e] L. 5. c. 30.

[*] *Add.* Hobbes *Leviathan*, c. 10. *in fin.*

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[1] V. *Juvenal.* Sat. 8. ver. 8, 19.

yet *Civil* Perſons have not always that *Eſteem* and *Value* paid them, which is their Due, and eſpecially among People of ſcanty *Knowledge* and *Obſervation*, both becauſe the natural and acquired Perfections, which are neceſſary to the Attainment of *Civil Accompliſhments*, lie generally out of common View, and are not well underſtood by vulgar Apprehenſions; and becauſe they ſeem to diſcover themſelves in a ſedate ſilent Way, without Noiſe, or Violence, or Danger. But now the *Military* Virtues and Qualities are perfectly of another Nature. And therefore, though *Courage* and *Reſolution* are no leſs neceſſary in *Civil Adminiſtration* and *Conduct*, than *Military*; yet People of *Martial* Temper and Spirit, that had rather purchaſe a Subſiſtence with their *Blood*, than by their *Sweat* and *Induſtry*, think nothing more *glorious* and *noble*, than to be prepar'd againſt all the Terrors of *War*, than to face and defy *Death* and *Danger*, and to hazard, what is of all Things moſt valuable, Life itſelf; that other Men may live in greater *Eaſe* and *Security*[a]. For theſe Reaſons in many Kingdoms of *Europe*, the *Nobility* hold their *Eſtates* by a *feudal Right*, and have *Immunities* from ſeveral *Duties* ſettled upon them, which are exacted from thoſe of *inferior Rank*, purely becauſe they are obliged to attend the *Wars*, and aſſiſt the State in *Military Service*. The *Original* of which *feudal Right* ſeems to be hinted in *Lampridius*'s Life of *Alexander Severus*, c. 58. where he tells us, "That the "Lands which the *Emperor* took from the Enemy were given to the Officers and Soldiers that "liv'd upon the *Borders*, to enjoy them for ever, "provided they would oblige their Heirs to enter into *Military* Service, and never to live a "private Life; the *Emperor* ſuppoſing that they "would be the better Soldiers, when they were "alſo to defend their own Eſtate." And hence it is unuſual for the *Nobility* to turn to *Trade* or *Merchandize*, not becauſe ſuch *Profeſſions* are really *mean* and *diſhonourable*[b]; but becauſe they would divert them from their *Military* Way of Life, and force them upon the *Diſhonour* of enjoying *Fiefs* and *Privileges gratis*, without any Returns of Service. And therefore wherever the *Nobility* are allowed, without Diſparagement to their *Honour*, to apply themſelves to *Trade* and *Merchandize*, it may ſafely be inferr'd, that they had no *Military Original*. The *Egyptians*, *Scythians*, *Perſians*, *Lydians*, and almoſt all the *old barbarous Nations*, according to *Herodotus*'s Account of them[c], look'd upon all Perſons, that apply'd themſelves to *Trades* and *Handicraft Employment*, to be the *meaneſt* and *loweſt* Sort of *Subjects*; and their *Children* they always thought *mean* and *baſe*. They only were allow'd to be of *Quality*, that were above all *mechanical* Employments; and eſpecially, that made *War* their *Buſineſs* and *Profeſſion*[d]. And at *Rome* there was a *Law* preferr'd by *Q. Claudius* Tribune of the *Commons*, "That no *Senator*, or *Senator's* Father, ſhould "have any *Ship* of greater Burthen than would "contain the Quantity of three hundred *Amphoræ*." Such a *Ship* being ſuppos'd large enough to carry their Corn out of the Field; and all *Trade* look'd upon to be beneath Perſons of that *Dignity*[e].

XXXI. But notwithſtanding, there are and have been ſome *States* and *Commonwealths*, where the *Honours* allow'd to *Birth*[f], have been and are very *inconſiderable*; every Man being left to raiſe and ſupport his *Nobility* by his *Merits* to the *State*. "So the *Egyptians*, we are told, in their "*Funeral Orations*, never uſed to make mention, "as the *Greeks* did, of the *Family* of the Party "*Deceaſed*; becauſe they thought every Man "equally *noble*: But his Education they were

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[a] *Vid.* Ariſt. *Probl.* §. 27. q. 5. The Nobility expoſe their Lives for the Preſervation of the State, and their Sovereign's Glory. "The Magiſtrate eaſes the Prince of Part of the Care in judging the People; on both Sides ſublime Functions, and of great Advantage: "And Men are ſcarce capable of performing greater Things. Yet I know not the Reaſon, why the Sword and the Gown are always "quarrelling with each other; and have almoſt exhauſted their whole Stock of Invectives on both Sides." *La Bruyeres Manners or Characters of the Age.* p. 305. Edit. *Bruſſ.* 1697.

[b] Conſ. Bodinus *de Repub.* l. 3. c. 8. p. m. 546. Some indeed fetch the Reaſon of this from *Eccleſiaſticus* xxxviii. 25, *&c.* and becauſe, as *Cicero* ſaith, *Offic.* l. 1. c. 42. thay make no Profit unleſs they reſolve not to ſpare for Lies.

[c] L. 2. p. 98. Ed. *H. Steph.*

[d] *Add.* L. 4. t. 63, l. 3. *de Commerc. & Mercator.* & L. 12. t. 1. l. 6. *C de dignitatibus.* Ariſtot. *Polit.* l. 3. c. 3. Cic. *Offic.* 1. *d. l.* The Gains that all Mercenaries make, who ſell their *Labour*, and not their *Art*, are baſe and ſordid; and the Wages, they receive is the ſame Thing as an *Earneſt* of their Slavery.

[e] *Liv.* l. 21. c. 63. and *Juvenal* calls the Merchant, *Vilis ſacci mercator olentis*, Sat. 14. ver. 269. a ſordid Wretch that trades for naſty Wares.

[f] *Juvenal* in the following Verſes, admirably well expoſes the falſe Notions of the *Roman* Nobility, and the ridiculous Pride of the Gentry, that had no perſonal Merit of their own, but owed every Thing to their *Anceſtors*.

Tota licet veteres exornent undique ceræ
Atria, Nobilitas ſola eſt atque unica virtus.
Paulus, *vel* Coſſus, *vel* Druſus, *moribus eſto.*
Prima mihi debes animi bona. Sanctus haberi
Juſtitiaque tenax, factis, dictiſque mereris?
Agnoſco procerem
- -
Tum licet à Pico numeres genus, altaque ſi te
Nomina delectant, omnem Titanida *pugnam*
Inter Majores, ipſumque Promethea *ponas:*
De quocumque voles proavum tibi ſumito libro.
Quod ſi præcipitem rapit ambitio, atque libido,
Si frangis virgas ſociorum in ſanguine, ſi te
Delectant hebetes laſſo lictore ſecures:
Incipit iſtorum contra te ſtare parentum
Nobilitas, claram facem præferre pudendis,

Long Galleries of Anceſtors, and all
Thoſe Follies that adorn a Country-Hall,
Challenge no Wonder or Eſteem from me:
Virtue alone is true Nobility.
Live therefore well: To Men and Gods appear
Such as good *Paulus*, *Coſſus*, *Druſus*, were. ——
Convince the World that you're devout and true,
Be juſt in all you ſay, and all you do,
Whatever be your Birth, you're ſure to be
A Peer of the firſt Magnitude to me. ——
Then trace your Birth from *Picus*, if you pleaſe;
If he's too modern, and your Pride aſpire
To ſeek the Author of your Being higher,
Chooſe any *Titan*, who the Gods withſtood,
To be the Founder of your antient Blood,
Prometheus, and that Race before the Flood:
On any other Story you can find;
From Heralds, or in Poets, to your Mind.
But ſhould you prove ambitious, luſtful, vain,
Or could you ſee with Pleaſure and Diſdain,
Rods broke on our Aſſociates bleeding Backs,
And Headſmen lab'ring till they blunt the Ax;
Your Father's Glory will your Sin proclaim,
And to a clearer Light expoſe your Shame.

Mr. *Stepney*.

"always ſure to ſpeak of, and Manner of Life, his Piety and Devotion, his Juſtice, Continence, and what other Virtues he was known to have practiſed [a]." So the *Turks* never ſet a higher Value upon themſelves, than what may ſeem due to their own *Merit*: To the *Ottoman* Family only they allow *Nobility of Blood* [b]. Neither do the *Chineſe* expreſs any *Honour* for *Antiquity* of *Deſcent*, the *pooreſt* and *meaneſt* Perſon in the *Empire* is capable by his *Learning* only of preferring himſelf to the higheſt Places of *Honour* [c]: And in their *Marriges*, neither the *Emperor* himſelf, nor any of his *Children*, make Choice of their *Wives* with regard to *Extraction*, but only to the Beauty and Agreeableneſs of the *Woman* [d]. Such Cuſtoms, perhaps, may be contrary to thoſe which are receiv'd in this Part of the World; but notwithſtanding the wiſer Part of Mankind ever have, and always muſt allow it to be true, that *Nobility* ought not to depend only upon the *Blood*, but ſhould much rather be raiſ'd and eſtabliſh'd upon *Virtue* [e]. It was a ſevere, but a very proper Anſwer which *Antigonus* gave to the Son of a brave *old Officer*, ambitious of *Honours* he had not deſerved, *'Tis your own Virtue, and not the Blood you derive from your Father, that muſt recommend you to me* [f]. For as *Plato* ſaith [g], "Every Man has had a numerous Race of *Anceſtors* before him, ſome of which were perhaps *rich* Men, and ſome *poor*; ſome may have been *Princes*, and ſome *Slaves*; ſome *barbarous*, and ſome *civiliz'd* [h]." And it is not unlikely, as another ſuſpects [i], that the *Poets* derived their *Heroes* from the *Gods*, only to cover ſome Misfortunes or Defects in *Birth* or *Quality*, which might perhaps have been found out, upon a ſtrict Enquiry into their *Deſcent*. For 'tis certain, *if we were to unravel any Man's Nobility, we ſhould at laſt come to ſomething mean and little* [k]: And therefore *Lycurgus* prov'd by the fam'd *Example* of the *two Dogs*, that it is not *Nature*, but *Education* that forms Men to *Virtue* [l]. And 'tis eaſy for a Man of the *lateſt* Quality to give them of *antient* but corrupt and degenerate *Nobility*, the ſame Anſwer that *Iphicrates* did to *Hermodius*, one of the *old Race* of the *Hermodii*, when he objected to him the *Meanneſs* of his *Birth*, *I am the firſt of my Family, and you are the laſt of Yours* [m]. Nor are there wanting thoſe that argue, that it is unjuſt to *exempt* any Man, or to grant him *Immunity* from any particular *Duty* and *Burden* in the *Commonwealth*, to the *Prejudice* of other *Subjects*; or to give him eaſier *Admiſſion* to *Preferments* and *Offices*, barely upon the Score of *Birth*, which, 'tis certain, can of itſelf confer no extraordinary Virtues, and which it is in no Man's Power to procure for himſelf [n]; ſince others may be as *well*, perhaps *better* acquainted with the *Arts* neceſſary for the *Adminiſtration* and *Management* of thoſe *Offices*, than he is, and particularly if he be a Perſon given to the Enjoyments of Eaſe and Pleaſure [o]. In ſhort, that it may ſeem to be a very great Misfortune in a *Commonwealth*, when the *Civil Sovereign* is ſo tied up and confin'd to a particular *Order of Men*, in diſpoſing Places of *publick Truſt*, that he cannot have the *Aſſiſtance* of his other *Subjects*, though in *Buſineſs* they are well *qualified* for; and eſpecially, if he has not Power to *elect* any Perſon of Worth into ſuch an *Order*. For when it becomes neceſſary for Princes to ſupport and favour the *Nobility* only, that by their Aſſiſtance they may more eaſily reſtrain and keep in Awe the reſt of their *Subjects*, 'tis certain that their *Power* grows feeble, and that the *Reins* of Government are ready to drop out of their Hands; ſince they are forced to enter into a kind of *Faction* with Part of their *Subjects*, to diſtruſt the Force of an *open Authority*, and take Refuge in the *artful Deſigns* of *ſecret Policy*. I ſhall add only what my Lord *Bacon* ſays in his *Advancement of Learning* [a], “That a *Kingdom* that would “be *great*, muſt not increaſe its *Nobility* to too “great a Number.

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[a] *Diod. Sicul.* l. 1. c. 92. *Tullus Hoſtilius* in *Dionyſ. Halicam.* l. 3. p. 148. Ed. *Lipſ.* ſays, I cannot think that human Nobility can conſiſt in any Thing but Virtue.

[b] *Auger. Busbequinus*, Ep. 1. And what he ſaith of the *Janizaries* in the ſame Place.

[c] Martin. *Præf. Hiſt. Sin.*

[d] Neubof. *in legat.* p. 280.

[e] *Senec. Hercul. Fur.* ver. 339, 340. *Qui genus jactat ſuum, aliena laudat.* Boetius *de Conſolat. Philoſoph.* L. 3. Metr. 6.

Quid genus & proavos ſtrepitis?
Si primordia veſtra,
Autoremque Deum ſpectes,
Nullus degener axtat;
Ni vitiis pejora fovens,
Proprium deſerat ortum.

Fondly our high Deſcent we boaſt:
If whence at firſt our Breath we drew,
The common Springs of Life we view;
The airy Notion ſoon is loſt.
Th' Almighty made us equal all,
But he that ſlaviſhly complies
To do the Drudgery of Vice,
Diſowns his high Original.

Horace, *Sat.* 6. l. 1. ver. 7, 8. *to* Mæcenas.

Referre neges quali ſit quiſque parente
Natus, dum ingenuus.

You own 'tis nothing whence a Man began,
When every Action proves the Gentleman.

Claudian, *l.* 2. *ver.* 133. *de Laudib.* Stilicon.

——— *Lectos ex omnibus oris*
Evehis; & meritum, nunquam cunabula quæris
Et qualis, non unde ſatus.

From every Land the Braveſt you ſelect,
And with their Virtues pleas'd, their Blood neglect;
Nor for Deſcent enquire, our noble Lines:
Careleſs of Birth, where Worth ſuperior ſhines.

Add. Seneca *de Beneficiis*, l. 3. c. 28. & Epiſt. 44. and thus *Canulejus* in *Livy*, l. 4. c. 3. The Growth of the *Roman* Empire was owing to this, That no Family was thought mean and contemptible which was eminent for its Virtues. *Herodian.* l. 5. c. 1 The Gifts of Fortune are frequently beſtowed upon ſuch as do not deſerve them; but the Virtues of the Mind are every Man's own proper Glory. And Greatneſs of Birth, Riches, and the like, though we think them happy that enjoy them, yet can add no real Praiſe to a Man, becauſe they are derived from others.

[f] Plutarch. *de vitioſ. Pudore*, p. 534. & *in Apophth.* p. 187. B.

[g] In *Theateto*, p. 128. *C. Ed.* Wech.

[h] There is a Paſſage like this in *Dio Chryſoſtome*, Orat. 15. *de Servitute*, p. 238. *B.* It is impoſſible, that from the Beginning of the World, there ſhould have been any Race of Men, in which there have not been almoſt innumerable Inſtances of ſome of the Progeny that have been Slaves, of others of them that have been Tyrants and Princes, Captives and Criminals, Tradeſmen and Mechanicks; and in ſhort, ſome of all States, Profeſſions, and Conditions, that have been in the World, and that have, in their Turns, gone through all the Buſineſs and Employments, all the Fortunes and Calamities of human Life.

[i] *Dio. Chryſoſ.* ibid.

[k] *M. Seneca*, L. 1. Controv. 6.

[l] *Plut.* Apoph. *Lacon.* p. 225.

[m] *Plut.* Apoph. *Add.* Philo Judæus *de Nobilitate*. Stobæus, *Serm.* 84, 85, 86, 87. Tho. Browne *de Religione Med.* Part. II. c. 1. When I ſpeak of the Vulgar, I do not underſtand the common People only, and the loweſt Dregs of the Rabble. For even among thoſe of the higher Ranks, there is a Sort of vulgar inferior Multitude, you may ſafely ſay, made entirely of the ſame Materials with the meaneſt of the Populace. For my Part, I make no Scruple of ranking them with the Mechanicks, however their Fortunes may conceal the Defects of their Underſtanding, and their Riches ſeem to excuſe their want of Senſe.

[n] Euripides *Electra*, ver. 551.

Πολλοὶ γὰρ ὄντες εὐ γενεῖς εἰσὶ κακοί.

The Noble often are Degenerate.

[o] *Such as thoſe* Ariſtophanes *mentions*, Ran. Act. 3. §. 1. v. 2. That were good for nothing but to Eat and Drink; *or thoſe* Juvenal *ſpeaks of*, Sat. XI. *ver.* 11.

Quibus in ſolo vivendi cauſa palato eſt.

Such whoſe ſole Bliſs is Eating, who can give
But that one brutal Reaſon why they live. Mr. *Congreve*.

XXXII. It may be proper now, in the laſt Place to enquire, whether *Civil Dignity* and *Marks of Honour* depend upon the *ſovereign Power* as to their *Durations* alſo and *Continuance*, as well as in their *Original*. And here it muſt be enquired, whether the *Marks of Honour*, and the *Privileges* and *Rights* annexed to it, are *confin'd* to any particular *Office* or *Employment* in the *Commonwealth*, which the *Sovereign* has the Diſpoſal of; or, whether they are ſettled upon the *Subject* in the *Nature* of *Property*. Upon the firſt Suppoſition, it is evident, the *Sovereign* has the ſame *Power* that he has to appoint or to remove his *Officers* and *Magiſtrates*. *Fabius* the *Cunctator* very well expreſs'd, not only the Greatneſs of his Spirit, but the Submiſſion alſo he thought himſelf oblig'd to pay to the *Power* of the *Commonwealth*, by that Calmneſs of Temper which he ſhew'd, when the *Maſter of the Horſe* was made equal with him, while he continued *Dictator* [b]. *Solon* us'd to ſay, “That *Courtiers* and the *Favorites* of *Princes* “were like *Counters* uſed in caſting up *Sums*; “for as *Counters* ſometimes ſignify a greater “Number, and ſometimes a leſſer, ſo theſe *Creatures* are abſolutely at the Mercy of their “*Princes*, whoſe Pleaſure makes them great and “noble, or mean and deſpicable [c].” But upon the ſecond Suppoſition, when the *Subject* enjoys his *Dignity* and the *Marks* and *Badges* of *Honour* in the *Nature* of *Property*, the *Government* cannot in Juſtice take them from him, unleſs by way of *Puniſhment*. And in this Caſe, as *Ariſtotle* in *Ælian* ſaith [d], *There is a wide Difference between not obtaining Honour, and between being turn'd out of it after a Man has obtain'd it: For it is no great Pain to a Man not to gain what he purſues; but to be diſpoſſeſſed of what he has gained muſt be a ſenſible Affliction.* But notwithſtanding, the *Immunities* and *Privileges* annex'd to *Honour* may either be laid under *Suſpenſion*, or be entirely taken away upon ſome preſſing Emergency in the Commonwealth; *Allowance* being made for them, as it beſt may, in ſome other Method. For ſince the *Extremities* and *Neceſſities* of the *State* muſt alway be ſuppoſed to be *Exceptions* to all ſuch *Privileges*; it would be the moſt extravagant Abſurdity imaginable, to make them *ſacred* and *inviolable* beyond the *neceſſary Defence* and *Preſervation* of the *Commonwealth*. From what hath been ſaid, it may alſo be diſcovered, how far any Commonwealth may with Juſtice enact, that *Children* of *Traytors ſhall be excluded from all Honours in the Commonwealth*? So it was decreed by the State of *Athens* in the *Caſe* of *Antipho*, as appears in his *Life* [e]: And at *Rome*, *Sylla* made a *Law*, that the *Children* of all Perſons *proſcribed* ſhould not appear Candidates for any *Honour*. And the Anſwer to it in ſhort is, that the State may juſtly enough deny them all *publick Dignities* and *Employments*, but cannot rightly deprive them of *ſimple Eſteem*.

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[a] L. 8. c. 3. n. 3. *Vid.* Eſſays, c. 14. *by the ame Author.*

[b] Vid. *Liv.* l. 22. c. 15. 26.

[c] Vid. *Polyb.* l. 5. c. 26.

[d] Var. Hiſt. l. 14. c. 1.

[e] *Vid.* Plutarch. *in Ejus Vit. in Orat.* 10. c. 1.

CHAP.

CHAP. V.

Of the Power of the Sovereign, both over the Publick Patrimony, and the Eſtates of Private Subjects.

The CONTENTS of every Paragraph of the Fifth Chapter.

I. *What Power the Prince hath over the Goods of the Commonwealth, where the Kingdom is his Patrimony.*
II. *The Subjects do not every where owe the Propriety of their Eſtates to the Commonwealth.*
III. *The Sovereign may make Laws to direct the Subjects in the Uſe of their Goods and Eſtates.*
IV. *And alſo impoſe Taxes upon them.*
V. *What is to be obſerv'd in the Impoſition of Cuſtoms.*
VI. *And other Taxes.*
VII. *Of the Sovereign or Tranſcendental Propriety.*
VIII. *What Power the Prince hath over the Goods that belong to the Commonwealth, as ſuch.*
IX. *Of the Alienation of the Kingdom, or any part of it.*
X. *A Prince cannot make his Kingdom a Fief, or mortgage it, without Conſent of his People.*
XI. *Nor alienate any Thing incorporated in the Crown.*

TO underſtand diſtinctly what Power the *Sovereign* has over the *Eſtate* and Fortunes of the Subject, it will be neceſſary to obſerve, that this Power is derived either from the Nature of *Sovereignty* in itſelf; or elſe from the particular Manner of the *Acquiſition* of it. For it is manifeſt, that there is a great Difference between a *Prince* [1], that has rais'd his own Kingdom, collected, as it were, his own Subjects, and who was at firſt the univerſal, abſolute *Proprietor* of every Thing in the Commonwealth; and another freely call'd to Government, and inveſted with *Sovereign Power*, by Perſons already in Poſſeſſion of their diſtinct *Proprieties*. The firſt, it is clear, hath not only all that Power over the *Bona Reipub.* the *Goods* contain'd in the Commonwealth, which flows from the Nature of *ſovereign Power* itſelf, but alſo the ſame which every *Maſter* of a *Family* has to his *Eſtate*, except he is pleas'd voluntarily to remit any Part of his *Right*. If ſuch a Prince therefore keeps his *Propriety* entire, the Subjects can have no better Right to what they poſſeſs, than the *Roman Slaves* had to what they got by their own labour, that is, a *precarious* Poſſeſſion, revocable at Pleaſure, whenever the *Prince* thinks fit. But however, as long as the Subjects are in Poſſeſſion of ſuch *Goods* or *Eſtates*, they may juſtly ſupply themſelves with Suſtenance and other Neceſſaries from them, by way of Wages, for the Trouble of improving and preſerving them. And therefore what *Hobbes* [a] *falſly* applies to all manner of Subjects holds true only with regard to theſe, *viz.* “That the *Propriety*, which a Subject hath to his *Goods*, conſiſts in a *Right* to exclude all other Subjects the Uſe of them, but not to exclude the *Sovereign*; as in a Family, the Father grants ſome of his Sons a *Propriety* to certain *Goods*, diſtinct from the *Proprieties* of other Sons of the ſame Family, but not from that of the Father himſelf; ſo that every Son in the Family enjoys a *Propriety* barely to *ſo much*, and for *ſo long* as the Father pleaſeth.” But if the *Prince* I am ſpeaking of recedes from any Part of his *Right*, the Subjects will have juſt as much *Right* to their *Goods*, as the *Conceſſions* of their *Prince* make over to them. And this, by different *Princes* hath been done different Ways. *Pharaoh* was to have the fifth Part of the *Increaſe* of all the Land of *Egypt* to himſelf; the other four were to continue to Husbandmen; only the Lands that belong'd to the *Prieſts* were not ſold, and they had a third part of the Land by the Donation of *Iſis* [b]. *Strabo* ſays, that in *India* the Land was the Prince's, and Husbandmen were hired to cultivate it for the fourth Part of the Produce [c]. And this is the Cuſtom now in the Dominions of the *Great Mogul*; where the Emperour is alſo Heir to all his Miniſters and Servants, and to all Merchants. In the Kingdom of *Congo* [2] no Subject has any Property which he can tranſmit to his Heirs, but all falls to the Prince; and he adminiſters and diſpoſes the Goods to what Uſes he thinks fit. In ſuch *Countries* therefore, all the *Right* private Subjects have to their *Goods* and *Eſtates*, depends originally upon the Favour of the Prince, who hath an abſolute Power to diſpoſe of all they have, ſo far as the *Compacts* and *irrevocable Grants* he hath made will permit. But after all, it is uſually obſerv'd by *Travellers* of thoſe *Countries*, and particularly of the *Empire* of the *Great Mogul* [d], that that *abſolute Propriety* of the *Prince*, has been the Reaſon why that and other Kingdoms of the *Eaſt*, otherwiſe very happy in the Advantages Nature has given them, ſhould lie wild, deſolate, and barbarous, and either be always poor and decaying, or at leaſt never arrive at the Splendor and Greatneſs of the *European* Nations, where the *Princes* are generally more tender of invading the *Properties* of

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[a] *De Cive*, c. 6. §. 15, *&c.* 12. §. 7.

[b] *Gen.* xlvii. ver. 23, 24, 26. Vid. *Diod. Sicul.* l. 1. c. 21. 72. Et *Grot.* Com. in *Gen.* xlvii. 26.

[c] *Strabo*, l. 15. p. 484. Ed. *Genev. Caſaub. Diod. Sicul.* l. 2. c. 40. Vid. *Garcilaſs* de la Vega, Com. Roy. l. 5. c. 5.

[d] *Bernier* de Nuperis Motibus in Imp. Magn. Mog.

Mr. BARB. *NOTE on* § 1.

[1] See above, in B. 7. c. 6. §. 16.

[2] Vid. *Edvard Lopez.*

of their Subjects, and where Subjects have the Liberty to defend their own, even againſt their *Princes* [a].

II. But there are, on the other hand, Commonwealths, where the *original Right* the Subjects have to their *Properties* does no way depend upon the *Favour* or *Indulgence* of the *civil Government*. And this ſeems to have happen'd theſe two Ways; either *firſt*, when a People under the *Conduct* of a *Prince* they ſet over themſelves remove in Search of *new Seats:* Or, *Secondly*, when a Number of *Maſters* of *Families*, already poſſeſs'd of their ſeveral *Properties*, freely erect themſelves into a *Commonwealth*, or voluntarily join themſelves to ſome *Commonwealth* already eſtabliſhed, and ſubmit themſelves and their Fortunes to *civil Government*. In the former Caſe, the Method uſually obſerv'd is this: The whole Body of the People, under the Conduct of their *Leader*, poſſeſs themſelves of ſome new *Country*, which perhaps in its large Extent is bounded by Limits which Nature her ſelf, or the arbitrary Conſtitutions of the World, have given it; but which is afterwards *canton'd* into Parts, and diſtributed to particular Perſons, either by *Lot*, or at the *Diſcretion* of the *Commander*, or poſſibly (tho' very ſeldom) by every Man's own *Choice* [b]. Now in this Caſe, tho' every particular Man's *Property* ſeems rather to be grounded upon the *Leader's* Appointment, than his own *Seiſure*; yet it does not follow, that therefore all he has is owing purely to the Favour of his *Commander*. For every Man that voluntarily went in the *Expedition*, has certainly an abſolute *Right* to ſhare in the *Acquiſitions* of it, and to be conſider'd in the *Diviſion* of the Land [c]. But much leſs do the Properties of the private Subject own any *original Dependency* upon the *Favour* and *Indulgence* of the *civil Sovereign*, where (as was ſuppoſed in the ſecond Caſe) a Number of *Maſters* of *Families*, poſſeſſed of their Liberties and diſtinct *Properties*, freely ſubmit to civil Government. For I take it to be clear, notwithſtanding all that *Hobbes* has ſaid to the contrary [1], that Perſons that live without *civil Government*, in a Liberty of Nature, may nevertheleſs enjoy their ſeveral Properties [2]. For admitting that Nature gave every Man a Right to every Thing, yet this is no Argument why every Man might not, by *Intervention of Compact*, have his ſeparate Property divided to him. And tho' a Compact of two or more about Things left in a Community of Nature, does not in the leaſt prejudice other Men, but leaves them to their full primitive *Right*; yet if all Men conſent by *common Compact*, either *expreſs* or *tacit*, to make a Diviſion of Things, without Diſpute this muſt introduce a true and real *Propriety*. And therefore *Hobbes*'s [3] Aſſertion is falſe, "That every Father of a Family, that is under no Subjection either to another Father, or to any common Maſter, has a common Right to every Thing [d]." Tho' it muſt indeed be allowed, that they that live under *civil Government* have their Properties better ſecured and defended, than they that live in a *Liberty* of *Nature*; for *theſe* muſt ſupport themſelves by their own ſingle Force alone, while the others can call the whole Strength of the Commonwealth to aſſiſt them, either againſt the Encroachments of Foreigners, or the Injuries of their Fellow-Subjects [e].

III. In Commonwealths therefore, where the Properties of the Subjects do not *originally* depend upon the Government, the civil Sovereign hath no further Power over them than what immediately flows from the Nature of the *Supream Power* in it ſelf, unleſs the Subjects freely conſent to enlarge it. "Every Thing, ſays *Seneca* [f], by a *civil Right* may be ſaid to belong to the *Prince*, while yet the particular Parts of that wide Poſſeſſion are divided among different Proprietors, and every Thing belongs to a diſtinct Owner. And therefore, when we preſent our Prince with our *Houſes*, our *Slaves*, or our Money, we do not think we give him back his own. The *Prince* hath indeed a Power over all we have, but the *Propriety* is in the *private Subject*. 'Tis common to ſay, that ſuch and ſuch *Territories* belong to the *Athenians* or *Campanians*; but the People of thoſe *Countries* diſtinguiſh and divide them further between one another by private *Boundaries*; the whole Extent of a Country may be under ſuch or ſuch a Commonwealth, but there are diſtinct *Proprietors*, who have their ſeparate Portions of it. And therefore we may give away our *Eſtates* to the *Publick*, tho' in ſome Senſe they may be ſaid to have belong'd to it before; becauſe the Title we have to them is of a very different Nature from that which the *Publick* can be ſaid to have. For the *Prince* poſſeſſes all by his *Sovereign Command* and *Authority*, the *private Subjects* by their *Propriety* [g]." And therefore the Emperour *Adrian*, when the People petition'd him to give a Slave Liberty that had pleas'd them in the *Chariot-Race*, reprimanded them for it, and told them, That *it neither became him to free another Man's Servant, nor them to offer ſuch an Injury to his Maſter* [h]. And the Emperour *Claudius* made an Edict, to ſuppreſs a common Practice of begging other Mens Eſtates of the Emperor; it being an Opinion current at that Time, that it was in his Power to give them away; and he reſtor'd an Eſtate he had obtain'd that way himſelf, when he was a private Subject [a]. But now this Power we are here ſpeaking of, may, I think, be properly enough reduc'd to three Heads: Firſt, to the Right of making Laws to direct ſuch a Proportion in the *Uſe* and *Conſumption* of certain *Goods* and Commodities, as the State of the Commonwealth requires. Secondly, to the Right of levying *Taxes*. Thirdly, to the Exerciſe of the *Tranſcendental Propriety* [b]. To the firſt Head we may reduce all *Sumptuary Laws* [1], or ſuch as preſcribe Bounds to extravagant unneceſſary Expences, which would in Courſe of Time be the ruin of private Families, and in conſequence weaken the Commonwealth it ſelf, by carrying the publick Money abroad into *foreign Countries*; whither the Humour or Vanity of Luxury and Waſte generally runs [c]. Beſides, another Inconvenience to be prevented by ſuch Laws is this, That they that ſquander away their Fortunes extravagantly, make themſelves incapable of ſerving the Publick. For a Man, for Inſtance, that ſpends but two Parts in five of what he hath yearly

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[a] Garcilaſſ. *de la Vega*, *Com. Roy.* l. 5. c. 2. relates, That it was the Command of the *Ynca's*, that none of their Subjects ſhould be obliged to plow the *Emperor*'s Lands, before they had taken care of their own; becauſe it was not likely any Man would be ſo diligent as he ought in his *Prince*'s Buſineſs, that had not before well ſettled his own. The Poor, the ſame *Hiſtorian* ſays, were always look'd upon to be an uſeleſs Multitude among them, both in War and Peace.

[b] See *Cornel. Nepos* in *Miltiades*, c. 2.

[c] Vid. *Geneſ.* xiv. 14, 21, 22, 23, 24. Vid. Supr. l. 4. c. 6. §. 3, 4.

[d] Vid. *Geneſ.* iv. 4. xiii. 5, *&c.*

[e] Vid. *Geneſ.* xxxiv. 30. Vid. *Xenoph.* Memorab. l. 2. p. 433. Ed. *H. Steph.* *where* Socrates *ſaith*, A Man is happier that lives ſecure in Society with a moderate Fortune, than he that leads a lonely melancholy Life, full of Fears and Dangers in the Enjoyment of the Riches of a whole Commonwealth. *And in this Senſe we may admit of what* Cicero *ſaith*, Orat. pro *Cæcina*, *c.* 25. That if we take away Civil Right and Government, there will be no Diſtinction left between one Man's Property and another's; *and in his* 2d *Book of Offices*, c. 21. *more clearly*, The chief Reaſon why Commonwealths were inſtituted, was, that every Man might enjoy what was his own*:* For tho' Men were by Nature directed to Society, yet they found it neceſſary to erect Cities for the Security of their Properties.

[f] *Senec.* de Beneficiis, l. 7. c. 4, 5.

[g] Vid. *Grot.* Com. in 1 *Reg.* XVI. 24.

[h] *Zonaras*, Tom. 2.

Mr. Barb. *NOTES on* § II

[1] *Ubi Supra.*

[2] See above, in B. 3. c. 4. §. 2, 3.

[3] *De Cive*, c. 6. §. 15.

And therefore it was a Miſtake in the Emperor **Frederick** to think that

Quicquid habet locuples, quicquid cuſtodit avarus,
Jure quidem noſtrum, populo concedimus uſum.
Rege ſiguratam Regis patet eſſe monetam;
Cæſaris & domino ſub Cæſare fulget imago.

All that the Rich and Covetous receive,
Is mine by Right, to them the Uſe I give;
The Royal Stamp, who claims the Coin, declares,
And *Cæſar*'s Money, *Cæſar*'s Image bears.

Gunth. Ligurinus, *l.* 3. *ver.* 480, *&c.*

It may be obſerv'd, that in theſe two laſt Verſes, there is an Alluſion to what our *Saviour* ſaid to the Diſciples of the *Phariſees* and *Herodians*, after he had ask'd 'em *whoſe Image and Inſcription* the Piece of Money they brought him as Tribute bore: They anſwer'd *Cæſar*'s; upon which he replied, *Render unto Cæſar the Things which are Cæſar's, and unto God the Things that are God's*. Matt. xxii. *ver.* 19, *&c.* But this does not prove, that by Right all the Subject's Goods belong to their Sovereign, as ſeveral of the Reform'd in *France*, have improperly maintain'd, who were in an Error, with regard to the Rights and Authority of the Prince. (*Nouvel. de la Republ. des Lettres, Avril* 1703. p. 415.) Our Saviour only means, that ſince the *Jews* made uſe of the Emperor's Coin, it was a Sign of his being Maſter of their Country, and of their tacit acknowledging him for their lawful Sovereign; ſo that they ought to obey him in every Thing that was not contrary to the divine Laws. See the Interpreters on this Paſſage.

[b] *Dominium Eminens.*

[c] V. *Plin.* Nat. Hiſt. *l.* 6. *c.* 23. The *Arabians* are certainly the richeſt People in the World, for they are the Merchants that exhauſt the Wealth of the *Roman* and *Parthian* Empires: They are continually importing among us the Produce of their Seas or Woods, and never buy any Thing of us in return. *N. H. l.* 6. c. 28. Every Year conſtantly the *Indies* drain us of little leſs than 500000 *Seſterces*, beſides that the Commodities we have from thence ſell here for an hundred Times double the Advantage they do there. *Vid. l.* 12. *c.* 18. *N. H.*

Mr. BARB. *NOTES on* §. III.

[1] "The other almoſt incurable *Evil* in a State (*ſays the Sage* Mentor *to his Pupil* Telemachus,) is Luxury. As too great Authority poiſons Kings, ſo does Luxury a whole Nation. 'Tis pretended that Luxury ſerves to maintain the Poor at the Expence of the Rich, as if the Poor could not get their Livelihood, by increaſing the Fruits of the Earth, without effeminating the Rich by the Niceties of Voluptuouſneſs. When once a Nation is accuſtom'd to look upon Superfluities to be Neceſſaries of Life, they will every Day be inventing new ones. They can no longer diſpenſe with the want of Things, which were utterly unknown thirty Years ago. This Luxury is call'd a nice Taſte, and the Perfection of Arts; this Politeneſs of a Nation, this Vice that draws ſo many after it, is commended as a Virtue, and ſpreads its Infection to the very Dregs of the People. The King's Relations imitate his Magnificence and Grandeur, the Nobility that of his Relations, and the Gentry or middle Sort of People equal the Nobility; for who is he that does himſelf Juſtice? The common People will paſs for Gentry, every Body lives beyond what he has; ſome out of Pride and Oſtentation to ſhew their Riches, and others out of an ill Shame, and to conceal their Poverty. Thoſe even who are ſo wiſe as to condemn this great Diſorder, are not wiſe enough to dare being the firſt in ſetting a contrary Example. Thus a whole Nation is ruin'd; and all Orders and Diſtinctions confounded. The Deſire of getting Riches to ſupport a vain and extravagant Way of living, corrupts the pureſt Minds. Their only Buſineſs is to be rich; to accompliſh which, they borrow, they cheat, and uſe a thouſand other mean and unworthy Artifices. *Avantures de Telemaque*, Tom. 5. p. 120, 121. Hiſtory informs us (to borrow Mr. *Le Clerc*'s Words, in the *Parrhaſiana*, Tom. II. p. 275, *&c.*) that *Julius Cæſar* had never attempted to deſtroy the Liberties of his Country, had he been able to have pay'd the Debts which he had contracted by his exceſſive Prodigality; or had known how to have ſupported his expenſive Way of living. (See *Suetonius* Cap. 30.) Abundance of People ſided either with him, or *Pompey*, only becauſe they wanted to ſupply their Luxury, and were in hopes of getting by the Civil Wars, enough to ſupport and maintain their former Pride and Greatneſs. (See *Salluſt. ad Cæſarem, de Republ. Ordinanda*, and the other Authors of that time.) One may ſay the ſame Thing of all ſorts of Crimes, which every Hour, as it were, knock at the Door of indigent and proud Perſons, and which ſeldom are deny'd Entrance, when they come attended with a large Sum of Money. To prevent theſe Evils and Diſorders, there is nothing ſo uſeful as good *Sumptuary Laws*, that reſtrain Luxury, and a rigorous putting them in Execution. By which—*you deprive Money, which is the moſt pernicious Thing in the World, of its Uſe and Luſtre—Id ita eveniet, ſi pecuniæ, quæ maxima omnium pernicies eſt, uſum atque decus demſeris.* (Salluſt. Orat. 1. *de Republ. Ordin.*) By that alſo we procure ſtill another Advantage to the State, which is of no ſmall Conſequence, and that is, that People marry on much eaſier Terms, when a moderate Expence is ſufficient for the Maintenance of a Family, than when they cannot handſomely avoid a greater; which, however, there are abundance of honeſt People, that are not able to be at. *Auguſtus* alſo, being deſirous to reform the Manners of the *Romans*, among other Laws that he either made or renew'd, eſtabliſh'd at the ſame Time both the *Sumptuary Law*, and that *de maritandis ordinibus*, which oblig'd the *Romans* to marry. (See *Sueton* Cap. 34.) If he could not oblige the *Romans* to obſerve the ſecond, it is very likely, it was becauſe the firſt was not ſevere enough (ſee *Tacit. Ann. Lib.* 2. Cap. 37.) We muſt obſerve farther, that abundance of People who decline Marriage upon the foreſaid Reaſon, make no Scruple to commit all manner of Debauchery, which tends to the utter Ruin both of private Families, and the Commonwealth too, and which ought to be prevented by *Sumptuary Laws*. See what Mr. *Le Clerc* adds concerning the Republicks of *Venice* and *Geneva*." To make theſe *Sumptuary Laws* more effectual, Princes and Magiſtrates themſelves, *ſhould*, as the Author of *Telemachus* obſerves, "*By the Example of their own Moderation, put thoſe out of Countenance that love Extravagance, and encourage the Prudent, who would eaſily ſubmit to follow the Pattern of an honeſt Frugality.*" To this we may add, the fine Paſſage of *Montaigne*'s, on the ſame Subject. "The Manner, ſays he, in which our Laws endeavour to regulate the vain and fooliſh Extravagance in our Clothes and Eating, ſeems to be contrary to the Intention of it. The true Way would be, to raiſe in Mankind a Contempt of Gold and Silks, as Things vain and uſeleſs; but we enhance their Honour and Value which is a ridiculous Method of putting People out of Conceit with 'em. For ſuppoſe, that none but Princes were allowed to eat Turbot, and to wear Velvet, and gold Lace; and the People prohibited the uſe of 'em; what would it be but to bring thoſe Things into Credit, and make every Body deſirous of having them? Let Princes boldly part with theſe Marks of Grandeur, they have enough of others; ſuch Exceſſes are more excuſable in another Perſon than a Prince——'Tis ſtrange how eaſily and ſuddenly Cuſtom aſſumes an Authority in theſe indifferent Matters: They had ſcarce worn black Cloth a Year at Court for Mourning for *Henry* II. but Silks were already grown ſo very contemptible in every Body's Opinion, that whoever appear'd dreſs'd in 'em, was immediately taken for ſome Citizen or Tradeſman. At laſt none but Phyſicians and Surgeons wore 'em; and tho' every Body went dreſs'd pretty near alike, yet there were beſides apparent Diſtinctions enough of Mens Qualifications.—Let Kings begin to leave off theſe Expences, and it will be done in a Month, without either Edict or Ordinance; we ſhall all follow after. The Law ſhould expreſs the contrary, That all except Whores and Watermen, were prohibited to wear Scarlet, and Gold and Silver. By ſuch an Invention *Zaleucus* reform'd the corrupted Manners of the *Locrians*, Eſſay, L. I. Chap. XLIII.

yearly coming in, and pays two more in Taxes to the *State*, feels no Inconvenience by it, and lays up to increaſe his Stock one fifth Part more; whereas one that ſpends every Year all he receives, if he pays never ſo little to the *Publick*, muſt either leſſen his Eſtate, or retrench his Expences. Of this Sort were thoſe *ſumptuary Laws* in the *Roman* Commonwealth, which *P. Manutius* recounts out of *Macrobius* [a]. And that Law of *Plato's* [b], "by which he would not have a Marriage Invitation bring together more than ten Perſons, and thoſe Relations; nor that Perſons of the beſt Quality ſhould ſpend above a *Mina*, or ten Crowns, on ſuch Occaſions [c]." To this Head alſo may be reduced *Laws* againſt Gaming [d], and *Prodigality*; of which Nature was *Periander's Law* at *Corinth*, by *which no Man was allowed to ſpend more than he had coming in* [e]. A Law which deſerves to be particularly enforced upon Perſons concern'd in the publick Affairs and Places; ſince it is very well obſerv'd [f], *That 'tis impoſſible any Man ſhould govern well in the Commonwealth, that is negligent in his own Concerns, or forbear miſpending the publick Treaſure, that hath uſed to live above his private Fortune; for a Man that hath managed his own ill, muſt be ſuſpected when he undertakes for others* [g]. And further, under this *Head* we may rank all *Laws* that determine the *Rates* and *Quality* of *Poſſeſſions* and *Eſtates*: Such was the *Licinian* at *Rome*, That *no Man ſhould have a Poſſeſſion of more than five hundred Acres of Land, nor above one hundred Head of large Cattle, or five hundred of the Leſs* [h]. As alſo the *Law*, which *Ariſtotle* ſays was generally obſerv'd in *popular* Governments, That no *Man ſhould ſell his firſt Inheritance.* And *Oxylus's Law*, That *Money ſhould not be lent upon Mortgage of Land* [i]. As alſo that *Decree* of the *Roman Senate* [k], that *all Candidates for Offices in the Commonwealth ſhould be obliged to turn a third Part of their Eſtates into Lands in* Italy. And we may further reduce under this *Head* all *Laws* that determine the *Quantity* and *Meaſures* of *Grants* and *Legacies*, that lay *Reſtraints* upon *the Power of making Wills*, or that put a Stop to *Exceſs in dedicating Things to pious Uſes* [l]. As alſo *Laws* that forbid *certain Subjects* to poſſeſs *certain kinds of Goods*; as in *India* no private Subject is allow'd to keep an *Horſe* and an *Elephant*, the Prince only enjoying that Privilege [m]. Moreover, Laws againſt *idle* [1] *and lazy People*; ſuch as was that among the *Nabathæi*, by which *every Man was publickly puniſhed that waſted his Eſtate* [n]. And thoſe *againſt Perſons that ſuffered their Eſtates to run to ruin purely by Careleſneſs and Neglect* [o]. And that made by *Amaſis* King of *Egypt*, by which *every Subject in his Kingdom was obliged every Year to make it appear to the Governor of the Province he liv'd in, what Trade or Profeſſion he was of, making it Death for any Man to refuſe to obey* [p]. To this *Head* alſo belong thoſe *Laws*, by which *Subjects* are forbid the *Acquiſition* of *certain Goods*, and to increaſe their *Eſtates certain particular Ways*: So *Pliny* ſays, there was a *Decree* of the *Roman Senate*, to *forbid the digging after any kind of* Ore *or Metal in* Italy, *tho' it was very well known that no Country had greater Abundance or Variety* [q]. To this *Head* belongs alſo the famous *Venetian Law*, *by which no Subject of that State can, either by Will or Sale, or any other Way, upon any Account, leave, ſell, or alienate the Perpetuity of any immoveable Goods to the Church, or Perſons Eccleſiaſtical, without Leave from the Senate* [r]. And laſtly, the *Laws* that forbid the *Exportation of Money*, and command that all *Trade* with *Foreigners* ſhall be managed by *Barter* only, and *Exchange of Commodities*.

IV. But

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[a] Manut. *de* L L. *Roman.* Macrob. *Saturnal.* l. 3.

[b] Plato *de* L L. l. 6. 870. D. E. Ed. *Francof.*

[c] Vid. *Ælian.* Var. Hiſt. *l.* 3. *c.* 34. *Garcilaſs* de la Vega, Com. Roy. *l.* 5. *c.* 11.

[d] Vid. L. 11. t. 5. *D. & C.* L. 3. t. 33. de Aleatoribus. *Gratian.* c. 7, 8, 9. Diſtinct. 86.

[e] *Heraclides* de Politiis.

[f] *Polyb.* l. 10. Excerp. Peireſc.

[g] *Lucian* in Antholog. T. 2. p. 834. Ed. *Amſt.*

[h] Vid. *P. Manutium de* L L. Rom. *Numb.* xxxvi. 7, 9. *Ariſtot.* Polit. *l.* 2. *c.* 5, 7. *l.* 6. *c.* 4, 5.

[i] Vid. *L L. Burgund.* tit. 84. §. 1.

[k] *Plin.* l. 6. Epiſt. 19.

[l] *Exod.* xxxvi. 6.

[m] *Strabo*, l. 15. p. 484. Ed. *Gen*

[n] *Strabo*, l. 16. p. 539.

[o] Vid. *Gellium*, l. 4, c, 12.

[p] *Herodot. Euterpe*,

[q] *Plin.* Nat. Hiſt. *l.* 3. *c.* 20.

[r] *Maurocenus*, Hiſt. Ven. *l.* 17.

Mr. Barb. *NOTE on* §. III.

[1] "Idleneſs, or Want of honeſt and uſeful Employment, is the Source of an infinite Number of Diſorders: The Spirit of Mankind being of ſo buſy and active a Nature as it is, cannot remain in a State free from Action; and if it is not employ'd in ſomething that is good, it inevitably applies itſelf to what is ill: For tho' there are ſome Things of an indifferent Nature, they become ill when they wholly engroſs the Mind to themſelves: If it is true, however, that there are idle Perſons in the World, that buſy themſelves more about indifferent Things than ill ones. ——— One cannot commend thoſe who ſpend their whole Time in Things neither uſeful to Man, nor pleaſing to God; if it is true, as there is no doubt of it, that Men were born to do Good. But —— we ſee by Experience, that thoſe who apply themſelves to no honeſt Calling, generally run into Debauchery, or Gaming. —— It were then to be wiſh'd, that there were Laws againſt Idleneſs, to prevent its ill Conſequences, and that no Perſon were ſuffer'd to live without having ſome honeſt Buſineſs to follow, either of the Mind or Body. ——— Thoſe that aim at Employments, either Political, Eccleſiaſtical, or Military, ought not to be ſuffer'd to ſpend in Idleneſs their youthful Time, which is moſt proper for the Study of Morality, Politicks, Religion, and the Art of Reaſoning, and, if they pleaſe, Mathematicks, and Hiſtory. There are ſtill other Perſons that betake themſelves to nothing but only eating and drinking quietly the Eſtates that their Relations left 'em, and care not for learning any Thing, being well enough ſatisfied with themſelves, if they do not conſume their main Stock. All the Virtue of thoſe Men conſiſts in regulating their Expences, ſo as not to live beyond their Income. But if their Eſtates are conſiderable, it infallibly happens that they make an ill Uſe of 'em, and plunge themſelves into a thouſand Debaucheries, which make 'em grow uſeleſs both to others and themſelves. —— We muſt compel 'em to follow the Advice which *Ovid*, who had but too well known the ill Effects of Idleneſs, gives in his *Remedia Amoris*, ver. 135.

Ergo ubi viſus eris noſtræ medicabilis arti,
Fac monitis fugias otia prima meis.
Hæc ut ames faciunt, hæc ut fecêre tuentur;
Hæc ſunt jucundi cauſa cibuſque mali,
Otia ſi tollas, periêre Cupidinis arcus
Contemptæque jacent, & ſine luce faces.

When you ſeem fit my healing Art to try,
From Idleneſs at firſt be ſure you fly:
'Tis that, that in your Boſom rais'd the Flame,
And with freſh Fuel ſtill ſupplies the ſame.
Be ſtill employ'd, and *Cupid's* Darts and Bow,
Together with his Torch, will uſeleſs grow.

Parrhaſiana, Tom. II. p. 279, *&c.* See the Law of the *Egyptians* mention'd above, Book III. Chap. 3. § 2. & *Herodot.* in *Euterp.*

IV. But Secondly, a farther *Right* which belongs to the *Sovereign* is, that he can take away Part of the *Goods* of the Subject by way of *Tax*. For *Taxes* moderately impoſed, and faithfully laid out in the Service of the *Publick*, are only the *Wages* which every Man pays the Commonwealth for the *Defence* and *Security* of himſelf and Fortunes; and to maintain the *Expences* unavoidably neceſſary to that End. And therefore when *Nero* propos'd to give Orders to lay aſide all ſorts of *Taxes*, ſuppoſing that *that would certainly be the nobleſt Grant he could ever poſſibly make to the World, the Senate put a Stop to his Heat, by ſhewing him that the Empire muſt be diſſolv'd and ruin'd, if he cut off the Revenues from it that ſupported it* [a]. Which if a Man will be at the Trouble fairly to conſider, he will be forced to confeſs, that the Complaints of the People (who are apt to think the Burthen of the Taxes the great Occaſion and Cauſe of all their Miſeries) are generally very *unjuſt*, as well as very *impudent* [b]. But their Complaints are moſt groundleſs and intolerable, *that wear whole Eſtates upon their Backs* (as *Plautus* ſays [1]) *and yet when they are to be tax'd, pretend they are not able to pay, though at the ſame Time they find enough to allow their Vanity, which lays a much more unreaſonable Tax upon them, than the State.* Archidamus *in his* Peloponneſian War, *when his Allies deſired him to ſettle ſome ſtated Proportion for their Contributions*, told them, that *War could not be carried on by fix'd Allowances*, for that *there is no determining before hand, what Supplies of Money will be neceſſary* [c]. *It being impoſſible for them that engage in a War to know what will be the certain Event of it* [d]: For it very ſeldom happens, that as *Cato* ſaid, *a War will maintain itſelf*. And indeed in general, the *publick Expences* cannot be confin'd within any particular Bounds, becauſe of that Variety of Caſualties and Accidents which happen, and which do not depend upon *ourſelves*, but our *Neighbours*, which will always demand *Supplies* of *Money* to be defeated or avoided [e].

V. However, a *wiſe Prince* will ſo far comply with the *querulous* Humour of his People, as to take care that his *Taxes* be collected with as little Diſturbance, and as much Gentleneſs as poſſible. Now the Generality of People think it harder to be obliged to part with what they look upon to be their *Property*, than to be denied the *Appropriation* of ſome few particular Things [f]. 'Tis generally true, *that Men have hardly any Senſe of publick Calamities* (as Hannibal *told the* Carthaginians) *but when they affect them in their private Fortunes; and there is no Loſs they feel ſo much, as that which touches any Part of their own Eſtates.* And therefore ſome have thought it the beſt Way to provide for that Inconvenience once for all, and ſet aſide a *Portion* of their *Eſtate*, purely for the Uſe and Service of the *Publick* [g]. Some again are of Opinion, that the Generality of the People are burthen'd leſs by *Taxes* rais'd by *Cuſtom* or *Exciſe*, than when levy'd in a Way of *Subſidy* and *Tribute*. In laying *Impoſitions* or *Cuſtoms* upon *foreign Commodities imported*, it ſhould be conſider'd, whether the *Commodities* are for *neceſſary Uſe*, or only for *Luxury*. If they are of the latter Kind, the *Cuſtom* may very juſtly be laid heavier, to prevent and ſuppreſs *Extravagance* and *Riot*; and becauſe the *Rich*, or *they that enjoy large Privileges otherwiſe*, and contribute little to the *Publick*, are generally the only *Buyers*. It ſhould alſo be conſider'd farther, whether the ſame *Commodities* might not be produc'd at home, or wrought to the ſame Perfection, by the *Induſtry* and Application of our own *People*. And if it appears they may, the *Impoſts* ought to be rais'd higher upon them, *eſpecially* upon *Commodities* that ſerve only to ſupply *Luxury* and *Vanity*, and make us pay Tribute to other Nations, *not for our Land, indeed, or Poſſeſſions, but what is much worſe, for our Folly* [h]. As to the *Exportation* of *Commodities*

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[a] *Tacit.* Ann. 13. c. 50. *Vid. Hiſt.* 4. *Tac.* c. 74. where *Cerealis* tells the *Treviri*, All the Harm we have done you by our Right of Conqueſt, hath been only to defend and ſecure your Peace; for it is impoſſible to ſupport Peace in the World without War, to maintain a War without Money, or to have Money without a Supply from Taxes. *Iſæus*, Orat. 6. He thought that he ought to be very thrifty in his own Expences, and reſerve all that was left for the Uſe of the Publick, that there might be enough to defray the Charges of the State. *Themiſtius*, Orat. 14. The Laws forbid every Man that is return'd into the Exchequer, to take any Place of publick Truſt, before he hath diſcharged that Debt.

[b] Vid. *Hobbes* de Cive, c. 12. §. 9.

[c] *Plut.* Apophth. p. 219. & in *Craſſus*.

[d] *Procop.* de Bello *Perſic.* L. 2. c. 26.

[e] It will not be impertinent to the Diſcourſe, or difficult to apply to any *Preparations* for *War*, what is mention'd by *Nicetas Choniates*, l. 1. "The Emperor *Manuel Comnenus* was over-perſuaded by his Treaſurer *Joannes Puzenus* to apply the Money that was "uſually raiſed to maintain a *Navy*, to his own Uſe, and bring it into the *Exchequer*. The Reaſons he gave to induce him to it were, "That the State had not always occaſion for a *Fleet*; and that the Charges to keep it were conſtant, and ran generally very high; and that "therefore it would be a better Way to call the Money into the *Exchequer*; and whenever the Poſture of Affairs made a *Fleet* neceſſary, "the *Emperor's Coffers* would be full enough to defray the *Expences* of it. The Propoſition took, and *Puzenus* was applauded for an "extraordinary Man, and look'd to have more than common Sagacity and Skill in the Management of *publick Affairs*. But in Reality "the greateſt Enemy to the Commonwealth could not have given more pernicious Advice. For he deceived the *Emperor* two Ways; "on the one hand, by miſrepreſenting the Greatneſs of the Expence; and on the other, by falſely ſtating the Eaſineſs of the Charge it "might be reduc'd to. And upon this Counſel, raſhly given, and obſtinately adhered to, the *Provinces* that lay upon the Sea were "continually afterwards infeſted with *Piracies*. And therefore the *Hiſtorian* infers, that the Calamities that followed might as juſtly be "charged upon the Author of that *Advice*, as a *Fire* is as much upon the Perſon that does not put it out when he can, as him that at "firſt kindled it." Vid. *Niceph. Gregoras*, l. 6. who gives an Account of ſome Inſtances, in the publick Affairs like this, in the Time of *Andronicus Paleologus*.

[f] Vid. *Liv.* l. 5. c. 23. l. 30. c. 44. *Plut. Camillus.* Where the People took it very ill, that they were forced to give back a Tenth Part of the Booty that had been ſhared among them. *Homer*, Iliad. 1. ver. 125, 126.

'Αλλὰ τὰ μὲν πολίων ἐξεπράθ, μενο τὰ δέδασται
Λαοὺς δ' οὐκ ἐπέοικε παλίλλογα ταῦτ' ἐπαγείρειν.

W'have ſhar'd the Spoils of the victorious Field,
And none will to a new Diviſion yield.

Claudian de Laudib. Stilicon. l. 1. ver. 379, 380.

——— *Graviorem amiſſa dolorem*
Quam necdum quæſita, movent,

The Loſs of our Enjoyments grieves us more
Than not to have enjoy'd. ——

Vid. L. 24. t. 1. l. 5. *D. de Donat. inter Virum & Uxor.*

[g] Vid. *Diodor. Sicul.* l. 1. c. 72. *Paulum Warnefridum* de Geſt. *Longobardorum*, l. 3. c. 16.

[h] *Dio Chryſoſt.* Orat. 79. p. 664. D. Ed. *Morell*

Mr. BARB. *NOTE on* §. IV.

[1] In *Epidicus*, Act. 2. Scen. 2. ver. 42, &c.

modities of our own Growth, it ſhould be conſider'd whether it be the Intereſt of the Commonwealth, that they ſhould not be *exported*; or whether it be neceſſary to ſend them to *foreign Markets*, that the Subjects may have a Way to continue *Trade*, or increaſe their Wealth. The firſt naturally *raiſes* the *Cuſtoms* upon the *Commodities*, the ſecond *lowers* them. But beſides, it may be further conſider'd, whether our *Commodities* are abſolutely neceſſary in *other Countries*, and whether they are to be had from any other *Place*. For all know the Induſtry and Diligence of the *Merchant*, and what Difficulties and Dangers he will venture himſelf in, upon the Hopes of *Advantage*; and that if the *Impoſitions* upon their *Commodities* be too high in one Place, the *Market* will ſoon be carried to another; or elſe that they that buy, will content themſelves to be without the Commodities; as *Gallianus* once ſaid, *What can't we live without this Egyptian Linen, and can't the Commonwealth be ſafe without theſe Robes of Honour?* And in my Opinion, *Heſiod*'s Rule may be very well apply'd to *Cuſtoms*, πλέον ἥμισυ παντὸς [1], *The Half is more than the Whole.* For a good *Harbour* is worth but very little, when it hath loſt its *Trade*. And ſuch a *Conſtitution* too as *Nero* made, might poſſibly deſerve Conſideration, *That Veſſels of Trade ſhould not be taken into the Valuation of Eſtates*, and that the *Merchants* ſhould not be obliged to pay *Taxes* for them [a]. The Government ſhould alſo provide againſt the *Frauds*, which *Collectors* of *Cuſtoms* uſually have, to promote their own private *Gains*, and take care to hinder their *Importunity* and *Impertinence*, and the *Trouble* they give *Subjects* and *Traders*, which are born with more Impatience and Regret, than the *Cuſtoms* themſelves. Thus *Dio Caſſius* B. 42. ſaith, *That* Cæſar *deliver'd* Aſia *from the Exactions and Oppreſſions of the Publicans, and reduced all their Cuſtoms into a Form of Tribute* [b]. So *Tacitus* [c] commends an *Edict* of Nero's, *by which he commanded, that the Laws relating to the Taxes, that had been out of uſe till then, ſhould be entirely laid aſide; and that no Suit for any Tax that had been dropp'd, ſhould be reviv'd after the Year was expired; and that the Magiſtrate ſhould have a Power extraordinarily to paſs Judgment againſt the Publicans.* Neither indeed ſhould the *Exchequer* itſelf be always allowed too much Favour, becauſe that *ſeldom loſeth a Cauſe, but under a good Prince*, and becauſe *there are never wanting thoſe that have Impudence enough to aſſiſt all its Pretenſions* [d].

VI. But in *levying Taxes*, and indeed any ſort of *Impoſition* upon the *Subjects*, particular Care ſhould be taken not to give any juſt Occaſion of Complaint, which will be unavoidable where the *Taxes* are laid unequally. For as *Hobbes* very well obſerves, *A Burthen which the whole Body of Subjects may poſſibly think eaſy and gentle, will if any conſiderable Number releaſe or excuſe themelves, lie heavy and inſupportable upon the reſt* [e]. For generally, it is not the *Tax* itſelf, ſo much as the *Diſproportion* and *Inequality* of it, that ſits uneaſy upon the People, either from the Diſcontent that followeth upon the *Injury*, or from *Envy* that others ſhould be excuſed. And indeed, ſince all that the Subjects pay the Commonwealth, in Reality, is nothing elſe but the *Price* of *Peace*, 'tis but reaſonable, that ſuch as have an equal Share in the *Peace*, ſhould pay equally for it, by aſſiſting the Commonwealth, either with their *Money* or their *Perſons*; ſo that all *Immunities* and *Privileges* granted in Commonwealths to particular *Men*, or *Orders of Men*, are no further reaſonable, than as they who enjoy them *balance* them, by the extraordinary *Merit* of the Service they do [f]. But to diſcover in what this *Equality* conſiſts, it muſt carefully be obſerved, that the *Enquiry* is not after *Equality* in *Money*, but in *Charge* and *Burthen*; or in other Words, it is not neceſſary to this *Equality* I ſpeak of, that every Man ſhould pay an *equal Sum of Money*, but that the Share every Man is to pay, ſhould not lie heavier upon one than another, which may eaſily enough be effected by making the *Proportions* equal, between the *Burthen* of the *Tax* and the *Benefit* of *Peace*. For though all equally enjoy *Peace*, yet they do not all make the ſame *Advantages* by it. Some get much more than others; and again, ſome ſpend much more than others. And from hence *Hobbes* makes an Enquiry; “Whether the Subjects ought to contribute to the Publick, in Proportion to what they *get*, or what they *ſpend?* or whether a Man ſhould be *taxed* according to what he hath *coming in*, or according to what he *conſumes?*” Where firſt I think I may ſay, that ſince every Man is ſecured in his *Property* by the Care the Commonwealth takes of him, he may juſtly be *taxed* in proportion to his *Income*, as *Servius Tullius* ſaid, in Defence of the *Inſtitution* of the *Cenſus* [g]: *It is very juſt, I think, and very much for the publick Good, that ſuch as have large Fortunes ſhould pay largely, and ſuch as have leſs in a due Proportion.* And thus all *Subſidies* levied upon extraordinary Exigencies in the Commonwealth, ought to be laid according to the *Value of Eſtates*. And then, ſecondly, ſince every Man's Life is defended by the Sword of the Commonwealth, and Life is equally dear to *Poor* and *Rich*, they are both equally obliged to attend the Service of the Wars, and to pay an equal moderate *Tax* upon that Account, ſuch as a *Poll-Tax*, in which the *Rich* pays no more than the *Poor*. But becauſe it is owing in like Manner to the publick Care of the Commonwealth, that the Subjects have the Advantage and Opportunities of raiſing Eſtates by their own Induſtry, the great Difficulty in this Caſe is, how the *Tax* upon this Account ought to be laid? And perhaps the moſt convenient Way may be, to *tax* Men according to what they *conſume*, rather than what they *get*; eſpecially, ſince Men generally *ſpend* in Proportion to what they have

coming

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[a] *Tacit.* Ann. 13. c. 51.

[b] Vid. L. 39. t. 4. l. 12. *Princip. D. de Publicanis.*

[c] *Tacit.* Ann. 13. d. l.

[d] *Plin.* Penegyr. c. 36.

[e] *Hobbes* de Cive, c. 13. §. 9.

[f] Vid. *Diod. Sicul.* l. 4. c. 73. de *Machaon.* & *Podalir.* *Iſocr.* in laudat. *Buſirid.* de Priv. Sacerd. *Egyptior.* p. 389, 390.

[g] *Dionyſ. Halicarn.* l. 4. p. 215. Edit. *Sylburg.*

Mr. BARB. *NOTE on* §. V.

[1] V. *Heſiod.* Oper. & Dier. ver. 40. ubi vid. *Cleric.*

coming in. For if the *Tax* be laid according to what People have *coming in*; and it ſhould happen that ſome who have equal *Incomes*, ſhould yet have unequal *Poſſeſſions* (which is as common as it is for one Man to be frugal, and lay up what he can, and for another to ſpend what he gets in Waſte and Luxury) the Conſequence will be, that they that equally enjoy the *Benefit* of the *common Peace*, muſt yet bear an *unequal Share* of the *Burthens* of the Commonwealth. For Inſtance, here are two Perſons which get equally an *hundred* Pounds a Year, and one of them ſpends conſtantly *forty* of it, and the other perhaps *fourſcore*; ſince both of them equally enjoy the *Benefit* of Peace, it ſeems reaſonable that both ſhould pay equally for it. But then in this there will be theſe two *Inconveniences*: Firſt, that it will be very difficult for the Government to diſcover what each Subject *gets* every Year by his Induſtry; beſides, that there cannot be a *Review* made ſo often, of what every Man is worth. And Secondly, that if the *Tax* be levied at the Year's End, when both have made up their *Accounts* of what they have *received*, and how much *expended*, and the *Tax* be laid upon each of them in Proportion to what they have remaining of the laſt Year's *Income*; 'tis manifeſt, that one muſt pay double as much as the other, though both equally enjoy'd the *common Peace*. And what is worſe, the one ſuffers for his *Parſimony*, and the other is eas'd by his *Extravagance*. And therefore it muſt be the beſt Method to lay the *Tax* upon the *Things* which are to be *conſumed*, and then every Subject will inſenſibly pay his Share to the *Publick*, in Proportion to his *private Conſumption*, not indeed for what he now actually is, but for what, by the Protection of the Commonwealth, he was formerly poſſeſs'd of; and ſo that which is paid to the *Publick*, will be look'd upon to be Part of the *Price* of the *Things* that are *conſumed* [a]. But what hath been ſaid before, in other Reſpects, of the *Cuſtoms*, may alſo be applied to *Taxes*, and all other *publick Impoſitions* [b]. What Ways of *raiſing Money* Neceſſity may ſometimes force a Government to take, may be ſeen at large in *Ariſtotle*'s OEconomicks, *l.* II. *c.* I. I cannot by the way forbear mentioning a very odd Sort of a *Tribute*, which the *Ynca's* of *Peru* laid upon the pooreſt of their Subject, which was to bring every Year to the Governors of their Provinces, a certain Number of *Gnat's* Horns; the Deſign of which might poſſibly be, either that no Body ſhould think himſelf exempt from paying *Taxes*, or elſe perhaps to free themſelves from thoſe Inſects [c].

VII. [d] *Sovereign* or *Tranſcendental Propriety* (which is the third Head) is what ſome pretend to be afraid of, more upon Account of the *Name*, than the *Thing* [1]. The *Sovereign* Power, they ſay, was erected for the common *Security*, and that alone will give a *Prince* a ſufficient *Right* and *Title*, to make uſe of the *Goods* and *Fortunes* of his Subjects, whenever *Neceſſity* requires; becauſe he muſt be ſuppoſed to have a *Right* to every Thing, without which the *publick Good* cannot be obtained. But the *tranſcendental Propriety* is too *arrogant* and *ambitious* a Name; and which ill Princes may ſometimes abuſe to the Damage and Ruin of their Subjects. But as it is *trifling* to diſpute about Words, ſo I think there can be no Abſurdity or Danger in giving a particular Name to a particular Branch of the *ſovereign Power*, as it exerts itſelf in a certain Way, upon certain Things. What the Force of this *Propriety* is, I ſhall now endeavour to explain [2]. It will be confeſſed agreeable to natural Equity, that when *Contributions* are to be made for the Preſervation of ſome particular Thing, by Perſons that enjoy it in common, every Man ſhould pay his *Quota*, and one ſhould not be forced to bear more of the *Burthen* than another. And the ſame holds to be Equity alſo in *Commonwealths*; but becauſe the State of a Commonwealth may often be ſuch, that either ſome preſſing Neceſſity will not give leave, that every particular Subject's *Quota* ſhould be collected, or elſe, that the Publick may be forced to want the Uſe of ſomething in the Poſſeſſion of ſome private Subject; it muſt be allowed that the *ſovereign* Power may ſeize upon it, to anſwer the Neceſſities of the State. But then, all above the Proportion that was due from the *Proprietors*, is to be refunded to them by the reſt of the Subjects. For Example, when a *Town* is to be *fortified*, the Fields and Gardens of private Subjects muſt be laid open, and perhaps their Houſes be pulled down, to give room for the *Works* and *Ditches*. In *Seiges*, Houſes and Trees that belong to private Perſons are taken down, that the Enemy may not be ſhelter'd by them, or the *Beſieged* incommoded. *Materials*,

private

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[a] Beſides, theſe Contributions, by way of *Exciſe*, are a Means to reſtrain the Exceſs of Luxury, and Profuſeneſs. People need only forbear magnificent Feaſts and Entertainments, and wearing fine Clothes, and then they will not pay much. But if they will, at any Rate whatſoever, indulge their Appetite, and humour their Vanity, they ought to blame no Body but themſelves. See *Hochſteteri Collegium Pufendorfianum*, &c. *Exercit.* xi. §. 12.

[b] Vid. *Tacit.* in *Agricola*, c. 19. Where he ſays, that if *Agricola* rais'd the Tribute upon the *Britains*, or obliged them to pay a greater Quantity of Corn, he made them amends, by allowing them proportionable Favours, and by taking away all thoſe Exactions and Oppreſſions which were more inſupportable than the Tribute itſelf; for they had been forced before to wait ridiculouſly at the Granaries, though they were ſhut againſt them, and to buy their own Corn, and ſell it again at a ſet Price; and it had been common to ſet them new Roads, and Places at a great Diſtance, that the People might carry their Corn from the Incampments that were neareſt to them, to thoſe that were fartheſt off, and in the worſt Ways, that ſo what lay open for all, might turn to the Advantage of a few. *Vid.* Cic. *in Ver.* 3. And it was too ſevere an Anſwer *Peſcennius Niger* gave the *Jews*, when they begged him to leſſen the Taxes upon their Eſtates: You would have me take off the Tax upon your Lands, but I aſſure you, if could, I would lay another upon the Air you breath in, *Spartianus*, c. 7.

[c] *Garcilaſſ. de la Vega.* l. 5. c. 6. Moreover, as to what relates in general to the Manner in which a Prince ought to manage, ſo as to make the Revenues of the State conſiderable, without oppreſſing the People; ſee *Charron de la Sageſſe*, *Liv.* III. chap. 2. §. 21. the *Parrhaſiana*, Tom. I. p. 274, *&c.* and Mr. *Buddeus*'s *Philoſophe Pratique*, Part III. Chap. 5. §. 7. *&* l. 8. c. 5, 6.

[d] *Dominium Eminens.*

Mr. Barb. *NOTES on* §. vii.

[1] See above in B. 4. c. 6. §. 3, *&c.* See Mr. *Budaeus*'s Hiſtory of the Law of Nature, in his *Selecta Jur. Nat.* §. 53. Beſides, we muſt remember, that every Thing that lies in the Territories of a State, and has no particular Proprietor, belongs originally to the State, unleſs it is otherwiſe left in common by a conſtant and received Cuſtom. See Mr. *Titius* in his *Specimen juris publici Romano-Germanici*, Lib. II. Chap. 3.

[2] See *Grot.* B. 1. c. 1. §. 6. and c. 13. §. 6. and B. 2. c. 14. §. 7, 8. and B. 3. c. 19. §. 7. and c. 20. §. 7, *&c.*

private Men lay by for their own Uſe, may be taken, and made uſe of in publick *Fortifications*. In general *Scarcity*, the Store-houſes and Granaries of private Subjects are ſet open. In the *Extremities* of State, *Monies* entruſted with the Government are ſeized. And private Mens *Coffers* are rifled, when they are not kind or publick ſpirited enough, to offer their *Money* voluntarily by Way of *Loan*; as *Xenophon* ſays *Cyrus* did [a]. Perhaps what *Cæſar* did of this Kind, when he came to *Rome* after the Defeat of *Pompey*, is not to be juſtified, though he be ſuppoſed a lawful Prince. For as *Dio* relates it; "He pretended to borrow the publick Money, when he found there was no other Way of getting it, but continued to threaten Force, and to demand it as his Due; and yet was reſolved never to pay it back [b]." So again, if there be no other Way to oblige a common Enemy to retreat, our own Country is to be laid Waſte, and all Things which might be ſerviceable, to be carried away, or left unfit for Uſe [c]. From all which it appears, that *tranſcendental Propriety* never takes Place, but in the *Extremities* and *Neceſſities* of the Commonwealth. Though *Bœcler*, in his Comment upon *Grotius*, l. i. c. 1. §. 6. obſerves, "That the *Neceſſity* here meant hath its different Degrees, and that it is not only at the laſt Extremity, this Power may be made uſe of." But neither, on the other hand, is this Power to be extended too far; but ſhould be reduced to Equity, as nigh as it is poſſible. And a famous Example of this we have in *Livy*, l. xxxi. c. 13. From hence it may alſo be further inferr'd, that the Prince himſelf cannot releaſe a Subject from the Force of this *tranſcendental Propriety*; becauſe the *publick Extremities* of the Commonwealth muſt always be ſuppoſed to be unanſwerable Exceptions to all Sorts of *Privileges*. For it is a Contradiction to pretend to be a Subject, and yet to inſiſt upon a *Right* utterly inconſiſtent with common *Safety*. But however, without Diſpute, they that have loſt or ſacrificed their Fortunes to the *publick Safety* in ſuch *Extremities*, ought to have a *Reſtitution* or *Satisfaction* made them, as far as it is poſſible by the whole Commonwealth [1]. Some indeed will make this *Exception*, when though the Damage ſuſtained be unavoidable, it might yet have been eaſily foreſeen and prevented. For Example, when Houſes built in the *Suburbs*, are pulled down in the Time of *War*. For the *Proprietors* of theſe can demand no *Compenſation* for their Loſſes; becauſe they knew before that they could not build in thoſe Places upon other Terms. And conſequently, by building there notwithſtanding, did in a manner tacitly conſent to it. But much leſs can any *Compenſation* be allowed, where the *Neceſſity* was univerſal, and every Subject ſuffer'd equal Loſs. For the Publick is concern'd no further than to take care that the Subjects be not injured by any ill Conduct in Government, but never obliged itſelf to bear all the Damages they might at any Time ſuſtain [d].

VIII. As to the publick *Goods* which belong to the Commonwealth itſelf as ſuch, it is to be obſerv'd, that in ſome Kingdoms they are divided into two Parts, one of which is intended for the Maintenance of the Prince, and the other to defray publick *Expences* for the Preſervation of the *State* [2]. So *Dionyſius Halicarnaſſeus* makes a Diſtinction between the Δημοσία κτῆσις, or the *publick Poſſeſſions*, and the Τῶν ἀεὶ βασιλέων κλῆρος, and the *Patrimony of the Prince* [e]. And in *China* one Part in Nine of the Land belongs to the *Emperor* [f]. By that Part intended to maintain the Prince, I mean, that the Prince in ſome States hath certain Goods aſſigned him out of the *Publick*, the *Income* of which is to maintain the *Expences* of his Palace. And of all theſe the Prince hath the full *Profits*, and may diſpoſe of what he hath coming in from them, as he pleaſes; and what he lays up out of his *Income*, where the Laws of the Kingdom do not provide otherwiſe, makes an *Acceſſion* to his own *private Patrimony* [g]. The Emperor *Pertinax* [h], upon this View refuſed to have his Name put upon any of the *imperial* Poſſeſſions; becauſe, as he ſaid, *They were not the Emperor's Propriety, but the common publick Eſtate of every Roman*. In *Peru*, under the Empire of the *Yuca*'s, the Lands were divided into three Parts; one Part belong'd to the *Emperor*, another to their *God* the Sun, the third to the *Commonwealth*; and therefore the Subjects paid no *Taxes* out of theirs [i]. But ſecondly, the *Goods* which are to defray the *Expences* for the *Conſervation* of the State, are only barely intruſted to the Care and good Huſbandry of the Prince, who ſhould always have eſpecial Regard for the *publick Good* [3], and expreſs the ſame Caution and Conſcience as a *Guardian* ought to have for the *Eſtate* of his *Pupil*. From whence it may be eaſily inferred, on which Side the *Right* lies, to what a Prince gets or lays up in the Time of his *Reign*, on *his*, or on the *Commonwealth's*. For if a Prince grows rich out of that Branch of the *publick Revenues*, which belongs to the Commonwealth, or by impoſing *Taxes* upon his Subjects, or by the Expence of their *Blood*, or by employing them in any of thoſe Services which by common Obligation they owe the Commonwealth; it is clear, that his Wealth muſt accrue to the *Publick*, and not to his own *private Eſtate*. But ſuppoſe, as it may alſo happen, that a Prince may make all neceſſary *Preparation* for a War, and carry it on afterwards, without any Aſſiſtance of the *publick Treaſure*, upon the Strength of his own *private* Riches

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[a] *Xenoph. Cyropæd.* l. 8. c. 2.

[b] *Dio Caſſius*, l. 42.

[c] *Critolaus*, when the *Romans* were making War upon him, agreed with the *Achaian* Magiſtrates, that all Suits for Debts ſhould be put off, and no Man ſhould be obliged to make any Payment till the War was at an End, *Vid.* Polyb. *Excerp. Leg.* 144. *c.* 3. *V. l.* 18. *t.* 3. *l.* 8. *D. de leg. Commiſſoria. Curtius*, l. 3. c. 4. See *Sueton.* ch. 42. of *Jul. Cæſ.* the Law made by *Cæſar* about the Payment of *Debts.*

[d] *Jo. Chriſtoph. Becmannus*, Medit. Polit. Diſſ. 21. §. 8.

[e] *Dion. Halicarn.* l. 3. *Antiq. Roman.* l. 3. c. 1.

[f] *Martin.* Hiſt. *Sin.* l. 4. c. 24.

[g] Senec. *de Benef.* l. 7. c. 6. Every Thing belongs to *Cæſar*; but to his Exchequer nothing but his own private Fortune; every Thing is at his Command; but his Patrimony only is his own Propreity.

[h] *Herodian.* l. 2. c. 15.

[i] Vid. *Garcilaſſ. de la Vega Comm. Roy.* l. 5. c. 14. and *Francis Hottoman's Quaſt. Illuſt.*

Mr. Barb. *NOTES on* §. vii, viii.

[1] See *Grot.* B. 3. c. 20. §. 7.

[2] See *Grot.* B. 2. c. 6. §. 11.

[3] See the laſt Section of this Chapter.

Riches and *Eſtate*, without engaging the Commonwealth, either in the *Expence* or *Hazard* of it, or it may be, perhaps, barely from the *Profits* and *Revenue* of his *Crown-Lands:* In ſuch a War 'tis alſo clear, that whatever *Acquiſitions* a Prince makes, will be abſolutely his own Right, and that he may, if he pleaſe, exclude the Commonwealth. For I have an undeniable Right to the *Profits* of what I have the *Uſe* and *Produce* of, and therefore may diſpoſe of them as I think fit [a].

IX. I ſhall in the next Place enquire, what lawful Power any Prince may have to *alienate* the *Whole* or *any Part* of his Kingdom. By which I do not mean a *patrimonial Kingdom*, but a *Kingdom* receiv'd by *free Conſent* of the People. *Grotius* is very large upon this Queſtion [b]. The Iſſue of the Matter in Diſpute in ſhort is this; That a Prince hath no manner of Power to *transfer* or *give away* his Kingdom by his own *ſingle Authority*; and that his Subjects are not at all *obliged* by ſuch an *Act*, if made; and that the *Conſent* of the *People* is entirely as neceſſary as that of a *Prince*. For as the *People* cannot juſtly take the *Crown* from their *Prince*, ſo neither can he, without their *Conſent*, ſet it upon whoſe Head he pleaſeth. But in the *Alienation* of a *Part of a Kingdom*, beſides the *Prince's Conſent*, there is required not only the *Conſent* of the *People*, that are to continue under their old *Prince* and Government, but the Conſent of that *Part* too eſpecially, which is to be *alienated*. The Reaſon is, becauſe they that at firſt erected the Commonwealth; and they that came voluntarily into it afterwards, bound themſelves by mutual *Compact*, to be govern'd by one and the ſame Government, as long as they thought good to continue in the Dominions of the ſame Commonwealth. And therefore, as every particular Subject acquired a Right by Virtue of that *Compact*, not to be violently *ejected* out of the Commonwealth, nor to be given up to any *foreign Power*, except by way of Puniſhment; ſo the whole Body of the Subjects, from the ſame *Compact*, acquires a Right to itſelf over the particular Subjects, by which no Subject can put himſelf under a *foreign Government* or *Power*, or diſclaim and renounce the *Authority* of his own, as long as he is allowed to live in any of the *Dominions* belonging to it. And therefore, ſince all *Commonwealths* (as all *moral Bodies)* are formed and grow by a *Conſent* of the Parts, we muſt look back upon the *original* Deſign and Intentions of the *primitive Founders* of them, when we enquire what Power the *whole Body* hath over the *Parts* in ſuch a Caſe as this. And it cannot be preſumed, that their Intentions were, that the *Body* ſhould have a Right to cut off its own *Members*, when it pleas'd, and deliver them up to *another's* Power and Command. And for this Reaſon the People of *Guienne* juſtly refuſed to be ſeparated from the Kingdom of *England*, notwithſtanding the Grant and Donation of *Richard* the Second [c]. But indeed there is one *Exception* againſt what was ſaid before, that a *Part* ought not to diſown or ſeparate from the *Body*, while it continues within the ſame Dominions, and that is this; except it be in the laſt *Extremities*, and that it be impoſſible for it to preſerve itſelf otherwiſe, than by ſubmitting to the *Enemy's* Power and Authority. For in all *Agreements* of this *Nature*, the utmoſt *Neceſſity* ſeems of Courſe to be excepted; which, it is always allowed, gives a Man full Liberty to ſecure himſelf all the Ways he can poſſibly. And therefore 'tis no more than what muſt be expected, and is far enough from being criminal, that a *Town*, after it hath made the beſt *Reſiſtance* it could againſt an *Enemy*, ſhould at laſt chooſe rather to ſurrender, than ſuffer itſelf to be carried by *Storm*, and be put to the Sword. For ſince every Man that ſubmits himſelf voluntarily to *Civil Government*, had before from *Nature* a *Right* to defend himſelf all the Ways he could, and therefore enters into the *Commonwealth* for the better Attainment and Security of that *Right*; when the Commonwealth can no longer afford Protection or Defence to the Subjects, they muſt be ſuppoſed to be releas'd from the Ties they were under before, and to be at Liberty to conſult their own Safety as they think beſt. And without Diſpute, the Commonwealth itſelf can have no other *Right* over the *Members* of it, than what was granted and left by them that at firſt erected it. And therefore as the Commonwealth engageth to protect and defend every one of its *Members*, unleſs hinder'd or prevented by unavoidable Neceſſity; ſo whenever it ſtruggles under ſuch a Neceſſity, it is ſuppoſed, that no Man is forbid to provide for his own Security as well as he can. In the *natural Body* indeed it is lawful to cut off any particular *Member* to preſerve the whole, becauſe every *Member* lives entirely by the Life of the *Body*, and cannot live otherwiſe; but in a *moral* or *politick Body*, 'tis poſſible the *Members* may exiſt and live in a ſeparate divided State; and therefore the *Body moral* hath not the ſame *Right* over its *Members*, as the *Natural*. But if a Prince ſhould be neceſſitated by *Extremity* of his Affairs, to compound for a Peace with an over-powerful Enemy, by giving him a certain *Country* in his *Dominions*, and that *Country* ſhould diſown and deny the *Grant*; in this Caſe, it is my Opinion, that the Prince may draw his *Forces* out of their *Towns* and *Garriſons*, and leave them *naked*, not hindering the *Conqueror* from taking *Poſſeſſion* of them. But then that he hath no Power to oblige or force them to ſurrender themſelves, or to ſubmit to the *Conqueror*'s Authority. Neither can I think, that the *Country* is under any *Obligations*, if they have Strength enough in it, not to make *Reſiſtance* againſt ſuch a *Conqueror*, or afterwards, if they can, not to erect themſelves into a *diſtinct Commonwealth*. For thus when the Emperor *Jovian* was obliged by *Treaty* to give up the City *Niſibis* to the *Perſians*, the Citizens deſired they might have Leave to defend themſelves [d]. By ſuch *Agreements* therefore the *Prince* indeed and *People* loſe their Right to ſuch a *Country*; but the *Conqueror*, if they conſent to receive him, and ſwear *Allegiance* to him, acquires a lawful *Authority* and *Power* over them. As to that Opinion ſome are fond of, either with regard to *all* Kingdoms, or perhaps only to ſome *Particulars*, that whatever *Goods are appropriated to*, or, as they ſay, *incorporated in the Crown*, can never be any Way *alienated*, and that neither the longeſt Courſe of Years, or another's quiet and peaceable Poſſeſſion can ſecure them from an *Act* of *Reſumption*, at any Time after, it is without Diſpute, falſe and groundleſs. And much more abſurd and ridiculous is it to aſſert, that any Kingdom may have Privilege to waſte and ruin others, and yet that what it hath once ſeized, can never afterwards be recover'd from it.

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[a] V. *Grot.* l. 1. c. 3. §. 12.

[b] L. 1. c. 4, §. 10. & l. 2. c. 6. §. 3. (Upon both which Places ſee *Bœcler*'s Annotations) & l. 3. c. 20. §. 5. &c.

[c] *Froiſſard.* l. 4. *Polyd. Virgil.* Hiſt. *Angl.* l. 20.

[d] *Ammian. Marcellinus*, l. 25. c. 12. *Zoſimus*, l. 3.

X. From what hath been ſaid it is further evident, that a *Prince* cannot, without his *People's* Conſent [1], make his Kingdom *feudatory* to another, or hold it upon Condition of [a] Forfeiture whenever the *feudal Oath* is violated, or that when his *Family* is extinct, it ſhall devolve to the *Prince* it is held from. For if the *Conditions* be ſuch as theſe, the making the Kingdom *feudatory* is indeed a *conditional Alienation*. And again on the other hand, the *People* may recal any *Act* of *Homage*, which the Prince hath remitted without their Conſent. And it further follows, that a Prince cannot *mortgage* any Part of his Dominions, ſo that the Government of it, and *natural* Poſſeſſion, ſhall be for ſo long reſign'd to the *Creditor*, without the Conſent of his *People*, and the *Part* engag'd by the *Mortgage*; and much leſs if there be any Conditions of [b] *Forfeiture* annexed. The Reaſon of which is, not only becauſe a final *Alienation* is generally the Conſequence of *Mortgaging*; but beſides, becauſe the *People*, when they made Choice of their *Prince*, choſe to be govern'd by *him*, and not by any *other*. And becauſe it may juſtly be preſumed, that they that are grown and are ſtrictly united in one *People*, can never be willing to be broken and and cantoned into *Parts* and *Diviſions*.

XI. And it is alſo further evident, that the *Prince* hath no Power, without Conſent of his *People*, to alienate thoſe *Goods*, the *Revenues* of which are deſign'd, either to ſupport the *publick Expences*, or to maintain the neceſſary *Greatneſs* and *Dignity* of his *Court*. For in thoſe *Goods* the *Prince* is allowed only the *Uſe* and *Produce* of them, which can never amount to a *Right* of *Alienation* [2]. And though perhaps he may think himſelf well enough provided for, for his own Life, yet it ſhould be conſidered, that there are to be other *Princes* to ſucceed *him*, who are all to be maintain'd agreeably to the Dignity of *crown'd Heads*. But however, we are to diſtinguiſh carefully between the *Goods* themſelves or the *publick Patrimony*, and the *Profits* or *Produce* of them. The firſt the *Prince* hath no Power to alienate, the other he hath free Liberty to diſpoſe of, as he pleaſeth. Thus where *the Right* [*] *of what the Sea or Rivers caſt up and join to the Land*, is the *publick Patrimony*, or belongs to the *Crown*, the Prince cannot *make away*, or *transfer* that Right, to any one elſe; but I can ſee nothing that can oblige him, not to diſpoſe of what is *thrown up by the Tide or the Stream*, as he thinks fit; becauſe *this* is the *Produce* of that Right. So the Right of *Confiſcation* may be a *publick patrimonial Settlement*, and the *confiſcated Goods* be the *Produce of that Settlement*. The firſt is appropriated to the *Commonwealth*, the ſecond belongs to the *Prince*. But after all, a *Prince* that hath Power, when *Reaſons* of *State* require it, to levy new *Subſidies* upon the Subject, as he pleaſeth, may, when the Neceſſities of the Commonwealth command, *mortgage* any Part of the *publick Patrimony*. For as the People are obliged to pay the *Subſidies*, ſuch a Prince lays upon them, upon ſuch *Reaſons of State*; ſo are they obliged to redeem what was *mortgaged* upon ſuch *Reaſons*. Since the Thing is the ſame, whether they pay the Money beforehand, to prevent the Neceſſity of the *Mortgage*, or whether it be levied upon them afterwards to redeem it. And here it is manifeſt, that every particular Subject is not the *Debtor* of that Money, though every one be obliged to contribute his Share to diſcharge it [c] [3]. So alſo, where the *Prince* lays out Money for the Uſe of the *Publick* out of his own *private Eſtate*, the Commonwealth muſt be ſuppoſed to *mortgage* to him the *publick Patrimony* upon that Account, till ſuch Time as the *Debts* contracted upon it are cleared by the *People*. But all this will hold only upon Suppoſition, that there be no *fundamental Law*, or *Capitulation*, which provideth otherwiſe, and either enlargeth or confineth the Rights of the *Prince* or *People*.

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[a] *Sub onere Commiſſi ex Felonia.*

[b] *Lex Commiſſoria.*

[c] *Vid.* Senec. *de Beneficiis*, L. 6. c. 20.

[*] *Alluvionum Jus.*

Mr. Barb. *NOTES on* §. x, xi.

[1] See *Grot.* B. 2. c. 6. §. 9.

[2] *Vid.* Grot. *ubi ſupra*, §. 11, 12, 13.

[3] See *Grotius*, B. 3. c. 2. §. 1.

CHAP. VI.

Of the Right of War.

The CONTENTS of every Paragraph of the Sixth Chapter.

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II. *Peace the ordinary proper State of Man; War extraordinarily indulg'd by Nature.*
III. *War either offenſive or defenſive.*
IV. *The Cauſes of War ought to be manifeſt.*
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VI. *Fraud lawful againſt an Enemy.*
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VIII. *In a Commonwealth particular private Men loſe their Right of War.*
IX. *War either ſolemn, or leſs ſolemn.*
X. *A Magiſtrate as ſuch hath no Right to make War.*
XI. *Whether he may make War upon a Preſumption of his Prince's Conſent.*
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XIII. *Of the Equity of Repriſals.*
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XVIII. *Whether lawful to kill an Enemy by Aſſaſſines?*
XIX. *Things ſacred not exempt from the Liberties of War.*
XX. *Things, how acquired in War.*
XXI. *To whom the Acquiſitions of War belong.*
XXII. *Things incorporeal, how far acquired in War.*
XXIII. *A Loan, whether acquirable in War.*
XXIV. *Dominion over the Conquer'd, how many ways acquired.*
XXV. *Things loſt in War, how recovered.*
XXVI. *Whole Nations, how reſtored to Liberty.*

SINCE every particular Man in a *Liberty of Nature* hath the ſame *natural* Right, which States and Commonwealths have, to defend himſelf againſt unjuſt Violence, and to defend and aſſert his Rights by Force, when others injure him in, or endeavour to deprive him of them, it will, I think, be a proper Method to enquire, firſt, what may be ſuppoſed common to the *Wars* of particular Men, and Commonwealths; and then, ſecondly, what hath either by Cuſtom of Nations, or by Nature, been appropriated to the latter.

II. Firſt therefore, 'tis, certain that nothing is more conſonant to the *Law of Nature*, than that no Man ſhould offer unjuſt Violence or Injury to another; and on the other hand, than that all Men ſhould ſhew Kindneſs and Humanity to one another, and be particularly exact in the Obſervation of Agreements and Compacts. And when Men duly attend to, and obey theſe Laws, they may be ſaid to enjoy *Peace*; which is a State moſt agreeable to human Nature, which tends moſt to promote its Happineſs and Security, and indeed which the *Law of Nature* was given to Men principally to eſtabliſh and preſerve[a]. Nay further, *Peace* is a State proper to human Nature, *as ſuch*; ſince it ariſeth from a Principle peculiar to Mankind above the Brutes; whereas *War* flows from Principles common to both. Brutes indeed by Inſtinct of Nature will endeavour to defend and preſerve themſelves as well as they can [1]. But Man alone underſtands the Nature and Conſtitution of *Peace*, For it is he only, that can voluntarily undertake or forbear the Performance of any Action, which may bring Good or Harm upon another Perſon, upon a Conſideration of certain Obligations on one Side, and certain Rights on another. All which depends entirely upon the Uſe and Exerciſe of *Reaſon*. Beaſts indeed perform the Service their Maſters are pleas'd to uſe them in: But the Reaſon of that Obedience goes no higher than the Fear of Blows, or the Temptation of good Keeping; for the Senſe of any Obligation, without doubt, lies much out of their Reach. We find too, that Beaſts are ſeldom inclin'd to hurt Men, or one another; but this muſt be ſuppoſed either the Effect of Fear and Weakneſs, or becauſe they find nothing to provoke their Appetite. Again, there are others of them that ſeem to be fond of, and to careſs and aſſiſt one another. But it is not to be ſuppoſed, that they do ſo, becauſe they are ſenſible they are obliged to it[b]. But notwithſtanding, it is very lawful, and may ſometimes be neceſſary for Man himſelf to make *War*; for Example, when he finds that another

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[a] Vid. *Polyb.* l. 12. c. 14.

[b] *To this Purpoſe is that Paſſage of* Quintilian. *Declam.* 9. *p.* 128, 129. Ed. *Lugd. Bat.* Nature ſeems to have infuſed into Man, more than into other Creatures, a certain Sociableneſs of Temper and Conſtitution, which has taught us to think ourſelves Happy in one another's Company and Converſation, to unite into Nations, and erect Cities and Commonwealths: And among all the Impreſſions ſhe hath made upon our Souls, there is none that can be of greater Uſe to us, than that of Kindneſs and Good-Will. For what can we imagine happier than Mankind, if all the World could be perſuaded to be Friends? We ſhould have no Wars, Seditions, Robberies, Quarrels, and Diſputes, or any of thoſe Evils which we ourſelves add to thoſe of Fortune. It hath pleas'd Heaven, indeed, that it ſhould be otherwiſe; but however, the World hath always been agreed, that Sincerity, Integrity, and Gratitude, ought to be the great Principles in the Compoſition of every brave and noble Spirit.

Mr. BARB. *NOTE on* §. II.

[1] Vid. *Lactan.* Inſtitut. Divin. L. 5. c. 17.

Perſon hath maliciouſly deſign'd to do him Harm, or denies him his *Right*. For in ſuch Caſes, the Care he is ſuppoſed to have of his own Safety, giveth him Power to defend himſelf, and aſſert his Right what Ways he thinks beſt, though it be with the Hurt of the injurious Perſon; or to *recover his Right by Force, when he cannot obtain it by eaſier Means* [a]. For Nature hath not only given Man a quick Senſe of Injuries, that he might not ſuffer himſelf to be oppreſs'd and inſulted; but ſhe hath alſo armed him with Strength and Agility of Body, that he ſhould not be forced tamely to ſubmit. But then, when Nature permits *War*, *Peace is the Price and Reward of War*. And when Men are forced to fight, it is not becauſe they are to make *War* perpetually, but that they may enjoy a laſting *Peace* and Security for the future [b]. But beſides, though the Perſon that doth Harm, doth immediately, as far as he is concerned, give a Man Power to make *War* upon him, yet it ought to be conſidered, what Good or Evil may probably be brought upon himſelf or others that did him no Injury by it. For Injuries, which do not entirely rob a Man of Quiet and Safety, ought not to provoke him to revenge them with *War*; when either the Inconveniences he may bring upon himſelf, and thoſe that belong to him by it, are like to be greater than the Advantages he can propoſe; or when others he at preſent is at Peace with, muſt by his War ſuffer ſuch Evils, as by the Laws of Humanity, on a quiet Submiſſion to the Injuries offer'd, he ought to defend them from. And therefore, that a Man is juſtly to be commended, that will not revenge an Injury, when he ſees that a *War* will, in all Probability, produce greater Evils than Good.

III. The *Cauſes* of *juſt War* may be reduc'd to theſe three *Heads* [1]. Firſt, *To defend ourſelves and Properties againſt others that deſign to do us Harm, either by aſſaulting our Perſons, or taking away or ruining our Eſtates.* Secondly, To aſſert our Rights *when others, who are juſtly obliged, refuſe to pay them to us.* And laſtly, *To recover Satisfaction for Damages we have injuriouſly ſuſtained, and to force the Perſon that did the Injury, to give Caution for his good Behaviour for the future* [2]. And hence ariſeth the Diviſion of juſt Wars into *offenſive* and *Defenſive*. The *latter* of which I take to be thoſe Sorts of *Wars*, in which

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[a] *Dictys Cretenſis*, l. 2. c. 21. p. 44. Ed. *Amſt. Max. Tyrius*, Diſſert. 14. p. 138. Ed *Ludg. Bat.* A good Man never begins a War but when he is forced to it; but a bad Man makes it his Choice. V. *Bœcler* in *Grot.* l. 1. c. 3. §. 1.

[b] *Ariſtot.* ad *Nicom.* l. 10. c. 7. We make War that we may live in Peace. There is no Body that deſires, or makes Preparations for War, purely for the ſake of the War itſelf. For a Man muſt be of an inhuman Temper, that will make Enemies of his Friends, barely for the Satisfaction of a Quarrel. *Tacit.* Hiſt. l. 4. c. 76. There is no Body ſo forward in taking Arms, that had not rather obtain that peaceably, which he truſts to the Deciſion of a War. *And therefore it is a very ill Character of ſome, which* Silius Italicus *deſcribes*, l. 3. ver. 330, 331.

Nec vitam ſine Marte pati, quippe omnis in Armis	They think Life pleaſant when in Arms employ'd,
Lucis cauſa ſita eſt, & damnatum vivere paci.	But dull and worthleſs if in Peace enjoy'd.

Mr. Barb. *NOTES on* §. III.

[1] " When we make War, we complain of ſomething that has been done by thoſe againſt whom we take up Arms, —— We ſay, that they " have cheated us, that they have inſulted us, and taken our Goods from us." *Plato* in the 1ſt *Alcibiad.* p. 109. *A. T.* II. Ed. *H. Steph.* 432. T. Ed. *Wechel. Ficin.* See *Grotius*, L. 2. c. 1. §. 1, 2. Our Author here tacitly excludes from the Number of *Lawful Cauſes* of War, the *Puniſhing of criminal Actions*; by which we are not injured ourſelves. But we have ſhewn above (Chap. iii. Sect. 4. Note 3.) that the Reaſon on which he eſtabliſhes his Opinion, is not very ſolid. It is true, that from Equal to Equal, we muſt not lightly take up Arms to puniſh all Sorts of Crimes, that do not relate to ourſelves, we muſt always uſe the following Precautions, which *Grotius* juſtly recommends to us. I. *Not to take them up for puniſhing the Violation of the Maxims of the Law of Nature, which is contrary only to certain Cuſtoms, though received upon ſome Foundation, among ſeveral Nations; ſuch as were almoſt all thoſe that gave the antient* Greeks *ſuch an Antipathy againſt the* Perſians. For this Reaſon (ſays *J. Freder Gronovius* thereupon) King *Darius* was to blame, to require the *Carthaginians* to eat no more Dogs-Fleſh, and not to burn their dead Bodies; ſince theſe two Cuſtoms had nothing in them to give a juſt Occaſion of War: But what he pretended, at the ſame Time, I mean their not offering any human Sacrifice, was manifeſtly founded upon the *Law of Nature*, (Juſt. Hiſt. Lib. xix. c. 1. Num. 10. Ed. *Grav.*) II. *Not lightly to place in the Number of Things forbidden by Nature, thoſe which we are not well aſſured are contrary to it, and which are rather ſimply prohibited by a Divine poſitive Law: Such are perhaps Conjunctions out of Marriage, and thoſe which are called Inceſtuous.* *Grotius* here adds *Uſury*; but let us ſet aſide the Abuſe of it, and there is nothing in it contrary to the *Law of Nature*, as we have ſhewn in another Place. III. *To diſtinguiſh carefully the general Principles of the Law of Nature, ſuch as, we muſt live honeſtly*, that is to ſay, after a Manner conformable to Reaſon, *and ſome others like that, but which are manifeſtly inconteſtable, as when we ſay, that we muſt not take away another Man's Goods; from the Conſequences that we draw from them: Some of which are eaſy to be perceived*, ſuch is the Prohibition of *Adultery, ſuppoſing Marriage; whereas, there are others more difficult to be diſcovered; as for Example, That Revenge where we propoſe nothing but Evil for Evil, is criminal* —— *As then political Legiſlators excuſe thoſe to whom their Laws have not been declared, or who are uncapable of underſtanding them; ſo in Matters of natural Laws, it is juſt to excuſe thoſe that violate them, through the Weakneſs of their Underſtanding, or the Unhappineſs of an ill Education.* ——IV. *In ſhort, Wars undertaken only to puniſh thoſe againſt whom we take up Arms, are ſuſpected of Injuſtice, when the Crime is not undeniably plain, and very flagrant, or when there is no other Reaſon beſides, that makes a juſt War.* This is what *Grotius* ſays, L. II. c. 20. §. 41, 42, 43. In the following Paragraphs, to the End of the Chapter, he treats of religious Wars, that is, of thoſe which we undertake againſt ſuch as have, on that Account, ſome Principle or Practice different from ours (for as to the reſt, it is clear that we may defend ourſelves againſt thoſe who would hinder us from profeſſing that Religion which we believe to be the beſt.) All that he ſays amounts to this, that we cannot lawfully take up Arms for this ſingle Reaſon, againſt any but *Atheiſts*, or elſe againſt thoſe who inſolently revile the Divinity itſelf, whom they make Profeſſion of adoring. (See Mr. *Buddeus*'s Diſſertation on the *Cruſades*; in his *Select. Jur. Nat. & Gent.* p. 97, &c.) So far is a ſimple Difference of Opinion in other Tenets of Religion from giving any juſt Cauſe of purſuing by Force of Arms, or diſturbing in the leaſt thoſe whom we believe to be in an Error. However, I queſtion not but that Proteſtant Princes may with a ſafe Conſcience enter into a Confederacy to deſtroy the *Inquiſition*, and force the Powers that ſuffer it in their Dominions, to diſarm this grand Cabal, under which *Chriſtianity* has groan'd ſo long, and which under a falſe Pretence to Zeal, exerciſes a Tyranny the moſt horrible and contrary to human Society that ever was. Thoſe who love to acquire Glory by their Arms, cannot find a fairer or more lawful Occaſion of ſignalizing their Valour, ſuppoſing they had otherwiſe, a ſufficient Strength to embark in this Undertaking; and never would any Hero have tam'd Monſters more furious and terrible to Mankind, than he that could accompliſh the Deſign of purging the Earth of theſe villanous Souls, who ſo impudently abuſe it under the ſpecious Shew of Religion, only to have wherewith to indulge themſelves in Pride, Luxury, and Lazineſs, and to make both Princes and Subjects dependent on them, and live under their Subjection.

[2] Upon which we muſt refer to our Obſervation in another Place, that in a Caſe of Neceſſity, an *imperfect Right* is chang'd into a *perfect Right*; ſo that then the Refuſal of him that will not yield up to us what he ought to do, gives a juſt Occaſion of War.

which Men endeavour to defend and keep what is their own. The *Former* [1] are, when Men extort their Rights that are denied by Force, attempt to recover what hath been unjuſtly taken from them, and require *Caution* for the future. Sometimes indeed the Party that firſt began the War may have the Credit of being on the *Defenſive*. For Inſtance, ſuppoſe he be often alarm'd and haraſs'd with ſudden Incurſions upon him, the Enemy retiring always when he appears to oppoſe him; or ſuppoſe a Man be aſſured that his Enemy hath form'd Deſigns againſt him, and ſo diſables him for the Attempt, while he is making his Preparation [a].

IV. But in general, the *Cauſes* [2] of every *War*, and eſpecially of the *offenſive*, ought to be *evident*, and without Mixture of *Doubt* and *Uncertainty* [3]. For it is very uſual in Caſes of this Nature for Doubts to ariſe; either perhaps out of Ignorance of Matter of Fact, when it is not abſolutely certain, whether it was done, or not; with what Intention it was done; or elſe out of a negligent, ſlight Compariſon between ſtrict Juſtice and the *Laws* of Love and Charity; or it may be from a miſtaken Computation of the Proportion of the Utilities, which it is probable will be the Effects of undertaking or forbearing the *War*. In theſe Caſes therefore, as no uncertain Pretenſions [4] ought to be made uſe of; ſo neither ſhould Men immediately ſeek Redreſs by Arms, but ſincerely endeavour, and that theſe three Ways eſpecially, to compoſe the Differences, before they break out into a War: Firſt, by *Conference* between the *Parties*, or their *Agents* [5]. Secondly, by *Appeal* to *Arbiters* [6]. Or in the laſt Place, by *Lot* [7] [b]. But how evident ſoever the *Cauſes* of

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[a] Vid. *Juſtin.* l. 2. c. 3. n. 12.

[b] Valerius Flaccus, *l.* 5. ver. 665, &c.

An nullas præferre preces, nec fœdera Regis
Ulla ſequi? cæca ſed cuncta impellere pugna
Debuimus? ſic Thraces agunt.

Never to peaceful Overture to yield,
Or ſacred League, but in the bloody Field.
Alway in Arms to breathe relentleſs War,
None but the wildeſt Savages will dare.

Mr. BARB. NOTES *on* §. III, IV.

[1] In the fourth Tome of the *Obſervations Choiſies*, printed at *Hall* in *Saxony*, Obſerv. VIII. there are ſome Reflections which I will here ſet down in the very Words of Mr. *Bernard*, who has given us an Abſtract of them in *Nouvel de la Rep. des Lett. Sept.* 1704. p. 304, &c. 'Tis now a-days the Cuſtom to excuſe the moſt unjuſt Wars, by ſaying they are purely *defenſive* Wars. There are ſome People that believe, that every unjuſt War ought to be called *offenſive*, which is not true; for if there are *offenſive* Wars that are juſt, as there is no Doubt of it, there are alſo *defenſive* Wars that are unjuſt; as when we defend ourſelves againſt a Prince who has Reaſon to attack us. Neither muſt we believe, that he who is the firſt Aggreſſor begins by that an *offenſive* War; and that the other, who demands Satisfaction for the Injury receiv'd, is always only upon the *defenſive*. There are a great many unjuſt Acts that may kindle a War, and which however are not the War; as the ill Treatment of a Prince's Ambaſſadors, or the plundering his Subjects: If then we take up Arms to revenge ſuch an unjuſt Act, we begin an *offenſive*, but a juſt *War*; and the Prince who has done the Injury, and refuſes to give Satisfaction, commences *defenſive*, but an unjuſt War. An *offenſive* War then is not unjuſt, but when it is undertaken without a lawful Cauſe; and then *defenſive* War, which upon other Occaſions would be *unjuſt*, becomes *juſt*. In general then, he that firſt takes up Arms, whether he does it *juſtly* or *unjuſtly*, commences an *offenſive* War; and he that oppoſes that War, whether he has or has not Reaſon to do ſo, begins a *defenſive* one. Thoſe who look upon the Word *offenſive* War to be an odious Term, as containing ſomething that is always unjuſt; and who conſider, on the contrary, a *defenſive* War, as inſeparable from Equity, confound all the Ideas, and perplex an Affair, which of itſelf would appear plain and clear enough. It is with Princes as with private Perſons. The *Plaintiff*, who commences a Suit at Law, is ſometimes in the Wrong, and ſometimes alſo he has Right on his Side: It is juſt ſo with the *Defendant*. We are in the Wrong not to pay a Sum that is juſtly due, as we are in the Right to forbear paying what we do not owe.

[2] See *Grot.* B. 2. c. 1. § 1. and c. 22. § 2. where he divides them into *juſtifying Reaſons*, and *Motives of the War*: (*Cauſæ juſtificæ, & cauſæ ſuaſoriæ*:) The firſt are thoſe that render, or ſeem to render, the War *juſt* with regard to the Enemy; ſo that we believe we do him no Injuſtice in taking up Arms againſt him. The *Motives* are the Views of Intereſt, which oblige us to declare War. In a War, innocent upon all other Accounts, the *juſtifying Reaſons* muſt not only be truly lawful, but muſt be blended with the *Motives*, that is, that we muſt never undertake a War but through the Neceſſity to which we are reduced of defending ourſelves againſt another's Inſults, of making him give up what is our undoubted Right, and of obtaining a Satisfaction for an apparent Injury done us. Thus a War may be vicious or unjuſt, with regard to the Cauſes, four ſeveral Ways: Firſt, when we undertake it either without any *juſtifying Cauſe*, or any Motive of Profit, tho' never ſo little, but only out of a fierce and brutal Fury, that makes us delight in Blood and Slaughter purely for the ſake of killing. But there is Reaſon to doubt, whether we can find any Example of ſo barbarous a War. (See *Grotius*, Lib. II. Cap. 22. §. 2.) Secondly, when we attack others only for our own Intereſt, without their having done us any Injury. And theſe Sorts of Wars are, with reſpect to the Aggreſſor, downright Robberies. (See *Grotius*, ibid. §. 3.) Thirdly, when we have ſome *Motives* founded upon *juſtifying Reaſons*, but which ſtill have only an apparent Equity, and which, upon a nice Examination, are found at the Bottom to be unlawful. Such are thoſe mention'd by our Author in the following Section, after *Grotius* (*ubi ſupra* § 4. *& ſeq.*) In ſhort, Fourthly, when notwithſtanding our having good *juſtifying Reaſons*, we undertake the War upon other *Motives*, that have no Relation to the Injury we have receiv'd, as acquiring Vain-Glory, enlarging our Rule and Dominion, enriching ourſelves, ſatiating our Revenge, or upon any other View of Intereſt, either publick or private, but quite diveſted of the *juſtifying Reaſons* of the War in which we are engag'd. (See *Grotius*, ibid. § 17.) Of theſe four Sorts of Wars, whoſe Undertaking contains ſomething that is *juſt*, or *unjuſt*; the third and the laſt are very common, there being very few People ſo barbarous and ſavage as to take up Arms, without declaring at leaſt ſome ſort of *juſtifying Reaſon*. The third is alſo very common; but it is not difficult to diſcover the Injuſtice of it. As for the fourth, perhaps it is the moſt common of all; it is not ſo unjuſt in itſelf, as with regard to the Diſpoſition and Views of him that does it. It is beſides very difficult to be convinced of it, the Motives being generally ſo impenetrable, or the greateſt Part of Mankind ſo very careful in concealing them. Thus we are not oblig'd to reſtore what we have taken from the Enemy in ſuch a War, exactly to the Value of the Damage and Injury he has done us. This is taken almoſt from Mr. *Buddeus's Philoſophie Pratique*, Part II. Cap. 5. § 2. &c. As he does very little beſides abridging *Grotius*, in all this, I ſhall here make uſe of his Book in ſome other Places; and by that, as well as by *Grotius* himſelf, and alſo by the Abſtract *de Officio Hom. & Civ.* I will ſupply what our Author wants, who has but lightly treated of all that concerns the *Right of War and Peace*, without doubt becauſe *Grotius* had already almoſt exhauſted the Matter. Moreover, whoever is deſirous to ſee the Application of what we have juſt now ſaid in this Note, to remarkable Examples, need only conſult Mr. *Buddeus's* Diſſertation, entituled, *Juriſprudentiæ Hiſtoricæ Specimen*, § 82, &c, *ſeq.* in which he examines the Juſtice of the Wars of the *Romans*.

[3] See above in B. 1. c. 3. § 7, 8. and *Grot.* B. 2. c. 23. § 1, 2, 3, 4, 5, and 6. Beſides, To the Queſtion whether there can be a juſt War on both Sides, Mr. *Buddeus*, in his *Philoſophie Pratique*, § 16. anſwers, No, if we conſider the Juſtneſs of the Cauſe in itſelf: For it implies a manifeſt Contradiction, that two Perſons ſhould have equal Right; the one to demand, and the other to refuſe one and the ſame Thing. But it may happen, that one of the two that are at War together, may have a very lawful Reaſon for it, and the other be in an invincible Ignorance of the Injuſtice of his Cauſe. In that Caſe both of 'em make War *juſtly* and *unjuſtly*; the invincible Ignorance on his Side, whoſe Cauſe is unjuſt, hindering his Action from being reputed unjuſt in itſelf. But that cannot happen but very rarely; for thoſe who engage in a War, examine, or at leaſt ought to examine, with a great deal of Care, all the Reaſons on both Sides. See *Grotius*, Lib. II. Cap. 23. § 13.

[4] See *Grot.* B. 2. c. 24.

[5] See above, in B. 5. c. 13. § 3.

[6] See the ſame Book and Chapter, § 4, &c.

[7] See the ſame Book, c. 9. § 2, 3.

of *War* may be, a wiſe Man, before he draws his Sword, ought to conſider what *Grotius* ſays, That it is a great Folly in particular Men, as well as Commonwealths, not to accept of Accommodation, or hear of Reconcilement, while Things ſtand whole on both Sides; *but when they have ſufficiently puniſhed and mortified one another, then quietly to give over, without giving any Body the Trouble of parting them* [a].

V. The *unjuſt Cauſes* of *War* are recounted by *Grotius*, L. ii. c. 22. § 5, *&c.* Some of them are manifeſtly unlawful; others of them have ſome *Colour* to be thought lawful, tho' it be but weak and faint. Under the *firſt Rank* is to be placed *Avarice* and *all extravagant Deſire of increaſing Wealth, as alſo Ambition, and the Hopes of enlarging Rule and Dominion, of growing great, and purchaſing a falſe Fame and Glory, by the Oppreſſion of others.* *Avarice* is a *Cauſe* of *War* uſually conceal'd and diſſembled with great Care, becauſe it ſuppoſes a baſe and ſordid Spirit. But *Ambition* is generally favour'd in the World, under the Name of Gallantry and Fortitude. And it is commonly thought Greatneſs and Bravery of Mind, to graſp after, and fight for what belongs to other Men. But yet Princes, as *Philiſcus* told *Alexander* [1], *Tho' they are never ſo ambitious of Glory, ſhould not think it any, to be remember'd, as Famines and Peſtilences are, as the Plagues of Mankind, but as the greateſt Bleſſings, as Peace and Happineſs.* For tho' the great God often makes uſe of War to purge and puniſh the World [b], yet when Princes make War without any other Deſign than that, it is the greateſt Impiety. And yet the *Jews* thought that they were allow'd, when their *Sanhedrin* declared *War*, tho' without any other Reaſon than barely for the Greatneſs and Glory of their Nation, to invade their Neighbours, and, if they could, make an abſolute Conqueſt of them [c]. Under the *latter* Claſs may be rank'd *Fears, which ariſe from the Strength and Power of Neighbours; and when Men think, as the Poet ſays, they don't want Will to do what they have Power* [d]. But this ſingle Suſpicion is not ſufficient to make a *Cauſe* of War *juſt*, unleſs Men have very good moral Certainty, that they have form'd Deſigns againſt them. For an uncertain Jealouſy of Danger may be Reaſon enough to perſuade a Man to be circumſpect, and fortify himſelf as well as he can, but can never give him a Right to ſtrike the firſt Blow, tho' it be only with Intent that the other ſhould give him *real Caution*, as they call it, that he will attempt nothing againſt him [e]. For as long as my Neighbour doth me no Injury, and I do not apparently take him in any Preparation for ſuch a Deſign (for ſometimes an intended Injury, and but begun, may as juſtly be puniſh'd with *War*, as an Injury that is finiſhed) I ought to preſume, he will always continue in the ſame Mind. But eſpecially, if I have his Word and Faith to aſſure me of his Sincerity. And it would be extreamly unjuſt in me to force him to give me *real Caution*; becauſe thus he muſt be in a more ſuſpected Condition than my ſelf, being forced himſelf to rely upon my Faith alone. Suppoſing indeed, that there be *juſt Cauſe* of *War*, the Growth and Power of Neighbours may very well deſerve immediate Conſideration and Regard, in Debates about it: For Experience hath often proved it true, that Mens Deſires of being great increaſe in Proportion to their Strength and Power [f]. " And it is natural for Men to be ſuſpicious, and " afraid of being oppreſs'd, whenever they ap- " prehend that there is an Over-balance of Power " in their Neighbours; for it is eaſy to imagine, " that

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[a] Iſocrates, *Orat. ad* Philip. *p.* 154. *Ed.* Min. Pariſ. This Period is taken from the Abſtract *de Officio Hom. & Civ. Lib.* II. Cap. 16. §. 3. See *Grotius*, Lib. II. Cap. 23. §. 11, 12. where he makes the two following Remarks, which are worth our taking notice of here. The firſt is, that what Aſſurance ſoever we may have of the Juſtice of our Cauſe, if it is not in our Power to produce a Title ſufficient to convince him that detains what is ours, of the Illegality of his Poſſeſſion, we cannot lawfully declare War againſt him on that Account; becauſe in that Caſe we have no Right to force him to deliver up to us the Thing he is poſſeſs'd of. Beſides, if the Poſſeſſor is a Perſon of no Honeſty or Sincerity, tho' we ſhould have loſt the Deeds, that were neceſſary to be produced before the Arbitrators, that would diminiſh nothing from our Pretenſions, nor hinder us from purſuing our Right by Force of Arms, as our Author has obſerv'd above, Book V. Chap. 13. §8. *Grotius*'s other Remark is, that when the Right is doubtful on both Sides, if neither of the Parties is in Poſſeſſion of the Thing in Diſpute between 'em, or if both of 'em are equally poſſeſs'd of it, they muſt decide the Matter by way of Diviſion, and he that refuſes this Expedient, ought to be look'd upon to be unjuſt, and an Enemy to Peace.

[b] As in *Euripides, Hellena*, ver. 38, *&c.* Jupiter *is ſaid to have engaged the* Greeks *and* Phrygians *in a Quarrel.*

To eaſe the Earth of her too numerous Sons.

[c] *Seldenus*, de J. N. & G. ſec. Hebr. l. 6. c. 3. & 12. To which we may add a fine Paſſage of *Cicero*'s, upon the falſe Idea of Conquerors. " If this Greatneſs of Soul which they ſhew in bearing Fatigues, and expoſing themſelves to the moſt hazardous " Dangers, is not adorn'd with a large Stock of Juſtice; and if they uſe it for themſelves, and their own private Advantage, inſtead " of imploying it for the *publick Good*, ſo far is it from being a Virtue, that it is a Vice, and a downright Fierceneſs, that ſtifles all " Sentiments of Humanity and Tenderneſs, *De Officiis*, Lib. I. cap. 19.

[d] *Lucan.* Pharſal. l. 3. ver. 100, 101.

[e] *Gellius*, l. 7. c. 3. A Gladiator that prepares himſelf to fight, muſt accept of theſe Conditions of Combat, either to kill his Enemy, or to fall himſelf; but the Life of Man is not confin'd by any ſuch hard and ſevere Laws, as to oblige us to do others Injuries firſt, that we might not ſuffer them ourſelves.

[f] Vid. *Cumberland.* de Leg. Nat. c. 2. § 15. in fin. *Bacon*'s Eſſays, c. 19. *Seneca, Oedip.* ver. 542, 543. *Stat ingens arbor atque umbra gravi ſylvas minores urget.*

A lofty Tree that ſtands, which with its Shade
Oppreſſeth all the Underwood.———

Procop. Hiſt. *Goth*, l. 4. *Herodes* Orat. de Repub. Neighbouring Nations are never concern'd at the Miſchiefs which befal one another from their own Domeſtick Broils and Quarrels; the Weaker have no Reaſon, becauſe thus they are ſecure from being enſlaved; they that are equal in Strength, think of gaining a Superiority by it; and the Strongeſt, of purchaſing an eaſier Conqueſt, *Polyb.* l. 1. c. 83. A Man ſhould never truſt another with ſo much Power, as to place him out of his Reach, when he is to conteſt with him about any Right that is confeſſedly his own. *Appianus Alexand. Lybic.* p. 32. Ed. *Steph.* Tho' it be a Friend, yet it is neceſſary to be cautious how he is made too great.

Mr. Barb. *NOTE on* §. v.

[1] Vid. *Ælian.* V. H. L. 14. c. 11.

“ that ſuch as have too great a Share of Strength, will find Reaſons, when they pleaſe, to make uſe of it upon them that are weaker, though they do nothing to deſerve it.” But now as for *Utility*, to make that a *Cauſe* of *War*, or to pretend the ſame Right from thence to what belongeth to others, as Neceſſity may give, is unpardonably impudent; though it is no more than what the *Athenians*[1], in *Thucydides*, ſaid for themſelves, “That no Body is ſo much a Friend to Juſtice, as to neglect an Opportunity of poſſeſſing himſelf of what he can get by Force, barely becauſe it is unjuſt.” Eſpecially ſince nothing can be more oppoſite to the publick Intereſt of Mankind, than to admit the Introduction of ſuch a Right, which will give a Man leave to take away any Thing by Force from another Perſon, which he thinks will be an Advantage to himſelf: For it muſt be expected that other Perſons will uſe him with the ſame Liberty he takes with them. And as to other *Pretences* for War, which *Grotius* mentions in the ſame Place, they may be anſwered the ſame Way. My Lord *Bacon*, in his *Advancement of Learning*, gives this for a *ſufficient Reaſon* for making War upon the *Americans*[a], which I muſt confeſs I cannot agree with him in: “That they were to be look'd upon as People proſcribed by the Law of Nature, inaſmuch as they had a barbarous Cuſtom of ſacrificing Men, and feeding upon Man's Fleſh.” For it ought to be diſtinctly conſidered, whether Chriſtian Princes have ſufficient Licence given them to invade thoſe *Indians*, as People proſcribed by Nature, only becauſe they made Man's[2] Fleſh their common Food? or, becauſe they eat the Bodies of Perſons of their own Religion? or, becauſe they devoured Strangers and Foreigners? And then again it muſt be ask'd, whether thoſe Strangers they are ſaid to kill and eat, come as Enemies and Robbers, or as innocent Gueſts and Travellers, or as forc'd by Streſs of Weather? For this laſt Caſe only, not any of the others, can give any Prince a *Right of War* againſt them; and this to thoſe Princes only, whoſe Subjects have been uſed with that Inhumanity by them.

VI. Tho' it be alſo common to all *Sorts of War* that the particular *Nature*, and, as I may call it, *Genius* of them is *Violence* and *Terror*, yet it is alſo lawful to make uſe of *Stratagem* and *Fraud* againſt any Enemy, provided there be no Treachery, or Violation of Compact and *Faith* in it. For as *Ageſilaus* ſaid, *To break the Faith of Articles and Leagues, is no leſs than a Contempt of GOD: But to circumvent an Enemy, is well enough conſiſtent with Juſtice, and may be attended with as much Glory as Succeſs*[b]. And the proper Senſe of that famed Saying of *Cleandridas* implies no more: *When the Lion's Skin fails, it is neceſſary to put on the Fox's*[c].

VII. But the better to underſtand how far it is lawful to purſue *Revenge*, and uſe Violence againſt an Enemy, it will be neceſſary to obſerve, that there is a great deal of Difference between the *Liberties* which a *State of Hoſtility*, ſimply conſidered, gives a Man againſt his Enemy, and the *Liberties* which the Mercifulneſs and Gentleneſs of the *Law of Nature* would ſuffer him to take. The *Law of Nature* obligeth Men to a mutual Exerciſe of the Offices and Duties of *Peace*; and the Perſon that firſt violates them to my Prejudice, releaſes me, as far as lies in his Power, from paying any of thoſe Offices to himſelf: And in Conſequence, as long as he profeſſes himſelf my Enemy, he gives me a *Liberty* to uſe *Violence* againſt him *in infinitum*, or as far as I pleaſe. Eſpecially ſince, if I am not allow'd this *Liberty*, but am neceſſarily obliged to confine my Violence within certain Bounds, and in no caſe to proceed to Extremities, the proper End of *War*, whether *offenſive* or *defenſive*, can never be obtain'd. And therefore every open *publick War* ſeems to have ſomething in it like *ſuch a ſort of Compact* as this: *Try your Strength, and I will try mine.* And this holds not only where my Enemy reſolves to puſh Things to the utmoſt againſt me, but alſo tho' he deſigns to deſtroy me, without going to Extremities: For he hath no more Right to give me a ſlight Wound, than one that may prove mortal. And therefore it is not only ſo far lawful for me to uſe *Violence* againſt my Enemy till I have repulſed the Danger he threaten'd me, or till I have recovered, or forced from him what he either unjuſtly deprived me of, or refuſed to pay me; but I may further oblige him to give me *Caution* for the future. Which if he ſuffers to be forced from him, he ſufficiently diſcovers, that he ſtill entertains malicious Deſigns againſt me, and that one Time or other he may put them in Execution. Neither indeed is it always unjuſt, to return a greater Evil for a leſs. It may, 'tis true, be objected, that Retribution ought to be made in due Proportion; but it muſt be ſaid, that this is to be applied only to *Courts of Judicature*, where Puniſhments are inflicted always by *Superiors*. The *Evils*, which are the Effects of a *Right of War*, are properly Puniſhments, becauſe they are not inflicted by a *Superior* as ſuch, nor have any Tendency to reform either the injurious Perſon, or any others, but only to defend or regain the Security of a particular Man's Rights and Properties. In purſuance of which End, it is lawful for me to make uſe of ſuch Means as I think will beſt prevail againſt a Perſon, who, by his injurious Treatment of me, hath put me out of all Capacity of doing

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[a] De Augmen. Scient. p. m. 348.

[b] *Plutarch* Apophtheg. Lacon. p. 209. B.

[c] *Cleandrid.* in *Polyen.* Stratag. L. 2. c. 10. n. 5. Vid. *Xenoph.* Cyropæd. *l.* 1. & *Grot.* l. 3. c. 1. § 6. add. ſupr. l. 4. c. 1. § 19.

Mr. BARB. *NOTES on* § V.

[1] B. 1. c. 76. Ed. *Oxon.*

[2] If theſe *Anthropophagi* eat only the Fleſh of human Creatures that die a natural Death, or are killed by others, and not themſelves, how barbarous and ſavage ſoever ſuch a Cuſtom was, it would give us no *Right* to attack them purely for that ſingle Reaſon. But ſince they themſelves kill human Creatures, either to eat them or ſacrifice them to their Idols, 'tis a Thing ſo cruel, ſo contrary to Humanity, and ſo deſtructive to Society and Mankind in general, that we cannot look upon, but as juſt and commendable, a War that ſhould be undertaken to endeavour to have the Uſe of it aboliſh'd, though theſe Men practiſed it but only among themſelves, and always ſpared Strangers. If our Author maintains the contrary, 'tis becauſe he always argues upon a Principle, whoſe Falſeneſs I have prov'd elſewhere. See Note 1. § 3. of this Chapter, and Chap. III. § 4. Note 3.

doing him any Injury, till ſuch Time as it ſhall be agreed between us to forbear *Hoſtilities*. But now the *Law of Humanity* would have Men conſider not only what an *Enemy* may ſuffer without Injury, but what it may be proper for a generous *Conqueror* to inflict. And therefore they ought to be particularly careful, that as far as is poſſible, and their own neceſſary Defence and future Security will permit, to proportion the Evils they inflict upon their Enemy, to the *Meaſures* and *Moderation* obſerved by *Civil Courts* in puniſhing *Criminals* and *Offenders*. Upon this *Moderation Grotius* [1] is very large, *l.* iii. *c.* 11, *&c. ad* 16. And the three Rules he preſcribes, *l.* iii. *c.* 1. § 2, 3, 4. will give us a clear View of the *Liberties of Hoſtility*. But beſides, the Uncertainties and Turns of Fortune which may happen in *War*, ought to perſuade Men to be very temperate in the Uſe of thoſe *Liberties*, for fear an Alteration in Affairs ſhould, as it were, make their own Weapons recoil, and return upon themſelves the Uſage they gave others [a]. So when *Colonna*, in *Gratianus* [b], gave Orders that the *Turks*, which were taken Priſoners in the Fight at *Lepanto*, ſhould be well uſed at *Rome*, he turn'd to *Mahomet*, and ſaid aloud, Learn to be merciful of us, you that are generally ſo cruel and barbarous to *Chriſtian Captives*: To which the *Turk* replied, The Cruelty, Sir, you object, is however pardonable in us, becauſe we never knew before what it was to be Priſoners, and be left to the Mercy of an Enemy. The *Turks* underſtood well enough how to take Priſoners, but never thought of being made ſuch. How they are to be dealt with [2] that ſupply an Enemy with what he wants, may be ſeen in the *Author* mentioned before, *l.* iii. *c.* 1. § 5. & *c.* 17.

VIII.

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[a] Vid. *Diod. Sicul.* l. 10. c. 47. *Virg.* Æneid. 10. ver. 533.

——— Belli commercia Turnus
Suſtulit illa prior, jam tum Pallante perempto.

[b] *Gratianus* de Bello Cyprio, *l.* 5.

Mr. Barb. *NOTES on* § vii.

[1] *Grotius*, (Lib. III. Cap. 1. § 1, 2, 3.) lays down at firſt three general Rules, which ſerve to explain the Extent of the *Rights of War*. Firſt, All that has a Relation morally neceſſary to the lawful End or Deſign of the War, is permitted, and no more: For it would be to no Purpoſe to have a Right to do a Thing, if we could not make uſe of the Means neceſſary to bring it about. But at the ſame Time, it would not be juſt, that under the Pretence of purſuing our Right, we ſhould ſuffer ourſelves to do every Thing, and carry on Matters, without any Manner of Neceſſity, to the laſt Extremity. *Secondly*, The Right which we purſue by Arms ought not to be conſider'd only with regard to the Cauſe which began the War, but ſtill in reference to the freſh Cauſes that happen afterwards: Juſt as at Law, one of the Parties often acquires ſome new *Right* before the ending of the Suit. There lies the Foundation of our *Right*, to act againſt thoſe that join with our Enemy, whether they are his Dependents or no. *Thirdly*, There are abundance of Things, which, tho' otherwiſe unlawful, are permitted, becauſe they are inevitable Conſequences of War, and happen contrary to our Intention; otherwiſe there would never be any Way of making War without Injuſtice, and the moſt innocent Actions would be look'd upon as unjuſt, ſince there are but few from whence ſome Evil may not accidentally happen, contrary to the Intention of the Agent. (See above, Lib. I. Cap. 5. § 3. Note 6, 7.) Here now follow the Particulars of the *Rights* that War gives over the Enemy's *Perſon* and *Goods*, with the Moderation that ought to be obſerv'd in them. *Firſt* then, It is certain that we may kill our Enemy, otherwiſe our taking up Arms would be to no Purpoſe. And to conſider the Thing in itſelf, it is no Matter which Way we rob him of Life; whether by open Force, or by Fraud and Stratagem, by the Sword, or by Poiſon, tho', according to the Notions and Cuſtoms of civilized Nations, the not only cauſing any poiſonous Draught to be given to our Enemy, but alſo the poiſoning of Fountains, Wells, Springs, Arrows, Darts, Bullets, and other Weapons employ'd againſt him, is eſteem'd as a baſe and criminal Cowardiſe. (Our Author a little lower, § 16. handles the Queſtion, Whether it is lawful to aſſaſſinate our Enemy?) We may alſo kill him wherever we find him, either in his own Territories or ours, in Places that belong to no Body, but not in *Neutral States*; for violent Means are not ſuffer'd in a *Civil Government*, where we ought to beg the Aſſiſtance of the Magiſtrate. Now if it is lawful to take away our Enemy's Life, much more may we wound, maim, or do him any Damage in his Perſon any other Way whatſoever. (See *Grotius*, Lib. III. Cap. 4.) But the *Rights* of War do not extend ſo far as to authorize the Outrages committed upon the Honour and Chaſtity of Women: For that contributes nothing towards our Defence or Security, or the maintaining our *Rights*, but only ſerves to ſatisfy the Brutality of the Soldiers. (*Grotius*, ibid. § 19.) Beſides, when we can defend ourſelves, or have Satisfaction for the Injury the Enemy has done us, without making a Slaughter, we ought to forbear it, and not ſhed human Blood unneceſſarily. Neither muſt we directly and deliberately take away the Lives of Priſoners of War, nor of thoſe that demand Quarter, and ſurrender themſelves; much leſs of Children, Women, and old Men; and in general of all thoſe who are neither of an Age nor Profeſſion fit to bear Arms, or who have no other Share in the War than their being in the Country, or Party of the Enemy. (See *Grotius*, Lib. III. Cap. 11.) Secondly, in relation to the Enemy's *Goods*: It is plain that we may carry 'em off, ravage, ſpoil, or entirely deſtroy them, even without excepting *ſacred* and *religious Things*, as they call 'em, that is, Things deſign'd for the Uſe of Religion: For thoſe belong either to the State or the Sovereign, and they are not called *ſacred* but on account of a certain Uſe to which they are applied. Thoſe who believe that they contain ſomething that is *divine* and *inviolable*, do ill indeed to meddle with 'em at all, but it is only becauſe they act againſt their own Conſcience. (See *Grotius*, Lib. III. Cap. 5. and Mr. *Buddeus*'s Diſſertation, *de jure belli circa res ſacras* among his *Selecta juris N. & Gent.*) However, of what Nature ſoever the Things belonging to the Enemy are, whether *Sacred* or *Profane*, we ought not to deſtroy or damage them but as it is neceſſary and conducive to the Deſign of the War, and the accelerating of Peace. To do *evil* to another, without a Proſpect of doing ourſelves any *good* by it, either directly or indirectly, would be a Madneſs equally fooliſh and criminal. There are but few, for Example, that are neceſſary after the taking of a Town, and ruining the Churches, Statues, and publick or private Buildings; but we ſhould generally ſpare all theſe, as well as the Tombs and Sepulchres.

[2] To give a clear and diſtinct Idea of this Matter, ſomething muſt here be ſaid in general about *Neutrality*, of which our Author ſpeaks no where. I ſhall here borrow pretty near what Mr. *Buddeus* ſays in his *Elemens de la Philoſophie Pratique*, Part II. Cap. 5. Sect. 6. § 36, *&c.* There is a *general Neutrality*, and a *particular Neutrality*. The *general Neutrality* is, when without being in Alliance with either of the two Enemies engag'd in the War together, we are very ready to do equally to both the good Offices which every State is naturally bound to render to others. The *particular Neutrality* is, when we are particularly engaged to ſtand *Neuter*, by ſome Compact, either expreſs or tacit. This laſt ſort of *Neutrality* is either *fully* and *entire*, when we act equally in all Reſpects towards both Parties; or *limited*, as when we favour one Side more than the other, with regard to certain Things and Actions. We cannot lawfully force any one to enter into a *particular Neutrality*, becauſe every one has the Liberty of making or not making *Alliances* and *Treaties*, or becauſe at leaſt they are not bound to do it but by Virtue of an imperfect Obligation. But he that undertakes a juſt War, may oblige other Nations to obſerve an exact and *general Neutrality*, that is to ſay, not to favour his Enemy more than himſelf. This then is, as it were, an Abſtract of the Duties and Obligations of *Neutral Nations*. They are oblig'd equally to put in Practice towards both Parties that are at War together, the *Laws of Nature*, as well *abſolute* as *conditional*, whether they impoſe a *perfect Obligation*, or only an *imperfect one*. If they do one of them any Office of Humanity, they muſt not refuſe to it the other, unleſs there be ſome manifeſt Reaſon which engages them to do ſomething for the one, that the other had beſides no *Right* to demand. But they are not bound to do Offices of Humanity to one Party, when they expoſe themſelves to great Dangers by refuſing them to the other, who has as much *Right* to demand them. They ought not to furniſh either of them with Things employ'd in exerciſing Acts of Hoſtility, unleſs they are impower'd by any particular Engagement: And as for thoſe that are of no Uſe in War, if they ſupply one Side with them, they muſt alſo the other. They ought to uſe their beſt Endeavours to bring Matters to an Accommodation,

that

VIII. I come now to conſider what Difficulties and *Enquiries* relate to *Wars* raiſed by *Commonwealths* and *Civil Governors*. And here it is firſt to be obſerved, that the *Right of War*, which always attends all Men in the *State* of *Nature*, is taken away from private [1] Perſons in Commonwealths; and that therefore in *Civil States* Subjects are not to puniſh ſuch as injure them with their own Swords, and as they pleaſe; nor endeavour to recover their Rights, when denied them, by their own Force; but they muſt apply themſelves to the *Magiſtrates* in ſuch Caſes, whoſe Duty it is to take care that their Wrongs be redreſs'd, *Satisfaction* be made for Damages ſuſtained, *Caution* be given for the future, and that every Man be maintain'd in his own juſt Rights [*]. For though at ſome Times, and in ſome Caſes, private *Subjects* may be allowed *Liberty* to defend themſelves with their own Strength; yet ſuch a *Liberty* is by no Means to be called a *Right of War*. For a Right to make *War* implies a Power to begin it at my own Diſcretion, to continue it as long as I pleaſe, and to put an End to it by *Compact* with the Enemy: But Subjects are never to be permitted to defend themſelves by their own Force, except in Dangers unavoidable [2], and then no longer, than till they have overcome them. And as no private Subject hath a *Right of War*; ſo neither is it neceſſary that *Peace* ſhould be made by any *Compact* of the Subjects, when the Authority of the *Sovereign* hath ſufficiently ſettled it before. Nay, though private Subjects be perfectly reconcil'd to one another, yet when all is over, the *Magiſtrate* may, if he pleaſeth, puniſh the Injury, which firſt gave occaſion to the Quarrel. But, it may indeed ſometimes happen, that any private Subject may aſſume the ſame *Right* of *Defence*, which he would have had in a *State of Nature*; for Inſtance, if he happened to come into any Place which belongs to no Commonwealth, but continues in its primitive *Liberty of Nature*. But then in this Caſe it is to be conſidered, whether the Perſon be aſſaulted by his *Fellow-Subject*, or by a *Stranger*: For if we ſuppoſe by the *firſt*, he is allow'd the Uſe of his own Force to reſiſt only the preſent Danger: But the further Puniſhment of the Injury muſt be referr'd to their common *Sovereign*; except it appears that the Perſon who makes the Aſſault, intends to return no more into his own Country, and hath left nothing behind him that can make *Satisfaction* for the Injury. But if a Man be aſſaulted in any ſuch *Place* by a *Foreigner*, he hath *Liberty*, if he can prevail againſt him, to bring him to the laſt Extremities. And he may alſo enter an *Action* againſt him in the Commonwealth he is a Subject of, and there demand *Satisfaction* and Puniſhment, and make uſe of the *Interpoſition* of his own Commonwealth. And then if Juſtice be denied him, his own Commonwealth hath *Right* to demand *Satisfaction* for him in a Way of *War*. And therefore, if a Man be ſet upon in the open Seas, he need not give himſelf the Trouble to uſe all his Force; but only juſt ſo much as will reſiſt preſent Danger, becauſe when his Enemy comes back to his own Country, he may enter an *Action* againſt him there. But if a Man be aſſaulted by a Subject uſed to deſpiſe and defy the Authority of the *Magiſtrate*, or the *Magiſtrate* himſelf openly refuſe to do Juſtice, he muſt right and defend himſelf as he can, whenever he goes out of the Dominions of his own Commonwealth. But if the *Magiſtrate* ſhould excuſe himſelf, by pleading the Iniquity of the Times, or the bad State of the Commonwealth, and deſireth either that the Proſecution of the *Cauſe* ſhould be deferr'd to ſome other Time, or that the Neglect of Juſtice ſhould be thought pardonable in the preſent Unhappineſs of the Commonwealth; every ſenſible and good Man ought to acquieſce in, and be ſatisfied with the Anſwer.

IX. *War* is commonly diſtinguiſhed into *ſolemn*, and *leſs ſolemn* [1]. In the *firſt*, it is neceſſary the *War* ſhould commence and be directed by the *ſupreme Authority* on both Sides, and that it ſhould be duly *proclaim'd* [2]. The *leſs ſolemn Wars*, are thoſe that are either not publickly declared, or

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[*] *Vid.* L. 50. t. 17. l. 176. *D. de reg. juris, &* L. 4. t. 2. *D. Quod metus cauſa geſtum erit*, l. 11, 12, 13. *&* L. 43. t. 24. l. 7. §. 3. *D. quod vi aut clam.*

Mr. Barb. NOTES on § viii, ix.

that the injured Party may obtain Satisfaction, and that the War may be brought to a Concluſion: And if they are under any *particular* or *private Engagement*, they ought to execute it punctually. On the other Side, thoſe who are at War, muſt exactly obſerve, towards *neutral Nations*, the Law of Sociability; and not ſuffer their Country to be ravaged or plunder'd. They may however, in a Caſe of great Neceſſity, make themſelves Maſter of a Place ſituated in a *Neutral Country*; provided that as ſoon as the Danger is over, they reſtore it to the right Owner, and make him Satisfaction for the Damage he has received by it. See what our Author has ſaid, B. II. c. 6. §. laſt, *at the End*; and *Grotius*, L. III. c. 1. §. 5. and c. 17. Moreover, as to what relates to the Queſtion, whether we may hinder *Neutral* Nations from trading, during the War, with the Enemy; ſee a little Letter of our Author's, publiſh'd about three or four Years ago, in a Book printed at *Hamburgh*, and intituled, *Jo. Groningii Bibliotheca univerſalis Librorum Juridicorum*, &c. p. 105. of the Treatiſes that are in the Beginning of it, and *Bœcler*'s Diſſertation, intituled, *Quies in Turba*, p. 1004. of the Collection of his Diſſertations, printed in 1701.

[1] Not only from private Perſons in a *Commonwealth*, but even from a whole entire Body of People, that are under the *Dominion* of any other, or a *Sovereign*. However, the antient Kings of *Perſia* did often permit their Subjects to war one with another. See *Eſther* ix, 6, *&c.* and Mr. *Le Clerc*'s Commentary upon it.

[2] See above, in B. 2. c. 5. §. 7, 8.

[1] See *Grot.* B. 1. c. 3. §. 4.

[2] The Declaration of War, conſidered in itſelf, and independently of the particular Formalities of every People, does not ſimply belong to the *Law of Nations*, taking this Word in the Senſe that *Grotius* and others give it, but to the Law of Nature. Indeed, Prudence and natural Equity, equally demand, that before we take up Arms againſt any one, we ſhould try all amicable Ways, to avoid coming to ſuch grievous Extremities. We ought then to ſummon him that has done us any Damage, to make us a ſpeedy Satisfaction, to ſee if he will have regard to himſelf, and not put us to the hard Neceſſity of purſuing our Right by forcible Means. See Mr. *Buddeus*'s *Elemens de Philoſophie Pratique*, Part. II. c. 5. §. 4, 8, 9. and his Diſſertation, intituled, *Juriſprud. Hiſtorica Specimen*, §. 34. where it appears, that the Declaration of War has no Place but in *Offenſive Wars*: For when we are actually attacked, that alone gives us Reaſon to believe, that the Enemy is abſolutely reſolved to enter into no Treaty of Accommodation. From thence it alſo follows, that we muſt not begin Acts of Hoſtilities immediately upon declaring War; but muſt ſtay till he from whom we received the Damage, plainly refuſes to give us Satisfaction, and has put himſelf in a Condition to receive us with Bravery and Reſolution: Otherwiſe the Declaration of War would be nothing but a vain Ceremony, without any Effect. See *Grotius*, L. III. c. 3. where all this Matter is treated of.

or elſe that are levied by, or againſt private Subjects. The *firſt* looks like an Incurſion or Depredation of Robbers: The *ſecond* ſuppoſes that one Side or other is in Rebellion, or at leaſt in ſuch a Way of Life, as can at no Time make the *War juſt*. And thus *Civil Wars* may happen to be a *Species* of the *leſs ſolemn*, when the Commonwealth is ſo divided, that it doth not appear on which Side the *Sovereign* is engaged. And here it is obſervable with regard to *ſolemn Wars*, that Authors uſually call two diſtinct *People*, their *Generals* and *Governors* concern'd in them, *juſt Enemies*, in Oppoſition to Robbers and *Pyrates* [a]. So *Cicero* ſays [b], "A juſt Enemy is one that hath a Commonwealth, Courts of Juſtice, and publick Treaſure under his Command. And beſides alſo, the Conſent and Agreement of his People, and Power, when Occaſion offers itſelf, to make Peace, or enter into League." Though a Commonwealth is not therefore to be look'd upon as only a Confluence of Robbers, when it hath been publickly guilty of ſome unjuſt Things. Neither on the other hand, can a Company of Robbers aſſume to themſelves the Honour of a Commonwealth, though perhaps there be ſome Appearance of Juſtice among them [c].

X. And here, upon what *Grotius* aſſerts, l. i. c. 3. §. 4. a Queſtion is moved, Whether a *Magiſtrate* properly ſo call'd, as ſuch, hath Power to make War? Which I think is to be denied. For ſince War is a Matter of that Nature and Conſequence, that it may involve the whole Commonwealth in Danger, to give the Magiſtrate, as ſuch, Power to *declare* and *determine War* by his own Authority, would be the ſame Thing with giving him the *ſovereign Power* [d]. It muſt be allowed indeed, that whatever *Branch* of publick Buſineſs the *Sovereign* entruſts with the *Magiſtrate*, he muſt be ſuppoſed to give him all the Power neceſſary to the due Diſcharge of his Duty in it. And therefore it is a *Maxim* of the *Roman Law* [1], "That every Magiſtrate that hath Juriſdiction, as ſuch, hath a mix'd Authority, which mix'd Authority is defined by a moderate Power, to puniſh obſtinate Offenders, as far as is neceſſary to ſupport his Juriſdiction, and a due Adminiſtration of Juſtice." But when a *Magiſtrate*, who is entruſted with *Juriſdiction*, uſeth Force only to reduce a few diſobedient Subjects, it is not to be ſuppoſed that he is making *War*; for a *coercive Power* over Subjects is not a *Right of War*: *War* ſeeming to lie entirely between *Equals*, or at leaſt thoſe that pretend themſelves to be ſuch. But if the Number of the *Malecontents*, or diſaffected Perſons grow ſo incurable, as to make it to be fear'd, that an Attempt to ſuppreſs them would endanger the Safety of the Commonwealth and the common *Officers* of *Juſtice* are too weak to reduce them, the *Magiſtrate* ought to expect the Reſolutions of his *Sovereign* to direct him in his Proceedings in the Matter. And therefore *Grotius* is under a Miſtake when he ſays, l. i. c. 2. §. 4. "That if we conſider the Thing without Relation to the Civil Laws, every Magiſtrate as he ought to protect the People under his Charge, ſo if he be oppoſed by Force in the Exerciſe of his Authority, he hath a Right to make War." For the Defence and Protection of the People properly belongs to the *Sovereign*, and a *Magiſtrate* entruſted with *Juriſdiction* is only ſo far to defend them, as he is obliged to guard the Poor and Weak by Juſtice againſt the Oppreſſions of the Rich and Great. To which End there is no Neceſſity he ſhould have a *Right* of making *War*. By the Way it may be obſerved, that though the Slaughter of above three thouſand Men, at the Command of *Moſes*, upon the *Idolatry* of the *Golden Calf*, may with more Propriety be call'd a *Puniſhment* than a War; yet that the Deſtruction of the *Benjamites* [e], looks more like a Rout in War than Puniſhment, though *Eraſmus* is of a different Opinion [f]. And here it will not be improper to add ſomething in general of the Power of *military Magiſtrates*, or of *Generals* and *Leaders*, to whoſe *Conduct* the *War* is entruſted by their Sovereign. A *General* therefore ſent to take the *Field* with an *unlimited* Power, may uſe what Meaſures he thinks fit, either to diſquiet and offend his Enemy, or defend himſelf; but as he is not impowered to levy any *new War*, ſo neither when *War* is begun, can he make *Peace* without the Authority of his *Sovereign*. But *Generals* confined by *limited Commiſſions* have, 'tis plain, no further Power than thoſe give them. However ſo much Power every *General*, whether his *Commiſſion* be *unlimited*, or not, may juſtly aſſume, as to uſe what Method he thinks beſt, to defend himſelf againſt the Enemy, when they have advanced too far to give him an Opportunity of making an honourable Retreat. And in ſuch a Caſe as this only, what *Tully* ſaith ought to be allowed [g]. "That in Affairs of ſuch unexpected and ſtraitning Circumſtances, a Man ſhould not think of ſtaying for the Inſtructions of the Senate, but be a Senate to himſelf, and do what he thinks will be beſt for the Advantage of the Commonwealth." But a *Defence* indeed doth not conſiſt only in a brave Reſiſtance, or in repelling or avoiding the Enemy's *Attacks*, but alſo in making an *Aſſault* upon him, and returning the ſame Treatment back. And therefore, for Example, an *Admiral* at Sea, who is by his *Orders* to be only on the *defenſive*, may yet, notwithſtanding ſuch a Confinement, upon Provocation ſufficient, break in upon the Enemy's Fleet, and ſink and burn as many of their Ships as he can; all that he is forbidden, is to challenge the Enemy firſt, when they don't think of *Fighting*. And ſo a *General* at Land, though his Inſtructions be not to engage the Enemy, may yet, if he be attack'd in his *Intrenchments*, not only repulſe them, when they would force his Camp, but make a Sally, and give them Battle; and

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[a] *Vid.* L. 50. t. 16. l. 118. *D. de verb. ſignif.* L. 49. t. 15. l. 21. §. 1. *&* l. 24. *D. de captiv.* *&c.*

[b] *Cic. Philip.* 4 c. 6.

[c] Vid. *Grot.* l. 3. c. 3. §. 2.

[d] Vid. L. 48. t. 4. l. 3. *D. ad.* L. Juliam *Majeſt.*

[e] See *Exod.* xxxii. 27, *&c.* and *Judges* xix, xx.

[f] *Eraſm.* Epiſt. l. 6. ep. 29.

[g] *Cic.* Ep. ad Familiar, l. 10. c. 16.

Mr. BARB. *NOTE on* §. x.

[1] V. D. L. 2. t. 1. *De Juriſdictione*, l. 3. *V. etiam* L. 1. t. 21. *De officio ejus cui mandata eſt Juriſdictio*, L. 5. §. 1.

and if he be ſet upon in his *March*, and finds he cannot make a ſafe and an honourable Retreat, he may juſtly venture a Fight. And therefore a *Governor* of a Province or Town, eſpecially if he hath any good Number of Soldiers under his Command, ought to make the beſt Reſiſtance he can, when he is invaded by an Enemy, without expecting *Inſtructions* from his *Soveriegn*. But he is not to carry the *War* into a *foreign Country*, without expreſs *Commiſſion*. An *inferior* Commander, that is left in truſt with a Body of Soldiers for the Defence of a Town, or Fort, is obliged to do the utmoſt he poſſibly can for its Security; and indeed, to hold out ſo long in Defence of it, till he ſees the Place muſt inevitably be carried by Storm, and his Forces cut off. And therefore from what has been ſaid, we may judge of the Action of *Pinarius*, mentioned in *Livy*, l. xxiv. c. 37. His *Orders* were to defend the Caſtle of *Enna*; and to deliver up the Keys of it to them of the *Town*, would have forfeited his Head; and therefore when he ſaw that both himſelf and Soldiers muſt neceſſarily have been left to the Mercy of the Enemy, and be put all to the Sword, unleſs he prevented it by ſuppreſſing the Inſurrection that was forming in the *Town* againſt him, he did nothing beyond what the Powers he had would allow him, in putting the faithleſs Citizens to Death, except, perhaps, it was carrying his Severity too far without Neceſſity, after he knew the Danger was over. Neitheir can it be ſaid that *Pinarius* rais'd a new War[a]. For the *publick War* was at that Time carried on in *Sicily*, againſt the *Carthaginians* and their *Allies*, with whom *they* of *Enna* endeavoured to join. But whether particularly when a *War* is at an End, the ſame Arms may be turned againſt them that aſſiſted the Enemy with Succours and Suppiles, is more than a *General* hath Power to determine. But if a *Governor* of a *Province*, at a great Diſtance from the *Metropolis* of the Empire, be impowered to make *War* or *Peace* with his Neighbours; the *Wars* he undertakes muſt be looked upon to be *ſolemn*. Becauſe he that gives another Power to do a Thing, muſt be ſuppoſed to be the *Author* of what he doth by Virtue of that Power. But if a *Governor* that hath no ſuch Power, make *War* upon another, without Authority from his *Sovereign*, it is left to the *Sovereign*, whether he will own the Action of his *Miniſter*, or not. If he owns it, the *War* muſt be looked upon to be *ſolemn*. And this *Ratification* doth, as it were, reflect back an Authority upon the *War*, ſo that the whole Commonwealth is obliged by it. But if the *Sovereign* diſown the Action of his *Governor*, the *War* muſt be looked upon to be a *Sort* of *Robbery*; and if the *Governor* be given up or puniſhed at home, and *Satisfaction* be made for the *Damages* ſuſtained, the Commonwealth is not engaged in, or obliged by the War. And this was the Reaſon why the *Roman Ambaſſador* demanded of the *Carthaginians*, Whether *Hannibal* laid Siege to *Saguntum*, by his *own*, or by the *publick Authority*[b]? To which the *Carthaginians* rightly anſwered, "That the Queſtion firſt to be determined was, whether the Siege of *Saguntum* was contrary to any Articles of *League* between them and the *Romans*? That before this was decided, the *Romans* had no Reaſon to enquire, whether a Subject of *Carthage* did any Thing by his *own* or *publick Authority*[c].

XI. It may be further enquired, whether a *Prefect* or *Governor*, that hath no *general* or *particular* Commiſſion to warrant him, can juſtly make *War* upon a *foreign State* or *Prince*, only upon *Preſumption*, or becauſe he believes his *Sovereign* will approve his *Action*? Which in my Opinion muſt be denied[1]. For it is not ſufficient to know what it is probable his *Sovereign* would approve, if he were conſulted in ſuch a particular Poſture of Affairs, but it ſhould rather be conſidered, what it is probable he would deſire ſhould be done without his Advice, when the Matter will bear Time, and the Point is nice and difficult, if a Law were to be made upon it, where he muſt determine univerſally of all ſuch Caſes. And then no doubt it will appear, that it would be provided, that no Miniſter ſhould undertake any Action in which the Commonwealth is nearly concern'd (ſuch as a *War* is, and eſpecially the *offenſive*, which is the proper Subject of the preſent *Enquiry*, and which will generally well enough admit of Delays) without the Advice of his *Sovereign*. And therefore, though it ſhould happen that the *Sovereign* ſhould at the ſame Time think a *War* with a certain Enemy neceſſary, yet to be ſure he cannot be pleaſed to ſee his *Miniſter* go beyond the Bounds of his Duty. Thus *Cambyſes* put his Servants to Death that ſaved

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[a] As *Manlius* made War upon the *Gallo-Græci.* See *Liv.* l. 38. c. 45, *&c.* and l. 41. c. 7. and *Florus*, l. 2. c. 11.

[b] *Livy*, l. 21. c. 18.

[c] Vid. *Xenophon* Rer. *Græc.* l. 5. Where the Juſtice of the Action of *Phæbidas* in ſeizing *Cadmea*, is diſputed.

Mr. BARB. *NOTE on* § XI.

[1] 'Tis *Grotius*'s Deciſion, L. I. Cap. 3. §. 5. Num. 3. upon which *Gronovius* pretends that this great Man ought not abſolutely to maintain the Negative, but to diſtinguiſh between *Defenſive* and *Offenſive* Wars: *For*, adds he, *there is no doubt, but that a Governor of a Province, eſpecially if he has any Forces ready in Pay, as it is the uſual Cuſtom in Frontier Provinces, may, without exceeding the Limits of his Power, oppoſe his Neighbours, upon their attacking him, and repel Force by Force, without ſtaying for a particular Order from his Prince.* For my Part, I cannot conceive, how it is that this Commentator has contriv'd it, that this Exception is not underſtood of itſelf? Tho' *Grotius* had not explain'd himſelf here; what he has ſaid elſewhere of the Privileges of Neceſſity, would have been more than ſufficient to have hindred us from attributing any other Thought to him. But is it not plainly expreſſed in the preceeding Paragraph, Num. 3. *Si ita præſens ſit periculum, ut tempus non ferat eum conſuli qui ſupremum in civitate jus habeat: hic etiam Neceſſitas exceptionem porriget?* After which he inſtances in the Example of *L. Pinarius*, related by *Gronovius* himſelf, and by our Author alſo; and in the very Place in diſpute; *Sed hoc magis videndum, quod ille, ubi res moram fert.* —— *ſe inconſulto cupiat fieri*; which manifeſtly ſuppoſes, that when the Buſineſs admits of delay, we are not obliged to ſtay for our Maſter's Orders; and that in ſuch a caſe it is reaſonably to be preſumed, that he leaves us at Liberty to act as we ſhall judge moſt proper. All the Difficulty that would here be in it, would be with Reſpect to the Application to particular Caſes; as for Example, *Gronovius* defends againſt *Grotius*, the Judgment of *Cicero*, who in a Panegyrick on *Octavius* and *Brutus*, commends and extols them, for taking up Arms upon their own Authority againſt *Mark Anthony*. But I have no Deſign to engage my ſelf in a Diſcuſſion of this Matter, which does not belong to my Subject in hand.

ſaved *Crœſus*'s Life, though at the ſame Time he was well enough pleaſed that they had ſpared him [a].

XII. But now, as Perſons that live in a *Liberty of Nature* cannot juſtly be puniſhed with *War*, unleſs the Injuries they themſelves do to others deſerve it; ſo how it comes to paſs, that in a *Civil State* the Guilt of the Injuries, and the Cauſe that gives Birth to War, diffuſe themſelves from the Perſons that were immediate Authors of them, over the whole Commonwealth, will be Matter of further Enquiry. This therefore is certain, that no *Community*, whether *Civil* or *otherwiſe*, is obliged by any Action of *particular Members*, without ſome culpable *Act* or *Omiſſion* of its own. For how ſeverely ſoever the Commonwealth may threaten, the Subjects are ſtill left to their natural Liberty to do otherwiſe if they pleaſe: So that the Commonwealth can no way be reſponſible for the Actions of the particular Subjects [b]. But among the ſeveral Ways, the *Governors* of Commonwealths are involv'd in Wars from the Injuries committed by their Subjects, theſe two, I think, will moſt deſerve our Conſideration, *viz.* [c] *Sufferance* and *Reception*. As to the Matter of *Sufferance*, it is manifeſt, that the Perſon who knoweth the Commiſſion of a Crime, and hath Power to hinder it, without apparent Danger of greater Evil by doing it, and is obliged to do it, muſt be ſuppoſed to be guilty of the Crime himſelf. For it is neceſſary the Knowledge of the Fact ſhould be attended with Power to hinder it; one of theſe ſeparately not being ſufficient to communicate any Share in the Guilt [d]. And the *Governors* of Commonwealths are preſumed to know what their Subjects openly and frequently commit, and their Power to hinder it is always ſuppoſed, unleſs the Want of it be manifeſtly proved. " The Guilt of a Crime before it hath been judicially tried, remains upon them that committed it; but after Sentence is paſſed upon " it, they are the Criminals that neglect to put " the Law in Execution [e]." The Caſe of *Reception*, and how far the Commonwealth gives *Reaſon* for *War* againſt itſelf, by receiving and defending Perſons that have injured others, may be ſeen at large in *Grotius*, l. ii. c. 21. §. 3, 4, 5, 6.

XIII. The ſame *Author* alſo, l. iii. c. 3. give, us a full Account of the Nature of *Repriſals*, which are violent *Executions* made upon the *Perſons* or *Goods* of the Subjects of a *foreign Commonwealth*, that refuſeth to adminiſter Juſtice [1]. In Defence of the Equity of which I further add, that as it is a natural Conſequence of the *Combination* of Men into *Civil* Bodies, that the Injuries which one Member ſuffers from a *Foreigner*, ſeem to affect the whole Commonwealth; ſo it doth not appear to be unjuſt, that every particular Subject ſhould be obliged to aſſiſt the Diſcharge of the publick Debts: Since whatever they pay upon that Account, muſt be refunded to them by the Commonwealth. But if it ſhould be any Man's Misfortune to be a Loſer by the *Publick*, he muſt look upon it to be one of thoſe Inconveniences, that are almoſt unavoidable in a *Civil State*, and conſider that theſe are very tolerable Evils in compariſon of thoſe, which he muſt have felt in a wild *Liberty of Nature*.

XIV. It is manifeſt that Men often make *War*, not only upon their own Accounts, but alſo for others [1]. But to anſwer for the Juſtice of it, it will be neceſſary, firſt, that the Party who is *aſſiſted* ſhould have *juſt* Reaſons for *War*. And ſecondly, that the Party that *aſſiſts* ſhould be under ſome particular *Ties* and *Obligations* to him that is principally concern'd in the War; becauſe otherwiſe it would be very unjuſt to aſſiſt one Man againſt another; ſince as they are Men they both equally deſerve Favour [f]. They therefore

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[a] *Herodot.* Thalia, p. 112. Ed. *H. Steph.* Vid. *Senec.* de Irâ, l. 1. c. 16. Concerning the Action of *Piſo*, *Pro-prætor* of *Sicily*, *Livy*, l. 44. c. 10.

[b] Vid. *Grot.* l. 2. c. 21. §. 2. and the Example he there produceth out of *Livy*, l. 29. c. 16. l. 35. c. 31. l. 45. c. 23. *Valerius Maximus*, l. 6. c. 6. §. 3, 5.

[c] *Patientia & Receptus.*

[d] *Vide* L. 47. t. 6. l. 1. §. 1. *D. ſi familia furtum fecerit.*

[e] *Lycurg.* Orat. adverſ. *Leocratem*. *Polyb.* l. 4. c. 27. ab init. *Gratianus*, Cauſ. 1 & 3. diſtinct. 36.

[f] *Lucan.* l. 4. ver. 707, &c.

Quis conferre duces meminit? Quis pendere cauſas?
Qua ſtetit inde favet; veluti fatalis arena
Muneribus, non ira vetus concurrere cogit
Productos, odere pares.

The Cauſe belongs not to a General's Care,
Their's he thinks beſt for whom his Arms declare;
As when in bloody Shews upon the Stage
The *Gladiators* generally engage,
Not Malice, nor Revenge creates the Fight;
But rival Bravery, and equal Might.

Mr. BARB. *NOTES on* §. XIII, XIV.

[1] This Definition of *Repriſals* is taken out of our Author's Abridgment, *De Offic. Hom. & Civ.* l. 2. c. 16. §. 10. For he contented himſelf here with referring to *Grotius*, l. 3. c. 2. To give a general Idea of the Matter, let us add ſome Remarks which Mr. *Buddeus* makes in his *Elem. Philoſ. Prat.* Part II. cap. 5. § 3, & 6, &c. *Repriſals* being a Sort of an Act of Hoſtility, or at leaſt the Prelude and Forerunner of War, it is plain that no Body can lawfully uſe this Right but with the Approbation of the Sovereign, who, before his granting that Permiſſion, ought nicely to examine whether the publick Intereſt of the State allows him to carry Matters to that Extremity. The Occaſion on which we make uſe of *Repriſals*, muſt alſo be very clear, and the Thing in Diſpute of great Conſequence: For it would be equally imprudent and unjuſt to accuſe a foreign Magiſtrate of Connivance, or a malicious Denial to do Juſtice in an obſcure and litigious Affair, or in one of no Importance, or without having ſufficient Proofs of the Inſincerity of the Prince, to whom we have made our Application. But how juſt a Cauſe ſoever we may have to uſe *Repriſals*, we can never directly, for that ſingle Reaſon alone, put thoſe to Death whom we have ſeiz'd upon, but only ſecure 'em, and not uſe them ill till we have obtain'd Satisfaction: So that during all that Time they are in the Nature of Hoſtages. As for Goods ſeiz'd by Right of *Repriſals*, we muſt take care of them till the Time ſet for the Payment is expir'd; after which we may either adjudge them to the Creditor, or ſell them to diſcharge the Debt, and return to him from whom they were taken the Overplus, deducting out of 'em all Charges and Expences. But it is not lawful to make *Repriſals*, but with regard to Subjects properly ſo call'd, and their Goods; for as to Foreigners, who do but paſs through a Country, or only come to make a ſhort Stay in it, they have no ſuch great Union with the State, of which they are only Members but for a Time, and in a very imperfect Manner, that we may indemnify ourſelves by them, for a Loſs we have receiv'd by any original and perpetual Subject, and by the Sovereigns refuſing to do us Juſtice. We muſt farther except *Ambaſſadors*, who are ſacred Perſons, even in the Height of War. But as for Women, Eccleſiaſticks, Men of Letters, &c. the *Law of Nature* gives 'em here no Privilege, unleſs they have otherwiſe got it by Virtue of ſome Treaty.

[1] See *Grotius*, B. 2. c. 25.

fore, whom we not only may, but are obliged to defend, are firſt of all our own Subjects. And that not only becauſe they are, as it were, a Part of the Government, but becauſe the End Men at firſt propoſed to themſelves by giving up their natural Liberty, and ſubmitting voluntarily to a *Civil State*, was the Enjoyment of ſuch a Defence. So the *Campanians* thought, that by yielding themſelves and all that they had to the *Romans*, they laid a Neceſſity upon them to arm in their Protection[2]. Tho' in this Inſtance it may be obſerv'd, that ſince the *Campanians* had exaſperated the *Samnites*, and raiſed an *unjuſt War* againſt them before, the *Romans* could not juſtly reſolve to defend them, notwithſtanding that they had yielded themſelves to be their Subjects, till they had made *Satisfaction* for the *Damages*, and defray'd the *Expences of the War*. But in Defence of any particular Subject, the Government can then only *juſtly* make War, when it will be no great Inconvenience or Diſadvantage to the Whole, or the Majority of the other Subjects, becauſe the *Government* is obliged to have a greater Concern for the Whole than for a Part; and the greater the Part is, the nearer it approaches to the Whole. The next to Subjects, whom we are obliged to aſſiſt, are thoſe *Allies* that have made this particular *Condition* and *Article* of *League* with us. But then all *Allies* are to give place to our own Subjects, when both cannot be aſſiſted, and that without any Breach of the *League*: For no Commonwealth can be more obliged to a *foreign State* than to its own Subjects. And therefore in every *Promiſe* of *Aid* and *Aſſiſtance* the Commonwealth makes, this *Limitation* is implied, *As far as is conſiſtent with the Obligations owing to the Subject*. And therefore it is very abſurd to place any Confidence in a *League*, which is not the Intereſt of our *Ally* to obſerve. But as we ought not to undertake any *raſh* or *unjuſt War*, ſo neither can we be obliged by any *League* to aſſiſt an *Ally*, that engages only in ſuch. 'Tis true, this holds chiefly in *offenſive* Wars, but it may alſo bear ſometimes in the *defenſive*: For if my *Confederate* is ſenſible that he is much weaker than his Enemy, and that his own Forces, and all I can ſupply him with, will not make him a *Match* for him, and yet is obſtinately bent to hazard himſelf, tho' it be to his certain Ruin, when he may treat upon tolerably good Terms; I ſhould be a mad Man to join myſelf with him in ſo extravagant and hopeleſs an Attempt. And thus far what *Grotius* ſaith[3] is very true, " That we are not obliged to ſend Aſſiſtance, when there is no Hopes of Succeſs; for Society is form'd for Good, and not Evil." But then it is alſo to be conſider'd, that it would be to no Purpoſe to make *Leagues*, if we were to run no Hazard, or ſuſtain no *Loſſes* in the Defence of an *Ally*. Next to our *Allies* are our *Friends*, or thoſe we have join'd ourſelves to by particular *Ties* of *Kindneſs* and *Reſpect*. To theſe, tho' we have not promiſed by expreſs *Article of Treaty*, to ſend a certain determinate Aid or Supply, yet the Nature of *Friendſhip* itſelf ſuppoſeth an Interchange and Union of Faith, and that one *Friend* muſt be concern'd for the other's Safety, as far as the ſtricter *Obligations* he is underwill ſuffer him; and that his *Concern* ought to be much ſtronger for him, than that which is due from one Man to another, by the common *Affinity* and publick *Relations* of Mankind; tho' ſometimes thoſe alone may be ſufficient Motives to us to undertake the Defence of a Perſon manifeſtly injured and abuſed; eſpecially ſince it may eaſily be made our own Intereſt to do it; and ſince nothing can tend more to promote publick Good than to puniſh thoſe that take pleaſure in diſquieting and injuring others. And therefore *Solon*, upon this View, when he was asked, how there might be fewer Injuries committed in the World, anſwered, *If they that were not injured would be as much concerned as they that were*[4]. But then we are not to imagine that every Man, even they that live in the *Liberty of Nature*, hath a Right to correct and puniſh with War any Perſon that hath done another an Injury, barely upon Pretence that common Good requires, that ſuch as oppreſs the Innocent ought not to eſcape Puniſhment, and that what toucheth one ought to affect all. For otherwiſe, ſince the Party we ſuppoſe to be unjuſtly invaded, is not deprived of the Liberty of uſing *equal* Force to repel his Enemy, whom he never injured; the Conſequence *then* would be, that inſtead of one *War*, the World muſt ſuffer the Miſeries of two. Beſides, it is alſo contrary to the natural *Equality* of Mankind, for a Man to force himſelf upon the World for a *Judge*, and *Decider* of *Controverſies*. Not to ſay what dangerous Abuſes this Liberty might be perverted to, and that any Man might make War upon any Man upon ſuch a Pretence. The Wrong therefore another Man ſuffers is not Reaſon ſufficient to engage me in his Quarrel, unleſs he calls me particularly to his Aſſiſtance; ſo that whatever I undertake to do, is not to be charg'd upon me, but upon the Perſon that deſires my Help. But whether it be lawful to take Arms in Defence of the Subjects of a *foreign* Commonwealth, againſt the *Invaſions* and *Oppreſſions* of their *Sovereign*, is a Queſtion; for the

Mr. BARB. *NOTE on* §. XIV.

[2] *Livy*, l. 7. c. 31. Florus, l. 1. c. 7.

[3] Vide *Grot.* l. 2. c. 25. § 4. Mr. *Buddeus* (in his Diſſertation *de comparatione obligationum, quæ ex diverſis hominum ſtatibus oriuntur*, § 60.) ſays, That we ought to eſteem thoſe of the ſame Religion with us more than our Friends and Allies, or elſe put them in the ſame Rank at leaſt. But he forgets not to obſerve at the ſame Time, § 62. that we muſt not think it lawful, under a Pretence of defending and favouring that Religion which we believe to be the true, to do every Thing againſt thoſe of another Religion whatſoever; which is a deteſtable Maxim, univerſally and juſtly blamed in the Conduct of *Roman Catholicks*, but which, *continues he*, thoſe who have the greateſt Abhorrence of the Tyranny of the *Roman Church*, do not ſeem to be entirely out of Conceit with.

[4] *Plutarch* in *Solon.* p. 88. D. *Quintilian.* Inſt. Orat, l. 4. c. 1. p. 270. 'Tis natural for us to pity the Diſtreſſed: *Euripides* Suppl. ver. 267, 268.

Εχει καταφυγὴν θὴρ μὲν πέτραν, &c.

The Beaſts purſued, to Rocks and Cliffs retreat,
The Slave clings to the Altars of the Gods,
And States diſtreſs'd, their Neighbours Aid implore.

the Solution of which I refer you to the Opinion of *Grotius* [a]; the ſafeſt Anſwer that can be given to it ſeems to me to be this, That we cannot lawfully undertake to defend the Subjects of a *foreign Commonwealth* in any other Caſe, than when they themſelves may lawfully take Arms to repreſs the inſupportable *Tyranny* and *Cruelties* of their own *Governors*.

XV. Of the *Declaration* neceſſary to *ſolemn War*, *Grotius* largely informs us, l. iii. c. 3.

XVI. The ſame Author, l.iii. c. 4, &c. gives us a long Account of many Nations that never ſet Bounds to themſelves in any of thoſe *Liberties* which, as I ſaid before, the *Law* of *Nature* allows againſt Enemies. But here it is to be obſerved, that tho' *Generals* uſually give Laws to their Soldiers, preſcribing how far they are to uſe *Hoſtilities* againſt the Enemy, and puniſh the Violation of them upon the Offenders; yet this is not done becauſe they ſuppoſe the Enemy is or may be injured, but becauſe it is neceſſary that the *General*'s Orders ſhould be obey'd, and that *military Diſcipline* ſhould be ſtrictly obſerv'd. So that tho' a Perſon, who in a *ſolemn War* had behav'd himſelf with greater Cruelty and Outrage than the *Law* of *Nature* will permit, ſhould afterwards happen to be indicted or accuſed for it in any *third* Commonwealth unconcern'd in the War, it would be a very uncommon Way of Proceeding, ſhould he be ſentenced for a *Ruffian* or *Murderer*, and be uſed as ſuch; becauſe as it does not belong to the People of one Nation to enquire what others are guilty of abroad, ſo there ſeems to have been a *tacit* kind of Agreement of *Nations*, that one ſhould not paſs Judgment upon the Wars another engages in. For why ſhould one at a Diſtance from the Diſpute, and no *Ally* to either of the Parties engaged, give himſelf the Trouble of making another's Quarrel his own? Beſides that, even in a *juſt War*, it muſt be allow'd difficult to know what are the juſt *Meaſures* of *Self-Defence*, in what Method to exact *Satisfaction* for *Damages*, and what Ways to take *Caution* for the future. So that in ſhort, it is ſafer to leave theſe Things to the Conſciences of the Parties engaged in the War, than to venture to give Sentence upon an Affair, the condemning of which may be of dangerous Conſequence to ourſelves; eſpecially ſince the Parties at War themſelves, by a *tacit ſort* of *Compact*, agreed either to increaſe or abate the Heat of the War, as they pleaſe.

XVII. How far in particular it is uſual to extend the *Liberties* of *War* upon the *Perſons* of the Enemy, may be ſeen at large in the ſame *Author*, l. iii. c. 4.

XVIII. It may alſo in the next Place be particularly enquired, whether it be lawful to *aſſaſſinate an Enemy*? And here *Grotius* [b] thinks that there ought to be a Diſtinction made between Perſons that violate their *Faith*, whether *expreſly* or *tacitly* given, as *Soldiers*, *Subjects*, *Vaſſals*, *Refugees*, and Perſons that were never bound by *Faith*. And that to employ the *latter* as *Aſſaſſines* is what no Law forbids [c]: But that to make uſe of them, who muſt by the *Act* be guilty of *Falſhood* and *Treaſon*, is what the more *civilized* Part of Mankind always look upon as the greateſt Infamy and Baſeneſs; tho' againſt *Rebels*, *Pyrates*, and *Highwaymen*, the moſt ſcrupulous *Princes* never doubt to propoſe even Rewards to the Perſons that can kill or apprehend them. Nor does any body blame the Conduct, or think the Meaſure hard, becauſe theſe are known to be common Enemies, and lie under the publick *Odium* of all. The ſame Anſwer will ſerve that other *general* Queſtion, Whether it be lawful to uſe *any Man's Service promiſcuouſly* in War? Where we are to diſtinguiſh between them that *betray* or *revolt* from their *Maſters*, and offer themſelves *voluntarily*, and them that ſuffer themſelves to be *corrupted* in their *Faith* by the Force of *Rewards* and *Promiſes*. By the common Practice of the World the former may lawfully be employ'd; but as *Grotius* thinks, l. iii. c. 1. § 21, 22. not the *latter* [d]; tho' I think it may very well bear Diſpute. For ſuppoſing the *Cauſe* I engage in be *juſt*, I have a Right to diveſt my Enemy of all *Forces* and *Succours*, to make him as defenceleſs, and to give him all the *Diſturbance*, and do him all the *Damage* as I can, which are the Things aim'd at in ſoliciting his Subjects to a Defection. And I do not ſee any ſufficient Reaſon why I may not purſue that End, by tempting my Enemy's Subjects with the Hope of Rewards, as well as any other Way; eſpecially ſince it is on all Hands allow'd, that an Enemy's Subjects may be lawfully frighted by falſe Threats, and Shews of Fear to ſurrender themſelves, and conſequently to deſert their *Maſter*: Which ſort of Deſertion is not wholly excuſable, ſince it is known, that by the *Laws military*, they that ſuffer themſelves to be impoſed upon in that Manner, are as liable to *Capital* Puniſhment as they that are guilty of *Perfidiouſneſs* and *Diſloyalty*; for *Cowardice* and *Credulity* are as inconſiſtent with the *Duty* of a *Soldier* as *Faithleſneſs* and *Treachery*. And further, tho' *Force* is the moſt lawful, and the braveſt Way of attacking an Enemy, yet this doth not make it unlawful to have Recourſe to *Fraud*. And tho' theſe *Deſerters* I ſpeak of are certainly criminal themſelves, yet there is no Reaſon why the Party that ſolicited them to a Deſertion, ſhould bear any Share in the Guilt of it: Becauſe I don't ſee any Manner of Obligation why I ſhould abridge myſelf of the Liberty of making uſe of the eaſieſt Methods to obtain my Right, only becauſe by doing ſo I may give *them* occaſion to be guilty of Sin, who have already, by the Injuries they have done me, broken off all *Communication* of *Right* with me. And why may it not be lawful for me to win thoſe with my *Money*, whom I might otherwiſe conquer with my *Sword*? Eſpecially ſince after all the Propoſitions and Solicitations I can make to them, it is ſtill left to their own Choice, whether they will look upon me for an Enemy, or buy my Favour by entering into my Service. But in Time of *Peace* there are theſe two *Reaſons* why I ought not to importune another Man's Servant or Subject, *unjuſtly* to *deſert* from his *Maſter*, and come over to me. *Firſt*, becauſe

[a] B. 2. c. 25. § 8.

[b] L. 3. c. 4. § 18.

[c] *Mori*, Utop. l. 2.

[d] Vid. *Quintil.* Decl. 255.

becauſe I have no lawful Power to intercept any Thing that belongs to another. And *ſecondly*, becauſe I cannot juſtly puniſh, or do any harm to him, tho' he ſhould refuſe to deſert, and make me his Maſter; both which are manifeſtly allowed me in the Caſe before us. As therefore the Propriety my Enemy hath to what he calls his own, is no Manner of Reaſon to me why I may not take it from him; ſo the Right he hath over his Subjects is ſo far inſignificant with me, as I am under no Obligations to be in the leaſt concerned, that he ſhould always inviolably enjoy it. And therefore the *Objection* uſually made againſt this *Opinion*, that a Man cannot incite another to do a Thing, which he muſt ſin in doing, or that, *that* Man is guilty of Sin himſelf, who ſupplies another with a *Cauſe* or *Occaſion* of Sin, ſeems to me to hold only between ſuch as are not *Enemies:* For an *Enemy*, in reſpect to me, is in ſuch a State, that as long as I am in Purſuit of my Right, and in Arms againſt him, I have no Reaſon to trouble myſelf whether he takes from thence an *Occaſion* to ſin, or not. And therefore, tho' perhaps my Promiſes or my Money may be really the Inducement to another to be falſe, and deſert; yet in Reaſon, the Crime of Falſeneſs and Perfidiouſneſs cannot be charged upon me as my own, becauſe for the preſent the *State* of *War* hath entirely broken off all Commerce and Communication of Right, between him and me; and he himſelf, as far as in him lay, gave me an unlimited infinite Power and Liberty againſt himſelf. And ſince it is not in the leaſt unlawful to put an Enemy to the Sword, when the State and Poſture of *War* requires it, I do not ſee why it ſhould be thought criminal to offer him a Temptation that may poſſibly tempt him into Sin: For it is evidently a weak Argument, which ſome produce to the contrary, that *Faith* ought to be kept by Enemies; and that therefore an Enemy's Subjects are not to be ſeduced to Deſertion. But after all, a Man ſhould be cautious, that he don't ſet an Example to others, that one Time or other may be of dangerous Conſequence to himſelf. And without Diſpute, it is an Evidence of uncommon Greatneſs and Generoſity of Spirit, when a Man hath it in his Power to refuſe to make uſe of ſo eaſy a Way of *Acquiſition*. Beſides that, "It is certainly true [a], that a Man that "accepts the Service of a Traytor, tho' upon "the Heat of his Succeſs, he may think himſelf "obliged by him; yet afterwards, when he reflects upon the Action, he will begin to ſuſpect, "and then to fear, and ſo to hate the *Traytor*, "tho' he loved the *Treaſon*, becauſe he knows "he hath had already ſufficient Experience of "the Inſincerity of his *Faith* [b].

XIX. How far the *Liberties* of *War* may be extended upon the *Goods* of an Enemy, and Things we call *Sacred*, we are inform'd by *Grot.* l. iii. c. 5.

XX. The *Laws* of *Nature* and *Conſcience* in a *juſt War*, allow [1] a Man to make ſuch *Acquiſitions* out of what his Enemy poſſeſſeth, as will either reſtore him what was due to him, or give him an *Equivalent* to it [2] further, *and* all *that*, the Refuſal of the Payment of which gave Birth to the War; *and beſides*, to ſatisfy himſelf for the Charge he was at in recovering his Right by Force; and to all if there be any Thing elſe, which he thinks neceſſary to ſecure further to himſelf, and take by way of *Caution* from the Enemy. And therefore if a Man inſults and oppreſſeth his *Neighbours*, upon the Confidence he repoſeth in his Riches, when he happeneth to be over-power'd, it is but juſt he ſhould be deprived of his ſuperfluous Wealth, that for the future he may learn to be more *quiet* and *peaceable*. But by the Practice of the World, a Man makes himſelf abſolute and perpetual Maſter and Proprietor of every Thing he takes from his Enemy in a *ſolemn War*, tho' much exceeding the *Pretenſions* the *War* begun upon, *Vid. Grot.* l. iii. c. 6. § 1, 2. Where he alſo ſheweth, when both *Moveables* and *Immoveables* may be ſuppoſed to be taken [3]. Where it is to be obſerv'd, that the Right to *Acquiſitions* of *War* is of Force only againſt any *third diſinterested* Party. But to give the *Conqueror* a Right of *Propriety*, that will hold good againſt the *Conquer'd*, there muſt of Neceſſity be a *Pacification* and *Agreement* between both the *Parties*, otherwiſe the Right is ſuppoſed to continue ſtill in the old *Proprietor*, and whenever he is ſtrong enough, he may juſtly ſtruggle to recover it.

XXI. It is alſo diſputed, to whom the *Acquiſitions* of *ſolemn War* belong, whether to the whole Body of the *People*, or to any particular Perſons among the *People*, or to them that made the *firſt Seizure* [1]? Which Controverſy I think may thus in ſhort be concluded. It is certain that the *Right of War* is lodg'd in the *Sovereign*, under which Right is comprized that other of *arming* the Subjects, of *leading* or *ſending* them abroad upon *Expeditions*, as alſo the *Right* to *raiſe* Money upon them, and other *Neceſſaries* for *War*. But ſince *Wars* are undertaken either to recover the *Rights* or *Dues* of the private Subject, which the Enemy wilfully refuſeth to pay, or elſe upon ſome *publick Cauſe*, which concerns the whole Commonwealth, it eaſily appeareth, that in the *firſt* Caſe, the principal Thing to be taken care of is, that the Perſons, upon whoſe *Wrongs* the War began, may be reſtored to their *Rights*. And the *Overplus* in *this* Inſtance, and in *Wars* that begin from a more *publick* Cauſe, all that is *taken* is firſt *acquired* to the *Sovereign*, as to him that gives *Authority* to the *War*, whatever *Hands* it firſt fell into, whether the *mercenary* Soldiers or *Subjects* obliged to *military* Service upon *Summons*, without receiving *Pay* [c]. But becauſe *War* lies heavy upon the *Subjects*, whether they are only *taxed* to ſupport it, or are ob-

liged

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[a] *Procop.* Hiſt. *Goth.* l. 1. c. 8.

[b] Vid. *Valer. Max.* l. 6. c. 5. § 7.

[c] *Ælian.* V. Hiſt. l. 6. c. 6. The *Spartan* Soldiers were not allowed ſo much as the Spoils of the Enemy.

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[1] This is ſhewn above, in B. 4. c. 6. §. 14.

[2] Provided they are his: For it is not ſo with thoſe Effects that are found in his Country, but belong to Strangers, with whom he is in Peace, unleſs they have ſent them to him with a Deſign to aſſiſt him in the preſent War. As for the Cargo of Ships belonging to the Enemy, they are lawful Prize, as long as Strangers have not demanded and clearly juſtified what Effects might have been in them.

[3] Vid. *Grot.* d. l. §. 3, 4.

[1] See *Grot.* B. 3. c. 6. § 8, 9, *&c.*

liged to *ſerve* in it themſelves, it is no more than a good *Prince*, that hath a Love for his Subjects, would yield to, that the Subjects ſhould be allowed in Return to make ſome Advantage to themſelves by the War; which may be done, either by aſſigning to them a certain *Pay* from the *Publick* when they go out upon any *Expedition* [a], or by ſharing the *Booty* among them, or by giving every one leave to keep the *Plunder* he gets himſelf (as the *Cuſtom* was among the *Greeks*, when they proclaim'd War, to declare at the ſame Time that every Man ſhould have free *Plunder* [b]) or elſe by giving the *Booty* to the *Publick*, in order to eaſe the Subjects of the Burden of the *Taxes* for the future. *Mercenary* Soldiers have no Right to any Thing but their Pay. What is given them above, that is Matter of *Bounty*, or perhaps Reward for their good Service, or Encouragement to their Valour: *Grotius*, in the Place above mention'd, is very large upon this Subject. But upon his Diſtinction of *Acts* of *Hoſtility* into *publick* and *private Acts*, which are undertaken only upon the *Occaſion* of the *publick War*, it may be obſerv'd, that it may be very juſtly queſtion'd, whether every Thing taken in *War* by *private Hoſtilities*, and by the Bravery of *private Subjects*, that have no *Commiſſion* to warrant them, belongeth to them that take it. For this is alſo *Part* of the *Right of War*, to appoint what *Perſons* are to act in a *hoſtile* Manner againſt the Enemy, and how far. And in Conſequence, no *private Perſon* hath Power to make *Devaſtations* in an Enemy's Country, or to carry off *Spoil* or *Plunder*, without *Permiſſion* from his *Sovereign*. And the Sovereign is to determine how far private Men, when they are permitted, are to uſe that *Liberty* of *Plunder*; and whether they are to be ſole *Proprietors* in the *Booty*, or only to ſhare a Part in it: So that all that a private *Adventurer* in War can pretend Right to, is no more than what his *Sovereign* will pleaſe to allow him. For to be a *Soldier*, and to act *offenſively* in an *hoſtile Manner*, a Man muſt be *commiſſion'd* by *publick* Authority. And therefore *Cato* us'd to ſay, that *no Man had any Right to fight an Enemy that was not a Soldier* [c].

XXII. As to the *Acquiſition* of Things *incorporeal*, it is to be particularly obſerved, that they are never acquired but with the Subject they *inhere* in. The Subjects they *inhere* in, are either in *Perſons*, or in *Things*. Thus for Inſtance, in *Things*, there are often certain peculiar *Rights* inherent in certain *Lands*, *Rivers*, *Ports*, *Towns*, and *Countries*; or rather the *Perſons* that are the *Proprietors* of thoſe *Things*, are inveſted with certain *Rights* over other *Perſons* and *Things*. But here it is to be conſidered, whether this *Right* be annexed to this particular *Thing*, by *perſonal* Compact, or by *real*; or whether the Perſon that firſt united this *Right* to the *Thing*, agreed by Compact, that that *Right* ſhould continue in the *Proprietor* of the *Thing*, whoever *he* might happen to be, or by what *Title* ſoever he came to the Poſſeſſion of it; or whether he intended that the *Right* ſhould be no longer valid, than *certain Perſons* ſhould poſſeſs the *Thing* by a *certain Title*. If the *Right* be annex'd *to the Thing* in this *latter* Method, it is manifeſt, that it is not *every one* that poſſeſſeth himſelf of the *Thing* by any *Title* whatever *at Random*, that hath Power to exerciſe that *Right*; but it muſt be conſidered, whether that *Right* ought to follow a *Title* of an *Acquiſition of War*, by its firſt Inſtitution. But thoſe *Rights* [1] which are *immediately*, and in *themſelves* applied, and annex'd to *Perſons*, relate either to other *Perſons* or *Things*. The *Rights* which are annexed to *Perſons* over other Perſons, ſince they are not obtain'd but with the *Conſent* of the *Perſons* themſelves (and this *Conſent* doth not reſpect any Man *promiſcuouſly*, but only ſome *certain Men*) cannot be ſuppoſed to be acquired with the *Perſons*, tho' perhaps the *Perſons* they were annex'd to, and lodg'd in, may fall into their Enemy's Power. Thus for Inſtance, tho' a *Prince* happen to be made *Priſoner* of War, his Enemies have not therefore acquired his *Kingdom* with him. And the taking an *Husband* or a *Father*, doth not give an Enemy Power over the *Wife* or *Children* [d]. When indeed an Enemy hath taken the *Wife* and *Husband* together, he hath a *Right* over the *captive Wife*, but not becauſe he took the *Husband* with her, but ſolely becauſe he hath made her his *Priſoner*. Neither would he have had more or leſs *Power* or *Right*, whether he had taken her *Husband* at the ſame Time, or not. Neither doth the Conqueror acquire any *Conjugal Power* over the captive *Wife*, but barely ſuch a *Right* as is uſually *acquired* over *Captives*. As to the *Rights* that relate to *Things*, we muſt diſtinguiſh, whether the *Perſon* be a Member of a Commonwealth, or live out of *Civil Government*, in a *State of Nature*. If he liveth in a *State of Nature*, the Enemy that taketh the *Perſon* is ſuppoſed to have taken all the *Things* with him, or at leaſt to have poſſeſs'd himſelf of Power to take them, becauſe there is no Body to reſiſt him, or that hath any *Right* to hinder him from *ſeizing* upon all he had. But in Commonwealths the *Thing* is not loſt with the *Perſon*, but the *Right* of it devolves to other *Perſons* of the ſame Commonwealth, or, upon *Default* of theſe, to the *Publick*. And therefore if a Subject of any Commonwealth be taken by an Enemy, his *Goods* that were not taken with him, are not acquir'd by his *Conqueror*, but fall to him that would have been his *Heir at Law*, if he had died a natural Death. But if the Enemy hath taken the *Goods* with his *Perſon*, that the Things taken are *Prize of War*, is Title enough to juſtify his *Propriety* in them, and it is perfectly needleſs for him to derive that *Propriety* from the *Perſon* of the laſt *Poſſeſſor*, whom he took with them. And ſo the Thing is the ſame, as far as concerns the *Right* of the *Conqueror*, to the *Things* he hath taken, whether he take the *Proprietor* with them, or not.

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[a] Vid. *Liv.* l. 4. c. 60. & l. 5. c. 4.

[b] Vid. *Polyb.* l. 4. c. 26, 36.

[c] *Cic.* Off. l. 1. c. 11. Add. *Ziegler* upon *Grot.* l. 3. c. 6. §. 12.

[d] Vid. *Grot.* d. l.

Mr. Barb. *NOTE on* § xxii.

[1] See *Grot.* B. 3. c. 7. § 4. and c. 8. § 4.

XXIII. The fam'd Queſtion once moved in the *great Council* of *Greece* may ſerve to illuſtrate what hath been ſaid, which *Quintilian*[a] ſays was occaſion'd thus: When *Alexander the Great* took and deſtroyed the City of *Thebes*, he found an *Inſtrument*, in which it appear'd, that the *Thebans* had lent the *Theſſalians* an hundred *Talents*. *Alexander*, becauſe the *Theſſalians* were in his Service, freely gave them up the *Inſtrument*. The *Thebans*, who afterwards were reſtored by *Caſſander*, demanded the Debt. The Reaſons the *Thebans* brought to juſtify their Demand, are to be ſeen in the ſame Place in *Quintilian*. To which the *Theſſalians* might have anſwered, Firſt, That what was taken away by juſt Force cannot be demanded again; that by the Cuſtom of Nations, the *Hoſtilities* committed in *ſolemn* War are look'd upon to be *juſt*; and in conſequence, the *former Proprietor* can have no *Pretenſion* left to any Thing that was taken from him, after a *Peace* is eſtabliſhed. Secondly, That a *Right* of *War* is a valid *Title*, when a *Thing* comes to be diſputed in the *Civil Court*: For after a *War* is ended, if any *Controverſy* ariſes about any *Thing* I have taken in the War, 'tis enough to plead that I have a *Title* to it as *Prize of War*. Thirdly, That what is taken in a *juſt War* may very juſtly be retain'd in *Peace*, eſpecially after the *Articles of Peace* are ſettled, and agreed upon on both Sides. For then every Thing is ſuppoſed to be left entirely to the Poſſeſſor, which he is not expreſly obliged to reſtore by the *Articles of Treaty*. Fourthly, thoſe *Rights* which are *properly* and *ultimately* founded in the *Things* themſelves, may be *acquired* with the *Perſon* that is made *Captive*, ſuppoſing the *Captive* giveth his *Conſent* to *transfer them to me*; which *Conſent* I have Power to force him to by threatening him with ſome greater Evil. Wherefore as I can make over an *Action* of *Debt* to another Man, and the Effect will be, that the *Debtor* muſt be obliged to pay his Debt to him, as much as he was before to me; ſo if a *Captive* conſent to make over his *Action* to me, what the *Debtor* owed before to my *Captive*, is now become due to me. And thus *Alexander* might, if he pleas'd, have made himſelf the *Creditor* in the Inſtance before us, though he had left the *Theban Commonwealth* ſtanding, only by forcing them to *transfer* their *Right* to the *Debt* to him. And indeed, he muſt be ſuppoſed to have made himſelf *ſuch*, ſince he made himſelf *abſolute* Maſter of *Thebes*, without any *Exception*; and therefore had a *Right* either to demand the *Debt* of the *Theſſalians*, or to forgive it them: Nay, he might immediately have forced the *Thebans* to remit the *Debt*. And therefore when *Alexander* gave up the *Inſtrument* of the *Debt*, to the *Theſſalians*, it is not to be ſuppoſed, that he did it for fear the City of *Thebes*, which he had then laid in Ruins, might ſome Time or other afterwards demand the *Debt* of them, but to give them Aſſurance that he himſelf would never require any Thing of them upon that Account. Fifthly, it is abſolutely falſe, that as long as there is any one Subject of a Commonwealth left alive, he muſt be ſuppoſed to be the *Creditor* of the whole *Debt*, and conſequently that he hath the ſame *Right* the Commonwealth had to demand its *Debts*. For thoſe particular Perſons that outlive the utter Diſſolution of the *Body* of the Commonwealth can have no manner of Pretence to aſſume to themſelves the *Right* of the Commonwealth; ſince it is not to be ſuppoſed that they any longer conſtitute it. And it is manifeſt that *Alexander* totally diſſolv'd and extirpated the *Theban* Commonwealth, ſo that they that eſcaped the general Deſtruction, could not be look'd upon to be a *People*. And they that afterwards re-eſtabliſhed the *Commonwealth of Thebes*, were manifeſtly a new *People*. And tho' perhaps the antient *Thebans* might have had certain peculiar *Rights*, yet theſe *new Inhabitants* could not pretend to aſſume the ſame to themſelves, barely from the Place they liv'd in, unleſs they obtain'd them all anew: Which was not done with relation to the *Theſſalian Debt*. Sixthly, the *Theſſalians* did not take any unjuſt Methods to obtain the *Inſtrument*, but received it from *one* that voluntarily offer'd it to them, and who had *Thebes*, and all that belong'd to it, at Mercy, purely with intent to pardon them the *Debt*.

XXIV. Conquer'd *Nations*, as well as particular Perſons, may be brought under *Dominion*; but that it be *lawful*, and oblige the *Conſciences* of thoſe who ſubmit to it, it is requir'd, that the vanquiſh'd Promiſe expreſly or tacitly to acknowledge the *Conqueror* for their *Maſter*, and that he for his Part will not treat 'em any longer as his *Enemies*[1].

XXV. I ſhall now briefly enquire how Things *loſt* in *War* return to the *antient Proprietors* and *Maſters*. And here, in my Opinion, nothing can be more agreeable to natural Equity, than that ſuch as have been made *Priſoners of War*, when they find Means to eſcape out of their Enemy's Reach, and are under no Obligations of *Faith* to them, and return to their own *Country*, ſhould not only recover their former *Quality* and *State* in the Commonwealth, but be alſo reſtored to all their *Rights*, *Goods*, and *Fortunes*. But with reſpect to *Things*, whether they be *Moveables* or *Immoveables*, if while the War continues they are retaken from the Enemy, either by *ourſelves*, by our *Subjects*, or by our Soldiers, it is juſt and reaſonable, if they are to be diſtinguiſh'd, that they ſhould be reſtor'd to the *antient Proprietors*. For ſince the Commonwealth is engaged to defend and ſecure the Subjects as far as is poſſible, in their *Goods* and *Properties*, there muſt, it is evident, be the ſame *Obligations* upon the Publick to take care that what is taken from them be reſtored. And it is no *Exception*, that the *Goods* were recovered by the *Soldiers*: For *Soldiers* are only the *Hands* of the Commonwealth,

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[a] *Inſt. Orat.* l. 5. c. 10, 387, 388. Mr. *Titius*, in his *Obſervat.* in *Compend. Lauterbach. Obſ.* 1438. and *Francis Hottoman's* Quæſtion. Illuſt. Quæſt. V.

Mr. BARB. *NOTE on* § XXIV.

[1] This Paragraph is taken out of our Author's Abridgment *de Offic. Hom. & Civ.* B. 2. c. 16. §. 14. See *Grot.* B. 3. c. 8. & 15. See above, in B. 7. c. 7. §. 3, 4.

monwealth, and what they win with their *Swords*, they *acquire* to the Commonwealth, and are not to make their own private *Purchaſe*. And ſince it would be *Oppreſſion* and *Injuſtice* in the Commonwealth to recover thoſe *Goods* only for itſelf, which the *private Subjects loſt* in War, there can be no Way left but to return them to the *antient Proprietors* [1]. Thus in *Homer* 'tis ſaid that the *Booty* was divided among them that had loſt to the Enemy before. How the *Roman Laws* provided in ſuch Caſes, and eſpecially with regard to the *Poſtliminium*, is with much *Exactneſs* explain'd by *Grotius*, l. iii. c. 9.

XXVI. A whole Nation, when it hath either by its own Strength, or by the Aſſiſtance of *Friends* and *Allies*, ſhaken off an Enemy's Yoke, without doubt recovereth its Liberty and antient State. And if any Part of what they were poſſeſs'd of remains ſtill in the Enemy's Hands, they have juſt *Pretenſions* to attempt to recover it, as long as a War is kept on Foot, and Peace is not yet concluded. But if a *third* Commonwealth reſcue a *Nation* by a War, which was overpower'd and enſlaved by Enemies, in its own Name, and for its own Advantage, the *Nation* only changeth its *Maſter*, but is as far from *Liberty* as ever. And we may ſay the ſame of a *Part* of any *Nation*. But if a *Part* of a *People* be recovered by the *People* they were for ſome Time divided or torn from, or by their *Allies*, they again *incorporate* with the old *Body*, and return to the Place and *Rights* they had before: Though perhaps, indeed, with an *Ally* it may be agreed, that he may keep what he won from the Enemy, tho' it before belonged to us. *Demetrius*, in *Juſtin*, when he loſt his *Kingdom*, choſe rather to yield it to *Philip*, than leave it to the *Romans* [*]. But though a *Part* of a *People* aſſert their own *Liberty*, and ſuppreſs their Enemies by their own Strength, they muſt return of *Courſe* to their antient *Body*, and muſt not pretend to *erect* a *ſeparate* Commonwealth by *themſelves*, when the old Commonwealth hath not quitted its *Right* to them, as a Part of its *Body*.

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[*] *Juſt*. l.29. c. 2.

Mr. Barb. *NOTE on* §. xxv.

[1] Vid. 1 *Sam*. xxx. 22, *&c. Homer*. Iliad. l. 11. as alſo Mr. *Buddeus*, in his *Elemens de Philoſophie Pratique*, Part 2. Cap. 5. Sect. 6. § 9. to which we may add Mr. *Lock*'s Principles thereupon, in his Treatiſe of Civil Government, Chap. 15. A Conqueror, ſays he, even in a juſt War, acquires no Power over thoſe that have been the Companions of his Conqueſt. 'Tis only over thoſe that have concurred or conſented to the making an unjuſt War on him. The Power he acquires over thoſe whom he ſubdues, is altogether deſpotick, with reſpect to their Lives, but not with reſpect to their Poſſeſſions. The Reaſon of this laſt Article, which at firſt ſeems to be a Paradox, is, becauſe we may kill thoſe who have taken up Arms unjuſtly, to take away their Lives, if they could have done it, that have conquer'd them: But that being only a perſonal Fault in thoſe that made an unjuſt War, their Poſterity ought not to feel the Effects of it. Now the ſame Thing would happen if we ſhould ſeize upon all their Eſtates, deſigned for the Breeding up and Maintenance of their Children, which we ſhould by that Means reduce to Beggary on account of their Fathers Crime. All that a Conqueror can do with Juſtice, is, to indemnify himſelf, if he has ſuffer'd any Loſs. Thus the People, whoſe Predeceſſors and Country have been oppreſs'd by Force, have always a Right, according to Mr. *Lock*, to recover it, and to uſe the ſame Means to regain their Liberties. Indeed it would be abſurd to ſay, that a Prince hath a Right to take all he can, and that after he has been in Poſſeſſion of it for ſome Time, the People that ſhall be born in thoſe conquer'd Countries in After-ages, are beforehand, by a divine Right, ſubject to his Dominion, and that theſe People may never attempt to take away from the Deſcendents what one of their Predeceſſors ſeized on by Force. " The *Truth* of it is (adds Mr. *Le Clerc*, of whom I have borrow'd this Abſtract) *there are great* Difficulties in this Mat-" ter on account of the Misfortunes of Civil Wars, which we ought to endeavour to prevent as much as poſſibly we can. But ſince " it ſeems that all the Right that we can eſtabliſh in this Matter is grounded upon the *Publick Good*, which is the ſovereign Law, we muſt " conſider whether what we are undertaking will in all Probability do more harm than good to the Government. If it be ſo, then what " we do becomes unjuſt; but if the Good which accrues by it is much greater than the Evil, the Enterpriſe muſt be call'd juſt. *Biblioth.* " *Univerſal*. Tom. 19. p. 586." See according to this Law *de Poſtliminio*, what Men acquire by their Return into their own Country, or that of their Friends and Allies *(ex reditu in limen) Grotius*, Lib. 3. cap. 9. and Mr. *Buddeus*'s *Elem. Phil. Pract.* Part. 2. cap. 5. Sect. 6. § 25. & ſeq. As to the Ideas of the *Roman* Law, we ſhall find ſeveral Remarks in Mr. *Byncker ſhock*'s *Obſervations*, Lib. I. cap. 20. Lib. III. cap. 6.

CHAP. VII.

Of Compacts that relate to War.

The CONTENTS of every Paragraph of the Seventh Chapter.

I. *The Diviſion of Compacts that preſuppoſe War.*
II. *Compacts that have no Tendency to remove the War, whether valid.*
III. *A Truce, what.*
IV. *Of the Duration of Truces.*
V. *A Truce leaves the Diſpute, the War began upon, undecided.*
VI. *No need of a new Declaration of War, when the Truce expires.*
VII. *Truces contracted and made by expreſs Compact.*
VIII. *Of the Beginning and End of Truces.*
IX. *The Subject when obliged by Truces.*
X. *What Liberties a Truce allows, and what forbids.*
XI. *Whether a Man, taken in an Enemy's Country, and forcibly detained, may be kept Priſoner after the Truce is expired.*
XII. *What enſues upon the Violation of the Truce.*
XIII. *Of Compacts, that relate to ſafe Conduct.*
XIV. *Of the Redemption of Captives.*
XV. *Of the Compacts of Generals.*
XVI. *Of the Compacts of private Perſons in War.*

IT may now be proper to take a View of that Sort of publick Compacts, which preſuppoſe a *State of War*. And theſe are of two Sorts: *Firſt*, ſuch as put an End to *War*. *Secondly*, ſuch as do not put an End to it, but only, in ſome Reſpects, *qualify* and *confine* it. But before I conſider theſe *Compacts* in *particular*, I ſhall firſt enquire *in general*, into the *Validity* of thoſe of the latter Sort.

II. All *Compacts* therefore *made with an Enemy*, ſaith *Grotius* in general, *ought to be obſerved*, l. iii. c. 19. which indeed is true of *Compacts* that tend to *Peace*, but is I think liable to Diſpute with Relation to ſuch as leave us in a *State of War*, without a Deſign to remove it. For I queſtion, whether it be a *concluſive* Argument, that becauſe a certain particular Man underſtands what is done, and hath Power to give his *Conſent* to it; therefore that from his *Promiſe* another Perſon may derive a *Right*, and he himſelf may contract on *Obligation* to the other. For a *State of War*, as ſuch, hath no other *Meaſure* of *Action* but *Force*. The proper uſe of *Faith* is to advance *Peace*. And therefore it looks like an Abſurdity to employ *Faith* without Thoughts of reſtoring or preſerving [1] *Peace* by it, and much more to make uſe of it, to *protract* and *carry on* War, rather than put an *End* to it. Beſides, when I enter into Articles of *Treaty*, 'tis implied, that I deſire the Perſon I treat with ſhould believe me, and rely upon my *Faith*: But now it is a ſort of a *Contradiction*, to require of him ſuch a Dependence upon me; and yet at the ſame Time to profeſs, that I reſolve to continue his Enemy, that is, to do him all the Miſchief every Way I can. For a State of *Hoſtility* in itſelf gives a Man *unlimited* Liberty, to take all the Advantages he can againſt his Enemy. And it is a *Contradiction* to my Actions to make a *Proteſtation* not to uſe the Liberty of an Enemy, while I perſiſt to continue in an abſolute *State of War*. And therefore what I ſaid before doth not extend to this Caſe; *that ſuch as enter into Compact with one another, do by that very Act renounce all Exceptions to one another's Perſons, which may make them ſuſpect one another to be falſe to their Faith*. For where both Parties do ſeriouſly renounce all ſuch Exceptions, they are already ceaſed to be Enemies: But where they openly *profeſs* that they intend to continue *Hoſtilities*; the *Evidence of Fact* confutes their *Promiſes*.

Mr. BARB. *NOTE on* §. II.

[1] Notwithſtanding whatever our Author here aſſerts, I am of Opinion that theſe Sorts of *Compacts* ought to be as religiouſly obſerved as any other. His Reaſons prove nothing, becauſe they prove too much. For in ſhort, if the *Law of Nature* did not impoſe on us an indiſpenſible Obligation of keeping whatever Contract we have voluntarily made with the Enemy during the War, if it was lawful, for Example, to break on purpoſe a ſolemn Truce, to detain without having any Reaſon for it, Perſons to whom we had given Paſſports, *&c.* I do not ſee what Crime it would be to circumvent the Enemy even under a Pretence of negotiating Peace. When a Treaty is ſet on Foot for this laſt Deſign, we are notwithſtanding Enemies; 'tis properly but a Sort of Truce, which we agree to, to ſee whether any Method of Accommodation can be found out. The Negotiations prove unſucceſsful; it is not then a new War that we commence; ſince the Differences which occaſioned our taking up Arms, are not yet adjuſted, but only a Continuation of the Acts of Hoſtility that were ſuſpended for ſome Time. Thus we could no more depend on the Enemy's Sincerity in the Buſineſs of *Compacts* which tend to the eſtabliſhing of Peace, than with Reſpect to thoſe which only relate to the moderating or Suſpenſion of Acts of Hoſtility; and this would be a perpetual Source of Jealouſies, which would occaſion eterna Wars, and would create an invincible Obſtacle to a Peace of any kind. All that our Author ſays then only proves, that we ought to be very cautious how we engage our Word to the Enemy; ſince Mankind are apt to break it for their own Intereſt, eſpecially when they have to deal with People that wiſh them ill, or hate them. But from the very Moment that the Treaty is concluded, we muſt keep it exactly, till either the Time is expir'd, or the Enemy's Violation of the Engagement on his Side, diſpenſes with the obſerving ours any longer.

miſes. And therefore a Man muſt rather ſuppoſe that they only deſign to impoſe upon and enſnare one another, and by making one another heedleſs and ſecure, to lay Trains for further Miſchiefs; ſo when *Narſetas*, in *Procopius*, ſent to aſk *Totilas*, what Day he would ſet for Battle, his Anſwer was, *After eight Days I'll meet you in the Field.* Upon which, they that were ſent returned and told their Maſter what was agreed to. But he ſuſpecting ſome Falſhood, put himſelf in a Readineſs to give his Enemy Battle the next Day; and he proved not to be miſtaken, for the next Morning, before Intelligence could be brought by the *Scouts*, *Totilas* was advanced and marching towards him with all the Body of his Army [a]. But then, neither can the Perſon that happens to be ſurprized by ſuch a *Compact*, claim any new *Right* againſt the Perſon that betrayed him by it; becauſe the *State of Hoſtility* itſelf already gives him as much *Liberty* as he deſires. If it be ſaid, that ſuch *Compacts* ſhould be obſerved, for fear the Enemy, when he finds himſelf deluded, ſhould be exaſperated, and purſue the War with greater Rage and Obſtinacy: I anſwer, that this Objection allows, that theſe *Compacts* are to be *meaſured* only by the *Uſe* and *Advantage* of them. And I confeſs it is true, that *when the Time or Place for Battle is agreed upon with an Enemy, it is a ſort of Injuſtice to fail in either, becauſe the Revenge of it will generally recoil upon the Cruel and Faithleſs* [b]. We are not always obliged indeed to make uſe of the utmoſt Liberties of War; nay, it is often the greateſt Glory to ſpare an Enemy, when it is in our Power to ruin aud deſtroy him. But ſince War becomes lawful upon *this* Account, namely, when it is neceſſary, we ſhould defend or aſſert our own *Rights*, where they are not to be obtained by peaceable Means, we ought to think that the *ſhorteſt* Way to the Attainment of that End is moſt agreeable to *Nature*. And therefore ſince by *Compacts*, that tend only to *moderate* and *qualify Hoſtilities*, the War is only *drawn out* into greater *Length*; 'tis evident they muſt be contrary to *Nature* [c]. But however this be, it is a Cuſtom which among others hath obtained in the more civiliz'd Part of the World (perhaps out of a particular Reſpect to *military Bravery*) that ſuch *Compacts* ſhould be looked upon to be valid, which were not intended to put an End to the *State of War*, but only to abate the Heat of it, and give the Parties engaged, Liberty to take Breath. Of this Sort are *Truces* for certain *Days*, and ſometimes *Hours to bury the Slain*; the *Agreements to grant Paſſage through one another's Guards* [1]; and ſometimes that no *Hoſtilities ſhall be uſed in certain Places, upon certain Perſons and Things*; *that there ſhall be a Ceſſation of Arms at ſuch a particular Time*; *that certain Weapons and Inſtruments of War ſhall not be made uſe of*. *Olearius* relates [d], "that the *Turks* and *Perſians* made an Agreement, that the Merchants on both Sides ſhould have free Exerciſe of *Traffick* and *Commerce*, and *Liberty* to paſs to and fro unmoleſted; becauſe it was the Intereſt of them both to continue their Trade with one another." For ſince Men, to gratify their Ambition and Avarice, will often raiſe Quarrels and foment Wars in the World; it may be thought abſolutely neceſſary to the State of *human* Affairs, to make War a ſort of *Trade* and *Profeſſion*, and to form it into an *Art*; that ſo at leaſt, the Injuries which the Innocent muſt ſuffer may be leſs inſupportable, when the Liberties of the *Sword* and the Miſeries natural to a *State of War* are more reſtrained. Beſides, the Reputation of being *falſe* and *treacherous*, and of *deluding* others by *Compacts*, is generally of *dangerous Conſequence* to Perſons often engaged in Wars: Since no wiſe Man will be impoſed upon more than once. But after all, a cautious Man can never lay any great Streſs upon ſuch *Compacts*; becauſe if he perſuades himſelf into *Security* by them, he leaves himſelf open to the Attempts of his Enemy. And therefore he ought to be careful, how he agrees to any *ſuch* without manifeſt Neceſſity, unleſs he is in a Capacity, upon any *foul Play*, to give himſelf Satisfaction, or hath other ſufficient *Caution* to depend upon.

III. Among other *Compacts*, which do not put an End to the *War*, but only *ſuſpend* the *Effects* of it, muſt be number'd *Truces*, which are *Agreements to forbear Hoſtilities for a particular Time, the War ſtill continuing. Which Definition* is explained by *Grotius*, l. iii. c. 21. §. 1. For *Truces* are ſometimes granted for ſeveral Years. But *in that Place*, it may be ſaid in *Excuſe*, for *Varro* and *Paulus*, that they had regard only to ſuch *Truces*, as are uſually made when the Armies on both Sides are in the Field and in Motion [2], which are generally limited to a few Days, and not to thoſe which put a Stop to all *Hoſtilities*, and *Preparations* for War, and for the Time they laſt, are little different from an abſolute *Peace*; particularly where any *Clauſe* is inſerted in the *Truce*, that mentions any *Conference* to be formed in the mean Time, towards the *ſettling* a full and entire *Peace*. But it muſt be obſerved, that though Truces of this latter Sort do generally comprehend all the *Territories* and *Dominions* of both the *Parties* engaged in the War; yet it may be, and often is agreed, that the *Truce* ſhall be obſerved only in certain *particular Places*, and that the War may be carried on, as it was before, in others. For Inſtance, thoſe Nations in *Europe*, that have *Plantations* in the *Eaſt* or *Weſt-Indies*, may make a *Truce*, that ſhall be of Force only in *Europe*, and continue the War all the while in the *Indies*.

IV. But it is a Queſtion, whether if *Peace* be limited to any *determinate* Time; for Inſtance, that it ſhall continue for *twenty* or *forty Years*, or the like, it ſhould be look'd upon to be a *Truce*? Now I confeſs, that in my Opinion, every *Peace* in its own Nature *eternal*, that is, whenever a *Peace* is concluded, both *Parties* agree never to take up Arms again upon that *Controverſy* which firſt gave Birth to the War; but that the *Diſpute* ſhall be abſolutely *ſilenced*; or be referred to the *Deciſion* of *Mediators*, or be ſome other Way amicably *compoſed*. And the *Perpetuity* of ſuch a *Peace* is not to be ſuppoſed to be interrupted, though a freſh War afterwards breaks out between the ſame *Parties* upon *new* Reaſons, and *different* from the *former*. For it is not to be imagined, that a perpetual *Peace* obliges Men always tamely to ſubmit to another's Injuries, without oppoſing him, or making Reſiſtance. And therefore though the Word *Peace* may be *uſed*, yet if the *particular* Time be *limited* for its Continuance, ſo that the Diſpute, upon which the War began, is not entirely at an End, it can amount to no more than a *Truce*; which as long as it continues, obliges them mutually to exerciſe the *Offices* of *Peace*. Thus the *Lacedemonians* [1] are ſaid to have made a *Peace* for *fifty Years*, but yet when the War broke out again *ſix Years* after, they were complained of only for Breach of *Truce*. But then, on the *other hand*, it may ſeem abſurd to make a *Truce*, as *Romulus* did with the *Vejentians*, for an *hundred Years* [a]. Though *Dionyſius Halicarnaſſeus*, l. ii. calls it ſimply a *League*, becauſe there can hardly be an Injury, but muſt be worn out of Memory, in ſo long a Courſe of Time; ſo that to defer the Revenge and Proſecution of it to another Age, ſeems unreaſonable. *Livy* indeed ſays, l. vii. c. 20. That a *Peace* was granted to the *Cerites*, but that the *Act* of the *Senate* run only for an *hundred Years Truce*. But I am inclined to think, that the Deſign of that was, that the *Senate* might not ſeem to leſſen their own *Authority*, by appearing eaſy in pardoning ſo ſenſible an *Injury* [b]. Thus alſo *Theodoſius the Second* made a *Truce* with the *Perſians* for an *hundred Years*. And *Diodorus Siculus*, l. xii. c. 60. mentions a *Peace* made for an *hundred Years*, between the *Ambraciotæ*, and the *Acarnanians*. And thus *Ferdinand* King of *Spain*, and *Alphonſus the Firſt of Portugal*, agreed to a *Peace* for an *hundred and one Years* [c],

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[a] *Procopius* Hiſt. *Goth.* l. 4.

[b] *Ambroſ.* De Offic. l. 1. c. 29.

[c] Vid. *Hobbes* de Cive, c. 3. § 27.

[d] Itin. *Perſic.* l. 5. c. 20.

Mr. BARB. NOTES *on* §. II, III.

[1] See *Grot.* B. 3. c. 21. §. 14. *&c.*

[2] V. D. L. 49. t. 15. *De Captivis, & de Poſtliminio*, &c. l. 19.

V. Since therefore, notwithſtanding the *Truce*, a *State of War* continues; which could not be, unleſs the *Pretenſions* were ſtill kept on foot, and the *Controverſy* the War began upon remained undecided; it is evident, that it would be abſurd to deſire to make only a *Truce* with an Enemy, and yet require him to give up all his *Pretenſions*; for if this be done, an abſolute *Peace* is concluded. And it would be unreaſonable to deſire to have Liberty to renew the War without Grounds, when ſuch a particular Time is expired [d].

VI. And it is further evident from the Nature of *Truces*, that if after the *Truce* expires, *Hoſtilities* begin afreſh, there is no need the War ſhould be *proclaim'd* again [e]. But yet, where the *Truce* is of *long* Date, and hath entirely put a Stop to the *Progreſs* and Appearance of War; and where there is any *Clauſe* in the *Truce*, that expreſly mentions *Conferences* to be held in order to put *an End to* the Diſpute; if it be not *neceſſary*, it is at leaſt *honourable*, ſome Time before the *Truce* expires, to *ſignify* our Deſign to the Enemy, and to make ſuch Overtures as may convince him, that we take no Delight in War, and that it is no Fault of ours, that the *Peace* is not concluded.

VII. It may alſo be further obſerved, that all *Truces*, which have any *binding Force* and *Obligation* in them, are contracted either by *expreſs Compact*, or by *Acts* that bear ſuch an Affinity to *Friendſhip* and *Peace*, as they can be referred to no other *Cauſe*. Though *Treaties of Peace* have not in themſelves the Force of *Truces*, except it be expreſly ſo agreed. And therefore an Enemy can have no good Reaſon to conclude, that becauſe I forbear *Hoſtilities* for a little Time, therefore I conſent to give him *Truce*. Neither can he charge me with Breach of *tacit Faith*, if after ſuch *Ceſſation of Arms*, which he hath been ſo unhappy as to grow ſecure upon; I make a ſudden *Deſcent* upon him, and ſurprize him. And in this *Senſe* are thoſe *Authors* to be explain'd, that give ſuch *accidental* Intermiſſions of *Hoſtilities* without *Compact*, the Name of *tacit Truces*, as *Juſtin* and *Livy* frequently do [f]; but which muſt be ſuppoſed to mean no more *than* that for ſuch a Time the Enemy lay ſtill, without offering any *Action* in the ſame Manner as is uſual upon *formal Agreements*, or *Truces*.

VIII. As for the Time *Truces* are generally *limited* to, I refer you to *Grotius* in the Place before cited, §. 4. But I cannot by any Means allow what he there inſiſts upon, that the *Day* from which the *Meaſure* of the *Time* is to commence, is not included within that *Meaſure* or *Compaſs* of *Time*, becauſe (ſays he) the Force of the Prepoſition *From* implies *Separation* and *Diviſion*, and not *Union* and *Conjunction*. For certainly the *Beginning* of any Thing is a Part of that which it *begins*. And therefore if, for Inſtance, it be agreed that there ſhall be a *Truce* for *ten Days*, from the *Firſt* of *July*, I believe it would be difficult for any Man to interpret this otherwiſe, than to take in the *firſt Day* of that *Month* within the *Compaſs* of the *Truce*. Beſides, it is not true that the Particle *From* hath always ſuch a *Force* as to *divide* what it is joined with, from what follows it. For it often ſignifies a *Beginning comprehended* within that which it begins. Thus what Expreſſions are more *common*, than *from Head to Foot, and from the Beginning to the End* [1]?

IX. When *Truces* begin more particularly to *oblige* the *Subjects* on *both* Sides, we may find in *Grotius*, in the Place before cited, §. 5.

X. What

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[a] *Livy*, l. 1. c. 15.

[c] *Conneſtagius* de Unione *Luſitan*. l. 1.

[e] Vide *Grotium*, l. 3. c. 21. §. 3.

[b] Vide *Sozom*. Hiſt. Eccleſ. l. 9. c. 4.

[d] *Vide* Baudium *de Induciis belli* Belgici, p. 128.

[f] *Vide* Juſt. l. 6. c. 7. Livy, l. 2. c. 18. & c. 64. l. 23. c. 46.

Mr. BARB. *NOTES on* §. IV, VIII.

[1] *Juſtin*. l. 3. c. 7.

[1] 'Tis becauſe the *Latin* Prepoſition *à*, which in this Place anſwers to our *From*, ſeparates the two Words to which it relates, from what is between them; ſo that, according to *Grotius*, when we ſay *from the Firſt of* June, *to the Firſt of* Auguſt, thoſe two Days muſt

be

X. What *Liberty* a *Truce* allows, and what it forbids, *Grotius* alſo *accounts* for in the ſame Chapter, §. 9, *&c.* But here I confeſs I am of Opinion, that *Acts* barely *defenſive* are lawful in *Truces* of any Sort; though perhaps *Truce* was deſired and obtained upon ſome other *Pretext*. Thus for Inſtance, though *Truce* be granted only to *bury the Slain*, yet I ſhould not think it unlawful to make uſe of it to retreat to a *Place* of better *Defence*, or to repair or raiſe a *Fortification*; or if a *beſieged Town* requeſt *Truce* only to defer the *Aſſault*, I ſhould not queſtion but that they meant alſo to take in freſh *Supplies* of Men and Proviſions. And *Grotius*'s Reaſon to the contrary, ſeems to me to have no Force in it, l. iii. c. 21. §. 10. that ſince the *Truce* makes for the Advantage of one *Party*, the other that granted it ought not to be prejudiced by it. For ſince Men cannot by any ſort of *Compact* give up their *Right* of *Self-Defence*; the Party that granted ſuch *Truce* can only charge the *Fault* upon his own Eaſineſs and *ill Conduct*, that he did not take ſufficient Care that the Enemy ſhould have no Opportunity to *reinforce* himſelf [a]. So *Tiſſaphernes*, in *Xenophon*, made *Truce* with *Ageſilaus*, but continued his *Preparations* for War all the Time. And I do not think that if he really ſignified his Circumſtances to his *Maſter* the King of *Perſia*, and had Leave from him to enter into *Articles* with the *Lacedemonians*, that he was guilty of Perjury only for arming, and putting himſelf in Readineſs to expect any *Event* [b].

XI. When the *Truce* expires, *Grotius* ſays, that a Man taken in his Enemy's *Territories*, and forcibly ſtopped, may be detained [1] *Priſoner*, l. 3. c. 21. §. 9.

XII. When either *Party* breaks *Truce*, the *Party* injured is at *Liberty* to renew the War without making a new *Proclamation* of it. Though if he thinks it convenient, he may forbear till the *Truce* expires. But if it happen'd to be *agreed*, that the *Party* that firſt broke *Truce* ſhould be liable to pay a certain Sum of Money by way of *Penalty*; where the *Money* is demanded and paid accordingly, it is evident that there is no *Pretence* for War left. For the Reaſon why the *Party* pays the Money is, becauſe he is willing to keep himſelf ſecure from War. But on the other hand, if the *injured* Party make War, he muſt be ſuppoſed *to recede* from his Right to the *Penalty*. Though it muſt certainly be contrary to the *Agreement*, to declare War immediately, and neglect the *Penalty*. For it is not uſual in ſuch *Compacts*, to leave it to Choice, whether the *Penalty* ſhould be accepted, or the War renewed [c].

XIII. *Compacts* that relate to *ſafe Conduct*, that ſecure *free Paſſage* and *Return* through *Places* in an Enemy's *Power*, and how they are to be *interpreted*, are largely explained by *Grotius*, l. iii. c. 21. §. 11, 12. to whom I refer you.

XIV. *Compacts* relating to *Redemption of Captives* [2] are allowed much *Favour* among Chriſtians, eſpecially when the *Captives* are detained in *barbarous Countries*; and even the Treaſures and *conſecrated Veſſels* of the *Church* are ſometimes juſtly given for *Ranſom* [d]. The Practice indeed of the *old Romans* is known to have been contrary [e]: For when *Hannibal* permitted them to redeem their *Captives*, the *Senate* anſwered, *That they that would be made Priſoners when they had Arms to defend them, were very unneceſſary Subjects* [f]. And *Plato* [g] determines, that in his *Commonwealth, if a Soldier were made Priſoner, he ſhould be left to the Enemy's Mercy, though they were willing to give him Liberty.* Nor were they without Reaſon thus ſevere. For (as the Declaimer ſays) [h], " The greateſt Glory in War is " Victory; and next to Victory, the greateſt is " to die for the Cauſe you engage in; there is " indeed a third Way too, but that a diſhonourable one, which is to fly when there is no " Hopes of Conqueſt. But then it may be " ſaid in Excuſe for ſuch a Perſon, that he reſerved himſelf for a ſecond Trial, and that he " hath ſtill Courage to meet his Enemy once " more. But a Man that yields in the Heat of " Fight, that lays down his Arms, and tamely " ſubmits to the Conqueror's Mercy, muſt for " ever be given for loſt. For what Hope can " be entertained of a Perſon that had rather be a " Slave than free, and that makes Captivity his " Choice?" What is to be obſerved upon this Sort of *Compacts* may be ſeen in *Grotius* l. iii. c. 21. §. 23, *&c.* to the 28th Section. I ſhall only

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[a] *Vide* Xenophon. *Orat. de* Ageſil. *laudibus.* Cornel. Nepos. Ageſil. c. 2.

[b] See *Montaigne*'s Eſſays, l. 1. c. 6.

[c] Vide *Grot*. l. 3. c. 21. §. 11, 12.

[d] Vide L. 1. t. 2. l. 21. *C.* de S. Eccleſ. *Gratian.* Jus Canon. Cauſ. 12. Quæſt. 2. c. 13, 14, 15.

[e] *Livy*, l. 22. c. 59, 61. *Horat. Carm.* L. 3. Od. 5. *Silius Italicus*, l. 10. ver. 654.

——— *Noxam ſuperaverat omnem,*
Armatum potuiſſe capi ———

[f] *Eutrop*. l. 3. c. 6.

[g] *De Republ.* l. 5. p. 662. *Ed.* Wech.

[h] *Quintil.* Declam. 339.

Mr. BARB. *NOTES on* §. VIII, XI, XIV.

be underſtood excluſively. But our Author ſays, that this Prepoſition alſo includes very often, the two Terms, as in the following uſual Ways of ſpeaking, *a capite ad calcem; ab ovo ad mala.* Beſides, though the Generals of the two contending Armies ought to forbear all *Acts of Hoſtilities* from the very Moment of the Concluſion of the Truce; yet the Soldiers on both Sides are not bound to obſerve it, till it has been publickly proclaim'd in their Camp. But all *Acts of Hoſtility*, that may have been committed during that Time, are o no Force, ſo that we muſt indemnify thoſe that have been Sufferers by them.

[1] Mr. *Buddeus*, in his *Elem. Philoſoph. Pract.* Part 11. c. 5. Sect. 7. §. 16. is of Opinion, That it is the Part of Humanity to let thoſe go who are ſeized as Priſoners in a Country, not through any Fault of theirs; ſince no Body is reſponſible for an Accident. I muſt add that there is a great Difference between thoſe that are found in the Territories of another State, immediately after its declaring War againſt their Prince; and thoſe who after *Truce* ſtay in the Enemy's Country, by an unforeſeen Accident. There has been no *Compact* between the firſt, and the Prince in whoſe Territories they are; whereas the other demand nothing but what is manifeſtly purſuant to the Execution of the Treaty of Truce. For ſince, by virtue of that Engagement, we are obliged to grant them the full Liberty of going and coming during the whole Time of the Truce; we ought alſo to give them, in my Opinion, the ſame Permiſſion, even after the Truce, if it plainly appears, that any violent Misfortune, or unexpected Accident has hindered them from making uſe of it, during the Time agreed upon: Otherwiſe, as theſe Sorts of Accidents may happen every Day, we ſhould not be ſo earneſt in ſtipulating ſuch a Permiſſion, which would hinder us from being always in fear of a Surprize, and would be as it were a Snare to make us fall into the Enemy's Hands.

[2] See *Grotius* in the Place above mentioned, §. 23, *&c.*

ly add this Story [a] out of the *Life* of *Caſtriot*; a *young Man* of the *barbarous Nations*, that happen'd to be made *Priſoner*, was preſented to *Muſachius* for his Share of the *Booty*; who agreed to give him his Liberty for two hundred Pieces in Gold. The *young Man* immediately took the Money out of his *Pocket* and offered to give it for his Ranſom: But *Muſachius* refuſed to accept it, or give him his *Liberty*, telling him that *Money* was his own before, when he became Maſter of his *Perſon*. But when the Caſe was brought before *Caſtriot*, he determined in *favour* of the *young Man*.

XV. Of *Compacts* of *Generals* of *Armies*, and what Obſervations may be made upon them [1], ſee *Grotius*. But to the eighth Section of it, I add, that *Generals* have Power only to grant *Truces* of *ſhorter* Date, and not ſuch as withdraw all *Appearance* of War; for theſe are to be granted only by the *ſovereign Power*.

XVI. Laſtly, how far *private Perſons* have Power to make *Compacts* with an Enemy, may be ſeen at large in the ſame *Author*, l. iii. c. 22. [1] To which I add the Cuſtom obſerved formerly between the *Engliſh* and *Scots*, with regard to *Compacts* of this kind. If any Perſon (ſays the *Hiſtorian Buchanan*, l. ix.) did not make his Appearance at the *Day* appointed, this was his Puniſhment: "In the publick Meetings upon "the *Borders* between the two *Nations* (which "uſually were held in order to the recovering "and reſtoring what had been loſt on either Side "in War) if any Perſon happened to complain "of another's *Falſeneſs* to him, he only carried "publickly a *Glove* or *Gantlet* upon the Top of "his Spear: And this they look'd upon to be "the greateſt Diſgrace that could be inflicted. "Nor was it uſual for Perſons that had thus "violated their *Faith*, ever after to be receiv'd "by Friends or Relations, or ever to be admitted to the Acquaintance or Converſation of "Perſons of Reputation or Quality." It was alſo a memorable *Compact* which happened to be made between a *Roman* and a *Gothick* Soldier, mention'd by *Procopius*, when they were both fallen into the ſame Pit [b], by which they promiſed to *aſſiſt* one another, and the *Goths* afterwards ratified their *Agreement*.

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[a] Vide *Martinus Barletius* de Vitâ *Caſtriotæ*, l. 7.

[b] *Procopius* Hiſt. *Goth.* l. 2. c. 1.

Mr. BARB. *NOTES on* §. XV, XVI.

[1] The *Sovereign* is obliged to keep the *Compacts* which are made by his Generals, Commanders, and other Military Officers, when they contain nothing beyond the Power that their Poſts, or the Extent of private Orders they were charged with give them, whether they are executed openly in the View of the whole World, or privately known to thoſe with whom they treat. But if a *Compact* be made without Orders, and afterwards ratified by the Sovereign, by an expreſs or tacit Conſent; it is plain, that in that Caſe it ought to be kept the very ſame as if it had at firſt been made by his Authority. Nay, when an Officer has gone beyond his private Inſtructions, the Sovereign is no leſs obliged by ſuch a *Compact*: Otherwiſe the Execution of all ſorts of Treaties would or might be evaded. See *Grotius* L. 3. c. 22.

[1] ' Theſe Sorts of *Compacts* ought not to paſs for *valid* but when they are authorized by the expreſs or tacit Conſent of the Sovereign, " or State, and in that Caſe, the Sovereign may force thoſe that have made them, to keep them. Now the *Laws* and *Orders* of *Sovereigns* ought always to be explained, as enjoining and commanding nothing above human Capacities.

CHAP.

CHAP. VIII.

Of Compacts that reſtore Peace.

The Contents of every Paragraph of the Eighth Chapter.

i. *Whether Compacts of Peace are invalidated by an Exception of Fear.*
ii. *Whether a Peace made with Rebels is valid.*
iii. *How far, upon a Pacification, the Goods of private Subjects may be excuſed.*
iv. *The Term limited for the Performance of the Conditions of Peace, to be ſtrictly interpreted.*
v. *How if a Peace be referr'd to the Deciſion of the Sword.*
vi. *An Hoſtage ſucceeding his Prince can be no longer detained.*
vii. *Of the Mediators of Peace.*

I Should now conſider that Sort of *Compacts* which entirely put an *End* to *War*; but *Grotius* is ſo large on this *Subject*, l. iii. c. 20. that all I can add upon it, will be only a few Things he happened to omit. The *principal* Doubt on this *Head* is, whether an *Exception* of *Fear unjuſtly* given is ſufficient to diſannul or reſcind theſe *Compacts?* which *Grotius*, in the Caſe of a *ſolemn War*, denies, l. ii. c. 17. § 19. and l. iii. c. 19. § 11. becauſe it is contrary to the common Practice of the *Laws of Nations*, and becauſe it would be otherwiſe impoſſible to put an End to this *ſort* of *Wars*, which are known to be very frequent, when it is the publick Intereſt of the World that it ſhould be done. But it muſt be ſaid, that the Extortions and Ravages of *unjuſt War* can never be retain'd or defended by Conſcience. And as it is beyond Diſpute, that an *unjuſt Conqueror* is obliged to make Reſtitution, ſo I cannot think it appears by any *Law of Nations*, that it is unlawful to plead an *Exception of Fear* againſt him. And though there were ſuch a *Law*, yet I confeſs I do not apprehend what Injury it would be to the common Quiet and Security of Mankind, if no Notice is taken of it. For according to *Grotius* [1], whatever be the *juſtifiable Cauſe* of *ſolemn War*, the *Effect* of it is the *Acquiſition* of the *external Dominion*, as he calls it, of what belongeth to the *Enemy*. If therefore the *Vanquiſh'd* return a *ſolemn War* upon his *Conqueror*, however he may have no other *juſtifiable Reaſon* for doing it, beſide that of *Fear*; yet if he happeneth to be ſucceſsful, he will not only recover what he himſelf loſt before to his *unjuſt Enemies*, but poſſeſs himſelf alſo of what he can win from his *Conqueror*. And therefore a Man muſt be very impudent, that imagines to ſecure himſelf in the Poſſeſſion of what he hath *unjuſtly* gotten, by the ſame Force and Violence that made him at firſt Maſter of it. And it is equally abſurd in a *Conqueror*, after he hath forced the *Vanquiſh'd* to ſubmit to hard *Terms* and *Conditions* of Peace, not to ſee them obey'd, while he hath him under his Reach, and at Mercy: But to content himſelf barely in the *Agreement* and *Compact* of the *Vanquiſh'd*, and then leave him in a Poſture which may give him Power to turn the Game upon *him* [*]. And therefore in *Reality*, the *Caſe* ſeems to be this, if a *Prince* be invaded with an *unjuſt War*, and after he hath offer'd peaceably to *concert* and *compoſe* the Difference, be forced to conſent to *rigorous* Demands, and accept an *hard* Peace, he is under no Confinement from any Law, while the Peace continueth unſettled, not to object his *Exceptions of Fear*; or afterwards as he ſeeth Opportunity, to endeavour to give himſelf *Satisfaction* for the Injury. And ſo *Polybius*, l. iii. c. 30. pronounceth, that the *Carthaginians* had juſt Reaſons for their declaring a *ſecond War* againſt the *Romans* upon this Account, becauſe while they were embroil'd in Troubles and Confuſions at home, the *Romans* forced them to give up *Sardinia*, and extorted a vaſt Sum of Money from them. And therefore ſaith that *Author*, the *Opportunity the* Carthaginians *took to revenge themſelves*, *was of the ſame kind with that the* Romans *had taken to injure them*. But the State and Deciſion of the Caſe will be different, if the Parties engaged in a War conſent at firſt, as it were, to a *Contract of Fortune*; that is, if while the Reaſons of War lie yet in Diſpute, they reject all Terms of *Accommodation*, take Arms, and commit the Juſtice of their Pretenſions, and the Purſuit of their Revenge, which might have been determined and ended by *Treaty*, or ſome other Way of *Compoſition*, to the Event of War. For in this Caſe, the Sword is evidently made Judge of the Diſpute, and both Parties put the Controverſy upon this Iſſue, *either I will right myſelf, and redreſs the Injuries I have ſuffered, or will ſuffer more*; and they that begin a War with ſuch Reſolutions as theſe, have no more Reaſon to complain of the Injuſtice done them, than a Man would have that is hired to fight a *Duel*, and happeneth to be wounded in it. And therefore where a Man puſhes on the Conteſt to ſuch Extremities, and then finds the Fate of the Day turn againſt him, he muſt be content to ſay as one of *Plautus*'s [2] *Soſia's* did to t'other, *Well, do as you pleaſe*, ſince you have the *ſtrongeſt Arm* [a].

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[*] Vid. *Guicciardin.* Hiſt. l. 16. ſub. fin. & l. 17. ſub init.

Mr. Barb. *NOTES on* §. 1.

[1] *Grotius* only means by that a *Right* of Property allowable before an human Tribunal, ſo that no body can lawfully uſe Violence to diſpoſſeſs us of what we have thus gotten, beſides our diſpenſing with the Reſtitution of it, in our own Conſcience. See B. 3. c. 7. §. 6. and c. 10. §. 5.

[2] *Plaut.* Amphitr. Act. 1. Scen. 1. ver. 240.

II. It hath likewiſe been a Queſtion variouſly diſputed, whether the Commonwealth or Government is obliged to obſerve a *Treaty* or *Peace* made with *rebellious Subjects?* *Grotius* is very large in the *Affirmative*, l. iii. c. 19. § 6, *&c.* But in my Opinion, the Caſe in a ſhorter and clearer View is this: A *Prince*, that hath ſuppreſſed his *rebellious Subjects*, may deal with them as he ſees beſt; but if he recovereth them by *Compacts*, the very Nature of ſuch a *Negotiation* is an Evidence that he pardons the Crime. So that the *Compact* is not to be declared void, upon pretence of the *Rebellion*: But the *Rebels* are by that *Accommodation* reſtored and reunited to the Commonwealth, and are ſuppoſed to promiſe Obedience to it. And the *Obſervation* of thoſe *Compacts* by the Commonwealth, the *Rebels* may well ſuppoſe to be the *Condition* of the *Obedience* they promiſe. So that in *kingly Governments* eſpecially, ſuch a *Compoſition* may ſometimes obtain the Force of a *Capitulation* or *fundamental Law*. But as *Gramondus* obſerves, “When *Subjects* rebel purely that they may force their *Prince* to yield to their Demands, they certainly quit the only Bond of Security Subjects can have, their *Allegiance* to their *Sovereign* [b].”

III. What Power the Commonwealth hath to *excuſe* the Goods [c] of the *private Subject* upon a *Pacification*, muſt be diſcovered from the Nature of [d] the *tranſcendental Propriety* [1]; upon the Force of which, the *Goods* and *Fortunes* of *private Men*, whatever Title purchaſed and poſſeſſed by, may be given up, whenever the Neceſſities of the *State* and *publick* Intereſt require it. But with this Conſideration, that the *State* is obliged to make good ſuch Loſſes to the *Subject*, out of the *publick Revenues*, either immediately, or at leaſt as ſoon as it is able. But whether a particular *Subject*'s Goods ought to be *excuſed*, or taken from him, muſt in a *Monarchy* be determined by the *Prince*. And the whole *Body* of the *Subjects*, upon his Command, is obliged to make Satisfaction to the Perſon that has ſuſtain'd Loſs upon the *publick* Account beyond his own Proportion. But the *Foreigners*, that are left to the Poſſeſſion of ſuch *Goods*, need not trouble themſelves to enquire, whether it was for the Intereſt of the Commonwealth to part with them, or no. For the *Act* of the *Prince* is ſufficient to give them a juſt and lawful *Propriety*, becauſe of the *Preſumptions* that attend the *Actions* of *Princes*, and becauſe there could be no Way of negotiating with *Foreigners*, without admitting that Things are juſtly diſpoſed, when managed under the Conduct of the *Head* of the Commonwealth. Beſides, as the *Laws of Society* oblige the reſt of the Subjects, to make good what hath been given up to the Enemy; ſo they ſeem to engage them alſo to the Relief of thoſe Perſons that have ſuffered Loſſes by the War; eſpecially if it began without any particular Fault of theirs [e]. Though it is too evident, that the unfortunate *Subjects* have hardly any where other Redreſs or Satiſfaction, than to be told, that it was an unforeſeen and unavoidable Calamity.

IV. If the *Time* be limited, in which the *Conditions* of *Peace* are to be performed [2], it muſt be interpreted in the ſtricteſt Senſe; ſo far as to exclude all Excuſes for the leaſt Delays, except ſuch as are manifeſtly the Effects of Force and Neceſſity, and ſuch as give no Jealouſy of Deſign and Subterfuge. The Reaſon is plain; becauſe a ſhort Delay may make a ſtrange Turn and Alteration of Affairs. If therefore either of the Parties ſhould be indulged in deferring Performance of the *Conditions*, it would be eaſy for them to find Occaſions to elude the *Agreement*. Beſides that, it muſt be a vaſt Expence to a Prince to maintain a *ſtanding Army*; as he muſt in Prudence be obliged to do, till the *Articles of Peace* are put in Execution.

V. Sometimes [3] the *Peace* and the *Conditions* of it, are left to be determin'd by a *deciſive* Battle; in which ſometimes only *two* particular Combatants for both Sides, and ſometimes *two*, and ſometimes *three* on each Side, and ſometimes *whole* Armies engage. And here a *difficult* Queſtion occurs; Whether the Fate of the Commonwealth may lawfully be committed to the Fortune of ſuch a Fight? This ſeems indeed to be a Way to prevent a greater Effuſion of Blood, and to reduce the Miſeries and Calamities of War to a leſſer Compaſs. But then on the other Side, it is more ſatisfactory, promiſeth fairer, and looks like a better Venture to ſtand the Shock even of a bloody War, than to loſe the *Security* and *Liberty* of the Commonwealth all at once in ſuch an Engagement. Since, on the other hand, the War may be ſet on Foot again, and perhaps the Succeſs of it be changed after two or three unhappy Encounters or Defeats. But indeed when there are no Hopes of making a good End of a War, tho' the whole *Force* of the Commonwealth ſhould engage, if the Enemy will admit of it, the Diſpute may juſtly be decided by ſome ſuch Sort of *Combat*, as the leaſt of two Evils. Nay, and where *Princes* themſelves make War upon their own *private Diſputes*, without any Reſpect to the *Intereſts* or *Rights* of the Commonwealth, the *State* may eaſily give them Leave to decide the Controverſy between themſelves by *ſingle Combat*. And we have an *Example* of this Nature in *Diodorus Siculus*, l. iv. c. 60. [f] Though *Princes* ought not to proceed to ſuch violent Methods, while the Matter in Diſpute is doubtful and uncertain. But here it muſt be obſerved, that they that leave the Iſſue of the Controverſy to the Event of *Combat* or *Battle*, may determine as they pleaſe of *what* themſelves are poſſeſſed of, but cannot tranſfer or loſe to others any of thoſe *Rights*, which are not in their Power to diſpoſe of. And therefore if a *Prince* ſet his Kingdom to *Stake*, except it be his in a *patrimonial Right*, it will ſignify nothing, unleſs he hath his *People*'s, and their *Conſent* for it, that have by Birth a Right of *Succeſſion*. But farther, in ſuch *pitch'd Battles* it often comes to a Diſpute, on which Side the Victory lies. And here it is to be conſider'd, that generally ſuch *Fights* are deciſive, and put an End to the Controverſy they began upon. And therefore where *two particular Combatants* engage, the Victory muſt be declar'd for him that kills his *Enemy*, or at leaſt that ſo weakens and diſables him, as to force him to confeſs himſelf conquer'd, as *Turnus*, when he was wounded, doth in *Virgil*[1]. Where a greater *Number* fight, that Side is victorious which deſtroys the Enemies, or puts them into ſuch Diſorder, that they are not able to make longer Reſiſtance. But where the Quarrel is left to be diſputed between *two* entire *Armies*, the Plunder of the Field, the Burying of the Slain, the Lodging upon the Place of Action, the Offering Battle a ſecond Time, are not in themſelves any Proof of *Victory*; ſince all theſe may happen when the Battle is fought with equal Bravery and equal Loſs. But if other Circumſtances concur, there may perhaps be Arguments enough to prove the Enemy fled. And certainly when an Enemy retreats, ſo far as to quit the Field after the Engagement, it is a juſt Suſpicion that he is fled. But when neither Side can ſhew any good Arguments to prove a *Victory*, Matters continue in the Poſture they were in before the *War*, and the *Parties* muſt either come to a *new Tryal* by the *Sword*, or end the Diſpute by *Treaty*[a]. Thus when the Diſpute was between the *Lacedemonians* and *Argives* about the *Thyreatick* Lands, it was agreed in a *general Aſſembly* of the *States of Greece*, that the Controverſy ſhould be decided by Battle between a ſelect Number of Subjects on both Sides, and that the *Lands* ſhould fall to the Conquerors. The *Lacedemonians* pitch'd upon *Othryades* for their Part in the Engagement; and the *Argives* made choice of *Therſander*. Two of the *Argive* Party ſurviv'd the Fight, *Agenor* and *Cronius*, who came home and brought News of their own Victory to the *State*: But after the Battle had been ſome Time over, *Othryades*, with the little Life he had left, made a Shift to ſupport himſelf with Pieces of broken Launces, took off the Shields from the dead Bodies, and erected a *Trophy* with them, leaving upon it an Inſcription in his own Blood, *To* Jupiter, *Guardian of Trophies*. For my Part I ſhould make no Doubt to pronounce the Victory for the *Argives*[b].

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[a] Vide L. 47. t. 10. l. 3. § 3. D. de Injuriis, & L. 9. t. 2. l. 7. § 4. *D.* ad *L. Aquiliam.*

[b] *Gramond.* Hiſt. *Gall.* l. 2.

[c] Circa condonanda Bona.

[d] Dominium eminens.

[e] *Vid.* L. 17. t. 2. l. 52. § 4. *D. pro Socio*, *&* t. t. *D. de lege* Rhodiâ, *de jactu*, L. 14. t. 2.

[f] *Dionyſ. Halicarn.* l. 3. p. 149, 150. Ed. *Lipſ.* When the *Generals* deſign only to aſſert their own Power and Authority, the ſingle Combat between them is an honourable and neceſſary Way to end the Diſpute; but when the Commonwealths themſelves contend for Superiority, the Uncertainty of ſuch a Trial, makes it mean as well as unſafe to venture it.

Mr. BARB. *NOTES on* § III, IV, V.

[1] See *Grot.* B. 3. c. 20. § 7, 8, 9, 10.

[2] See *Grotius*, in the above-cited Place, § 25.

[3] *Vid.* Grot. *ubi ſupra*, § 42, *&c.* and Mr. *Buddeus*'s Diſſertation, intituled *Juriſprudentiæ Hiſtoricæ Specimen*, § 21. to 30, excluſively. This Cuſtom was ſo firmly eſtabliſh'd among the Antients, that there have ſometimes been Princes who have loſt their Crown, and been forced to reſign it to another, becauſe they would not ſubmit to it. 'Twas thus the Poſterity of *Theſeus* loſt the Kingdom of *Athens*. *Conon.* lib. 39. *apud Phot.* Cod. 186. See the Diſſertation *de Prætorio* by Mr. *Perizonius*, p. 6, 7. Ed. 1696.

VI. As to *Hoſtages*[1] given for the *Ratification* of the *Peace*, beſides what we find in *Grotius*[2], it may be further obſerv'd, that if the *Hoſtage* happeneth to be the *Prince*'s *Heir* and *Succeſſor* that giveth him up, when that *Prince* dies, he is no longer to be detain'd as an *Hoſtage*, though the *League* doth not expire at his Death. For this *Caſe* is ſuppoſed to be *tacitly* excepted; that he ſhould be no longer an *Hoſtage*, when he ſucceeds himſelf in the room of the *Principal*: But then he is obliged to *ſubſtitute* another in his ſtead, whenever it is demanded.

VII. There is alſo another Way of ſecuring *Peace*; and that is, when others, and eſpecially ſuch as interpoſed as *Guarantees* and *Mediators* of the *Peace*, engage their *Faith*, that the *Articles* ſhall be obſerv'd on both Sides; which *Engagement* of theirs implies a ſort of *Agreement*, by which they oblige themſelves to aſſiſt the *Party* invaded contrary to *Treaty*, againſt the injurious *Aggreſſor*[c]. But the *Guarantees* are not obliged to ſend *Aids* to any *War* that begins upon other Reaſons, than the *Violation* of the *Articles of Peace*.

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[a] *Vid.* Plut. *in Parallis* Herod. Clio.

[c] Vid. *Diod. Sicul.* l. 4. c. 55.

[b] *Vid.* Jo. Meurſ. *Miſcell. Lacon.* l. 4. c. 14.

Mr. Barb. *NOTES on* §. v, vi.

[1] *Virg.* Æn. 12. ver. 931, *&c.*

[2] See *Grotius*, B. 3. c. 20. § 52, *&c.*

[1] See the Second Chapter of this Book, Sect. the laſt.

CHAP.

CHAP. IX.

Of LEAGUES.

The CONTENTS of every Paragraph of the Ninth Chapter.

I. *The Diviſion of Leagues.*
II. *Leagues that eſtabliſh nothing but what was due by the Laws of Nature.*
III. *Equal Leagues, which and what Sorts of them.*
IV. *Of unequal Leagues.*
V. *Of two Confederates, which a third ought to aſſiſt.*
VI. *Leagues Real or Perſonal.*
VII. *Which may be diſtinguiſhed either by particular,*
VIII. *Or general Marks.*
IX. *Whether exil'd and depoſed Princes can have the Benefit of their Leagues.*
X. *Future Allies, whether comprehended under the Name of Allies in general.*
XI. *Leagues not to be ſuppoſed to be tacitly renewed.*
XII. *What Obligations lie upon the Engagers, when their Engagements are not own'd and confirm'd.*
XIII. *An Engagement, whether ratified by the Silence of the Sovereign.*

I Shall in the next Place conſider that *Species* of *publick Compact* [1], which is uſually called *Leagues* [2]. *Pliny* in his *Natural Hiſtory*, l. vii. c. 56. gives *Theſeus* the Honour of being the firſt that made or uſed them; which is not to be allowed, in any other Senſe, than that perhaps he might be the firſt in *Greece* that enter'd into League, or that perhaps annex'd certain *Rights* and *Solemnities* to be obſerved at the making of them. The moſt proper *Diviſion* of them ariſes from the *Matter* of them; and from thence they may be divided, firſt, into Leagues that *conſtitute* what was an *Obligation* of the *Law of Nature* before. Secondly, into Leagues that *ſuperadd* ſome Particulars to the *Duties* of *natural Law*; or at leaſt, that, where *theſe* are too *general* and *indefinite*, reſtrain them to *certain* and *particular* Articles.

II. Under the *firſt Head* may be rank'd all *Leagues* [1], that provide barely for the Exerciſe of *Civility* and *Humanity*, or to prevent *Injuries* on either Hand; ſee *Geneſ.* xxi. 23. And in the *League* the *Lacedemonians* made with the King of *Perſia* there was this *Article* [a], *Whatever Towns and Countries the King is at preſent in poſſeſſion of, and were before in the Poſſeſſion of his Predeceſſors, ſhall continue in Subjection to him. And no* Lacedemonian, *or Ally to the* Lacedemonians, *ſhall make War upon them, or injure them any other Way, or demand Tribute from them upon any Pretence whatſoever. The King ſhall have the entire free Rule in his own Dominions.* But perhaps it may be thought, that by this *Article* the *Lacedemonians* renounced all *Claims* and *Pretenſions* whatever, in *Aſia*: For *Aſia* was the King's, notwithſtanding the *Lacedemonian* League. And 'tis eſſential to all *Propriety*, both that what is *mine* ſhould be free from the Invaſions of other Men, and that I ſhould have Liberty to do with it as I pleaſe. With this League may be compar'd the *Treaty of Peace* between the *Athenians* and the *Perſians*, *Diod. Sicul.* l. xii. c. 4. 'Tis certain the *Athenians* look'd upon ſuch *Leagues* to be neceſſary eſpecially between *Nations* that never had Intercourſe with one another before. And no wonder, ſince the greateſt Part of the World had loſt the Senſe of that *Law of Nature*, *that there was a Sort of natural Kindred between Men*; *and therefore that it was highly criminal for them to injure one another without Grounds of Provocation.* Nay, ſo far was this Truth unknown to them, that the common Opinion was, that *Offices* of *Humanity* were due only to *Fellow-Subjects*; that all *Strangers* and *Foreigners* were *Enemies*, and might lawfully be treated as ſuch upon any Proſpect of *Advantage* [b]. However, at this Time of Day, when all *Nations* almoſt know more of the *Law of Nature*, are more ſtrict in the Obſervation of it, and more poliſhed in their Manners, ſuch *Leagues* may be ſuppoſed abſolutely unneceſſary [2]; unleſs, perhaps it be allowed (as it is between particular Men) that when the firſt Advances are made towards Acquaintance, good Breeding ſhould make the *Preliminaries* to *Friendſhip* a little ceremonious and ſolemn. As *Cicero* ſays in his *Epiſtles* [c], "In every new Acquaintance it muſt be conſidered, what are the firſt Steps to be made, and by what Recommendation the Paſſage is to be opened to Friendſhip." In any other Reſpect, 'tis a Scandal to human Nature that any Civil People ſhould enter into any *Treaty*, the *Articles* of which have no further Intent, than to provide that the *Law of Nature* ſhould not ſimply and directly be broken; as if a Man could not have a proper Senſe of his Duty, unleſs he bound himſelf under ſuch an *Obligation*. Such Leagues indeed are commonly called no more than *Treaties of Friendſhip*; but certainly the ſtrict proper *Notion of Friendſhip* alſo includes much more than the common *Offices* of *Humanity*. For tho' the *Actions* due to *Friendſhip* are not ſo determinate, as thoſe due by *Compact*; yet in general, every Man will allow that it is the *Duty* of one *Friend* to impart himſelf and his *Fortunes* to the Relief of the other, to provide for his Happineſs and Security, to aſſiſt him with Advice, ſupport him with Counſel and Comfort, to protect him, as far as he has Power, from Evils and Dangers which threaten him; and that all this is to be done with greater Intenſeneſs of Paſſion, than common *Offices* of *Humanity* pay'd to other Men indifferently require. Further, under this Head *Grotius* reduces all *Leagues* made for the *Eſtabliſhment* of mutual *Correſpondence* and *Hoſpitality*, and of the *Trade* and *Commerce*, as far as due by *Right* of *Nature* [a]. But that all are not properly *Allies* and *Confederates*, who have made an *Agreement* barely to obſerve common *Duties* of *Humanity*, may appear from *Livy*, l. xli. c. 24. Where the *Achaians*, upon Diſpleaſure conceived againſt King *Perſeus*, forbid the *Macedonians* their Country. Whereupon *Macedonia* became the Refuge to all their fugitive Slaves, the *Achaians* not daring to attempt to recover them by purſuing them thither. But *Perſeus*, to regain their good Opinion, promiſed them, that if they would take off the *Prohibition* of Intercourſe between *Macedonia* and *Achaia*, he would ſend them back their Slaves. Upon which the Matter was debated in the Meeting of the *States* of *Achaia*. *Callicrates* oppoſed their gratifying the King, for fear of giving Umbrage to the *Romans*; and on the other hand, *Arco* contended that notwithſtanding their League with the *Romans*, they might ſafely accept the King's Offer, and ſatisfy his Deſire, urging, that *the Thing in Debate was not, whether they ſhould enter into any new Alliance or Confederacy; but only whether they would give and take the Liberty of Trade; to let their Country be open to the* Macedonians, *that they might have free Paſſage into theirs, and that their Slaves might not be out of Reach, when they fled thither.* And that all this was not inconſiſtent with their *Alliance* with the *Romans*, ſince that did not oblige them to act particularly againſt *Perſeus*.

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[a] *Thucyd.* l. 8. c. 18. Ed. Oxon.

[b] V. *Grot.* l. 2. c. 15. § 6.

[c] Cic. *Ep. ad Fam.* L. 13. Ep. 10.

Mr. BARB. *NOTE on Chap.* IX. §. 1, II.

[1] See *Grot.* B. 2. c. 15. § 1, *&c.*

[2] I could not find a more proper Word to expreſs the *Latin* Term *Fœdera* by. *Treaties* would have been too general; for 'tis plain that the Author here excludes all *Compacts* made during the War, whether to moderate or ſuſpend Acts of Hoſtility, or barely to treat of Peace, having already treated of 'em in the preceeding Chapters. Beſides, he ſays himſelf in this very Chapter, § 3. *Utraque Fœdera iniri potiſſimum ſolent* OB ALIQUAM SOCIETATEM *contrahendam*, &c. ſo that the Word *League* may not be very improper here, though it is generally reſtrained to Treaties, by which ſeveral Princes or States unite, confederate, or league together, to defend each other, or in Conjunction to attack the common Enemy.

[1] *Vid.* Grot. *ubi ſupra.* § 5.

[2] See above in B. 2. c. 2. § 11.

III. *Secondly*, Leagues which *ſuperadd* to the Duties Men owe one to another by the *Law of Nature* are of *two Sorts*, ſome *Equal*, others *Unequal*. The firſt are ſuch as are alike on both Sides [1]; or, when not only the *Engagements* and *Promiſes* are either *ſimply*, or, in proportion to the Strength of either Party, on *both* Sides *equal*; but alſo when the Manner of paſſing them is *equal*, ſo that neither of the Parties is *obliged* to harder *Conditions*, or left any Way *obnoxious* to the other. The *Unequal* I ſhall conſider by and by. *Iſocrates* [2] diſtinguiſhes after the ſame Manner, "That *Covenants* or *Leagues* are *equal*, when the "ſame *equal Right* is divided to both Par-"ties; and that that is a *Command* or *unequal* "*League*, when one hath harder Terms than the "other (for I ſee no Neceſſity of adding *contrary* "*to Juſtice*.") The End of both *Sorts* is *chiefly* the *Advancement* of *Society*. And this *Society* either relates to *Commerce*, or to *Community of War*; or to *mutual Promiſes* of Aid and Supplies in *Wars offenſive* and *defenſive*; or in ſhort, to any *other Matter*. *Equal Leagues* relating to *Commerce*, may be various. For Example, ſuppoſe it be agreed that none of the *Subjects* of the *confederate Commonwealths* ſhall be obliged in any of the *Ports*, or any other *Parts* of the *Territories* belonging to one another, to pay *Cuſtom* or *Toll*; or not more than is paid at preſent; or not above a certain *Rate* or *Quantity*; or not more than *Subjects*, or other *Allies* pay; and the like. *Equal Leagues* relating to a *Community of War* are ſettled thus; when, for Example, it is agreed, that both the *Confederates* ſhall furniſh out an equal Aid of *Men* and *Ships*, and other *Neceſſaries* for *War*; and *that*, either *both*, when *either* of the *Confederates* is invaded by *Enemies*, or make *War* upon others, or only when either *Party* is invaded. Sometimes *Aids* and *Supplies* are promiſed only for a particular *War*, or againſt a particular *Enemy*, or againſt all *Enemies* in general, excepting only the particular *Allies* of each *Confederate*. *Laſtly*, Leagues about any other *Matter* are *equal*, when it is agreed, that *one* ſhall have no *Forts* upon the other's *Confines*; that *one* ſhall not *defend* the *other's Subjects*, or receive them into *Protection*, but apprehend and ſend them back to the *other*; that *one* ſhall not give the *other's* Enemies *Paſſage* through his *Country*, and the like.

IV. Having thus explained the *equal Leagues*, it will be eaſy to underſtand what are the *unequal* [1]. And theſe are when either the *Promiſes* are *unequal*; or when either of the Parties is obliged to *harder* Conditions. The *Promiſes* may be *unequal*, either with regard to the *ſuperior*, or *inferior Confederate*. The *firſt* happens when the more powerful *Confederate* promiſes his Aſſiſtance to the other, without requiring the like; or when the Aids he promiſes, are greater than what the *other* promiſeth; or when the *other* is not bound to bring proportionate Aids. The *latter* happens when the *inferior Confederate* is obliged to *Conditions* of larger Extent than the *other*. Some of this ſort of *Leagues* include a *Diminution* of the *ſovereign Power*. Of this Nature was the *League* between the *Romans* and *Carthaginians*, in the End of the *ſecond Punick War*; by an *Article* of which the *Carthaginians* were not to begin any *War* without Leave from the *People* of *Rome*. And thus *Armenia Major* received its Kings from *Rome*, though, it paid no *Tribute* to the *Romans* [b] [2]. On the other hand, thoſe *Leagues* are no *Diminution* to the *ſovereign Power*, which include only a * *tranſient Burthen*; or one which may be complied with once and for all. For Inſtance, if when a *Peace* is concluded, one Party is obliged to pay the other's Army; to defray the *Charges* of the War; or to pay a Sum of Money by way of *Mulct*; or when either Party is obliged to diſmantle Towns, demoliſh his Forts, evacuate certain Place, remove from certain Countries, give Hoſtages, deliver up Ships, and Arms, and the like. Thus in the *Articles of Treaty*, which *Porſenna* allowed the *Romans* upon their *Excluſion* of the Kings, it was particularly mentioned, that *they ſhould have no Inſtruments of Iron for any Uſe, but in Husbandry* [a], And here, by the way, the Story which *Procopius* relates in the fourth Book of his *Hiſtory of the Goths*, may perhaps deſerve Obſervation. "When the *Truce* was made between *Juſtinian* and *Coſroes*, by the *Conditions* of it, *Juſtinian* was to pay two thouſand *Libræ* of *Gold*; whereupon *Iſdiagunus* the *Perſian* Ambaſſador demanded immediate Payment; but *Juſtinian* propoſed rather to pay every Year four hundred, thinking by that Means to lay the ſtronger Obligations upon *Coſroes* not to break the *Truce*. But the *Romans* complied at laſt, and paid the entire *Sum*, for a *yearly Payment* might look like *Tribute*. *So common* (ſaith the Hiſtorian) *it is for a Man to be more afraid of a diſhonourable Name, than diſhonourable Actions*. But here it may be ask'd, whether ſuch *unequal Leagues*, as are attended with *permanent* and *perpetual Burthens*, do always and in themſelves leſſen and impair the *ſovereign Power?* Or, whether an *unequal Confederate* may be ſuppoſed to retain his *Sovereign?* Now *permanent* and *perpetual Burthens* are ſuch as theſe; when the *one* is obliged to have the ſame *Allies* with the *other*, and not on the contrary; when *one* Party is obliged not to build *Forts* in ſuch particular Places, not to *levy Forces*, or *raiſe* an *Army* (and this was one of the *Conditions* of the *League* between the *Romans* and the *Latines*, that the *Latines* ſhould make no *Levies* of *Men*, nor ſet any *Officers* of their own over them, or ſend them out upon any Expedition. The neceſſary Conſequence of which was, that the *Romans* paſs'd the *Decrees* of *War* or *Peace*, and that the *Allies* were Partners only in the Toil, while they took the Conduct themſelves, and enjoyed the Honour and the Benefit of the Victory [b]) that *one* ſhall not have above a *certain* Number of *Ships*, ſhall not build new *Cities*, ſet out *Fleets* to *Sea*, *raiſe* Soldiers in ſuch particular *Places*, and the like; but eſpecially when one of the *Confederates* is obliged to pay a Deference and Submiſſion to the other; or, what is the ſame Thing, to acknowledge him *ſuperior* in *Dignity*, and to expreſs a Reverence to him in all his Actions [c]. Thus the *Athenians* allowed their *Allies* their ſeparate Liberties, and erected a *popular Form* of *Government* among them; but reſerved Superintendence and ſupreme Direction of Affairs to *themſelves*. *Grotius* anſwers this Queſtion, l. i. c. 3. §. 21. out of l. xlix. t. 15. l. 7. §. 1. *D. de Captivis*, &c. But the Difficulty lies in the following Words of the *Civilian*, *At fiunt apud nos rei ex civitatibus fœderatis, & in eos damnatos animadvertimus. But the Subjects of our Confederates are brought to Trial before us; and we paſs Sentence, and puniſh them.* For this certainly implies *Subjection*, when another hath a *Right* to ſummon our *Subjects* to appear and ſtand their *Trials* in his *Courts*, and to *puniſh* them according to *Sentence* given. The Story of *Decius Magius*, in *Livy*, is an Inſtance of this [d]. But particularly, that which *Pauſanias* relates [e]. When upon the Motion and Inſtance of *Callicrates*, the *Roman Legate* charged the greateſt Men among the *Athenians* with being in *Perſeus's* Intereſt; *Xenon*, who was one of them, upon Confidence of his Innocence in that Matter, anſwered, that he did not doubt but he could clear himſelf of that Charge, even before the *Roman Senate* itſelf; which the *Legate* immediately took the Advantage of, as if he had appeal'd to *Rome*; and thereupon *he* and ſeveral *others* were ſent to *Rome*. And yet *Polybius* informs us, [f] ſpeaking of thoſe that were ſent thither, *that the Senate did not think that it belonged to them to bring them to a Trial*. And therefore, the *Anſwer* to the Difficulty mentioned is eaſy, that the *former Part* of the *Words* muſt be underſtood of the primitive Times of the *Roman* Commonwealth, when they were ſtrict in their Obſervance of the Laws of *Confederacy*, and uſed to make a *Diſtinction* in their Carriage and Treatment, between ſuch as *voluntarily* enter'd into an *Alliance* with them, and ſuch as their *Arms* had conquer'd. And this *Cicero* confeſſes, that the old *Romans* thought themſelves obliged to *protect* their *Allies*, and never *aſſumed the Command* over them [g]. And *Scipio* made it a particular Part of their Commendation, that the *Romans* did not confine the *foreign Nations* to their Intereſt by *Severity* and *Servitude*, but by the *Ties* of *Friendſhip* and *Alliance*. But the *latter Words* refer us to After-ages, when the Reſpect and Reverence they had to their old *Confederacies* ran low, and their *Allies* as well as the *conquer'd Nations* were reduced to equal Terms of *Slavery* [h]. So *Sylla* forced all the *Roman Allies*, that had been free till his Time, to pay *Tribute*. At which Time it was alſo common to bring the *Subjects* of the *confederate States* to *Rome*, to be *tried*, and to *puniſh* them *there*, as *Roman Subjects*. But it is evident, that in the *Epiſtle* of *Proculus*, between the *former* and *latter Words*, there were ſeveral intermediate Things mention'd. But here *Grotius*, after he hath tediouſly recounted the ſeveral Kinds of Diſputes, which might happen between *Allies* and *Confederates*, at laſt diſmiſſeth the *Difficulty*, without anſwering any Thing to it [i]. However, it is well obſerved by wiſe Men, that it generally happens, that if the Party *ſuperior* in the League be conſiderably ſtronger, and more powerful than the other *Confederates*, he will by Degrees arrive at an *abſolute Sovereignty* over them, eſpecially if the *Confederacy* be perpetual, and allow him a *Right* to place *Gariſons* in their *Towns* [k].

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[a] *Vid. Supra*, l. 3. c. 3. §. 9, 11, 12.

[b] *Appianus Alexand.* Præfat. p. 2. A. Ed. *H. Steph.* Vid. *Procop.* Hiſt. *Gothic.* L. 1. c. 6. The Agreement *Peter* made with *Theodatus*, concerning *Sicily*.

* *Onus tranſitorium.*

Mr. Barb. *NOTES on* §. III, IV.

[1] See *Grot.* B. 2. c. 15. §6.

[2] *Iſoc.* Panegyr. p. 132.

[1] *Vid.* Grot. *ubi ſupra.* §. 7.

[2] V. *T. Liv.* l. 30. c. 37.

V.

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[a] *Plin.* Nat. Hiſt. L. 34. c. 14. See alſo, 1 *Sam.* xiii. 19, 20.

[b] Vid. *Dionyſ. Halicarn.* l. 8. c. 15.

[c] *Vid.* Iſocat. *Panegyr.*

[d] *Livy*, l. 23. c. 7.

[e] *Pauſanias* in *Achaicis.*

[f] Polyb. *Excerp. Legat.* 105.

[g] Cic. *Off.* l. 2. c. 8.

[h] Vid. *Liv.* l. 42. c. 1. Appian. *de Bello Civ.* l. 1.

[i] *Vid.* Anton. *Matth. de Criminibus, ad tit.* L. Jul. *Majeſtatis*, c. 1. § 5, 6.

[k] Vid. *Bodin. de Repub.* l. 5. c. 6. *Iſocrates Archidam.* p. 217. People that are jealous of their Liberty, ſhould avoid all unequal Confederacies, for there is hardly any Difference between them and Slavery.

V. *Another* Queſtion *Grotius* enters upon [1], is this, Suppoſe *two Parties* both *Allies*, and *Confederates* to a *Third*, make *War* upon one another, which of them the *third Confederate* ought to aſſiſt [a]? In which *Place* it may be added, that in all *Leagues* which a *Prince* enters into with his *Neighbours*, upon the *Points* of Aſſiſtance and Supplies, this *Exception* ought always to be ſuppoſed, *if the Condition and Circumſtances of my own Kingdom will permit*. For that Conſideration ought always to over-balance, not only any *private* Reſpect, but even the *Ties* of Blood and Affinity [b]. For ſince it is impoſſible a *Prince* ſhould be under nearer or ſtricter Obligations to an *Ally*, than to his own *Subjects*; 'tis plain he can make no *Promiſe* that can be binding to any *Confederate*, when it is manifeſtly inconſiſtent with the *good* of his own *Subjects*. It was ſaid by King *Francis* I. in *Guicciardine*, that *he thought the Oath he took at* Rhemes *was of the ſtrongeſt Obligation*; *and by that the Kings of* France *were obliged not to alienate any Part of the Patrimony of the Crown* [c]. And in this Senſe, what my Lord *Bacon* ſaith, in his *Wiſdom of the Antients*, c. 5. may be very well admitted: "That there is but one true and proper Bottom of Faith among Princes, and that is Neceſſity (a Deity of great Power with the Great) the Danger of the State, and the Communication of Profit. And *Ariſtotle* ſpeaks very plainly [d]: Advantage ſeems to be the main Cauſe of Confederacies between Commonwealths [e]:" *Polybius* ſays of the *Rhodians* [f], that they made no *Alliance* with the *Romans* for a *hundred and forty Years* together, though they ſent them *Aſſiſtance* in ſeveral *Wars*; and the *Reaſon* of this, *he ſaith* was, "Becauſe they were willing to appear *fair* to all the World, and to give every *Prince* Hopes of their *Aſſiſtance* and *Friendſhip*, but at the ſame Time unwilling to abridge themſelves of any Part of their *Liberty*, by binding themſelves under *Oaths* and *Compacts*, to adhere to the Intereſts any one *Nation*." Sir *Thomas Moore* would have his *Utopians* forbear entring into *Confederacies* upon other Reaſons [g]. But a *Prince* that ſuffers by an *Alliance*, that expires upon a *Change* of Affairs with his *Confederates*, muſt charge the Misfortune upon himſelf, that he did not make ſtricter Search into the *Circumſtances* of his *Ally* [h]. Tho' an honourable *Confederate*, when he finds that the Poſture of Affairs he is in will not ſuffer him to continue any longer in the *Alliance*, ſhould give Advice of it to the *others* that are concerned, that they may have Time to provide for themſelves, and ſecure their own Intereſt. For it is certainly *the higheſt Pitch of Baſeneſs poſſible, to ſacrifice a Friend to ſave myſelf* [i]. And therefore in all *Leagues of War*, it is look'd upon to be a very important and neceſſary *Article*, that no *one* of the *Confederates* ſhall make a *ſeparate Peace* with the *common Enemy*, excluding the reſt of the *Allies*. Though 'tis reaſonable *this Article* ſhould be underſtood with *this Limitation*, *ſuppoſing the other Confederate, or Confederates, do not refuſe to comply with fair Terms and proper Overtures of Peace*. For in ſuch a Caſe, *this* looks like a Violation of the *Confederacy*, and in conſequence the other *Ally* may juſtly take *ſeparate* Meaſures for his own Security. But then *this* alſo muſt be allowed in a *mitigated Senſe* only, and with *certain* Alleviations, that it may not be a *Pretext* to elude *Confederacies*, and that *one* of the *Allies* may not in ſome Senſe be made the *other's* Judge [k].

VI. Another *celebrated* Diſtinction of *Leagues*, is that which divides them into *real* and *perſonal*. The *latter* are ſuch as are made with the *Prince*, purely with Relation to his *Perſon*, and expire with him. The *former* are ſuch as are made with the *Kingdom* and *Commonwealth*, rather than the *Prince* or *Government*; and theſe outlive the *Miniſtry* and the *Government* itſelf, under which they were firſt made. To which of theſe every *League* belongs, will appear from what follows. This therefore is certain, that whatever *Leagues* are made with a *free People* are in their own Nature *real*, and muſt continue till the *Term* limited in the *League*, notwithſtanding that the *Government*, by whoſe *Intervention* the *Leagues* were made, may die or be changed. And hence we may infer, that if a *free People* enter into a *League*, and afterwards the *State* of the Commonwealth happen to be changed from a *Democracy*, into a *Monarchy*, the *League* is ſtill in force, becauſe the *People* is the ſame, tho' the *Form* of the Commonwealth be changed. And becauſe a *Prince* called to the *Throne* by the *free Voice* of the *People* is always ſuppoſed to take the *ſovereign Power* upon him, together with all the *Obligations* contracted by the *People*, when it lay in their Hands. Beſides, *Leagues* are made by them that are inveſted with *ſovereign Power*. The *common Subject* of which *Power* is the *Commonwealth*; and *ſovereign*

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[a] Vid. *Simlerum de Repub. Helvetiorum*, l. 1. p. 119.

[b] Vid. *Gellium*, l. 2. c. 29.

[c] *Guicciardine*, Hiſt. l. 16.

[d] *Ariſt. Ethic. Nicom.* l. 8. c. 5.

[e] *Ariſt.* Rhet. l. 3. c. 14, 'Tis incredible, that any Man ſhould chooſe to do a Thing without any Proſpect of Advantage by it. *Valer. Flaccus*, l. 4. ver. 744.

Certa fides animis idem quibus incidit hoſtis.

They're certain Friends that have a common Foe.

Iſocrates Orat. ad *Philip.* p. 156. A Commonwealth hath no Regard either to Enemies or Oaths, or any Thing elſe, further than it thinks it tends to Advantage: Thus *Polybius*, l. 2. c. 47. ſaith of *Aratus*, That he knew Kings naturally look'd upon none, either as Friends or Enemies, but rated Friendſhip and Enmity, purely according to their own Profit. *Andr. Maurocenus*, Hiſt. *Venet.* l. 1. ſpeaking of the State of *Venice*, ſaith, We meaſure our Alliances and Friendſhips only by the Credit and Intereſt they bring us.

[f] *Polyb.* Excerp. Legat. 93. c. 6.

[g] *Moore*, Utop. l. 2.

[h] *Vid.* L. 50. t. 17. l. 19. *init. D. de reg. juris.*

[i] *Euripid.* Iphigenia in *Tauris* ver. 605, 606, 607.

[k] V. *Joh. Labard. Hiſt.* Gall. l. 5. p. 313. *Ed.* Pariſ. *An.* 1671.

Mr. Barb. NOTES on §. V.

[1] L. 2. c. 15. §. 13. His Deciſion is reduced to this: When two Allies make War unjuſtly againſt each other, we muſt aſſiſt neither of them. But if the Cauſe of one of the Allies is juſt, we muſt aſſiſt him, not only againſt Strangers, but even againſt one of our Allies; unleſs there be any expreſs Clauſe in the Treaty that does not ſuffer us to undertake the Defence of the firſt againſt the laſt, though he is in the Wrong. But if ſeveral of our Allies enter into a Confederacy againſt a common Enemy, we muſt then equally aſſiſt them all, as far as poſſible: And when it is not in our Power to aſſiſt them all at the ſame Time, we muſt give the Preference to the moſt antient Ally. See Mr. *Buddeus*'s Diſſertation *de Comparatione Obligationum quæ ex variis hominum Statibus oriuntur*; and that by Mr. *Thomaſius de Sponſione Caudina*, Sect. 17. & ſeq.

reign Power is the ſame, both when it is exerciſed by the common *Suffrages* of the *whole Body* of the *People*, and when it is afterwards entruſted to a *Prince*, created by the *Conſent* of the *People*. But *here* all thoſe *Leagues* are excepted, that were made only for the *Preſervation* of the *preſent State* of the Commonwealth. For Example, ſuppoſe *two free Commonwealths* enter into a *Confederacy*, by which they agree to *aid* and *aſſiſt* one another, againſt all ſuch as ſhall endeavour by Force to ſubvert the preſent *Eſtabliſhment* of the Government in either Commonwealth. For if afterwards, either of the *two Nations* freely conſent to an *Alteration* of the *State* of their Commonwealth, the *Reaſons* ceaſing, the *Confederacy* is ſuppoſed of courſe to expire. But however in the *general*, though every *League* made with a *free People* be *real*; yet it does not follow, on the other hand, that therefore every *League* made with a *Prince* is *perſonal*, and dies with him. For the inſerting a *Perſon* in a Compact, doth not make the Compact *perſonal*, but only ſhews by what *Perſon's Intervention* the *Agreement* was made [a]. But becauſe it is evident, that *Princes* make ſome *Leagues* with no farther Intention, than that they ſhould continue till their Death; and others, with Deſign to derive them down to their *Succeſſors*; it muſt therefore be enquired, what are the *Marks* whereby we may diſtinguiſh, which *Sort* every *regal League* ought to be reduced to.

VII. And it is *Grotius*'s Opinion [b], that it is eaſier to diſcover this, from the *Form* and *Phraſe* of the *League* itſelf, than from any *general* Rules, or Obſervations. And thus all *Leagues* will appear to be real, in which 'tis *expreſly* mention'd, either that they are to be *perpetual*; or that they are made for the *common Good*; or made with the *Prince* and his *Succeſſors*; or when a particular *Time* is limited for the Continuation of them. But beſides, the other *Words* of the *League ſometimes*, and *ſometimes* the *Matter* of it, and *ſometimes* the *Motives* of entring into it, may make a Conjecture eaſy in *this* Caſe. If the Conjectures are equal on both Sides, *favourable* * *Leagues* muſt be ſuppoſed to be the *real*, and the † *odious*, the *perſonal*. The *favourable Leagues* are thoſe that are made for the Advancement of *Commerce*. Not that all *Leagues* of War are *odious*; for the *defenſive* generally incline to the *favourable* Part; the *offenſive* hath more of that which is *odious* in them.

VIII. But how far a *Succeſſor* is obliged by the *Leagues* of the *Prince* his *Predeceſſor*, is what we may take a more diſtinct View of. For in the *firſt Place* 'tis certain, that if the *Predeceſſor* make a *Peace*, the *Succeſſor* is obliged by it. For by a *Peace* 'tis manifeſt, all paſt Injuries that gave Birth to *War* are forgotten, the *Articles* of the *Peace* being duly obſerved. And then, *ſecondly*, 'tis beyond Diſpute, that the *Succeſſor* is obliged to ſtand to all thoſe lawful *Agreements*, by which his *Predeceſſor* transferred any *Right* to a *third Perſon*. And *again*, *thirdly*, it is alſo certain, that when *one* of *Confederates* hath performed what the *League* obliged him to, and the *Prince* dies before he *ſatisfies* what was required on his *Part*, the *Succeſſor* is obliged to *ſatisfy* it. For ſince what the *other* performed upon a *Condition* of an *Equivalent* to be paid him, did either really, or at leaſt was intended to promote the Advantage of the Commonwealth; it is evident, that unleſs the *Equivalent* be paid him, he hath a *Right* to demand *Reſtitution* or *Satisfaction*, for what he performed, in a Manner before it was due; and conſequently, that the *Succeſſor* is obliged to *refund* all back, except he chooſeth to pay the *Equivalent*, according as the *Articles of Confederacy* before determined. *Laſtly*, as to theſe *Leagues*, where nothing hath been *performed* on *either hand*, or where the *Performances* have been *equal*, it may I think be ſaid in *general*, that the *Prince*, if he enter'd into the *League* as *Head* of his *People*, and with deſign to advance the *publick Good* by it, muſt be ſuppoſed to have made a *real League*, and to have obliged his *Succeſſor* by it. Becauſe ſuch a *League* affects the whole Maſs of the *People*; and the *ſucceeding Prince*, the *Head* of them, enters upon the ſame *Rights*, and takes upon him the ſame *Incumbrances* with his *Predeceſſor*. But where the *League* directly regards the *Benefit* of the *Prince's Perſon* and *Family*, 'tis evident that when *he* dies, or *that* is extinct, the *League* muſt alſo be at an End. But it is grown into a Cuſtom upon any new *Succeſſion*, to renew the *Leagues*, though in themſelves undoubtedly *real*, at leaſt in *general Terms*, for fear any *Diſpute* or *Exception* ſhould ariſe, that ſince the Commonwealth hath not yet perceived the Uſe and Advantage of ſuch a *League*, that therefore it hath no other *Bottom* but his *Faith* that made it, and doth not deſcend to the *Succeſſor*. And eſpecially ſince the Deſign of every *League* is to promote the *publick Good*; and ſince the *Succeſſor* may perhaps have Sentiments in relation to *that* different from his *Predeceſſor*, he hath in conſequence a *Right* to take different *Meaſures*; and therefore may neglect a *League*, which he thinks is now grown uſeleſs and *unſerviceable* to the Commonwealth [c]. And here it may be obſerv'd, that where ſeveral different *Leagues* have formerly paſs'd *interchangeably* between *Nations*, and they afterwards renew them in *general* [1], the *League* that was laſt made, muſt be ſuppos'd chiefly to be renewed. Since the *latter* always leſſen the *Force* of the *former* [d]. And therefore it was unpardonable Inadvertence and Neglect in the Ambaſſadors, that went to renew a *League* with King *Ptolemy*, and in them too, who ſent them without knowing what *Treaties* and *Leagues* had formerly paſſed between that *Prince* and the *Achaians*, or which of them the *Achaians* were deſirous to *renew*.

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[a] *Vid.* L. 2. t. 14. l. 7. § 8. *D. de Pactis.*

[b] *Grot.* L. 2. c. 16. § 16.

[c] *Vid.* Johan. Labard. *Hiſt. de Reb.* Gall. L. 5. p. 74, 75. Ed. Par. *An.* 1671.

[d] *Vid.* Polyb. *Excerpt. Legat.* 41.

* *Favorabilia.*

† *Odioſa.*

Mr. BARB. *NOTE on* § VIII.

[1] See above in B. 5. c. 12. § 6. in the Beginning.

IX. And here Enquiry may be made, whether if one of the *Princes* of a *League* happen to be *depos'd* and *expell'd* by his own *Subjects*, the other *Confederate* be obliged to ſend him the ſame *Aids* and *Supplies*, which were promiſed when he was in Poſſeſſion of his Kingdom? *Grotius*, in the Chapter before quoted, § 17. affirms that he is. Becauſe a *Prince*, unjuſtly *depoſed* and *expelled*, hath ſtill a *Right* to his *Kingdom*, tho' he hath loſt the *Poſſeſſion*. To me, ſo much in this Caſe ſeems to be certain, that if the *Terms* of the *League* expreſly mention and intend the Defence of the *Prince*'s Perſon and Family, he ought to be aſſiſted in the *Recovery* of his *Kingdom*. But if the *League* was formed for *publick Good* only, 'tis a diſputable Point, whether the *exil'd Prince* can demand *Aſſiſtance* in *virtue* of his *League*. For the *Aids* mention'd are preſumed to have been promiſed againſt *foreign Enemies*, without View of this particular Caſe. Not but that ſtill ſuch a League leaves Liberty to aſſiſt a *lawful Prince* againſt an *Uſurper*. And thus if while we are engaged in a *League* with a *free People*, an inteſtine domeſtick *Enemy* endeavours to *enſlave* them, we may with Juſtice ſend them *Aſſiſtance* to ſuppreſs him, before he is grown into a *lawful Prince*. For the * *Qualities* in *Leagues* (as ſuppoſe it be expreſly mentioned, that the *League* is made with the *Prince* and his *Succeſſors*) imply a *ſtrict* and *proper Right*, and intend ſuch *Princes* only as have a *juſt Title* to the *Kingdom*, not that keep it by bare *Uſurpation*, or that have no other *Title* to depend upon, but Force and Power.

X. It is alſo a famous Queſtion, whether it be provided by the *League*, that neither of the *Confederates* ſhall injure or invade the other's *Allies*? By *Allies* is meant ſuch only as were *Allies* at the Time the *League* was made, or ſuch as were afterwards taken into *Alliance* on either Side. What was urg'd in a Diſpute of this Kind between the *Romans* on one hand, and the *Carthaginians* on the other, at the Beginning of the ſecond *Punick War*, may be ſeen in *Polybius*, l. iii. c. 27. and in *Livy*, l. xxi. c. 19. The Deciſion *Grotius* makes of it is *this* [a], that it was no Breach of *League* either for the *Carthaginians* to make War upon the *Saguntines*, though after they were taken into *Alliance* by the *Romans*, or for the *Romans* to undertake to defend them. For it may happen without Breach of *League*, that of two *Confederates*, one may make War upon, and the other aſſiſt the ſame Party. And it is uſual in *Leagues* to make *Articles* that relate particularly to ſuch Caſes; ſee the Leagues made between the *Romans* and the *Carthaginians* in the Time of the *Tarentine* War, *Polyb.* l. iii. c. 25. Tho' when *Confederates* are ſo far engaged in oppoſite Intereſts, 'tis evident, they muſt be upon the Brink of an open *Rupture*. For the Senſe of *Pain* is the *ſame*, whether the Wound be given in another's *Name*, or in the *Striker*'s own; but it is yet clearer, when the *Seat* of the *War* happens to be carried into the *aſſiſting Prince*'s Country [b].

XI. And it is to be further obſerved, that *Leagues* limited to a particular *Time*, when *that* expires, muſt not be ſuppos'd to be *tacitly* renewed. Both becauſe no Man can be preſum'd to bind himſelf raſhly by new Obligations [1]; and becauſe otherwiſe it could never be known how long a *League* is to continue. And therefore if after the *League* expires, ſome *Acts* of *ſeeming Alliance* are continued, they are to be look'd upon as *Acts* of *Kindneſs* and *good Nature*, but not as Arguments of the *Renovation* of the *League*. For *Friendſhip* continues after the *League* is at an End. Again, it is evident from the Nature of all *Compacts* [2], that where one of the Parties refuſeth to ſtand to the *Conditions* of the *League*, the other is at Liberty to break too. *Confederates* may indeed agree, that though *one Article* of the *League* be neglected, yet the *reſt* ſhall be inviolably obſerved. But then the other Party is not obliged to perform the *Equivalent* to the *neglected Article*, and ſo not to ſuffer any poſitive *Evil* by it.

XII. I come now to conſider the Nature of † *Engagements*, or thoſe *publick Compacts* which are made by *Miniſters* of *State* [1], in *Negotiations* relating

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* *Qualitates.*

[a] *Grot.* l. 2. c, 16. § 13.

[b] Vid. *Juſtin*, l. 3. c. 7.

† *Sponſiones.*

Mr. Barb. *NOTES* on § xi, xii.

[1] See *Grotius*, B. 2. c. 15. § 14.

[2] See the above-quoted Place of *Grotius*, § 15.

[1] As our Author no where explains, in expreſs Terms, the *Right* of AMBASSADORS, and has only but juſt mention'd it by the bye, Lib. 1. cap. 3. it will not be improper to treat of it in general and ſuccinctly, ſince Treaties are uſually negotiated and concluded by the Power of theſe Miniſters. I ſhall borrow from Mr. *Buddeus*'s *Elem. Phil. Pract.* Part II. cap. 4. Sect. 5. § 19 *& ſeq.* enough to give a ſhort and clear Idea of this Matter by the Principles of the *Law of Nature*, common to all Men, and not of the *Right* of *Nations*, taken in *Grotius*'s Senſe (Lib. II. cap. 18.) for a tacit *Compact* of all People, or at leaſt the greateſt Number. We can then make it appear, that theſe ſort of Miniſters are to be eſteem'd as ſacred and inviolable Perſons, independently of this pretended *Compact*. We cannot doubt but that it highly concerns Mankind in general, and Nations in particular, not only to put an End to Wars and Diſputes, but alſo to eſtabliſh and maintain Friendſhip and Commerce between each other. Now *Ambaſſadors* are neceſſary to procure theſe Advantages. God then, who without Diſpute commands every Thing that contributes to the Good and Preſervation of human Society, cannot but forbid, by the *Law of Nature*, the doing any Injury to theſe ſort of Perſons. We abuſe an Ambaſſador, either by *refuſing to receive him*, without having any powerful Reaſon to oblige us to do ſo; or by doing him ſome Injury either in his Perſon, his Goods, his Honour, or his Domeſticks, *&c.* We may lawfully diſpenſe with receiving an Ambaſſador, when his Maſter, for Example, has already cheated us under Pretence of Ambaſſies, and we have Reaſon to ſuſpect the like Deceit; or when he that ſends the Ambaſſadors, has betray'd us, or is guilty, with reſpect to us, of any other heinous Crime; or when we are aſſur'd, that under Pretence of Negotiations, the Ambaſſador comes only but to raiſe ſome Diſturbance, or as a Spy, *&c.* But if we have no Reaſon to miſtruſt any Thing of the like Nature, we muſt honourably receive every Ambaſſador that is ſent to us, and not do him the leaſt Injury, not even by the *Right* of *Retaliation*, or *Repriſals*, ſince by our bare receiving him in that Character, we have renounced, with regard to him, the Right which we might have had otherwiſe upon that Account. Ambaſſadors then muſt be regarded as ſacred and inviolable Perſons, that is to ſay, as far as the Deſign and Nature of their Ambaſſy requires it. Thus an Ambaſſador cannot be puniſhed by the Prince or State to whom he is ſent: For as he repreſents his Maſter, he treats in that Quality with the Power to whom he is ſent, as one of an equal Rank with him. But if he has committed any Crime of Importance ſufficient to demand Satisfaction, and we have Intereſt enough to get him puniſh'd, we muſt apply ourſelves to his Maſter: And then, if his Maſter refuſes to gives us Satisfaction, we muſt uſe againſt him all the *Rights* that we have againſt a Prince that boldly tolerates and approves of the Crimes of his Subjects: Nay, it is allowable, when the Buſineſs requires it, to ſeize upon his Perſon immediately, as a declared Enemy, to impriſon him, and even put him to Death, if it appears abſolutely neceſſary for our Preſervation; for we are not to bear every Thing from Ambaſſadors, neither does the Deſign of their Ambaſſy require it.

Nor

relating to the *Sovereign Power*, but without *Advice* and *Command* from it. And here, the firſt Queſtion is concerning that difficult Caſe, where if the *Engagement* is paſs'd *abſolutely* without *Proviſo* or *Condition* of being *accepted* and *ratified* by the *Sovereign*, and the *Sovereign* afterwards refuſe to give it any *Ratification*; what the [2] *Engagers* are obliged to do in Satisfaction to the Party they made the *Engagement* to? This was a Caſe once warmly diſputed among the old *Romans*, upon the *Engagement* made at the *Furcæ Caudinæ*. The Story is at large in *Livy*, l. 9. c. 8, &c.[3] And indeed if the *Meaſure* of that Matter were to be given by *ſtrict* Juſtice, it muſt be ſaid that the *Romans* were neither obliged to *ratify* the *Engagement*, nor to ſet Things in the Poſture they were in before. But then it had been enough for them to *ſurrender up* the Perſons that made it [a]. But if the State of the Caſe be rather *eſtimated* by *Equity*, certainly the *Romans* ought to have *ratified* the *Agreement*, however it was concluded without their *Advice* and *Conſent*. The *Conſuls* indeed had not Power to *determine War*, *conclude Peace*, or enter into *League* with an *Enemy*, without particular *Inſtructions* and *Commiſſions* from their Maſters, the *Senate* and *People*; yet ſince they did not preſume upon the *People*'s Conſent without very *good Reaſon*; when it was impoſſible otherwiſe to ſave the Lives of many thouſand Citizens, the *Flower* of all the *Roman* Commonwealth; and when the *Enemy* had perform'd all that could ſeem *equivalent* to a *formal Peace* and *League*; the *People* in reaſon ought to have *confirmed* the *Conditions*, eſpecially ſince there was nothing intolerably *hard* or *unjuſt* in them [b]. For it would have been enough for the *People* to have ſtood reſolutely to their *Principle*, that *their Magiſtrates could oblige them to nothing without their own Conſent and Command*, if the *Samnites* had demanded any Thing that was unreaſonable and inſupportable. But 'tis clear, the great Mortification to that proud ambitious *People* was, that their *Army* was forced to ſubmit to the Ignominy of paſſing under the *Jugum*. Which was indeed very ill Conduct in the *Samnite General*. For that *Diſgrace* did not leſſen the Strength of the *Romans*, but only provok'd and exaſperated that *fierce* People to revenge the Diſhonour. However, the *Roman* Army very well deſerved the Treatment they met with, for venturing raſhly to paſs a Place they were Strangers to, without ſending before to diſcover it. And it was certainly their wiſeſt Way to ſubmit to the *Diſgrace*, rather than ſuffer the Strength of *Rome* to be cut off. And here the Arguments *Lentulus* offered to perſuade the *Engagement* may be conſider'd, *Liv.* l. ix. c. 4. And further, that a Commonwealth may often be obliged to *ratify* the *Acts* and *Promiſes* of its *Generals*, becauſe of their *Authority*, and to oblige them not to go over to the Enemy. Hence *Tacitus* ſaith, *Ann.* 12. *c.* 18. “That *Mithridates* was at a Loſs whoſe Pity he “ſhould addreſs himſelf to; becauſe none of the “*Romans* had *Powers* large enough to give him “any Aſſurance in depending upon their Pro“miſes.” But in the Caſe before us 'tis manifeſt, that the haughty *Romans* never conſider'd, that they might ſome Time or other be forced to accept as hard Conditions themſelves, as they had impoſed upon others. However, it was a Strain of Generoſity in the *Samnites* not to accept the *Surrender* of the *Sponſors*: And it was an extravagant Action in *Poſthumius*, when the *Surrender* was offer'd, to ſtrike the *Fecialis*, and then cry out that he was a *Samnite* Subject, and that, contrary to the *Laws of Nations*, he had injured a *publick Miniſter*; and therefore, that the *Romans* might carry on their *War* with more *Juſtice*. The *Judgment* of *Livy* upon this whole Proceeding may perhaps deſerve our Obſervation; The *Sponſors*, ſays he, after they had been offer'd to be yielded up, and were not accepted, return'd back to the *Roman* Camp, *ſua fide liberati*, abſolv'd from their own *Faith* and *Engagement*; but he adds doubtfully, *forſan & publica*, and perhaps from the *Publick*.

XIII. The laſt Queſtion upon this Subject is, if the *Sovereign* knows that his *Miniſters* have paſs'd *Promiſe* and *Engagement*, and is *ſilent* upon it, whether it may be inferr'd from thence, that he *owns* and *approves* it? But for an Anſwer to this, I refer you to *Grotius*, l. ii. c. 16. §. 17.

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[a] Vid. *Grot.* l. 2. c. 15. § 16. *Val. Max.* l. 4. c. 8. § 1. *Jo. Mariana.* Hiſt. *Hiſp.* l. 21. c. 12.

[b] See *Guicciardine*'s Hiſt. l. 12. p. m. 342, & 344. where he talks of the Treaty that *La Trimouille* concluded with the *Swiſs* at *Dijon*, without the King of *France*'s Orders. Sir *W. Temple*, in his *Obſervations* upon the *Government* of the *United Provinces*, ſaith, That in the Year 1668. he prevail'd with the States-General to conclude three Treaties, and to draw up and ſign the ſeveral Inſtruments in the Space of five Days, without any Recourſe to the Provinces, and from them to the ſeveral Cities, where by the Intereſt and Arts of others, the Affair would have been oppoſed and eluded, tho' it was of the greateſt Importance to the States that it ſhould be concluded. He adds, That doing this without Commiſſion from their Principals, they ventured their Heads if they had been diſown'd by their Provinces.

Mr. BARB. *NOTES on* §. XII.

Nor does this Character oblige an Enemy to their Maſter, to reſpect them in their Paſſage through his Territories to another State, or hinder him from doing them any Injury: It not being neceſſary to the Deſign of the Ambaſſies that their *Rights* ſhould extend ſo far; unleſs there be ſome particular *Compact* made for that Purpoſe. What we have here ſaid concerning Ambaſſadors, is alſo to be applied in ſome ſort to *their Domeſticks, and their whole Retinue.* If any one of their *Domeſticks* has done any Damage or Injury, we may require his Maſter to deliver him up to us; otherwiſe he makes himſelf acceſſory to his Crimes, and in that Caſe he gives us *Right* to act againſt him as if it were his own perſonal Crime. Now he cannot puniſh his Domeſticks himſelf; becauſe this *Right* contributing nothing to the Deſign of his Ambaſſy, it is not to be preſum'd that his Maſter has given it him. As for his Goods, we cannot ſeize upon them for Debt by way of Juſtice; for that would ſuppoſe a taking away from the Juriſdiction of the Sovereign to whom his Ambaſſy is made: But if he refuſes to pay his Debts, we muſt take the ſame Meaſures with him, as we have already obſerv'd, are to be uſed in obtaining Satisfaction for the Damage and Injury he has done us. As for the *Right* of *Privileges*, it is a Conſequence of of the Nature and Deſign of Ambaſſies. Neverthele*ſ*s, if we have once granted it to Ambaſſadors of a certain State, nothing authorizes us to revoke it, as long as the Good of the Commonwealth does not require it. Neither muſt we refuſe, without preſſing Reaſons, to grant Ambaſſadors the other *Rights* and *Honours*, which are ſettled by the common Conſent of *Sovereigns*, for then this would be a ſort of an Affront to them.

[2] *Sponſores.*

[3] See Mr. *Buddeus*'s *Diſſertation*, entitled, *Juriſp. Hiſtoricæ Specimen*; as alſo thoſe by Mr. *Thomaſius de Sponſione Caudina & Numantina,* which are the ſixth and fourteenth of the Collection of his Diſputes maintain'd at *Leipſick*.

CHAP. X.

Of Promiſcuous Compacts of Sovereign Princes.

The Contents of every Paragraph of the Tenth Chapter.

I. *The Diviſion of the Chapter.*
II. *How far a Prince may reſtore himſelf to his Right, when injured in Compact by a Foreigner,*
III. *How far, when by his own Subjects.*
IV. *The Contracts of Princes, how far exempted from the Civil Laws.*
V. *A Prince cannot diſpenſe with any valid Oath he hath taken.*
VI. *How far a Subject may have an Action againſt his Prince upon Matter of Contract.*
VII. *The Contracts of the Subject liable to be over-ruled by the Tranſcendental Propriety.*
VIII. *How far Succeſſors are obliged by the Contracts of their Predeceſſors.*
IX. *The Grants and Donations of Princes, whether revocable.*

I. I Am, in the next Place, to conſider the Difficulties which relate to any ſort of *promiſcuous Compacts* made by *ſovereign Princes*, which may be reduced to theſe *three Heads*[1]. Firſt, whether a *ſovereign Prince* has any particular Power, with regard to *Compacts* that affect himſelf? Secondly, what *Liberty* he hath in *Obligations* contracted with his *Subjects?* And, thirdly, how, and how far he can *oblige* his *Succeſſor?*

II. The firſt Difficulty therefore is, that ſince a *Prince* has the Power to reverſe any *Contract* made to the Prejudice of his *Subjects*, and can reſtore them to the State they were in before ſuch a Contract was made, or upon *juſt* Reaſons *releaſe* them from their *Obligation* to obſerve it; whether he cannot make uſe of the ſame Power in Caſes that concern himſelf? For Example, ſuppoſing that by *Fraudulence* or *Force*, or through Indiſcretion of *Age*, he ſhould have *agreed* to *prejudicial* Terms; or hath been any other Way notoriouſly abuſed in his *Contracts*; or bound himſelf by any *raſh Oath*[1]*?* And here it is to be *obſerved*, that the *Queſtion*, as it is ſtated in this *rude Form*, and as the *Words* of it lie, implies a Contradiction. For to *reſtore* Perſons to the State they were in, and to *releaſe* from Oaths, are *Acts* which bear *Relation* and *Tendency* to another Perſon; and which are derived and flow from one inveſted with *Power* and *Authority* over the Perſon that is to be *reſtor'd* and *releas'd*. And therefore the *Queſtion* ought rather to be ſtated thus: Whether, when a *Prince* has prejudiced himſelf, by conſenting to certain *Obligations* and *Conditions* of Contract, upon a Senſe of the Injury he ſuffers, he may by his own *Authority* declare, that by Reaſon of certain *Faults* adhering to the Contract, he looks upon himſelf to be releaſed from the *Obligation?* To which it may be anſwer'd; that as Perſons that live in a *Liberty of Nature*, and own no Subjection, are under their own Conduct, and are Judges in their own Affairs; ſo if they are *unjuſtly* injured in their *Contracts*, they may by their own *Authority* demand *Reſtitution* or *Amendments* to be made to their *Agreement*; on Suppoſition the Prejudice and Injury they ſuſtain be *viſible* and *manifeſt*. For when the Thing is diſputed, the Matter muſt be referred to the Deciſion of *Arbitrators*. And therefore if a *Prince*, ſince he is ſtill in Poſſeſſion of his *natural Liberty*, find any *Abuſe* put upon him in the *Terms* he has conſented to, he may by his own *Authority* declare to the Party concern'd, that he will not be obliged to ſtand to any ſuch *Compact*. And there is no Neceſſity that he ſhould procure a *Releaſe*, ſince the *Thing* is in its own Nature uncapable of producing *Obligation* or *Right*. Thus *Lewis* XIII. of *France* declared, That *there lay a juſt Appeal from the King under Confinement and Bonds, to the King at Liberty.* But becauſe it may ſometimes happen, that ill Men, when they have a Mind to put a Cheat upon the World, and falſify their *Faith*, may pretend an Abuſe or Fault in their *Contracts* to cover their own Frauds and Perfidy; therefore under *Civil Government* it is very neceſſary to *enact*, what *Acts* ſhall in their own *Right* be look'd upon to be *invalid* and *null*, and what are to be examin'd into and determin'd by *Sentence of Court*.

III. But when the Caſe lies between the *Prince* and his *Subjects*, the *Difference* of the Circumſtance will, I think, deſerve a *diſtinct* Conſideration. A *Prince's Minority* is ſuppoſed to continue as long as the *Adminiſtration* of the *Government* and *Affairs* of the *Kingdom* remains in the Hands of his *Governors* and *Tutors*; and during their *Adminiſtration*, the *Prince* himſelf can make no *Contract* with any Perſon of a *foreign State:* But if he enter into any *Contract* with a *Subject*, and afterwards find himſelf injured in it, I ſee no Reaſon why he ſhould not enjoy

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[1] See *Grotius*, B. 2. c. 14.

[1] See *Grotius*, in the Place above mentioned, § 1, 2, 3, 4, 5.

enjoy the ſame common Benefit of the Law, which he allows and ſecures to other Men; otherwiſe *his* Condition would be more confin'd than that of *private* Subjects. Nor can any *Renunciation* of *Exceptions*, which might be made to his *Minority*, be ſuppoſed of Force ſufficient againſt the *Preſumptions* of the *real* Weakneſſes that *Age* is liable to. A *Prince* cannot diſannul the *Treaties* and *Compacts* that were *lawfully* made by his *Governors* with *foreign Powers* or *Perſons*, when he is come to *Age*, upon Pretence that they were made in his *Minority*. Becauſe then, nothing could be paſs'd with any Security under a *Prince* that happen'd to be a *Minor*. However, the *Prince*'s *Governors*, the *Regents*, are obliged to give an Account of their *Adminiſtration*. But no *Exception* whatever of *Fear*, *Injury*, or *Fraud*, is of Force againſt any of thoſe *Capitulations*, which in *limited Monarchies* the People propoſe, and the Prince conſents to, at his *Acceſſion* to the *Government*. For if the *Capitulations* or *Conditions* ſeem'd too ſtrict and ſevere, the *Prince* had his Liberty of accepting or refuſing them; and the People would not have forced him to take the *Government* upon him. And it is not to be ſuppoſed, that any People would be ſo inconſiderate, as to tie up the Hands of their *Prince* with ſuch *Laws*, as muſt make the *Sovereign Power* weak and feeble, and his *Government* unactive and unprofitable. And here I will by the way enquire, whether *David* could have retracted his *Oath*, when he ſware not to puniſh *Shimei* that curſed him as he fled from *Abſalom*? And I confeſs in my Opinion he could not. For the *King* was under no Apprehenſion of Force or Fear, when he gave him his *Oath*, neither could he be thought to have ſworn out of Raſhneſs or Indiſcretion; but on the contrary, rather with mature Conſideration and Deſign, that upon ſo remarkable an Inſtance of his Clemency, the People that had been engaged in the *Rebellion*, might return the more willingly, and with greater Aſſurance of being pardon'd, to their Obedience. Neither was the Promiſe of Impunity in itſelf unlawful; for the *King* might very juſtly, and without Injury to any Man, pardon a Crime which was committed purely againſt his own Perſon. But it hath given further Matter of Diſpute to ſome, whether he can be excuſed for leaving ſuch a Remembrance of *Shimei*'s Crime in all his laſt Commands to *Solomon*. In my Opinion, *David* did nothing in this, contrary to his former *Oath*; for he did not leave any *Command* with his *Son* to puniſh *Shimei* for his Crime; but only adviſed him to keep a ſtrict Eye upon that malicious bad Man and Enemy to his Family, and to take care that he did not create him any freſh Diſturbance; and that if he ſhould afterwards find him guilty of any Miſdemeanour, not to be eaſy to forgive him. And therefore *Solomon* commanded him to live in *Jeruſalem* under the *Eye* of the *Court*, and forbad him to paſs over the Brook *Kidron*, that he might not inſult upon his Impunity; nor conceive any ſecret Satisfaction in ſeeing the Place where he had with ſo much Bitterneſs reviled and curſed *David*. But *divine Providence* ſo diſpoſed, that he ſhould break thoſe eaſy *Conditions* which he had himſelf approved and conſented to, that there might be juſt Occaſion given to take off ſo ill a Man by puniſhing him as he deſerved.

IV. But here it is to be obſerved, that however *Princes*, when they enter into any particular *Acts* with their Subjects, not as *Princes*, but as other *private Men*, are preſumed always to comply with the *poſitive Laws* of the Commonwealth which relate to the *Validity* of ſuch *Acts*; yet ſince they are above the *Civil Laws*, they are under Neceſſity of following thoſe *Laws* always in their *private Acts*. And therefore if they voluntarily and adviſedly enter into any *Contract* that would otherwiſe be *invalid* in *Law*; they are ſuppoſed to have *exempted* that particular *Contract* from the Force of the *Laws*, where there are ſuch, and to declare that no *Nullity* ſhall enſue upon that Account. For otherwiſe, all that was done would ſignify nothing[a]. And I think it is very reaſonable to allow, that if a *Prince* find himſelf very much injured in a *Contract*, which at firſt he did not perceive, he may if he pleaſe *annul*, or at leaſt *correct* and *amend* it[b].

V. That no *Prince* hath Power to releaſe himſelf from his *Oath*, when there lies no *Objection* either againſt the *Validity* of his taking it, or the *Matter* contain'd in it, or the *Circumſtances* belonging to it, upon Pretence that it is lawful for him to *relieve* his *Subjects* in ſome *particular Oaths*, I think is evident. For the *Oaths* which he has Power to *vacate* in his *Subjects*, have always this *Condition* annex'd to them, *if it pleaſe the Sovereign*. And 'tis certain it would be impoſſible to bind any *Obligation* upon a Man, if he reſerves to himſelf a Power to break from it, whenever he thinks fit[c].

VI. But though *Princes* are as much obliged in *Conſcience* by their *Promiſes* and *Compacts* as *private Men*; yet, in this Reſpect, there is a Difference between the *Obligation* of a *Prince* and that of a *Subject*, that 'tis eaſy for the *Prince* to force the *Subject* to ſtand to eaſy *Terms*, when perhaps he would willingly go back; but a *Subject*, as long as he is ſuch, hath no way to *oblige* his *Prince* to give him his *Due*, when he refuſes it. But no wiſe *Prince* will ever refuſe to ſtand to a *lawful Contract*; ſince he muſt neceſſarily conſider, that his *Honour* and *Security* depends upon the Credit he hath of obſerving his *Compacts*; and that it is the worſt Thing that can be ſaid of a *Prince*, that he obſerves not himſelf that *Juſtice*, which it is his *Duty* to *adminiſter* and *ſupport*. But however, if a *Prince* upon *Contract* give the *Subject* Liberty to enter an *Action* againſt him in his own *Courts*, the *Action* itſelf proceeds rather upon natural *Equity* than the *Civil Laws*; as if it were implied, that upon the Knowledge of his *Obligation*,

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[a] Of the Action of *Philip* II. of *Spain*, who *by a Fetch of Law, would have releaſed himſelf from paying his Debts*, ſee *Grot*. Hiſt. *Belg*. l. 5.

[b] Vid. *Grot*. l. 2. c. 14. §. 2.

[c] Vid. *Grot*. l. 2. c. 14. § 3.

gation, he would not refuſe the *Performance* of it. And therefore the *End* promiſed by ſuch an *Action* is not to force the Prince to ſtand to the *Contract*, but only to make it appear to the *Subject*, that the *Prince* had *obliged* himſelf to obſerve it. And in ſuch *Tryals*, *there ſhould be no Regard had to Honour or Greatneſs, but Judgment ought to be given barely according to the ſtrongeſt Probabilities of Argument* [a].

VII. It may alſo happen, that the *Subjects* may be deprived of a *Right* acquired by *Contract* [1], either by way of *Puniſhment*, or by the *Force* of the *Tranſcendental Propriety* *. Always ſuppoſing in this Caſe, that the *Neceſſities* of the Commonwealth demand it, and that the *Publick* ought to make *Reſtitution*. And therefore for the ſame Reaſon the *Prince* may defer his *Payments*, when any preſſing *Exigence* of *State* obliges him to turn the Money another Way, which ſhould have been paid to the *private Subject*. And from hence in appears, what is to be determined about the *Tabulæ novæ*, or *general Diſcharges* from *Debts* or *Obligations*, which *Solon* call'd Σεισάχθεια, or the *ſhaking off a Burden* [b].

VIII. But *laſtly*, that it may appear, whether and how far a *Prince* hath *Power* to tranſmit an *Obligation* upon a *private Contract* down to his *Succeſſors*; it is to be firſt conſider'd, whether the *Prince's Kingdom* be his *Patrimony*, or whether he poſſeſs it only as it were upon an *uſufructuary Right*. A *Succeſſor* to a *Prince* that holds his *Kingdom* in the *former Right*, ſince he ſucceeds to all his *Goods* and *Poſſeſſions*, muſt be ſuppoſed to inherit all *Debts* of *Princes* that poſſeſs their *Kingdoms*; in the *latter*, *Grotius*, l. ii. c. 14. § 10, *&c.* is of Opinion, that the *Succeſſors* are not *immediately*, and purely, becauſe they *ſucceed them* in the *Kingdom*, *obliged* to diſcharge them. *For* ſuch *Princes* do not derive their *Right* to the *Throne* from the *King* their *immediate Predeceſſor*, but from the *People* themſelves. But even *theſe Succeſſors* are obliged by the *Debts* of their *Predeceſſors*, *mediately* and by *Interpoſition* of the *Commonwealth*, not as upon their own *Account*, but as they are *Heads* of the Commonwealth. For in the laſt *Reſort* the *Debts* of the *Prince* affect the *State* itſelf, as they were contracted by the *Head* and *Governor* of it. And the Truth of it is this, that *Princes* have Power to devolve *Debts* upon the *Commonwealth* itſelf, is evident from hence, that ſometimes it would be impoſſible to ſupply the *Neceſſities* of the *State* otherwiſe than by *contracting* ſuch *Debts*. And ſince the *Adminiſtration* and Security of the Commonwealth is entruſted with the *Prince*, he muſt be allowed to have the Command of thoſe *Means*, without which that *End* cannot be *purſued* or *obtain'd*. But then, on the other hand, this *Power* to *oblige* the Commonwealth ought to be ſtrain'd no farther than the *Prince* can have *good* Reaſons for *contracting* the *Debt*. But then *again*, neither ought the *Prince* to be ſo far *limited*, as not to have *Power* to devolve any *Debts* upon the Commonwealth, but what have *actually* given ſome *Advantage* to the State; tho' 'tis fit *inferior Magiſtrates* ſhould be ſo confin'd [c]. But 'tis ſufficient if he hath a fair Probability in Reaſon for what he attempts, though perhaps the Event may fall out contrary to his Expectations. And therefore upon the *whole*, all *Contracts* made by the *Prince*, *oblige* the Commonwealth, unleſs when they are manifeſtly *abſurd* or *unjuſt*. And when the Caſe is *doubtful*, 'tis always to be preſumed in *favour* of the *Prince*. And ſuch *Contracts* as theſe alſo *oblige* the *Succeſſor*, as he is the *Head* of the Commonwealth. Nay, the *People* themſelves will be *obliged* by them, if they ſhould change their *Form* of *Government*, and erect a *free State*. And ſo whatever a *free People* contract, *devolves* upon and *obliges* the *Perſon* they afterwards confer the *Sovereignty* upon, though they give him never ſo *full* and *abſolute* a *Power*. And this I think is a better Way of deciding the Queſtion, than by diſtinguiſhing between the *greater* and the *leſſer Injuries*. For in the *Adminiſtration* of *publick Affairs*, the *Probability* of the *Means* ought to be allowed a *fairer* Conſideration than the *Succeſs* of the *Event*, ſince an unforeſeen Accident may ſometimes break and diſtract the wiſeſt Meaſures and Deſigns.

IX. What hath been ſaid of the *Contracts* of *Princes*, may alſo be applied to their *Grants* and *Donations* [2], *viz.* that they cannot be *recall'd* by the *Succeſſors*, where they were made upon *fair* and *favourable Reaſons* [d]. Yet 'tis certain, on the contrary, that *Galba* endeavoured to recover the *Largeſſes* and *Donatives* made by *Nero*, allowing no Man to keep more than the *tenth Part* of his *Liberality* [e]. So alſo the *Roman Senate* reduced thoſe *Cities* to a *tributary State*, that had bought their *Privilege* or *Immunity* of *Sylla*. *Cicero* indeed thought them too ſevere in it [f]. And I think it had been but reaſonable to have refunded them their Money, ſince it had been employ'd in *publick Uſes*. And ſo *Baſilius* of *Macedon*, when his *Predeceſſor Michael* had *exhauſted* the *publick Treaſure*, publiſhed an *Edict*, commanding *all Perſons that had received any of the Money, and could give no fair Account, why, or for what they received it, to return it again, or at leaſt the Half Part of it* [g]. But indeed as to *Grants* of this Nature, it ought to be conſidered out of what they are made. If the *Prince* give out of his own *Pocket*, or *Eſtate*, without Diſpute the *Grant is irrecoverable*. And if he diſtribute his *Bounty* out of the *Revenues* or *Income* of thoſe *Goods* or *Poſſeſſions* which are entruſted to his *Adminiſtration*, it ought always to be conſidered, upon *what Reaſons* and with *what*

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[a] *Heliod. Æthiop.* l. 10.

* Vi Dominii eminentis.

[b] Vid. *Plutarch. Solon Cic.* Off. l. 2. c. 24. ad fin.

[c] Vid. L. 12. t. 1. l. 27. *D.* de rebus Creditis, *&c.*

[d] Vid. *Sueton.* in *Tito*, c. 8. *Plin.* L. 10. Ep. 66. *Gratian.* Cauſ. 25. Quæſt. 1. c. 15.

[e] Vid. *Sueton.* in *Galba*, c. 15.

[f] *Cic.* Off. l. 3. c. 22.

[g] Vid. *Hieron. Oſorium de* Reb. geſt. *Emanuel*, l. 1. *Where he gives an Account of the Grants King* John *made juſt before his Death.*

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[1] See in *Grot.* the Place quoted, § 7.

[2] See *Grot.* ubi ſupra, § 13.

what Caution and *Moderation* the *Donations* were made. For as no Body denies but that the *Prince* hath *Power* to reward the *Services* of his *Friends* and *Subjects* out of the *publick Monies*, as far as the *Riches* and *Occaſions* of the *State* will allow; ſo if the *Money* of the *Nation* be profuſely ſquander'd away upon *Perſons* that do the Commonwealth neither *Credit* nor *Service*, and the *publick Stock* is laviſh'd away only to ſatisfy their *Ambition*; in my Opinion, *they* ſhould be repleniſh'd from their *Purſes* that at firſt exhauſted it. It was the wiſeſt Method *Ferdinand* King of *Arragon* obſerv'd, never to part with any of the *Lands* that belonged to his *Crown*; and his *Reaſons* were good, *that Princes that alienated their Lands, generally created themſelves more Enemies than Friends by it, becauſe they made ſome of their Subjects ſo great by it, that they would always be ſuſpicious and fearful of being deprived of their Rights*[a]. What hath been ſaid with Relation to *Grants*, may alſo be applied to[2] *Privileges* and *Immunities*, namely, that it ought to be conſidered upon *what Reaſons*, and with what *Caution* and *Moderation* they were given; and whether they are conſiſtent with the *common Peace* and *Security* of the *State*. For without Diſpute, *theſe Things* are of far greater Concern than the *unwary Eaſineſs* of the *Prince*. And indeed all *Privileges* are to be confin'd under ſuch *Limitations* and *Reſtrictions*, whenever they begin to lie *heavy* upon the other *Subjects*[b]. So when the *Romans* demanded an *Aid* of *Men* and *Money* from the *Celtiberi*, and they thought to excuſe themſelves by pleading the *Privileges* that had been granted them by the *Romans* themſelves, the *Hiſtorian* ſays, "That what they "inſiſted upon was allowed to be true; but that "the *Senate* when they gave ſuch *Privileges*, al"ways annexed this *Exception*, *that they were to "continue in Force as long as it ſhould ſeem good "to them and the* Roman *People, and no longer*[c]. *Lewis*, King of *France*, after he had reduced the *Genoeſe* that had *revolted* from him, diſannull'd all the *Agreements* and *Treaties* formerly paſs'd between *him* and that *State*, and gave them all back again by the way of *Privileges*, not as *Compoſitions* or Compacts; *that ſo it might be always in his Power to recal them.* Perhaps indeed *that* was not to hold with relation to *Privileges* of all Kinds, but to ſuch only as were to have barely a *precarious Dependence.*

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[a] Vid. *Bœcl.* ad *Grot.* l. 1. p. m. 107. *Grot.* L. 2. c. 14. § 12. *Laurentius Valla* de rebus geſtis *Ferdinand. Arrag.* l. 3.

[b] Vid. L. 43. t. 8. l. 1. § 16. *D. ne quid in loco publico,* &c. *Demoſthen.* Orat. adv. *Leptin.*

[c] *Appian.* Iberic. *Guicciardine* Hiſt. 7.

Mr. BARB. *NOTE on* § IX.

[2] See upon this Subject the *Obſervationes Select. ad rem litterariam ſpectant.* printed at *Hall* in *Saxony*, Tom. III. Obſ. 13, 14, 15. or Mr. *Bernard*'s Abridgment of them in the *Republ. des Lettres Auguſt*, 1704. p. 190, *&c.* See alſo Mr. *Le Clerc*'s *Biblioth. Choiſie*, Tom. 1. p. 41, *&c.* To which we may add, that the *Revocation* of lawful *Privileges*, is a very nice Point, and requires a great deal of Prudence. For, to uſe Mr. *La Bruyere*'s Words (*Caract. ou Moeurs de ce Siécle*, p. 316.) "there are certain Circumſtances of Af"fairs, in which we cannot humour the People too much. You may to Day deprive this City of its Liberties, Rights, and Privileges; "but To-morrow, do not ſo much as think of regulating their very Signs." "Indeed (as Mr. *Le Clerc* ſays in the Place I have cited) "we cannot make the Duration of all Sorts of Privileges depend upon the variable Caprice of Princes, without expoſing the State to "Diſturbances, which would be difficult to appeaſe.—— What Eſteem could we have for Privileges that were to laſt no longer than "the Prince's Will and Pleaſure? Thus in ſetting up Princes above Privileges, we do them as much Injury as the People.

CHAP. XI.

How Subjection ceaſes.

The CONTENTS of every Paragraph of the Eleventh Chapter.

I. *A Man ceaſes to be a Subject when his Prince dies without a Succeſſor.*
II. *Or, if he removes out of the Commonwealth.*
III. *What to be obſerved in ſuch a Remove.*
IV. *Whether lawful to remove in great Companies.*
V. *Whether lawful to counterfeit a Refuge.*
VI. *Whether the Commonwealth may eject a Subject, when it pleaſes, without Reaſon.*
VII. *Of Baniſhment.*
VIII. *A Man is deprived of the Privileges of a Subject when overpower'd by an Enemy.*
IX. *Whether a Subject ſurrender'd to an Enemy, and not accepted, continues a Member of the Commonwealth.*

AMONG the *ſeveral Ways* by which Men ceaſe to be under Subjection, it is by *ſome* thought to be *one*, when a *Prince* dies and leaves no *Heir* or *Succeſſor* behind; or gives his *Kingdom* for loſt. For then *(they ſay)* every particular *Subject* is left *free* to a *Liberty of Nature.* But ſince it is clear that a *Kingdom* in ſuch a Caſe is not abſolutely *diſſolv'd*, but only reduced to a State of *Interregnum*; it follows, that though the *Obligation* of the Subjects to the *Prince* they have *loſt*, are indeed at an End, yet that they continue ſtill united to one another by the original *Bond* and *Compact* of *Society*.

II. But now the uſual Way by which Subjection ceaſes is, when a Man by *Permiſſion* of his *own Commonwealth* voluntarily *removes* into another, and ſettles himſelf and his Effects, and the Hopes of his Fortune *there* [1]. How far ſuch *voluntary Removes* may be permitted, muſt be diſcovered by the Methods by which Subjects are admitted into the Commonwealth. For ſome Perſons are forced to put themſelves under the *Protection* and *Government* of certain *Commonwealths*, by being conquered in *War*, or reduced to the laſt Neceſſities. And what *Liberty* is allowed to theſe muſt be known by the *Laws* of thoſe Commonwealths. But if a Perſon *abſolutely free*, that never knew what it was to be *Subject* (ſuch as the *Patriarchs* and *Maſters* of *Families* of old) or is at *preſent free* from all *Subjection* he had been under *before*, *voluntarily* join himſelf to any Commonwealth; it muſt alſo be determined by the *Conſtitutions* of that Commonwealth, what *Liberty* to remove thence was left him [2]. For in ſome *Commonwealths* no Man is permitted to leave them without the *expreſs Conſent* of the *Government*. In others, a Man may be allow'd that *Liberty*, if he will ſubmit to certain *Impoſitions*; as ſuppoſe, if he will pay a certain *Sum* of *Money*, or leave Part of his *Goods* behind him [a]. But where there are no *Laws* about the *Matter*, we muſt be determined by *Cuſtoms* ariſing from the *Nature* of *civil Subjection*. What *Cuſtom* admits of, every *Subject* is ſuppoſed at Liberty to uſe. But if *this* gives no Light to the Matter, and the *Compact* of *Subjection* makes no mention of it; it muſt be preſumed, that every Man reſerved to himſelf the *Liberty* to *remove* at Diſcretion, and that he choſe rather to be a *Citizen of the World* (as *Socrates* ſaid) than a *Subject* in any *particular* Commonwealth [b]. For when a Man enters himſelf into a *Commonwealth*, it cannot be ſuppoſed that he gives up all Care of himſelf and Fortunes, but rather that by ſo doing he takes the beſt *Expedient* to defend and ſecure both. But becauſe it often happens, that the Nature of the *Government* does not ſuit with every private Man's particular Circumſtances, or he thinks at leaſt he can make his Fortune with more *Advantage* elſewhere; and ſince it would be unreaſonable to *reform* and make *Alterations* in the Commonwealth at the *Deſire*, and for the *Benefit* only of a few *private Subjects*; the only Method left is, to give them leave to *remove*, and provide for themſelves where they think beſt. 'So " *Demaratus*, the Father of King *Tarquin*, fled " with his Family to *Corinth*, and ſettled there, " becauſe he could not bear the Inſolence of the *Tyrant*

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[a] *Ovid. Metam.* l. 15. ver. 28, 29. ſpeaking of the *Argives*

—— Prohibent diſcedere leges,
Pœnaq; mors poſita eſt patriam mutare volenti.

The Laws forbid my Flight, and threaten Death
To thoſe that leave the Land which gave them Breath.

[b] Valerius Flaccus, *Argon.* L. 7. ver. 227, *&c.*

Omnibus hunc potius communem animantibus orbem,
Communes & crede Deos; patriam inde vocato,
Qua redit itque dies; vec nos diis nata Malignis
Cluſerit hoc crudo ſemper ſub frigore meſſis.
Fas mihi non ſtabiles, fas & tibi linquere Colchos:

The World to all her ample Fields extends,
And God and Providence are common Friends;
Where e're the Day diſcovers diſtant Earth,
The Country's mine; nor are we doom'd by Birth
To this cold frozen Soil: But unconfin'd
May change our Country, as we change our Mind.

Mr. BARB. *NOTES on* § II.

[1] See *Grot.* B. 2. c. 5. § 24.

[2] V. Dig. L. 49. t. 15. De Captiv. & de Poſtliminio, *&c.* l. 12. § 9.

“ *Tyrant Cypſellus*, wiſely preferring *Liberty*, “ though in *Baniſhment*, to *Servitude* at *Home* [a].” So alſo ſometimes it is known, that there is not ſufficient Encouragement allowed to Men of Parts in their own *Nation*. And ſome have found it true by Experience, *that a Prophet hath no Honour in his own Country* [1]. For Men of baſe Natures are apt to look with Envy upon Perſons that would riſe by their own Worth to an Height of Greatneſs above their Reach; when perhaps *they* remember themſelves once *ſuperior*, at leaſt upon the *Level* with them; and as *Lacydes* ſaid [b], *Statues ought to be ſeen at a Diſtance*, becauſe too near a View leſſens the Beauty of them. Now to deny ſuch Perſons the Liberty of *removing* would in effect be all one, with laying a Command upon Men free and at their own Diſpoſal, and not to preſume to riſe above the *Rank* and *Condition* of their *Anceſtors*. But the Commonwealth alſo itſelf may make Advantages by theſe *Removes*, by inviting in Perſons of Worth and Eminence from *Abroad*. “ By the Conſtitution of the *Roman* “ Commonweatlth, no Citizen could be forced to “ leave the Commonwealth, or if he pleaſed, not “ to leave it, when he was made a Member of “ another he preferr'd to it. And therefore *Tully* “ ſays [c], that a little before his Remembrance, “ ſeveral *Citizens* of *Rome*, Men of Credit and “ Fortunes, voluntarily left *that*, and ſettled “ themſelves in other Commonwealths. And “ the Way, *ſaith he*, lies open from every *State* “ to *ours*, and from *ours* to *every* other.” And this *Right* he very often highly extols [d]. Neither is it any Objection againſt what is here ſaid, that the *Father of Families*, who at firſt *erected* the Commonwealth, may be ſuppoſed to have bound one another by *Compact*, to *aſſemble* and *unite* their Strength in common. For even in other *Societies* any *Member* has Liberty to leave it, ſo it be not with *fraudulent Deſign*, at an *ill Time*, or to the *Prejudice* of the other *Members*, eſpecially if the *Society* were not eſtabliſh'd with any particular Limitation of *Time*. And therefore many Commonwealths have appeared to be very little concern'd, when their *Subjects* left them, as being already overſtock'd with Men, and glad to have their Numbers leſſened.

III. But however, ſince 'tis generally the *Intereſt* of every Commonwealth to know the Number of its *Subjects*; they that *remove* ought in point of *Duty* or *Honour* to ſignify their *Departure*; unleſs a Man has good Reaſon to ſuppoſe, that it will be no *publick* Concern whether he leaves it with ſuch Ceremony, or not. But all Perſons that have engaged themſelves in any particular *Service* or *Employ*, for a *certain Time*, ought without queſtion to have the *expreſs* Conſent of the Commonwealth for their *Remove*. For Example, *Subjects* that are ſent on *Ambaſſies*, *Expeditions*, or that are entruſted in any other *Buſineſs* which they undertook upon particular *Compact* and *Agreement*. But beſides, a *Remove* ought to be at a *proper Time*, and when it is not directly againſt the Intereſt of the Commonwealth to ſuffer it. For Example (to make uſe of the Inſtances in *Grotius* in the Place above quoted) when the *publick Debts* are great, a *Subject* ſhould not have Leave to *depart*, except he would pay his *Share of them* before he *remove*; nor when the Commonwealth is engaged in War upon Preſumption of the *Number* or *Bravery* of *certain Subjects*; and eſpecially when there is Danger of *Invaſion*, or of being *beſieged*; except the *Subject* that would *depart* can be ſure to leave others behind him, every way as fit to *defend* the State as himſelf [e]. Neither can they be good Subjects that ſerve their *Country*, as *Horace* [2] ſpeaks of his *Friends*, *Diffugiunt cadis cum fæce ſiccatis amici, ferre jugum pariter doloſi*, that is, who when they have drained all they could from it, leave it to ſtruggle with Misfortune by itſelf. But then it muſt be obſerved, that by *removing* in this Place I underſtand the *departing* out of the *Dominions* and *Territories* of the Commonwealth, and not the *denying* its *Authority*, and continuing to live in its *Dominions*. For the Commonwealth, when it *bounds* its *Power* within *certain* Limits, is ſuppoſed at the *ſame Time* to prohibit every Perſon to inhabit within that Compaſs, who will not acknowledge its *Authority*. And therefore it may be obſerved *by the way*, that the *Grandees* of *Spain* were very much miſtaken, when they thought themſelves releaſed from the *Obligations* of the Commonwealth, by renouncing the Laws of their Country, and then retiring to other Places. Though it was uſually ſuppoſed, that when that was done, they might lawfully take up Arms againſt their *Prince*, and begin *open Hoſtilities*, without incurring the Guilt of *Treaſon* and *Rebellion* [f]. From what has been ſaid we may infer, what *Force* thoſe *Avocatory Commands* may be ſuppoſed to have, by which the Commonwealth endeavours to recall its Subjects from Employments in *foreign Countries*. For Inſtance therefore, if a *Subject*, that is under no particular *Ties* or *Reſtraints*, *remove* from his Commonwealth, where that *Liberty* hath always been *promiſcuouſly* allowed, and ſettles himſelf and his *Effects* under the *Protection* of a *foreign State*; the Commonwealth he left hath no longer any *Authority* over him. And therefore it is to no purpoſe to think to *reduce* ſuch an one by threatning him with the Loſs of *Fame*, which is the utmoſt that can be done, when he is determined not to obey. But the Commonwealth hath ſtill *Authority* over *Subjects* that depart either contrary to the *Laws*, or are *obliged* to *it* by any particular *Ties*, or hold *Poſſeſſions* of *Goods*, eſpecially of *Immoveables*, under its *Dominions*, or are abſent only upon *Travel*, and reſerve to themſelves the *Right* of Subjects. And by the way

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[a] Cic. *Tuſc. Quæſt.* l. 5.

[b] *Diog. Laert.* l. 4. § 60.

[c] Cic. *Orat. pro* Balbo, c. 13.

[d] *O jura præclare, atque divinitus jam inde à principio* Romani *nominis à majoribus noſtris comparata*, &c. *Cicero* d. l. What noble Rights are theſe! Which by the Bleſſing of Heaven have been enjoy'd by us and our Anceſtors, ever ſince the *Roman* State began, that none of us ſhould be forced to leave our Country, or to ſtay in it againſt our Wills. This is the immoveable Foundation of our Liberty, that every Man is Maſter of his Right, and may keep or reſign it as he pleaſes.

[e] *Vid.* Lycurg. *Orat. contr.* Leocratem.

[f] *Vid.* Mariana *de rebus* Hiſp. L. 13. c. 11.

Mr. BARB. *NOTES on* § II, III.

[1] Luke iv. 24.

[2] B. 1. Od. 35. ver. 26, 27, 28.

way, it was a prudent Law of *Solon*'s, which *Plutarch* [1] mentions in his *Life*, by which he obliged the *Athenians*, "To admit no Perſons "into their Commonwealth, except ſuch as "were condemn'd to perpetual Baniſhment from "their own Country, or elſe ſuch as remov'd "with their whole Families to *Athens*, for the "Convenience of Trade and Employment in "the *Arts* they profeſs'd. And this Law it was "ſaid he made, not ſo much to keep out *Foreigners*, as to invite them to ſettle at *Athens*, "by giving them Aſſurance of incorporating "them into the *Body* of the Commonwealth. "For he made no Doubt, but *both* theſe *ſorts* of "*People* would make very good *Subjects*, the *one* "becauſe they *voluntarily* quitted, and the *other* "becauſe they were forced out of their own "*Country*." But further, ſince the Commonwealth really hath no *Power* or *Authority* over *Perſons* free from all *Civil Obligations* to it, it is manifeſt, that if the *new* Commonwealth they ſettle in, ſend them in *Quality* of *Ambaſſadors* or *publick Miniſters* to the *State* they left; that they ought to be received agreeably to their *Characters*, and enjoy all the *Privileges* of *Ambaſſadors*, one of the chief of *which* is to be *free* from the *Authority* and *Power* of the Commonwealth they are ſent to. For if this be thought too great an *Honour* to be ſhewn to Perſons who have formerly been *Subjects*, 'tis eaſy to deny them *Reception*. Nay, to carry the Thing farther, if for Inſtance, a *Subject* in the *Face* of his own Commonwealth engage his *Faith* to a *foreign State*, in order to take upon him to *negotiate* for *it* there, under the *Character* of *Ambaſſador* and *publick Miniſter*; the Commonwealth muſt be ſuppoſed to have releas'd him from all *Civil Obligations* to itſelf. Since it is impoſſible the ſame Subject ſhould be capable of two *Obligations* of the *ſame Nature*. And in conſequence, *that* Perſon muſt from that Time be admitted to all the *Rights* and *Privileges* of an *Ambaſſador* in his own *Country*, which by a ſort of *Fiction* he is ſuppoſed to have *changed*.

IV. But however, to *depart* in *Companies*, great Numbers together, *Grotius* [1] thinks *unlawful* for *this* Reaſon, becauſe ſuch a *Liberty* would be utterly *inconſiſtent* with the *Nature* of *civil Society*. And in *Morality* that muſt be judged *neceſſary*, without which, an *End* propoſed cannot be attain'd; and that *inconſiſtent* with it, which prevents or deſtroys the End [a]. But the Truth of this Opinion may I think be queſtion'd [2], for if it be lawful for *particular Subjects* to *remove* as they pleaſe themſelves, why is it not lawful for *greater Numbers* to take the ſame *Liberty*, who all propoſe to themſelves the like Conveniences of bettering their Fortunes by *changing* their *Country*; ſuppoſing none of thoſe Objections againſt it that were mentioned before? For it is nothing to the Purpoſe to anſwer, that by *this Means* the Commonwealth muſt be enfeebled and diſſolv'd. For where a Perſon hath no *Right* to *detain me* contrary to my own Inclinations, he ſuffers no Injury, tho' perhaps by my *Departure* ſome *future Benefit*, but not yet *due*, is *intercepted* from him. There is no Neceſſity ſuch a *particular* Commonwealth ſhould have ſo many *Millions* of Subjects, or ſhould always appear formidable to its Neighbours, any more than it is that any particular *private Man* ſhould be worth ſo many *thouſand Pounds*, though 'tis true indeed, that neither one nor the other ought to be reduced to a *lower* Condition by *unjuſt Means*. And therefore I think there is but little Force in *Grotius*'s Argument. For though perhaps, *this* or *that* particular Commonwealth may be much *weaken'd*, or perhaps by continual *Drains* in Time be utterly *diſpeopled*, where the Subjects are permitted to *deſert* in Numbers together; yet *civil Society* among Men is in no Danger of being abſolutely *diſſolv'd* by it. For the *Corruption* of one Commonwealth is the *Generation* of another, and what is *loſt* in one Place, is *gain'd* in another. *Nature*, when Men began to *increaſe* and *ſpread* themſelves over the *World*, *formed* and *divided* them into *civil Societies*, but never gave Command that *ſuch* or *ſuch* a particular Commonwealth ſhould ſtand for ever in an uninterrupted Courſe of Greatneſs and Fortune. *Babylon* was exhauſted by *Seleucia*, and *that* by *Cteſiphon* [b]. However, when *Companies* depart, they are obliged as well as *particular Subjects*, to depart out of the *Dominions* and *Territories* of the Commonwealth. For otherwiſe there muſt enſue ſuch Diſtractions and Confuſions, as would neceſſarily be *fatal* to all *Governments*, that is, if whole Cities or Provinces were allow'd *Liberty* to withdraw at Pleaſure from their *Obedience*, and either to put themſelves under the *Protection* of *others*, or to erect ſeparate *States* of themſelves.

V. I ſhall now in the next Place enquire, whether, and how far thoſe Perſons may be *juſtified*, that pretend to be *Refugees* and *Deſerters* only with Deſign to injure them that *receive* them, and to bring ſome *Advantage* to their *Prince* or *Country*. It is not indeed to be excuſed from great Imprudence, to be eaſy in giving Credit to ſuch ſort of Men, 1 *Sam.* xxix. 4. nor does the World generally appear diſſatisfied, that *Traitors* are puniſhed after their *Treaſon* hath taken Effect [c].

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[a] V. *Liv.* l. 41. c. 8, 9.

[b] Vid. Plin. *Nat. Hiſt.* l. 6. c. 26.

[c] Vid. Vopiſ. *in* Aurelian. c. 23.

Mr. Barb. *NOTES on* § iii, iv.

[1] *Plutarch*, p. 91. F.

[1] Ubi *ſupra*.

[2] Mr. *Wernher*, Profeſſor at *Wittemberg*, anſwers our Author (in his *Elementa*, *J. N.* and *Gent. Cap.* 26. *Sect.* 4.) that though particular Members of a Body, taken one by one, have ſuch and ſuch *Rights*, it does not always follow, that a whole Multitude muſt have them alſo, becauſe there may have been ſome Reaſon which hinders the granting to a great Number of Men, what is allowed to a ſmall one; as it is here, where it plainly appears, that it is the Intereſt of the *State*, that their Subjects do not remove out of it into another, in large Bodies. Beſides, that is contrary to the *original Contract*, which forms *Civil Governments*, and by Virtue of which the Subjects are bound to act nothing that tends to the Deſtruction of the State. And it ſignifies nothing to ſay, that one *State* makes an Advantage of the Ruins of another. For the *Compact* here in Diſpute, relates to the Advantage of that State into which they enter; and it is not with reſpect to *Civil Governments* in general; but in relation to the Intereſts of every particular *State*, that we muſt judge of the Extent of Engagements and Duties of Subjects. This is the Manner in which that Author defends the Opinion of *Grotius*. However, the Caſe here in Queſtion can ſeldom happen, but when *Princes* have made themſelves odious and inſupportable to their *Subjects* by their tyrannical Government; and then it is certainly their Buſineſs to alter their Meaſures, if they are unwilling to ſee their Countries depopulated. Otherwiſe all the Prohibitions in the World would not be very prevailing, nor hinder their being forced in Time to reign over vaſt Deſerts.

Yet it ought not to be thought therefore lawful or honourable for me to betray a Man, becauſe I find him of an eaſy Temper, and likely to be taken by the *Train* I have laid for him. Nor is any Man obliged to ſerve his Country at the Expence of his Honour and Conſcience, as has been already ſhewed. And without Diſpute, for a Man to *engage* his *Faith* purely with Deſign to make Advantage by the *Violation* of it, in doing Harm to a ſecure and heedleſs Enemy, is a very great Sin. And it was no Queſtion an execrable Saying of *Lyſander*'s, or *Philip*'s, That *Children were to be cheated with Trifles, and Men with Oaths* [a]. If therefore a *Deſerter* expreſly engages his *Faith*, he cannot break it without Sin, whatever *Pretence* or *real Deſign* he may have of advancing *their* Intereſt he *deſerted* from. It may perhaps be replied, that ſince they that give *Reception* to *Deſerters*, know before-hand, that they can do them no Service without Sin, and that no Man can lay any binding *Obligation* upon himſelf to commit Sin, and therefore that the *Faith* given by Deſerters ſignifies nothing; it follows, that no Injury is done them, if they are impoſed upon by their own *Credulity* in depending upon ſuch *ſlender* Arguments. But I anſwer, that it is foreign to the *Queſtion*, to enquire whether it be a Sin, or not, to make uſe of the Service of *Deſerters*. For it does not follow, that if I *ſin* myſelf, in imploying ſuch a Perſon in my Service, that therefore for that Reaſon he hath a *Right* to do me an *Injury*. As it does not follow, that becauſe if a Man hire a *Ruffian* to commit Murder, he contracts the ſame *Guilt* with the *Villain* himſelf, therefore it is *lawful* for the *Ruffian* to kill alſo the Perſon that hired him. It is commonly ſaid indeed, that *Deſerters* are received by the *Laws of Arms* [†]; that is, that it is contrary to the *Laws of Arms*, not to give *Admittance* to Perſons that *leave* the *Enemy*, and *come over to us*, as *Grotius* and *Cujacius* explain that Law [b]. But whether we ought to underſtand *this* Paſſage of the *external Laws of Arms* (as *Grotius* calls it) or of the *internal*, may very well be Matter of Diſpute. But however, if a Man will *defend* that all Perſons have abſolute Liberty to make uſe of the Aſſiſtance of *Deſerters*; methinks it ſhould not be thought ſo proper for the Purpoſe to inſiſt, that even *God* himſelf makes uſe of the Actions of the *Devil* and *wicked Men*; as to plead the *Favour* which ought to be allow'd to the *Juſtice* of *Arms* taken up, either to *puniſh* the Inſolence of an *injurious* Enemy, or to *aſſert* and *regain* juſt and oppreſſed *Rights* [1]. For upon the Suppoſition of this *Favour*, a *Prince* engaged in a *juſt War* needs not think himſelf obliged to make a curious Enquiry, whether the *Deſerters* gave over *Hoſtilities* againſt him upon honourable Motives, or not. And ſince he may preſume, that they had good Reaſons that moved them to relinquiſh the Cauſe they were before engaged in, he cannot contract Guilt by ſeeming to give Encouragement to *unjuſt Deſertions*. But however this be, 'tis certain, that it is utterly *unlawful* to make *Faith* an Inſtrument to deceive and abuſe Mankind. And again, 'tis alſo certain, that where a *Deſerter* owns he *deſerted* without *reaſonable* Cauſe, his *Faith* can ſignify little; ſince it muſt either tend to advance *new* Treaſons, or to continue the *old*; and therefore that it muſt be very great Imprudence to lay any Streſs upon it [c]. But *Deſerters* therefore, that propoſe to ingratiate themſelves with them that receive them, and yet, to carry on their ſecret *Deſign* under the Maſk of *Refugees*, generally pretend that the inſupportable Nature of the Injuries they ſuffered, forced them to take this only Way for their Security. The Stories of *Zopyrus* [2] and *Sextus Tarquinius* are very well known; and what *Arts* the *one* uſed to gain upon the Credulity of the *Babylonians*, and the other upon the *Gabinians* [3]. So *Mezeras* the *Syrian*, as *Florus* calls him, or *Abarus* the *Arabian*, as *Appian*, or *Ariamnes*, as *Plutarch*, that drew *Craſſus* into the Plains, gained Credit with him by extolling the Favours and Obligations he had received from *Pompey*, and by relating the Miſfortunes he had ſuffer'd in eſpouſing the *Roman* Cauſe. *Virgil* [4] ſeems to deſcribe the Cunning of *Sinon* with more than uſual Life and Beauty, that he might free the *Trojans* from the Imputation of being an imprudent credulous People. For firſt, *Sinon* pretends he was a Perſon mortally hated by *Ulyſſes*, a Man the *Trojans* would eaſily think bad enough to be guilty of any Fraud that could be charged upon him, and to whom to be an Enemy was with them the greateſt Recommendation. The Cauſe of this Animoſity between *Ulyſſes* and *himſelf* he then derives from the Death of *Palamedes*, who was put to Death for having impoſed the continuing the War. He goes on with his Story, that he was at laſt doom'd to be *ſacrificed*, not by any Oracle or Command from the Gods, that he might not ſeem to have refuſed even to be made a Victim for the common Safety; but only by the Malice of *Calchas*, who was ſuborn'd and hired to do it by *Ulyſſes*. And certainly an Injury of ſo high a Nature as this might very well juſtify him in ſaying, he thought himſelf now releas'd from all Obligations to his Country. And yet with much perſuaſive Art and Cunning, he firſt of all beſeeches Heaven that it might now be lawful for him to renounce Faith and Love with thoſe *Greeks*, that were ſo unjuſt and unkind to him, tho' he had once conſidered them as Country Men and Fellow-Subjects. And yet all he could ſay

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[a] Vid. *Ælian. Var. Hiſt.* l. 7. c. 12.

[†] *V. D.* l. 41. *De Acquirend. rerum dominio*, l. 51.

[b] *Cujac.* Obſ. 4. c. 9. *Grot.* l. 3. c. 1. § 22.

[c] *Liv.* l. 22. c. 22. *Vid. ap. eund. Orat. Indibilis*, l. 27. c. 17. and that of *Cn. Marcius* to the *Volſci*, in *Dionyſ. Halicarnaſſ.* l. 8. And that of *Segeſtes*, in *Tacitus*, Ann. l. 1. c. 58. *Neque odio patriæ*, &c. This I did, not out of any Ill-will I bear to my Country (for Traytors are hated even by thoſe they deſign'd by their Treaſon to oblige) but becauſe I look'd upon it to be the common Concern both of *Romans* and *Germans*, and becauſe I was more inclined to Peace than War. V. *Amm. Marcellin.* l. 18. c. 11. *in fin.*

Mr. BARB. *NOTES on* § V.

[1] See the ſixth Chapter of this Book, § 16.

[2] V. *Herodot.* l. 3. & *Juſtin.* l. 1. c. 10

[3] *Liv.* l. 1. c. 53, 54.

[4] V. *Virgil.* Æneid. l. 2, 57, &c.

ſay was hardly enough to overcome the *Trojans*, till the Gods themſelves ſeem'd to confirm the Truth of what he had ſaid by a very ominous Accident. But after all, 'tis certainly true, that *a Deſerter that comes over to an Enemy ſingly by himſelf, without betraying ſome conſiderable Advantage to him, brings but a poor Prize with him either of Credit or Value.* But however ſuch Perſons are not to be look'd upon as *Deſerters*, that go privately to an Enemy with Deſign to ſurprize, or make a ſudden *Attack* upon him, without engaging their *Faith* to draw their Swords in his Aſſiſtance. And it is not to be ſuppoſed, that ſuch are under any *tacit Engagement* upon this Account, becauſe 'tis not probable they would make any Attempt againſt an Enemy, when they were within his Reach. For ſuch a *tacit Obligation* can be preſumed only in Perſons, who go over to a *foreign State* in Time of *Peace*, and not in *War*.

VI. The next Enquiry I ſhall make, is, whether the Commonwealth on the other hand can *forcibly eject* the *Subject* at Pleaſure, and without antecedent Tranſgreſſion? *Cicero*, in the Paſſage before cited, makes it one of the *Foundations* of *Liberty*, that *a Subject ſhould not be forced to change his Country*. But now admitting this to be true, the *State* of the Commonwealth is not therefore granted to be *inferior* in the leaſt to that of *private Subjects*, becauſe they are allowed to have Liberty to remove as they pleaſe, when the Commonwealth has not Power to *force* them to depart againſt their Will. For when a Man puts himſelf under the *Protection* of any Commonwealth, he does, at leaſt for the preſent, entruſt himſelf and *Fortune* entirely with it, and *that*, at leaſt, muſt neceſſarily be expoſed to *Diſtraction* and *Ruin*, if he may at any Time be *forcibly ejected* from it. And ſince this would be the greateſt Hardſhip imaginable upon the *Subject*, every Man muſt be ſuppoſed to have made an *Agreement* with the *State*, that *he ſhould not be forced to leave it contrary to his own Demerits.* But now on the other hand, the Commonwealth doth not build its *Fortune* and *Security* upon a few common Subjects, and therefore loſes little or nothing by the *Departure* of ſome few of them. For where the great and particular *Truſt* is placed in any Subject of *extraordinary* Value, 'tis uſual to oblige him by particular *Ties* and *Agreements* not to leave the Commonwealth without *Licence* from the *Government*. And certainly it hardly deſerves any Man's Envy, that the Subject in this *particular* ſhould be allowed to have more *Liberty* than the Commonwealth. For the other *Advantages* which the Commonwealth enjoys more than, and beyond the Subject, are of much larger Extent. So when a Subject refuſes to conform to the Commands of the Sovereign, 'tis an eaſy Thing to force him to comply. But when a Subject is diſſatisfied with the *publick Adminiſtration*, he hath nothing elſe to do, but to *ſubmit* and be *patient*, or to *remove*. But however, there is ſometimes a leſs *invidious Way* made uſe of in Commonwealths to *remove* ſuſpected or uſeleſs Subjects, or burdenſome Numbers of them, to make room for the *others*; and that is, by ſending them abroad in *Colonies*. Tho' *Colonies* indeed generally conſiſt of Perſons that voluntarily offer themſelves, either upon the Hopes of mending a broken and decay'd Fortune; or elſe, that are out of Humour with the *Government*, and willing to be out of its Sight, when they find they are not to expect Favours from it. So *Iſocrates* perſuaded *Philip* "to "build [a] *Cities* in *Aſia*, and to *people* them with "ſuch ſort of Perſons, whoſe *Poverty* forced "them to lead looſe vagabond Lives, and to "rob and pillage the Country; in ſhort with "the Scum and Refuſe of the People." And *he* commends the Prudence of that Method in the *Athenians* [b]. What Account is to be given of that Cuſtom, common among the *Antients*, both of *barbarous* Nations as well as the *Greeks*, of ſending out great Numbers of their young People in ſearch of new Seats, as it were, under the Conduct of ſome *titular God*, to whom they were ſuppoſed ſacred, may be ſeen at large in *Dionyſius Halicarn.* l. i. And the ſame Author is of Opinion, that the *Aborigines* were a Settlement of this kind, that is, of young People, who after the Cuſtom of their *Countries* had been conſecrated to the Gods, ſent in Queſt of new Seats, and that ſettled wherever their Valour or Fortune carried them [c]. And ſo *Pliny* tells us, that the *Picentes* were ſent out by the *Sabines*, *upon a Vow which they look'd upon to be ſacred.* And *Strabo* ſays the *Samnites* were deſcended from the *Sabines* the ſame Way [d]. "So *Lydus* and "*Tyrrhenus* (as *Paterculus* tells the Story) upon "a great Scarcity, threw Lots which of them "ſhould take his Share of the People, and go in "ſearch of new Seats [e]." And *Paulus Warnefridus* † gives very near the ſame Account of the People of *Scandinavia*. But *Colonies* may be, and often are ſettled in different Methods. For either the *Colony* continues a Part of the *Commonwealth* it was ſent out from; or elſe is obliged only to pay dutiful Reſpect to the *Mother Commonwealth*, and to be in a Readineſs to defend and vindicate its *Honour*, and ſo is united to it by a ſort of *unequal Confederacy*; or laſtly, is erected into a *ſeparate Commonwealth*, and aſſumes the ſame *Rights* with the *State* it is deſcended from.

VII. A Man ceaſes to be a *Subject againſt his Will*, when for ſome *Crime*, whether truly or wrongfully laid to his Charge, he is ejected out of the Commonwealth. For when the Commonwealth refuſes to own any Man for a *Member* of it, and forces him to depart the Dominions; he is releas'd from all *Obligations* which before, as a Subject, he ow'd to it. Upon which he is left to his own Choice to ſettle where he can. And as long as he continues in this *Exile*, the Commonwealth hath no *Authority* over him. So *Iolaus* [f] [1] ſaid, that the *Argives* had no Power to bring him away from *Athens*, when they had before condemn'd him to *Baniſhment*. But certainly to be forced into *Baniſhment*, if upon a *falſe* Accuſation, is a very great *Injury* (though a Man of Courage will not want Supports under ſuch a Misfortune.) And if upon a *real* Crime, a very ſevere *Puniſhment*, *Philo* the *Jew* thinks it worſe than *Death* itſelf [a]. For though the *exiled* Perſon may perhaps be allowed to enjoy the beſt or greateſt Part of his Eſtate in his *Baniſhment*, yet the Difficulties and Inconveniences that muſt attend *removing* it to another Place are unavoidable. It muſt be allowed too, that it is a very ſenſible Affliction to a Man to be forced to part with his *Relations* and *Friends*; and beſides, to be judged a Perſon unfit to live any longer in the *Commonwealth* is a ſevere Diſgrace, and muſt leave a foul Blot upon a Man's Honour and Memory [b]; nor can a Man have loſt leſs than all Senſe of Shame, that can have no Apprehenſions of the *Infamy* of it [c]. *Tully* ſaith much on the other hand to the contrary, but it does not ſeem to me of much Force [d]. "*Baniſhment*, ſays he, is ſo far from being a Puniſhment, that I think it a Refuge only and "Security from it. For when Men fly from "Puniſhment and Misfortune, they only change "the Air and Soil, remove and ſettle in other "Countries. And therefore, by the *Roman Law*, "*Exile* is never made a Puniſhment, as it is in "thoſe of other *Commonwealths*. But when Men "would avoid Impriſonment, Death, or Ignominy, or other Puniſhments which the Laws "appoint, they take Sanctuary in *Exile*; if they "chooſe to ſtay in the *Commonwealth*, and ſuffer "the Law, 'tis certain they cannot be deprived "of the *Right of Subjects*, but with their Lives; "but becauſe there are none that will make that "Choice, their *Rights* are not forcibly taken "away from them, but they voluntarily relinquiſh and reſign them [e]." It was indeed peculiar to the antient *Roman* Conſtitution, that no Man ſhould be forcibly deprived of his *Right* of being a Member of that *State* [f]. And by the *Porcian* and *Sempronian* Laws it was provided, that no *Magiſtrate* ſhould inflict capital Puniſhment on any *Citizen* without the *People's* Conſent. But that Criminals might not enjoy abſolute Impunity, and none ſeem to be ejected, or forced to quit his *Privilege* of a *Citizen*, they would have had it believed, that the *Citizens* voluntarily choſe *Exile* to eſcape Puniſhment [g]. But the Neceſſity of the Delinquents leaving his *Country* was ſufficiently implied in the forbidding all that were condemn'd to *Capital Puniſhment*, the Uſe of *Fire* and *Water* within the *Roman* Dominions. Though it is to be confeſs'd, that when *Baniſhment* is inflicted, Care ſhould be taken that the Commonwealth may be ſecure from all Danger that may happen, by making the Perſon baniſhed an Enemy to it. For which Reaſon ſome *Nations* never puniſh with *Baniſhment*; as the *Turks* and *Moſcovites* now, and formerly the *Jews*, tho' they might be rather ſuppoſed to have Regard to other Reaſons, *viz.* that they might not change their Religion. The *Relegatio* is a milder ſort of *Puniſhment*, by which the Criminal is not entirely diveſted of the *Right of a Subject*, but is only confined to inhabit within a particular Diſtrict, or elſe prohibited coming within a particular Part of the *Dominions*. They that lay under this latter Penalty, were by the *Romans* properly called *(Interdicti) Perſons interdicted* [h]. But to be baniſhed ſome particular *Countries* and *People*, may well enough be thought no *Puniſhment*; as *Diogenes* ſaid, when *one* told him that the *Sinopenſes* had condemn'd him to *Baniſhment*, *And I have condemn'd them to ſtay where they are.*

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[a] *Orat. ad* Philip.
[b] In *Panathenaic.* See *Bacon's* Eſſays, c. 33.
[c] *Dionyſ. Halicarn.* l. 2. *Plin.* N. H. l. 3. c. 13.
[d] *Strabo*, l. 5. Vid. *Juſtin.* l. 24. c. 4. & *Feſtum in Ver ſacrum* & *in Mamertini Liv.* l. 34. c. 44.
[e] *Paterculus*, l. 1. c. 1.
† *Paulus Warnefridus* de geſtis *Longobardorum*, l. 1. c. 2.
[f] *Eurip. Heraclid.* ver. 186.

Mr. Barb. *NOTE on* § vii.

[1] See *Grotius*, B. 2. c. 5. § 25.

VIII. Again, a Man is forced, *againſt his Will, to change* his Commonwealth, when he is ſubdued and maſtered by a powerful Enemy, is forced to put himſelf under his *Protection*, and to ſubmit to his *Authority* as a *Subject*, whether at the ſame Time he be removed into another *Country*, or not. And this Method muſt be allowed to be lawful, not only for *particular Subjects* to take, at leaſt for ſuch as are under none but the common *Obligations* of *Subjection*; but alſo for entire *Cities* and *Provinces*, when they find no other Way left for their Safety and Preſervation [i].

IX. Sometimes alſo it happens, that a *Subject* upon *Injury* done by him to a *foreign Commonwealth*, is by his own *Sovereign* deliver'd up to the *injured State*, to prevent *Wars* that might otherwiſe follow upon his Account. *Herodotus*, in his *Calliope* [1], gives us the Story of *Timegenides* and *Attaginus* to this Purpoſe, who had been Authors of engaging the *Thebans* in an *Alliance* with the *Perſians*. And here a Queſtion is moved, whether a *Subject ſurrender'd* by his own State or Commonwealth, but not accepted by the *other*, continues a *Member* of that which was his own, or not [2]? *P. Mutius* was of Opinion that he did not [3], becauſe when a *Subject* is deliver'd up by the publick Voice and Conſent of the *People*, he ſeems to be as much *ejected*

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[a] *Philo Judæus* de *Abrahamo*, p. 359. A. Ed. *Paris*.

[b] *Oppian. Halieut.* l. 1. ver. 274, &c.

[c] As *Juvenal* deſcribes *Marius*, Sat. 1. ver. 47, 48, 49.

——— *Hic damnatus inani*
Judicio, &c.
Exul ab octava Marius bibit & fruitur Diis
Iratis ———————

——— Contemns his Infamy,
Can riſe at Twelve, and get him drunk e're Three;
Enjoys his Exile, and's condemn'd in vain.

[d] *Vid.* Cic. *Orat pro* Cæcina, c. 34.

[e] V. *Polyb.* l. 6. c. 12.

[f] Cic. *pro domo ſua* c. 29. *Hoc jus à majoribus proditum*, &c. c. 29. This is a Right we all received from our Anceſtors, That no *Roman* Citizen ſhould ever loſe that Privilege, but by his own Choice.

[g] *Diodorus Siculus*, l. 3. c. 5. mentions an Inſtitution of a quite contrary Nature among the *Æthiopians*. *Salluſt. Bell Catilin.* c. 50. *Cæſar* in his Oration to the Senate tells them, That there were Laws by which no Citizen's Life could be taken from him; but that after Condemnation he ſhould be permitted to go into Exile; and again afterward, Baniſhment was always allow'd the condemn'd Criminal.

[h] *Vid.* Briſſon. *Select. Antiq.* l. 3. c. 5. Anton. Matthæ. *de Crimin. ad Tit. de Pœna*, c. 1. § 6, 10.

[i] Vid. *Grot.* L. 2. c. 6. § 5.

Mr. BARB. *NOTES on* §. IX.

[1] Pag. 344. Ed. *H. Steph.*

[2] See *Grot.* B. 2. c 21. § 4.

[3] *Vid. D.* L. 50. t. 7. *De Legat.* l. 17.

ejected out of the Commonwealth as he would be, had he been forbid the *Uſe of Fire and Water.* And the ſame Queſtion was diſputed with great Heat in the Caſe of *Mancinus*[4], who had been ſurrender'd at *Numantium*, but not received. For when *Mancinus* afterwards offered to go in to take his Place in the *Senate*, *Rutilius* the *Tribune* of the *Commons* ſtopp'd him, and refuſed him *Admiſſion*; telling him, that when the *Pater Patratus*, to releaſe the Commonwealth from the *Obligations* of the *Treaty* he had *ſign'd*, ſurrender'd him up to the *Enemies* of the *Roman* State, he then ceaſed to be a *Roman* Citizen. However, when the Caſe was debated and put to the Vote, the *Majority* declared in favour of him; and among others for this Reaſon, That no Perſon could properly be ſaid to have been delivered, who was not accepted by the Party the Offer was made to. Now to me the State of the Controverſy ſeems to be this, The Commonwealth that ſuffer'd the *Injury*, hath a *Right* to proſecute the *Subject* of the *foreign State* with *War*. But by the *Surrender* of him he is entirely conſigned over to the *injured* Commonwealth, and may be puniſhed as one of its own Subjects. And if he be received, the Commonwealth he was formerly a *Member* of, muſt be ſuppoſed to quit all *Right* to him; ſince by *publick* Conſent and Approbation, he is delivered up to the *Authority* of the *foreign State*. But if the *injured* Commonwealth refuſe the *Offer*, and decline the *Acceptance* of the *ſurrender'd* Perſon, the *State* that offered the *Surrender* may diſpoſe of him as it pleaſes, and may either abſolutely eject, or puniſh him according to the Demerits of his Crime. But if no Puniſhment happen to be inflicted on him, it is not to be ſuppoſed that he hath loſt the *Right* of a Subject. For the *Act of Surrender* is in itſelf only a *Tender* made to the *foreign State* of that Right, which every Commonwealth hath over its own Subjects, and not an utter *Abdication* and *Renunciation* of him. And therefore the *Surrender* doth not in itſelf deprive any Man of the Right of a Subject, unleſs it be declared by any particular *Law* in expreſs Words, that in a Concurrence of ſuch Circumſtances, the Perſon ſhall be ſuppoſed to have forfeited all Rights of a Subject. And *Cicero* is of the ſame Opinion. For, ſays he[a], *A Citizen that hath been deliver'd by the* Pater Patratus, *if he is not accepted by the Enemy, retains the Rights and Privileges of a Citizen entire*[5]. But from what hath been ſaid it may be inferr'd, that if the Surrender is accepted, and afterward the Perſon that was given up ſhould happen by ſome Chance or other to return to his own Country again; he cannot be admitted as a Subject, but by a new Grant of Favour[b]. For the *Right* of *Poſtliminium* belongs only to Perſons forced to ſubmit to an Enemy's Power, contrary to the *Conſent* and *Approbation* of their own Commonwealth; not to thoſe that are *voluntarily* given up to *foreign Authority* by their own *State*.

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[a] *Cic.* Orat. pro *Cæcina*, c. 34.

[b] *Vid.* L. 49. t. 15. l. 4. *D. de Captiv. & Poſtlim.* &c.

Mr. Barb. NOTES *on* §. IX.

[4] *Vid.* Freinſhemii *Supplementor. Livianor. Decad. in* Lib. 55.

[5] *Vid.* Ciceron. *Topic. in* c. 8. *Vid. etiam de Orat.* l. 1. c. 40. *&* l. 2. c. 32.

CHAP.

CHAP. XII.

Of the Changes and Diſſolution of the Commonwealth.

The CONTENTS of every Paragraph of the Twelfth Chapter.

I. *The People continue the ſame, tho' the Form of the Commonwealth be changed.*
II. *The Debts of the Commonwealth not diſcharged by a Change in the Form of it.*
III. *The Acts of an Uſurper, how far valid after his Government is expir'd.*
IV. *What Place a Commonwealth may challenge after a Change in it.*
V. *One Commonwealth may divide into more.*
VI. *More may unite into one.*
VII. *The People, how eternal?*
VIII. *How the* Materiale *of the People may be deſtroy'd.*
IX. *How the* Formale.

C*HANGES* happen in the Commonwealth three Ways; Firſt, it may be ſo *changed* as ſtill to continue the ſame; ſecondly, it may be ſo *changed* as ſtill to continue, tho' not the ſame it was before; thirdly, it may be ſo *changed* as to be utterly deſtroy'd. The firſt ſort of *Change* happens when the *Form* of the Commonwealth is changed; as when a *Monarchy* changes into an *Ariſtocracy*, or an *Ariſtocracy* or *Democracy* change themſelves into a *Monarchy*[1]. For in either of theſe *Changes* the *eſſential Form* of Civil Government is ſtill preſerved, only the *accidental Form* which reſults from the *proper Subject* of *ſovereign Power* is changed[2]. So that the *People* are the *ſame*, whether the Government be *Monarchical*, *Ariſtocratical*, or *Popular*. Nay, tho' it ſhould happen, that a *free People* ſhould in ſome War with a *Sovereign Prince*, be reduced to ſo entire a Subjection, as to be made an Acceſſion to his *Patrimony*, yet they do not ceaſe to be the *ſame People* as long as the Conqueror governs them as a diſtinct and ſeparate *Kingdom*, and does not annex them as a *Province* to another People. For ſince the *People* in a large Extent may be ſuppoſed to comprehend the *ſovereign Power*, it is no material Difference, whether the *Prince* exerciſes the *Government* over them in the moſt full and abſolute Manner, or not. For either Way he is *Head* of one and the ſame *Body*.

II. From what hath been ſaid, the Queſtion propoſed by *Ariſtotle*[1] may be anſwered, Whether if a *Commonwealth*, from a *Tyranny*, or an *Oligarchy*, become a *free Popular State*, it be obliged[2] after ſuch a *Change* to obſerve the *Treaties*, *Capitulations*, *Pacta*, *Conventa*, and other *Acts*, made during the Government of the *Tyrant* or *Oligarchy*? The Reaſons of the Negative are, that the *Acts* of a *Tyrant* or *Oligarchy* are not *Acts* of the *Commonwealth*, and that the *Commonwealth* can be obliged by its own *Acts*; that the *Commonwealth* is concern'd only where the Advancement of the *publick Good* is conſider'd, and that where it is otherwiſe, the *Right* and *Name* of a *Commonwealth* is abuſed, and Force and Violence only have the *Rule*. But theſe Reaſons are certainly weak. For not to repeat what was ſaid before[3] concerning *Tyranny*; a diſtempered and diſordered *Head* is certainly a *Head*; and the *Acts* of an *Head*, though indiſpoſed, are look'd upon to be *Acts* of the Commonwealth. And a Commonwealth muſt not be denied a *Being*, becauſe it is in ſome Diſorder. There was a Diſpute of this Nature formerly among the *Athenians* which begun on this Occaſion: The *Thirty* that govern'd the *Athenian* State, borrow'd Money of the *Lacedemonians* upon *publick Faith*; after the *Athenians* had ejected the *Thirty*, and recovered their Liberty, the *Lacedemonians* demanded their Money of them; the Matter was debated at *Athens*, and it was reſolved that it was juſt, and for the Peace of the *State*, to pay it. *Demoſthenes*'s Opinion of the Caſe was †, *That the People choſe rather to pay the Money, than not make good their Articles of Agreement*; and again (he ſays) ſpeaking to the *Athenians*, *And then you conſented to pay your Money to thoſe that had injured you, rather than go back from any Part of your Articles**. Nay, though a Commonwealth ſhould be reduced to a *Province*, and loſe the very Nature of a *Commonwealth*, yet the *Debts* it has contracted are ſtill due. For *Debts* being founded in the Commonwealth, not preciſely as *ſuch* a Commonwealth, but as poſſeſſed of *certain Goods*, whoever is Maſter of thoſe, muſt take the *Debts* with them.

III. But tho' the Caſe ſeems to be beyond Diſpute, as to the *Debts* contracted for the Uſe of

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* See *Iſocrates* in *Areopag.*

Mr. BARB. *NOTES on Chap.* XII. §. II.

† *Demoſthenes* contra *Leptin.* The Author propos'd this for two different Reaſons; and yet afterwards he refutes it himſelf but as one ſingle Reaſon. Indeed there is but one with its Proof. For if the *Commonwealth* is not obliged to diſcharge the Debts, and obſerve the other *Acts* and *Engagements* of an abſolute *Monarch*, or of a ſmall Number of Men, who had got the *Adminiſtration* of the Government into their Hands; 'tis, according to them, becauſe what was done is not look'd upon to have been done by ſuch a *King*, or by ſuch *Magiſtrates*. And the Reaſon why it is not look'd upon as being done, is becauſe the *Dominion* of thoſe Men was not founded upon the *publick Good*, but only upon the Superiority of their *Force* and *Violence*; and conſequently that it was not lawful: From whence they would infer, that the People ought not to ſtand to what they did in their Name, but without their Conſent.

[1] See *Grot.* B. 2. c. 9. § 8.

[2] *Vid.* Grot. *ubi ſupra.*

[2] See above, in B. 7. c. 5. § 1.

[3] In B. 7. c. 8. § 3, 8.

[1] *Ariſtot.* Pol. l. 3. c. 3.

of the Commonwealth, and ſuppoſed to continue upon the whole Body of it; yet whether all the *Acts* of an *Uſurper* will fall under the like Determination, when he is *depoſed* or *ejected*, is ſtill a Queſtion. If an *Uſurper* indeed make a League with a *foreign State* for mutual Supplies of *Aid* againſt ſome *common Enemy*, and then either divide the Booty of War with his *Confederate*, or ſell Part of it to him; the *League*, the *Donation*, and the *Sale*, muſt continue in Force after the *Uſurper* is depoſed. For the *foreign Commonwealth* acquires a ſolid *Right* from ſuch *Acts*, becauſe it agreed upon them with the *Uſurper* as *Head* of his Commonwealth, and in Appearance for its Intereſt and Advantage: And there was no Reaſon why the *foreign Commonwealth* ſhould concern itſelf what *Title* the *Uſurper* might have to his *Government*; ſuppoſing there be no other Fault in the Acts ſuppoſed. But then the Difficulty is, if any *Uſurper* by Oppreſſion and Violence rifle his own *Subjects* of their Goods and Fortunes, and ſell them to *foreign States*, whether upon Diſſolution of *Government*, they can demand them back again? *Bœcler* [a] thinks they may; and that if they that bought them did it adviſedly and deliberately, they ought to acknowledge their Fault, and be content to part with what they could neither buy, nor the other ſell, without Injuſtice. He adds, nay, though they knew nothing of the Caſe when they bought them. All which may perhaps appear reaſonable enough in *Foro Conſcientiæ*; but if we conſider the general Practice of the World, I don't ſee how the Sufferers can recover what they have been thus deprived of. For as long as the *Uſurper* continues his Oppreſſions, he is look'd upon to be an *Enemy* to the Commonwealth, and the *Spoils* he takes from his Subjects, when transferr'd to *foreign States*, are retain'd with the ſame Pretences of *Right* as other *Acquiſitions* of *War* [1]. But if the *Uſurper's Government* has been confirmed by the Conſent of his Subjects, *Foreigners* may pretend *Right* to the Goods of his Subjects, as *lawfully confiſcated*. For as in other Caſes, *Nations* at Peace with, and unconcern'd in the Wars of their Neighbours, treat the Parties engaged with equal Reſpect, attending only to the Event: So *foreign States* are not ſuppoſed to be concern'd what Meaſures their Neighbours take in their *Government* at home. But the *unjuſt Acts* of *Uſurpers* which are confin'd within the Commonwealth, may, when their *Government* expires, be reſcinded and repeal'd by a *lawful Power*, as far as the Occaſions of the Commonwealth require. And by the *Acts* is alſo meant, not only the *Laws* they made, but all *Grants* and *Alienations* whatſoever, contrary to the *Conſtitutions* of the Commonwealth.

IV. In the next Place, it is a common Queſtion, What *Place* ought to be allowed *Princes* that have raiſed themſelves to *ſovereign Power* over *People* before *free*, and what to *free People* after Extirpation of *kingly Government*? To this *Grotius* anſwers [b], that a Commonwealth may challenge the ſame *Place* after ſuch a *Change*, which it had by itſelf, or Repreſentative in any Aſſembly before. But to me it ſeems neceſſary to diſtinguiſh, whether, for Example, the *Prince* that has obtain'd the *Government* of the *People* before *free*, continue in the *Aſſembly* or *Syſtem* he was before Member of: Or whether he divides from it, and enters upon a *ſeparate* Adminiſtration of his own Affairs. For in the *firſt* Caſe, without Diſpute he can have no Pretence to any other *Place* than what the *free People* were before contented with, notwithſtanding that *Greatneſs* and *Majeſty* with which the *Perſons* of *ſovereign Princes* are inveſted. And ſo on the other hand, a *free People* after Extirpation of *kingly Government*, may demand the ſame *Place* in any *Common Aſſembly* which was allow'd to their *Princes* before. But if the *Prince* or *People* ſeparate from their *old Aſſemblies* or *Syſtem*, the *Place* that antiently belonged to them ought to be no Prejudice to them, or be any Argument for the *Precedence* of others that had formerly that *Privilege* in the *common Aſſembly*; ſince all *ſovereign Powers* are naturally equal.

V. *Changes* which ſo *diſguiſe* the Commonwealth, that it appears no longer the ſame, happen generally theſe two Ways; either *firſt*, when *one* Commonwealth breaks into *two*, or *more*; or *ſecondly*, when *many* diſtinct Commonwealths unite into *one*. The *firſt* may be the Effect either of *mutual Conſent*, or elſe of Force of *War* [1]. Different *Commonwealths* may be form'd out of one by common *Conſent*, by ſending out *Colonies* in the Manner uſual in *Old Greece*. For the *Romans* afterward (who are follow'd now by the *Nations of Europe*) when they ſent a *Colony* abroad, continued it under the *Juriſdiction* of the *Mother Commonwealth*, or greater *Country*. But the *Colonies planted* by the *Greeks*, and, after their Method, conſtituted *particular Commonwealths*, were oblig'd only to pay a kind of *Deference* and *dutiful* Submiſſion to their *Mother Commonwealth* [c]. But however, a *Colony* ſettled after this *Form* is not obliged to pay the *Debts* contracted by the *Mother Commonwealth*, unleſs that Article was expreſly agreed upon when the *Colony* was ſettled. Becauſe all *publick Debts* in the laſt Reſort affect the *Goods* and *Effects* of the Commonwealth, which the *Colony* ('tis ſuppoſed) hath no Share in. And tho' particular Perſons in the *Colony* might perhaps have enjoy'd the Benefit of thoſe *Debts*, while they were *Members* of the *old* Commonwealth; yet when the *Mother Commonwealth* diſmiſſes them free, it ſeems to declare that they ſhall not be liable to pay any Thing upon that Account. But indeed, upon a ſtricter View, the Commonwealth is not really in itſelf *changed* upon the ſending out *Colonies*; neither doth it ceaſe to appear the ſame; but only as in a *natural* Generation, one Commonwealth gives Birth to another. But where a *Kingdom* divides by common Conſent into *two* or *more diſtinct Commonwealths*, the *publick Patrimony*, with all the *Debts* and *Incumbrances* upon them, ought to be equally ſhared among them. Tho' indeed when ſuch *Separations* are made by mutual *Agreement*, there is commonly expreſs *Proviſion* made for ſuch *Caſes*.

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[a] Bœcler. *Diſſert. de eo quod agit Civitas*,

[b] L. 2. c. 9. §8.

[c] Vid. *Thucyd.* l. 1. *Hen. Valeſius* ad Excerpt. *Peireſc.* p.6, & 7. *Hobbes* de Cive, c. 9. §8.

Mr. BARB. *NOTES on* §. III, V.

[1] See *Grot.* B.3 c.9. §.4.

[1] See *Grot.* ubi ſupra, § 10.

VI. Another *Change* in the Commonwealth, and by which it ceaſeth to be the *ſame*, is where *two People* unite (not by way of *Confederacy* or *Subjection* to one *common Sovereign*, but) in ſuch a manner that the *two States* grow entirely into *one*. In which Caſe *Grotius* [1] thinks, that the *Rights*, which the *particular* Commonwealths that make the *Union* enjoy'd before, are not loſt, but communicated to the whole Body, as alſo the *Debts* and *Incumbrances*, unleſs the contrary hath been particularly agreed upon [a]. But it muſt be conſider'd, whether the *two* or *more People unite* with Deſign to *erect* a new Commonwealth, where all are to enjoy the ſame *Rights*; as ſuppoſe *two distinct People* ſubject to a *Government* of the *Populace* aboliſh their *Form* of *Conſtitution*, and unite into one *Kingdom*; or *two Kingdoms* take away their *fundamental Laws*, diſplace the *antient Line Royal*, and ſet up a new *Kingdom*. By this *Union* 'tis manifeſt, that their former Commonwealths are ſubverted, and a *new one* erected upon their Ruins. But when *one* Commonwealth unites with *another*, in ſuch Manner that one keeps its *Government* and *States*, and the Subjects of the *other* change their *Country*, and are taken into the Rights and Privileges of the foreign *Commonwealth*, it is evident that *one* is ſwallowed up and loſt in the *other*. But that which remains doth not ceaſe to be the *ſame*, though from ſuch an Acceſſion it receiveth a conſiderable Increaſe in Strength and Power. But there are no Ways of *uniting diſtinct* Commonwealths, ſo that each ſhall preſerve its own ſeparate *Conſtitutions*, and be as it was before; but by ſtrict *Alliance* and *Confederacy*, which rather gives Riſe to a *Syſtem* than a *Commonwealth*, properly ſo call'd.

VII. The laſt *Change*, that by which the Commonwealth entirely ceaſeth to be, happens when the *People* themſelves are either *diſſolv'd* or *deſtroy'd* [1]. It is a common Saying, that *Kings are mortal, but Commonwealths eternal* [2]. By which it is not meant, that it is impoſſible that a *People* ſhould ever be ſcatter'd or utterly extinguiſhed by any Violence or fatal Period; but that they do not ſuffer ſuch Decays of Nature, as particular Men do, after a certain Courſe of Years. For though Individuals change, yet there continues a conſtant Succeſſion, either by Reſort from *neighbouring States*, or by the natural Iſſues of Procreation at *home*. By a continual Courſe of which Succeſſions the *People* always appear the *ſame*, and poſſeſs the *ſame Rights* and *Privileges*, tho' particular Subjects are frequently changed [b]; as *Virgil* ſaith of his Bees;

Ergo ipſas quamvis anguſtus terminus ævi
Excipiat (neque enim plus ſeptima ducitur æſtas)
At genus immortale manet, multoſque per annos
Stat fortuna domus, & avi numerantur avorum.

Tho' ſeven ſhort Springs conclude their vital Date,
Yet by repeopling their decaying State,
Their antient Stocks eternally remain,
And in an endleſs Race their Childrens Children
reign.

Mr. *Addiſon.*

The *Senſe* of the *old Philoſophers* upon the *Diverſity of Bodies* will perhaps give us a clearer View of this Matter. And *Plutarch* tells us [c], that *ſome Bodies* (according to them) are compounded of *Parts disjoin'd*, as *a Navy*, *an Army*, *and the like*; others conſiſt of *compacted Parts*; as *an Houſe*, *a Ship*, &c. a third Sort are framed of *united Parts*, ſuch as are combin'd into one Nature, as *every particular Animal* [d]. Which in other Words may be thus expreſs'd; a *Body in general* is a Thing contain'd by ſome *Habitude*, *Coherence*, or *Tie*, ſo that it conſtitute one. The *Ligament* or *Tie*, by which the Parts of a Body are join'd and united, is threefold; *natural*, *artificial*, and *moral*. The *natural Tie* or *Bond*, is that by which natural Bodies are contain'd; the *artificial*, is that by which Things otherwiſe divided in Nature, are by human Induſtry brought to *Unity* and *Community*; and the *moral Tie*, laſtly, is that by which ſeveral Individuals are connected by human Inſtitution, and ſuppoſed to make one Body. And this Body may indeed conſiſt of Beaſts, as in a *Flock* or *Herd*: But here I ſuppoſe it to extend no further than to a Combination of a Number of Men. And from theſe different Modes of Union, reſult thoſe three Sorts of Bodies, the *natural*, *artificial*, and *moral*. All which are ſuppoſed to continue the *ſame*, as long as that *Connection* which at firſt join'd the Parts together, is not all at once diſſolved and broken. And thus therefore a Man ſtill appears the ſame, tho' innumerable little Particles of his Body perſpire; and are conſtantly ſupplied with new, from the Nutriment he takes in [e]. And though ſome of the *Antients* thought *Theſeus*'s *Ship* (about which they had ſo many Diſputes) the *ſame*; though in Tract of Time it went through ſo many Repairs, that hardly any Thing remain'd of the Materials it was firſt built with [f]. *Plutarch* ſays

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[a] Vid. *Liv.* l. 1. c. 52. init.

[b] Vide *Lucianum*, in amoribus, p. 888. Ed. *Amſt.* T. 1. Nature, being ſenſible that we were all framed of periſhing Matter, and that Fate had given ſo ſhort a Period to every Man's Life, provided that the Loſs of one Man ſhould be repair'd by the Birth of another; and balanced the Number of them that died with a new Generation, that ſo by continued Succeſſions we might, in ſome Senſe, live to Immortality, *Virg.* Georg. l. 4. ver. 206, *&c.*

[c] *Plutarch.* conjug. Præcep. p. 142. F.

[d] Vide L. 41. t. 3. l. 30. D. de Uſurp. Uſucap. & L. 6. t. 1. l. 23. § 5. D. de rei vindicat. *Seneca* Epiſt. 102.

[e] *Brown.* Relig. Med. § 36. This very Body I carry about me came in at my Mouth, and all this Bulk of Fleſh lay once upon my Trencher; in fine, we devour our own ſelves. *Seneca* Epiſt. 58. *Plut.* de *Ei* apud *Delph.* Edit. *Xyland.* p. 392. A. B. *Lucret.* l. 3. ver. 860, &c. *But this Paſſage muſt be cautiouſly interpreted, that it may not reach the Article of the Reſurrection.*

[f] *Plut. Theſeus.* p. 10. C. *Vid.* L. 5. t. 1. l. 76. D. de Judiciis. Vid. L. 7. t. 4. l. 10. D. quibus modis Uſusfructus amittitur. *Tho' this Law ſeems to be contrary to thoſe in* L. 46. t. 3. l. 98. § ult. *D. de Solution, in* l. 83. § 5. *Vid.* Dionyſium Halicarnaſſæum, l. 1. de Casâ Romuli. Alex. *ab* Alexandro, l. 3. c. 1. Mich. Piccardus *ad* Polit. Ariſtot. l. 3. c. 3.

Mr. Barb. *NOTES on* § vi, vii.

[1] Ubi ſupra, § 9.

[1] Vid. *Grotium*, ubi ſupra, § 3.

[2] *Tiber.* apud *Tacit.* Annal. l. 3. c. 6.

ſays on this Subject [a], *A Commonwealth is one entire Body, which comprehends a Number of Members, and reſembles the natural, that it neither loſeth its Nature by Succeſſion of Years, nor is it liable to change by Alteration of Time, but always preſerves the ſame Affections and Properties, that are agreeable to its Conſtitution, as long as it continues united by common Ties and Obligations, and preſerves the Unity of a publick Body.* He adds, that *particular Men are more expoſed to the Injuries of Time, than Commonwealths; for if a Man be abſent from his Friend but a few Years; at his Return he diſcovers a Change in his Conſtitution and Face, and often ſuch Alterations in his Humour and Behaviour, that he hardly knows him again. But if a Man after thirty Years Abſence, come again into the ſame Commonwealth, he not only finds the ſame Houſes and Buildings, but the ſame Inſtitutions, and the ſame Manners and Diſpoſitions in the People* [b]. Tho' indeed it is impoſſible but in a long Courſe of Time, a Nation ſhould receive ſome Alterations, and not appear the ſame as to all Effects [c]. *Hobbes* (*Philoſ. Prim.* c. 11. § 7.) chooſes to expreſs the ſame Thing thus, *When any Thing is denominated from ſuch a Form, which is the Principle of Motion in it, as long as that Principle remains, the Individual is the ſame.*

VIII. But notwithſtanding the Truth of all this, it is poſſible for a Commonwealth to be utterly *deſtroy'd*; and that either when the *Materiale* of the *People*, or *whole Number* of *Subjects*, periſh or ſcatter, or when the *moral Tie* which joins the People together is utterly broken and diſſolved; the *Materiale* or *Body* of the *People* periſhes, either when the *Parts* abſolutely neceſſary to the Subſiſtence of the *Body* are taken away, or when the *Body* itſelf is deſtroy'd. *Grotius* [d] gives ſeveral Inſtances of *Nations* utterly *deſtroy'd* all at once, by *publick* Fatalities. And here Enquiry may be made, whether if after ſuch a general Deſolation ſome weak Remainders are left that cannot be call'd a *People*, they may be ſuppoſed to retain the *Rights* of their *antient Nation?* Grotius *is of Opinion*, l. ii. c. 9. § 4. that the *Propriety* which the *People* had, as they were *private Perſons*, might ſtill ſubſiſt in their *Remains*, but that nothing belongs to them which agreed to the *People* as *ſuch*; that is, that they may claim *Inheritance* of the *Poſſeſſions* and *Subſtance* of thoſe that were once their *Fellow Subjects*, but have no *Right* to aſſume *Sovereign Power*, or any of thoſe *Rights* that are the neceſſary Conſequents of it [e]. But however, if the *few* that are left were reduced to ſo thin a Number not by *War*, but ſome other *caſual* Misfortunes, and are able to defend themſelves againſt the *Invaſions* of their *Neighbours*, till either by *Supplies* of their own Growth, or by Invitations to *others* to ſettle among them, they grow up again into a *People*, I ſee no Reaſon why they may not claim the *Rights* of the *former People* [f]. Eſpecially ſince it has not yet been agreed what *Number* of *Maſters of Families* is neceſſary to make a *People*; and ſince when firſt Mankind divided into *Nations*, a very *ſmall Number* made a *People*. In *Juſtin* [g] *Artaxerxes*'s fifty Sons are call'd *Tantus Populus*, and *Niobe* calls her *fourteen* Children a *People* [h]. Again a *Multitude* of Men of which a *People* conſiſts is broken and diſſolved, when not every *particular Subject* periſhes; but when upon Peſtilence, Diſcontent, or Sedition, they voluntarily *deſert* and *ſcatter* elſewhere; or elſe are diſunited, and forcibly caried away, ſo that they can never meet or make Head again. And therefore it was Flattery rather than Truth, when the People of *Ilium* boaſted, that they were *Anceſtors* to the *Romans* [i].

IX. The *Form* or *Species* of the *People* is *deſtroy'd* [k], if either the *whole* or the *perfect Community of Right* be loſt. The *Community of Right and Government* is entirely loſt, when the *Subjects* ſcatter different Ways, and ſettle in *different Commonwealths*, whether they retain *perſonal Liberty*, or are forced to ſubmit to a Condition of *Slavery*; the Story of *Capua* is an Example of this Nature [l]. A *perfect Community of Right* between the *Members* of the *ſame Commonwealth* is loſt; when though the particular Subjects are allowed their *perſonal Liberty*, and are permitted to inhabit their own *Cities*, and live in their own *Country*, yet they are under the *Government* and *Dominion* of a foreign State. And ſuch a *People* are uſually ſaid to be reduced into the *Form* of a *Province*. But barely the *changing Country*, *evacuating Towns*, *demoliſhing Forts*, are not *Alterations* ſufficient to make a *People* ceaſe to be the *ſame*.

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[a] *Plutarch.* de ſera Num. Vindict. p. 555. B. C. Edit. *Wech.* He alſo ſays, p. 559. *ibid.* that a *Commonwealth* may be compared to an Animal, that does not become unlike itſelf, by the different Changes that happen to it with Time, and which has different Ages, without ever changing for all that its Nature; but has always the ſame eſſential Properties, and is anſwerable or commendable for every Thing it does or has done as ſuch, as long as the ſame Ties and *Compacts* which unite it remain pure and undiſturb'd; ſo that to conceive a Commonwealth as different, only becauſe the Members that compos'd it are a new Generation of People, is as if one Man were made ſeveral diſtinct Perſons, as being a Child, a Youth, and an old Man.

[b] Vid. *Grot.* l. 2. c. 9.

[c] Vid. Supra, l. 8. c. 3. § 29.

[d] L. 2. c. 9. § 4. *Vid.* L. 7. t. 4. l. 21. 31. D. quibus modis Uſusfruct. amitt. *&c.*

[e] Vid. D. d. l.

[f] Vid. *Juſtin.* l. 5. c. 6. n. 5.

[g] L. 10. c. 1. n. 6. *Ovid.* Met. l. 6. ver. 197.

[h] *Apuleius* Apolog. Fifteen Freemen make a People. *Vid.* L. 3. t. 4. l. 7. §. 2. D. quod cujuſcunque Univerſit. *&c. Where the Title of a Community* (a Corporation, not a Commonwealth) *is ſaid to remain in one Perſon, but that he is under a Neceſſity of taking in Aſſociates in Time.*

[i] Vid. *Buchanan.* Rer. Scot. l. 4. fin. How the *Scots* were diſpers'd by *Maximus* Juſt. l. 28. c. 1. & l. 31. c. 8.

[k] *Grot.* ubi ſupra, § 6.

[l] Vid. *Liv.* l. 26. c. 16.

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